

MIAC2010

The Mauritius International Arbitration Conference 2010

Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat

Papers from the joint conference of the Government of Mauritius
UNCITRAL, PCA, ICSID, ICC, ICCA and LCIA
held in Mauritius on 13 and 14 December 2010

Edited by

The International Bureau of the
Permanent Court of Arbitration

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THE MAURITIUS INTERNATIONAL ARBITRATION CONFERENCE
13 & 14 DECEMBER 2010

**FLAWS AND PRESUMPTIONS:
RETHINKING ARBITRATION LAW AND
PRACTICE IN A NEW ARBITRAL SEAT**

TABLE OF CONTENTS

FOREWORD

Brooks W. Daly ix

OPENING CEREMONY

Salim Moollan, Welcoming Address 1

Prof. Jan Paulsson, Opening Remarks 3

Dr. the Hon. Navinchandra Ramgoolam, G.C.S.K., F.R.C.P.,
Keynote Address 5

**PART A INTERNATIONAL COMMERCIAL
ARBITRATION**

**I. RETHINKING JURISDICTION, *COMPÉTENCE-COMPÉTENCE*
AND SEPARABILITY**

John Beechey, Introductory Remarks 13

Salim Moollan, Report to the Conference 15

Prof. Jan Paulsson, Response to the Report 39

Prof. Brigitte Stern, Response to the Report 47

Thierry Koenig S.A., A Mauritian Perspective 59

TABLE OF CONTENTS

II. RETHINKING ARBITRABILITY, INCLUDING THE ARBITRABILITY OF COMPANY DISPUTES

<i>Hon. Keshoe P. Matadeen</i> , Introductory Remarks	67
<i>Prof. Christopher Seraglini</i> , Report to the Conference	69
<i>V. V. Veeder Q.C.</i> , Response to the Report	95
<i>Sundaresh Menon</i> , Response to the Report	101
<i>H.E. Milan Meetarybhan</i> , A Mauritian Perspective	127

III. RETHINKING THE ROLE OF THE COURTS IN THE ARBITRAL PROCESS AND INTERIM MEASURES

<i>Adrian Winstanley</i> , Introductory Remarks	135
<i>Dr. Albert Henke</i> , Report to the Conference	137
<i>The Rt. Hon. The Lord Philips of Worth Matravers</i> , Response to the Report	211
<i>Jean-Pierre Ancel</i> , Response to the Report	217
<i>Satyajit Boolell S.C.</i> , A Mauritian Perspective	221

IV. RETHINKING THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

<i>Corinne Montineri</i> , Introductory Remarks	229
<i>Ricky Diwan</i> , Report to the Conference	233
<i>Prof. Albert Jan van den Berg</i> , Response to the Report	247
<i>Zia Mody & Shreyas Jayasimha</i> , Response to the Report	261
<i>Anwar Moollan</i> , A Mauritian Perspective	265

PART B INVESTMENT TREATY ARBITRATION

V. RETHINKING THE NEGOTIATION OF INVESTMENT TREATIES

<i>Meg Kinnear</i> , Introductory Remarks	273
<i>Andrea J. Menaker</i> , Report to the Conference	277
<i>Prof. Emmanuel Gaillard</i> , Response to the Report	313
<i>Makhdoom Ali Khan S.A.</i> , Response to the Report	327
<i>Ali Mansoor</i> , A Mauritian Perspective	333

VI. RETHINKING THE SUBSTANTIVE STANDARDS OF PROTECTION UNDER INVESTMENT TREATIES

<i>Brooks W. Daly</i> , Introductory Remarks	339
<i>Dr. Stephan W. Schill</i> , Report to the Conference	341
<i>Toby Landau Q.C.</i> , Response to the Report	367
<i>H.E. Judge Sir Christopher Greenwood</i> , Response to the Report	373
<i>Rajsoomer Lallah Q.C.</i> , <i>G.O.S.K.</i> , A Mauritian Perspective	379

CLOSING REMARKS

<i>Hon. Y. K. J. Bernard Yeung Sik Yuen</i> , <i>G.O.S.K.</i> , Closing Remarks	391
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Foreword

*Brooks W. Daly**

It gives me great pleasure to present this volume of papers delivered at the Mauritius International Arbitration Conference in December 2010. Unprecedented in Africa, the conference brought to the region a gathering of leading international arbitration practitioners, senior public officials and heads of major international arbitration institutions. Their purpose, reflected in the name of the conference, “Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat,” was to assess the fundamentals of international arbitration against the fresh blank canvas of a new jurisdiction.

As expounded by Dr. The Hon. Prime Minister Navinchandra Ramgoolan in his Keynote Address, Mauritius is launching itself as a new platform for international arbitration in Africa, starting with its passing of the International Arbitration Act (“IAA”) in 2008. The IAA designates the Secretary-General of the Permanent Court of Arbitration (“PCA”) as the appointing authority for arbitrations seated in Mauritius and empowers this office with important statutory functions of procedural oversight. Pursuant to the 2009 Host Country Agreement between Mauritius and the PCA, the PCA opened its first office outside of The Hague in Mauritius in 2010. From its Mauritius office, the PCA carries out case management, promotes PCA dispute resolution services in the African region, and through education and outreach builds the capacity of Mauritius as an arbitral centre.

The December 2010 conference was co-sponsored by six international organisations, namely the PCA, the United Nations Commission on International Trade Law, the International Centre for the Settlement of Investment Disputes, the International Council for Commercial Arbitration, the International Chamber of Commerce International Court of Arbitration; and the London Court of International Arbitration. This latter institution has recently launched a joint venture with the Mauritian government in creating a Mauritius International Arbitration Centre for the handling of commercial disputes in the region.

Amongst the distinguished speakers at the conference were the Prime Minister, Chief Justice, Financial Secretary and Director of Public Prosecutions of Mauritius; a former Attorney-General of Pakistan and the current Attorney-General of Singapore; judges from the International Court

* Acting Secretary-General, Permanent Court of Arbitration, The Hague.

of Justice, the Supreme Court of the United Kingdom and the French *Cour de cassation*; Secretaries-General of the sponsoring arbitral institutions; and leading academics, arbitrators and practitioners from around the world. The diverse and incisive views were presented in six panel presentations at the conference, and this published volume is accordingly divided into six sections.

The first section is on rethinking *compétence-compétence* and separability, with a report by Mr. Salim Moollan considering both the positive and negative side of the *compétence-compétence* doctrine. Responding to his report are Professor Jan Paulsson, who examines the role of the courts before the commencement of arbitral proceedings, and Professor Brigitte Stern, who analyses the doctrine from the perspectives of public and private international law. Mr. Thierry Koenig offers a perspective of arbitrating in Mauritius under the new IAA.

The second section rethinks **arbitrability** in the context of company disputes, with a report by Professor Christopher Seraglini. Mr. Sundaresh Menon provides a response from a Singaporean perspective and Mr. V.V. Veeder Q.C. from an English law perspective. Mr. Milan Meetarbhan presents the subject in the context of the burgeoning global business sector in Mauritius.

The third section rethinks the **role of courts and interim measures**, with a detailed multi-jurisdictional report by Dr. Albert Henke. The Rt. Hon. Lord Phillips of Worth Matravers responds from the perspective of an appeals judge and offers a comparison of the IAA with the English Arbitration Act of 1996. Judge Jean-Pierre Ancel considers the limited role of the judge in international arbitration under French law. The Mauritian perspective on courts and interim measures was offered by Satyajit Boolell S.C.

The fourth section rethinks the **recognition and enforcement of arbitral awards**, with Mr. Ricky Diwan's report comparing how various jurisdictions approach the enforcement of awards annulled at the seat of arbitration. In response, Professor Albert Jan van den Berg brings his expertise on the New York Convention and proposes new language for a revised convention to deal with the issues raised by Mr. Diwan. Ms. Zia Mody considers arbitrating questions of public policy in India. Mr. Anwar Moollan considers potential enforcement issues under the Mauritian IAA.

The fifth section shifts the focus to **bilateral investment treaties** ("BITs") with a detailed report by Ms. Andrea Menaker on the efforts of governments to negotiate or renegotiate substantive standards in light of the interpretation by tribunals of existing treaties. In response to uncertainties in EU BITs brought about by the Lisbon Treaty, Professor Emmanuel

Gaillard offers recommendations for Mauritius to update and sign new BITs with EU Member States. Mr. Makhdoom Ali Khan provides unique and candid insights based on his experience with a State having both negotiated BITs and faced the consequences in the form of significant arbitral claims. Mr. Ali Mansoor discusses the efforts of Mauritius to avoid arbitration by creating a more transparent and business-friendly investment environment.

The final section rethinks the **substantive standards of investment protections**, with Dr. Stephan Schill's report on the level of deference granted to States in investment disputes. In response, Mr. Toby Landau Q.C. urges a reassessment of the basic foundations and purposes behind BITs to address a growing legitimacy crisis in the system. His Excellency Judge Sir Christopher Greenwood discerns the strands of international law, public law, and commercial law in investment arbitration and argues that the international law concerns must dominate. Mr. Rajsoomer Lallah explores the topic from a Mauritian perspective.

A great debt is owed to all those involved in planning the conference, especially Mr. Salim Moollan who instigated the event and ensured its success. The Mauritian Government's support was evident in the organising efforts of the Board of Investment, and has continued through to publication of this volume by the Government Printers. I would also like to thank the International Bureau of the PCA for compiling the presenters' contributions and preparing them for publication, in particular the PCA Legal Counsel and Representative in Mauritius, Ms. Judith Levine and her predecessor Mr. Matthias Kuscher; Assistant Legal Counsel Ms. Sarah Melikian and Ms. Hinda Rabkin; and the PCA's Mauritius Intern Mr. Ali Adamjee.

At the time this volume goes to press, the PCA is witnessing record levels of case activity. Of the arbitrations administered by the PCA in 2012 so far, half involve parties from Africa, Asia or the Indian Ocean. As arbitration of international disputes proliferates in these regions, Mauritius is perfectly placed geographically, culturally, and legally. This volume captures this momentum with a penetrating look at the issues confronting all those involved in dispute resolution. It is hoped that the book will provide an enriching base for future development of the field not only in this part of the world but across all boundaries.

Brooks W. Daly
Acting Secretary-General
Permanent Court of Arbitration
The Hague, March 2012

Welcoming Address

*Salim Moollan**

Dr. the Honourable Prime Minister,
Dr. the Honourable Deputy Prime Minister,
Honourable Ministers,
Excellencies of the Diplomatic Corps,
Distinguished guests and delegates,
Ladies & Gentlemen,

For those of you who have travelled from abroad, welcome to Mauritius. To all of you, welcome to the Mauritius International Arbitration Conference 2010.

This conference launches the new platform created for international arbitration in Mauritius. Over two days, six panels of internationally recognised experts in the field will aim to “rethink” key areas of international arbitration law and practice. Why this emphasis on fresh thought in a field which has for many decades been the subject of much theoretical and practical analysis? Because, as matters stand, Mauritius is a blank canvas in the field of international arbitration, with no substantial history, no developed jurisprudence and no settled doctrine. Some may perceive this as a disadvantage. It can in fact be seen as a great advantage. It means that we are free to draw from, and revisit, international best practice in the field without preconception, in order to try and create the best possible regime to serve the interests of arbitrating parties and of international users. To that end, a clean cut has also been made between our new regime of international arbitration and our well established regime of domestic arbitration.

It is a great honour that Dr. the Honourable Prime Minister is with us today to open the conference. I say it is a great honour, but I must also say it is hardly a surprise. The international arbitration project has been the Prime Minister’s project from its inception. It is the Prime Minister who personally introduced the International Arbitration Bill to Parliament in November 2008, and it is he who personally oversaw the conclusion of

* Barrister-at-Law, Essex Court Chambers (London) and Chambers of Sir Hamid Moollan Q.C. (Mauritius); Chairman of UNCITRAL and of the UNCITRAL Arbitration Working Group; Vice-President of the ICC International Court of Arbitration (Paris); Senior Visiting Lecturer in International Arbitration Law, King's College London.

our Host Country Agreement with the Permanent Court of Arbitration in April 2009. His presence here today will give the international community a further indication of the level of commitment behind this project in Mauritius.

It is also a great privilege that the conference is being co-hosted by six leading institutions in the field, all of which are represented at this opening ceremony. On this stage is a truly formidable array of personalities, all of whom play a defining role in the field of international arbitration.

- Starting from my far left is Mr. Adrian Winstanley, the Director-General of the London Court of International Arbitration.
- To his right is Mr. Brooks Daly, the Deputy Secretary-General of the Permanent Court of Arbitration at The Hague.
- To his right is Ms. Meg Kinnear, the Secretary-General of the World Bank's International Centre for Settlement of Investment Disputes.
- To the right of Dr. the Honourable Prime Minister is Professor Jan Paulsson, the President of the International Council for Commercial Arbitration.
- Next to him is Mr. John Beechey, the President of the International Court of Arbitration of the International Chamber of Commerce.
- And finally, closest to me, Ms. Corinne Montineri, the Secretary of the UNCITRAL Working Group on Arbitration. Ms. Montineri is also representing the Secretary-General of the United Nations, who could unfortunately not be with us today.

Professor Paulsson has kindly agreed to be the voice of all six institutions this morning. He is singularly well placed to do so, being:

- the current President of ICCA;
- a serving Vice-President of the ICC Court;
- a past President of the LCIA;
- a past President of the World Bank Administrative Tribunal;
- the delegate of the State of Bahrain at UNCITRAL; and
- the Member of the Permanent Court of Arbitration for Bahrain.

Following Professor Paulsson's opening words, Dr. the Honourable Prime Minister will deliver his keynote address to the conference. Without further ado, I give the floor to Professor Paulsson.

Opening Remarks

*Prof. Jan Paulsson**

This beautiful morning auspiciously beckons us to an event which, let us believe, will be long remembered in the annals of international arbitration. The international organisations which are acting as co-hosts of this great conference have deputised me to express their best wishes and their support for this initiative, intended to establish Mauritius as an enduring platform of excellence and reliability in the domain of international arbitration.

The world of international arbitration, your excellencies, ladies and gentlemen, has come to Mauritius. I might put it more dramatically: if the participants who have come from abroad were so beguiled by the raptures of this enchanting island that they simply refused to depart, then the industry of international arbitration would come to a shuddering stop, as the ICSID, the ICC's International Court of Arbitration, the LCIA all awaited instructions from their absent leaders. The Permanent Court of Arbitration ("PCA") would perhaps be somewhat more sanguine, because its first establishment outside The Hague is already here in Mauritius, while UNCITRAL and ICCA are delocalised by their nature, so they would presumably adjust very quickly after verifying that the island's internet connections are up to the task of greater traffic.

The six organisations I have just mentioned are not the only ones here today from abroad. Leaders of important national arbitration institutions are also present, and so are eminent individual personalities, who have made their marks in government service, in the judiciary, and in academia. I take particular pleasure in recognising one individual, if I may. I am not sure how one would go about identifying THE planetary dean of international arbitrators, but I am very sure that Pierre Lalive of Switzerland would be on a very short list of possible nominees, and we are pleased to have him with us.

The world of international arbitration has come to Mauritius because it recognises that this is a credible effort to establish something useful and important. But with every great ambition, success is uncertain. Will Mauritius succeed?

* President of the International Council for Commercial Arbitration (ICCA); Co-head of International Arbitration and Public International Law Groups, Freshfields Bruckhaus Deringer LLP; Michael Klein Distinguished Chair, University of Miami School of Law.

Let me venture that there is one important thing we know already and a second thing which might be called promising incidental evidence. Thirdly, there is a profoundly important matter about which it is too early to say anything except to define the criteria for success.

The thing we already know is that Mauritius has committed significant resources to this project and understands that this is not a sprint, but an endurance race. This takes patient agriculture – the harvest is perhaps 15 years in the future. But Mauritius needs no lessons in this matter. Its remarkable offshore sector is testimony to the virtues of commitment and patience.

The incidental bit of promising evidence is the very conception of this conference, which promises to be anything but a concert of platitudes performed by complacent veterans. The topics chosen question the very fundamentals of international arbitration. The speakers may surprise you with their youth and diversity. This is promising. We are reviewing our blueprints, we are thinking of new designs, we are building for tomorrow.

The final thing is a challenge, and here, if I may say so as someone who wishes you all possible success, here is where Mauritius must prove itself as a matter of daily reality in the future. Your excellencies, ladies and gentlemen, it may be in the national interest to establish and promote an international arbitration centre, but no international arbitration centre will succeed because it is in the national interest. The criteria for success in the 21st century may be defined in two words: inclusiveness and cosmopolitanism. The world of arbitration does not come *en masse* to a country because it is motivated by a sudden inexplicable urge to promote the professional interests of the local bar. The world of international arbitration examines new entrants very carefully to measure their inclusiveness and cosmopolitanism in terms of governance and decision-making. It has been two decades since a British national presided the LCIA. Arbitrators at the Stockholm Institute are selected after the input of an advisory committee of international practitioners who serve on a rotating basis to prevent entrenchment and capture by special interests. The Singapore International Arbitration Centre is today presided by a lawyer/professor from Melbourne. The Hong Kong International Arbitration Centre is presided by an Austrian. It should not be hard to get the message.

But again, I doubt Mauritius needs lessons in inclusiveness and cosmopolitanism. You have a considerable capital of confidence. Let me say: now is the time to use it.

Keynote Address

*Dr. The Hon. Navinchandra Ramgoolam, G.C.S.K., F.R.C.P.**

I am delighted to be here for the opening of the Mauritius International Arbitration Conference 2010.

The Government of Mauritius is very pleased to sponsor and host this Conference on the occasion of the official launching of our new platform for international arbitration in Mauritius. I extend a very warm welcome to the representatives of the six co-hosts of this Conference, namely the United Nations Commission on International Trade Law (“UNCITRAL”), the Permanent Court of Arbitration (“PCA”), the International Centre for Settlement of Investment Disputes (“ICSID”), the International Chamber of Commerce (“ICC”), the London Court of International Arbitration (“LCIA”) and the International Council for Commercial Arbitration (“ICCA”).

I also welcome the Ministers of Justice, distinguished judges and other learned participants who have travelled from all around the region and from many parts of the globe to Mauritius.

We are privileged to have among our speakers some very prominent jurists: these include, Judge Sir Christopher Greenwood C.M.G., Q.C., Judge of the International Court of Justice; the Rt. Hon. Lord Phillips of Worth Matravers, President of the Supreme Court of the United Kingdom; Judge Jean-Pierre Ancel, *Président de Chambre Honoraire de la Cour de Cassation*; and Mr. Sundaresh Menon, the Attorney-General of Singapore. A very warm welcome to them all.

The Government of Mauritius has embarked on an ambitious project: to establish Mauritius as an International Arbitration Centre, the first of its kind in the region. Our aim is to offer a modern and attractive jurisdiction for international arbitration. International arbitration is increasingly used as a means of settling disputes. Indeed, it has become the standard method of resolution of substantial commercial disputes around the world.

Compared to litigation, arbitration offers a more neutral forum for dispute resolution. From a commercial perspective, recourse to arbitration makes it possible for the parties to avoid entanglement in each other’s domestic courts. It allows for greater flexibility because the parties have a greater say in the arbitral process, the choice of arbitrators and the

* Prime Minister of the Republic of Mauritius.

applicable law and rules. Arbitral awards are usually final and binding, which helps to prevent a long drawn-out appeals process. Arbitration further enables the parties to maintain the confidentiality of the proceedings and of the resulting award.

It is therefore not surprising that international arbitration is now acknowledged as an essential corollary of international trade and cross-border investment flows. For this reason, we believe that the steps which our region has taken to promote these twin aspects of development would be greatly assisted by the availability, in this part of the world, of a safe, stable and congenial place for the arbitration of related international disputes.

And I believe that Mauritius offers a very favourable environment for international arbitration. Mauritius is politically stable, with a long tradition of democracy, good governance and a profound respect for the rule of law. For the third consecutive year, the Mo Ibrahim Index of African Governance has ranked Mauritius first out of the 53 African countries. Mauritius has a vibrant economy. Services account for 70% of our Gross Domestic Product. We have embarked on bold reforms to diversify and internationalise our economy. While restructuring the traditional pillars of our economy, we are consolidating new sectors such as financial services.

In addition, a number of measures have been taken by the Government to make our business environment more attractive. These efforts have been internationally acknowledged. The Doing Business 2011 Report ranks Mauritius 20th worldwide and 1st in Africa. The Economic Freedom Index of the Wall Street Journal ranks Mauritius 12th, and the Africa Competitiveness Report, 4th.

Mauritius is geographically at the crossroads of Africa, Asia and Europe. We are a multi-cultural and multi-lingual country where English and French are spoken. Many of our people speak a third or even a fourth language. We are also one of the rare countries in the world to have a legal system that is a hybrid of the Common Law and the Civil Law. We have a pool of highly skilled legal counsel, accountants, and experts in international trade and finance, we have an independent judiciary, and we are taking steps to strengthen and enhance the quality, efficiency and robustness of our domestic courts.

In addition to the possibility of calling on the expertise of Mauritian lawyers, the parties seeking counsel for international arbitrations will be able to use international lawyers or law firms of their choice. It is expressly stipulated by the International Arbitration Act that foreign lawyers are entitled to represent parties and to act as arbitrators in international arbitrations in Mauritius. Further, the extensive network of

Double Taxation Agreements which we have concluded with a large number of investor countries, as well as developing countries, makes Mauritius a perfect conduit for international investments and an ideal place for the resolution of investment disputes.

Mauritius is also party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention.

The need for this arbitration-friendly environment to be supported by a sustained effort explains the involvement of the Government at this stage of the project. However, let me make it plain that the role of the Government is, and will *only* be, to ensure the existence of the most favourable conditions for international arbitration in Mauritius. It is axiomatic for the success of this endeavour that the Government observes an *absolute* rule of non-interference with the conduct of arbitral proceedings within the jurisdiction of Mauritius. This has been the basis for the Government's involvement in the international arbitration project since its inception, and it will continue to be so.

What the Government *can* do is take steps to create a favourable legal and logistical environment for international arbitration in Mauritius. What have we done?

First and foremost, there is our new legislation, the International Arbitration Act 2008 that was passed by the National Assembly of Mauritius in November 2008. This Act is based on the UNCITRAL Model Law for International Commercial Arbitration of 1985, as amended in 2006. The Model Law reflects a worldwide consensus on key aspects of international arbitration practice, accepted by countries of all regions and by the different legal and economic systems of the world.

The most innovative feature of our new law is the permanent office of the Permanent Court of Arbitration in Mauritius. This is the first such office outside The Hague, created as a result of the Host Country Agreement which the Government of Mauritius concluded with the Permanent Court of Arbitration in April 2009.

And that is not all. The Government is currently engaged in negotiations with one of the leading institutions in the field of international arbitration, with a view to creating a new Arbitral Centre for the region, the Mauritius International Arbitration Centre. We expect that these negotiations will come to a fruitful completion. In addition, work is currently ongoing towards the adoption of specific and user-friendly civil procedure rules dealing with arbitration. Such rules will work seamlessly with the new legislation to guarantee to international users that the use of our Court system is fast and efficient.

Prompt and confident access to the courts, when necessary, is an important ingredient in the success of any centre of arbitration and, as I have said, the Government is strongly committed to the progressive strengthening of our judicial and legal system.

Finally, in terms of logistics, while Mauritius is already well equipped to host arbitral hearings of every type, the Government is dedicated to supporting the opening of state-of-the-art hearing facilities in the coming years. This will also be a convenient location for the office of the PCA in Mauritius and the Mauritius International Arbitration Centre.

In practical terms, our new platform for international arbitration is intended to provide a legal and logistical environment where all forms of international arbitration can thrive. The very presence of representatives of UNCITRAL, the PCA, the ICSID, the ICC, the LCIA, and the ICCA at this Conference clearly signals that this message has been heard and understood.

Mauritius is a jurisdiction of choice, and it is profoundly pleasing that these institutions have recognised that this is so in becoming a partner in the creation of this new platform. We know that our international arbitration project can only succeed with the continuing support and assistance of all of your institutions. We look forward to many more years of successful collaboration with you.

I am delighted that this Conference will afford an opportunity for leading practitioners and others in the field to develop and “re-think” central aspects of the law and the practice of international arbitration. This is an important opportunity for our own legal profession to participate in this development and the Conference constitutes the first step in a regular training programme that will be implemented with the assistance of the PCA Office in Mauritius and our partner institutions.

The aim is to ensure that whenever Mauritius is used for international arbitration, our lawyers and those of the region will be in a position to service the needs of international users. I hope that it will also contribute to making international arbitration gradually become truly integrated as a form of dispute resolution into our own legal cultures. It is important that it should not be seen as an imported and foreign concept perceived to be governed and run by and for others.

Indeed, I believe that this form of cultural cross-fertilisation is essential for the success of international arbitration in the developing world, and perhaps for its very survival, as a truly international form of dispute resolution. I very much hope that this Conference will give all of you the opportunity for such “cross-cultural” exchanges, and that you will also be able, at the same time, to savour some of the beauty and the friendliness of the island that is pleased and honoured to have you as its guests.

OPENING CEREMONY

I now have the great pleasure to declare the Mauritius International Arbitration Conference 2010 open.

PANEL I

**RETHINKING JURISDICTION, *COMPÉTENCE-COMPÉTENCE*
AND SEPARABILITY**

Introductory Remarks

*John Beechey**

The focus of this first session is upon sections 20 and 5 of the Mauritian International Arbitration Act of 2008. We are looking at questions of jurisdiction, *compétence-compétence* and the separability of the arbitration agreement from the main contract in which that arbitration agreement is contained.

There is a report by Salim Moollan. To that report will come responses from Jan Paulsson, Brigitte Stern and Thierry Koenig. Before I give the floor to Salim Moollan, it would be remiss of me not to recognise his own very significant contribution towards this, as the Honourable Prime Minister himself acknowledged, ambitious project and towards the organisation of this remarkable conference with which the ICC is delighted to be associated. He deserves our congratulations as do all of those who have been responsible for seeing this Act through Parliament and safely onto the statute book. Second, I must say how much I appreciate the opportunity to participate in this conference and, above all, the opportunity to return to this beautiful island with which I have had the good fortune to enjoy a long and happy association of more than thirty years standing, which, as it happened, started with an ICC arbitration presided over by my predecessor, Robert Briner. One of my great friends who is visiting this island for the first time, and who, so far, has seen little of it beyond the confines of this hotel said that he rather envied the Prime Minister of Mauritius and wondered if he could please have his job. Now, I gather that it is not available just yet, but I am sure he will keep trying. Anyway, so much for that, it is really a pleasure to be here and Salim, the floor is yours. The only rule I am applying to all of those around me is that they observe the time limits. Typically, with my usual inability to control anything, I set some time limits, they change them, but having changed them, they can abide by them! So, may we start please, with Salim.

* President, ICC International Court of Arbitration (Paris).

Report to the Conference

*Salim Moollan**

We start the substantive work of this first Mauritius International Arbitration Conference by looking at the very foundation of the arbitral process – the jurisdiction of arbitral tribunals.

The question of whether a tribunal is imbued with authority to decide the dispute submitted to it is, as can only be expected, as old as the existence of arbitration itself. Questions of jurisdiction raise a potential tension between two main concerns:

- (i) On the one hand, one must ensure that parties who have chosen to arbitrate their disputes are held to their agreement to arbitrate and do not end up before State Courts;
- (ii) On the other hand, one must also ensure that *only* parties who have chosen to arbitrate their disputes are in fact made to arbitrate.

As Professor Park put it in his 2006 report to the ICCA Congress in Montreal, “*litigants in arbitral proceedings do not expect to be bound by overreaching intermeddlers*”.¹ The determining factor is the parties’ consent. If consent is absent, the tribunal is in truth not a tribunal at all; it is nothing but a purported tribunal.

The tension between these two aims – protecting the parties’ wish to arbitrate while preserving the consensual foundation of arbitration – has been resolved in particular by the development over the years of the two important concepts referred to in the title of our panel – *compétence-compétence* and separability. It is fair to say however that, with the accumulation of jurisprudence and doctrine from a great many jurisdictions, these concepts have become increasingly complex, to the risk of becoming forbidding to the uninitiated.

* Barrister-at-Law, Essex Court Chambers (London) and Chambers of Sir Hamid Moollan Q.C. (Mauritius); Chairman of UNCITRAL and of the UNCITRAL Arbitration Working Group; Vice-President of the ICC International Court of Arbitration (Paris); Senior Visiting Lecturer in International Arbitration Law, King’s College London.

¹ W. W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, ICCA Congress Series No. 13 (Montreal, 2006), van den Berg (ed.), p. 55 (hereinafter, “Park”) at p. 107.

To take one example for each of the concepts:

- Professor Park's report to the Montreal ICCA Congress on *compétence-compétence*² runs to some 91 pages of dense material, complemented by a lengthy annex.
- Professor A. S. Rau, aware of the increasing complexities in the field of separability set out to help us all by summarising in one article "*everything one really needs to know about separability*" in a few simple questions. The result is a 120 page article, addressing some 17 questions.³ Hardly encouraging to a newcomer to the field.

The key, it is submitted, is to see those two concepts for what they really are: pragmatic solutions to practical problems, which can therefore be adapted and adopted in a way that is useful and which makes sense, not as untouchable "*cornerstone[s] of the entire structure*" of international arbitration as they have sometimes been referred to⁴. As Professor Park puts it, "*when all is said and done, [the principles of *compétence-compétence* and separability] are designed to create presumptions that help the arbitration process run smoothly*".⁵ Elevating them above that practical station is bound to create confusion. Thus, with respect to *compétence-compétence*, Professor Park's view is that "*asking the right questions, rather than simply reciting a catch phrase, permits attention to costs and benefits of each alternative, enhancing the transactional security and economic cooperation that can be facilitated by arbitration*".⁶ This echoes the sentiments expressed by Professor Mayer in his intervention at the Paris 1998 ICCA Congress, in the context of severability: "*Big words always tend to distort the reality they describe ... Severability is a good thing;*

² Park, *supra*.

³ A. S. Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions* (2003) 14 Am. Rev. Int'l Arb. 1.

⁴ The quote is from Ph. Fouchard, *Où va l'Arbitrage International?* (1989) 34 McGill Law Journal No. 3, p. 435, and has been reiterated *inter alia* in Ph. Leboulanger, *The Arbitration Agreement: Still Autonomous?*, ICCA Congress Series No. 13 (Montreal, 2006), van den Berg (ed.), p. 3 at pp. 4 and 31.

⁵ Park, *supra*, p. 92.

⁶ Park, *supra*, p. 57.

*however under the name of autonomy it has attained an almost mythical status that yields absurd results and which should be condemned”.*⁷

What I propose to do is accordingly as follows:

- (a) I will begin by considering what one means by the term *compétence-compétence*, and I will seek to identify the particular problem or mischief which this concept is intended to deal with. In that analysis, I will distinguish between two aspects:
 - (i) the so-called “positive effect” of *compétence-compétence*, which is uncontroversial and universally accepted; and
 - (ii) its so-called “negative effect” which – as we will see – is more controversial.
- (b) In doing so, I will look at the solutions adopted in the two main jurisdictions from which Mauritian law has traditionally drawn: England and France. This may in turn allow us to identify some of the pitfalls to be avoided, and possible ways forward for a jurisdiction that comes new to the field.
- (c) I will then address the solution put in place in the Mauritian International Arbitration Act.
- (d) I will conclude with a discussion of separability, again with the aim of identifying the practical aspects of the doctrine which are most likely to solve the actual problems one is likely to encounter in practice.

⁷ P. Mayer, *The Limits of Severability of the Arbitration Clause*, ICCA Congress Series No. 9 (Paris, 1999), van den Berg (ed.), p. 261 at 267.

I. *COMPÉTENCE-COMPÉTENCE*

A. Positive Effect

1. *The concept*

The issue which the concept of *compétence-compétence* is intended to resolve is simple: Does a tribunal have jurisdiction to determine whether it itself has jurisdiction, or is there some logical impossibility in it doing so? My work for this conference has been made considerably simpler by the delivery, on 3 November 2010, of a very important judgment of the Supreme Court of the United Kingdom in a case opposing a Saudi entity, *Dallah Real Estate and Tourism Holding Company*, and the *Government of Pakistan*. The case is a complex one dealing with the recognition and enforcement of an award rendered in France, and is addressed further in the context of our fourth panel.⁸ The case turned on whether the tribunal sitting in Paris had correctly determined that it had jurisdiction, and a large section of Lord Collins' judgment addresses the doctrine of *compétence-compétence*.

Lord Collins started by stating that “*the terms Kompetenz-Kompetenz and compétence-compétence may be comparatively new but the essence of what they express is old*”.⁹ He traced back the concept to tribunals established under public international law in the 18th century, a point which is dealt with further in Professor Stern's contribution to this panel.¹⁰ Lord Collins concluded that, in public international law as in international commercial arbitration, “*the principle that a tribunal ... has the power to consider its own jurisdiction is no doubt a general principle of law*”.¹¹ Any other solution would be unworkable, as the work of tribunals could be brought to a halt by a simple assertion of an alleged lack of jurisdiction, and that general principle of law is what is often referred to as the positive effect of *compétence-compétence*. It has one important corollary, also cogently analysed in Lord Collins' judgment: that any decision by the tribunal on its own jurisdiction cannot be final. As Lord Collins put it, by reference to the U.S. Supreme Court's decision in *First Options v. Kaplan*¹²:

⁸ Panel 4, “Rethinking the Recognition and Enforcement of Arbitral Awards”, *infra*.

⁹ *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (hereinafter “*Dallah*”), para. 79.

¹⁰ *Infra*.

¹¹ *Dallah*, para. 84.

¹² 514 US 938 (1995)

“that flows inexorably from the fact that arbitration [is] simply a matter of contract between the parties and [is] a way to resolve those disputes, **but only those disputes**, that the parties had agreed to submit to arbitration”.¹³

In other words, a tribunal may make a preliminary decision on jurisdiction but it cannot “pull itself by its own bootstraps”.¹⁴

Leaving aside a now abandoned practice to the contrary in Germany prior to that jurisdiction’s adoption of the Model Law¹⁵, and the peculiar position of U.S. law¹⁶, this is the accepted and logical answer. As

¹³ *Dallah*, para. 91 (emphasis added).

¹⁴ *Dallah*, per Lord Saville at para. 159 (quoting para. 1.38 of the Departmental Advisory Committee on Arbitration Law’s Report of 1996).

¹⁵ Prior to Germany’s adoption of the Model Law in 1998, some German Court decisions had ruled that so-called “*Kompetenz-Kompetenz-Klausel*” had the effect of insulating an arbitrator’s decision on his own jurisdiction from any judicial scrutiny. This has now been consigned to history. See A. Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law*, Publications de l’Institut Suisse de Droit Comparé, Schultess (1989) (hereinafter, “Samuel, *Jurisdictional Problems*”) pp. 179-180. The practice is also referred to by Lord Collins in *Dallah* at para. 87.

¹⁶ In his report to the Montreal ICCA Congress, Professor Park raises the possibility – on the basis in particular of dicta in the U.S. Supreme Court’s decision in *First Options v. Kaplan* (*supra*) that, as a matter of U.S. law, a “clear and unmistakable” agreement to submit issues of jurisdiction to an arbitral tribunal would operate to insulate the tribunal’s decision from any or from any extensive Court review, and submits that “with a different vocabulary, American courts have in essence adopted the old German concept of a *Kompetenz-Kompetenz* clause, by which the parties may agree to submit a jurisdictional matter to final and binding arbitration” (Park, *supra*, p. 126). Professor Park however goes on to express the view (i) that the *First Options* dictum “may in some instances lend itself to mischief if applied by courts seeking to reduce their workload” as “at some point in any chain of agreements, a consensual basis must exist for arbitral authority”; (ii) the question of whether the parties have agreed to arbitrate at all could only really be determined conclusively by the arbitrators in the exceptional factual scenario where the parties conclude a subsequent, separate, agreement to arbitrate the issue which – being jurisdictional in respect to the first agreement to arbitrate – then becomes an issue of merits with respect to the second (a rare set of facts, and one which – it is submitted – does not add much to the conceptual debate); and (iii) “questions related to the scope of an arbitration clause lend themselves more easily to application of the ‘arbitrability question’ dictum” (Park, *supra*, pp. 130-131). Other U.S. authors, such as Steven Reisberg would also distinguish between situations where the actual existence of the arbitration agreement is in issue and situations where the jurisdictional dispute is about the scope of the agreement to arbitrate – for instance where the question is whether the agreement to arbitrate covers tortious claims as well as contractual claims: see S. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited* (2009) 20 Am. Rev. Int’l Arb. 159 (Vol. 2). Reisberg’s thesis – in a nutshell – appears to be that the arbitrator who is considering such an issue of scope does already have some authority under the arbitration clause, and is not, to use Professor

the learned authors of one of the leading works in the field, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* put it in a passage¹⁷ cited with approval by Lord Mance in *Dallah*¹⁸:

“Even today, the *compétence-compétence* principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators’ jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award.”

The orthodox, and – it is submitted – logical position is therefore that a tribunal’s decision on jurisdiction is always subject to review by a court. This in turn raises two main issues:

- (a) First, what standard of review should the court adopt when reviewing a tribunal’s decision on jurisdiction? In particular, is the court free to reach its own determination of the question anew, or should it pay any deference to the preliminary determination made by the arbitral tribunal?
- (b) Secondly, and crucially, how does the arbitral tribunal’s power to determine its own jurisdiction interact with the court’s own powers to do so?

Park’s phrase “an overreaching intermeddler” so that his decision on the question of scope can itself be final and not subject to review by the courts. A pronouncement made *obiter dicta* by Lord Mance in *Dallah* appears to be consistent with such a distinction between issues which go to the very existence of the arbitration clause and issues which relate merely to the scope thereof: See *Dallah*, para. 30, where Lord Mance appears to place some weight on the fact that, in that case, “*the issue [was] whether the tribunal had any legitimate authority in relation to the Government at all*”, thus apparently opening the door to a distinction between such cases and cases where the jurisdictional issue only concerns the scope of an otherwise admittedly binding arbitration clause. For the view that there may not be much difference in practice between the French and U.S. approach in that respect, see V. Colaiuta, *The Similarity of Aims in the American and French Legal Systems With Respect to Arbitrators’ Powers to Determine Their Jurisdiction*, ICCA Congress Series No. 13 (Montreal, 2006), van den Berg (ed.), p. 154 at 165.

¹⁷ E. Gaillard and J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) para. 659.

¹⁸ *Dallah*, *supra*, para. 22.

The second issue is best analysed in the context of the discussion of the so-called negative effect of *compétence-compétence*, and I will come back to it. I now turn to the first issue.

2. *Standard of review*

The question of standard of review was the central issue in *Dallah*. The analysis above, and the logical conclusion that a tribunal cannot rule finally on its own jurisdiction, inexorably leads one to conclude that the standard of review is that of a full rehearing.

As expressed by Lord Saville in *Dallah*¹⁹:

“To take as the starting point the ruling made by the arbitrators and to give that ruling some special status is to beg the question at issue, for this approach necessarily assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations; for without some such agreement such a ruling cannot have any status at all....

...

The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that the court must consider for itself.”

That is also the position in France, as was famously decided in the *Pyramids* case back in 1984²⁰. The principle has been recently reaffirmed by the French *Cour de Cassation* in its decision of 6 October 2010 in the *Abela* case²¹, which further clarifies that it applies both where the arbitral tribunal has asserted jurisdiction over the dispute and where it has declined jurisdiction. The Court held as follows:

« Le juge de l’annulation contrôle la décision du tribunal arbitral sur sa compétence, qu’il se soit déclaré compétent ou incompétent,

¹⁹ *Dallah, supra*, para. 159.

²⁰ Cass. civ. 1^{ère}, 6 January 1987, *SPP v. Egypt*, Rev. arb. 1987, p. 469, note Ph. Leboulanger; *JDI* 1987, p. 638, note B. Goldman.

²¹ Cass. civ. 1^{ère}, 6 October 2010, *Fondation Joseph Abela Family Foundation v. Fondation Albert Abela Family Foundation*, Rev. arb. 2010, p. 813, note F.-X. Train.

en recherchant tous les éléments de droit ou de fait permettant d’apprécier la portée de la convention d’arbitrage et d’en déduire les conséquences sur le respect de la mission confiée aux arbitres. »

B. So-called Negative Effect

Turning now to the so-called “negative effect” of the principle of *compétence-compétence*, it is important to understand that the point discussed above – the positive right for an arbitral tribunal to make a *preliminary and non-binding* assessment of whether it has jurisdiction – is the only universally accepted use of the term *compétence-compétence*. That concept in turn gives rise to another problem: if both the courts (as they must) and the arbitral tribunal (as recognised by the positive effect of *compétence-compétence*) have the right to determine questions of jurisdiction, how does one ensure that they are working together in an efficient and cost-effective manner? There are two possible extremes:

- (a) First, one can take the view that it makes no sense for a tribunal to make a preliminary assessment of its own jurisdiction when any final determination can in any event only be made by the court. Following that logic, one should simply let the court decide the point and let the tribunal proceed to determine the merits only if the court does find that jurisdiction exists. One may note at this point that while this approach is on its face cost-efficient:
 - It assumes too much in that the issue may in fact never come back before the Court. For example, the party denying jurisdiction may win on the merits, or the parties may settle the case altogether.
 - It would also mean that the positive effect of *compétence-compétence* would be largely redundant as tribunals would in practice normally not be called upon to rule on their own jurisdiction. This may not be a criticism *per se* as the said “positive effect” is not an end in itself; but it is certainly something worth noting.

- (b) Alternatively, one may take the completely opposite stance and say that all issues of jurisdiction should primarily go to the arbitrators, and only come back to Court after they have ruled on jurisdiction.

Another way to express the two alternatives is as a rule of priority, or of timing. Who of the tribunal or of the court has priority? When should the courts hear questions which go to the jurisdiction of a tribunal? As soon as that issue is raised before them, or only after the arbitrators have made a preliminary assessment thereof?

Ultimately, whether one chooses one or the other solution is really a matter of weighing finely balanced considerations of efficiency. The one thing that should not weigh in the balance is dogma or – to use the words of Professor Mayer – “mythical status”.

To try and assess where the balance lies, a quick survey of the current French and English regimes is instructive.

1. France

In France, full effect is given to the so-called negative effect of *compétence-compétence*. That solution stems from article 1458 of the French Code of Civil Procedure which applies to both domestic and international arbitrations and which provides as follows²²:

²² See, e.g., Cass. 1^{ère} civ. 28 June 1989, *Eurodif*. This paper was delivered in December 2010, prior to the promulgation of the *Décret* of 13 January 2011 enacting the new French Law on arbitration. The solution remains the same (albeit with slightly different wording) in the new Law, article 1448 *al.* 1 and 2, of which provide as follows: « Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente, sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable. La juridiction de l'Etat ne peut relever d'office son incompétence ». See further Ch. Jarrosson and J. Pellerin, *Le droit français de l'arbitrage après le décret du 13 janvier 2011*, Rev. arb. 2011, p. 5, para. 12 (« Le nouvel article 1448 reprend en substance les dispositions des deux premiers alinéas de l'ancien article 1458, quasiment sous les mêmes limites : un litige relevant d'une convention d'arbitrage entraîne l'incompétence de la juridiction étatique (effet dit négatif de la compétence-compétence), que le tribunal arbitral soit ou non déjà saisi, mais à condition que l'une au moins des parties soulève cette incompétence que le juge étatique ne peut relever d'office. Lorsque le tribunal arbitral n'est pas encore saisi, le texte reprend la limite selon laquelle la convention d'arbitrage ne doit pas être manifestement nulle et intègre l'extension prétorienne du cas où la clause est manifestement inapplicable».).

« Lorsqu'un litige dont un tribunal arbitral est saisi en vertu d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci doit se déclarer incompétente.

Si le tribunal arbitral n'est pas encore saisi, la juridiction doit également se déclarer incompétente à moins que la convention d'arbitrage ne soit manifestement nulle. »

Unfortunately, dogma has been allowed to colour the debate, so that today some (mainly French) commentators take the position that any jurisdiction that adopts a different approach to what is nothing more than a finely poised question of procedural efficiency is committing a sin against international arbitration. That is not a fair criticism. The French approach does however have one major practical advantage: that of clarity. A clear-cut choice has been made for one of the two extremes noted above; it will sometimes result in cost-savings, it will sometimes be judged after the event to have been wasteful, but the courts, the arbitrators and the parties all know what to expect and how to operate the system. This can be contrasted with the situation prevailing in England today.

2. *England*

The English regime contained in the English Arbitration Act is complex, and is contained in no less than five sections of the 1996 Act: sections 9, 30, 32, 67 and 72.

- Under section 9, the court must stay any court action brought in breach of an agreement to arbitrate “*unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed*”.²³

²³ Section 9 provides as follows: “Stay of legal proceedings

- (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
- (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
- (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

- Section 30 contains the positive principle of *compétence-compétence*, allowing tribunals to rule on their own jurisdiction subject to review by the courts.²⁴
- Section 32 provides for a special mechanism whereby the parties to an arbitration or the arbitral tribunal have the right to ask the court to determine finally a question of jurisdiction. That right is subject to stringent requirements. In particular, it can only be exercised either where all parties agree or where the tribunal's request appears to the court to be likely to result in substantial savings in time and costs.²⁵

-
- (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
 - (5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings".

²⁴ Section 30 provides as follows: "Competence of tribunal to rule on its own jurisdiction

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
 - (a) whether there is a valid arbitration agreement,
 - (b) whether the tribunal is properly constituted, and
 - (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
- (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part".

²⁵ Section 32 provides as follows: "Determination of preliminary point of jurisdiction

- (1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.
A party may lose the right to object (see section 73).
- (2) An application under this section shall not be considered unless—
 - (a) it is made with the agreement in writing of all the other parties to the proceedings, or
 - (b) it is made with the permission of the tribunal and the court is satisfied—
 - (i) that the determination of the question is likely to produce substantial savings in costs,
 - (ii) that the application was made without delay, and
 - (iii) that there is good reason why the matter should be decided by the court.
- (3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.
- (4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
- (5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

- Section 67 of the Act provides for challenges to awards on jurisdiction.²⁶
- Section 72 of the Act provides for a further special mechanism whereby a party who takes no part in the arbitral proceedings may ask the court to determine issues of jurisdiction. That mechanism is not subject to any of the stringent requirements of Section 32.²⁷

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- (6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal”.

²⁶ Section 67 provides as follows: “Challenging the award: substantive jurisdiction

- (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
 - (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
 - (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
- (2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
- (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
 - (a) confirm the award,
 - (b) vary the award, or
 - (c) set aside the award in whole or in part.
- (4) The leave of the court is required for any appeal from a decision of the court under this section”.

²⁷ Section 72 provides as follows: “Saving for rights of person who takes no part in proceedings

- (1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—
 - (a) whether there is a valid arbitration agreement,
 - (b) whether the tribunal is properly constituted, or
 - (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.
- (2) He also has the same right as a party to the arbitral proceedings to challenge an award—
 - (a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or
 - (b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him; and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.”

How these sections interact is not entirely clear.²⁸ A first difficulty is that there is nothing in the wording of section 72 which would prevent a party from having recourse to that section until after the determination of the issue of jurisdiction by the tribunal. In *Law Debenture Trust v. Elektrim*²⁹, Mann J. held that a party may indeed use section 72 at any stage of the proceedings, including at the very outset of the case. In other words, under the current English regime, the party seeking to resist arbitration has all the cards in his hands and can either decide to play ball and allow the issue to go to the tribunal (and then – at its option – challenge any award rendered against it under section 67) or – in its entire discretion – to refuse to participate and ask the court for a final ruling under section 72. It – the recalcitrant party – decides who goes first. That hardly seems a desirable result as a matter of policy. One can also note that such a use of section 72 short-circuits the stringent requirements of section 32 and renders that section largely redundant.

In addition to this, in a number of cases under section 9 of the Act³⁰, the English courts have held that the court had a discretion – to be exercised on an *ad hoc* basis in each case as a matter of case management – whether to refer an issue of jurisdiction to the arbitrators or to decide it itself. So that not only is there no clarity about who decides the issue, but you now even need a hearing before the court to decide who will decide the

²⁸ Rix J. sought to explain the regime in the following terms in *Azov Shipping Co. v. Baltic Shipping Co.* [1999] 1 Lloyd's Rep. 68 at 69: "Where a challenge to an arbitrator's substantive jurisdiction is made, the party that challenges the jurisdiction has a number of options under the Act. It may agree to participate in the argument before the arbitrator of the question of his competence and jurisdiction: see section 30 of the Act. It may do so while reserving its right to challenge the arbitrator's award as to his own competence (see section 67) ... Alternatively, it may seek, without arguing the matter before the arbitrator, to promote the determination of the preliminary point of jurisdiction by the court under section 32. The third option of someone disputing an arbitrator's jurisdiction is to stand aloof and question the status of the arbitration by proceedings in court for a declaration, injunction or other appropriate relief under section 72 of the Act. In such a case he is in the same position as a party to arbitral proceedings who challenges an award under section 67 on the ground that there was no substantive jurisdiction".

²⁹ [2005] 2 All ER 476.

³⁰ *Birse Construction v. St. David Ltd.* (Court of Appeal) [2000] BLR 57; *Al Naimi v. Islamic Press Agency* (Court of Appeal) [2000] 1 Lloyd's Rep. 522. In a subsequent case (*Albon v. Naza Motors* [2007] 2 All ER 1075), a Chancery Judge has held that – given the wording of section 9(4) of the Act (which provides that "the Court shall unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed"), issues of jurisdiction should normally be determined by the Court but the Court could "in exceptional circumstances" exercise its inherent jurisdiction to order a stay.

issue. In an *obiter dictum* in *Dallah*³¹, Lord Collins may have taken one step in clarifying the position (albeit one which runs directly contrary to the French position and which denies any “negative effect” to the principle of *compétence-compétence*), stating that “*where there is an application to stay proceedings under section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate*”.³² The result, it is submitted, is one of utmost confusion which cannot be productive or desirable.

3. *What lessons can be drawn from this? The Mauritian solution*

Where does this leave a new arbitral seat like Mauritius? The first point to note is that Mauritius has of course adopted the positive rule of *compétence-compétence*: see section 20(1) of the Act.³³ In terms of the rule of priority (who goes first, the court or the arbitral tribunal), it is submitted that if one clear lesson can be drawn from this short comparative survey, it is that whatever solution is chosen, a clear choice must be made in favour of one or other of the two opposite positions. After weighing the matter carefully, the Mauritian legislator has opted for the French solution: the arbitral tribunal goes first. Why?

- First, in terms of perception, and perception in a new arbitral seat may well be everything, there is little doubt that this will be perceived as a “pro-arbitration stance”.
- Secondly, it is in keeping with a general philosophy of the Mauritian Act to keep points of contacts with the courts during the arbitral proceedings to a minimum. A party who comes to Mauritius to arbitrate should not start his trip with a lengthy visit to the Mauritian courts, however pleasant our judges.
- Thirdly, although this was not a factor taken into account when drafting the Act, it is interesting to note that the solution adopted in Mauritius is that ultimately recommended by Professor Park in his

³¹ *Dallah, supra*, para. 97.

³² The cases referred to by Lord Collins are however two of those referred to in fn. 21 above (*Al Naimi* and *Albon*), both of which proceeded on the basis that the Court has a discretion whether to decide the issue itself or whether to refer it to the arbitrators.

³³ This provides as follows: “An arbitral tribunal may rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement.”

Montreal ICCA Congress report, that is the French rule attenuated to provide for “*a summary mechanism to permit courts to halt arbitral proceedings when the arbitration clause is manifestly void*”.³⁴

One can also note that what is now Mauritian domestic arbitration law also follows the French rule, as article 1016 of the Mauritian Code of Civil Procedure is identical to French article 1458.

The test has however been framed differently in the new Act in order to be readily understandable to users from all parts of the word. It is set out in section 5 of the Act which provides in particular that all arbitration applications made to the court are to be decided by a three-judge bench of the Supreme Court, which must:

“refer the parties to arbitration unless a party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed (...)”

This test is in substance identical to the French test save that:

- It is spelt out that the hearing before the Supreme Court must not be a trial, or even a mini-trial, but must be a summary *prima facie* determination; and
- The Court may decide the question itself where the clause is “*manifestement nulle*” not only when the arbitral tribunal has not yet been constituted, but also where it has been constituted. This is the gloss recommended by Professor Park.³⁵

Finally, it is important to understand the nature of the ruling of the Court under section 5 when it refers a matter to arbitration. When it is referring the matter to arbitration in this manner, the Court is not making any decision one way or another about the validity of the arbitration clause. It is

³⁴ Park, *supra*, pp. 144-145.

³⁵ It is further strongly arguable that the *prima facie* test expressly adopted under Mauritian law is in any event the correct test under article 8 of the Model Law given (in particular) the *travaux préparatoires* of the Model Law, and the reasoning of the Courts of Hong Kong and of Canada in that respect: see F. Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?* (2006) Arb. Int'l Vol. 22 No. 3, pp. 463-476. The Mauritian legislator has put this beyond doubt in the Mauritian International Arbitration Act.

not saying the clause is valid. It is simply finding on a *prima facie* basis that the person denying its validity has not shown that there is a very strong probability that it is invalid. The ruling does not have any *res judicata* effect, and a full ruling by the Court would only take place if and when the arbitrators' jurisdictional award is challenged at a later point in time.³⁶

II. SEPARABILITY

Like *compétence-compétence*, separability is a pragmatic concept devised as a practical solution to another, related, problem: a “*perceived logical puzzle*”³⁷ with the following steps:

- First, the parties purport to conclude a contract that contains the agreement to arbitrate.
- Secondly, an arbitral tribunal finds that the purported contract does not bind the parties.

As expressed by McNeill & Juratowitch³⁸:

“Pure logic might be thought to suggest that if the entirety of the purported contract does not bind the parties, neither does the arbitration clause contained within it. On this approach, the arbitral tribunal would, by determining on the merits that the contract is invalid, also be deeming itself to lack jurisdiction to make such a finding”.

The pragmatic answer developed to this logical conundrum has been to draw on jurisprudence – dating back to Swiss case-law in the early 20th century – which considers the arbitration agreement to be a separate contract from the main contract in which it is contained. Thus the term separability.³⁹ Once this is accepted, the logical conundrum largely falls away, but not completely as is explained further below.

³⁶ An award on jurisdiction can be challenged under sections 20(7) or 39 of the Act.

³⁷ M. McNeill & B. Juratowitch, *The Doctrine of Separability and Consent to Arbitrate in Agora: Thoughts on Fiona Trust* (2008) Arb. Int'l Vol. 24 No.3, pp. 475–487 at 476.

³⁸ McNeill & Juratowitch, *supra*, p. 476.

³⁹ For the historical development of the concept, see Samuel, *Jurisdictional Problems (supra)*, Chapter III (“The Separability Doctrine”); Samuel, *Separability of Arbitration Clauses – Some Awkward Questions about the Law on Contracts, Conflicts of Laws and the Administration of Justice* (accessible at <<http://www.adamsamuel.com/pdfs/separabi.pdf>>, hereinafter “Samuel, *Separability*”).

Hoffmann L.J. put it in the following terms in *Harbour v. Kansa* in 1993⁴⁰:

“[Counsel] calls this logic. I call it oversimplification. The flaw in the logic as it seems to me lies in the ambiguity of the proposition that the arbitration clause “formed part” of the [main contract] ... parties can include more than one agreement in a single document...”

On that basis, it becomes possible for an arbitrator to rule conclusively and with jurisdiction for instance on the following issues:

- whether a condition precedent in a contract has been fulfilled; or
- whether a contract has been lawfully avoided for fraudulent misrepresentation; or
- whether a contract is void for illegality – this was the scenario in *Harbour v. Kansa* itself.

In terms of jurisdiction, the focus shifts to the arbitration agreement, as opposed to the main contract, and an attack on the main contract will not necessarily constitute an attack on the arbitration agreement. To take some extreme examples:

- In *SNE v. Jocoil*⁴¹, a case referred to with approval by the English Court of Appeal in *Harbour v. Kansa*⁴², the Court of Appeal of Bermuda upheld a Soviet award holding that the signatory to a contract containing an arbitration clause had no authority to bind the plaintiff to the substantive obligations in the contract, but was authorised to sign an arbitration agreement. The arbitration clause was thus separable and binding.
- In a decision of 27 February 1970, also referred to with approval by the Court in *Harbour v. Kansa*, the German Supreme Court held that an arbitrator had jurisdiction to determine the consequences of the invalidity of a contract. In particular, the

⁴⁰ *Harbour v. Kansa* (Court of Appeal) [1993] 1 Lloyd’s Rep. 455 at 467 rhc.

⁴¹ (1990) XV Yearbook Commercial Arbitration 384.

⁴² *Supra*.

arbitrator could decide whether one of the parties was entitled to a restitutionary remedy in light of the invalidity of the contract.⁴³

One further point to note is that, where the principle operates so that an attack on the main contract does not impugn the arbitration clause itself, the arbitral tribunal will rule on the relevant issue (say, the entitlement of the parties to a restitutionary remedy following invalidity of the main contract, to take the last example above) *on the merits and with jurisdiction*, so that there can be no question of a later jurisdictional challenge to their decision before the State courts. As explained by Adam Samuel⁴⁴:

“Separability is a matter of substantive rights. The arbitrator’s decision on the validity of the contract containing the arbitral clause is to be considered as final under that doctrine unlike the same person’s decision relating to the validity of the arbitral clause, made on the basis of his right to rule on his own jurisdiction”.

I should add two caveats to this very streamlined description of the concept of separability:

A. First Caveat: Terminology and the Peculiar Position under French Law

The first caveat relates to terminology, and to the position under French law. As with *compétence-compétence*, the concept of separability (or ‘*autonomie de la clause arbitrale*’ in French) means different things to different people. This is essentially for two reasons:

- First, its historical development as a substantive concept derived from other fields of arbitration law. For instance, the Swiss Courts initially developed the concept in 1915 in order to answer conflict-of-law issues arising from the federal organisation of their State.⁴⁵ The arbitration clause was considered to be a procedural contract separate from the main contract, and as such was made subject to

⁴³ The decision has been translated in *Arbitration International* in 1990, with a note by Stewart Boyd Q.C.: see S. Boyd, *Arbitration under a Stillborn Contract: The BGH Decision of 27 February 1970*, (1990) Arb. Int’l Vol. 6 No. 1, pp. 75-78.

⁴⁴ Samuel, *Jurisdictional Problems* (*supra*), p. 184.

⁴⁵ See *Jörg v. Jörg* ATF 41 II 534 (1915); Samuel, *Jurisdictional Issues*, *supra*, p. 155; Samuel, *Separability*, *supra*.

cantonal law (the law of the specific Canton) while the rest of the agreement was subjected to the Federal Code of Obligations. Similarly, English law recognised as far back as 1894 that the arbitration clause could be governed by a different law to the main contract.⁴⁶

- Secondly, the concept has been used and developed beyond its original framework in France to the extent that French academics and practitioners have now for some time described it as the “cornerstone of the whole system” of international arbitration.⁴⁷ In that jurisdiction, the concept of ‘*autonomie de la clause arbitrale*’ is now said to mean two things, that is:

- (a) autonomy from the main contract⁴⁸, but also
- (b) an “autonomy from all State laws” used by the French Courts in particular to uphold arbitration agreements which might fail under another law.⁴⁹

⁴⁶ See *Hamlyn v. Talisker* [1894] AC 202; Samuel, *Separability, supra*; A. Samuel, *Separability and Construing Arbitration Clauses: the House of Lords’ decision in Premium Nafta and the Fiona Trust in Agora: Thoughts on Fiona Trust* (2008) Arb. Int’l Vol. 24 No.3, pp. 489-497 at 495.

⁴⁷ The quote is from Ph. Fouchard, *Où va l’Arbitrage International?* (1989) 34 McGill Law Journal No. 3 p. 435 and was picked up in Ph. Leboulanger, *The Arbitration Agreement: Still Autonomous?*, ICCA Congress Series No. 13 (Montreal, 2006), van den Berg (ed.) p. 3 at pp. 4 and 31.

⁴⁸ This was the original formulation of the French doctrine of “autonomy” in the *Gosset* case, the relevant part of the *Cour de Cassation*’s decision reading as follows: “with respect to international arbitration, the arbitration agreement, whether concluded separately or included in the contract in the contract to which it relates, shall, save in exceptional circumstances, have full legal autonomy and shall not be affected (« *en matière d’arbitrage international, l’accord compromissaire, qu’il soit conclu séparément ou inclus dans l’acte juridique auquel il a trait présente toujours, sauf circonstances exceptionnelles, une complète autonomie juridique excluant qu’il puisse être affecté par une éventuelle invalidité de cet acte* »): See *Gosset*, Cass. civ. 1^{ère}, 7 May 1963, *Bull. civ.* I, n° 246; Leboulanger, *op. cit.* p. 7.

⁴⁹ This evolution has – as much of French international arbitration law – been effected by the Courts. First, in its judgment in *Menicucci* (CA Paris, 13 December 1975), JDI 1977, p. 107, note E. Loquin; Rev. arb. 1977, p. 147, note Ph. Fouchard; Rev. crit. DIP 1976, p. 506, note B. Oppetit), the Paris Court of Appeal held that “*given the autonomy of an arbitration clause providing for international arbitration, the said clause is valid independently of any reference to the law of any given State*”. This was followed by further rulings to the same effect (albeit in an evolving formulation) by the Court of Appeal (see CA Paris, 20 avr. 1988 : Rev. arb. 1988, p. 570. – CA Paris, 30 nov. 1988 et 14 févr. 1989 : Rev. arb. 1989, p. 691, note P.-Y. Tschanz. – CA Paris, 28 nov. 1989 : Rev. arb. 1990, p. 675, 1^{re} esp., note P. Mayer. – CA Paris, 11 janv. 1990/1990 : Rev. arb.

As with the negative effect of *compétence-compétence*, one may or may not applaud such a development. What should be noted for present purposes however is (i) that this remains “a very isolated solution in comparative law”⁵⁰; (ii) that this French concept of ‘*autonomie*’ is altogether different from the narrower concept of ‘separability’ described above, and (iii) that the failure sufficiently to appreciate that difference can cause confusion.⁵¹

In Mauritius, the doctrine of separability has been incorporated in its narrow meaning and not in the expanded French meaning. Section 20(2) of the International Arbitration Act, which reproduces the relevant part of Article 16 of the Model Law provides as follows:

“An arbitration clause which forms part of a contract shall be treated for the purposes of subsection (1)⁵² as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

B. Second Caveat: The Limits of Separability

The second caveat relates to the limits of separability. The point was made in those terms by Hoffman L.J. in *Harbour v. Kansa*⁵³:

1990, p. 95, note D. Cohen; JDI 1991, p. 141, note B. Audit; RTD com. 1992, p. 586, obs. Dubarry et Loquin. – CA Paris, 17 déc. 1991, *Gatoil* : Rev. arb. 1993, p. 281, note H. Synvet. – CA Paris, 7 déc. 1994, *Jaguar*: RTD com. 1995, p. 401, obs. Dubarry et Loquin), until the *Cour de Cassation* consecrated this view in the *Dalico* case (Cass. 1^{re} civ., 20 déc. 1993, *Dalico* ; JDI 1994, p. 432, note E. Gaillard, et p. 690, note E. Loquin; Rev. crit. DIP 1994, p. 663, note P. Mayer ; Rev. arb. 1994, p. 116, note H. Gaudemet-Tallon) in the following terms: “in application of a substantive rule of international arbitration law, an arbitration agreement is legally independent from the main contract which contains it (either directly or through incorporation by reference) and its existence and binding effect – subject to the mandatory rules of French law and to international public policy – are to be determined in accordance with the common will of the parties, without any need to refer to the law of any given State”. See further Ch. Seraglini’s chapter on “Arbitrage international” in “Traité de droit du commerce international”, direction J. Béguin et M. Menjucq (Litec, 2005) para. 2463 and ff, esp. 2465-2468.

⁵⁰ See Seraglini, *op. cit.*, para. 2471.

⁵¹ In that respect, as already noted above, Professor Mayer has advocated the use of the term “severability” in preference to that of “autonomy”: see Mayer, *op. cit.*, quoted in the text to fn. 8 above.

⁵² As noted above, Section 20(1) enshrines the principle of *compétence-compétence* in the following terms: “An arbitral tribunal may rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement”.

⁵³ *Harbour v. Kansa*, *op. cit.*, at p. 469 lhc.

“saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be”.

To broaden this pronouncement beyond illegality, there will be cases where the causes of invalidity of the main contract will also be causes of invalidity of the arbitration clause. This does not put the basic concept – separability – in doubt. The arbitration clause and the main contract remain conceptually separable; but they can both – separately – be undermined by the same set of facts. For that reason, most authors and courts support the view that there remains one logical limit to separability understood in its traditional sense, that is *where initial consent to the main contract and to the arbitral clause is altogether missing*. The paradigm examples are cases of *non est factum* or forgery.⁵⁴

The only jurisdiction where this would appear not to be the case is France, and this can be linked to that jurisdiction’s expanded view of ‘autonomie’.⁵⁵ The French position appears to rest, ultimately, on a policy decision that all purported arbitration clauses should in the first instance be held valid whatever the circumstances, as “*the principle’s main purpose [is] to ensure that the arbitration agreement remains unaffected by flaws in*

⁵⁴ For instance, McNeill & Juratowitch express the view (*op. cit.* at pp. 486–487) that, under English law (as most recently laid down in *Premium Nafta v. Fili Shipping* [2007] UKHL 40, better known as the *Fiona Trust* case), “*the arbitration agreement is also likely to fall with the main agreement in cases where the main agreement is found to be void because of (i) non est factum, (ii) forgery, (iii) threat, (iv) mistake about the identity of the other party, or (v) signature by someone lacking authority to agree on behalf of the alleged party alleged to be bound. Other examples can be imagined. Their common theme is that the same defect affects both the main contract and the conceptually separate arbitration clause. What types of defect in the main agreement also cause the arbitration agreement to fail is likely to be a continuing cause of controversy*” (one may pause to note that example (v) will depend on whether the alleged lack of authority encompasses a lack of authority to conclude the arbitration clause as opposed to the main contract: see *SNE v. Jocoil* referred to above). See also Mayer, *op. cit.* pp. 263–265; Park, *op. cit.* pp. 93–95.

⁵⁵ See for instance, Leboulanger, *op. cit.* pp. 23–27, where the author criticises the 1990 *Cour de Cassation*’s decision in *Cassia (Pia Investments Ltd. v. Cassia)*, Rev. arb. 1990, p. 851) in which the Court had held that “*in international arbitration, the autonomy of the arbitration clause presupposes the formal existence of the main contract containing it*”) and notes the subsequent re-affirmation by the *Cour de Cassation* in 2005 of “*the French ‘traditional’ solution*”: see *Sté Omenex v. M. Hugon*, Rev. arb. 2006, p. 103, note J.-B. Racine; JDI 2006, p. 996 (note F.-X. Train), where the Court held that “*in application of the principle of validity of the arbitration agreement and of its autonomy in international law, neither the nullity nor the non-existence of the underlying contract affects it*”.

the underlying contract".⁵⁶ As noted by McNeill and Juratowitch, such an approach does however create the risk that arbitration is imposed on a party who has not genuinely agreed thereto (for instance because the signature affixed to the document containing both the main contract and the arbitration clause is a forgery), thus undermining "*the most fundamental rule of arbitration, which is that 'arbitration is consensual'*".⁵⁷

C. Conclusions for a Country Like Mauritius?

Practically speaking, where does this leave a new seat such as Mauritius? As already noted, the concept of separability has been expressly incorporated into Mauritian law in its narrow meaning. This will provide courts and tribunals with the necessary tool to avoid dilatory tactics. In particular, it will not be enough for a party to assert a flaw in the main contract. That flaw will often have no impact on the agreement to arbitrate itself. Practically speaking however, is this of much use if a party can abuse the limits of the concept, and simply assert – in bad faith – a complete absence of initial consent and thereby validly impugn both the main contract and the agreement to arbitrate, and disrupt the arbitration? This can pose real problems in a jurisdiction such as England where the trend appears to be for the courts to fully determine jurisdictional issues themselves, as a question then immediately arises as to who – court or tribunal – should determine the particular factual allegation. If separability operates and there is no proper attack on the arbitration clause, then the question is one on the merits for the arbitral tribunal; if it does not then it is one of jurisdiction which must go to the courts. This problem does not arise under the Mauritian regime, as any allegation against the arbitration agreement – whether together with, or independently from, the main contract – will go to the arbitral tribunal first, save in the exceptional circumstances set out in Section 5 of the International Arbitration Act. This, it is hoped, will discourage dilatory tactics.

CONCLUSION

The principles of *compétence-compétence* and separability are crucial tools of modern arbitration law, and play an important part (i) in resolving actual or perceived logical difficulties inherent whenever a judicial body has to

⁵⁶ Leboulanger, *op. cit.* p. 26.

⁵⁷ McNeill and Juratowich, *op. cit.*, p. 485 (quoting from the *Fiona Trust* case).

determine the contours of its own authority; and (ii) in preventing dilatory tactics by recalcitrant respondents.

In order for them to remain useful and practical tools, it is submitted that it is important to focus on their actual pragmatic use and to avoid elevating them into untouchable, or sacrosanct, principles that can – as noted by Professor Mayer – end up doing more harm than good.

This is what the Mauritian legislator has aimed to do – to try and assess, in the light of the substantial body of authority and doctrine available worldwide, how these principles might best be implemented to serve the interests of international users of arbitration. In particular, the International Arbitration Act seeks to tailor the concepts so as to ensure that parties who come to arbitrate in Mauritius actually end up arbitrating and not litigating, with the Mauritian courts supporting, and not interfering with, arbitrations.

Response to the Report: The Concept of Negative Effect

*Prof. Jan Paulsson**

We are considering the posture of courts seized on the merits in disregard of an arbitration agreement, on the ground that it is non-existent or invalid, or does not cover the particular dispute that has arisen. What should the judge do, given the coexistence of the *Kompetenz-Kompetenz* principle and the proposition that the ultimate control nevertheless lies in the courts?

If a court first hears about the matter when the arbitration is already in progress, the rule of arbitral jurisdiction to decide jurisdiction means that the court has no warrant to prevent the arbitrator from proceeding while it considers the jurisdictional matter. Once the court has done so, it legitimately expects that an arbitrator subject to its jurisdiction will stop or continue in accordance with the court's decision, subject to appeal but irrespective of the arbitrator's own view of the matter.

There is, however, a second obvious hypothesis: the court hears about the dispute before the appointment of an arbitrator. A party has gone to court without mentioning an arbitration agreement which it either forgets or ignores. If the other party answers on the merits, without making an objection to the court's jurisdiction, the arbitration agreement – no matter how solid – generally lapses beyond any hope of resurrection. There is no problem. But if the answer takes the form of a motion to stay the case before the court – in effect an objection to its jurisdiction – what effect, if any, is to be given to arbitral *Kompetenz-Kompetenz*?

One might start out by observing that in this situation the plaintiff is in essence contesting arbitral authority. It may be disturbing to think that great advantages should be gained by winning a race to the courthouse. Apart from anything else, it places a premium on litigiousness over negotiation, which is unlikely to be consonant with anyone's idea of good social policy. The problem is, after all, the same as the one to which the rule was intended to respond. Should the court stay its hand, and allow the arbitrator to accept or reject jurisdiction? After all, if it turns out that the case should have been arbitrated, this approval would minimise the type of judicial proceedings which the parties had agreed to eschew. In the

* President of the International Council for Commercial Arbitration (ICCA); Co-head of International Arbitration and Public International Law Groups, Freshfields Bruckhaus Deringer LLP; Michael Klein Distinguished Chair, University of Miami School of Law.

contrary hypothesis, why not give weight to the possibility that the arbitrator, after a thorough investigation that uses no scarce judicial resources, would decline jurisdiction – subject in any case to judicial verification and correction?

There are three possible answers: one simple and dubious, the other simple and attractive, and the third more complex but worthy of consideration.

The simple but dubious answer is to hold that the introduction of the court action in and of itself precludes even the commencement of the arbitral proceedings. To criticise this approach may be to invite controversy, because it is followed in some jurisdictions. Still, it gives undue advantage to the party which contests arbitral jurisdiction, in effect securing the automatic and perhaps practically decisive tactical advantage of paralysing arbitration for many years. The more attractive answer, also simple, is that the other party should be entitled to seek arbitration; if the arbitrator sees merit in the objection he or she may not only deal with it preliminarily, but also thereafter keep further action in abeyance pending judicial determination; if the court is concerned that even this would be a waste, the onus is upon it to act quickly. Considering once more the consensus reflected in the UNCITRAL Model Law, Article 8 ensures that there is no advantage to winning a race to the courthouse. Its first subparagraph provides that courts must refer to arbitration any matter “which is the subject of an arbitration agreement” unless that agreement is “null and void, inoperative or incapable of being performed”. While any debate under that subparagraph is under way, Article 8(2) states that “arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court”. This approach promises the surest balancing of the consequences of the alternatives: arbitral authority or not.

Of course not all arbitrators will be inclined to move forward, as Article 8(2) enables them to do, while the court examines whether the arbitration agreement is “null and void, inoperative or incapable of being performed”. This cloud may therefore hang over the head of arbitants and arbitrators for a long time. Not so in France, where a more complex approach has been adopted.

The French courts have developed the postulate that the principle of *compétence-compétence* does not only have the positive effect of empowering the arbitrators to rule (provisionally) on their own jurisdiction, but also the negative one of prohibiting courts in the meanwhile from deciding disputes possibly covered by arbitration agreements. There is no logical necessity for *compétence-compétence* to have a negative effect. It is

not a required complement of the positive effect of allowing the arbitral tribunal to proceed when faced with a jurisdictional objection. Whether to extend the rule to prevent courts from impeding arbitrations by entertaining such objections is a policy choice; what is feared the most – court actions pursued with the aim of disrupting arbitration, or overreaching by arbitrators? In jurisdictions suspicious of arbitration, the tendency is to want courts to have a preventive role. In jurisdictions that accept arbitration, it is expected that arbitrators will not overreach, and understood that if they do the courts may intervene remedially. It is essentially a question of timing, but can be of decisive practical importance if court proceedings are lengthy and costly, and there is no redress for the victim of unmeritorious disruption.

So far so good, although it is not very much. The difficulty remains: how courts dispose of doubts as to whether a given dispute is indeed covered by an arbitration agreement. This is where French case law has significantly expanded the negative effect, reading Article 1458 of the Code of Civil Procedure¹ as follows: (i) if the arbitral tribunal is already seized of the matter, it alone has authority to make the initial determination of “the validity or limits of its investiture”, and the courts are therefore not authorised to question its jurisdiction;² or (ii) if the arbitral tribunal is not in place, the courts should abstain from dealing with a dispute in the presence of an arbitration clause which is not “*manifestement nulle*”.

To make this distinction may seem sensible. A party which has taken the initiative to raise a claim in court is perhaps more likely to have a genuine belief that it is not impeded by an arbitration agreement than one which goes to court only in reaction to a claim in arbitration. Naturally this does not mean that there are no tactical pre-emptive actions, or that jurisdictional demurrers in a pending arbitration necessarily lack *bona fides*. Still, it seems odd that the French approach would paralyse any possibility of judicial intervention to stop a runaway arbitrator purporting to assert jurisdiction in circumstances where it seems obvious that any award would be a nullity.

When a claim has been properly introduced before a court which would have jurisdiction over it and over the defendant in the absence of the arbitration agreement invoked by that defendant, the straightforward way of

¹ It merits quotation in full:

“[W]hen a dispute of which an arbitral tribunal is seized pursuant to an arbitration agreement is brought before a national court, the latter must declare itself to lack jurisdiction.

If the arbitral tribunal has not yet been seized, the court must also declare itself to lack jurisdiction unless the arbitration agreement is manifestly void.”

² *Coprodag v. Bohin*, 10 May 1995, (1995) *Rev. arb.* 617; and innumerable others.

dealing with the matter may seem to be for the court to dispose of it once and for all. If the court finds that the arbitration agreement is valid, the parties are sent to arbitration with the reasonable expectation that there will be no further discussion of this point. In most cases, although there are complications in the international context,³ the arbitrators will be bound by that determination, and it would be pointless to come back to the same court after the arbitration to seek to invalidate the award for lack of arbitral jurisdiction; it is *res judicata*.⁴ If the court reaches the contrary conclusion, it will generally be vain for the defendant to pursue arbitration. So either way, the efficient administration of justice may appear well served by a definitive court decision, rather than a provisional (*prima facie*) filter which would allow cases to go to arbitration with two clouds hanging over them: the prospect of both a debate before the arbitral tribunal and ultimately full judicial review.

The implicit French answer is that there must be a choice, and it should favour parties who have the legitimate objective of relying on arbitration agreements. Although it may happen that arbitrators erroneously assume jurisdiction and that this cannot be corrected for quite some time thereafter, that possibility is less daunting than the risk of creating incentives for bad-faith tactics of “parasitic litigation” in order to disrupt the work of arbitrators, who should not *a priori* be suspected of inability or disinclination to perceive a valid objection to their jurisdiction.⁵ This risk of creating undesirable incentives is obvious if the arbitral tribunal is already in place, and justifies the absolute prohibition of judicial consideration of jurisdictional objections to arbitration at that stage. The situation is different in the case of a plaintiff who has taken the initiative of going to court in disregard of an arbitration agreement; there is less reason to suspect dilatory tactics, so the court may go ahead and take up the dispute

³ If the case comes before a court in a country which is not the seat of the arbitration, the arbitral tribunal would not necessarily be bound by that foreign court’s pronouncements as to arbitral jurisdiction (although the defendant may be discouraged from pursuing the arbitral option in such circumstances if the only plausible place of enforcement was in the jurisdiction of that court). If the court is that of the seat of arbitration, going against the court decision would be a far more ambitious thing, but it is conceivable that the defendant will still seek to pursue arbitration on the grounds that the law under which the arbitration takes place is not in fact that of the country where the arbitration takes place, or that an award would be legitimate irrespective of its unenforceability in that place – but these are rare occurrences.

⁴ This may explain why fewer cases arise under Article V of the New York Convention, which provides for enforcement of awards, than under Article II, which gives effect to agreements. One might expect a similar preponderance in purely domestic contexts.

⁵ Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, *Traité de l’arbitrage commercial international* 424 (1996).

if it considers the arbitration agreement to be “*manifestement nulle*”.

The French approach also seeks to accomplish a second objective: to reduce the complexity of litigation about arbitration by concentrating the control function wherever possible. The above-described extension of the negative effect tends to have the result that overreaching by arbitrators is controlled by a single appellate court, namely the one having authority to consider annulment applications (generally located in the place of arbitration). Without this extension, the control function may be exercised by innumerable courts of first jurisdiction, seized by crafty parties wishing to derail arbitration.

In respect of arbitrations taking place in Switzerland, the Federal Tribunal in that country has held that a court asked to stay a case should “restrict itself to a summary review of the existence *prima facie* of an arbitration agreement, in order not to prejudge the arbitral tribunal’s decision as to its own jurisdiction”.⁶ This implicit endorsement of the French approach may seem odd; why should a court not *prejudge* an issue which it may in any event have to judge *in fine*? There are three cogent answers, and they all tend to invalidate the arguments in favour of a once-and-for-all decision by the court first seized. To start with, the first court may in fact not be the court, territorially or hierarchically, which would have jurisdiction to rule on the validity of an award; this may make a difference, and it seems incongruous for the result to be different depending on how the matter began. Second, there is merit in allowing an arbitral tribunal to conduct the inquiry and hearings that may be required for a full debate with respect to arbitral authority. The arbitral tribunal’s shouldering of that burden will preserve on judicial resources. If the arbitrators perform the task inadequately, it may have to be redone correctly, but why assume that they will do a defective job? Third, and perhaps most importantly, it is an illusion to think that an *ex ante* determination of jurisdiction issues will be a final disposition of all that needs to be done, and nothing more. Issues that appear *in limine* may fall away in the arbitration, and new ones may appear as the case develops.

Attempts have been made in France to distinguish (i) cases where the non-existence of a contract is *the legal consequence* of the lack of an essential element from (ii) those where the non-existence is simply a *finding of fact*. In the latter case, there simply never was a contract and so, it would be argued, there was no arbitration agreement either. An illustration of the second category might be a document which speaks consistently in the future tense of the parties’ will to negotiate a contract on certain broad

⁶ *Fondation M v. Banque X*, 29 April 1996, ATF 122 139.

assumptions, including prospective reference to arbitration. Such a case arose before the Court of Appeal of Bourges. In France (as often elsewhere) the Courts of Appeal are the final judges of fact; only issues of law are susceptible to cassation. So it is significant, indeed sufficient, to note that the judges in Bourges found that the document signed in this case was neither a “framework agreement” nor a “letter of intent”; it created no obligation “whose breach would be wrongful” but was merely a “forecast of an overall accord which never took place”. Above all, the Court specifically found that the reference to arbitration itself never reached the stage of an agreement.

Yet the Court of Cassation overturned the decision, and did so with some familiar signs of emphasis which make French lawyers say it was intended to be an *arrêt de principe* or a leading precedent. These indicia include notably the fact that it was a reversal on a point of law, and that its first preambular clause explicitly referred to a principle, namely this:

“[C]onsidering the *compétence-compétence* principle according to which it is for the arbitrator to decide in the first instance whether he has jurisdiction.”⁷

The Supreme Court explained that the Bourges court had failed to establish that the arbitration clause was either null and void or manifestly inapplicable, and therefore was bound to send the case to arbitration.⁸

But the judgment in fact goes further than it says. That an arbitration clause may be held null and void, or inapplicable, is not inconsistent with the proposition that the parties at least *purported to agree* to arbitration. That is why French law allows such contentions to go to arbitration, so that the process is not paralysed by a mere allegation. But if the facts – as here authoritatively found by the Court of Appeal – are that such an agreement never came about, we are perhaps taken beyond a point where even ardent supporters of arbitration would prefer to stop.

With the benefit of the French example, we can now return to the question of what a court should do under the two usual hypotheses.

The position of a court hearing a claim within its ordinary jurisdiction, but faced with an application by the defendant to stay its proceedings in deference to an alleged arbitration agreement, is similar to that of a court asked to appoint an arbitrator (a relatively frequent

⁷ Civ. 1^{re}, 28 Nov. 2006, n° 05-10.464, *Sté So Good Int.* reported in REC. DAL. 17.1.08 p. 182.

⁸ “Vu le principe compétence-compétence selon lequel il appartient à l’arbitre de statuer par priorité sur sa propre compétence”

occurrence when the contractual mechanism has not functioned). In each situation, the court is taking a positive action, either to interrupt an ordinary case before it or to create an arbitral tribunal which will displace the otherwise competent court. It seems extraordinary to imagine that either decision could be made on the say-so of the applicant. (The advantages or disadvantages of a full or provisional examination of arbitral jurisdiction at that stage have been reviewed above.)

When a claimant in arbitration has succeeded in initiating arbitral proceedings, a court may simply allow that process to run its course without lending its imprimatur to it. Even in the truly exceptional cases of a bogus arbitration which is not arrested by the arbitral tribunal itself, the time will come when the futility of any award is made clear by judicial annulment or refusal to enforce. In the event of legitimate apprehensions of irreparable harm in the meanwhile, courts may of course step in. To the extent that the French approach suggests the contrary, it is unpersuasive.

Response to the Report: The Positive Effect of *Compétence-Compétence* From a Public International Law Perspective and a Private Law Perspective

*Prof. Brigitte Stern**

Salim Moollan a brossé un excellent tableau des questions soulevées par le principe de compétence/compétence sur lesquelles se concentrent mes remarques. En particulier, il a bien montré qu'il y avait pour ainsi dire deux faces d'une même médaille : l'effet positif unanimement admis, l'effet négatif qui est plus controversé. Pour bien comprendre ces deux aspects d'une même réalité, il suffit de poser la question suivante : qui décide en premier et j'insiste sur « en premier » de la compétence d'un tribunal arbitral? Je vais donner la réponse en anglais, car elle me semble particulièrement parlante:

- les tribunaux arbitraux vont répondre à cette question: « *Yes, we can* » – c'est la réponse positive ;
- les cours étatiques vont répondre: « *No, we cannot* » – c'est la réponse négative, qui est clairement donnée en France – et Salim a indiqué que Maurice a adopté la même approche, à une nuance près.

Bien sûr, le principe de compétence/compétence dans son acception négative n'implique pas que les tribunaux étatiques ne peuvent pas revoir la détermination de compétence effectuée par les tribunaux arbitraux au moment d'une éventuelle demande d'exécution ou d'annulation de la sentence. Priorité (des arbitres) ne signifie pas primauté. Le dernier mot reste toujours aux tribunaux étatiques.

Une des tâches qui m'a été assignée dans ce panel est de rappeler comment le principe de compétence/compétence se décline en droit international public et je développerai cette question dans un premier point.

* Professeur émérite à l'Université Paris 1, Panthéon-Sorbonne.

Mais ensuite, dans un second point, je m'aventurerai sur un terrain moins connu de moi, et proposerai quelques commentaires sur l'affaire *Dallah*.¹

Avant d'aborder ces deux points, une remarque importante s'impose, à savoir qu'en droit international public, seul est nécessaire l'effet positif – les tribunaux internationaux qui tiennent tous leur compétence de l'accord des Etats se font certes un devoir d'examiner l'existence de leur compétence, mais tout se passe dans l'ordre international et ne se pose donc aucun problème de concurrence avec des instances nationales. La décision sur la compétence est finale et n'est pas soumise à examen – la question de l'effet négatif ne se pose pas donc pas en droit international public. En droit international public, le principe de compétence/compétence n'est donc pas un principe de *répartition* des compétences, mais un simple principe de *vérification* des compétences, dont le but est de respecter la souveraineté des Etats qui créent les tribunaux internationaux.

Ce préalable étant posé, j'aborde donc le premier point de mes brèves remarques.

I. LE PRINCIPE DE COMPÉTENCE/COMPÉTENCE EN DROIT INTERNATIONAL PUBLIC

Je rappellerai que Lord Collins a abordé cette question dans le jugement *Dallah* rendu le 3 novembre 2010.² Je reprendrai rapidement ce qu'il a dit et j'ajouterai quelques autres exemples.

A. Un exemple d'application du principe de compétence/compétence à un arbitrage entre Etat et personnes privées

Les premiers exemples viennent des arbitrages qui ont eu lieu après le traité de Jay mettant fin à la guerre d'indépendance. Le traité de Jay a été ratifié en 1795 et est intitulé *Treaty of Amity, Commerce, and Navigation*. Il prévoyait des commissions mixtes pour régler les réclamations de citoyens américains contre la Grande-Bretagne et de citoyens britanniques contre les Etats-Unis.

¹ *Dallah Real Estate and Tourism Holding Company c. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (ci-après, *Dallah*).

² *Ibid.* voir paras. 79 à 83.

Le traité indique ce qui suit quant aux sentences rendues:

« The award of said commissioners shall in all cases be final and conclusive both as to the justice of the claim and to the amount of the sum to be paid to creditor or claimant ».

Etait donc prévu le caractère final de la détermination quant aux mérites et quant à la réparation. Rien n'était dit sur la compétence.

La compétence des membres des commissions mixtes ayant été mise en cause dans l'affaire *Betsey*, les ambassadeurs des deux pays se sont réunis et ont déclaré que les arbitres devaient nécessairement décider pour chaque cas s'il entraînait ou non dans leur compétence.

B. Un exemple d'application du principe de compétence/compétence à un arbitrage entre Etats

J'évoquerai ici le traité de Washington du 8 mai 1871, qui a permis l'arbitrage de l'*Alabama* entre les Etats-Unis et la Grande-Bretagne, résultant des réclamations américaines pour l'aide britannique aux Confédérés pendant la guerre de sécession. Là aussi, la cour d'arbitrage a reconnu sa compétence qui lui venait de l'accord des deux Etats.

Pour la petite histoire et pour rassurer ceux qui pensent que des dommages et intérêts excessifs sont parfois réclamés dans les arbitrages internationaux, je rappellerai que les Etats-Unis avaient présenté comme demande de réparation à titre alternatif :

- (i) La cession du Canada ; ou bien,
- (ii) 2 milliards de dollars américains.

Ils ont reçu 15,5 millions (payés en 1872) !

C. Le principe de compétence/compétence s'applique également à la Cour permanente de Justice internationale ("CPJI") et à la Cour internationale de Justice ("CIJ")

Ceci est vrai qu'il s'agisse de compétence contentieuse ou de compétence consultative.

1. *Un exemple tiré d'une affaire consultative devant la CPJI*

Il s'agit de l'opinion consultative sur l'*Interprétation de l'accord gréco-turc du 1^{er} décembre 1926*.³ Il convient tout de suite de noter que dans cette opinion, la Cour n'a pas examiné sa propre compétence, mais a été interrogée sur les compétences devant être attribuées à une commission mixte d'arbitrage créée par le traité dont on lui demandait l'interprétation. Voici ce qu'elle a dit à ce sujet, qui me semble très pertinent pour nos débats :

« En règle générale, tout organe possédant des pouvoirs juridictionnels a le droit de se prononcer en premier lieu sur l'étendue de ses attributions ».

On retrouve ici la priorité sur laquelle j'avais insisté au début de ma présentation.

2. *Un exemple concernant la compétence contentieuse de la CIJ*

J'évoquerai ici l'*Affaire Nottebohm* bien connue des internationalistes.⁴ Le Guatemala contestait la compétence de la CIJ. Le Lichtenstein invoquait l'article 36§6 du Statut de la Cour, qui dispose :

« En cas de contestation sur le point de savoir si la cour est compétente, la Cour décide ».

La Cour a effectivement examiné l'étendue de sa compétence et a déclaré :

« Le paragraphe 6 de l'article 36 ne fait que reprendre une règle que le droit international commun a consacrée en matière d'arbitrage international. Depuis l'affaire de l'*Alabama*, il est admis, conformément à des précédents antérieurs, qu'à moins de convention contraire, un tribunal international est juge de sa propre compétence ... »

³ *Interprétation de l'accord gréco-turc du 1^{er} décembre 1926* (1928), Avis consultatif, CPIJ (sér. B) n° 16.

⁴ *Affaire Nottebohm (Liechtenstein c. Guatemala)* (exceptions préliminaires) (1953) CIJ Rec. 111.

D. Le principe de compétence/compétence s'applique également à la Cour européenne de justice

Ce fait a été évoqué également par Lord Collins qui a cité l'exemple de l'affaire *West Tankers*, dans laquelle la Cour se réfère au principe général selon lequel chaque cour est habilitée à examiner sa propre compétence.

E. Le principe de compétence/compétence s'applique aussi aux tribunaux pénaux internationaux

L'exemple des tribunaux pénaux internationaux se distingue cependant de ceux que nous avons vu jusqu'à présent, qui concernaient la détermination des *frontières* de la compétence, la détermination de l'étendue des compétences. Ici, la question est plutôt celle de l'*inexistence* de toute compétence. Mais je crois qu'il est tout de même intéressant d'évoquer ces exemples car pour réfuter les allégations d'une inexistence de toute compétence, les différents tribunaux pénaux internationaux ont bien bel et bien invoqué le principe de compétence/compétence. Dans les cas examinés jusqu'ici, il n'était pas nié que le tribunal en cause avait certaines compétences, mais il était affirmé qu'il n'avait pas de compétence dans le cas soumis. Dans le cas des tribunaux pénaux internationaux, il est nié que le tribunal puisse avoir la moindre compétence.

Les accusés devant les différents tribunaux internationaux qui ont été créés dans le cadre du droit pénal international ont presque toujours violemment contesté la compétence de ces tribunaux pour les juger.

1. Le Tribunal de Nuremberg

Le premier exemple auquel on songe est évidemment le Tribunal de Nuremberg, ainsi d'ailleurs que celui de Tokyo, créés après la deuxième guerre mondiale pour juger les criminels nazis et japonais. Les accusés ont en effet contesté la compétence de ces deux tribunaux, en déclarant qu'ils ne pouvaient être compétents, en raison du principe de non-rétroactivité.

Le Tribunal de Nuremberg s'est donc attelé à vérifier sa compétence et ce qui est intéressant, c'est qu'il l'a affirmée à la fois du point de vue de la légalité et du point de vue de la légitimité. Il a d'abord indiqué qu'il était compétent parce que cette compétence lui avait été octroyée par la Charte de Nuremberg. C'est pour affirmer la compétence du

Tribunal de Nuremberg que le procureur russe, le général Rudenko a déclaré :

« I could simply pass over the principle of *nullum crimen sine lege*, as the Charter of the International Military Tribunal, which is an immutable law and is unconditionally to be carried out, provides that the Tribunal ‘shall have the power to try and punish all persons, who were acting in the interest of an European Axis country’ ».

Autrement dit, de la validité formelle de l’accord de Londres, dans lequel le Statut de Nuremberg est intégré, est déduite la compétence du Tribunal. Mais le Tribunal de Nuremberg ne s’est pas contenté de cette approche formelle. Cette attitude est expliquée par le Professeur Donnedieu de Vabres qui a été juge au Tribunal de Nuremberg :

« Sans qu’il existe, à notre sens, entre le statut et le tribunal militaire international, une subordination identique à celle d’un juge quelconque vis-à-vis de la loi qui le régit, la volonté des auteurs du statut s’imposait, en général, aux juges de Nuremberg. Et l’on a pu soutenir que cette obligation apporte une justification suffisante des innovations contenues dans le jugement. Le Tribunal ne l’a pas pensé. Il a considéré qu’une exacte interprétation du statut – la nécessité d’en combler les lacunes – imposait un rattachement du statut à des principes antérieurs ».

Et le Tribunal a justifié son existence et ses compétences par le recours aux textes existants et aux principes de justice, parmi lesquels le principe qui demande que l’on ne laisse pas impunis les crimes nazis.

2. *Le Tribunal pénal international pour l’ex Yougoslavie et le Tribunal pénal international pour le Rwanda*

La même problématique s’est retrouvée devant le Tribunal pénal international pour l’ex-Yougoslavie (“TPIY”) et le Tribunal pénal international pour le Rwanda (“TPIR”).

C’est dans l’affaire *Tadic* que la compétence du TPIY a été mise en cause sur la base d’une longue série d’objections qu’il serait trop long de développer ici, parmi lesquelles le fait que la création du TPIY est illégale parce que la Charte de l’ONU ne donne pas un tel pouvoir au Conseil de

sécurité qui l'a créée. Tout en affirmant ne pouvoir contrôler le Conseil de sécurité, la Chambre d'instance comme la Chambre d'appel ont cependant examiné ces différents griefs, estimant avoir la « *Kompetenz-Kompetenz* », c'est-à-dire la compétence de vérifier leur propre compétence.

La même question de la compétence ou de l'incompétence du Conseil de sécurité pour créer le TPIR a été soulevée. C'est dans la première affaire portée devant lui, l'affaire *Kanyabashi*, que s'est posée la question de la compétence ou de l'incompétence de ce tribunal pour juger les génocidaires et autres criminels rwandais.

Le TPIR a affirmé qu'il avait le pouvoir d'examiner sa compétence. Et l'on retrouve la double approche mentionnée pour Nuremberg. Première étape de l'examen de sa compétence : le TPIR constate que c'est le Conseil de sécurité qui lui a octroyé ses compétences, en agissant dans le cadre du chapitre VII lui donnant de larges pouvoirs en cas de menace de la paix. Deuxième étape : le TPIR ajoute que cette compétence est justifiée. Un des arguments de l'accusé était justement qu'au moment où le Conseil de sécurité a créé le tribunal, il n'y avait plus de menace à la paix, qui seule donne de larges pouvoirs au Conseil de sécurité. A cela, le TPIR donne une double réponse. Le Conseil de sécurité est seul juge, c'est la réponse formelle. Mais le TPIR fait un pas de plus, en confirmant que selon lui le Conseil de sécurité était justifié à invoquer la menace à la paix car, nous dit-il, et je pense qu'il n'y a là une remarque assez profonde :

« Peace and security cannot be said to be re-established adequately without justice being done ».

Voilà, nous nous sommes quelque peu éloignés de l'arbitrage commercial, mais il m'a semblé intéressant de montrer que le même principe de compétence/compétence connu des privatistes – dans son acception positive – est à l'œuvre en droit international public, qu'il s'agisse de la contestation partielle de la compétence d'un tribunal international ou de la contestation radicale de toute compétence de celui-ci. J'en viens maintenant à mon second point.

II. LE PRINCIPE DE COMPÉTENCE/COMPÉTENCE EN DROIT INTERNATIONAL PRIVÉ

J'aborderai cette question plus rapidement avec quelques réflexions autour de l'affaire *Dallah*. Pour ne pas être accusée de traitement discriminatoire devant le Centre international de règlement des différends sur

l'investissement ("CIRDI"), je vais présenter ce second point en anglais, et ceci me paraît d'autant plus justifié que les citations de *Dallah* seront dans cette langue.

As I just mentioned the International Centre for Settlement of Investment Disputes ("ICSID"), I would like to say, in passing, that the problems here raised of a control of national courts over ICSID disputes do not arise under the Washington Convention. As is well known, the specificity of ICSID awards is that they are not subject to such control by national courts. But as it is never accepted to give an unfettered power to international arbitrators, the control of the existence of the jurisdiction of an ICSID tribunal is performed through the annulment procedure, inside the ICSID system. This is, as is well known, a minimal control, or at least it is supposed to be so.

Coming back then to *Dallah*, first it is clear that this decision has raised both a tremendous interest and contradictory evaluations. It is quite interesting as it implies the appreciation by the English courts of French law, when we all know that these two countries have quite different approaches concerning the principles of *compétence/compétence*. This is an example of control *a posteriori* by a national court of the competence of an arbitration tribunal. Maybe it is worth recalling briefly the exact French position, and I speak under the control of my colleagues "*privatistes*". Positive effect is embodied in Article 1466 of the New Code of Civil Procedure ("NCCP"). Negative effect is embodied in Article 1458 of the NCCP. Article 1458 of the NCCP, provides as follows:

"[W]hen a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before a national court, such court shall decline jurisdiction.

If an arbitral tribunal has not yet been seized of the matter, the national court shall also decline jurisdiction unless the arbitration agreement is manifestly void.

In both cases, the national courts cannot decline jurisdiction *ex officio*."

Article 1466 of the NCCP states that:

"[I]f before the arbitrator, one of the parties challenges the principle or scope of the arbitrator's jurisdiction, the arbitrator shall rule on the validity or scope of his jurisdiction".

On the question whether the Supreme Court of the United Kingdom applied French Law correctly in *Dallah*, the opinions differ to say the least. Another way to put the same question is: would a French court give the same answer? And of course, if at the moment this is conjecture and academic thinking⁵, the answer will be given in due course, as the case will be pleaded by some of the lawyers present in this conference in mid-January before the Paris Court of Appeal. Emmanuel Gaillard answers this question positively, as does Salim Moollan. Alexis Mourre is more skeptical and some of you have probably read his statement at the British Institute of International and Comparative Law event, reproduced in *Global Arbitration Review*, where he declared:

“[J]ust as it is almost impossible for a non-Italian to make good spaghetti, so the problem here is that the English Courts purport to apply French law, but even if they use the right recipe, they will never manage to do it correctly”.

Let us also recall that the two experts in French law from both sides agreed in the relevant applicable law stating:⁶

“[U]nder French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration ... need not be assessed on the basis of a national law, be it the law applicable to the main contract or any other law, and can be determined according to rules of transnational law”.

Now I will dare to give my own opinion – I am in agreement with Emmanuel Gaillard – *une fois n'est pas coutume* ! – that the end result is one that the French courts would, in my view, reach, if we look at French precedents. However, it is possible that the spaghetti are not completely Italian and I would like to make two remarks. The first remark is that the specific approach of French law on arbitration which relies on non-national rules, like the rules of transnational law, is not really accepted in England. Therefore, the United Kingdom Supreme Court made its own English interpretation of the common position of the experts on French law in order

⁵ The answer is now well known (and the answer is “no”). The judgment came out after my presentation and too late to be really taken into account in a pertinent manner in this paper, due to time constraints. It might be an idea for a follow up comment.

⁶ *Dallah*, *supra* note 1 at para. 14.

to avoid referring directly to transnational rules. Thus in paragraph 15 of *Dallah*, the Supreme Court stated:⁷

“... the true analysis – [and this means the English analysis] is that French law recognises transnational principles as rules potentially applicable to determine the existence, validity and effectiveness of an international arbitration agreement, such principles being part of French law”.

Salim Moollan in a comment on *Dallah*⁸ emphasised this aspect when stating that “both Lord Mance and Lord Collins expressly held that the ‘transnational law’ rules applied by the French Court in international cases are in fact rules of French law”.

In conclusion, I consider that the solution should be the same in the French courts if the same approach as the one which was used in the *Pyramids Case* is applied. That case had many similarities to *Dallah*. There was a Head of Agreement between the Government and the foreign company which had no arbitration clause and then a contract with the foreign investor and a separate State entity with an ICC arbitration clause. At the end of this contract there was the famous mention: “Approved, agreed and ratified by the Minister of Tourism”. This was not considered as an acceptance by the Government of the arbitration clause, the approval having been analysed as an approval given by “*autorité de tutelle*” that the separate entity can accept an arbitration clause.⁹ So even with an apparently stronger legal involvement of the Government in the contract, the French Court did not consider the Government to be bound by the arbitration agreement.

A second remark which I would like to make is that the theoretical statement by the Supreme Court of what is French law is not exhaustive. In paragraph 88, Lord Collins writes:

“[I]n an international arbitration conducted in France, the tribunal has power to rule on its jurisdiction if it is challenged”.

⁷ *Ibid.* at para. 15.

⁸ Salim Moollan, *Dallah v. Pakistan: “Worth the Wait”* (Global Arbitration Review 01/12/2010)

⁹ I am not sure of the translation: maybe “supervisory power” or something like that.

This is correct. And, then Lord Collins goes on:

“[I]f judicial proceedings are brought in alleged breach of an arbitration agreement the court must declare that it has no jurisdiction unless the jurisdiction is manifestly a nullity.”¹⁰

This is only partially true, although Lord Collins cites the best authors in support of this statement.¹¹ It is in fact only true as long as the court is seized *before* the arbitral tribunal. As soon as the dispute is submitted to the arbitral tribunal, the court does not even enjoy this limited margin of appreciation, and purely and simply has to decline jurisdiction without even looking at the arbitration agreement. However, this does not have any incidence in the case of *Dallah*, as the question was not one of control *a priori*, or a control while the tribunal was deliberating, but a control *a posteriori*.

As mentioned earlier, this presentation was made before the French decision in *Dallah* was known, and the time constraint of the publication did not allow an update. Let me just quote what several articles on this case have used as a title: “*Vive la différence!*”¹²

¹⁰ *Dallah*, *supra* note 1 at para. 88.

¹¹ E. Gaillard and J. Savage (eds.), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para. 440, cited in *Dallah*, *supra* note 1 at para. 16.

¹² Sometimes with a « ! », sometimes with a “?”.

A Mauritian Perspective

*Thierry Koenig S.A.**

As can be gathered from the theme of this conference, Mauritius has the ambition to position itself as a new arbitration seat for international disputes. The eminent speakers before me have explained, in a brilliant manner, the topic “*Rethinking Jurisdiction, Compétence-Compétence and Separability*”. In the short time imparted to me, I propose to look at the question of *compétence-compétence* from the angle of a practitioner.

Why would parties choose Mauritius for their international arbitration rather than any of the other well established arbitral centres such as Paris, London, New York, or, any of the new centres in the region such as Singapore or Dubai? Or, to put the question differently, how do you convince the international business community to use Mauritius as an arbitration centre?

Although such questions can crop up at any stage, they are usually addressed by the practitioner at the outset of the negotiation process: when sitting across the negotiation table, discussing and drafting an arbitration clause, how do you convince your clients (be it a consortium of international bankers or a multinational company in a joint venture) to incorporate Mauritius as the seat of arbitration. How to you convince the lawyers sitting across the table that Mauritius should be the seat of arbitration?

The fundamentals when discussing an arbitration clause are somewhat elementary for the numerous international experts attending this conference, but I feel it is necessary to very briefly remind a few of these basic points:

- **Location of assets:** As a financial centre, numerous joint venture companies or investment holding companies are situated in Mauritius. In the event of a successful award, shares in these companies can be targeted, especially if these companies benefit from favourable tax treatments by virtue of double tax treaties signed by Mauritius.
- **Enforcement:** The enforceability of a Mauritian award when the assets are situated outside of Mauritius will surely be the subject of

* Attorney-at-Law, De Comarmond & Koenig (Port Louis, Mauritius)

interesting debate in tomorrow's session on enforceability.

- **Type of arbitration:** Should the arbitration be institutional and administered by the rules of an institution, or *ad hoc* with the parties creating their own rules? Does the Permanent Court of Arbitration ("PCA") under the Mauritian International Arbitration Act 2008 give comfort to the parties?
- **Governing law:** Africa is divided between the English speaking common law jurisdictions and the French speaking civil law jurisdictions. When the parties come from different legal systems, there is a tug of war between the parties as to which legal system will apply - to the contracts themselves - but also to the arbitration. Can Mauritius, with its unique hybrid legal system, be a solution to this important issue? Mauritius has a blend of civil law and common law which strikes a balance between the two legal regimes. In addition to choosing Mauritius as the arbitral seat, parties from different legal cultures may want to consider choosing Mauritian law as a proven middle way between those two systems. I hope that during these two days of discussions we will be able to take stock of this unique advantage which Mauritius may offer in the context of Africa.

There are other basic points such as costs and disclosure, but let me come back to our topic: *compétence-compétence*, which ranks amongst the important basic points to be considered by a practitioner when discussing an arbitration clause.

Foreign parties will only choose to come to arbitrate in Mauritius if they can be guaranteed that their contractual wish to arbitrate, rather than to litigate before courts, will be respected. They need to be reassured that they will end up before their arbitral tribunal and that the Mauritian courts will not intervene in the arbitral process, save to support that process. This principle of non-intervention is one of the cardinal principles of international arbitration.¹

If a lawyer cannot guarantee to his client and to the other side that the parties will not end up before a domestic court judge, and be stuck there for quite some time with the possibility of appeals, there is no way he will

¹ The principle of non-intervention is enshrined in the Mauritian International Arbitration Act 2008 in section 3(8) which enacts Article 4 of the UNCITRAL Model Law as amended in 2006 ("Amended Model Law").

be able to convince anyone to use Mauritius as the arbitration seat. So, how can you alleviate this fear?

This is achieved by a robust legislation confirming the *compétence-compétence* principle. In Mauritius, the principles of *compétence-compétence* are set out in our domestic law in articles 1016 and 1023 of the Code of Civil Procedure:

- **Article 1016:** «Lorsqu'un litige dont un tribunal arbitral est saisi en vertu d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci doit se déclarer incompétente. Si le tribunal arbitral n'est pas encore saisi, la juridiction doit également se déclarer incompétente à moins que la convention d'arbitrage ne soit manifestement nulle. Dans les deux cas, la juridiction ne peut relever d'office son incompétence».
- **Article 1023:** «Si, devant l'arbitre, l'une des parties conteste dans son principe ou son étendue le pouvoir juridictionnel de l'arbitre, il appartient à celui-ci de statuer sur la validité ou les limites de son investiture».

These two articles are borrowed from France so that our courts stand guided by French case law on this issue.

The domestic position has been reinforced, in Mauritius, for international arbitrations. What is considered an “*international arbitration*” is set out in the International Arbitration Act² (“the Act”). An “*international arbitration*” is defined in section 3(2) of the Act³ and if there is any issue as to whether the arbitration is an international one, such issue is determined by the arbitration tribunal⁴. The position in connection with

² The Act (No. 37 of 2008) became operative on 1 January 2009 by Proclamation No. 25 of 2008 and was published in the Government Gazette of Mauritius No. 119 of 13 December 2008.

³ Where the juridical seat of the arbitration is Mauritius and (i) the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their place of business in different States; or (ii) one of the following places is situated outside the State in which the parties have their places of business - (A) the juridical seat of the arbitration if determined in, or pursuant to, the arbitration agreement; or (B) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or (iii) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State, or that this Act is to apply to their arbitration; or (iv) the shareholders in a GBL company have determined that any dispute concerning the Constitution of the company or relating to the company shall be referred to arbitration under this Act.

⁴ Section 3(5)(a)(i) of the Act.

the *compétence-compétence* principle is set out in sections 5⁵ and 20⁶ of the Act. Sections 5 and 20 give real efficacy to the principle of *compétence-compétence* through the following mechanism:

- **Automatic transfer to three judges of the Supreme Court⁷:** Where any action or matter is brought before any Mauritian Courts, the action is automatically transferred to the Supreme Court with a bench comprising three judges (Section 42 of the Act).
- **Nullity Issue:** The Supreme Court shall refer the parties to arbitration unless it is established that on a *prima facie* basis “there is a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed” (the “nullity issue”).
- **High Threshold:** In its initial assessment, the Supreme Court does not engage into a full trial (or even a mini-trial) of the relevant issues, but only assesses them on a *prima facie* basis. Only if a party is able to meet the very high threshold of “very strong probability” will the Supreme Court itself proceed to a full determination of the nullity issue. Any doubts are to be resolved in favour of referring the nullity issue to the arbitral tribunal (see *Travaux Préparatoires* para. 42).
- **Bootstraps:** Section 20 provides that the tribunal decides whether it does or does not have jurisdiction. Section 20 also grants jurisdiction to the arbitral tribunal to decide “on any objection with respect to the existence or validity of the arbitration agreement”. It is therefore the tribunal that rules on its own jurisdiction, and the tribunal’s decision can only come to court once the arbitrators have taken a decision on the issue.⁷ This defeats any dilatory tactics. Hence, as regards

⁵ Section 5 of the Act enacts Article 8 of the Amended Model Law and gives effect *inter alia* to Mauritius’ obligations under Article II(3) of the New York Convention.

⁶ Section 20 amends Article 16 of the Amended Model Law in one material respect. Section 20(7) modifies Article 16(3) to provide that the losing party’s right to refer issues of jurisdiction to the Courts under Section 20 arises not only where the tribunal has ruled that it has jurisdiction, but also where it has ruled that it does not have jurisdiction. Section 20 adopts the same modification in the Model Law as in New Zealand.

⁷ It must be noted that a plea on jurisdiction must be taken “not later than the submission of the statement of defence” (section 20(3)(a)). If the tribunal rules on its jurisdiction as a

questions of jurisdiction the arbitral tribunal is given “the first bite” to rule on its own jurisdiction. However, the “final word” is given to the court, in the event that the question is referred to the court after the arbitrators’ decision (the arbitral tribunal cannot itself finally resolve any matter going to its own jurisdiction and thereby pull itself by its own bootstraps).

- **No appeal:** Section 42(2) of the Act provides that appeals from the three judge panel of the Supreme Court go directly to the Judicial Committee of the Privy Council as of right in respect of any “final” decision. The decision to refer the parties to the Tribunal is in essence interlocutory and not a final decision. It is in reality a discretionary measure and one of timing in light of the bootstraps provisions. It is believed that to remove any uncertainty in this connection this will be made beyond doubt either in the Rules of Court to be put in place under the Act, or in an amendment to section 81 of the Constitution.

This mechanism under Mauritius law is meant, therefore, to ensure that the parties will be referred to arbitration, save in the most exceptional circumstances, and that it is the tribunal that determines its own jurisdiction (in the first instance). The success of Mauritius as a jurisdiction of choice for international arbitration will be largely dependent on the uniform and consistent application by the Mauritian Courts of modern international arbitration law, and (in particular) on their strong adhesion to the principles of non-interventionism which are at the heart thereof.

The issue of *compétence-compétence* is not a theoretical one and very much a practical one. For the practitioner, once the negotiation and drafting is over, but before signature, your client may ask you a very simple question which needs a straight forward answer: Are you sure that in Mauritius we will not end up in court and be stuck there?

The answer must, undoubtedly, be that you will not end up in court but before the arbitral tribunal.

preliminary question, any party may request, within 30 days, the Supreme Court (composed of three judges) to decide the matter but notwithstanding this request is pending, the tribunal may continue with the arbitration and make rulings.

PANEL II

RETHINKING ARBITRABILITY, INCLUDING THE ARBITRABILITY OF COMPANY DISPUTES

Introductory Remarks

*Hon. Keshoe P. Matadeen**

The object of this panel is to rethink the issue of arbitrability of company disputes.

The last decades have witnessed an increased acceptability and use of arbitration to resolve disputes involving companies, their shareholders and, in some matters, officers and directors. This has been the result of both changes in the law and changes in the interpretation of the law. However, national approaches differ on the extent to which different states permit the arbitration of company disputes.

The non-arbitrability of certain matters may broadly be attributed to the public policy of the different jurisdictions, and general or specific reservation by statutory provisions. The arbitrator is not generally allowed to make a decision binding on third parties. Acts involving some criminal element may be kept out of the purview of an arbitrator. The arbitrability of issues relating to winding up and minority oppression is also pertinent. The recent trend, however, seems to suggest the broadening of the scope of arbitrable matters, with national legislation enshrining a principle of non-intervention by the courts in the arbitral process.

The main speaker on this topic this afternoon will be Professor Christophe Seraglini, a distinguished Professor of Law at the University of Paris XI with wide experience as arbitrator, counsel and in academia. He will address us in French in the true tradition of the bilingual culture of Mauritius. He may answer questions at the end in French or English.

Responding to the main speaker will be, first, Mr. Johnny Veeder Q.C., from Essex Court Chambers in London, a specialist in international arbitration with wide experience as counsel and arbitrator in arbitration proceedings; and, secondly, Mr. Sundaresh Menon S.C., who was the Managing Partner of Rajah & Tann until 1 October 2010 when he assumed office as Attorney-General of Singapore. Mr. Menon has been practising in the field of commercial arbitration for more than 20 years. He will bring a Singaporean perspective to the subject.

The final speaker, before we take in questions, will be Mr. Milan Meetarbhan, the Chief Executive of the Financial Services Commission.¹ Mr. Meetarbhan has had a long association with the development of the

* Senior Puisne Judge, The Supreme Court of Mauritius.

¹ Mr. Meetarbhan is now Mauritius' Ambassador to the United Nations in New York.

financial services sector in Mauritius. He will provide the link between our successful offshore sector and the new international arbitration jurisdiction, especially given the fact that the Mauritius International Arbitration Act 2008 will allow the arbitration of disputes arising between the shareholders of its offshore companies.

So, without further ado, I invite Professor Christophe Seraglini to address us.

Report to the Conference

*Prof. Christophe Seraglini**

Tous les droits, même les plus modernes et libéraux à l'égard de l'arbitrage international, posent des restrictions à la possibilité pour les parties de recourir à l'arbitrage. Ces restrictions posent la question de l'arbitrabilité des litiges. Mais comme l'a souligné Charles Jarrosson, « l'arbitrabilité est une question abstraite, délicate, mal cernée, fuyante, et qui suscite un certain nombre de malentendus, voire de contresens »¹. Aussi, avant de tenter de « repenser » l'arbitrabilité des litiges, particulièrement en droit des sociétés et à l'aune du droit mauricien, essayons de lever ces malentendus et de mieux cerner la notion d'arbitrabilité. Cela conduira à nous interroger sur le concept d'arbitrabilité en droit comparé afin de délimiter le sujet (I), avant d'examiner plus particulièrement les difficultés que l'arbitrabilité engendre spécifiquement dans le domaine du droit des sociétés (II), pour enfin apprécier comment la loi mauricienne peut s'inscrire dans ces problématiques et « repenser » le sujet (III).

I. LE CONCEPT D'ARBITRABILITE EN DROIT COMPARÉ

Il faut d'abord s'entendre sur le sens ici retenu de cette notion (A), avant de décrire rapidement les grandes évolutions que la question de l'arbitrabilité a connues dans les années récentes (B).

A. Le sens de la notion d'arbitrabilité en droit comparé

En principe, la plupart des droits distinguent l'arbitrabilité, de la portée de la convention d'arbitrage et du consentement à celle-ci : la première question concerne une restriction légale à la possibilité de recourir à l'arbitrage, alors que la seconde relève de l'interprétation de la volonté des parties, qui peuvent contractuellement délimiter le champ d'application qu'elles donnent à leur convention d'arbitrage ; la troisième question est, quant à elle, relative à l'existence même de la volonté commune des parties de

* Professeur agrégé des facultés de droit (Université Paris-Sud 11 – France); Of-Counsel, White & Case LLP (Paris)

¹ Ch. Jarrosson, « L'arbitrabilité, présentation méthodologique », *RJ com.* 1996, p. 1.

recourir à l'arbitrage. Cependant, dans certains droits, ces distinctions ne sont pas véritablement faites². Ici, elles le seront et je traiterai donc essentiellement de la première question évoquée ci-dessus... même si j'aborderai également les deux autres, et notamment celle du consentement à la convention d'arbitrage, dans la mesure où elles posent des problèmes spécifiques en matière de sociétés.

Si on s'en tient au concept d'arbitrabilité, tel qu'il est retenu dans la plupart des droits étatiques, on peut encore distinguer deux dimensions différentes de celui-ci : l'arbitrabilité d'un litige peut être contestée soit à l'égard de l'une des parties, en raison de son statut particulier ou de sa mission particulière qui lui interdirait de valablement se soumettre à la justice arbitrale, et donc de conclure une convention d'arbitrage, soit à l'égard de la matière ou des droits litigieux qui ne pourraient, généralement pour des raisons d'intérêt général ou relatives à la protection nécessaire de certaines catégories de personnes, être soumis à l'arbitrage et qui devraient être réservés aux juridictions étatiques. Dans le premier cas, on parle généralement d'arbitrabilité « subjective » ou « *ratione personae* », et ce cas de figure concerne essentiellement l'Etat et les autres personnes morales de droit public. Dans le deuxième cas, qui concerne l'objet du litige, on parle généralement d'arbitrabilité « objective » ou « *ratione materiae* ».

Cependant, la notion d'arbitrabilité « subjective » fait l'objet de controverses³, certains auteurs estimant que l'expression constitue un abus de langage, dans la mesure où la question est en réalité celle de l'aptitude d'une personne à recourir à l'arbitrage ; aussi, ce serait en fait un problème spécifique de capacité à compromettre. Ces auteurs considèrent en conséquence que la notion « d'arbitrabilité » devrait uniquement être utilisée à propos de l'aptitude d'un litige à être soumis à l'arbitrage, c'est-à-dire à propos de l'arbitrabilité objective⁴. Sans trancher ces controverses, on pourra se limiter ici à la seule arbitrabilité dite « objective », ne serait-ce que parce que le sujet principal qui nous retiendra ensuite, soit l'arbitrabilité

² V. J. -F. Poudret, S. Besson, *Comparative Law of International Arbitration*, 2nd ed., Thomson – Sweet & Maxwell, 2007, n° 326.

³ Sur ces controverses, v. Ph. Fouchard, E. Gaillard, B. Goldman, *Traité de l'arbitrage commercial international*, Litec, 1996, n° 533, p. 329, et n°s 537 et s., p. 331, et les réf. citées ; J.-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, op. cit., n° 228.

⁴ En ce sens, Ch. Jarrosson, « L'arbitrabilité, présentation méthodologique », op. cit., spéc. n°s 2 et s., pour qui « l'arbitrabilité est le fait d'être arbitral ; or, est arbitral ce qui est susceptible d'être arbitré » ; J.-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, op. cit., n° 228. Contra, Ph. Fouchard, E. Gaillard, B. Goldman, *Traité de l'arbitrage commercial international*, op. cit., n°s 536 et s.

des litiges relatifs aux sociétés, concerne essentiellement cet aspect de l'arbitrabilité.

L'arbitrage n'est donc pas possible en toute matière et on distingue généralement les droits (ou les matières) litigieux arbitrables et ceux qui sont non-arbitrables ; pour ces derniers, on parlera donc d'inarbitrabilité du litige. Il convient de noter que les Etats (en fait, leurs juges) ont tendance à juger de l'arbitrabilité des litiges, même dans un contexte international, selon leur propre point de vue, sans recourir à la méthode du conflit de lois et avec une emprise forte de leur ordre public, et par conséquent du droit du for⁵. Toutefois, si les droits étatiques ont une approche « lex foriste » de l'arbitrabilité des litiges, s'ils retiennent des solutions variées en la matière, et si on ne peut donc pas encore parler d'un consensus en droit comparé sur ce qui est arbitrable et ce qui ne l'est pas, on peut néanmoins dégager quelques grandes « tendances » en matière d'arbitrabilité à l'heure actuelle, en tout cas si on limite le propos au commerce international (autrement dit, en excluant des matières plus « sensibles », comme le droit de la famille, etc.).

B. L'évolution de l'arbitrabilité des litiges en droit comparé

De façon générale, on peut constater une admission de plus en plus large de l'arbitrabilité des litiges nés du commerce international. La méfiance ancienne à l'égard de l'arbitrage s'est très largement atténuée. La plupart des domaines du commerce international sont aujourd'hui ouverts à l'arbitrage⁶. A ce titre, des litiges qui peuvent ne pas être arbitrables en matière interne peuvent au contraire l'être en matière internationale ; autrement dit, dans de nombreux pays, l'arbitrabilité fait l'objet d'une approche plus libérale en matière internationale qu'en matière interne. Ainsi, en France, la jurisprudence ne se réfère pas, pour définir l'arbitrabilité en matière internationale, aux dispositions de droit interne relatives à l'arbitrabilité (articles 2059 à 2061 du Code civil français). Elle retient plutôt, sans le dire expressément il est vrai, une règle propre à l'arbitrage international posant un principe d'arbitrabilité des litiges du commerce international, soumis à quelques exceptions qu'elle précise au cas par cas et rangées sous le vocable général (et un peu mystérieux quant à

⁵ Ch. Seraglini, *Traité de droit du commerce international*, J. Béguin, M. Menjucq (dir.), Litec, 2005, n° 2498 et s.

⁶ V. J.-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, *op. cit.*, n° 337 et s.

son contenu) d'ordre public international : matières inarbitrables par nature, comme le droit pénal, ou exceptions plus limitées⁷.

Par ailleurs, il est aujourd'hui largement admis que l'implication de dispositions d'ordre public régissant le fond du litige n'est pas en soi un obstacle à l'arbitrabilité de ce litige. Pendant longtemps, la solution inverse s'est imposée, en vertu d'une méfiance à l'égard des arbitres, qu'on estimait incapables d'assurer le respect des dispositions d'ordre public. Ainsi, en droit français, la jurisprudence a longtemps estimé que l'arbitrage était exclu dès lors que des règles d'ordre public étaient applicables au fond du litige⁸. Cette croyance était tirée de la rédaction de l'article 2060 du Code civil qui énonce que « l'on ne peut compromettre (...) dans toutes les matières qui intéressent l'ordre public ». Toutefois, à la suite d'une longue évolution⁹, débutée dans les années 1950 et qui a trouvé son aboutissement dans les années 1990 (!), la jurisprudence a finalement totalement « réécrit » cette partie de l'article 2060 pour lui faire dire aujourd'hui que l'arbitrabilité d'un litige n'est pas exclue par le seul fait qu'une réglementation d'ordre public est applicable au fond du litige et que, bien au contraire, l'arbitre a le pouvoir d'appliquer lui-même ces dispositions et d'en sanctionner la méconnaissance éventuelle (en prononçant par exemple la nullité du contrat), sous le contrôle du juge de l'annulation¹⁰. Autrement dit, il appartient à l'arbitre d'appliquer lui-même les dispositions d'ordre public susceptibles de régir le fond du litige et d'en assurer le respect, notamment en annulant au besoin le contrat qui serait contraire à de telles dispositions ou en sanctionnant la violation de ces dispositions, et le juge n'interviendra qu'a posteriori, dans le cadre du contrôle de la sentence arbitrale rendue (recours en annulation ou demande d'exequatur de la sentence), afin de vérifier si les arbitres ont effectivement assuré un tel respect. La solution ancienne était particulièrement malvenue pour le développement de l'arbitrage et on ne peut que saluer cette évolution,

⁷ Sur ce point, v. Ch. Seraglini, *Traité de droit du commerce international*, op. cit., n° 2510 et s.

⁸ V. en France, Cass. civ., 9 janv. 1854, *DP* 1854, 1, p. 69 ; CA Paris, 9 févr. 1954, *D.* 1954, p. 192 ; *JCP* 1955, II, 8483, note H. Motulsky ; *Rev. arb.* 1955, p. 21.

⁹ Sur cette évolution, V. notamment, L. Idot, « Rapport introductif », in *Competition and arbitration law*, Publ. CCI n° 480/3, 1993, p. 11, spéc. n° 38, p. 22 ; « L'arbitrabilité des litiges, l'exemple français », *RJ com.* 1996, p. 6 ; J.-B. Racine, *L'arbitrage commercial international et l'ordre public*, LGDJ, 1999, n°s 202 et s. ; Ph. Fouchard, E. Gaillard, B. Goldman, *Traité de l'arbitrage commercial international*, op. cit., n°s 560 et s. ; Ch. Seraglini, *Traité de droit du commerce international*, op. cit., n° 2513.

¹⁰ CA Paris, 19 mai 1993, *Labinal*, *Rev. arb.* 1993, p. 645, note Ch. Jarrosson ; *JDI* 1993, p. 957, note L. Idot ; *RTD com.* 1993, p. 492, obs. J.-C. Dubarry et E. Loquin ; CA Paris, 20 sept. 1995, *Matra Hachette*, *Rev. arb.* 1996, p. 87, note D. Cohen ; CA Paris, 10 sept. 1997, *Chambon*, *Rev. arb.* 1999, p. 121, obs. D. B.

commune à de nombreux pays¹¹. En effet, les dispositions d'ordre public sont très fréquentes dans le domaine économique et commercial. Aussi, la solution ancienne fermait un grand nombre de contentieux à l'arbitrage. De plus, elle instaurait une incertitude quant à la validité et à l'efficacité de la stipulation d'une clause compromissoire dans un contrat en affectant cette stipulation d'une grande précarité, et favorisait ainsi les manœuvres dilatoires : il suffisait en effet à une partie voulant ralentir ou stopper un arbitrage de prétendre à la nullité du contrat pour contrariété à des règles d'ordre public, et de soutenir que les arbitres n'étaient pas compétents pour connaître de cette prétention ; au minimum, cela devait conduire les arbitres à surseoir à statuer dans l'attente de la décision d'un juge étatique sur cette prétention. Aussi, on peut comprendre que la solution nouvelle s'impose aujourd'hui très majoritairement en droit comparé. L'arrêt qui a sans aucun doute joué un grand rôle dans cette évolution est celui rendu en 1985 par la Cour Suprême des Etats-Unis dans l'affaire *Mitsubishi*¹².

En fait, la solution aujourd'hui dominante en droit comparé était tout simplement essentielle au développement de l'arbitrage international. L'évolution a d'ailleurs été parfaitement assimilée par les arbitres eux-mêmes (pouvait-on en douter ?) qui se reconnaissent aujourd'hui compétents pour trancher des litiges mettant en cause des règles d'ordre public. Ainsi, l'arbitrage est possible pour des litiges impliquant le droit de la concurrence, la propriété industrielle, la faillite, un argument de corruption ou de fraude. Ils restent toutefois quelques limites à l'arbitrabilité, pour des questions touchant de trop près à l'ordre public et, de ce fait, « par nature inarbitrables », pour reprendre le vocabulaire de la jurisprudence française, car devant impérativement être tranchées par un juge étatique. Il faut donc distinguer un ordre public de fond, qui vise des règles d'ordre public qui ont vocation à s'appliquer au fond du litige soumis aux arbitres, et un ordre public « juridictionnel », qui vise les cas dans lesquels le recours aux juridictions étatiques pour la résolution de certains litiges est lui-même d'ordre public. Seul ce dernier, beaucoup plus restreint que le premier, constitue une limite à l'arbitrabilité. Et le fait que l'ordre

¹¹ Sur cette évolution en droit comparé, V. notamment, B. Hanotiau, « L'arbitrabilité et la favor arbitrandum : un réexamen », *JDI* 1994, p. 899 ; D. Hascher, « Rapport introductif », in *Competition and arbitration law*, Publ. CCI n° 480/3, 1993, p. 153 ; A. Kirry, « Arbitrability : Current Trends in Europe », *Arb. Int.* 1996, vol. 12, n° 4, p. 373 ; A. Rogers, « Arbitrability », *Arb. Int.* 1994, vol. 10, n° 3, p. 263 ; E.-A. Schwartz, « The domain of arbitration and issues of arbitrability : the view from the ICC », *Foreign Investment Law Journal* 1994, vol. 9, n° 1, p. 17, spéc. p. 18 ; Ph. Fouchard, E. Gaillard, B. Goldman, *Traité de l'arbitrage commercial international*, op. cit., n° 559 et s.

¹² Cour suprême, 2 juill. 1985, *Mitsubishi Motors Corp.*, *Rev. arb.* 1986, p. 273, et l'article de J. Robert, p. 173.

public soit impliqué au fond du litige ne doit pas nécessairement entraîner le jeu de l'ordre public juridictionnel réservant la matière au juge. Au contraire et en principe, l'intervention de règles d'ordre public au fond du litige n'est plus un frein à l'arbitrabilité de ce dernier ; elle impose seulement à l'arbitre de respecter ces règles dans la résolution du litige, sous peine de sanction à l'égard de sa sentence. Les limites à l'arbitrabilité constituées par l'ordre public « juridictionnel » vont, quant à elles, bien entendu varier d'un Etat à un autre. Une bonne illustration de ce propos est le droit des sociétés qui sera examiné plus loin¹³.

Dans la même ligne, beaucoup de droits étatiques ont progressivement admis que l'attribution, par un texte, d'une compétence exclusive à une juridiction étatique particulière pour connaître de certains litiges, ne signifie pas nécessairement que ces litiges sont fermés à l'arbitrage. En effet, très souvent, cette attribution de compétence exclusive est une simple question d'organisation judiciaire interne et de répartition des compétences entre les différentes juridictions d'un Etat. En ce cas, le recours à l'arbitrage n'est pas exclu. C'est seulement lorsque la compétence a été attribuée à une juridiction spécifique pour une raison d'ordre public particulièrement forte (la concentration du contentieux devant une seule juridiction, à l'exclusion de toute autre, est vue comme le seul moyen de réaliser l'objectif poursuivi par la loi en cause) que l'arbitrage est exclu. Pour reprendre les mots d'Henri Motulsky, « l'interdiction de l'arbitrage ne résulte pas de la seule existence d'une attribution impérative de compétence ; elle ne doit être admise que dans le cas où cette attribution traduit l'idée que le règlement du différend par la voie arbitrale apparaîtrait, en soi, comme contraire à l'ordre public »¹⁴... du fait du caractère trop spécifique de la matière concernée (les intérêts de la collectivité publique ou des tiers étant en jeu). En France, il en est par exemple ainsi de la matière pénale, de certaines décisions en matière de faillite (celles touchant à l'organisation de la faillite).

Toutes ces évolutions ont un impact en droit des sociétés. En effet, le droit des sociétés est une matière fortement « teintée » d'ordre public, au sens où elle est régie, dans la plupart des droits étatiques, par de nombreuses dispositions qui ont un caractère d'ordre public. Aussi, il aurait été aisé de soutenir qu'un litige relatif à la société mais couvert par des dispositions d'ordre public applicables au fond ne pouvait être soumis, pour cette raison, à l'arbitrage. L'évolution que nous venons de retracer doit heureusement permettre de couper court à ce type d'arguments. Cette évolution favorable

¹³ V. *infra*, p. 75, para. 1 et s.

¹⁴ V. H. Motulsky, note sous Soc. 7 févr. 1958, *JCP* 1958, II, 10777.

des droits étatiques à l'égard de l'arbitrabilité des litiges touche en effet particulièrement la matière du droit des sociétés.

II. L'ARBITRABILITE DES LITIGES RELATIFS AUX SOCIETES

Si l'arbitrabilité des litiges relatifs aux sociétés est aujourd'hui largement admise (A), l'arbitrage de tels litiges n'en pose pas moins certaines difficultés (B).

A. L'admission de l'arbitrabilité des litiges relatifs aux sociétés

En droit comparé, l'arbitrabilité des litiges en matière de droit des sociétés est aujourd'hui assez largement reconnue¹⁵. Je n'évoquerai ici que les litiges « internes » ou « endogènes », c'est-à-dire ceux trouvant leur origine dans le fonctionnement, au sens large, de la société et opposant la société à ses associés, à ses organes et dirigeants, ou les associés entre eux. Sont donc exclus du propos les litiges « externes » ou « exogènes », relatifs aux opérations passées par la société avec des tiers dans la mesure où, pour l'essentiel, ces derniers ne posent pas de problèmes spécifiques.

En France, le droit des sociétés est un domaine aujourd'hui largement ouvert à l'arbitrage, bien que très largement gouverné au fond par des dispositions d'ordre public. Les réticences anciennes à l'arbitrabilité de tels litiges ont été progressivement levées, même si cela a parfois pris du temps. Ont ainsi été jugés arbitrables : un litige relatif à l'exclusion d'un associé décidée par l'assemblée générale extraordinaire¹⁶ ; un litige relatif à la révocation d'un dirigeant social¹⁷ ; après quelques hésitations et atermoiements de la jurisprudence, la question de la dissolution, voire celle de la nullité, d'une société¹⁸. En droit comparé, il est aujourd'hui largement

¹⁵ Pour une étude de droit comparé, B. Hanotiau, « L'arbitrabilité des litiges en matière de droit des sociétés », in *Liber Amicorum Claude Reymond – Autour de l'arbitrage*, Litec, 2004, p. 97.

¹⁶ CA Paris, 6 janv. 1984, *Rev. arb.* 1985, p. 279.

¹⁷ CA Paris, 24 nov. 1981, *Rev. arb.* 1982, p. 224, note Ph. Fouchard.

¹⁸ Pour la dissolution : CA Paris, 22 mars 1991, *Rev. arb.* 1992, p. 652, note D. Cohen ; CA Colmar, 21 sept. 1993, *Rev. arb.* 1994, p. 348, note D. Cohen ; *RJ com.* 1994, p. 154, note Ch. Jarrosson. Et, semble-t-il, pour la nullité : Cass. Com., 9 avr. 2002, *Rev. arb.* 2003, p. 103, 2^e esp., note P. Didier ; *D.* 2003, p. 1117, note L. Degos ; *ibid.* 2003, som., p. 2470, obs. Th. Clay ; *JCP* 2003, I, 2003, n° 2, obs. Ch. Seraglini ; *RTD com.* 2003, p. 62, obs. E. Loquin ; un doute subsiste dans la mesure où cet arrêt concerne plutôt la mise en œuvre du principe de compétence-compétence, et donc la seule question de l'éventuelle « nullité manifeste » de la clause d'arbitrage, et où des arrêts plus anciens sont en sens contraire.

admis que l'on peut recourir à l'arbitrage pour trancher les litiges trouvant leur cause dans l'existence du pacte social ou, plus généralement, pour trancher les contestations entre associés, entre ces derniers et la société, ou encore entre la société et ses dirigeants. Sans trop insister sur le sujet, dans la mesure où Johnny Veeder vous exposera le droit anglais, et même un peu plus, à cet égard, et Sundaresh Menon le droit de Singapour, on peut dire de façon générale qu'il en est ainsi des litiges relatifs à la création de la société (nullité de la société, responsabilité de ses fondateurs), au fonctionnement de la société (fonctionnement des assemblées générales, bonne gestion de la société, statut des dirigeants sociaux, etc.), à la qualité d'actionnaires (droit de vote, perte de cette qualité), ou encore à la dissolution et à la liquidation de la société. Dans ces conditions, la stipulation d'une clause d'arbitrage dans les statuts d'une société pour la résolution des litiges entre associés, ou entre la société et les associés, ou encore entre la société et ses dirigeants, est devenue une pratique relativement courante dans de nombreux pays.

Les solutions varient bien entendu quelque peu d'un Etat à un autre quant aux limites fixées à ce principe d'arbitrabilité. Ainsi, s'agissant de Singapour, il me semble que l'arbitrabilité est la règle, soumise à quelques exceptions, certaines questions étant, semble-t-il, réservées à la compétence exclusive des tribunaux étatiques, comme la liquidation d'une société ou la réduction de son capital ; mais je ne m'aventurerai pas trop sur ce terrain et je laisserai Sundaresh Menon vous en dire plus, et mieux, à cet égard. En tout cas, il est certain que cette arbitrabilité est admise dans des proportions variables d'un Etat à un autre et qu'il existe ainsi des « nuances ». C'est qu'en effet, l'arbitrabilité des litiges en matière de sociétés ne va pas sans susciter quelques problèmes et quelques interrogations et réticences.

B. Les difficultés liées à l'arbitrage des litiges relatifs aux sociétés

L'arbitrage des litiges relatifs à une société pose certains problèmes, qui résultent très largement de la nature particulière de la justice arbitrale, en ce qu'elle est volontaire et privée. En effet, l'arbitrage repose sur une base contractuelle : seules les parties à la convention contenant la clause d'arbitrage devraient être liées par celle-ci, et uniquement pour les litiges qu'elles ont entendu, par cette clause, soumettre à l'arbitrage ; de même, seule une personne ayant exprimé son consentement à la clause d'arbitrage devrait être liée par la décision rendue par les arbitres. Ce caractère volontaire et privé de la justice arbitrale explique divers obstacles et autres restrictions posées par certains droits étatiques à l'arbitrabilité des litiges relatifs aux sociétés. On peut tenter d'en répertorier quelques uns.

Tout d'abord, on pourrait songer à l'obstacle traditionnel des règles d'ordre public régissant le fond du litige, très présentes en matière de sociétés, même si, compte tenu de l'évolution précédemment indiquée¹⁹, les barrières sont largement levées sur ce point.

Ensuite, une restriction à l'arbitrage de certains litiges en matière de sociétés peut trouver sa source dans des questions relatives à la validité et à l'opposabilité aux associés de la clause d'arbitrage figurant dans l'Acte constitutif de la société. On peut ici notamment songer à la question du statut, professionnel ou non, des associés, qui pourrait avoir un impact sur la validité de la clause d'arbitrage à leur égard. On peut également évoquer la question du consentement même de ces personnes à la clause d'arbitrage, notamment pour les nouveaux associés entrant, qui n'ont donc pas forcément exprimé un consentement explicite à la clause d'arbitrage ; dans les sociétés cotées, on peut encore davantage s'interroger sur la réalité d'un tel consentement de celui qui acquiert des actions de la société. On peut encore envisager la question parallèle de la possibilité d'insérer une clause d'arbitrage dans les statuts en cours de vie sociale, sans obtenir l'accord de tous les associés ; sera-t-elle alors opposable à tous les associés ? On peut enfin signaler la question parallèle de l'opposabilité de la clause d'arbitrage aux administrateurs et autres dirigeants non associés, s'agissant des litiges les opposant à la société. Si l'on s'arrête à la seule question de l'opposabilité de la clause d'arbitrage aux actionnaires, on peut en effet hésiter à admettre qu'une convention d'arbitrage puisse lier peut-être des milliers d'actionnaires, répartis dans le monde entier, qui ont simplement acquis quelques actions de ladite société sans probablement savoir qu'une clause d'arbitrage figurait dans ses statuts.

Ici, on le voit aisément, ce sont des problèmes de consentement à la convention d'arbitrage, plus que d'arbitrabilité. Néanmoins, ils peuvent de fait entraver l'arbitrabilité des litiges relatifs à la vie de la société. Aussi, quelles solutions adopter pour tenter de résoudre ces difficultés ? Sans entrer dans le détail, faute de temps, on peut néanmoins souligner qu'il est avant tout nécessaire de ne pas être trop strict quant à la caractérisation d'un consentement donné par un associé à la convention d'arbitrage, et de considérer que l'adhésion à la société vaut nécessairement adhésion à ses statuts et que ceux-ci sont supposés connus par celui qui adhère ; dans ces conditions, l'adhésion à la société vaudrait acceptation de la convention d'arbitrage y figurant. On pourrait retenir la même solution s'agissant de l'acceptation des fonctions d'administrateur ou de dirigeant, qui devrait emporter adhésion à la clause d'arbitrage figurant dans les statuts de la

¹⁹ V. *supra*, p. 72, para. 1.

société. Par ailleurs, il convient également de ne pas être trop strict quant aux conditions de forme relatives à une convention d'arbitrage. Il faudrait notamment admettre de façon libérale la clause d'arbitrage par référence, soit la clause stipulée dans un document qui n'est pas nécessairement signé par les parties et émanant parfois de l'une d'elles, mais auquel le contrat principal renvoie toutefois, comme par exemple les conditions générales de vente ou d'achat de l'une des parties, et, plus généralement, tout document annexe au contrat auquel celui-ci fait référence. Dans notre hypothèse, le contrat en cause (par exemple, contrat de cession d'actions) pourrait donc faire référence aux statuts de la société, contenant eux-mêmes la convention d'arbitrage. Il s'agirait donc de ne pas s'attacher tellement à des exigences formelles à cet égard mais plutôt à la réalité du consentement des parties.

Le droit français suit plutôt ces principes de solution, en se révélant même très libéral et très peu formaliste. De façon générale, la jurisprudence française a retenu le caractère purement consensuel de la convention d'arbitrage internationale, qui n'est donc soumise à aucune exigence de forme particulière pour sa validité²⁰. Plus spécifiquement, elle se montre très libérale à l'égard de la clause d'arbitrage par référence, et donc quant à la preuve d'un consentement d'une partie à la convention d'arbitrage. La Cour de cassation considère « qu'en matière d'arbitrage international, la clause compromissoire par référence à un document qui la stipule est valable lorsque la partie à laquelle on l'oppose en a eu connaissance au moment de la conclusion du contrat et qu'elle a, fût-ce par son silence, accepté cette référence »²¹. Ainsi, le principe du consensualisme domine : l'essentiel est de pouvoir déceler un consentement des parties à la clause. Ce consensualisme est atténué par une exigence de forme très limitée : la convention d'arbitrage doit figurer dans un document, et donc dans un écrit, auquel le contrat principal doit faire référence. Mais ce document peut revêtir des formes diverses et n'a pas besoin d'être signé par la partie à laquelle on l'oppose. De plus, la référence par le contrat principal à ce document n'a pas à être écrite ; pour caractériser le consentement des parties à ce document, il suffit d'établir que son contenu a été porté à leur connaissance au moment de la conclusion du contrat, ou qu'elles en avaient alors nécessairement connaissance, notamment en raison de son caractère usuel dans le secteur d'activité où les parties interviennent, ou du fait que

²⁰ CA Paris, 24 févr. 2005, *JCP G* 2005, I, 179, n° 1, obs. Ch. Seraglini. Et elle a été récemment suivie par le décret n° 2011-48 du 13 janvier 2011 réformant le droit français de l'arbitrage : le nouvel article 1507 du Code de procédure civile énonce clairement, pour l'arbitrage international, que « la convention d'arbitrage n'est soumise à aucune condition de forme ».

²¹ Cass. 1^{re} civ., 3 juin 1997, *Rev. arb.* 1998, p. 537 ; *Rev. crit. DIP* 1999, p. 92, note P. Mayer ; Cass. 1^{re} civ., 20 déc. 2000, *Rev. arb.* 2003, p. 1341, 1^{re} esp., obs. C. Legros.

les parties avaient pris l'habitude d'y soumettre leurs relations d'affaires. Si la clause doit, en principe, être au surplus acceptée par la partie à laquelle on l'oppose, ce consentement pourra être présumé dès lors que cette partie a eu connaissance du document contenant la clause et n'a pas protesté ; son silence fait présumer son acceptation de la clause. Ainsi, en droit français, la question relève davantage de l'existence du consentement, appréciée en fait, que de la forme proprement dite. Enfin, de façon plus libérale encore, la jurisprudence française retient que la clause d'arbitrage figurant dans un contrat (ici, ce serait le contrat de société) s'étend à toute partie directement impliquée dans l'exécution de ce contrat et les litiges qui peuvent en résulter²². Cette solution, posée pour les groupes de contrats, est certainement de portée générale, et serait donc applicable à notre hypothèse, et notamment aux associés, voire aux dirigeants d'une société. D'ailleurs, la jurisprudence française a même déjà étendu les effets d'une clause d'arbitrage figurant dans les statuts d'une société à des personnes qui ne sont pas à proprement parler les associés de la société en question. La Cour de cassation a en effet admis l'extension de la clause compromissoire figurant dans les statuts de la personne morale à un « associé de second rang »²³, soit un associé de la personne morale elle-même associée de la personne morale dont les statuts comportaient une clause compromissoire²⁴. On peut donc relever en droit français un assouplissement certain des conditions du consentement à la clause d'arbitrage.

Une autre question qui se pose et qui, tout en n'étant pas une question d'arbitrabilité au sens strict, est néanmoins susceptible de

²² Cass. 1^{re} civ., 27 mars 2007, *Stés ABS et AGF Iart c/ Sté Amcor Technology et a.*, JCP G 2007, II, 10118, note C. Gohlen ; JCP G 2007, I, 168, n^{os} 11 et s., obs. Ch. Seraglini ; D. 2007, p. 2077, note S. Bollée, et pan. 180, spéc. 184, obs. Th. Clay ; JDI 2007, p. 968, note C. Legros ; Rev. arb. 2007, p. 785, note J. El Adhab ; Rev. crit. DIP 2007, p. 798, note F. Jault-Seseke ; F.-X. Train, « Action directe et arbitrage – À propos de l'arrêt ABS du 27 mars 2007 », Cah. arb., vol. IV, Pédone, 2008, p. 30 ; RTD com. 2007, 677, obs. E. Loquin.

²³ Pour reprendre l'expression de M. F.-X. Train, note sous Cass. Com. 8 nov. 2005, *M. Tinnes c/ sté Système U*, Rev. arb. 2006, p. 709.

²⁴ Cass. Com. 8 nov. 2005, *M. Tinnes c/ sté Système U*, Rev. arb. 2006, p. 709, note F. X. Train. Dans le même sens, d'autres arrêts « Système U » : Cass. 1^{re} civ., 20 sept. 2006, *M. Médard c/ sté Système U*, Rev. arb. 2006, som., p. 1078 ; Cass. 1^{re} civ., 22 oct. 2008, Rev. arb. 2008, som., p. 846 ; JCP 2008, I, 222, n^o 2, obs. J. Ortscheidt, où la Cour de cassation se repose sur le règlement intérieur de la coopérative qui prévoit que la personnalité et l'activité d'une société, personne morale membre de la coopérative, se confondent avec la personnalité et l'activité de celui ou de ceux qui la contrôlent directement ou indirectement et la dirigeant, si bien que, selon la Cour, l'associé de second rang avait nécessairement adhéré à titre personnel à ce règlement et accepté d'être lié par les clauses le concernant directement en tant que dirigeant social, particulièrement par la clause d'arbitrage.

restreindre le champ des litiges relatifs aux sociétés pouvant être résolus par arbitrage, est celle de la portée de la clause d'arbitrage figurant dans les statuts de la société. Il s'agit cette fois d'une question d'interprétation de la convention d'arbitrage quant aux litiges qu'elle a vocation à couvrir.

Il faut ici avant tout conseiller aux parties d'adopter une rédaction appropriée de la clause, qui permettrait de couvrir l'ensemble des litiges pouvant survenir entre la société (ou l'un de ses organes) et ses associés, ou entre associés, et les litiges relatifs, tant à la validité qu'au fonctionnement, et même à la dissolution de la société, bref à toute la vie de la société. Une formule suffisamment large permettrait par exemple de couvrir les contestations des décisions prises par l'assemblée générale, les litiges relatifs au statut et aux fonctions des administrateurs, les litiges relatifs à la qualité d'actionnaires (exclusion, participation aux bénéfices et aux pertes, etc.). Toutefois, malgré ce conseil, on n'est pas à l'abri de rédactions défaillantes. Face à cela, et afin de favoriser l'efficacité des clauses d'arbitrage figurant dans les statuts de sociétés, et donc l'arbitrage des litiges relatifs à la vie de la société, les juges doivent adopter une interprétation favorable à l'arbitrage, qui pourrait partir d'une présomption selon laquelle, sauf indication claire contraire, les parties ont entendu soumettre à l'arbitrage l'ensemble des litiges qui pourraient naître de leur contrat (ici le contrat de société).

A ce propos, l'attitude de la jurisprudence française est en ce sens. Elle retient une interprétation très large des termes de la convention d'arbitrage, au nom de « l'effet utile » de celle-ci qui commande d'éviter une dispersion du contentieux. La Cour d'appel de Paris a parfaitement exprimé la philosophie suivie par la jurisprudence française dans l'interprétation des conventions d'arbitrage en déclarant que « la convention d'arbitrage soustrait d'une manière générale le litige à la compétence des tribunaux judiciaires pour tout ce qui est en relation causale ou connexe avec son objet ; lorsque la clause se réfère à l'exécution du contrat, elle est applicable au litige mettant en cause la caducité du contrat »²⁵. Cela devrait conduire à présumer que les parties ont voulu que tous litiges affectant la vie de la société soient couverts par la clause d'arbitrage figurant dans les statuts.

Même avec une clause d'arbitrage bien rédigée, se pose encore la question de sa mise en œuvre, lorsqu'il y a potentiellement plus de deux parties intéressées au litige, lorsque, par exemple, il s'agit de contester une résolution de l'assemblée générale ; plusieurs personnes peuvent alors s'en plaindre, et plusieurs personnes peuvent être concernées par la décision qui

²⁵ CA Paris, 10 mars 1995, *Tardivel c/ SA Cejibe*, *Rev. arb.* 1996, p. 143, obs. Y. Derains.

sera prise relativement à cette résolution (notamment la société elle-même, d'autres associés, et même certains tiers). Or, il convient d'éviter la multiplication des procédures parallèles relatives à cette résolution, source de complications et de décisions contradictoires. On entre dans la délicate question des arbitrages multipartites.

On peut tout d'abord identifier ici un problème d'information, car pour agir, encore faut-il être au courant de la résolution prise par l'assemblée. Ensuite, on peut évoquer des problèmes liés à la difficulté d'admettre l'intervention forcée ou volontaire d'une nouvelle personne dans une procédure arbitrale en cours, sans l'accord de tous et ce, en raison de la base contractuelle de l'arbitrage. Se posent encore des problèmes de constitution du tribunal arbitral lorsque la procédure implique plus de deux parties, avec l'interférence du principe d'égalité dans la nomination des arbitres entre tous les associés participant à la procédure. De plus, dans le cas d'une intervention d'un associé qui interviendrait en cours d'instance arbitrale, après constitution du tribunal arbitral, cet intervenant peut-il alors être privé de ce droit à un traitement égal dans la constitution du tribunal arbitral ? Enfin, compte tenu de toutes ces difficultés précédentes, il existe un éventuel problème de développement d'instances parallèles, et le risque de décisions contradictoires qui s'en suit, lorsqu'une arbitrage multipartite n'aura pas été mis en place.

Une dernière difficulté en ce qui concerne les relations entre l'arbitrage et les litiges relatifs à la vie d'une société concerne la question des effets des décisions rendues par les arbitres, dans la mesure où elles sont susceptibles d'avoir des effets à l'égard d'autres personnes que celles qui étaient parties à l'arbitrage, d'affecter leurs droits et situations (autres associés, créanciers de la société, autres tiers). Certains pourraient s'interroger sur la capacité d'un juge privé, nommé par les parties à la procédure arbitrale, de rendre une décision susceptible d'avoir des effets au-delà de ces mêmes parties. Vient alors immédiatement à l'esprit une restriction à l'arbitrabilité de certains litiges relatifs à la vie de la société. Il en serait ainsi pour la nullité ou la dissolution de la société, mais aussi de l'annulation des résolutions d'assemblée générale. A supposer même que la convention d'arbitrage figurant dans les statuts soit rédigée de façon suffisamment large pour couvrir de telles demandes (il convient donc d'éviter les formules restrictives, comme celle visant les litiges relatifs à l'application du contrat de société), demeurerait ici un problème évident d'effet de la décision du tribunal arbitral, ce type de demandes visant généralement à obtenir une décision ayant des effets *erga omnes* ! A cet égard, il n'y a pas d'unanimité en droit comparé sur la question de savoir si la nullité d'une société peut ou non être prononcée par un tribunal arbitral.

Et, en effet, on peut hésiter à attribuer à une sentence arbitrale rendue entre quelques parties, souvent deux, un effet qui va concerner, non seulement tous les associés, mais encore les tiers (qui eux, ne peuvent de toute façon pas intervenir à l'arbitrage) ; certains estimeront qu'une telle décision ne pourrait, au mieux, qu'avoir un effet *inter partes*. Je crois que cette question est débattue à Singapour. Elle l'est également en France, même si la Cour de cassation a admis l'arbitrabilité de la dissolution de la société²⁶, et semble s'orienter vers celle de la nullité de la société²⁷. La doctrine y est en tout cas majoritairement favorable²⁸. Daniel Cohen a démontré que, compte tenu des conséquences attachées par le droit français à la nullité d'une société, celle-ci n'était pas susceptible d'atteindre gravement les droits des tiers. En effet, la nullité est inopposable au tiers de bonne foi. De plus, le même auteur a pu remarquer qu'une nullité prononcée par un tribunal arbitral ne risque pas de porter davantage préjudice aux tiers qu'une décision des associés prononçant la mise en liquidation de la société²⁹. Surtout, en France, la jurisprudence tend de toute façon, et de façon générale, à conférer des effets à une sentence arbitrale allant au-delà du cercle des parties à l'arbitrage. En effet, elle retient une interprétation très large de la notion d'opposabilité de la sentence aux tiers (qui devrait être différente de l'autorité de chose jugée de la sentence)³⁰... si large que certains auteurs ont pu estimer qu'il s'agissait en réalité d'autorité de chose jugée de la sentence à l'égard des tiers³¹.

Reste que cette « opposabilité », très largement entendue, à des parties qui n'ont pas participé à l'arbitrage pose problème et peut choquer une autre personne qu'un Français. Aussi, la possibilité d'intervention de parties autres que celles qui ont initié la procédure, dans l'arbitrage impliquant une question relative à la société susceptible d'intéresser ces autres parties, serait bienvenue pour résoudre ces difficultés. Dans certains pays d'ailleurs, des dispositions spécifiques sur ces questions existent, qui permettent de faire intervenir un maximum de participants à la procédure

²⁶ Cass. Com. 30 janv. 1967, *Rev. arb.* 1967, p. 92 ; *JCP* 1967, II, 15215, note P. L. ; *D.* 1968, p. 320 ; et aussi, plus récemment, CA Paris, 22 mars 1991, *Rev. arb.* 1992, p. 652, note D. Cohen ; CA Colmar, 21 sept. 1993, *Rev. arb.* 1994, p. 348, note D. Cohen ; *RJ com.* 1994, p. 154, note Ch. Jarrosson.

²⁷ Cass. Com., 9 avr. 2002, *Toulousy c/ Philam*, *Rev. arb.* 2003, p. 103, 2^e esp., note P. Didier ; *D.* 2003, p. 1117, note L. Degos ; *ibid.* 2003, somm., p. 2470, obs. Th. Clay ; *JCP* 2003, I, 2003, n° 2, obs. Ch. Seraglini ; *RTD com.* 2003, p. 62, obs. E. Loquin.

²⁸ V. D. Cohen, *Arbitrage et société*, *LGDJ*, 1993, n° 281 et s.

²⁹ D. Cohen, *Arbitrage et société*, *LGDJ*, 1993, n° 302.

³⁰ Cass. Com., 23 janv. 2007, *JCP G* 2007, I, 168, n° 9, obs. J. Béguin ; *RTD civ.* 2007, p. 383, obs. Perrot ; *Rev. arb.* 2007, p. 769, note P. Mayer ; *D.* 2008, pan. 185, obs. Th. Clay ; 2 déc. 2008, *Rev. arb.* 2009, p. 327, note P. Mayer.

³¹ P. Mayer, notes précitées sous Cass. Com., 23 janv. 2007, et Cass. Com., 2 déc. 2008.

arbitrale. C'est par exemple l'orientation récente du droit italien pour le droit des sociétés³².

La question qu'il convient maintenant de se poser est celle de savoir comment s'intègre, ou pourrait s'intégrer à l'avenir, le droit mauricien dans ces problématiques, notamment au regard de la loi sur l'arbitrage du 25 novembre 2008.

III. L'INTEGRATION DU DROIT MAURICIEN DANS LES PROBLEMATIQUES DE L'ARBITRAGE DES LITIGES RELATIFS AUX SOCIETES

Ou l'occasion de « repenser » le sujet ! Evoquons d'abord le contexte, même s'il relève essentiellement de l'intervention de Milan Mehtarbhan. A cet égard, on peut souligner le caractère très attractif de Maurice pour l'installation de sociétés *offshores*. On pense ici aux « Global Business Licence Companies » (ci-après Sociétés GBL), soit des « Resident Companies « conducting business outside Mauritius » qualified for a Global Business Licence » ; selon l'article 2 (1), qui figure parmi les « dispositions préliminaires » de la loi du 25 novembre 2008, il s'agit d'une « société titulaire d'une licence *Global Business* en application de la Loi relative aux Services Financiers ». Toutefois, il existe encore un frein à un développement encore plus satisfaisant de ces sociétés : la justice, qui doit leur apparaître adaptée à leurs besoins, et donc rapide, efficace, et donc à l'écoute de leurs attentes spécifiques, et neutre. L'arbitrage peut donc constituer un élément d'attraction supplémentaire pour l'installation de sociétés *offshores* à Maurice. Et le gouvernement mauricien en a été parfaitement conscient au moment de l'élaboration de la loi mauricienne sur l'arbitrage international de 2008. Ainsi on peut lire, dans les travaux préparatoires, que « la Loi contient des dispositions spécifiques sur l'arbitrage de différends relatifs aux statuts de sociétés *offshores* de droit mauricien, de manière à relier le secteur *offshore*, qui est florissant à Maurice, et les activités escomptées dans le domaine de l'arbitrage international ».

Auparavant, les litiges entre associés des sociétés GBL mauriciennes devaient être soumis aux juridictions étatiques mauriciennes³³.

³² V. A. Frignani, « Nouveautés sur l'arbitrage en matière de propriété intellectuelle et de droit des sociétés en Italie », *Cah. de l'arb.*, Vol. III, *Gaz. Pal. éd.*, 2006, p. 205, spéc. p. 210.

³³ Avant la loi du 25 novembre 2008, l'arbitrage était essentiellement régi par le Code de procédure civile mauricien (articles 1003 à 1028, issus d'une loi de 1981). Ces dispositions restent applicables à l'arbitrage interne mais ne régissent plus, depuis la loi

Ce n'est plus le cas aujourd'hui. En effet, en vertu de l'article 3 (6) (a) de la Loi, « sans préjudice du droit d'une société GBL d'accepter de recourir à l'arbitrage pour tout différend survenant entre elle-même et un tiers en application de la présente Loi, ses actionnaires peuvent prévoir que tout différend relatif aux statuts de la société ou relatif à la société soit soumis à l'arbitrage en application de la présente Loi ». Ainsi, au-delà des litiges « externes », pour lesquels le recours à l'arbitrage est bien entendu possible en vertu de la nouvelle loi mauricienne sur l'arbitrage international, ce sont bien les litiges « internes » à une société GBL qui sont dorénavant ouverts à l'arbitrage. On peut même parler d'une véritable incitation à cet égard. Cela apparaît clairement dans les dispositions relatives à l'insertion de clauses d'arbitrage dans les statuts d'une société GBL, qui est grandement facilitée. En effet, l'article 3 (6) (c) dispose : « Les actionnaires d'une société GBL peuvent inclure une convention d'arbitrage dans les statuts de la société, que ce soit en y insérant la clause d'arbitrage type contenue dans la Deuxième Annexe ou d'une autre manière : (i) lors de la constitution de la société ; ou (ii) à tout moment ultérieur, par une résolution prise à l'unanimité des actionnaires ». Dans le prolongement de cette possibilité nouvelle et de cette volonté d'en faire bénéficier le plus grand nombre, la Deuxième Annexe de la Loi fournit une clause d'arbitrage-modèle que les associés d'une société GBL, même déjà constituée, peuvent choisir d'incorporer dans les statuts de la société. Son article 1er dispose tout d'abord que les actionnaires d'une société GBL mauricienne déjà existante peuvent inclure une clause d'arbitrage dans les statuts de la société, conformément à l'article 3 (6) de la Loi, par résolution prise à l'unanimité des actionnaires, « sous la forme suivante : Les actionnaires de la Société conviennent par la présente que les statuts de la Société seront amendés pour inclure la clause d'arbitrage prévue dans la Deuxième Annexe de la Loi sur l'arbitrage international de 2008 (...) ». Ensuite, l'article 2 de la Deuxième Annexe fournit la clause-modèle suivante : « Tout différend, controverse ou réclamation découlant de, ou relatif aux présents statuts ou la violation, résiliation ou nullité de ceux-ci, ou relatif à la société, doit être tranché par voie d'arbitrage international en application de la Loi sur l'arbitrage international de 2008 (...) ».

Le but recherché est évident : il s'agit de faciliter l'adoption de conventions d'arbitrage par les sociétés GBL dans leurs statuts, pour favoriser les synergies entre un important secteur d'activité (les sociétés *offshores*) et l'arbitrage international à Maurice. Dans cette perspective, on

du 25 novembre 2008, l'arbitrage international, ni le cas spécifique qui nous intéresse, celui des « GBL », que ladite loi soumet au régime de l'arbitrage international.

relèvera les quelques particularités du régime mauricien nouveau qui sont susceptibles d'assurer le succès de cette entreprise.

Tout d'abord, on notera que les dispositions de la Loi, qui sont en principe faites pour les arbitrages internationaux, s'appliquent aux litiges relatifs aux sociétés GBL mauriciennes, peu important qu'ils soient internes à l'ordre juridique mauricien ou répondent à la définition de l'internationalité figurant à l'article 3 (2) de la Loi. En effet, l'article 3 (2) (b) (iv) de la Loi énonce qu'un arbitrage est international au sens de la Loi lorsque « les actionnaires d'une société GBL ont prévu, conformément au paragraphe (6), que tout différend relatif aux statuts de la société ou à la société devra être soumis à l'arbitrage en application de la présente loi ». Autrement dit, les litiges qui naîtront des clauses d'arbitrage figurant dans les statuts des sociétés GBL mauriciennes seront en toute hypothèse internationaux au sens de la loi du 25 novembre 2008, et donc régis par les dispositions de cette loi, et non par celles applicables aux arbitrages internes à Maurice. Ceci étant, une telle solution pourrait ne guère surprendre un juriste français, compte tenu de la définition très généreuse de l'internationalité de l'arbitrage retenue par la jurisprudence française³⁴.

Ensuite, on relèvera également le caractère obligatoire du siège de l'arbitrage à Maurice pour un litige impliquant la vie d'une société GBL mauricienne. En effet, l'article 3 (6) (b) de la Loi énonce que « nonobstant tout accord contraire, le siège juridique de tout arbitrage en application du présent paragraphe » (soit le paragraphe relatif aux sociétés GBL) « est Maurice et la Première Annexe s'applique à cet arbitrage »³⁵. Il s'agit

³⁴ La définition de l'arbitrage international, figurant auparavant à l'ancien article 1492 du Code de procédure civile, et figurant aujourd'hui à l'article 1504 du même code depuis la réforme du droit français de l'arbitrage opérée par le décret n° 2011-48 du 13 janvier 2011, est la suivante : « Est international l'arbitrage qui met en cause des intérêts du commerce international ». Selon la jurisprudence rendue sous l'empire de l'ancien article 1492, en vertu de cette définition, « l'internationalité de l'arbitrage fait exclusivement appel à une définition entièrement économique selon laquelle il suffit que le litige soumis à l'arbitre porte sur une opération qui ne se dénoue pas économiquement dans un seul État, et ce, indépendamment de la qualité ou de la nationalité des parties, de la loi applicable au fond ou à l'arbitrage, ou encore du siège du tribunal arbitral » : CA Paris, 10 mai 2007, 2^e arrêt, *Rev. arb.* 2007, p. 821, note V. Chantebout ; CA Paris, 13 nov. 2008, *Rev. arb.* 2009, p. 389, note M. Audit ; CA Paris, 11 juin 2009, *Rev. arb.* 2009, somm. p. 652 ; CA Paris, 7 avr. 2011, *Rev. arb.* 2011, somm. p. 576 ; CA Paris, 29 mars 2001, *Rev. arb.* 2001, p. 543, note D. Bureau. Cette formulation a été approuvée par la Cour de cassation : Cass. 1^{re} civ., 26 janv. 2011, pourvoi n° 09-10.198, *Inserm, JCP E* 2011, n° 1219, note C. Asfar-Cazenave.

³⁵ La Première Annexe, dont l'application est donc elle aussi obligatoire pour les sociétés GBL mauriciennes qui décident de stipuler des conventions d'arbitrage dans leurs statuts, est intitulée « Dispositions supplémentaires optionnelles pour les arbitrages internationaux ». Ainsi, des dispositions qui sont en principe optionnelles pour les

toutefois d'un siège juridictionnel et non pas d'un siège matériel, ce qui autorise le développement des opérations d'arbitrage ailleurs qu'à Maurice³⁶.

Cette exigence, qui va essentiellement conduire à retenir la compétence du juge mauricien comme juge de l'annulation de la sentence arbitrale, peut se comprendre car elle est un peu la contrepartie de la liberté nouvellement offerte de recourir à l'arbitrage en la matière ; il peut sembler légitime que le législateur mauricien souhaite ainsi conserver un certain degré de contrôle sur les litiges internes de ses sociétés GBL. Toutefois, un point doit être ici souligné avec insistance : cette exigence ne devrait pas être interprétée comme annulant toute clause d'arbitrage qui y contreviendrait en stipulant un siège ailleurs qu'à Maurice. Une telle stipulation relative au siège à l'étranger devrait plutôt être considérée comme non-écrite... et la volonté des parties de recourir à l'arbitrage demeurer. Une telle solution semble d'ailleurs en harmonie avec la rédaction de l'article 3 (6) (b), qui énonce que « *nonobstant tout accord contraire*, le siège juridique de tout arbitrage (...) est Maurice (...) », et qui ne dit donc pas qu'une stipulation différente rend la clause d'arbitrage nulle, ou encore que cette exigence est posée à peine de nullité de cette clause.

Au-delà de ces remarques préliminaires, pour apprécier la contribution de la loi mauricienne au débat sur l'arbitrabilité des litiges relatifs aux sociétés, on peut examiner ce que la Loi ne dit pas, et ce qu'elle dit. Elle reste, en effet, peut-être opportunément, silencieuse sur l'arbitrabilité elle-même des litiges relatifs aux sociétés GBL (A). En revanche, elle envisage quelques mécanismes intéressants pour la mise en œuvre de cette arbitrabilité (B).

A. Un silence opportun sur l'arbitrabilité des litiges relatifs aux sociétés GBL ?

Le législateur mauricien, dans la loi de 2008, ne traite pas vraiment la question de l'arbitrabilité objective des litiges relatifs à la vie d'une société GBL. On peut toutefois considérer que cette arbitrabilité est sous-jacente et implicitement admise, au moins dans son principe, puisqu'on incite les sociétés GBL à adopter des clauses d'arbitrage dans leurs statuts pour régler les litiges relatifs à la vie sociale ! Néanmoins, ce silence conduit à ce que le domaine exact de l'arbitrabilité des litiges impliquant la vie des sociétés

parties, et que celles-ci doivent donc expressément choisir si elles souhaitent en bénéficier, deviennent obligatoires dans le cas des conventions d'arbitrage visées par l'article 3 (6) ; sur ce point, v. *infra*, p. 90, para. 2.

³⁶ V. art. 10 (2) de la Loi.

GBL n'est pas délimité dans la Loi. Il s'agit probablement d'un silence volontaire, le législateur préférant généralement, au moins en droit comparé, laisser la jurisprudence œuvrer sur la question délicate, complexe, et en constante évolution, de l'arbitrabilité des litiges. L'avantage évident d'un tel choix est que le juge mauricien dispose d'un terrain totalement vierge, et ne subit pas certaines contraintes textuelles, ou le poids, parfois lourd, des mauvaises habitudes issues du passé et de l'histoire. Ainsi, on peut songer au temps pris en France pour que la jurisprudence parvienne à se débarrasser de la formulation malheureuse de l'article 2060 du Code civil qui exclut l'arbitrage « dans les matières qui intéressent l'ordre public »³⁷. Pour apprécier le champ de l'arbitrabilité des litiges relatifs aux sociétés GBL, le juge mauricien devra garder à l'esprit les Recommandations faites par l'article 3 (9) et (10) de la Loi en matière d'interprétation. Ainsi l'article 3 (9) invite à une interprétation « véritablement internationale » du texte nouveau, en soulignant le caractère favorable d'une telle démarche au développement de l'arbitrage international à Maurice. Il énonce que, « pour l'application et l'interprétation de la présente Loi, et pour le développement du droit applicable à l'arbitrage international à Maurice », il doit être tenu compte de l'origine de la Loi-type et de la nécessité de promouvoir l'uniformité de son application, et que toute question concernant les matières régies par la Loi-type non expressément réglée par elle doit être tranchée en conformité avec les principes généraux dont elle s'inspire ; il ajoute enfin qu'il est permis à cet égard d'avoir recours à la documentation internationale relative à la Loi-type et à son interprétation, y compris les rapports de la CNUDCI, les rapports et commentaires émanant du Secrétariat de la CNUDCI, la jurisprudence d'autres juridictions ayant adopté la Loi-type, et encore les ouvrages, articles et commentaires de doctrine relatifs à la Loi-type. A l'inverse, l'article 3 (10) indique clairement au juge que, dans l'exécution de cette mission d'interprétation, « il n'est pas permis d'avoir recours, et il ne doit pas être tenu compte, de la législation, des précédents, pratiques, principes ou règles de droit ou de procédure existants relatifs à l'arbitrage interne ». On ne peut être plus clair ! Au-delà de ces remarques générales, on s'autorisera la formulation de quelques pistes et « recommandations » à propos de l'arbitrabilité des litiges relatifs à la vie des sociétés GBL mauriciennes.

Tout d'abord, il convient de donner la priorité aux arbitres pour trancher ces questions d'arbitrabilité, en mettant pleinement en œuvre le mécanisme de compétence-compétence tel qu'il est reconnu par la Loi, c'est-à-dire dans une version consacrant à la fois son effet positif donnant

³⁷ V. *supra*, p. 72, para. 1.

compétence à l'arbitre pour statuer sur sa propre compétence, « y compris sur toute exception relative à l'existence ou à la validité de la convention d'arbitrage »³⁸ (art. 20 (1) de la Loi), et son effet négatif retirant en principe, dans un premier temps au moins, cette compétence au juge et donnant ainsi une priorité chronologique à l'arbitre pour trancher ces questions (art. 5 de la Loi). Aussi, le juge étatique ne devrait pas, sauf exceptions très limitées, se prononcer avant l'arbitre sur les questions d'arbitrabilité et devrait renvoyer les parties qui le saisiraient à l'arbitrage. A cet égard, l'exception au renvoi à l'arbitrage, prévue à l'article 5 (2) de la Loi et visant le cas où « l'une des parties démontre *prima facie* qu'il existe une très forte probabilité que [la] convention [d'arbitrage] soit caduque, inopérante ou non susceptible d'être exécutée », devra être entendue très restrictivement. La démarche peut être adoptée sans trop de crainte, puisque le siège de l'arbitrage étant obligatoirement à Maurice, quelles que soient les stipulations de la clause d'arbitrage à cet égard³⁹, le juge mauricien aura l'occasion de contrôler l'appréciation faite par l'arbitre de l'arbitrabilité du litige dans le cadre d'un recours en annulation contre la sentence, finale (art. 39 de la Loi) ou partielle lorsque le tribunal arbitral aura décidé de statuer sur l'exception d'incompétence à titre préalable (art. 20 (7) de la Loi).

Ensuite, la jurisprudence devrait s'appuyer, selon la logique préconisée à l'article 3 (9) (c) de la Loi, sur les enseignements du droit comparé pour juger de la question de l'arbitrabilité des litiges relatifs aux sociétés GBL, afin d'éviter un débat, comme celui qui a eu lieu en France, sur la question de savoir si l'implication de règles d'ordre public dans le litige est ou non un obstacle à l'arbitrage. Conformément aux solutions aujourd'hui très largement admises, elle devrait alors poser clairement qu'une telle implication n'est pas, en elle-même, un obstacle à l'arbitrage, et que l'arbitre peut appliquer ces règles d'ordre public. La solution est d'autant plus essentielle en matière de droit des sociétés, où les règles impératives sont nombreuses.

La jurisprudence devrait suivre une logique similaire à propos des compétences exclusives conférées éventuellement à un tribunal étatique en particulier pour connaître de certains litiges relatifs aux sociétés. D'ailleurs, l'article 3 (1) (d) de la Loi précise expressément à cet égard que « le fait qu'une disposition législative donne compétence à une juridiction étatique mais ne mentionne pas qu'une question peut être réglée par voie d'arbitrage ne signifie pas que cette question ne peut pas être réglée par voie d'arbitrage ». Il faut donc bien distinguer la compétence exclusive posée dans un souci de répartition des compétences juridictionnelles (il n'y a alors

³⁸ Et donc celle relative à l'arbitrabilité du litige.

³⁹ V. *supra*, p. 85, para. 3.

pas d'obstacle à l'arbitrage), et les « *réelles* » compétences exclusives d'arbitrage pour un motif d'ordre public juridictionnel (elles constituent effectivement un obstacle à l'arbitrage, mais sont rares)⁴⁰. Surtout, sur l'ensemble de ces questions liées à l'ordre public, il ne faut pas oublier que le juge mauricien aura toujours l'opportunité de contrôler la bonne ou la mauvaise application des dispositions d'ordre public par l'arbitre, puisque le siège de l'arbitrage des litiges impliquant des sociétés GBL est impérativement à Maurice⁴¹. Il s'agit donc seulement d'opérer un contrôle plus tard, mais qui demeure possible.

Dans ces conditions, quel domaine exact attribuer à l'arbitrabilité des litiges en droit des sociétés GBL à Maurice ? Quels litiges issus de la vie de ces sociétés peuvent faire l'objet d'un arbitrage ? Bien entendu, cette appréciation doit nécessairement se faire au regard des dispositions de fond du droit mauricien sur les sociétés, et je ne m'aventurerai donc pas trop sur ce terrain, n'étant pas un spécialiste de la matière. Cela étant, on peut néanmoins soutenir que cette appréciation des contours exacts de l'arbitrabilité des litiges relatifs à la vie des sociétés GBL devrait se faire avec un *a priori* favorable à l'admission de l'arbitrabilité. Dans cette perspective, il conviendrait très probablement, afin de définir le domaine de l'arbitrabilité objective des litiges relatifs aux sociétés GBL, d'interpréter largement les dispositions de l'article 3 (6) (a) de la Loi selon lequel « tout différend relatif aux statuts de la société ou relatif à la société » peut être soumis à l'arbitrage. Par ailleurs, s'agissant de la question parallèle du champ d'application de la clause d'arbitrage, il conviendrait également d'interpréter largement les dispositions de la convention d'arbitrage figurant dans les statuts, en retenant peut-être que, malgré des rédactions éventuellement défaillantes, les parties sont présumées, faute de restrictions claires, avoir entendu viser toute contestation relative à la vie de la société. A cet égard, la clause-modèle figurant à l'article 2 (1) de l'Annexe 2 de la Loi semble satisfaisante, lorsqu'elle fait référence à « tout différend, controverse ou réclamation (...) relatif à la société ».

Et il y a aussi ce que la Loi dit.

⁴⁰ Sur ce point, v. *supra*, p. 74, para. 2.

⁴¹ V. *supra*, p. 85, para. 3.

B. Des solutions novatrices pour une bonne mise en œuvre de l'arbitrabilité des litiges relatifs aux sociétés GBL

Une première disposition intéressante de la Loi concerne la question de l'adhésion à la clause d'arbitrage par les associés. Si la clause était dès l'origine dans les statuts, on trouve des conditions de forme plutôt favorables à l'article 4 de la Loi. En effet, il résulte de cette disposition l'admission de la clause d'arbitrage par référence⁴², et une acception relativement libérale de la forme écrite. S'agissant de la clause par référence, l'article 4 (1) (a) de la Loi énonce qu'« une convention d'arbitrage peut prendre la forme d'une clause compromissoire dans un contrat ou un autre instrument juridique ou d'une convention séparée », et l'article 4 (2) précise que « la référence dans un contrat à un document contenant une clause compromissoire vaut convention d'arbitrage écrite lorsque la référence est telle qu'elle fait de la clause une partie du contrat ». Quant à la forme écrite d'une convention d'arbitrage, qui est exigée par la Loi, elle est toutefois satisfaite lorsque le contenu de la convention d'arbitrage est consigné sous une forme quelconque, que la convention elle-même ou le contrat aient ou non été conclus verbalement, du fait d'un comportement ou par d'autres moyens, ou lorsque la convention d'arbitrage est conclue sous forme d'une communication électronique et l'information qu'elle contient est accessible pour être consultée ultérieurement, ou lorsque la convention est consignée dans un échange de conclusions en demande et en réponse dans lequel l'existence d'une telle convention est alléguée par une partie et n'est pas contestée par l'autre (art. 4 (1) de la Loi). En revanche, s'agissant, d'une clause d'arbitrage insérée postérieurement dans les statuts, au cours de la vie sociale, si cette insertion est possible, et paraît même encouragée, l'article 3 (6) (c) (ii) de la Loi exige néanmoins l'unanimité des associés.

Mais ce sont surtout les dispositions de la Première Annexe à la Loi qui sont particulièrement intéressantes et qui renferment de réelles potentialités relativement à notre sujet. Cette Annexe, intitulée « Dispositions supplémentaires optionnelles pour les arbitrages internationaux » et qui contient en principe des dispositions optionnelles pour les parties, que celles-ci doivent donc expressément choisir si elles souhaitent en bénéficier, est impérative pour les conventions d'arbitrage visant les litiges « internes » des sociétés GBL. Ainsi, des dispositions en principe optionnelles deviennent obligatoires dans le cas des conventions

⁴² Sur cette notion, v. *supra*, p. 77, para. 2.

d'arbitrage visées par l'article 3 (6) de la Loi⁴³. Autrement dit, les dispositions relatives à la consolidation des procédures arbitrales (art. 3 de l'Annexe), et à l'appel en cause (art. 4 de l'Annexe), ainsi que celles relatives aux décisions sur un point préliminaire de droit mauricien par la Cour Suprême (art. 1 de l'Annexe) et aux appels sur des points de droit mauricien (art. 2 de l'Annexe), sont obligatoirement disponibles.

Pourquoi ces dispositions sont-elles en principe optionnelles ? Parce qu'elles sont trop controversées (et, pour certaines, peut-être trop novatrices ?) pour faire partie du régime de droit commun de l'arbitrage international ; d'où la nécessité en principe, pour les voir appliquer, d'un choix des parties, qui doit de plus être exprès (v. art. 3 (4) de la Loi). Pourtant, on n'hésite pas à les imposer s'agissant des sociétés GBL. Ainsi, on passe du service offert ... au service imposé ! On peut le comprendre s'agissant des dispositions sur la consolidation des procédures arbitrales et sur l'appel en cause, puisqu'il s'agit de trouver des solutions adéquates aux hypothèses d'arbitrages multipartites et d'éviter les procédures parallèles et les décisions contradictoires, bref les multiples difficultés susceptibles d'apparaître dans l'arbitrage des litiges relatifs aux sociétés. En principe, et pour justifier de telles mesures de consolidation des procédures et d'appel en cause malgré le caractère consensuel de l'arbitrage, les parties à la convention d'arbitrage sont censées avoir accepté ces possibilités à l'avance, en adoptant l'Annexe 1... sauf pour les associés des sociétés GBL, pour lesquels on dira plutôt que leur accord provient de l'adhésion à la possibilité offerte à l'article 3 (6) de la Loi. Concrètement, cela conduit à la possibilité de voir consolider des procédures arbitrales liées ou de joindre des tiers (actionnaires, ou autres tiers intéressés) à la procédure arbitrale.

S'agissant de la consolidation des procédures, l'article 3 de la Première Annexe prévoit deux cas, selon que les procédures parallèles ont le même Tribunal arbitral (art. 3 (1) de l'Annexe), ou qu'elles n'ont pas le même Tribunal arbitral mais qu'il y a de bonnes raisons de consolider les deux instances (art. 3 (2) de l'Annexe), hypothèse qui peut se révéler très importante pour notre sujet. Lorsque les procédures parallèles ont lieu devant un même tribunal arbitral, celui-ci peut, à la demande d'au moins l'une des parties dans chacune des procédures, ordonner la consolidation des procédures aux conditions qu'il considère justes, ou que les audiences relatives à ces procédures aient lieu en même temps ou l'une immédiatement après l'autre, ou surseoir à statuer dans l'une des procédures aux conditions qu'il estime appropriées. Dans le cas où les procédures parallèles n'ont pas lieu devant le même tribunal arbitral, l'article 3 (3) de

⁴³ V. *supra*, spéc. note 35.

l'Annexe offre néanmoins la possibilité pour l'un des tribunaux arbitraux d'ordonner, à la demande d'une partie et de façon provisoire, le même type de mesures. Et l'ordonnance rendue « cessera d'être provisoire lorsque des ordonnances provisoires cohérentes auront été rendues dans toutes les procédures concernées » (art. 3 (3) (b) de l'Annexe). Pour faciliter cela, il est prévu une possibilité de communication entre les différents tribunaux arbitraux (art. 3 (3) (c) de l'Annexe). Par ailleurs, si le tribunal arbitral, ou l'un des tribunaux arbitraux selon le cas, refuse de prendre une mesure visée par l'article 3 de l'Annexe, l'une des parties peut encore saisir la Cour Suprême pour ordonner de telles mesures de consolidation (art. 3 (2) et (3) (d) de l'Annexe). La Cour Suprême peut encore intervenir, dans le cas des procédures parallèles devant plusieurs tribunaux arbitraux, pour rendre « cohérentes » des ordonnances provisoires rendues par ces tribunaux arbitraux qui ne le seraient pas (art. 3 (3) (e) de l'Annexe). De plus, les dispositions sur la consolidation des procédures arbitrales s'appliquent que les parties aux différentes procédures soient ou non les mêmes (art. 3 (8) de l'Annexe).

Bref, le texte offre diverses possibilités de joindre, ou au moins d'harmoniser, les procédures, donc de rationaliser le contentieux. Bien entendu, ces dispositions doivent subir l'épreuve de la pratique, mais les potentialités offertes par ce texte me paraissent très intéressantes pour l'efficacité de l'arbitrage des litiges relatifs aux sociétés GBL, dans la mesure où il pourrait permettre de donner aux tribunaux arbitraux les armes nécessaires pour résoudre nombre de difficultés susceptibles de se poser dans ce type d'arbitrage, où des procédures parallèles ont par exemple pu être engagées par des associés différents. Le texte connaîtra probablement des difficultés d'application, surtout lorsque les tribunaux arbitraux seront différents ... mais la piste demeure intéressante, et est donc à explorer !

S'agissant de l'appel en cause (« Joinder »), c'est l'article 4 de la Première Annexe qui en traite. Ici, c'est la Cour Suprême, et non plus le tribunal arbitral, qui pourra prononcer une telle mesure, à la demande de l'une quelconque des parties à l'arbitrage. La Cour Suprême dispose d'un pouvoir qualifié de « discrétionnaire » pour « décider qu'un ou plusieurs tiers doivent être appelés en cause à l'arbitrage ». Une condition est toutefois posée : le tiers et la partie requérante doivent y avoir consenti par écrit ; néanmoins, et *a contrario*, il n'est donc pas nécessaire que toutes les parties y aient consenti. Une fois encore, la disposition devra subir l'épreuve de la pratique, mais il y a à nouveau ici de réelles potentialités pour régler les problèmes sus-évoqués.

Pour finir, on peut mettre en avant quelques interrogations pour l'avenir : les éventuels problèmes d'information des associés sur les

procédures arbitrales entamées par d'autres associés (comment agir, intervenir, demander une consolidation, si l'on n'est pas informé des autres procédures arbitrales éventuellement en cours ?) ; la question épineuse du stade auquel l'intervention d'un tiers est possible (au début de la procédure arbitrale, avant la constitution du tribunal arbitral, ou à tout moment ?) ; ou encore celle, non moins délicate, de la résolution des problèmes de constitution du tribunal arbitral que ces interventions peuvent engendrer. Sur ce dernier point, l'article 12 de la Loi semble potentiellement susceptible de résoudre les difficultés. L'article 12 (3) (d) prévoit notamment un mécanisme de nomination en cas de pluralité de demandeurs ou de défendeurs, et a donc une vocation naturelle à s'appliquer aux litiges relatifs à la société ; en ce cas, l'ensemble des demandeurs, de manière conjointe, et l'ensemble des défendeurs, de manière conjointe, nomment chacun un arbitre, et les deux arbitres ainsi nommés désignent le troisième, qui sera le président du tribunal arbitral ; et, si ce processus n'aboutit pas, la nomination est alors faite conformément aux paragraphes 4 et 5 de l'article 12, c'est-à-dire essentiellement par l'intervention de la Cour Permanente d'Arbitrage de La Haye⁴⁴. La solution à un éventuel blocage serait donc d'instaurer une procédure spécifique de nomination par un tiers, permettant de préserver le principe d'égalité des parties dans la constitution du tribunal arbitral, et facilitant de ce fait l'intervention ultérieure de tiers dans la procédure arbitrale.

Pour conclure, on pourra s'interroger sur l'opportunité d'adopter dans le futur des dispositions spécifiques à ce type d'arbitrage sur ces divers points, et donc des dispositions plus fournies dans la loi relative à l'arbitrage. Dans une prochaine étape peut-être.... En tout cas, certains pays, comme l'Italie et l'Autriche, ont suivi cette voie ; pourquoi Maurice ne suivrait pas ce mouvement novateur ?

⁴⁴ V. également, dans le cas spécifique des procédures de consolidation de plusieurs procédures arbitrales, art. 3 (4) de la Première Annexe.

Response to the Report

*V. V. Veeder Q.C.**

It is a pleasure to comment on the remarkable report we have just heard from my friend and colleague Professor Seraglini. I propose to address only two of his points relating, first, to consent to arbitration – consent is still important – and contractual privity. And, second, to the arbitrability of shareholder intra-company disputes. I will do so from the perspective of English law, and here English law includes the laws of the European Union but not French law, of course.

Under English law there is nothing historically new about members of a voluntary association or a joint stock company, on a multilateral basis, agreeing to refer their disputes as members to arbitration and not to an English or other state court. English law as with other private law contracts does not require parties to an arbitration agreement to express their consent to arbitrate at the same time or to follow the orthodox formation of a bilateral contract by consecutive offer and acceptance. Of course, English law requires written consent by all disputing parties to an arbitration but even before the English Arbitration Act 1996 it was a somewhat special kind of consent. So, for example, we can see in English legal history even before the creation of joint stock companies, members of a club being held to a particular rule of membership regulating their legal relations on a multilateral basis. Thus, in *The Satanita*¹ the owners of different yachts entered, at different times by their owners, in a yacht race on the Clyde in 1894 were held by the House of Lords to have agreed separately to the same rules governing legal liability. Lord Herschell said:

“[I] cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race and undertaking to be bound by these rules to the knowledge of each other is sufficient, I think, where those rules

* Barrister-at-Law, Essex Court Chambers (London); Member of the International Council for Commercial Arbitration (ICCA); Council Member of the ICC Institute of World Business Law; Member of the LCIA Arbitration Court; Visiting Professor on Investment Arbitration, King’s College London; United Kingdom delegate to the UNCITRAL Arbitration Working Group. This text is an edited version of the transcript of Mr. Veeder’s remarks at the conference.

¹ *Clarke v. The Earl of Dunraven and Mount-Earl (The “Satanita”)* [1897] AC 59 (HL)

indicate a liability on the part of the one to the other to create a contractual obligation to discharge their liability.”

More recently, racing drivers and teams in the Fédération Internationale de l’Automobile (“FIA’s”) Formula 1 agreeing at different times and with separate documentation were held to have agreed to abide by the terms of FIA’s Concorde Agreement providing for arbitration in Geneva on a multilateral basis. And, so in the *Pedro Diniz*² case, involving a famous Portuguese driver and the owners and operators of the Arrows Formula One racing team. Mr. Justice Thomas of the English Commercial Court decided that all three disputing parties were bound by the same arbitration agreement all be it agreed by them at different times and with different contractual documentation. The learned Judge there held, and I quote:

“[J]urisdiction has been conferred by the parties by contracts signed by the Formula One racing teams with the FIA and the contracts between each driver and each team. It is common ground that the fact that there is no bilateral contract between the respective teams does not matter, the agreements bring about multilateral contracts. It is nothing to the point that these are contracts of adhesion and the parties have to assent thereto if they wish to participate in Formula 1 racing.”

Although the *Arthur Anderson* case involving the dissolution of that accountancy partnership involved thousands of accountants all over the world and was ultimately decided by the Swiss Courts, the same result would have been reached by an English Court under English law. It was there held by the Swiss Federal Tribunal that the worldwide partners in Arthur Andersen were all bound by the same arbitration provision although each partner had entered into that agreement separately in different languages and in different places and at different times. So, there is nothing new about numerous parties measured in thousands or tens of thousands or more, agreeing separately to an arbitration provision at different times and under separate procedures for consent. So, how then was, this kind of multilateral contract to arbitrate transferred to the shareholders of an English company subject to the Companies Acts (now the Companies Act 2006). Under English law the transition from voluntary associational club to joint stock company was easily made in some but not to all respects. Under English company law as with many common law countries including

² *Thomas Dobbie Thomson Walkinshaw & Ors. v. Pedro Paulo Deniz* [2000] 2 All ER (Comm.) 237

Mauritius, a company's foundation documents, *i.e.*, its Memorandum and Articles of Association, bind the company and its shareholders to the same extent as if these documents respectively in the words of the statutes had been signed and sealed by each shareholder and contained promises by each shareholder to observe all the provisions contained in those documents. In the early days of English joint stock companies it was, therefore, not uncommon to insert an arbitration clause in the articles of a company, intended to oblige its shareholders to refer their disputes as shareholders to private arbitration rather than public litigation.

As we have seen in the case of *Hickman v. Kent or Romney Marsh Sheepbreeders' Association*³ where Mr. Justice Astbury held that an Article of Association in a company incorporated under the Companies Act 1862 providing for arbitration, bound its members and shareholders of the company in regard to disputes as members and was therefore an arbitration agreement under Section 4 of the Arbitration Act 1889 with the result of the action being stayed by the Court in favour of arbitration.

There was nothing special about the wording of that article providing for arbitration. It was in the standard form of the time, providing for two arbitrators and an umpire, and Mr. Justice Astbury continued, "this is a common form of article in private companies and the object of this association being what they are, it and its members might be seriously prejudiced by a public trial of their disputes." The company, of course, was concerned with sheep and apparently sheep require the confidentiality of English arbitration. So the English principle there was and remains today no difficulty in multi-party multilateral arbitration agreements formed by individual non-contemporaneous acts of acceptance and consent by shareholders without the process of offer and acceptance. And that is the same, as I understand, in many common law countries and indeed under international law also because of the famous arbitration involving the Bank for International Settlements ("BIS"), an international legal person, and its private shareholders. In 2002 and 2003 the arbitration tribunal treated the arbitration provision in a treaty towards the private shareholders of private persons were not party as a free standing *lex specialis* created by the Bank's foundation documents under international law and under international law the shareholders were legally bound to arbitrate the dispute for the Bank having accepted to do so as a condition of their shareholding. The tribunal decided – and one of the arbitrators is in the room – as follows in its final award:

³ [1915] 1 Ch. 881

“[A]rticle 55 of the statutes that was the Bank’s principal foundation document is beside being part of the international legal structure of the Bank, a bilateral commitment that operates parallel to Article 54 and Article 17. By accepting the statute pursuant to Article 17 shareholders also accept the jurisdiction of a tribunal established under the 1930 Hague Agreement that was the international treaty and agreement not to pursue actions within the jurisdiction of such a tribunal before national courts.”

The regime that emerges from these provisions makes clear that disputes between, *inter alia*, the Bank and its shareholders with regards to the interpretation or application of the statutes were to be referred to a tribunal established in accordance with the 1930 Hague Agreement. Such a tribunal was empowered to decide all questions including the question of its own jurisdiction and, in addition, to order any appropriate provisional measures in order to safeguard the respective rights of the parties. A private shareholder, the award would continue, could not be formal party to the 1930 Hague Agreement but a private shareholder purchasing shares acquired a special and equally binding type of privity with respect to the dispute resolution regime described above. At least where consent of acceptance of an arbitration provision by a shareholder is plain and obvious, belying any possibility of misunderstanding. But now the question which arose under English law was whether an arbitration clause in a company’s articles was always effective. As Professor Seraglini has already explained in his report, a company shareholder might acquire his share on a stock exchange from a third party without actually signing or agreeing or even knowing of the arbitration provision in the company’s articles. Furthermore, a company’s articles could be amended after a shareholder’s acquisition of his shares so as to insert a reference to arbitration notwithstanding his active opposition and disagreement as a shareholder voting at a general or special meeting.

How then can it be said that such a shareholder has agreed to the arbitration provision in the company’s articles particularly if that shareholder does not even know that provision. One will recall the passage I just cited from *The Satanita* where Lord Herschell stressed knowledge and the PCA tribunal in the *BIS* case emphasises a critical factor of acceptance. Moreover, the statutory language of the English company ever since the mid 19th century have treated shareholders of a joint stock company as having signed and sealed the company articles as a form of contract. But the statutory language does not extend to the company itself and it is not addressed at all the position of the company’s directors or other officers and

third persons such as the company's creditors. Nor does it affect the shareholder in a capacity other than a shareholder, say as an ordinary trader contracting with the company. There have also been difficulties under English law where the remedy sought by a shareholder has not been one which could be granted by an arbitration tribunal in England and also where the relief sought by the claimant is aimed at third persons not privy to the arbitration agreement or indeed directed at procuring an award *erga omnes* purporting to serve *in rem* and not *in personam*.

All these difficulties were exposed by a Welsh shareholder in a German company in a case decided in 1992 under Article 17 of the Brussels Convention (now Article 23 of the Brussels I Regulation) which contains a choice of jurisdiction provision here to be equated with a written arbitration agreement under Article II of the New York Convention and Section 5 of the English Arbitration Act 1996 (at that time the English Arbitration Act 1975). The analogy between arbitration and jurisdiction agreement is not exact but both depend legally upon consent and contractual privity and the uniform application of both is required for transnational commerce both within and without the European Union. In the case of *Powell Duffryn*⁴, the European Court of Justice ("ECJ") decided that an exclusive jurisdiction clause in the statutes of a German company to which the shares owned by the Welsh company was subject under German law was effective to bind the company and Welsh shareholder under Article 17 of the Brussels Convention. That was so even though German law might not recognise the clause as a jurisdiction clause under its own national law because the issue was to be decided as an autonomous concept under European law even where the shareholder had opposed and voted against the introduction of the arbitration clause at the company's general meeting.

In the lengthy report to the Court by Advocate-General Tesaro these problems were eloquently set out and it is possible to read much of its analysis in the later judgment of the ECJ where the English Judge Sir Gordon Slynn, later Lord Slynn, was the *juge rapporteur*. In his opinion the Advocate-General said:

"[t]he contractual institutional dichotomy and the categorisation of corporate relationships seems to me in the end rather theoretical and thus of little relevance in the solution of the problem in question. What is important, in my opinion, is rather the fact that regardless of the view adhered to and of the academic discussion on this subject there is underlying the reason to learn the corporate phenomenon of an expression of an intention to enter into legal

⁴ *Powell Duffryn Plc. v. Wolfgang Petereit* (Case C-214/89) [1992] ILPr 300

relations which manifest itself in the deed of incorporation of the company.”

And so he decided that even where the shareholder had opposed the resolution to introduce arbitration in the articles, because he had continued to be a shareholder, that bound him and the result was a contractual jurisdiction clause.

The ECJ adopted that analysis and that is now European law and indeed English law. It may even be German law because since that case in a later decision by the German Supreme Court they have gone a long way to adopt the *Powell Duffryn* approach. Now time is running out as I have been told so I am going to leave arbitrability in a somewhat short order. The difficulty with arbitrability is that we have divided views in England. In recent cases and most recently in a decision involving the *Fulham Football Club v. The Football Association*⁵ by Mr. Justice Vos, held that a petition by a minority shareholder was arbitrable that is no doubt going on appeal. We still do not know whether a derivative action by a shareholder under the new Part 11 procedure of the Companies Act 2006, brought by an individual shareholder against the company’s director is arbitrable. It probably is not.

So, in conclusion, what can this mean for Mauritius as a new international seat for international companies and the new Act. For international companies there is an enormous risk of action by shareholders in state courts far away from Mauritius, as a seat of the company particularly in the United States of America with the intended risks there posed by the plaintiff’s power, class actions and punitive and other multiple mapped damages.

You have in the Act, as we heard from Professor Seraglini, in section 36, a provision which will allow shareholders to arbitrate the shareholder disputes and an arbitration clause in the articles a Mauritian Global Business Licence Company would undoubtedly help legal certainty in international trade and make dispute resolution fairer and more effective for its arbitration participants. Whether it is arbitrable in all cases I am not sure, I do not share the same confidence of Professor Seraglini, I hope he is right, I fear he may not be; if he is so much the better, if he isn’t as regards English law *vive la difference*!

⁵ [2010] EWHC 3111 (Ch.)

Response to the Report

*Sundaresh Menon S.C.**

I. INTRODUCTION

We gather for this conference at a time when arbitration has, seemingly, come of age. From its early beginnings as the poor cousin of the traditional court-centered methods of dispute resolution, arbitration has certainly gone past the stage of being seen as the challenger brand of dispute resolution. That was when litigators were frequently heard musing if arbitration would emerge as a competitor in the global dispute resolution industry. Today arbitration has arrived, and is seen in many areas as an equal partner to litigation, and in some, such as complex cross-border commercial disputes, it has perhaps grown in stature to such a degree that it may have a genuine claim to being the main game, played by an international band of highly qualified and much sought-after expert arbitrators. In this light, it is not surprising that the concept of “arbitrability” has lost some of its importance and vitality.¹ After all, arbitrability has its roots in the idea that there are certain types of issues that are ultimately not arbitrable in the sense of being not suitable for arbitration. This was a determination made by the courts, which if satisfied that a particular dispute or controversy should not be arbitrated, would refuse to enforce agreements that had been made by parties to resolve their disputes by arbitration. With the ascendancy of arbitration, the whole notion of the courts determining that something is suitable (or not) for arbitration seems at first blush to be somewhat outdated. In keeping with the overarching theme of this conference of rethinking the basic assumptions that we may have taken for granted, it is timely to have another look at arbitrability.

The concept tends to be obscured by a couple of things. First, there are differences in definitions and the scope of the term. Is something not appropriate for resolution by way of arbitration by virtue of the

* LL.B. (Hons.), LL.M. (Harvard); FSI Arb; Senior Counsel (Supreme Court of Singapore), Attorney (New York); Attorney-General, Republic of Singapore. I would like to express my deepest appreciation to my colleague, Mohamed Faizal, for his extremely valuable assistance in researching a number of points and for the time he spent discussing the issues with me and helping me to prepare this paper.

¹ See Karim Youssef, “The Death of Arbitrability” in Mistelis & Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Kluwer Law International: 2009) (“Mistelis and Brekoulakis”).

character or capacity of the prospective arbitrator? Or is the concept implicated solely by reason of the type of issues raised and perhaps the relief(s) sought? The term has been used in both senses. Second, arbitrability is often impacted by notions of public interest or public policy, by reason of which it is said that certain types of issues may not be finally resolved by arbitration. Here, an additional issue arises because what is arbitrable in one jurisdiction may be under the exclusive jurisdiction of the courts in the next. Unlike the judicial system, where differences in philosophies across geographical boundaries are more likely to have an attenuated effect because of the self-contained single-jurisdiction nature of such proceedings, the seat of an arbitration is often distinct from the forum where enforcement may be envisioned.² Moreover, the question of what is or is not arbitrable may sometimes be influenced by each state's notion of its own public policy. This is unlike much of the rest of arbitration where the emphasis is on harmonisation.

In sharing a Singaporean perspective on these issues, I would like to suggest a couple of core ideas that might assist in the discussion. First, when I speak of arbitrability, I am speaking of the idea that a particular question or controversy is not appropriate for final resolution by arbitration. This raises the question why anything should be incapable of resolution by arbitration. The answer to this, I think, lies in what has hitherto been one of the foundational features of arbitration: that it is a method of dispute resolution that is founded on the consent of the parties. The parties are the only people who can confer jurisdiction on the arbitrators and their powers depend on the agreement of the parties. For this reason, their decisions would ordinarily be expected to bind and affect only the parties. Those who have not consented to have their rights or liabilities affected or determined by the contractual creation that is the arbitration should not be so affected. This, I suggest, is one of the few remaining areas where arbitrability retains some relevance, so that a dispute that entails the application of a remedy or calls for the resolution of an issue or controversy which impacts parties other than the arbitrants would not be appropriate for arbitration. This leaves open the question whether the parties can be taken, by entering into an arbitration agreement, to have forgone certain substantive rights because of their potential to affect third parties, so as to retain the right and

² There are many reasons why parties might decide to choose a country with which neither side is affiliated as the arbitral seat. One primary reason is the desire to arbitrate in a jurisdiction that possesses no (or minimal) interest in the dispute and a sufficiently developed and advanced legal and judicial framework that will ensure that the parties' legitimate contractual expectations are not frustrated.

correspondingly the obligation to resolve the matter by arbitration. I touch on this a little later.

One other area where the concept seems to have some relevance is where the issue that arises concerns an interest beyond the purely private interests of the parties. Thus where a real issue of public interest is raised, it may well be that such a dispute or controversy is also not appropriate for arbitration. Provided that these core concepts are kept in sharp focus, the scope for the applicability of the doctrine of arbitrability will remain within reasonable limits and ought not to interfere unduly with the freedom of the parties to select their preferred method of dispute resolution. I will refer to a couple of Singapore decisions to illustrate these propositions.

II. SINGAPORE REGIME

To set the context, it is useful to preface my remarks with a brief overview of Singapore's arbitration framework. The Singapore arbitral regime is *principally* governed by two sets of legislation, with the applicable legislation governing any arbitration dependent on whether it is designated as "domestic" or "international".³ "Domestic" arbitrations are governed under the auspices of the Arbitration Act (Cap. 10, 2002 Rev. Ed.), while, as its name implies, the International Arbitration Act (Cap 143, 2002 Rev. Ed.) governs "international" arbitrations. Such a bifurcation of the Singapore arbitral regime is by design,⁴ and achieves at least three objectives. First, it allows the Singapore Courts to play a larger role in *domestic* arbitrations, thus aiding the principled development of *domestic* commercial law. Second, in the context of domestic arbitrations, there is less interest in excluding the involvement of the domestic courts, which are therefore able to exercise a supervisory jurisdiction over such disputes, especially given that there might be a significant (perceived or actual) power differential.⁵ Finally, as parties are able to opt-in to (or opt-out of, as the case may be) the framework governed by the International Arbitration Act, such a two-tiered approach also affords parties the necessary latitude to

³ Strictly speaking, there is another piece of legislation that governs arbitrations, namely the Arbitration (International Investment Disputes) Act (Cap. 11, 1985 Rev. Ed.), which governs the recognition and enforcement of ICSID disputes and awards. The contours of that Act fall outside the auspices of the present discussion and will therefore not be considered here.

⁴ A more in-depth discussion of how the dual regime in Singapore came into being, and its underlying motivations, can be found elsewhere. See Leslie Chew, *Introduction to the Law and Practice of Arbitration in Singapore* (LexisNexis: 2010) at 9-11.

⁵ See, for example, the comments of the Court of Appeal in *NCC International A.B. v. Alliance Concrete Singapore Pte. Ltd.* [2008] 2 SLR(R) 565 at [51].

customise the extent of curial intervention that they wish to have in support of the arbitration process.

III. THE APPROACH OF THE SINGAPORE COURTS TO ARBITRATION

Singapore has risen rapidly in recent years to become one of the key arbitral hubs of choice in Asia.⁶ It is fair to say that one of the primary factors contributing to this ascent has been the receptiveness displayed by the courts towards arbitration.⁷ The jurisprudence of our courts unambiguously evinces the prevailing wisdom that arbitration is a complementary partner in the effective resolution of disputes. The observations of the Court of Appeal in the recent decision of *Tjong Very Sumito and Others v. Antig Investments Pte. Ltd.*⁸ are emblematic of such an enlightened approach:

“....There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with. More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, **a court ought to give effect to the parties’ contractual choice as to the manner of dispute resolution unless it offends the law.**”

⁶ A recent study concludes that Singapore is “the regional leader in Asia” in the field of arbitration, and that, notwithstanding the relatively recent push for arbitration, “clearly emerges as the most popular Asian seat”. See White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration*, available at http://www.arbitrationonline.org/docs/2010_International_ArbitrationSurveyReport.pdf

⁷ For this reason, Singapore is internationally recognised for its pro-enforcement policies. See Rufus Rhoades *et al.*, *Practitioner’s Handbook on International Arbitration and Mediation*, 2nd ed. (JurisNet: 2007) at 336. This is, of course, important since the New York Convention espouses a *reciprocity* element for the enforcement of arbitral awards.

⁸ [2009] 4 SLR(R) 732 at [28] - [29]

“...Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step. *Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. It must also be remembered that the whole thrust of the IAA is geared towards minimising court involvement in matters that the parties have agreed to submit to arbitration.* Concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process. Jurisdictional challenges must be dealt with promptly and firmly. If the courts are seen to be ready to entertain frivolous jurisdictional challenges or exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase costs all round. In short, the role of the court is now to support, and not to displace, the arbitral process.”

[Italics in original; bold added]

These observations highlight the generally enlightened pro-arbitration curial approach. But as we will see, in spite of this, the Courts do recognise that there are some inherent limits and the doctrine of “arbitrability” serves as one manifestation of such limits. In the context of this discussion, the challenge ultimately lies in determining *exactly where along the spectrum* from public justice to private autonomy the line should be drawn in determining what should not be left to be determined by arbitration.

IV. THE IMPLICATIONS OF CRIMINAL LAW ISSUES ARISING IN CORPORATE DISPUTES

The intersection of criminal law issues and arbitration continues to gain in significance particularly in the context of the increasing prevalence of transactions, and by extension, disputes, between corporations that transcend borders. With the growing trend of such business, companies often find that some aspect of their business transactions might give rise to a breach of local laws, sometimes because of a lack of familiarity with local

norms and sometimes, in spite of such familiarity.⁹ At first blush, the answer to any question posed in relation to the proper interplay between criminal law and arbitration appears largely self-evident – criminal matters are not arbitrable.¹⁰ This stems first from the fact that such issues would fall outside the context of any agreement. Moreover, the prosecuting authorities are charged with the task of upholding the *public* interest inherent in the enforcement of a state’s criminal laws and this is plainly and obviously unsuitable for private resolution. But this issue can become considerably more complex. The prosecutorial process represents but one facet of criminal law. As a recent case in Singapore illustrates in matters relating to pending criminal proceedings, the Courts may, in appropriate circumstances, adopt a broad view of public policy and consequently be slow to uphold the party’s rights to freedom of contract if it perceives that to do so would entail the prospect of interference with the criminal justice system. Though perhaps not directly connected with the core question of arbitrability, it warrants a brief digression to explore the limits of such a principle.

In *AJT v. AJU*¹¹, the plaintiff (a company incorporated in the British Virgin Islands) had initiated arbitration proceedings against the defendant (a company incorporated in Thailand). In the course of the proceedings, the defendant lodged a complaint with the Thai authorities alleging fraud (which was compoundable under Thai law) and forgery (which was not). It was alleged that this had been committed, among others, by the plaintiff’s sole shareholder and director. The police got involved but while the investigations were proceeding, the parties entered into a further agreement under which the defendant agreed to withdraw its complaint in return for which the plaintiff agreed to take all necessary steps to terminate all pending actions, including the subsisting arbitration proceedings. The defendant proceeded to withdraw its complaint. The Thai authorities duly issued a cessation order in respect of the fraud charges on the basis of the defendant’s withdrawal of his complaint and later issued a non-prosecution order in respect of the forgery charges on the basis of a lack of evidence. It was not in dispute that the defendant had informed the Thai authorities that it was withdrawing the complaint because it had settled its disputes with the plaintiff and its related parties. Unfortunately, after the

⁹ This is further exacerbated by the trend to criminalise certain facets of corporate law behavior. See the comments found in Alexis Moure, “Arbitration and Criminal Law” in Mistelis & Brekoulakis, *supra* note 1 at 208.

¹⁰ See, for example, Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell: 2003) (“Redfern & Hunter”) at 149.

¹¹ [2010] 4 SLR 649

cessation and the non-prosecution orders had been issued, the plaintiff refused to terminate the arbitration proceedings.

The defendant then tried to enforce the further agreement that had been reached by applying on its own motion to terminate the arbitral proceedings on the basis that the further agreement constituted a full and final settlement of all pending claims. In response, the plaintiff argued that the further agreement was unenforceable for duress, illegality and/or undue influence. The parties eventually agreed that the arbitral tribunal that had been convened in relation to the original arbitral proceedings (in Singapore) would be tasked with determining the validity of the further agreement. The arbitral tribunal concluded that there had been no illegality on the face of the further agreement. The tribunal also noted the distinction between the compoundable fraud charge and the non-compoundable forgery charge and observed that in relation to the potentially problematic forgery charge, the prosecutor, in issuing the non-prosecution order, retained the right to continue the investigation and so on no basis could it be said that the defendant's withdrawal of the complaint was illegal. The further agreement had been drafted and negotiated with the help of legal advisors who appear to have taken pains to ensure that as drafted, the further agreement contained no contractual obligation on the part of the defendant to procure the cessation of the criminal proceedings – just to withdraw the complaint. The tribunal accordingly held in favour of the defendant that the substantive dispute was compromised by the further agreement which constituted a final and binding agreement between the parties and which was not void for illegality.

The plaintiff applied to the High Court to set aside the award on the premise that it was against public policy to uphold an illegal agreement which had been entered into with a view to stifling prosecution. There is a measure of cynicism in this since the prosecution in question would have been against the plaintiff's sole director and shareholder, and plainly, it was at the plaintiff's behest that the agreement had been reached in the first place. Secondly, it will be noted that unlike most cases where questions of illegality arise, this arbitration and this tribunal had been tasked to answer the very question which the court was then being invited to second-guess, namely, whether the further agreement was tainted by illegality. The answer to this was largely a matter of interpreting the further agreement. Having found that it did not like the tribunal's answer, the plaintiff then wanted in effect to appeal that finding to the High Court.

The High Court saw the matter as encompassing two conflicting considerations that were pulling in opposite directions – on the one hand, the “need to uphold the public interest in ensuring the finality of arbitral

awards”; and on the other, “the countervailing public interest in ensuring that its processes are not abused by litigants”. In striking what it felt was the appropriate balance between these competing considerations, the Court concluded that the tribunal’s finding that the further agreement was not illegal was not conclusive, and held that in the appropriate circumstances, it retained the power to exercise its supervisory jurisdiction to examine the facts and to assess afresh the issue of illegality.

The High Court held that the tribunal was wrong in finding that the agreement was not illegal, and that failing to set aside the award would be to allow the Court process to be used to legitimise and enforce such an illegal contract breaching the public policy of Thailand. This was extended to the public policy of Singapore on the basis of conceptions of international comity.

On appeal, the Court of Appeal¹² (“*AJU v. AJT*”) reversed the decision of the High Court. In gist, the Court of Appeal took the view that the tribunal’s findings *vis-à-vis* the parties’ motivations for entering into the further agreement constituted a finding of fact that was final and binding on the parties. In its view, the High Court should not have reopened the tribunal’s findings on this point since “public policy, based on the alleged illegality of the [further agreement], was not engaged by such findings of fact.” The Court opined that was particularly so given the “reality that where an arbitral tribunal has jurisdiction to decide any issue of fact and/or law”, the Court should refrain from interfering with the decision arrived at, however seemingly erroneous it may be, unless the decision was tainted by fraud, breach of natural justice or any other vitiating factor. The Court of Appeal, however, took pains to emphasise that if the tribunal had, in fact, erred in its comprehension of the contours of public policy and as a result arrived at an erroneous conclusion as to the legality of the further agreement, it retained a supervisory power to correct the tribunal’s decision for “the Court cannot abrogate its judicial power to the tribunal to decide what the public policy of Singapore is”.¹³

On a broad level, there is considerable merit to the Court of Appeal’s conclusion that the High Court should not have reopened the tribunal’s findings. As a general proposition, it is difficult to quarrel with the contention that it would be against public policy to *stifle* prosecutions. Nonetheless, as the Court of Appeal observed, *on the facts*, this principle was never implicated in this case. The decision of the tribunal turned not on a misappreciation of the contours of public policy *vis-à-vis* the stifling of prosecutions but on its view that the further agreement did not necessitate

¹² *AJT v. AJU* [2011] 4 SLR 739

¹³ See *AJU v. AJT* at [62]

any illegal conduct on the part of either party. Such a conclusion appears to have been manifestly supportable on the evidence before the tribunal. Indeed, the evidence available does not point to the Thai authorities having been unduly perturbed. The defendant had fully set out the position in its letter to the police and indicated that its wish to withdraw the proceedings arose from the fact that the parties had settled their differences. The police were perfectly content to acquiesce in this and in any event, as the arbitral tribunal had noted, the Public Prosecutor of Thailand retained the ability to pursue the criminal complaint if it wished. Seen from that perspective, the High Court, in its anxiety not to undermine the perceived public policy interest in not interfering with the criminal process, appeared to arrive at a result that ended up giving the plaintiff the best of all worlds. The plaintiff in effect successfully derailed the criminal proceedings that had been initiated against its principal and at the same time, was able to pursue its claim against the defendant. It is difficult to see how the plaintiff could legitimately raise a public policy interest against the alleged stifling of a prosecution that it had actively wanted (and tried) to stifle.

Perhaps most importantly, the High Court's conclusion that it retained the ability to reconsider the merits of the decision as to the construction and hence the illegality or otherwise of the further agreement seems open to question. As noted earlier, the Court of Appeal took issue with the High Court's approach on this front, opining that the question that was properly before the tribunal did not implicate issues of public policy. The Court of Appeal characterised the question as being that of whether the further agreement required the execution of any illegal act. I question this characterisation in that this question seems to be primarily one of *interpretation* rather than a *factual* one. In my view, a more fundamental objection could be made to the High Court's apparent willingness to revisit the matter of the tribunal's construction of the further agreement: the question of its construction (and by extension, whether it was illegal or otherwise) was the very decision that the tribunal was asked to make and did make. The tribunal ruled that on a proper construction, it was not. Accordingly, the issue before the Court was never whether the further agreement was illegal but whether the award holding that it was not should be set aside. The High Court did refer to the English Court of Appeal decision of *Soleimany v. Soleimany*¹⁴ ("*Soleimany*") and the two-stage test that was suggested there as the framework which should guide a Court in approaching any question on illegality that may have been considered by an arbitral tribunal. But, as the Court of Appeal rightly observed, *Soleimany*

¹⁴ [1999] QB 785

concerned a very unusual set of facts where the illegality infecting the transaction was never in dispute. In fact, the English Court of Appeal had taken pains to emphasise that it was dealing with an award that had found as a fact that it was the common intention of the parties to commit an illegal act but the agreement was nonetheless enforced on the basis that it was governed by a choice of law under which this illegality would not have affected the rights of the parties.¹⁵ There had, therefore, been no question in *Soleimany* of second-guessing the arbitrator's award on whether the agreement was illegal. Rather, the question in *Soleimany* was whether the award, which plainly recognised that the agreement was illegal but nonetheless held that it should be enforced, should itself be upheld.

Moreover, on a closer scrutiny of the English Court of Appeal's *dicta*¹⁶ in *Soleimany* that in order to avoid re-litigating matters that have already been canvassed before the tribunal, a two-stage test should be undertaken to ascertain whether any decision on the lack of illegality had been properly reached by an arbitral tribunal, I doubt that the Court in that case would have contemplated the second-guessing of the very decision that the tribunal had been asked to decide. Under the two-stage test, the Court must first enquire whether the award should be given full faith and credit and in this respect it seemed to think that where the tribunal has expressly found that the contract is not illegal then that decision should be given due credit. It bears noting that immediately after this *dicta*, the Court had observed that such an approach would accord with the rule that there can be a *bona fide* compromise or settlement as to whether a contract is illegal.¹⁷ If this is so, why should a finding by an arbitrator on this same question be any less valid and binding on the parties?

In *AJT v. AJU* where the primary or sole question before the tribunal related to whether the agreement was illegal or otherwise, I do not think that the High Court could properly have gone behind the finding of the tribunal on the basis of the two-stage inquiry. In doing so, it was in effect entertaining an appeal against the tribunal's decision on the core question of whether the further agreement was illegal and it had no basis for doing this. The only other way the Court might have approached the issue would have been to say that the question whether the agreement was contrary to law was not arbitrable. This was never presented as the basis for

¹⁵ See *Soleimany* at 797B and 794G-H.

¹⁶ The Court took pains to highlight that its position was not intended to be determinative since on the facts of the case, it was not in dispute that the contract that was the subject of arbitration was illegal. As Waller LJ observed at 800, it was unnecessary to "propound a definitive solution to this problem, for it does not arise in the present case."

¹⁷ *Soleimany* at 801 *et seq.*

the decision of the High Court and had it been, I do not think it would have fared any better. The further agreement contemplated, among other things, the defendant withdrawing its complaint and if this resulted in the termination of the criminal proceedings, then the original arbitration proceedings would be compromised. There had been no deception or want of candour in dealing with the Thai police. In these circumstances, it is difficult to see how the question whether this was or was not an illegal agreement implicated any question of public interest that would have rendered it inappropriate for resolution by arbitration.

Of course, the propriety of the two-stage test in *Soleimany* remains open to question and has been criticised elsewhere in light of the fact that the line between a preliminary review and a complete reopening of the case on the merits is not always apparent.¹⁸ In *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd.*¹⁹ (“*Westacre*”), for example, a subsequent panel of the English Court of Appeal expressed its reservations with the *Soleimany* test, observing that it had “some difficulty with the concept and even greater concerns about its application in practice.”²⁰ More recently, the English Commercial Court in *R v. V*²¹ observed that the inherent difficulty “with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go”.²² I should also add that the Court of Appeal in *AJU v. AJT* appeared to be appreciative of the problems expressed in these cases *vis-à-vis* the two-stage test in *Soleimany* but did not appear to go as far as to expressly offer any determinative views on it.²³

Whatever the problems plaguing the two-stage test in *Soleimany*, however, there is significant merit to the argument that where any allegation of illegality or impropriety has been canvassed at length before the tribunal, and has been duly dismissed, a court should be extremely slow to scrutinise the underlying merits of such a determination. The observations of Mantell LJ (at 316) in *Westacre* are particularly apposite:

¹⁸ See Jacob Grierson, *Commentary – Court Review of Awards on Public Policy Grounds*, (2009) 24 Mealey’s International Arbitration Report 1 at 4.

¹⁹ [2000] QB 288

²⁰ *Westacre* at 316 *per* Mantell LJ.

²¹ [2008] EWHC 1531

²² *R v. V* at [30].

²³ I say this because the Court of Appeal in *AJU v. AJT* had, in its discussion, at [45] to [52], considered the decisions of *Soleimany* and *Westacre* at some length, but appeared to focus largely on the differing approaches taken by these cases *vis-à-vis* questions of fact, as opposed to the propriety or feasibility of the two-stage test. As I have noted earlier, the determination of the arbitral tribunal in *AJT v. AJU*, was, strictly speaking, an interpretative exercise.

“[F]rom the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed...Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.”

Similar sentiments were echoed in *R v. V*. In that case, the Court, at [30], had observed that where the arbitrators had expressly found that the contract was not illegal, the arbitrators were sufficiently competent and where there was nothing to suggest that the award had been procured in bad faith, the Court should be wary of second-guessing the determination of the arbitral tribunal and should accord such determinations full faith and credit.

The merits of such an approach are particularly obvious when the matter is viewed through the lenses of the parties’ commercial expectations. When the parties agree to arbitrate a particular dispute, they essentially do so on the premise that the tribunal is (or will be) sufficiently well-placed, and qualified, to decide the dispute on its merits. Recent jurisprudential developments in England have highlighted the importance of not frustrating the rational commercial expectations of businessmen by interpreting the scope of arbitration agreements *in vacuo*.²⁴ So too an argument of considerable force can be made that courts, in order to ensure that the commercial expectations of the contracting parties are met, should accord due deference to a tribunal’s determination as to the legality of an agreement where there is no reason to believe that such determination is anything but *bona fide*. Any other approach would run counter to the perception that:²⁵

“...so far as international arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal even if it is wrong, so long as the correct procedures are observed. If a court is allowed to review this decision on the law or on the merits, the speed and, above all, the finality of the arbitral process is lost. Indeed, arbitration then becomes merely the first stage in a process that may lead, by way of successive appeals, to the highest appellate court at the place of arbitration...”

²⁴ See *Fiona Trust & Holding Corporation & Others v. Privalov & Others* [2007] 4 All ER 951 at [7] *per* Lord Hoffman.

²⁵ See Redfern & Hunter, *supra* note 10 at 432.

There are, of course, logical limits to this principle. In the Singapore context, for example, where the upholding or recognition of an award would violate the forum's most basic notion of morality and justice, or otherwise shock the conscience, the Courts have made it amply clear that they can, and will, review the propriety of the reasoning that led to the award.²⁶ In the same vein, the Courts should have little hesitance in intervening where an arbitral tribunal arrives at an erroneous conclusion of the illegality of a contract as a result of a misguided understanding of the contours of public policy in Singapore. As the Court of Appeal in *AJU v. AJT* observed, the Courts remain the final arbiter as to the proper contours of public policy in a particular jurisdiction.²⁷ It must be stressed, however, that these situations are by far the exception, not the norm, and it would only be in the most exceptional of circumstances that the Courts would intervene. The restrained approach of the Singapore Courts reflect their appreciation of the reality that errors of fact and law serve as a prosaic feature of international arbitration, and it would unduly impair the efficacy of arbitration as a dispute resolution platform if the Courts were to intervene in every situation where it might have arrived at a different conclusion from the arbitral tribunal. As Quentin Loh JC (as he then was) quite succinctly puts it, albeit in the context of the enforcement of awards made in a different jurisdiction:²⁸

“...[it] is worth remembering that just as parties who have chosen arbitration must live with their arbitrator, ‘good, bad or indifferent’, our courts may be called upon to enforce ‘bad’ awards....”

In the final analysis, the long journey that the parties had to traverse in *AJT v. AJU* before the matter of the propriety of the award arising out of the further agreement was resolved serves as a useful reminder of the need to be sensitive to the subject matter of disputes. The more it concerns matters of public interest or the interests of parties other than the arbitrants, the greater, perhaps, might be the risk of the Courts straining not to uphold the finality of arbitration (as was the case in the High Court in *AJT v. AJU*).

²⁶ See the comments of the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR(R) 597 at [57] to [59].

²⁷ This is particularly so in light of the fact that how public policy might affect arbitrations is seldom a static concept and may morph over time. See Steven Gee QC, “The Autonomy of Arbitrators, and Fraud Unravels All” (2006) 22 *Arbitration International* 337 at 338.

²⁸ See *Strandore Invest A/S and Others v. Soh Kim Wat* [2010] SGHC 151 at [24].

V. INTERNAL CORPORATE DISPUTES

What about disputes that arise within companies? Do these pose any problems in the context of arbitrability?

In *Four Pillars Enterprises Co. Ltd. v. Beiersdorf Aktiengesellschaft*²⁹ (“*Four Pillars*”), the Singapore Court of Appeal was asked to stay subsisting winding-up proceedings in favour of arbitration.³⁰ The appellant and respondent had been joint venture partners in a company. Unfortunately, differences between them emerged. This, coupled with the increasingly bleak financial prospects for the joint venture, led to the respondent filing a petition seeking the winding up of the joint venture. The appellant applied to stay the petition relying on the existence of the arbitration agreement. The application was dismissed at first instance.

On appeal, the Court of Appeal took the view that the respondent had a *statutory right* to present a winding-up petition and that the arbitration clause could not encumber this right. Moreover, the relief sought (namely an order for winding up of the company) was *not one available in arbitration*. Furthermore, on the facts of the case, as the joint venture company itself had not been a party to the arbitration agreement between the appellant and respondent, there was no room to grant a stay, since the action before the Court did not relate to legal proceedings between the appellant and respondent *inter partes*, but had been one taken by one of the parties *against* the joint venture company, a separate legal personality.

Four Pillars presents a good canvas on which to sketch out some of the issues that might arise in relation to the arbitrability of *intra*-corporate disputes. In my view, the case correctly sets out some parameters.

- First, *some* forms of intra-corporate disputes plainly are ill-suited to being resolved in arbitration because they call for remedies that would have the effect of defining the rights of the parties *in rem* rather than *inter partes*.³¹

²⁹ [1999] 1 SLR(R) 382

³⁰ It may be noted in passing that *Four Pillars* was decided on the basis of the Arbitration Act, even though the facts suggest that the dispute should have in fact been under the jurisdiction of the International Arbitration Act. See Lawrence Boo, *Halsbury's Laws of Singapore*, Vol. II (Arbitration) (Butterworths: 2003 Reissue) at [20.045], in particular footnote 4. However, nothing turns on this for present purposes.

³¹ Under Section 12(5)(a) of the International Arbitration Act, an arbitral tribunal “may award *any* remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court”. The provision has not been the subject of judicial pronouncement but it has never been suggested that this provision

Thus, arbitration may be inappropriate where the tribunal is not empowered to provide some of the possible remedies that would conventionally be available if the matter were being adjudicated in a court.

- Second, occasionally, the resolution of such internal disputes may implicate the rights of third parties. As the authority of the arbitrator is derived solely from the consent of the parties embodied in the arbitration agreement, the tribunal would not be ideally placed to make a decision that binds third parties, including, for instance, creditors.

In *Four Pillars* there was an overlap of insolvency issues and internal squabbling between the joint venture partners. The latter type of issue can sometimes arise without any overlay of insolvency – say, for example, in cases involving minority shareholder oppression by a majority shareholder. Minority shareholders have a statutory right in Singapore, and in many other places, to apply to the Court if the affairs of the company are being conducted in a manner that is oppressive or in disregard of their interests in a manner which is unduly prejudicial or unfairly discriminatory against them.³²

One possible objection against arbitration in this setting is the fact that one of the remedies that is legislatively prescribed and available in such cases is the winding up of the company.³³ Although there is a paucity of jurisprudence on the point, one commentator has suggested that this should not serve as a bar against arbitration but merely indicates the unavailability of the remedy should parties opt for arbitration.³⁴ This position has been

serves as a *carte blanche* for allowing arbitral tribunals to make pronouncements that potentially impacts non-parties to the arbitration agreement.

³² Section 216 of the Companies Act (Cap. 50, 2006 Rev. Ed.).

³³ Section 216(2)(f) of the Companies Act. In a related vein, at least in the context of joint ventures, a minority shareholder in one of the companies which is a shareholder in the joint venture cannot rely on an arbitration agreement found in the joint venture agreement and also cannot commence or intervene in a derivative action by way of arbitration: see *Kiyue Co. Ltd. v. Aquagen International Pte. Ltd.* [2003] 3 SLR(R) 130 and *Jiang Haiying v. Tan Lim Hui and Another Suit* [2009] 3 SLR(R) 13.

³⁴ See Michael Hwang, “The Prospects for Arbitration and Alternative Dispute Resolution Supplement to Programme Statement for Corporate Governance and Arbitration of Company-Law Disputes”, Presentation at the 6th Asian Roundtable on Corporate Governance, 2 November 2004, available at <http://www.oecd.org/dataoecd/42/34/33962683.pdf>.

buttressed by recent jurisprudence from England.³⁵ I have some misgivings about this.

The position appears to be that an arbitrator cannot make an order for the winding up of a company or for its compulsory dissolution. But it is said that as long as such a remedy is not sought and as long as no third parties are bound by the award, there is no difficulty with allowing a dispute founded on unfair or oppressive treatment to be resolved by arbitration. But arbitration is generally meant to provide an alternative *forum* for dispute resolution – it is not generally the case that arbitrants should face a different corpus of law to resolve their disputes. Yet, this would be the effect of saying that such internal disputes should remain arbitrable albeit without the tribunal having the power or option to order winding up when this can sometimes constitute the singular just remedy in cases involving intractable management disputes, and where the working relationships between the shareholders and managers have irretrievably broken down.³⁶ Indeed, the substantive law is that winding up is an equal option at the disposal of the Court in such cases.³⁷ And what if the decision, though only affecting the parties before the tribunal, has significance to other members of the company who are similarly situated but not party to the decision and hence not bound by it?

Furthermore, what if the arbitral tribunal concludes that indeed, winding up would be the appropriate remedy? Should it stay the arbitration to allow the parties to make the requisite application to the Court? But what if the Court then concludes that a winding up order is not the most just and equitable order to be made after all? And what of the fact, as illustrated by the recent Court of Appeal decision of *Over & Over Ltd. v. Bonvests Holdings Ltd. and another*³⁸, that even where the most appropriate relief

³⁵ See, for example, the recent decision of the English High Court in *Fulham Football Club v. Sir David Richards & Anor.* [2010] EWHC 3111 (Ch) (“*Fulham v. Richards*”), in which the Court adopted the view that as long as the remedy being sought by a party can be granted by the arbitrator, and will not strictly bind third parties, such a dispute can be the subject of arbitration. In that case, the Court took the view that the statutory right of a member of a company to present an unfair prejudice petition can be removed or distinguished by contract. It may be possible to take issue with the reasoning employed in *Fulham v. Richards*, insofar as the Court there may have struck the balance between party autonomy and public justice too much in favour of the former, especially in light of the Court’s apparent recognition (at [82]) that the arbitrations could be compromised if other parties were not able, or willing, to become party.

³⁶ See, for example, *Low Peng Boon v. Low Janie* [1999] 1 SLR(R) 337.

³⁷ If so, this might be argued to be contrary to the duties that it would be expected to uphold since a Court in an analogous position would be expected to consider the viability of all the options available under law, with each of the options ranking “equally” with the others: see *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 MLJ 227.

³⁸ [2010] 2 SLR 776

might not be the winding up of the company, it may nonetheless be necessary for winding up to be imposed *as an alternative final remedy*, so as not to give leaden feet to the primary remedies imposed by the Court? Absent an analogous ability to impose such coercive measures, an arbitral tribunal may find that it just cannot solve such problems as well as the courts might be able to.

Unfortunately, the problems plaguing arbitrations involving allegations of oppression transcend situations where winding up may represent the most equitable solution. The contractual nature of arbitration imposes considerable limits to its efficacy in situations where third parties are potentially involved – for instance, while it would be open to the Court, in appropriate circumstances, to allow a joinder of non-parties in oppression proceedings,³⁹ the same cannot be said of arbitral tribunals. This has severe implications given that many of the remedies that arise in such proceedings potentially impact third parties. A couple of examples might be helpful. Any order compelling the company to purchase shares from the oppressed party would, in all likelihood, have to be accompanied by an order for the reduction of the capital⁴⁰ of the company.⁴¹ What if the company is not party to the proceedings? And even if it were, what of the interests of its creditors? Similarly, any arbitral award made against a shareholder *per se* would, strictly speaking, not bind any of its nominees *qua* director.⁴² Furthermore, unless the submission to arbitration is extended to them (by the consent of all the parties concerned), it would also appear to be the case that debenture holders cannot initiate, or become parties to, arbitrations involving oppression proceedings,⁴³ even though they possess the statutory

³⁹ See *Chong Hon Kuan Ivan and another v. Levy Maurice and others* [2004] 1 SLR(R) 545 at [6]. It must be noted, however, that such a power is to be exercised sparingly: see the comments of the High Court in *Ng Sing King and others v. PSA International Pte. Ltd. and others* [2003] 3 SLR(R) 591.

⁴⁰ Indeed, Section 216(2)(e) of the Companies Act expressly caters for such a scenario.

⁴¹ This is an order that, by definition, impacts the rights of third parties since companies are generally not allowed, or expected, to return capital to its members. In this connection, a distinction ought to be made between the dissipation of assets through the normal course of business (which is a risk that all creditors must implicitly be taken to bear), and the return of assets to its members (which is *not* a risk that creditors are generally expected to bear). See Tan Cheng Han, ed., *Walter Woon on Company Law*, 3rd ed. (Sweet & Maxwell: 2009) at [12.7].

⁴² See *Hickman v. Kent or Romney Sheepbreeders' Association* [1915] 1 Ch 881. There are, of course, ways to minimise the harshness of this principle – for example, the arbitral tribunal might require that the shareholder involved in the arbitration support a resolution that forces the director to take certain steps or actions to give effect to the arbitration award.

⁴³ In this connection, it would be a stretch to argue that the debenture holder would be able to avail himself of the powers of an entity claiming “through or under a party” to an

right to initiate analogous court proceedings.⁴⁴ What these illustrations suggest is that the efficacy of arbitration may, in many cases involving allegations of oppression, be considerably impaired given its consensual and contractual underpinnings. This gives rise to a category of cases where arbitrability remains relevant in my view. Undoubtedly, there will be many disputes within companies which have no direct impact on third parties and there would appear to be no reason why such disputes cannot or should not be arbitrated. In these cases, the key consideration is not that it is a dispute between shareholders but *whether the type and magnitude of the relief sought (or potentially available)* is incompatible with the fact that an arbitral tribunal, a contractual creature, cannot generally bind third parties. Thus, there is no reason why an arbitrator or arbitral tribunal should not be allowed to order specific performance (or some other *personal* remedy).⁴⁵ As one commentator observed, in many jurisdictions, as is the case in Singapore,⁴⁶ disputes encompassing a non-monetary dimension such as the interpretation of the articles of association or incorporation would be considered largely uncontroversial and will be perfectly capable of being resolved by arbitral tribunals,⁴⁷ so long as all the affected parties are parties to the arbitration.

arbitration agreement (*see* Section 6(5) of the International Arbitration Act) in order to enforce the said arbitration agreement.

⁴⁴ Section 216 of the Companies Act expressly extends itself to the holder of a debenture of the company.

⁴⁵ Of course, whether it makes sense to order specific performance or some other non-monetary orders would turn largely on the facts of each case. For a deeper discussion, in particular, on the particular problems relating to orders of specific performance, *see* Alexis Mourre, “Judicial Penalties and Specific Performance in International Arbitration” in Filip De Ly & Laurent Lévy, *Interest, Auxiliary and Alternative Remedies in International Arbitration* (ICC: 2008) 53.

⁴⁶ To state one example, in the recent decision of *Sinwa S.S. (H.K.) Co. Ltd. v. Morten Innhaug* [2010] 4 SLR 1, the High Court appeared to implicitly adopt the position that the construction of the proper scope of the powers of party-appointed directors, in a dual-shareholder company, can be the proper subject matter of arbitration.

⁴⁷ *See* Pilar Perales Viscasillas, “Arbitrability of (Intra-) Corporate Disputes”, in Mistelis & Brekoulakis, *supra* note 1 at 284. Of course, for this to be effective, the arbitration clause would presumably be agreed upon by all of the shareholders. One possible way might be to include such arbitration agreement in the articles of association, failing which the interpretation proffered by the Tribunal would be of little value since it only binds the parties *inter se*, and is not binding on the rest of the shareholders.

VI. DISPUTES INVOLVING INSOLVENT OR BANKRUPT COMPANIES

I turn finally to the arbitration of disputes *vis-à-vis* insolvent or bankrupt companies. It is a relatively uncontroversial proposition in most jurisdictions that “pure” insolvency issues, or issues concerning the appointment of an administrator or trustee, would not be arbitrable. On the other hand, arbitral awards obtained *before* insolvency are enforceable in ensuing bankruptcy proceedings in the same manner as a debt owed to a creditor can be enforced, subject of course to the overarching scheme of debt rearrangement or settlement under the auspices of the relevant bankruptcy framework.

There is, however, a lack of unanimity on the more intricate question of whether it would be possible to *commence* arbitration proceedings against (or by) an insolvent party. Put another way, would a dispute become *ipso facto* non-arbitrable by virtue of the insolvency of one of the parties? At one level, this seems to focus on the status of the corporate arbitrant rather than on the nature of the issue raised or the remedy sought. The underlying *raison d’être* of an insolvency framework is to compel parties to resolve disputes in a centralised forum under court supervision so as to minimise the unnecessary “leakage” of funds and to salvage whatever residual value remains within the company for the benefit of its creditors. Arbitration, on the other hand, rests on a decentralised consensual platform for dispute resolution founded on holding parties to their agreement.⁴⁸

Given the countervailing considerations, it would be unsurprising to note that different jurisdictions have arrived at quite distinct conclusions as to how appropriate balance is to be struck.

To understand Singapore’s position, it would be helpful to sketch out some aspects of the domestic insolvency framework. First, leave of court is necessary before a party would be allowed to proceed with or commence any action *against an insolvent company* or a company which has appointed a provisional liquidator.⁴⁹ In assessing whether to grant

⁴⁸ See in this connection the comments of the Bankruptcy Court in *SONATRACH v. Distrigas* 80 B.R. 606, 610 (D. Mass.: 1987). See also the comments of Tan Lee Meng J in *Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) v. Larsen Oil and Gas Pte Ltd* [2010] 4 SLR 501 and the comments of V. K. Rajah JA in *Larsen Oil and Gas Pte. Ltd. v. Petroprod Ltd. (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414.

⁴⁹ As for actions *by* the company, under Section 272(2)(a) of the Companies Act, the liquidator is empowered to bring any legal proceedings on behalf of the company though

leave, the Court is primarily concerned with whether it would be just and equitable in the circumstances to allow such proceedings to commence or continue, and in this, it is guided by the underlying consideration of whether the proposed action “raises issues which can be (more) conveniently decided in the course of the winding up”.⁵⁰ The question of arbitrability is a *secondary* enquiry that is only engaged when leave is, in fact, granted. The former inquiry focuses on the merits of allowing the substantive claim to be adjudicated other than in the context of assessing the proofs of debt filed as part of the insolvency framework; the latter considers the proper forum for doing so.

The position in Singapore on the arbitrability of disputes involving parties in insolvency has only recently been the subject of judicial pronouncement by the Court of Appeal in *Larsen Oil and Gas Pte. Ltd. v. Petroprod Ltd. (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)*⁵¹ (“*Larsen Oil and Gas*”). The case sheds considerable light on the rights of parties to seek arbitration in an insolvency setting. The respondent company, which was in liquidation in Singapore, filed a suit against the appellant alleging that certain transactions entered into between them had been either undervalued or constituted unfair preferences in contravention of bankruptcy laws. The suit was filed with a view to recovering the payments the respondent had made to the appellant. The appellant applied for a stay of the proceedings, on the ground that there was a valid arbitration agreement between the parties. One of the questions that arose squarely for the determination of the Court was whether the transactions in question constituted unfair preferences or were undervalued and hence, prejudicial to the pool of other creditors and liable to be “clawed back”. Was this a question that capable of being arbitrated?

At first instance, the High Court concluded that such a dispute was *not arbitrable*. In its view, there was a distinction between “core” and “non-core” insolvency claims, noting that only the former would not be arbitrable. In determining whether the claim in question was “core” or “non-core”, the High Court adopted the position advanced elsewhere in the Commonwealth of assessing the matter by applying a “cause of action” analysis. Simply put, a claim would be arbitrable if the party’s rights to

it is open to creditors and other interested persons (pursuant to Section 272(3)) to apply to the Court to question the exercise of such discretion.

⁵⁰ *Re Exchange Securities & Commodities Ltd.* [1983] BCLC 186 at 195h-196b, as reproduced in *Jumabhoy Rafiq v. Scotts Investment (Singapore) Pte. Ltd. (in compulsory liquidation)* [2003] 2 SLR(R) 422 at [15].

⁵¹ [2011] 3 SLR 414

such claim, or cause of action, arose *independent* of the liquidation.⁵² The converse would also be true – the claim would not be arbitrable if the party’s rights accrued *as a result of* the liquidation. In the circumstances before the Court, as it was clear that any claim for undue preference and undervalued transactions arose *solely by virtue* of the fact that the respondent had been in liquidation (under Singapore law, no cause of action accrues for such claims if a company is solvent), the claim was held not to be arbitrable.

On appeal, the Court of Appeal affirmed the decision of the High Court on two distinct, and alternative, threads of reasoning. The first pertained to an issue of construction, *i.e.*, that, in its view, the claims in question did not fall within the auspices of the arbitration agreement. That, in itself, would have been sufficient to dispose of the matter. Nonetheless, as the matter of the interplay between domestic bankruptcy and arbitration laws had, hitherto, not been considered by the Singapore Courts, the Court of Appeal indicated that it felt it necessary to confront the question of whether insolvency-related claims were even arbitrable to begin with. On this front, the Court of Appeal surmised that the subject matter of the dispute would have rendered it non-arbitrable. It ought to be observed that in coming to this conclusion, the Court of Appeal added a gloss to the principle that had been applied by the High Court, as elucidated upon in the preceding paragraph. Although it agreed that there should be a bifurcation between “disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime”, insofar as disputes arising from the rights that accrue as a result of insolvency are *ipso facto* not arbitrable, it did not necessarily follow that all disputes that arose out of pre-insolvency rights and obligations can and ought to be arbitrated. Instead, the Court impressed the point that *vis-à-vis* the matter of the arbitrability of disputes arising out of pre-insolvency rights, the question that had to be resolved was whether it would affect the *substantive rights* of creditors – it is only if arbitration would not affect such rights that it would remain arbitrable. On the facts of this case, however, it was not necessary to determine whether this was the case – as the claims in question had arisen as a result of the respondent’s insolvency, the Court of Appeal concluded that the matter was necessarily non-arbitrable.

Larsen Oil and Gas informs our understanding of the interplay between insolvency and arbitration in at least two ways. First, it serves to clarify the fact that a party’s insolvency *per se* does not serve as an absolute

⁵² See the New South Wales Supreme Court decision in *New Cap Reinsurance Corporation Limited v. A. E. Grant & Ors., Lloyd’s Syndicate No. 991* [2009] NSWSC 662.

bar from being able to advance a claim in arbitration.⁵³ Indeed, the High Court took pains to observe that the other claims that had been made by the respondent company (that, in its view, had arisen *independent* of the existence of the liquidation) *should ideally have been resolved by way of arbitration*, as had been requested by the defendant, notwithstanding the plaintiff's insolvency, but nonetheless declined to stay the court proceedings having regard to the interest in dealing with all the claims in one forum to ensure that inherently irreconcilable decisions do not ensue. Although it disagreed with the characterisation of the High Court of such claims as having arisen independently of the existence of the liquidation, the Court of Appeal, in an implicit endorsement of the proposition that the fact of insolvency does not *per se* frustrate existing arbitration agreements, concluded that where agreements involving insolvent parties pertained to the resolution of prior private *inter se* disputes, "there will usually be no good reason not to observe the terms of the arbitration agreement." *Larsen Oil and Gas* thus affirms the Court's desire to remain faithful to the parties' legitimate expectations to have their disputes resolved by arbitration, notwithstanding one party's insolvency.

Secondly, *Larsen Oil and Gas* also clarifies that arbitrability in this context will be determined by the application of a two-tiered test. The analysis commences with the application of the cause of action test. Does the cause of action arise solely from the insolvency or is it independent of that? If the cause of action arises solely out of the insolvency, then the analysis ends there and the dispute would be *ipso facto* non-arbitrable. Nonetheless, even if it could be said that the cause of action arises independently of the insolvency, the secondary enquiry that has to be entered into is whether any arbitration would affect the substantive rights of other creditors. If so, then notwithstanding the fact that the cause of action is independent of the insolvency, the dispute would be non-arbitrable. The secondary enquiry is, of course, nothing more than the corollary of the trite principle in arbitration that had been discussed earlier – that the authority of an arbitral tribunal is derived from the consent of the parties, and as such, it possesses no power to bind, or affect the substantive rights of, third parties.

In the context of *Larsen Oil and Gas*, the result arrived at by the Court of Appeal was undoubtedly correct. Any claw-back would have directly affected other creditors and it was therefore appropriate that the issue be reserved to the Court. This result does not, of course, militate

⁵³ That there is no bar against arbitral proceedings during insolvency is further supported by the fact that under Section 148A of the Bankruptcy Act (Cap. 20, 2009 Rev. Ed.), the adoption of a contract would mean that the accompanying arbitration agreement (if any) would serve to bind the Official Assignee.

against the fact that “non-core” claims that are not borne out of the liquidation proceedings and that possess no impact on the substantive rights of creditors (one example might be a contractual claim of damages on an existing contract) can continue to be resolved by arbitration.

An appreciation of how each of our respective regimes handles claims in relation to insolvent companies, or companies in the course of winding up, is important: indeed, recent developments and in particular the 2008 financial crisis plainly illustrate the interconnected nature of contemporary commerce and underscores the importance of a coherent and consistent approach in resolving issues of arbitrability of disputes involving insolvent companies. The collapse of Lehman Brothers, for example, demonstrates the cascading effect of financial failure, with the bankruptcy of the global financial conglomerate in the United States precipitating the bankruptcy of more than eighty related entities spanning twelve different jurisdictions.⁵⁴ Such a complex interconnected web of related companies with branches all over the world emphasises the point that the line between domestic and international enforcement is porous, if not non-existent; invariably, arbitration proceedings in one jurisdiction will have to be enforced in any number of different jurisdictions. The upshot of that reality is that the determination of the arbitrability of a claim against an insolvent entity in one jurisdiction may well have a significant impact in another. Seen in that light, the approach each jurisdiction takes on how it deals with insolvency arbitrations would be of considerable significance for many other jurisdictions. It bears noting that in *Larsen Oil and Gas*, the insolvent company had been subject to *two ongoing liquidation proceedings* that had been concurrently taking place in both Singapore *and* the Cayman Islands.

VII. CONCLUSION

As has been suggested elsewhere, in light of the general trend worldwide to favour arbitrability, the continuing significance and importance of arbitrability should not be overstated.⁵⁵ Indeed, in an aptly titled commentary, “The Death of Inarbitrability”, one commentator analysing the international trends concludes that the kind of rights capable of being arbitrated has increased so much in scope over the past few years that “the

⁵⁴ See Mike Spector & Jeffrey McCracken, *Lehman Units Argue Bankruptcy*, Wall Street Journal, May 26, 2009.

⁵⁵ See Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards* (Cameron May: 2001) at [2.3.7]. See also Redfern & Hunter, *supra* note 10 at 154, in which the authors note that its “significance...should not be exaggerated. It is important to be aware that [arbitrability] may be an issue, but in broad terms most commercial disputes are arbitrable under the laws of most countries”.

concept of arbitrability...has virtually died in real arbitral life.”⁵⁶ While it may be stretching it somewhat to suggest that the concept is dead, it is certainly no longer a significant restraint on the ability of parties to resolve their disputes by arbitration.

As we look ahead, perhaps the best takeaway from conferences like this would be to see the emergence of a consensus of what the concept should mean and how it should be applied. There is a benefit in having the same sort of harmonisation in defining the content and limits of arbitrability as has emerged in many other areas of arbitration. Taking one example, should an arbitral tribunal sitting in Mauritius give weight to the fact that Mauritius might view the issue as non-arbitrable, although the assets for which enforcement is envisioned are to be found in one or more jurisdictions that are likely to take the opposite view? In light of the express mandate of Art. 34(2)(b)(i) of the Model Law that the subject matter ought to have been “capable of arbitration under the law of *this State*”, it appears to be difficult to argue that the laws of the forum state can be ignored.⁵⁷ Nonetheless, to the extent that such an approach might lead to a result in which the parties’ legitimate expectations and purposes are frustrated, some commentators have attempted to chart a different course, suggesting that in such cases, it may be appropriate, though perhaps not wholly in keeping with principle, to accord primacy to the laws of the jurisdiction of enforcement.⁵⁸

A doctrine that is rooted in the simple idea that all disputes governed by a suitable arbitration agreement are arbitrable unless:

- the matter at hand raises issues that affect third parties not party to the dispute; or
- the arbitrator is neither empowered nor well placed to give the remedies sought; or
- the matter concerns a public interest or the interest of a person not party to the arbitration;

would go a long way towards removing any lingering ambiguity and this in turn would reinforce the limits of the doctrine. It would also clarify that courts faced with such an issue are not engaging in a censorial exercise of

⁵⁶ *Supra* note 1 at 47.

⁵⁷ The same, perhaps, can be said of the Singapore position. *See Aloe Vera of America Inc. v. Asianic Food (S) Pte. Ltd.* [2006] 3 SLR(R) 174.

⁵⁸ *See* Stavros Brekoulakis, “Law Applicable to Arbitrability: Revisiting the Revisited *Lex Fori*”, in Mistelis & Brekoulakis, *supra* note 1 at 108-109.

determining whether arbitration is “good” for the dispute before it but merely applying some well understood principles.

A Mauritian Perspective

*His Excellency Milan Meetarbhan**

This paper will essentially focus on the global business sector, on why international arbitration is important for the development of this sector, but also on why international arbitration is important for the further development of the international financial centre which we have established in Mauritius.

With due apologies to Mauritian readers, much of what I have to say is intended primarily for international readers. This is because, I believe, it is important to understand what the global business centre is to better understand the opportunities for international arbitration in Mauritius and also to better understand how the fact that we are an international financial centre can, facilitate the establishment of an international arbitration centre in Mauritius.

First, I will present a brief overview of the Mauritius financial services sector. As the Honourable Prime Minister mentioned in the Opening Address, the services sector as a whole contributes to around 70% of GDP and the financial services sector is expected to be an engine of growth for the services sector as a whole. At the moment, the contribution of financial services to GDP is around 12%. There are two apex regulators for financial services in Mauritius: the Bank of Mauritius as the regulator for the banking sector and the Financial Services Commission ("FSC") as the regulator for non-banking financial services. The FSC is also the regulator for global business and I will be talking essentially about global business. We established what we then called the offshore sector in Mauritius in the early 1990s and we positioned ourselves right at the outset as a jurisdiction of substance. We wanted real substance in Mauritius.

We also wanted to make sure that Mauritius would be a jurisdiction of sound repute, that we would have a sound regulatory framework, and that Mauritius would be fully compliant with international norms. We have over the years regularly amended our laws to make sure that we incorporate the latest norms and standards prescribed by international standard-setting organisations. Mauritius, unlike many other small International Finance Centres ("IFC"), had an existing pool of professionals and we wanted to create opportunities for our lawyers,

* Mauritius Ambassador to the United Nations in New York; Former Chief Executive of the Financial Services Commission.

accountants and so on, by setting up an IFC but also by setting ourselves up as an IFC of substance because unless you have substance in the jurisdiction, you do not really create opportunities for your professionals. Obviously, we also wanted to be a quality jurisdiction and make sure that our services are competitive.

One of the significant features of the Mauritian IFC is the vast Double Taxation Avoidance (“DTA”) network which we had and we still have. I will further refer to the DTA network below. We have also concluded a wide number of Investment Promotion and Protection Agreements (“IPPs”). The FSC is a member of international standard setting organisations like IOSCO for securities, IAIS for insurance, and IOPS for pensions. We have also fully subscribed to the Anti-Money Laundering/Counter-Financing of Terrorism (“AML-CFT”) framework. We have incorporated in our legislation the Financial Action Task Force recommendations. Furthermore, we have concluded a number of exchange of information agreements with fellow regulators across the world - we currently have 19 of these agreements.

In addition, Mauritius was on the so-called white list of the OECD which was published in 2009. Indeed, Mauritius was considered as one of the countries which has substantially implemented OECD standards relating to the exchange of information. The Honourable Prime Minister has already mentioned some of the rankings for Mauritius in terms of the ease of doing business and also regarding the protection of investors. It is perhaps worth adding that Mauritius has already undergone two Financial Sector Assessment Programmes, conducted by the World Bank and the IMF. On both occasions we have been found to be largely compliant with international norms.

The legislative framework relating to financial services is basically found in the Financial Services Act, the Insurance Act, the Securities Act, the Trusts Act and the Protected Cell Companies Act. For those not familiar with the concept of Protected Cell Companies, this is basically an umbrella fund which would by law mandate the segregation of assets and liabilities.

We have considerably reinforced our supervisory framework for financial services and of the global business sector. Mauritius has, a couple of years ago, been one of the first emerging-market jurisdictions to adopt a Risk Based Supervisory Framework. We have also enforced a Code of Corporate Governance for all service providers in the financial services sector. The FSC in its capacity as a regulator, has prescribed an AML-CFT code which applies in addition to the legal provisions found in the Financial Intelligence and Anti-Money Laundering Act.

In addition, we make sure that we adopt international standards and these are mandatory for our Category One Global Business Companies. I will not go into details as to what is Category One and Category Two, but it will suffice to note that Category One constitutes the bulk of the business. These companies are required to prepare their accounts in accordance with International Financial Reporting Standards and these accounts have to be audited and annually submitted to the FSC. More markedly, there are three additional pieces of legislation which are currently in the pipeline. These include, a Limited Partnerships Act which will come into force shortly, a Foundations Bill, and a Takeover Code which should be published very soon.

As I have said, we have signed a number of IPPAs. There are currently 19 such agreements which are already in force and there are 6 agreements awaiting ratification. Mauritius also has a significant treaty network and we distinguish ourselves from many other small IFCs in this respect because this is probably unique to us.

Much reference has been made to global business and it is warranted at this juncture to give its legal definition as set out in the Financial Services Act. In 2007 the law was amended to simplify the definition which currently simply says that any resident corporation, *i.e.*, a company which is incorporated in Mauritius or a trust which is governed by Mauritian law or is a partnership which is governed by Mauritian law and which conducts business outside Mauritius, qualifies for a global business licence. The term GBL, which means Global Business License, has been used extensively since the beginning of this session and is used in the law as well. Global Business Companies (“GBCs”) would be companies holding a global business licence.

The law has been simplified and, as I said, global business now means business conducted outside Mauritius so that two regimes for corporates exist in Mauritius. One is for companies conducting business in Mauritius and the other one is for companies conducting business outside Mauritius. However, both domestic and global business companies are incorporated under the Companies Act 2001 (“Companies Act”), though with respect to disputes relating to shareholders of GBCs there is a distinct provision in the International Arbitration Act 2008 (“IAA”). As I previously noted, we insisted on substance and some of the requirements to ensure substance in Mauritius include the fact that these GBCs must have two resident directors in Mauritius. The GBCs are also required to route all banking transactions through Mauritius and these companies must ensure that there is management and control in Mauritius.

One specific feature of the global business sector in Mauritius is the fact that we have management companies. These companies are licensed service providers and all applications for global business licences must be made through a management company. The management company then provides administration services to the GBCs.

We are currently focusing very much on the development of funds. We want Mauritius to be an international financial centre which is also known as a “fund jurisdiction”. We currently have around 30,000 GBCs in Mauritius, but out of these 30,000 companies, there are around 700 which are currently structured as funds and these funds have a net asset value which is in excess of US\$ 100 billion.

One last word about global business. Mauritius has a uniform tax rate for both individuals and corporates which is 15%. But for companies holding a Category One Global Business there is a tax credit for actual foreign tax paid or there is a deemed foreign tax credit of 80% which means that the effective rate of a tax for global business companies in Mauritius is 3% and we do not have any tax on repatriation of profits. We do not have any capital gains tax and we do not have tax on dividends.

What are the potential areas of dispute in the global business sector which may eventually give rise to arbitral proceedings? Of course, we have the loan agreements and the shareholders agreements which may give rise to disputes and a lot has been said about this already. Additional potential areas of dispute are between the global business companies and the management companies or breaches of contract involving GBCs in Mauritius.

For the benefit of overseas readers, I would like to add a few words on the court system in Mauritius. We have the Supreme Court of Mauritius which presently has both original and appellate jurisdiction. In addition, there is a direct and automatic right of appeal to the Judicial Committee of the Privy Council. However, there are reforms currently being proposed and as part of the reforms which have already been adopted, there is the Commercial Division of the Supreme Court which now has jurisdiction over company law matters. A lot has been said about protracted judicial proceedings in Mauritius and I have just one quote here from a decision of the Commercial Division of the Supreme Court:

“[D]espite the numerous protagonists and legal advisers involved in the present case at its initial stage, *we view with much concern the protracted proceedings which had taken more than six years before it was ready for hearing.*”¹ (emphasis added)

¹ *Mauritius Commercial Bank Ltd. v. Mr. Robert Lesage & ors.* [2010] SCJ 222

Obviously, this affects the competitiveness of Mauritius as an international financial centre and this is why we very much welcome the setting up of international arbitration centre in Mauritius.

Though the IAA applies to disputes which are international in nature, disputes relating to shareholders of Global Business Companies may be subject to arbitration under the IAA. This is a specific feature of our IAA because, as I said, all companies are incorporated under the Companies Act. So if company disputes are to be arbitrable at all, one would expect that since we have two distinct arbitration regimes in Mauritius, one for domestic arbitration and the other one for international arbitration, that disputes among shareholders of GBCs as companies incorporated under the same domestic company law would have been governed by the provisions of the domestic arbitration regime. However, this is *not* the case. In fact, we do not as of yet have a proper domestic regime for the arbitration of company law disputes. So making the IAA applicable to shareholder disputes in relation to GBCs is a major feature of our international arbitration law and, hence, helps ensure that Mauritius is more competitive as an international financial centre.

It is very important to the global business sector and to Mauritius, as an international financial centre, that international arbitration is available in Mauritius and that it has a proper legal framework. But, I would like to take this opportunity to stress that the existence of a vibrant global business sector in Mauritius can in turn facilitate the development of Mauritius as an international arbitration centre. This is because, investors and fund managers from all over the world have a presence in our global business sector (there are thousands of them), and they may not only arbitrate disputes relating to their Mauritian investments here, but the fact that they are already in Mauritius and doing business in Mauritius - they might as well bring in their non-Mauritius related international disputes to Mauritius for arbitration.

Finally, before I conclude, we have thus far developed our international financial centre essentially in relation to the structuring of investments into Asia. As mentioned earlier, the two main destinations of investments from the Mauritian International Financial Centre are India and China. Obviously, we hope that this will continue and, in fact, will increase over the coming years. But our strategy now is to make sure that investments into Africa – and there is a lot of interest in Africa today – are also structured from Mauritius. Mauritius is so far the only established financial centre in Africa. So, we want to ensure that Mauritius becomes the financial hub for the African Continent and obviously if we achieve this strategy, then, we also hope that the Mauritian International Arbitration

Centre will become one of the major arbitration centres for the African continent.

PANEL III

RETHINKING THE ROLE OF THE COURTS IN THE ARBITRAL PROCESS AND INTERIM MEASURES

Introductory Remarks

*Adrian Winstanley**

I have the honour to moderate this panel on one of the hottest topics in the international commercial arbitration world – the role of state courts.

The choice of the place of the arbitration, both the legal place or seat and the physical venue for any hearings, is among the most important decisions to be taken by contracting parties, who are traditionally expected to elect for an “*arbitration friendly legal environment*”. Whilst modern procedural laws, like that now in place in Mauritius, are an essential attribute to such an environment, the attitude and track record of local courts in interpreting and applying applicable laws is of equal importance. These Courts are expected, by the international business community, to provide support for arbitration and not to obstruct; to uphold valid arbitration agreements; to respect the independence and authority of properly-appointed tribunals; to provide urgent interim or conservatory measures when the tribunal cannot (or before the tribunal is constituted); to respect the finality of an award and to enforce it; but, equally, to hear and to uphold a legitimate challenge to an award.

During the course of recent months and years, many interesting judgments concerning arbitration have been made in the courts of many jurisdictions (and we have heard this morning of the very recent decision of the Supreme Court of the United Kingdom in the *Dallah* case). Throughout this session, we shall consider a number of other cases, as well as the principles by which, and the parameters within which, courts of jurisdiction should operate.

My distinguished panel comprises of Dr. Albert Henke, who will first deliver his report to the conference, Lord Phillips of Worth Matravers and Judge Jean-Pierre Ancel, who will give responses to the report, and Mr. Satyajit Boolell, who will provide a Mauritian perspective. Dr. Henke is a Research Fellow and Lecturer at the University of Milan, where he teaches civil procedure and international arbitration. Lord Phillips is a former Master of the Rolls and former Lord Chief Justice of England and Wales, and is now President of the Supreme Court of the United Kingdom. Judge Jean-Pierre Ancel has had an illustrious career in the French judiciary and is currently *Président de Chambre Honoraire à la Cour de cassation* (Honorary President of Chamber of the *Cour de cassation*). Mr. Boolell is

* Director General, London Court of International Arbitration (LCIA).

the Director of Public Prosecutions of the Republic of Mauritius and Chairman of the Arbitration Committee of the Law Reform Commission. I am delighted now to hand the proceedings to Dr. Henke.

Report to the Conference

*Dr. Albert Henke**

I. INTRODUCTION

Arbitration is a private dispute resolution mechanism for commercial law disputes alternative to state court proceedings. However, it is not a self-sufficient system of justice. It is established and regulated pursuant to law¹, and it necessarily bears a close relationship to a nation's court and judicial system. National courts have a critically important role to play in making the arbitration system work, as arbitration cannot do without them in order to perform its tasks and attain its goals. In fact, while arbitration's outcome (*the award*) is given in most jurisdictions the same effects as a judicial decision (being in certain situations, by virtue of the New York Convention, even more readily enforceable internationally than a national court judgment²), its main actors (*the arbitrators*) have limited powers by comparison with those vested in judges. Moreover, state courts retain a certain degree of control over an arbitral decision, in order to guarantee that proceedings are conducted and awards are rendered in accordance with the principles, rules and standard of due process.

In theory, an arbitration could proceed from beginning to end without the need for any intervention from a court, in a dimension outside the law.³ However, if something goes wrong, it may be necessary to seek and rely upon the support and assistance of a court. It may seem a paradox,

* Aggregate Professor of International Investment Law and Disputes Settlement, Università degli Studi (Milan, Italy); Research Fellow and Lecturer of Civil Procedure, Università degli Studi (Milan, Italy); Of Counsel, Clifford Chance (Milan, Italy).

¹ Arbitration "(...) is a system built on law and which relies upon that law to make it effective both nationally and internationally. National courts could exist without arbitration, but arbitration could not exist without the courts" (N. Blackaby and C. Partasides, *The Role of National Courts During the Proceedings*, in *Redfern and Hunter on International Arbitration*, 5th ed., Oxford University Press, U.K., 2009, 440).

² See R. W. Hulbert, *Arbitrators and Judges: An Uncertain Boundary*, *Arbitration in the Next Decade: Proceedings of the International Court of Arbitration's 75th Anniversary Conference*, *Special Supplement to the ICC International Court of Arbitration Bulletin*, 1999, 35: 'As a consequence of the wide-spread acceptance of the New York Convention, binding arbitral awards issued by (...) tribunals (...) are more readily entitled to enforcement in most countries of the world than the decisions of professional judges.'

³ This expression was used by O. Young, Chairman of the Commercial Arbitration Committee of the U.S.A. Chamber of Commerce at the ICC Congress, which took place in London in 1921.

but those attributes of arbitration that are its greatest advantages when all goes smoothly, may become handicaps when problems arise. The principles of party autonomy and consent, which are the cornerstones of arbitration, come most readily to mind. When the parties are unable to agree on certain essential procedural issues (such as the appointment of arbitrators) or when there is a need for urgent, perhaps even *ex parte*, interlocutory measures or, again, when parties other than those who have signed the arbitration agreement need or seek to be involved in the proceedings (one may think of a party to a related contract, a guarantor, or a sub-contractor *etc.*), those principles might become an obstacle. The same is true when a third party seeks to join in the proceedings of its own volition, or when an order for provisional measures is to be addressed to third parties. Another peculiarity of arbitration is the fact that arbitrators are private individuals. Since they are not public officials, they have *iurisdictio* but not *imperium*, and thus limited powers of compulsion to ensure, for example, that the parties comply with the terms of a tribunal's order or that witnesses appear before the tribunal. Finally, arbitrators are selected solely in relation to that particular dispute (*i.e.*, they are not a permanent body). That might become an obstacle when there is a need to obtain interim and urgent measures before the arbitral tribunal is constituted.

In all such situations, arbitration requires external support, which is usually provided for by national courts and state judges.

Traditionally, the attitude of the courts to the development of the practice of arbitration has been to resist that development. State laws and courts have shown a measure of hostility towards arbitration, inasmuch as the latter was viewed more as a way of ousting the State jurisdiction than as a viable and acceptable method of rendering justice. This phenomenon occurred, to a greater or lesser degree, in most jurisdictions.⁴

However, the general trend since the middle of the nineteenth century has been towards the enhancement of the effectiveness of arbitration as a method of private dispute resolution, and towards the

⁴ Referring to the development of arbitration in England, Lord Campbell [*Scott v. Avery* (1853) 25, L.J. Ex. 308] observed that: "(...) formerly the emoluments of the Judges depended mainly or almost entirely upon fees, and as they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall....therefore they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so"; for an overview of the development of arbitration in England see J. M. H. Hunter, *Arbitration Procedure in England: Past, Present and Future*, *Arb. Int'l*, 1985, Vol. 1, N. 1, 84 ff. For an historical overview in the U.S.A., where, until the 1920s courts were inclined to view arbitration agreements as contrary to public policy [*White Eagle Laundry Co. v. Slawek*, 296 III, 240, 245 (1921)] as they were said to empower laymen to usurp the role of the courts, see R. W. Hulbert, *Arbitrators and Judges: An Uncertain Boundary*, *cit.*, 35 ff.

recognition by legislators and the judiciary that – within certain limits dictated by public policy – the arbitration system, to maintain its effectiveness, must have a substantially autonomous existence, free from external hindrance.⁵ The process of judicial acceptance and endorsement of arbitration has followed similar patterns in many countries. The last decades of the twentieth century saw the most industrialised States engaged in a sort of competition in ensuring the best possible legal environment for arbitration within their own territories.⁶ As pointed out by some commentators,⁷ there has been a ‘(...) *gradual transition in the approach of national courts from jealously guarding their exclusive possession of the dispute resolution arena to accepting arbitration as an established alternative method of dispute resolution*’.⁸ The promulgation in 1985 of the *UNCITRAL Model Law on International Commercial Arbitration* (amended in 2006) encouraged and advanced that process. The increasing favour with which national legislators view international arbitration is confirmed by the number of States which have become parties to international arbitration conventions or which have enacted laws regarding arbitration in general or, more specifically, international arbitration.⁹ Currently, nations with well developed legal and judicial systems tend to support arbitration strongly,¹⁰

⁵ See J. M. H. Hunter, *Arbitration Procedure in England*, cit., 88; N. Blackaby and C. Partasides, *The Role of National Courts During the Proceedings*, cit., 440. See also W. W. Park, *Judicial Controls in the Arbitral Process*, *Arb. Int'l*, 1989, 276: ‘(...) *international dispute resolution will become more effective to the extent that the current trend toward less interaction between judge and arbitrator at the place of the proceedings reduces judicial meddling in the merits of a dispute*’.

⁶ That was the case in England (1979 and 1996), France (1980/1981), Switzerland (1981) and the Netherlands (1986), which set the precedent for this process, followed by other countries in all areas of the world.

⁷ M. Hwang S.C. and R. C. Muttah, *The Role of Courts in the Course of Arbitral Proceedings: Singapore and Other Asian Perspectives*, *Arbitration*, 2002, 68, 3, 224.

⁸ R. W. Hulbert, *Arbitrators and Judges: An Uncertain Boundary*, cit., uses an interesting metaphor describing this transition, suggesting that one consider: ‘(...) *the respective terrains of international commercial arbitration and conventional national court litigation in terms of a football field. In 1923, when the ICC Rules came into effect, play was concentrated near the penalty box in front of the arbitrator's goal and the litigation team controlled the rest of the field. (...) The football field no longer looks as it did. The centre of play is now well past midfield and approaches the judges' goal*’. See also Y. Derains, *State Courts and Arbitrators, Arbitration in the Next Decade*, cit., 27.

⁹ However, for reference to jurisdictions which are much less arbitration-friendly see, for Latin America, H. A. Grigera Naón, *Competing Orders Between Courts of Law and Arbitral Tribunals: Latin American Experiences*, *Liber Amicorum in Honour of Robert Briner*, 2005, 335.

¹⁰ See M. Ball, *The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration*, *Arb. Int'l*, 2010, Vol. 22, N. 1, 91 ff., who observes that: ‘(...) *the courts in developed legal systems typically apply a 'pro-*

not least, because they see it as a means of relieving overcrowded court dockets and avoiding delays in dispute resolution. An effective arbitration system enhances the role of the courts in overseeing a system of justice. As observed by Chief Justice Burger: “(...) *neither the federal nor the state court systems are capable of handling all the burdens placed upon them (...) Arbitration should be an alternative that will complement the judicial systems*”.¹¹

The actual role of the courts in supporting arbitration differs from jurisdiction to jurisdiction, depending on the terms of the governing national laws. However, the principal actions that courts may or should take in relation to arbitration proceedings are much the same in all countries that have adopted modern arbitration statutes, and may be divided into two main groups:¹² the *assistance functions* (enforcing agreements to arbitrate; appointing and removing arbitrators; granting interim relief; assisting arbitral tribunals in taking evidence); and the *control functions* (deciding challenges to the jurisdiction of arbitral tribunals; setting aside domestic arbitral awards; recognising and enforcing arbitral awards¹³). The current attitude of States is to enlarge the situations in which courts may provide assistance and to restrict those in respect of which control is exercised, by even permitting the parties to opt out of such control in some cases.

The creation of a new international arbitration centre in Mauritius and especially the enactment of new arbitration legislation (The International Arbitration Act, 2008 (Act 37 of 2008) hereinafter “the Act”) is an opportunity to reconsider the role of the courts in international arbitration.

This will be done in the current Report by:

- addressing the general principles, rules and provisions on which the Act is based and which address the relationship between arbitration and the courts (and the role peculiar to the Permanent Court of Arbitration (“PCA”));

arbitration bias’ in interpreting and applying their national arbitration statutes, and in cases of doubt tend to err on the side of arbitration (...)”.

¹¹ Address to the American Bar Association, January 1982, 68 ABA J., 274 ff.

¹² See M. Ball, *The Essential Judge*, cit., 73 ff.

¹³ This classification of the courts’ functions is recognised by most commentators: see Schroeder in K. H. Bockstiegel-S. Kroll-P. Nacimiento, *Arbitration in Germany, The Model Law in Practice*, Kluwer Law International, 2008, 573.

- underlining the originality and special nature of these rules and provisions, by reference to the approaches adopted by arbitration laws (and, to a more limited extent, rules) in the prominent arbitral jurisdictions;
- setting the new Mauritian arbitration law in the context of current trends regarding the problematic relationship between the courts and arbitral tribunals, as part of a wider attempt to rethink the role of the courts in arbitration and, specifically, having regard to interim measures.

II. THE NEW MAURITIAN ARBITRATION LAW: GENERAL PRINCIPLES

As to the relationships between state courts and international arbitration, the new Mauritian legislation adopts innovative provisions, the aim of which is to provide all possible support to arbitration without affecting its autonomy. In particular:

- it vests the PCA with many (administrative) functions, that traditionally fell within the purview of the courts, thereby: (a) formalising, in the statute, the role of an institution which is neutral, multilateral, arbitration-friendly and sensitive to the needs and characteristics of arbitration and the expectations of the international arbitral community; and (b) increasing the appeal of Mauritius as a seat for international arbitration, as it bolsters confidence among foreign parties and participants that the local courts will not intervene in such matters;
- the general principles of the new Act, as they emerge in particular from the amended *Travaux Préparatoires*, leave no room for doubt that the new Act is arbitration-friendly. It fosters party autonomy. It reduces the scope for intervention by the (local) courts, the role of which, in any event, is limited to measures intended to support the arbitral process. It ensures that Mauritian international arbitration law and practice will conform with internationally recognised arbitration standards. Finally, it involves in the process a neutral, multilateral and arbitration-friendly institution, the PCA. In this regard, it is worth mentioning, in particular: a) the general statement according to which the purpose of the Act is to create a favourable environment for the development of international

arbitration;¹⁴ b) the option to create a different regime for domestic and international arbitration, in order to reduce, as far as possible, in respect of the latter, the scope for intervention of the local courts;¹⁵ c) the fact that the Act is based on the UNCITRAL Model Law,¹⁶ characterised by the principle of non-intervention by the courts and cooperation between the latter and arbitral tribunals; d) that, by applying and interpreting the Act and in developing the law applicable to international arbitration in Mauritius, regard must be had to the Model Law and to the need to promote uniformity in its application and the observance of good faith;¹⁷ e) the fact that the Act has adopted, at section 3(8), a provision that mirrors Art. 5 of the Model Law, to the effect that the courts cannot intervene in arbitral proceedings: “*except where the Act provides that they are to do so*”;¹⁸ f) the fact that many sections of the Act, dealing with the relationship between courts and arbitration, such as sections 5 (Substantive Claim before Courts), 6 (Compatibility of Interim Measures), 22 (Recognition and Enforcement of Interim Measures) and 23 (Powers of Supreme Court to Issue Interim Measures), apply also to arbitrations the seat of which is outside Mauritius;¹⁹ and g) the fact that, under section 3(1)(d) of the Act, an enactment which confers jurisdiction upon a court does not *per se* indicate that a dispute about the matter is not capable of determination by arbitration.²⁰

¹⁴ The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - Introduction - 2.

¹⁵ The International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (1-2).

¹⁶ The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - Introduction - 2 (a).

¹⁷ Any question concerning matters governed by the Model Law, which is not expressly settled in that law, are to be settled in conformity with the general principles on which that law is based. Recourse may be had to international writings relating to the Model Law and to its interpretation, including relevant UNCITRAL reports, commentaries, case-law from other jurisdictions, and textbooks. Finally, in applying and interpreting the Act, no recourse shall be had to, and no account shall be taken of, existing statutes, precedents, practices, principles or rules of law or procedure relating to domestic arbitration: see the International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (9 and 10).

¹⁸ The International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (8).

¹⁹ The International Arbitration Act (No. 37 of 2008) - Part II - Initiation of proceedings - Art. 5, 6, 22, 23.

²⁰ The International Arbitration Act (No. 37 of 2008) - Part I - Preliminary - Art. 3 - Application of Act (1 – d).

III. SPECIFIC PROVISIONS OF NOTE / A COMPARATIVE ASSESSMENT

A. Introduction: Two Different Regimes For Domestic and International Arbitration

Before analysing in detail the most relevant provisions of the new Mauritian Act concerning the relationship between state courts and arbitration, it is worth emphasising the decision to adopt two different regimes for domestic and international arbitration in the Act. The purpose, expressly stated in the *Travaux Préparatoires*, is to “(...) *limit the intervention of Mauritian courts in the arbitral process, save to support that process and to ensure that the essential safeguards expressly provided for in the Act are respected*”.²¹

Different policy considerations apply to domestic and international arbitration. The latter has its specific needs and characteristics. Foreign parties choose a country as the seat of their arbitration to the extent they can rely on the fact that local courts will not interfere in the arbitral process.²² International awards might be written in a style with which local courts may not be familiar. Moreover, in the context of international arbitration, where parties agree to limit their rights of review in return for certainty,²³ the parties’ interest in the finality of the dispute process is very strong. Domestic arbitration, in contrast, is not incompatible with a wider intervention by state courts (for instance, to control possible errors of law by a domestic tribunal).²⁴

²¹ See The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - A. Decisions of Principle – 7 (2).

²² In Singapore, Canada and Australia, for example, the stay of court proceedings is discretionary in cases of domestic arbitration, while it is mandatory in the event of international arbitration.

²³ See W. Craig, W. W. Park and J. Paulsson, *International Chamber of Commerce Arbitration*, 2nd ed., Paris and New York, 1990, 327.

²⁴ The Mauritian Act achieves the purpose of limiting undue interference of local courts by: a) providing that any application to the Mauritian courts, made pursuant to the Act, be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Judicial Committee of the Privy Council, so that international users have the assurance that Court applications relating to their arbitrations will be heard and disposed of swiftly by senior and highly experienced judges; and, by b) codifying the principle according to which, in applying and interpreting the Act and in developing the law applicable to international arbitration in Mauritius, no recourse shall be had to, and no account shall be taken of, existing statutes, precedents, practices, principles or rules of law or procedure relating to *domestic arbitration* (Art. 3, par. 10).

The ‘two-regimes’ option also characterises the UNCITRAL Model Law²⁵ and has been adopted by Singapore,²⁶ where the international regime provides for reduced intervention by the courts and institutionalises deference towards the arbitral process and awards. Various decisions issued in recent years²⁷ demonstrate that only rarely will allegations of procedural defects, substantive errors or breaches of due process be upheld against international awards by the courts of Singapore: setting aside international awards in that jurisdiction appears to be a near ‘Herculean task’.²⁸ The ‘two-regimes’ option has also been adopted by the laws of Australia,²⁹ Azerbaijan³⁰ and Kazakhstan.³¹

The ‘two-regimes’ option has certainly some drawbacks, such as interpretative disputes concerning the respective scope of application of the two regimes, the need for the local courts to decide among potentially overlapping provisions, and the development of different, and perhaps inconsistent, case law. However, it is probably the most advisable solution

²⁵ Chapter I – General provisions – Art. 1 – Scope of application – par. 1.

²⁶ See Section 5 of the Singapore International Arbitration Act - IAA - (Cap 143A, 2002 Ed). On January 2010 the IAA was amended by the International Arbitration (“Amendment”) Act which made three changes to the arbitration regime, namely in the areas of court-ordered interim measures in support of foreign arbitrations, the definition of an arbitration agreement, the authentication of awards made in Singapore.

²⁷ See in particular *VV v. VW* (2008) 2 SLR 929; *Soh Beng Tee & Co v. Fairmount Development Pte Ltd* (2007) 3 SLR 86; *Dongwoo Mann + Hummel Co Ltd v. Mann + Hummel GmbH* (2008) 3 SLR 871; see also, in matters of jurisdiction, *Insignia v. Alstom* (2001) 1 Lloyd’s Rep. 715.

²⁸ M. Hwang S.C. and C. Tan, *New Developments in Arbitration in Singapore*, *Asian Int’l Arb. Journ.*, 2010, Vol. 5. Out of all reported cases from the Singapore courts, all applications to enforce international awards have been granted and only one award from a domestic arbitration in Singapore has ever been successfully appealed against (*Ng Chin Siau & Ors v. How Kim Chuan* (2007), 4 SLR 809 (2007), SGCA 46).

²⁹ See the International Arbitration Act 1974 (Cth.) (IAA), governing international arbitrations having their seat in Australia. Domestic arbitrations are governed by the Commercial Arbitration Act (CAA) of the State or territory in which the arbitration takes place. The most significant differences between the CAAs and the IAA relate to a greater degree of judicial supervision and the possibility of limited appeals from awards under the CAAs.

³⁰ See the Law of the Republic of Azerbaijan on International Commercial Arbitration dated 18 November 1999. See G. Karimov – A. Movsumova, *The Baker & McKenzie Int’l Arb. Yearbook, Azerbaijan*, 2009, 99

³¹ The Arbitration Courts Law applies to dispute between residents of Kazakhstan. The International Commercial Arbitration Law is based on the UNCITRAL Model Law and applies to disputes where at least one party is not a resident of Kazakhstan; it also contains implementing procedures for the enforcement in Kazakhstan of foreign awards. State courts are entitled to review a foreign award on the merits if they deem that the award violates Kazakhstani public policy. See A. Kuatbekov and A. Korobeinikov, *The Baker & McKenzie Int’l Arb. Yearbook, Kazakhstan*, 2009, 198.

for jurisdictions that are not yet very familiar with international arbitration (as is the case with Mauritius³²). Experience in several countries³³ suggests that if the same rules are applied to both domestic and international arbitration, then a tension is created between the more interventionist approach that may be necessary in the domestic context and the non-interventionist approach required in the international context.³⁴

B. The Decision to Entrust the PCA with all Appointing Functions (and a number of further Administrative Functions) Traditionally Exercised by Courts

The Mauritian Act is unique in that it vests all appointing functions (and a number of further administrative functions) in the PCA.

The PCA's appointing functions are governed by Sections 12 (concerning the appointment of arbitrators), 14 (concerning the procedure for challenging arbitrators) and 15 (concerning the failure or inability to act of an arbitrator), which enact, respectively, Arts. 11, 13 and 14 of the Amended Model Law. In all cases, the authority in charge of making the ultimate determination is the PCA. Finally, Section 16, concerning the replacement of arbitrators, enacts Article 15 of the Amended Model Law. It

³² See the International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - A. Decisions of Principle – 7 (a), where it is said that: “(...) *There are on the other hand no – or very few – international arbitrations currently being conducted in Mauritius*”.

³³ Such as India, where the judiciary has recently taken wide-ranging actions in relation to the arbitral process (both domestic and international), far beyond the reasonable expectations of the international arbitration community. The interventionist approach of the Indian courts (which starts from the appointment of arbitrators and extends to the enforcement of awards), along with their interpretation of certain legal concepts (such as public policy) or the introduction, *de iure condendo*, of ambiguous concepts like *patent illegality*, has led to serious delays and inefficiencies in arbitration proceedings, conflict with other jurisdictions and disregard for fundamental rules of international arbitration (like the exclusive power of the courts of the seat of arbitration to set aside the award). Decisions such as *I.T.I. Ltd v. District Judge et al.* (1998) [A.I.R., 1998, *Allahabad Series*, 313], *Bhatia Int'l v. Bulk Trading* (2002) [A.I.R. 2002, S.C. 1432], *ONGC v. Saw Pipes* (2003) [5 Supreme Court Cases 705], *S.B.P. v. Patel Engineering* (2006) [A.I.R. 2006, S.C. 450], *Venture Global Engineering v. Satyam Computer Services* (2008) [2008 S.C.A.L.E. 214] are destabilising for the global arbitration community. If limited to domestic arbitrations, they would no doubt have caused less prejudice to the reputation of India as a seat for international arbitrations. The same can be said for similar decisions in Pakistan, like *The Hub Power Co. v. WAPDA* (2000) *Supreme Court of Pakistan*, June 20, 2000, 16 *Arb. Int'l.* 439 (2000).

³⁴ W. W. Park, *Judicial Controls*, *cit.*, 231, observes that “(...) *when an arbitration implicates foreigners, the judiciary of the arbitral seat might not examine the award according to the same standards applied to domestic controversies*”.

contains two new provisions dealing with the issue of truncated tribunals, granting the PCA the power ultimately to decide whether to proceed on a “truncated” basis.

Some peculiarities of these legislative choices are worth emphasising. First, the breadth of the powers granted to the PCA in this context. In any situation of failure by the parties and/or an institution to reach an agreement and/or to perform any functions entrusted to it, the PCA is entitled, upon the motion of one party, to take *any necessary measures* to find a proper solution. These measures include giving directions as to the making of any necessary appointments, revoking any appointments already made, designating any arbitrator as the presiding arbitrator and so on. Second, the PCA remains the authority in charge of *ultimately* appointing, challenging and/or replacing arbitrators, even where another arbitral institution (by reason of the choice by the parties of its arbitration rules) is somehow involved in the proceedings. Art. 8(4)(c) of the Act, for example, empowers the PCA, upon a party’s application, to take any necessary measures where a third party, *including an arbitral institution*, fails to perform any function entrusted to it under that procedure. In turn, Art. 10(3) provides that, in the event that a challenge under any procedure agreed by the parties (and therefore also a procedure involving another arbitral institution) is not successful, the PCA will ultimately decide on the challenge. Third, in order to avoid delays in the arbitral process and the use of dilatory tactics by recalcitrant parties, the Act expressly provides that all the decisions of the PCA under the Act are to be final and subject to no appeal or review. That means that any complaints by a party arising from such decisions can only be filed with the Supreme Court in the context of a recourse against the final awards (Section 19(5) of the Act).³⁵

The Act aims at resolving all the issues concerning the removal of arbitrators within a pure arbitration dimension, avoiding *in toto* the interference of the state judge, which has often proved problematic in this

³⁵ As to the PCA’s administrative functions, the most relevant ones are those related to fees adjustment and time limit extensions. As to the latter, in particular, the PCA is entitled to extend any time limits agreed by the parties in relation to any matter relating to the arbitral proceedings or specified in the Act (including time limits for commencing an arbitral procedure or for making the award). This power undoubtedly broadens to no little extent the scope of intervention by the supervising authority in the arbitral process. However, the practical advantages of this provision outweigh the possible doubts. An arbitral process can be seriously frustrated by short time limits set by the parties in their agreement, long before a dispute has arisen, and without much thought being given to their application in practice. Any risk of undue interference in the parties’ autonomy should be minimised, considering the status of PCA as the body exercising these powers.

context, not least in terms of the duration of the proceedings.³⁶ The PCA is a neutral and multilateral institution, highly competent in arbitration matters and arbitration-friendly. It is likely to guarantee a sensitive approach to the needs and characteristics of arbitration and the expectations of the international arbitral community and to prevent narrow and parochial interpretations of the new Act. The PCA can be relied upon to fulfil its appointing and administrative functions in an independent and efficient way. Its involvement will likely increase the appeal of Mauritius as a seat for international arbitration, as it bolsters confidence among foreign parties and participants. An institution like the PCA is in fact in a better position than a state court to assess the wide variety of factual situations likely to exist in the context of international arbitration, ensuring consistency in the solutions and avoiding the risk that each challenge be dealt with in a markedly different way, depending on the favourable or unfavourable approach towards arbitration of a particular judge.³⁷ Moreover, the Act permits that a determination on all possible complaints be made at any stage of the proceedings, without necessarily waiting for the issuance of the final award. It thus prevents the risk of rendering meaningless and wasteful the entire process. Finally, by preventing any review or appeal against the decisions of the PCA, it reduces the risk of any further delay in the process. The rights of the parties are in any case safeguarded by the possibility to file any possible residual complaint with the Supreme Court of Mauritius in a recourse against the final award.

Taking into account the potential tensions and conflicts which arise in this area between the principle of party autonomy, the powers of the arbitrators, the functions of the arbitral institutions and the role of the courts, the solution adopted by the new Mauritian Act is certainly to be prized, especially as it involves an institution which is more experienced in dealing with challenges than any national court can possibly be.³⁸

That solution is *unique* in the panorama of the arbitration laws; therefore it is not possible to make a direct comparison on this precise point

³⁶ In Switzerland, for example, prior to the enactment of the 1987 Swiss PILA, the exclusive intervention by the courts in the challenge procedure had resulted in a dramatic length of arbitral procedures (between 4 and 8 years for cases where the final award was not yet rendered). In the *Westland* case, for example, the decision rejecting a challenge became final nearly 4 years after the challenge was initially submitted. See G. A. Alvarez, *The Challenge of Arbitrators*, *Arb. Int'l*, Vol. 6, N. 3, 1990, 211 ff.

³⁷ An unfavourable attitude towards arbitration has emerged in a case (referred to by G. A. Alvarez, *The Challenge of Arbitrators*, *cit.*, 205), in which the Egyptian courts held they had jurisdiction over the challenge of an arbitral tribunal sitting in Cairo, *on the grounds that the arbitrators used English during a hearing*.

³⁸ G. Born, *International Commercial Arbitration - Commentary and Materials*, 3rd ed., Kluwer Law International, The Hague 2009, 1552.

between the Act and other laws. However it might be useful briefly to consider how those laws deal in this context with the issues concerning the relations between the principle of party autonomy, the prerogatives of the arbitrators, the power of the arbitral institutions and the role of the courts.

Under the UNCITRAL Model Law, in all the Model Law jurisdictions and in most countries worldwide, courts have the power to appoint arbitrators where there is no agreed procedure or where an agreed procedure fails.³⁹ There are still some jurisdictions in which the courts do not have such powers.⁴⁰ In some jurisdictions the parties may agree from the outset that arbitrators will be appointed directly by the state court.⁴¹

Most national laws also empower national judges to decide on challenges against arbitrators relating to their impartiality, independence, qualifications and/or incapacity to act and/or to fulfil their tasks, when there is no agreed procedure for such challenges or where the agreed procedure fails and the challenge made to the tribunal is unsuccessful.⁴² At the same time, as a rule, most institutions administering arbitrations provide procedures for challenging arbitrators during the proceedings.⁴³

The first issue which arises, therefore, is the identification of the authority competent to decide on the challenge.

As a matter of principle, when the parties agree to incorporate the rules of an institution in their agreement, they agree to submit to the administrative procedures of that institution, which usually include the

³⁹ See Art. 11 (5) UNCITRAL Model Law. See also, *ex multis*, Germany, where the power of the state courts in respect of the formation of an arbitral tribunal is governed by Art. 1062 (1) ZPO. See K. H. Bockstiegel-S. Kroll-P. Nacimiento, *Arbitration in Germany*, cit., 600. For Asian jurisdictions, see, *ex multis*, Art. 12 of the South Korean Act and Section 8 of the Philippines Act (L. Arroyo, *The Baker & McKenzie Int'l Arb Yearbook*, Philippines, 2009, 50 ff.).

⁴⁰ In China, for example, the relevant powers are vested in the competent arbitration commissions (see Arts. 13 and 34 to 38 of the Chinese Arbitration Act). In Singapore those powers are vested in the Chairman of the Singapore International Arbitration Centre. See also R. Krishan, *Appointment of an Arbitrator in Arbitration Proceedings under the Indian Arbitration and Conciliation Act 1996*, *Int'l A.L.R.*, 2001, 90.

⁴¹ That is the case in Germany (see *Muench. Komm. ZPO- Muench.* 2001, Art. 1062, para. 4), where the parties are free to assign the right to nominate arbitrators to other independent third parties, whether a private individual or a public body (see Schwab/Walter 2005, Chap. 10 para. 3).

⁴² For Germany see Art. 1037 (3) sent. 1 ZPO (jurisdiction of the courts for the challenge proceedings) and Art. 1038 (1) sent. 2 ZPO (jurisdiction for the removal proceedings). Similar provisions are to be found in most Model Law jurisdictions. In Asia see Section 11 of the Philippines Act; Art. 14 of the South Korean Act; Arts. 22-25 of the Indonesian Act.

⁴³ See, for example, Art. 14 of the ICC Rules; s. 17 of the AAA Rules; Art. 15 (i) of the JAMS Rules. See also T. Walsh, R. Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, *Arb. Int'l*, 2011, Vol. 27, Issue 3, 283 ff.

power of the latter to decide challenges against arbitrators. The submission of a challenge directly to a national judge by a party that has agreed to an institutional procedure would thus be a breach of the terms of the arbitration agreement.⁴⁴ Therefore many statutes respect (and enforce) the will of the parties who, by selecting a set of arbitral rules, have deferred to the remedy provided for by those rules. The decision of an institution is generally considered administrative in nature (*i.e.* non-judicial)⁴⁵ and final.

The question is whether that decision - which, being final, cannot be subject to any internal (*i.e.* within the institution) appeal or review - is subject to an immediate judicial review before the courts of the seat of arbitration or whether any complaint against that decision can only be filed with a recourse against the final award. The first approach has been adopted by the UNCITRAL Model Law and by many legislations enacted on its basis, like those of Germany⁴⁶ and Austria.⁴⁷ Other countries, such as France and the U.S.A., have opted for the second approach.

In the Model Law system there are two steps.⁴⁸ A challenge against an arbitrator is *first* made according to a specific procedure agreed upon by the parties (either by providing for a specific procedure⁴⁹ or by making reference to particular arbitration rules - accepting, in the latter case, the challenge procedure provided for under these rules -) or, failing that, directly to the arbitral tribunal. Only at a subsequent point in time, when the challenge is rejected or is not successful, an application may be made to the competent court.⁵⁰ The tribunal (including the challenged

⁴⁴ G. A. Alvarez, *The Challenge of Arbitrators*, *cit.*, 204.

⁴⁵ The non-judicial nature of the ICC Court's decisions has been confirmed by French case law. For reference see G. A. Alvarez, *The Challenge of Arbitrators*, *cit.*, 204.

⁴⁶ As previously stated, the German procedure for the challenge of arbitrators is regulated in Art. 1037 ZPO, which is based on Art. 13 of the Model Law. Therefore the parties are given the opportunity to agree on a specific procedure for challenging an arbitrator and, in its absence, a default procedure will apply.

⁴⁷ Under Austrian law, the procedure for challenging an arbitrator is provided for in Section 589 of the Austrian Code of Civil Procedure (*Zivilprozessordnung* - ACCP) and is similar to that under the Model Law and German law.

⁴⁸ Art. 13 of the Model Law recognises parties' autonomy and gives the parties the right to agree on a procedure for challenging an arbitrator.

⁴⁹ Which, in any case, must be in line with the principle of fairness, equal treatment and the right of the parties to be heard.

⁵⁰ If, however, the tribunal (or the arbitral institution or any other authority charged with making the decision) decides to uphold the challenge, its decision is *unappealable*. In fact, there is no legal remedy against a decision of the arbitral tribunal (or any other authority) granting the challenge and terminating the arbitrator's mandate (Stein/Jonas-Schlösser 2002, para. 1027, para. 4; B. Spiegelfeld, S. Wurzer, H. E. Preidt, *Challenge of Arbitrator: Procedural Requirements*, *Austrian Yearbook on International Arbitration*, Vienna, 2010, 49 and 53).

arbitrator), may continue the arbitration and render an award, while the challenge proceedings are pending (in order to prevent the parties from using dilatory tactics to prolong the arbitral proceedings by submitting unfounded challenge requests). The consequences of the issuance of the award on the pending challenge procedure are not always clear.⁵¹ Under the Model Law system, since the parties may have agreed on an arbitral institution's procedure, the rejection of the application by such an institution would be scrutinised by a state court, which, technically, will not review the decision of the institution, but rather make its own independent decision (being court proceedings independent of the arbitration proceedings).⁵² In any case, the supervisory role of the courts is mandatory and can never be excluded by agreement of the parties.⁵³ This system is said to balance the principle of party autonomy and the duty of the State to ensure objectivity *vis à vis* its citizens.⁵⁴ The court's decision is final and binding upon the parties. There is no legal remedy against this decision⁵⁵ and it is not possible to later dismiss the arbitrator based on the same reasons alleged as the basis for challenge. If the court grants the challenge, the mandate of the arbitrator is terminated *ex nunc* and a substitute arbitrator has to be appointed.

Under the UNCITRAL Model Law system, it is not clear whether the parties can exclude a challenge procedure before the arbitral tribunal or an arbitral institution altogether, providing for instant recourse to domestic courts.⁵⁶

In systems which are not based on the Model Law, like France and the U.S.A., the courts exercise their supervisory function not directly against the decision of the institution or the tribunal, but only against the

⁵¹ See the different views of, respectively, P. Schlosser in Stein & Jonas ZPO, 2002, Section 1037 mn. 5, P. Hartmann in A. Baumbach et al., *Zivilprozessordnung*, Section 1059, mn. 11 and J. P. Lachmann, *Handbuch fuer die Schiedsgerichtspraxis*, 200, 1111, 8 mn.

⁵² Zoeller-Geimer 2007, para. 1037, para. 2.

⁵³ In this sense see, for Germany, Art. 1037 (3) ZPO and for Austria, Section 589 para. 3 ACCP. A similar regime exists in some extra-European jurisdictions, such as the Philippines (see L. Arroyo, *The Baker & McKenzie Int'l Arb Yearbook*, Philippines, 2009, 51).

⁵⁴ See MuenchKommZPO-Muenh (2001), para. 1037, 1.

⁵⁵ For Germany see Section 1965 GCCP.

⁵⁶ In Germany, in favour of this possibility are P. Mankowski, *Die Ablehnung von Schiedsrichtern*, Schieds VZ, 304, 305 (2004); R. Geimer in R. Zoeller ZPO Section 1036 mn. 1 (2007); *contra* P. Schlosser in Stein & Jonas ZPO Section 1037 mn. 2 (2002); J. P. Lachmann, *Handbuch fuer die Schiedsgerichtspraxis* mn. 1090 (2008). See also *Oberlandesgericht Hamburg*, OLG Hamburg, July 12, 2005 (Docket n 9 SchH 1/05, Germany). For the debate in Austria see C. Hausmaninger, in Hans W. Fasching, ZPO IV/2 346 (2d ed. 2007) and B. Spiegelfeld and S. Wurzer, H E. Preidt, *Challenge of Arbitrator*, cit., 47.

final award on the merits. If courts are seized with complaints against the decisions of arbitral institutions, they usually restrict themselves to examining whether the institution has correctly applied the Rules. This approach has been adopted, for example, by the famous French court decisions in *Raffineries de Petrole d'Homs et de Banjas v. Chambre de Commerce Internationale*,⁵⁷ which clearly stated the principle that in the context of an entirely contractual international arbitration, the French courts will not entertain an application for the annulment of an institutional decision.⁵⁸ If an arbitral institution or any third party is entitled to decide upon a challenge (according to a free choice of the parties), their decision will not be subject to any direct review by a state judge.⁵⁹ In the absence of any party agreement on the challenge procedure, the President of the *Tribunal de Grande Instance* of Paris will be entrusted with the decision,⁶⁰ which will be issued in the form of an order in summary proceedings (*référé*), against which no recourse is available.⁶¹ For the party who has unsuccessfully challenged an arbitrator, the only option available would be an application to set aside the award on the basis of Art. 1502(2) NCPC, while the failure to object to an arbitrator during the proceedings may be deemed to be a waiver of this ground.⁶²

⁵⁷ Court of Appeals, Paris, 15 May 1985, *Rev. Arb.*, 1985, 147. In this case, a decision by the ICC Court of Arbitration ordering the replacement of an arbitrator was referred first to the *Tribunal de Grande Instance* of Paris and, subsequently, to the Court of Appeals. Both judges recognised the ICC's jurisdiction to rule on the question in the application of the ICC Rules. See also the decision of the Paris Court of Appeals in *Opinter France v. Dacomex*, 7 October 1987, refusing to review the decision of the ICC Court with respect to a challenge.

⁵⁸ These principles, however, do not find uniform application in every jurisdiction. In Switzerland, for example, prior to the enactment of the Swiss PILA, courts held themselves to have exclusive jurisdiction to decide on the removal of a challenged arbitrator, with the consequence of extremely lengthy procedures.

⁵⁹ This is usually the case when a decision is rendered by a private body which does not exercise judicial functions. See M. W. Buehler & T. H. Webster, *Handbook of ICC Arbitration* 133 (2d ed., 2008).

⁶⁰ See Art. 1457 NCPC.

⁶¹ The manner in which French courts have exercised their supervisory role to assist the arbitral process reveals an attitude of respect, both for the parties' autonomy and legitimate expectations and for the arbitrator's prerogatives. See M. S. Leurent, *L'Intervention du Juge*, *Rev. Arb.*, 1992, 307 *et seq.* and Pluyette, *Intervention à la Suite du Rapport de M. S. Leurent*, *Rev. Arb.*, 1992, p. 317. An indication of the limits of the French court's cooperation are clearly indicated in the decision of 16 November 1996 in the case *Société Regimage c. Société Mitan Presse*, *Rev. Arb.*, 1995, p. 659.

⁶² Y. Derains - R. Goodman - Everard, *France in Int'l Handbook on Commercial Arbitration*, 53, P. Sanders & A. van den Berg, ed. 1988. French law does not prescribe any time limits within which a challenge must be filed.

The U.S. Federal Arbitration Act is silent about the question concerning the removal of arbitrators by the courts, while the proceedings are pending. It only mandates the *vacatur* of an arbitral award where an arbitrator is found to be biased or to have engaged in certain misconduct.⁶³ Within this legislative context, U.S. federal courts have consistently held that there is no judicial remedy against an arbitrator before the completion of the arbitration.⁶⁴ Any different conclusion was said to contrast with the Congressional intent to avoid judicial intervention at the pre-award stage.⁶⁵ When parties choose arbitration: “(...) *the role that the judiciary should aim at is to have no role at all*”.⁶⁶ U.S. courts have always maintained that post-award judicial review is sufficient to deter abuse, notwithstanding the argument that allowing an openly biased arbitrator to proceed will inevitably lead to a challenge and likely *vacatur* of a final award, thus rendering meaningless and wasteful the entire process.⁶⁷ Only exceptionally and on the basis of very severe grounds such as *manifest injustice, severe irreparable injury*⁶⁸ or *overt misconduct*⁶⁹ have courts been able to admit a judicial review of the institution’s decision or to intervene and order the replacement of an arbitrator.⁷⁰

In the 1996 English Arbitration Act, provision is made for a two-tier system: a decision is made based upon a procedure agreed by the parties and a subsequent application may be made to the court. In particular, while the authority of an arbitrator can be revoked only by agreement of the parties or by the action of the arbitral body vested with the relevant powers

⁶³ See Federal Arbitration Act 9, U.S.C. para. 10.

⁶⁴ See Y. Andreeva, *How Challenging is the Challenge, or can U.S. Courts Remove Arbitrators before an Arbitration has Come to an End?*, *The Am. Review of Int’l Arbitration*, 2008, Vol. 19, 127.

⁶⁵ See *Marc Rich & Co., A. G. v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 388 (“if Congress had wished to authorize such review before arbitration proceedings commence, it could easily have so provided”); see also *Michaels v. Mariforum Shipping S.A.* 624 F. 2d 411, 414 n. 4 (2d Cir. 1980) and *Alter v. Englander*, 901 F. Supp. 151, 153 (S. D.N.Y. 1995).

⁶⁶ E. Tuchmann, *Removal of the Arbitrator during Proceedings*, N. Y. L. J., May 7, 1998, at 3, col. 1.

⁶⁷ See *Marc Rich & Co., A. G. v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 388: “(...) a just and expeditious result with a minimum of judicial interference can best be achieved by requiring an arbitrator...to declare any possible disqualification and then to leave it to his or her sound judgement to determine whether to withdraw”).

⁶⁸ See *Aerojet v. AAA*, 478, F. 2d, 248, 25 (9th Cir. 1973); *MGMT v. O’Malley*, 965, S.W. 2d 215, 220 (mo. Ct. App. 1998); *York Hanover v. AAA* 1993 U.S. Dist Lexis, 6192 (S.D.N.Y. May 7, 1993).

⁶⁹ What is required is a very high standard: *irreparable harm, proper case, extreme case*. See *Metropolitan Property and Casualty Insurance v. J. C. Penney Cas.*, 780 Supp. 885, 893-94 (D. Conn. 1991).

⁷⁰ These interventions are possible both in *ad hoc* and institutional arbitration.

(Section 23), the English courts retain the exclusive power to remove an arbitrator on one or more of the grounds listed in Section 24 (including doubts about the arbitrator's impartiality, doubts as to his capacity to act, failure to conduct the proceedings). However, if there is already in place an arbitral (or any other) institution vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal, unless it is satisfied that the applicant has first exhausted any available recourse to that institution or person.⁷¹ Unlike the UNCITRAL Model Law, the Arbitration Act does not provide for a default challenge procedure before the arbitral tribunal. As was the case under Section 23 (1) of the 1950 Act,⁷² it seems that an application to remove an arbitrator can be made at any time during the proceedings. One of the grounds for removal listed in Section 24 (1) (d) (failure or refusal to conduct the proceedings properly or to use all dispatch in conducting the proceedings or making an award) is so broadly worded as potentially to permit a heavy interference on the part of the courts in the arbitral process.⁷³

Finally, in other jurisdictions, such as Switzerland and Sweden, mixed solutions have been adopted.⁷⁴

⁷¹ See K. Maxwell, *England, Practitioner's Handbook on Int'l Arbitration* 608 (F. Weigand ed. 2002). The court's power to review any decision rendered in a challenge procedure by an arbitral institution was confirmed by the English Court of Appeal in *AT&T Cooperation Lucent Technologies Inc. v Saudi Cable Company*, [2002] 2 Lloyd's Rep. 127.

⁷² See *Pratt v. Swanmore Builders Ltd* [1980] 2 Lloyd's Rep. 50.

⁷³ In order to prevent this risk the DAC, in its February 1996 Report paras. 105-106, provided some guidelines to set out the limits of Section 24 (1) (d), stating in particular that: "(...) this part [of the Act] (...) should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute its own view as to how the arbitral proceedings should be conducted".

⁷⁴ Under Art. 179 and 180 PILA, either a procedure agreed upon by the parties (concerning both the grounds for a challenge and the possible involvement of an arbitral institution) or a challenge before the state courts is possible, but not both. See P. A. Karrer & P. A. Straub, *Switzerland, Practitioner's Handbook on International Arbitration* (F. Weigand, ed. 2002), 1056 mn. 56; M. Blessing, *The New International Arbitration Law in Switzerland: a Significant Step Towards Liberalism*, *Journal of Int'l Arb.*, Vol. 5, n. 2 (1988) 9-44; B. Spiegelfeld - S. Wurzer - H. E. Preidt, *Challenge of Arbitrators, cit.*, 57. For Sweden see H. Jung, *SCC Practice: Challenge to Arbitrators, SCC Board Decisions 2005 – 2007, Stockholm Int'l Arb. Review*, 2008, 1, *Arb. Institute of the SCC*, Jurisnet, LLC, 1 ff.

C. The Options Concerning Interim Measures of Protection

The Mauritian Act contains innovative provisions also in respect of interim measures of protection issued by arbitrators and courts.

First of all, the Act follows what is now the current law in the majority of jurisdictions, entrusting arbitrators with the power to grant interim measures of protection. As for the content and scope of such powers, an arbitral tribunal under the new Act is entitled to issue only certain interim measures, expressly identified in Section 21 of the Act (which enacts Art. 17 of the Amended Model Law and contains, among others, orders to provide security for costs), subject to the agreement of the parties, who can exclude (or broaden the scope of) that power. There are some ancillary powers vested in the tribunal, in order to enable it fully to exercise its ability to make orders for interim measures: they concern the modification, suspension or termination of a measure on the application of any party or, in exceptional circumstances and on prior notice to the parties, on the tribunal's own initiative (Section 21(5)). The measures may be granted in the form of an award or in another form.⁷⁵

The principles that govern the recognition and enforcement of interim measures issued by a tribunal are the same that characterise the corresponding provisions of the Amended Model Law (*i.e.* Arts. 17H and 17J) and may be summarised as follows: a) the enforcement falls within the exclusive jurisdiction of the courts (in Mauritius, the Supreme Court); b) the enforcement is granted upon a party's application to the Supreme Court; c) the Supreme Court can also enforce measures issued by tribunals sitting abroad; d) the enforcement may be refused on the same grounds invoked for refusing recognition of arbitral awards (with some additional grounds); e) any determination made by the Supreme Court at the stage of enforcing an interim measure shall be effective only for the purposes of application to recognise and enforce the interim measure and the Court shall not, in

⁷⁵ The Act provides also for the tribunal's power to request appropriate security from the applicant party, as well as disclosure of any material change in the circumstances and for the determination of a party's liability for damages and costs unlawfully suffered by another party (Section 21(6)(7)). As emerges from the *Travaux Préparatoires*, the conditions that a tribunal is free to impose when granting an interim measure are not restricted to the power to order the payment of costs and damages (Section 21(8)). It is possible, for example, that a tribunal may require the party requesting an interim measure to give an express undertaking in damages and/or "fortify" that undertaking through the provision of an appropriate bank guarantee or other security, as a condition of granting the measure (Amended *Travaux Préparatoires*, part IV - Interim Measures - 83).

making that determination, undertake a review of the substance of the interim measure.

As to the concurrent power of the courts to issue interim measures, the Act adopts a clear arbitration-friendly approach, by limiting the Supreme Court's powers to those which support, and do not disrupt, arbitrations and only then in cases of *real urgency* or when the tribunal is itself unable to act effectively. The subordinate nature of the Supreme Court's power to issue interim measures clearly emerges from two provisions contained, respectively, in paras. 5 and 6 of Section 23. The Court shall act only if (or to the extent that) the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard has no power or is unable for the time being to act effectively (para. 5). An order made by the Supreme Court under this section shall cease to have effect on the order of the arbitral tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order (para. 6). Section 23 provides that the Supreme Court shall have the power to issue interim measures, even in relation to arbitration proceedings having their seat abroad.⁷⁶

The Supreme Court is prevented from granting interim measures outside the framework of Sections 23 (3) to 23 (6), for instance pursuant to its inherent jurisdiction or to other statutory powers.⁷⁷ This conclusion is based on both Section 3(8) of the Act (which codifies the principle of non-intervention of the courts subject to the provision of the Act) and of Section 3(10) (which states the principle of non-application of domestic law principles).

The provisions of the Act on interim measures are clearly based on the UNCITRAL Amended Model Law (Art. 17 et ff.), which is a leading example of the trend towards expansive arbitral authority to grant interim relief. However, they depart from the latter on two major points. First, they omit to regulate *ex parte* interim measures issued by the tribunal (the so called *ex parte* "Preliminary Orders"⁷⁸), due to their controversial nature. Second, as to the concurrent power of the courts, unlike the Model Law which contains very little guidance as to how the courts are to exercise that power and how the latter inter-relates with the arbitral tribunal's own

⁷⁶ While in case of urgency, the Supreme Court can also act on *ex parte* application, when there is no urgency the requesting party must previously give notice to the other party or parties and to the arbitral tribunal.

⁷⁷ Accordingly Mauritian Courts should not follow the jurisprudence currently adopted in England, where the Courts have used their inherent jurisdiction and/or Section 37 of the English 1981 Supreme Court Act to grant interim measures *even* where the conditions for the grant of such measures under Section 44 had not been fulfilled.

⁷⁸ Articles 17 B and 17 C UNCITRAL Amended Model Law.

power,⁷⁹ the Act provides that the Supreme Court's power be limited so as to ensure that it will not interfere with the arbitral process, and will only intervene to support – and not disrupt – arbitrations, at times when: (i) there is real urgency and (ii) the arbitral tribunal is unable to act effectively. This has been done through the incorporation of the text derived from Section 44 of the English Arbitration Act into Sections 23(3) to 23(6) of the Act.

The topic of interim measures in international commercial arbitration has been the subject of extensive and exhaustive analysis, as shown by the number of studies and commentaries published. There remain a number of controversial issues, however, which are worth analysing here. Taking into account the limited scope of this Report, we will limit this review to the most relevant ones.

The current law in the majority of jurisdictions recognises the power of arbitrators to issue interim measures of protection (also named pre- award relief, conservatory relief, protective relief),⁸⁰ without affecting

⁷⁹ See Article 17 J of the Amended Model Law, which simply provides that: “A court shall have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration”.

⁸⁰ Historically only national courts were empowered to grant interim or conservatory measures. The powers of arbitral tribunals to order provisional relief, if any, were subject to significant limits or prohibition (see the situation in Germany until the new law based on the Model Law was enacted in 1998 (Art. 1036 German ZPO); in Austria until 2005 (Art. 593 Austrian ZPO); in Greece until 1999 (Art. 685 Greek Code of Civil Procedure); in Spain until 2003 (Art. 23 Spanish Arbitration Act). Arbitral tribunals, in turn, were reluctant to exercise even those limited powers that they possibly did possess (the reticence on the part of arbitrators to grant provisional relief is clearly shown by the Report of the Secretary General of the ICC Court of Arbitration (1992), according to which, between 1977 and 1992, *only* 25 ICC cases had addressed the subject of interim measures; in contrast, a review of ICC awards between 1985 and 2000 identified some 75 cases in which some form of provisional measures were requested). The rationale of those limitations was the traditional precept that arbitrators may not issue *coercive measures* and that granting interim power to arbitrators would in this respect constitute a breach of public policy. This rationale was (and still is, when referred to in jurisdictions, like Italy, which still prevent arbitrators from granting interim measures) clearly unsatisfactory. On the one hand, the power to grant interim measure is no more an exercise of coercive powers than the making of a final award on the merits, which grants a relief directing a party to take, or not to take, specified actions. What the tribunal lacks is only the power directly to require compliance with its orders or to sanction non compliance. By agreeing to arbitrate, in addition, the parties presumptively wished to have their disputes resolved in a single procedure before a neutral tribunal. Prohibiting arbitrators from granting interim powers would thus appear inconsistent with the terms of most international arbitration agreements.

the concurrent power of the courts to issue interim measures.⁸¹

As regards the power of arbitrators, the latter are given default power to issue interim measures in nearly all Model Law countries and in the majority of European and extra-European jurisdictions.⁸² However, there are still some notable exceptions, including Italy,⁸³ China,⁸⁴ Quebec,⁸⁵ Argentina⁸⁶ and Thailand.⁸⁷ In addition, most international arbitration conventions do not expressly deal with the authority of arbitrators to order provisional measures.⁸⁸ As regards the concurrent power of the court, it has

⁸¹ On the topic of interim measures in international arbitration see G. Born, *International Commercial Arbitration*, cit., Chapter 16, *Provisional Measures in International Arbitration*, 1941 ff., esp. nt. 1; A. Yesilirmak, *Interim and Conservatory Measures in ICC Arbitral Practice*, ICC Int'l Ct. Arb. Bull., 2000, 11 (1), 31 ff.; D. F. Donovan, *Le pouvoir des arbitres de rendre des ordonnances de procédure, notamment des mesures conservatoires, et leur force obligatoire à l'égard des parties*, ICC Int'l Ct. Arb. Bull., 1999, Vol. 10 N° 1, 59 ff. J. D. M. Lew, *The Case for the Publication of Arbitration Awards*, *The Art of Arbitration: Essays on International Arbitration: Liber Amicorum Pieter Sanders, 12 September 1912-1982*, editors, J. C. Schultz, A. Jan van den Berg, Deventer 1982, 223; H. A. Grigera Naón, *Editorial* (1988) 5.2 *J. Int'l Arb.* 5; K. P. Berger, *International Economic Arbitration*, Deventer, 1993 at 509-525.

⁸² Just to mention only a few (for further reference see *infra*), consider, for example, in Europe, Art. 25 (4) Swedish Arbitration Act (1999) and Art. 183 (1) Swiss PILA; for extra-European jurisdictions see Art. 26 of the Venezuelan Commercial Arbitration Law (1998); Art. 32 Columbia Decree N. 2279 (1989); Art. 52 (1) Costa Rica Law for Alternative Resolution of Disputes and the Promotion of Social Peace; Art. 9 of the Ecuador Law on Arbitration and Mediation (1997); Art. 24 (1) Panama Decree Law 5 (1999); Art. 492 Uruguay Code of Civil Procedure (1990).

⁸³ See Art. 818 of the Italian Code of Civil Procedure.

⁸⁴ See Art. 28, 46 and 68 of the Chinese Arbitration Law. Under the latter provisions, only the competent People's Court has the power to grant or deny an application for interim relief. Accordingly, parties have first to apply to the relevant Arbitration Commission for preservation of property (and also for the preservation of evidence). Such applications will then be submitted to the relevant People's Court by the Arbitration Commission. The preservation of property will be dealt with according to the relevant provisions of the Chinese Law of Civil Procedure.

⁸⁵ See Art. 940 (4) of the Quebec Code of Civil Procedure.

⁸⁶ See Art. 753 of the Argentinean Code of Civil and Commercial Procedure.

⁸⁷ See Section 18 of the Thai Act.

⁸⁸ The Geneva Protocol and the Geneva Convention did not contain any express provision on interim measures, nor do the New York Convention and the Inter-American Convention. The European Convention on International Commercial Arbitration of 1961 (Geneva 21 April 1961) only provides, at Art. VI (4), that: 'a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement or regarded as a submission of the substance of the case to the court', without specifically addressing the issue whether or when an arbitral tribunal may itself grant provisional measures or the relationship between applications for tribunal ordered and court ordered provisional measures. The 1965 ICSID Convention, on the contrary, allows (at Art. 47) ICSID tribunals to 'recommend' that a party adhere to 'any provisional measures which should be taken to

been codified in most arbitration laws⁸⁹ and rules,⁹⁰ is well recognised both by national and international authorities and is generally considered implied, even in the absence of an express provision.⁹¹

preserve the respective rights of either party'. These recommendations are increasingly treated as *binding* by arbitral awards: see *Occidental Petroleum Corp. v. Republic of Ecuador* case N. Arb/06/11 (decision on interim measures 17 August 2007); *Tokios Tokelés v. Ukraine* Case N. Arb/02/18 (procedural order N. 2, 28 October 1999). On this topic see Y. Derains et E. A. Schwartz, *A Guide to the New ICC Rules of Arbitration*, The Hague, 1998, 272.

⁸⁹ The UNCITRAL Model Law is a prime example of legislation authorising *concurrent judicial and arbitral jurisdiction* to grant provisional measures. See Article 17 of the 1985 (and Art. 17 J of the 2006) Model Law. Many arbitration legislations contain similar provisions. See Art. 183 of the Swiss PILA (S. Besson, *Arbitrage International et Mesures Provisoires*, cit., 192; G. Walter, J. Broennimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz*, 1991, 144). The same can be said for Belgium (see Arts. 1696 (1) and 1679 (2) Belgian Judicial Code); the Netherlands (Art. 1022 (2) Code of Civil Procedure); Germany (Section 1041 ZPO: for a commentary of the German relevant provisions see J. P. Lachmann, *Handbuch fuer die Schiedsgerichtspraxis* 2852 *et seq.* (3d ed. 2008); K. H. Schwab, G. Walter, *Schiedsgerichtsbarkeit* ch. 17a 1 *et seq.* (7th ed. 2005); P. Schlosser in Stein-Jonas (eds.) *Kommentar zur Zivilprozessordnung*, Art. 1041 1 *et seq.* (22nd ed. 2002); England (see Art. 44); Japan (see Art. 15 Japan Arbitration Law); India (Art. 9 Indian Arbitration and Conciliation Act). See also Section 14 of the Philippines Act; Section 12 (6) of the Singapore Act; Art. 18 of the South Korean Act; Art. 9 Greek Arbitration Law.

⁹⁰ See, *ex multis*, Art. 26 (3) of the UNCITRAL Rules, according to which: 'A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement'; Art. 21 (3) ICDR Rules; Art. 32 (2) SCC Rules; Art. 21.3 AAA Rules; Section 20.2 DIS Rules; Art. 24.3 Hong Kong Rules; Art. 36, para. 4 ICA Court at the Russian Federation Chamber of Commerce and Industry; Art. 25.2 and 25.3 LCIA Rules; Articles 38 and 42 NAI Rules; Rule 1.1 SIAC Rules.

⁹¹ Even in jurisdictions where the legislation does not expressly provide for concurrent jurisdiction to order provisional measures, national courts have reached this result. In the U.S.A. for example, the text of the F.A.A. only grants federal courts the express power to order provisional measures with regard to a narrow category of maritime disputes (U.S. F.A.A. 9 U.S.C. Art. 8). Nonetheless, outside the context of the New York Convention, the overwhelming weight of U.S. judicial authority under the F.A.A. concludes that federal courts has jurisdiction to issue provisional measures (absent contrary agreement by the parties) to protect the parties and the arbitral process. See *Discount Trophy & Co. v. Plastic Dress-Up Co.*, 2004 WL 350477 at 8 (D. Conn. 2004); *American Express Fin Advisors v. Thorley* 147 F. 3d 46 (8th Cir. 1994). For comments see E. Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: a Perspective from Contract Law* 54 U. Chi. L. Rev., 1987, 1373; G. D. Pilke, *The Federal Arbitration Act: a Threat to Injunctive Relief*, 21 Willam. L. Rev., 1985, 674. Likewise, also in the absence of statutory guidance, French courts have concluded that an agreement to arbitrate does not ordinarily preclude court-ordered provisional measures: see Judgment of 27 October 1995, Paris Court of Appeal, *Rev. Arb.*, 1996, 274; *Fouchard Gaillard Goldman on*

Both the arbitrators' and the courts' powers to issue interim measures raise a number of issues, which will be addressed here below.

As to the arbitrators' power, at present its content, scope and limits differ quite substantially from country to country. In some jurisdictions (like Switzerland), arbitrators have a general power to issue interim measures, subject to the contrary agreement of the parties.⁹² In other jurisdictions (like England) (as well as under the UNCITRAL Model Law and most laws enacted on its basis), arbitrators have the power to grant certain specific measures, subject to an agreement of the parties which can broaden that power.⁹³ From a practical point of view the difference is not so significant, since in both cases the precise identification of the scope of the arbitrators' power depends (directly or indirectly) on the will of the parties. However, the second option (*i.e.* a descriptive provision, pointing to some broadly defined (non-exhaustive) categories of measures, which the tribunal can grant, subject to a different agreement of the parties, who can exclude, reduce or broaden the tribunal's power) is to be preferred. It enhances the certainty as to the ambit of the arbitrators' power, it fosters its acceptability by the courts, which are later requested to enforce those measures and it still allows a certain degree of flexibility.

In other jurisdictions, such as France and the U.S.A., there are no express provisions conferring upon arbitrators the power to issue interim measures. However, that power is considered an inherent prerogative of the arbitrators, implied in the stipulation of the arbitration agreement. In the U.S.A., the F.A.A. and the majority of U.S. state statutes governing arbitration are silent on the power of arbitrators to grant interim measures. Nevertheless, there is no doubt about the existence of such a power. While early U.S. court decisions frequently held that arbitrators lacked the authority to issue provisional relief (generally relying on a narrow reading

International Commercial Arbitration, *cit.*, 1306-09, 132; J. F. Poudret, S. Besson, *Comparative Law of International Arbitration*, *cit.*, 611.

⁹² Art. 183 of the Swiss PILA now provides that: '(...) unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or protective measures'. Under this provision, Swiss authorities now recognise a broad power (absent contrary agreement) on the part of international tribunals seated in Switzerland to grant interim relief (*see* S. Berti, in S. Berti *et al.*, eds, *International Arbitration in Switzerland*, Art. 183 (2000); W. Habscheid, *Einstweiliger Rechtsschutz durch Schiedsgerichte nach dem Schweizerischen Gesetz ueber das International Privatrecht IPRG*, para. 134 *et seq.* 1989).

⁹³ *See* Section 38 and 39 of the English Arbitration Act. *See also* T. Oyre, *The Power of an Arbitrator to Grant Interim Relief under the Arbitration Act 1996*, *Arbitration* 1999, 113 ss.

of the parties' arbitration agreement),⁹⁴ at present the overwhelming majority of U.S. courts recognise that arbitrators have a broad power to grant interim relief (in the absence of any agreement to the contrary⁹⁵). The commentary on the Revised Uniform Arbitration Act ("RUAA"), which contains a summary of the state of U.S. law in this field, reports that: "*The case law, commentators, rules of arbitration, organizations and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief, including interim awards, in order to make a fair determination of an arbitral matter*".⁹⁶

Most arbitration rules, in turn, recognise the power of arbitrators to order interim relief.⁹⁷ Even where those rules do not contain express provisions on this matter, national courts and arbitral tribunals have often interpreted them as to authorise such action.⁹⁸ For example, the 1988 ICC Rules did not expressly authorise tribunal-ordered provisional measures: nevertheless, arbitral tribunals concluded that they had authority to grant provisional relief.⁹⁹

⁹⁴ See *Swift Indus., Inc. v. Botany Indus., Inc.* 466 F. 2d, 1125, 1134 (3d cir. 1972); *Recyclers Ins. Group Ltd v. Ins. Co. of Am.*, 1992 WL 150662, E.D. Pa. 1992.

⁹⁵ See *Banco de Seguro del Estado v. Mut. Marine Office, Inc.*, 344, F. 3d 255 (2d cir. 2003); *Charles Constr. Co. v. Derderian* 586 N.e. 2d 992 (Mass. 1992); *Pacific Reins Mgt. Corp. v. Ohio Reins Cor.*, 935 F. 2d 1019, 1022-1023 (9th Cir. 1991); *Island Creek Coal Sales Co. v. City of Gainesville* 729, f. 2d 1046, 1049 (6th Cir. 1984); *Konkar Maritime Enter, SA v. Compagnie Belge d'Affretement*, 668 F. Supp. 267 (S.D.N.Y. 1987); *Certain Underwriter at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 837 (N.D. Cal. 2003). Most U.S. commentators also conclude that arbitral tribunals presumptively have the power to order provisional relief (unless otherwise agreed) (see M. F. Hoellering, *The Practices and Experience of the American Arbitration Association*, in *ICC Conservatory and Provisional Measures in International Arbitration* 31, 1993; C. C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 *Tulane L. Rev.* 1991, 1535-36).

⁹⁶ See RUAA, par. 8, comment 4, 2000.

⁹⁷ See Art. 26 UNCITRAL Rules; Arts. 21.1 and 27.7 AAA Rules; Art. 20.1 DIS Rules; Art. 28 ICC Rules, which allows the tribunal to grant any interim or conservatory measures it deems appropriate, absent contrary agreement by the parties; Art. 25 LCIA Rules. In contrast, the CIETAC Rules provide that where any party applies for the preservation of property or evidence, CIETAC shall forward the party's application to the competent court at the place where the property/ evidence is located for a ruling (see Arts. 26 and 28).

⁹⁸ See *Rockwell Int'l System Inc. v. Islamic Republic of Iran*, award, N. Itm. 20-430-1 (6 June 1983), 2 Iran U.S. C.T.R. 369, 371, 1983.

⁹⁹ Where the parties did not empower the tribunal to grant interim measures expressly in their agreement or in the terms of reference, certain ICC arbitral tribunals have retained jurisdiction on the basis of an *implied power* deriving from Article 8(5) of the 1988 Rules (see first interim award (1988) in case 5835 in 8, 1 *ICC Arb. Bull.* (1997) 67), sometimes in conjunction with Article 11 or 24 of the Rules (see second interim award (1996) in

The power of arbitrators in this area is subject to some limitations, possibly deriving from: a) the particular nature of the individual measure to be adopted; b) the need to respect the principle of equal treatment of the parties, which underlies arbitration; and c) the possible conflicts between the different legal sources which converge to regulate the power of the tribunal to issue interim measures. These may include, the agreement of the parties, any arbitration rules referred to in the agreement, the applicable arbitration law and the general principles and praxis of international arbitration.

As to the issue under a), a possible example is the order for security for costs (also referred to as *caution pour les frais* or *cautio judicatum solvi*).¹⁰⁰ It is not settled yet whether it can be granted by arbitrators or by the courts only and, in any event, to which regime it is subject. Security for costs is a measure whereby a responding party seeks to compel the party bringing the complaint to put up money to cover any eventual award of legal fees assessed against the claimant by the arbitral tribunal. This measure can take various forms, among them the payment of an escrow account, bonds, bank guarantees, liens on property and so on.¹⁰¹ There might be a broad range of possible arrangements in respect of the allocation of power between national courts and arbitrators, including the complete lack of regulation by the applicable law and arbitral rules, exclusive jurisdiction to order security on the part of either the state court or

case 7544 and interim award (1993) in case 6632). See also award in ICC case N. 7589, 11, 1 *ICC Ct. Bull.* 60, 61 2000.

¹⁰⁰ Most authorities take as given that security for costs is a form of interim or conservatory relief. See Lord Mustill's opinion in *SA Coppée Lavalin Nv v. Ken – Ren Chemicals and Fertilizers* [1994] 2 Lloyd's Rep. 109 at 116 (HL). Security for costs orders differ from other interim measures in that the former can be implemented directly, without State assistance in enforcement, since the standard enforcement tool is the stay of arbitral proceedings, rather than the seizure of assets or compulsion to take some action. On security for costs in international arbitration see N. Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, *Am. Rev. of Int'l Arb.*, 2000, Vol. 11, 312, 313; B. Berger, *Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, *ASA Bulletin* 1/2010, 7 ff.; W. Gu, *Security for Costs in International Commercial Arbitration*, *J. of Int'l Arb.*, 22 (3), 167-206, 2005, 167 ff.; M. O'Reilly, *Costs in Arbitration Proceedings: a Handbook* 79-96, 1995. For an informative survey of national arbitration statutes governing security for costs in international arbitration, see O. Sandrock, *The Cautio Judicatum Solvi in Arbitration Proceedings*, 14 *J. Int'l Arb.* 17 (1997). The ICC held a Colloquium in 2000 addressing the issues concerning costs of arbitration entitled '*Costs of arbitration – payments, role of arbitrators, security for costs allocation of costs: in house costs?*' available at <http://www.iccwbo.org/home/business_law/conference_reports/costs.asp>.

¹⁰¹ P. Bowsher, *Security for Costs*, *cit.*, at 40.

the arbitral tribunal, or shared authority to do so.¹⁰² The general trend is to discourage orders for security for costs in modern international commercial arbitration. Indeed, against this measure stand several arguments, among which: the fact that, in many civil law jurisdictions, it is perceived as a common law peculiarity,¹⁰³ which is potentially in conflict with each party's right to be heard; when the courts are involved, there is always a risk that the speed, efficiency and confidentiality of the arbitration procedure might be affected. If on the contrary, arbitrators are granted (and make use of their) exclusive power to issue security for costs, they run the risk of being perceived as prejudging the merits of the case and are thus not impartial (by imposing on one party to the dispute financial commitments that it might not meet).

As to the issue referred to above under b) (the need to comply with the principle of equal treatment of the parties), a possible limitation to the power of the tribunal to issue interim measures is related to the so called *ex parte* interim measures. The power of the arbitrators to issue *ex parte* interim measures is rather unknown within most arbitration laws and rules (with some limited exceptions: see the TAS Rules (Art. R3783) and the WIPO Emergency Relief Rules). Some institutional rules go further and

¹⁰² In England, until 1994, English courts had *exclusive and fully discretionary power* to order security for costs in arbitral proceedings when the parties had not expressly agreed beforehand on such interim measures (para. 12 (6), 1950 Arbitration Act). See *SA Coppée Lavalin NV v. Ken – Ren Chemicals and Fertilizers* [1994] 2 W.L.R. 631; D. Sarre, *Caution Pour Les Frais et Honoraires d'un Arbitrage de la CCI en Angleterre: Les Affaires Ken – Ren, L'arbitrage Commercial International en Europe: Supplément Spécial du Bulletin de la Cour International d'Arbitrage de la CCI* 60 1994. Under the 1996 English Arbitration Act that power was expressly removed from the courts. It now lies exclusively in the hands of the arbitral tribunal (see Section 38(3)). In the U.S.A. the situation is much less clear (see R. Hulbert, *The American Law Perspective in Conservatory and Provisional Measures*, *Int'l Arb.* 1993, 92; D. Rivkin-D. F. Donovan-F. Kelner, *United States, in Peaceful Solutions: Int'l Guide to Commercial Arbitration*, 1993, 41, 45). As to Switzerland, of all the European jurisdictions it presents perhaps the highest level of hostility towards security for costs. Many Swiss commentators and judges (following the renowned scholar's Ernst Rixler's opinion in 1947, condemning *cautio judicatum solvi*) agree that, *absent explicit agreement*, a respondent should never be allowed to demand security from his opponent in arbitral process, regardless of whether such an order would originate from the tribunal or a Swiss court. Other Swiss commentators have objected to security as a violation of the neutrality principle, as such orders favour the respondent over the claimant. In Austria, Greece, Italy and some Scandinavian countries, arbitrating parties may be required to turn to the courts for security orders. This seems to be the norm also in developing countries.

¹⁰³ In fact, while orders for security for costs are part of everyday life in common law litigation and arbitration, they are still rather resisted in civil law countries, where they are perceived to interfere with the right of the aggrieved party to be heard.

expressly forbid *ex parte* provisional relief.¹⁰⁴ The UNCITRAL Model Law is the most notable exception in this respect: after a long debate it has been finally modified to include this mechanism (on an opt-out basis).¹⁰⁵

Considerable doubts and scepticisms surround *ex parte* measures issued by arbitrators. They essentially relate to the enforcement of such measures (in case a party does not spontaneously comply with them), which may take the form of an *ex parte* enforcement of an *ex parte* measure - in which case there might be a duplication of procedures both bypassing the adversarial principle, with possible delays and inefficiencies compared with the alternative of direct recourse to the competent state court. The measure may consist of an *inter partes* enforcement of an *ex parte* measure - in which case one of the key advantages of *ex parte* measures (*i.e.* no advance notice) might vanish. In addition, *ex parte* measures might be difficult to enforce in a number of legal systems, as they might appear in violation of public policy or local constitutional rules. There might also be confidentiality issues, especially in respect of the position of the co-arbitrators. If the measure is granted, the arbitrator appointed by the party requesting the measure risks being perceived as siding with that party. In turn, the arbitrator appointed by the other side may lose the trust of that party, if one of the first things he does is to be seen to have heard the other party behinds his party's back. Finally, there might be an issue of liability for the arbitrators, especially in cases where the effects of the *ex parte* measures turn out to be irreversible.¹⁰⁶ However, probably the most relevant objection is that an *ex parte* measure issued by arbitrators will rarely be a practical expedient or accomplish any effective purpose.¹⁰⁷ As it emerges from the arbitration praxis, in the vast majority of cases the role and position of arbitrators (as the final judges on the merits) will suffice to foster compliance with their orders.¹⁰⁸

In light of the foregoing, the view of some commentators that, at least at present, *ex parte* measures are beyond the power of arbitral tribunals

¹⁰⁴ See ICSID arbitration rules (Rule 39.4).

¹⁰⁵ See Arts. 17 B and 17 C of 2006 version of the UNCITRAL Model Law.

¹⁰⁶ In general, on the debate concerning the admissibility and opportunity of *ex parte* interim measures issued by arbitrators, see H. van Houtte, *Ten Reasons Against: Proposal for ex parte Interim Measures of Protection in Arbitration*, 2004, 20 *Arb. Int'l*; J. Fry, *Interim Measures of Protection: Recent Developments and the Way Ahead*, 2003 *Int. Arb. L. Rev.* 153 at 155.

¹⁰⁷ See G. Born, *International Commercial Arbitration*, *cit.*, 2017.

¹⁰⁸ E. A. Schwartz, *The practices and experience of the ICC Court, in Conservatory and Provisional Measures in International Arbitration*, ICC Publication N. 519 (1993): 'Parties seeking to appear before arbitrators as good citizens who have been wronged by their adversary would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims'.

is likely to be favoured.¹⁰⁹ In any event, it is our view that the inclusion of such measures in arbitration laws appears advisable only for jurisdictions which are already quite familiar with international arbitration law and practice, and provided parties are given certain flexibility as to their operativeness (*i.e.* by means of opt-out/opt-in mechanisms). Provisions regarding *ex parte* interim measures, in fact, introduce a level of complexity which is not easy to handle, making extremely problematic their acceptability in jurisdictions with little or no tradition of international arbitration.

As to the third type of limits to the power of an arbitral tribunal to issue interim measures (referred to above under (c)), the conflicts between the legal sources which converge to regulate that power (and relating, for example, to the requirements for issuing an interim relief, the power of the arbitrator to modify it) can arise not only between sources of different categories (*i.e.* the agreement of the parties, the arbitration rules, the arbitration laws, the international conventions, the praxis and usages *etc.*), but also between sources of the same category belonging to different jurisdictions, every time the granting and enforcement of a specific interim measure involves more than one legal system. The need to have regard to the provisions of the *lex arbitri* and those of the law of the place where the enforcement is sought cannot be overlooked.

In order to determine whether it has jurisdiction to grant interim measures, a tribunal usually examines the parties' agreement (which rarely contains express provisions on interim measures), any arbitration rules referred to in the agreement and the governing arbitration law,¹¹⁰ which usually is the law of the place of arbitration. As a matter of principle, it is likely that a tribunal will not issue any measure, unless it is satisfied that the law applicable to the arbitral proceedings¹¹¹ allows it to do so¹¹² (in order to

¹⁰⁹ See Z. Stalev, *Interim Measures of Protection in the Context of Arbitration*, in A. J. van den Berg (ed.), *International Arbitration in a Changing World* 111 (ICCA Congress Series N. 6, 1994); D. Caron, L. Caplan, M. Pellonpää, *The UNCITRAL Arbitration Rules. A Commentary*, New York, 2006, 543.

¹¹⁰ See, *e.g.*, first interim award (1988) in case 5835, in 8,1 *ICC Ct. Bull.* (1997) 67, and award (1980) in case 3540, in 108 *J.D.I.* (1981) 914; 7 *Y.B. Comm. Arb.* (1982) 124, at 129130; S. Jarvin & Y. Derains, *Collection of Arbitral Awards 1974-1985* (1990) 105 and 399; interim award (1997) in case 9301; interim award (1998) in case 8879.

¹¹¹ See the interim award (1996) in case 8786 and final award (1997) in case 8879.

¹¹² See G. Petrochilos, *Procedural Law in International Arbitration*, 2004, 209, according to whom: '(...) arbitrators invariably rule that if the law of the seat prohibit them to order interim protection (...) they have no such jurisdiction'. See also final award in ICC case N. 7895, 11, 1 *ICC Ct. Bull.* 64 (2000); partial award in ICC case N. 8113, 11, 1 *ICC Ct. Bull.* 65 (2000); interim award in ICC case N. 8879, 11 1 *ICC Ct. Bull.*, 84 (2000).

prevent the future award from being set aside).¹¹³ However a practice has emerged internationally, according to which arbitrators often and increasingly determine the issue of whether or not to grant interim reliefs without reference to any national law.¹¹⁴ Some courts and commentators have even stated that the agreement of the parties (whether or not expressed by reference to a liberal set of arbitral rules), which contemplates the power of arbitrators to grant interim measures, will in any event prevail over the possibly more restrictive law of the seat, which, to the extent it denies effect to that agreement, should be considered in breach of the New York Convention's requirement that contracting States recognise international arbitration agreements.¹¹⁵ This assertion is probably too radical a conclusion, characterised by an excessive emphasis on the principle of party autonomy as a foundation (*rectius* dogma) of the arbitral process, which may cause some practical problems (among them the almost certain setting aside of the future arbitration award by a judge of the seat). The point is unquestionably a dilemma for the arbitrators. The compliance, by all means and in any event, with the will and/or agreement of the parties (*i.e.* whether or not it is in conflict with the *lex fori*), will almost certainly lead to the setting aside of the award for breach of mandatory provisions (and possibly public policy) of the law of the seat. However, disregarding any agreement of the parties might lead to the subsequent refusal of the recognition and enforcement of the award on the basis of Art. V (1) (d) New York Convention ('*the arbitral procedure was not in accordance with the agreement of the parties*'). Finally, the question whether the parties have the power to contract out of the law of the arbitral seat, with regard to the denial of arbitrators' power to award provisional relief, has generally received a negative answer.¹¹⁶

¹¹³ See the interim award (1996) in case 8786 and final award (1997) in case 8879.

¹¹⁴ See partial award (1995) in case 8113. In several awards the arbitrators have resorted *directly* to the facts to decide whether or not to grant the relief sought. There has been little discussion as to whether they have authority to grant the measures other than by reference to the ICC Rules. See the final award (1994) in case 7589 and the final award (1994) in case 7210.

¹¹⁵ See *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 59-63 (1995), according to which the choice of law clause was deemed to encompass the substantive principles that the New York courts would apply, but not to include arbitration law, with the consequence that procedural provisions which would affect and limit arbitration were deemed not to apply; *Preston v. Ferrer* 128 St. Ct. 978, 988-989, U.S. S. Ct. 2008. See also G. Born, *International Commercial Arbitration*, *cit.*, 1952 and E. A. Schwartz, *The practices and experience of the ICC Court*, *cit.*, 44 ff., reporting a case in which the tribunal concluded that it was entitled to order interim measures, notwithstanding the contrary provisions of the Swiss Cantonal Concordat.

¹¹⁶ See C. Huntley, *The Scope of Article 17: Interim Measures under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 72 (2005); *Derma Jaya Properties Sdn. Bhd. v. Premium*

An agreement to arbitrate in accordance with institutional rules which do not expressly vest in the arbitral tribunal the power to order provisional relief, should not be treated as an exclusion of such power, nor should that conclusion be inferred from an agreement to arbitrate which omits to include, among a list of powers, the power of the arbitrators to issue interim measures. Similarly, the parties' agreement to arbitrate in a jurisdiction that does not expressly grant the arbitral tribunal the power to order provisional measures (like France or the U.S.A.), or an agreement according to which a particular national court will have the power to order provisional relief, does not necessarily imply an intention of the parties to withhold such power from the arbitrators.

The parties are free to withhold or limit the arbitrators' power to grant provisional relief provided in the arbitration rules or law, even to the point of channelling all requests for provisional measures to the courts.¹¹⁷ As to the concurrent power of state courts to issue interim measures,¹¹⁸ it raises a number of issues: should the power of the courts or the arbitrators be subject to the agreement of the parties, and, in that case, on the basis of which mechanism (opt in/opt out)? What is the scope of the respective authority? Are the courts and the arbitrators entitled to issue the same types of measures or does the power of one of the two bodies have a broader scope? Is a body entitled to review, modify or revoke the measure issued by the other body?

To begin with, no obstacle to the concurrent power of state courts can be derived from the New York Convention, and in particular from its Art. II¹¹⁹ (notwithstanding the well known, and subsequently abandoned,

Properties Sdn. Bhd. [2002] 2 Sing. L. R. 164 (Singapore High Court) ('parties may not agree to institutional arbitration rules that alter a tribunal's power to award interim measures under Singapore's version of the UNCITRAL Model Law').

¹¹⁷ Leading arbitration laws (such as Art. 17 UNCITRAL Model Law; Art. 183 (1) Swiss PILA; Art. 38 (1) English Arbitration Act 1996) and most arbitration rules (ICC and LCIA among them) give effect to agreements withholding the power to grant provisional measures from the arbitral tribunal.

¹¹⁸ On the issue of court ordered provisional measures, see C. N. Brower and A. M. Tupman, *Court Ordered Provisional Measures under the New York Convention*, 1986, 80 *Am. J. Int'l L.* 24; S. Jarvin, *Is Exclusion of Concurrent Courts' Jurisdiction over Conservatory Measures to be Introduced by a Revision of the Convention?* 6,1, *J. Int'l Arb.*, 1989, 171; A. Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide about to Turn?*, 1992, 30 *Tex Int'l L. J.*, 72; L. Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 *Int'l Tax*, 1986, 368. See also the Note by the UNCITRAL Secretariat (30 January 2002 A/CN.9/WG.II/WP.119) on *Interim Measures Issued by Courts and Arbitral Tribunals*.

¹¹⁹ This is the prevailing view. See A. J. van den Berg, *The New York Arbitration Convention of 1958*, 139-140 (1981); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard*

contrary view within the American case law),¹²⁰ nor from any other international conventions in the field of international arbitration (some of which, on the contrary, expressly provide for that compatibility¹²¹). This conclusion is based not only on the fact that none of these conventions deal with interim measures (but mostly with topics such as the recognition and enforcement of arbitral agreements and awards) but, most of all, on the fact that a proper use of that power by state courts, far from disrupting the autonomy of arbitration,¹²² fosters its efficiency. There are in fact a series of instances when a tribunal cannot operate: before it is constituted; when the measure is addressed to third persons who have not signed the arbitration agreement; when it is necessary to proceed *ex parte*, but the law of the seat forbids arbitrators to issue such measures; and because of the particular measure requested, which for some reason does not fall within the arbitrators' powers.

In all these cases, the only option available for the parties is to refer to the competent state courts.¹²³

Goldman on International Commercial Arbitration, (Kluwer Law International 1999, 1307; Judgment of 12 May 1977, *Scherk Enter. AG v. Société des Grandes Marques*, IV Y.B. Comm. Arb. 286; *The Rena K.* [1979] QB 377; see also Lord Mustill's statements in *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd* [1993] AC 334 at 354 (HL)).

¹²⁰ A view dating back to the leading cases *McCreary Tire & Rubber Co. v. Ceat S.p.A.* (501 F. 2d 1032 (3d cir 1974)) and, partially, to *Cooper v. Ateliers de la Motobecane S.A.* (442 N.E. 2d 1239 (N.Y. 1982)), and confirmed by subsequent decisions, such as *McDonnell Douglas Corp. v. Kingdom of Denmark* 607 F Supp. 1016 (E.D. Mo. 1985), *Shah v. Eastern Silk Indus Ltd* 493 N.Y. S. 2d 150 (N.Y. App. Div. 1985), *Drexel Burnham Lambert Inc. v. Ruebsamen*, 531 N.Y.S. 2d 547 (N.Y. App. Div. 1988). See, in general, C. N. Brower & A. M. Tupman, *Court Ordered Provisional Measures*, cit., 27; D. A. Zeff, *The Applicability of State International Arbitration Statutes and the Absence of Significant Pre-emption Concerns* 22 N. C. J. Int'l L. & Comm. Reg. 705 at 768 (1997); L. F. Ebb, *Flight of Assets from the Jurisdiction 'in the Twinkling of a Telex': Pre- and Post-Award Conservatory Relief in International Commercial Arbitration* 7, 1 J. Int'l Arb. 9 (1990); J. D. Becker, *Attachments in Aid of International Arbitration – the American Position*, 1 Arb. Int'l 40 (1985).

¹²¹ The 1961 European Convention, for example, at Art. VI (4), provides that an application for interim measures submitted to the court is not incompatible with the existence of an arbitration agreement. See D. Hascher, *European Convention on International Commercial Arbitration of 1961 – Commentary* XX Y.B. Comm. Arb. (1995).

¹²² As could appear *prima facie* on the basis of a superficial reading of Art. 5 of the UNCITRAL Model law, a cornerstone provision as far as the relationships between state courts and arbitrators are concerned.

¹²³ It is to be noted, however, that some arbitral rules (ACICA Rules, AAA Rules, SIAC Rules, SCC Rules, the new ICC Rules) provide for the mechanism of the *emergency arbitrator*, i.e. a temporary solution for the parties that require immediate relief, prior to the formation of the arbitral tribunal. Usually the order of the emergency arbitrator, even

The regime of the concurrent power of state courts to issue interim measures varies from jurisdiction to jurisdiction. There is a ‘free-choice’ model, in which the parties have a free choice to apply to either courts or tribunals, which, in principle, have the same powers to grant the same types of measures. There is also a ‘court-subsidary’ model, in which the power of courts is subsidiary to that of the tribunal and can be exercised only in support of the arbitrators’ power (in case of urgency, or when the tribunal is not yet constituted, or when it is for some reason unable to perform its task, or when the measures are addressed to third parties).¹²⁴ The first model has been adopted, for example, by the UNCITRAL Model Law,¹²⁵ Germany,¹²⁶ Switzerland,¹²⁷ Singapore.¹²⁸ The second model has been adopted by England,¹²⁹ Hong Kong,¹³⁰ the USA¹³¹ (and, within the latter, Ohio¹³²) and, to a certain extent, France.¹³³

if binding on the parties, is not binding on the arbitral tribunal which can modify or annul the order.

¹²⁴ On this topic see D. F. Donovan, *The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal*, in A. J. van den Berg, *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series N. 12, Deventer, 2005, 206. See Jarvin, *Is Exclusion of Concurrent Courts’ Jurisdiction over Conservatory Measures to be Introduced by a Revision of the Convention?* 6, 1 *J. Int’l Arb.*, 1989, 171; P. Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II *Y.B. Comm. Arb.*, 1977, 172 at 197; D. Caron, *Interim Measures of Protection: Theory and Practice in light of the Iran - U.S. Claims Tribunal*, 46 *Zeit. fuer Ausl. Oeffentl. Recht und Voelk.*, 1986, 465.

¹²⁵ See Art. 17 J of the UNCITRAL Model Law (as amended in 2006).

¹²⁶ See Art. 1033 and 1041 (1) German ZPO. Although some authors argue that parties can opt-out of the court power, most contend that courts must always be able to order interim measures, in order to meet the German constitutional law requirement that the State guarantees the availability of effective legal protection to its citizens. German law does not create a clear priority between the two bodies.

¹²⁷ See Art. 183, 1 Swiss PILA.

¹²⁸ See Section 12 (6), Singapore Act. See M. Hwang S.C. and R. C. Muttah, *The Role of Courts in the Course of Arbitral Proceedings*, cit., 234.

¹²⁹ See Art. 44 (2) English Arbitration Act 1996. The Act clearly provides that the power of the courts to order interim measures will be subsidiary to that of an arbitral tribunal. The purpose behind this model is to ‘(...) leave the control of the arbitral process in the hands of the tribunal so far as possible’ (B. Harris, et al., *The Arbitration Act 1996: A Commentary*, 2nd ed., Oxford, 2006, 218). See D. Brawn, *The Court’s Power to Intervene in Arbitration Matters in England and Wales, with Particular Reference to the Court’s Inherent and Residual Discretion*, *Arbitration*, 2010, Vol. 76, N. 2, 221.

¹³⁰ One of the most important features of the new Hong Kong Arbitration Ordinance is the minimal court intervention in the area of interim measures, vesting as much power as possible with arbitral tribunals. Section 45 of the Ordinance empowers the Hong Kong courts to grant certain interim measures in support of arbitral proceedings – whether seated in Hong Kong or not – albeit that the courts may decline to grant such relief, if it is considered more appropriate for the interim measure sought to be granted by the arbitral

A number of reasons suggests that this second model is to be preferred. By entering into an arbitration agreement, the parties have agreed that their disputes will be resolved in arbitration, with the exclusion, in principle, of any role of state courts. Every involvement of the latter would then appear as a potential violation of the intention expressed by the parties, especially when (and to the extent that) such involvement overlaps the powers and competencies of the arbitrators, *de facto* replacing their function. Moreover, every time a court decides on an application for interim measures, it inevitably intervenes, to a greater or lesser extent, into the merits of the dispute, in order correctly to assess (albeit on a provisional basis) the facts and the law of the case: an analysis that, by virtue of the stipulation of the arbitration agreement, the parties intended to reserve to the arbitrators and which cannot but affect (or at least influence) the subsequent decision which the arbitrators have to take on the merits. In other words, the requested relief of interim measures might become an attempt to obtain, by the back door, judicial resolution of the merits of the parties' underlying dispute. In certain jurisdictions, the power of the courts to issue interim measures may be subject to certain constraints, even though expressly provided for by the law (or otherwise impliedly recognised),

tribunal. Furthermore, the Hong Kong courts may only grant interim measures in support of proceedings seated outside of Hong Kong, if: a) the arbitral proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong; and b) the interim measure sought belongs to a type or description of interim measure which may be granted in Hong Kong.

¹³¹ National courts have emphasised that, where an arbitral tribunal has been constituted and is in a position to grant provisional measures, judicial relief should be granted sparingly (*Leviathan Shipping Co. Ltd. v. Sky Sailing Overseas Co. Ltd.* [1998] 4 H.K. Court of First Instance, High Court 347). See also *Merrill Lynch v. Salvano* 999, F. 2d , 211 (7th Cir. 1993) (issuing provisional measures '(...) only until the arbitration panel is able to address whether the relief should remain in effect. Once assembled, an arbitration panel can enter whatever temporary injunctive relief it deems necessary to maintain the status quo'). See also the *Revised Uniform Arbitration Act*, Art. 8(b) (2000).

¹³² The State of Ohio, for example, adopts Article 17 of the Model Law (S. 2712.36 of the Ohio Code, *International Commercial Arbitration*), adding that while a party may also request interim measures directly from the court, the court should not grant this request, unless: '(...) the party shows that an application to the arbitral tribunal for the measure of protection would prejudice the party's rights and that an interim measure of protection from the court is necessary to protect those rights' (Art. 2712.36 Ohio Rev. Code Ann.).

¹³³ The situation is less clear in other jurisdictions (e.g. Argentina, Brazil, Chile). See D. F. Donovan, *The Allocation of Authority Between Courts and Arbitral Tribunals*, cit., 221 ff.

In England, for example, a court, as shown in the *Channel Tunnel* case,¹³⁴ may be reluctant to make a decision on an application for interim measures that would risk prejudicing the outcome of the arbitration.¹³⁵ In France, the pro-arbitration courts are reluctant in taking measures (such as *constat*, *expertise*, *référé provision*) which, by their nature, tend heavily to interfere with the arbitral process and the determination on the merits of the dispute. Those measures can be issued only when there is a situation of urgency and the tribunal has yet to be constituted.¹³⁶ The ECJ, in the *Van Uden* case,¹³⁷ has ruled out the application of the interim measure available in the Netherlands ('*kort geding*'), issued in that particular case by a state judge in respect of a dispute referred to arbitrators: in particular the ECJ held that, since that measure directly affected the merits of the dispute other than in a merely provisional manner, the state judge was not entitled to grant it and should have rejected the party's application. Even in countries like Italy, in which courts always had, and still have, an exclusive power to issue interim measures, their jurisdiction was denied in several instances, on the basis of the alleged *not-entirely provisional* nature of the measure

¹³⁴ See *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334 at 367-8, where it was stated: '(...) there is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits, in order to decide whether the plaintiff's claim is strong enough to merit protection and, on the other, the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail ... if the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.'

¹³⁵ See also *Elais Nordik Inc. v. S. Marine Sers Ltd* 24 F.t.r., 256 (Fed. Ct. of Canada 1988); ICC interim award in ICC case 10973 XXX Y.B. Comm. Arb. 83 (2005); *Oberlandesgericht Hamm* 29 November 1991, 1992 NJW – RR 640; *Worldsource Coil Coating Inc. v. McGraw Const. Co. Inc.* 846 F. 2d 473 (6th Cir. 1991); *Shainin II, LLC v. Allen* 2006 WL 2473495 /W.D. Wash. 2006. Partial award in ICC case 5896, 11,1 ICC Ct. Bull. 37 (2000); *China Nat'l Metal Prods Imp. / Exp. Co. v. Apex Digita Inc.*, 155 F Supp. 2d 1174, 1179 (C.D. Cal. 2001) ('complaint ... seeks to bypass the agreed upon method of settling disputes, which is prohibited by the convention if one party to the agreement objects').

¹³⁶ See *Cour de Cass.* 14.03.1984, *République Islamique d'Iran v. Commissariat de l'Energie Atomique*, Rev. Arb., 1985; *Cour de Cass.* 20.03.1984 A.S.C. Cairo v. *Ipirtrade International*, Rev. Arb. 1989, nt. Couchez; *Cour de Cass.* 6.03.1990 *Société Horeva v. C. S.*, Rev. Arb. 1990, 633, nt. H. Gaudemet Tallon; *Cour de Cass.* 9.07.1979 *La Lagune c. S.a.r.l. Sercif*, Rev. Arb., 1980.

¹³⁷ *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line and Another* [Case C-391/95].

concerned, which had the potential to affect the decision on the merits of the dispute.¹³⁸

In addition, local courts are often ill-prepared to consider at an interim stage the foreign law governing the merits of the dispute, and might have problems in dealing with the language of the dispute and the contract.¹³⁹ Moreover, if the chosen court is located at the place of enforcement of the measures, that might give rise to a less objective analysis of the request, if the measures sought are either against a State entity or a local entity in that jurisdiction in favour of a foreign corporation.¹⁴⁰

In conclusion, a legal system which intends to give effect to the parties' intention to the fullest extent in this area should seek to minimise the role of the courts. A way to achieve that goal might be: a) to allow the courts to grant interim measures only when the tribunal cannot, for any possible reason, act (or act effectively); b) to recognise the freedom of the parties to agree on granting, extending or waiving the interim power of the courts; c) to allow tribunals to modify, adapt or revoke measures issued (before its constitution or in cases of particular urgency) by the courts. Most jurisdictions authorise court ordered provisional measures in aid of arbitration, provided that the parties have not agreed otherwise.¹⁴¹ National courts will virtually always apply their own law to the availability and form of court ordered provisional measures. In particular, the relief requested in

¹³⁸ As was the case for the so called '*provvedimenti di istruzione preventiva*'. See Cass. 85/5049; Cass. 92/9380; Cass. 09/22236. However, see the decision of the Constitutional Court 10/26, which has restated the interim nature inherent in '*istruzione preventiva*'.

¹³⁹ N. Blackaby and C. Partasides, *The Role of National Courts during the Proceedings*, cit., 450.

¹⁴⁰ N. Blackaby and C. Partasides, *The Role of National Courts during the Proceedings*, cit., *ibid*.

¹⁴¹ For the most part, this caveat is not reflected in express statutory language, but is the result of judicial decisions giving effect to principles of party autonomy. If parties wish to exclude recourse to national courts for provisional measures, they are generally permitted to do so: French *Cour de Cassation Civ. 1e*., 18 November 1986, *Société Atlantic Triton v. République Populaire Revolutionnaire de Guinée et Société Soguipeche*, *Rev. Arb.*, 1987, 315; English Court of Appeal, *Mantovani v. Capparelli Spa* [1980] 1 Lloyd's Rep. 375; W. P. Mills, *State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief*, 13 *Int'l L. J.*, 1989-1990, 604; Fouchard Gaillard *Goldman on International Commercial Arbitration*, cit., 1319. There may be circumstances in which a party's agreement not to seek court ordered provisional measures will be unenforceable. Some decisions (*Anaconda v. American Sugar Refining Co.* 322 U.S. 42 U.S. S. Ct. 1944) and commentators (T. Hausmaninger, *The ICC Rules for a Pre-Arbitral Referee Procedure: a Step Towards Solving the Problem of Provisional Relief in International Commercial Arbitration* 7, *ICSID Rev. for Inv. L. J.* 82 (1992)) have concluded that agreements not to seek court ordered provisional measures will not be given effect when no relief is available via the arbitral process.

aid of arbitration must be a category of relief recognised and available under the law of the judicial forum.¹⁴²

A question may arise as to whether an agreement to exclude the concurrent jurisdiction of the courts extends to judicial actions to enforce tribunal ordered provisional measures. The better view is that, save where express and precise language is used which excludes judicial enforcement of provisional measures, parties should not be held to have agreed to such a result, which would render tribunal ordered provisional measures unenforceable and thus the whole process ineffective.

Whether or not the parties have agreed upon a contractual forum for court ordered provisional measures, national law will be decisive in determining what forum(s) will or will not issue such relief. There is relatively little uniformity among different legislative regimes in this field. In most States, courts are entitled to issue interim measures only in support of arbitration which take place within their national territory. However, since this might turn out to be inefficient in respect of certain disputes, parties and assets,¹⁴³ in many jurisdictions, even in the absence of an explicit legislative provision, national courts have concluded that they have the power to order provisional relief in connection with a foreign arbitration: that is the case of the U.S.A.,¹⁴⁴ England,¹⁴⁵ Hong Kong¹⁴⁶ and Singapore.¹⁴⁷ In the latter case, there are strong reasons for suggesting that

¹⁴² The foregoing conclusion is made explicit in Art. 183, 2 of the Swiss PILA, which provides that '(...) the court shall apply its own law to requests for court ordered provisional measure'. See also *Commerce and Indus. Ins. Co. of Canada v. Certain Underwriters at Lloyd's of London* [2002] 1 WLR 1323 (QB); *French Cour de Cassation civ. 1e*, 28.06.1989, *Eurodif v. Islamic Republic of Iran*, *Rev. Arb.*, 1989, 653; *Paris Cour d'Appel*, 27.10.1995, *Rev. Arb.*, 1996, 274; K. P. Berger, F. Kellerhals, *Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz*, Ber, 2006, 1163, 1175.

¹⁴³ That is because security measures often have only territorial effect; even when they purport to apply extra territorially, enforcement may be impossible or difficult.

¹⁴⁴ For a recent decision granting pre-award attachment in aid of a foreign international arbitration see *Sejitz Corp. v. Prithvi Information Solutions Ltd.*, 2011 N.Y. Slip Op., 1741, 2011 N.Y. App. Div. Lexis 1709. See also, for further references, G. Born, *International Commercial Arbitration*, cit., 2059, nt. 549.

¹⁴⁵ See G. Born, *International Commercial Arbitration*, cit., 2059, nt. 550.

¹⁴⁶ In the past Hong Kong courts have affirmed their inherent authority to issue provisional measures in aid of foreign arbitrations. However, they have demonstrated a tendency to refuse to grant interim measures, if the applicant party had not first obtained the approval of the arbitral tribunal, unless the court was satisfied that the justice of the case required the grant of such relief. See G. Born, *International Commercial Arbitration*, cit., 2059, nt. 552. Now Section 45 of the new Hong Kong Arbitration Ordinance expressly codifies that authority.

¹⁴⁷ The changes introduced by the "Amendment" (January 2010) codify the principle according to which the court can issue interim measure in support of a foreign arbitration proceedings; in particular, the court can exercise these new powers only when the arbitral

such authority be exercised with caution, in order to avoid a double interference with the arbitral proceedings and with the (greater or lesser) supervisory jurisdiction of the courts in the arbitral seat.¹⁴⁸

Turning now to the issue of enforcement of interim measures, despite a strong historical tendency towards voluntary compliance with arbitral awards and orders, there are still many cases in which tribunal ordered provisional measures are not complied with.¹⁴⁹ Nearly all national arbitration legislations acknowledge the fact that enforcement of interim measures is a matter for courts alone, since arbitrators do not dispose of the direct coercive power to enforce the interim measures issued.¹⁵⁰ However, there are certain sanctions which arbitrators might impose on a recalcitrant party, failing which the only solution is to seek the intervention of the state judge.¹⁵¹

First of all: ‘(...) *the arbitrators’ greatest source of coercive power lies in their position as arbiters of the merits of the dispute between the parties.*’¹⁵² Second, arbitrators might order a party that damages incurred

tribunal or arbitral institution has no power to act or is unable to act for the time being *effectively*: ultimately, the court will need to exercise its discretion in deciding whether a court order is appropriate. The scope of the court’s power does not extend to procedural or evidentiary matters dealing with the conduct of the arbitration: therefore, interim injunctions to preserve assets are within the courts’ purview, but matters relating to discovery, interrogatories or security of costs are not. *See also* C. T. Tan, T. Cooke, K. Kek, *The Baker & McKenzie Int’l Arb. Yearbook*, Singapore, 2009, 74.

¹⁴⁸ An example of a national court’s caution in this regard was the decision of the House of Lords in the case *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd and Others* [1993] 2 WLR 262; [1993] 1 All ER 664, in which it stated: ‘(...) *the Belgian court must surely be the natural court for the source of interim relief. (...) Apparently no application for interim relief has been made to the court in Bruxelles; (...) to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration*’ [1993] AC at 368). A similar caution is reflected in *Borden Inc. v. Meiji Milk Products Co.* (919 F. 2s 822, 2d Cir. 1990).

¹⁴⁹ *See* G. Born, *International Commercial Arbitration*, cit., 2019.

¹⁵⁰ On the topic of enforcement *see* T. Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief – How Final is Provisional?*, *J. Int’l Arb.*, 2001, 512; S. Besson, *Arbitrage International et Mesures Provisoires*, Zurich, 1998, 315; P. Karrer, *Arbitral Interim Measures Issued by Tribunals and the Courts: Less Theory, Please!*, in A. J. van den Berg, *Int’l Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series N. 10, Deventer, 2001, 103.

¹⁵¹ *See* A. Carlevaris, *The Enforcement of Interim Measures Ordered by International Arbitrators: Different Legislative Approaches and Recent Developments in the Amendment of the UNCITRAL Model Law, Interim Measures in Int’l. Comm. Arb.*, AIA, 2005, 15 ff.

¹⁵² E. A. Schwartz, *The practices and experience of the ICC Court*, cit., ‘*Parties seeking to appear before arbitrators as good citizens who have been wronged by their adversary*

by another, be compensated by the former with the terms of its order as a consequence of its non-compliance. This sanction is connected to the contractual nature of the interim measures (which, in itself, derives from the contractual power conferred by the parties to the arbitrators through the arbitration agreement). However, in many circumstances, such a sanction would amount to an unsatisfactory *post-facto* indemnification for an irreversible harm already suffered by a party. Third, arbitrators can draw adverse inferences on the merits of the dispute against the non-compliant party.¹⁵³ However, it is controversial whether, and to what extent, a conduct which breaches a procedural order can (albeit partially) affect the final determination of the substance of the dispute. Fourth, arbitrators can sanction a party, taking into account its conduct in any future decision on costs.¹⁵⁴ Finally, arbitrators, under the laws of certain jurisdictions, are entitled to issue *astreintes*, or penalties, for non-compliance (*i.e.* ancillary orders for interim payment of a pre-determined amount payable for every day the original decision is not complied with).¹⁵⁵ However, not many jurisdictions delegate such a power to arbitrators. In addition, this remedy amounts to a duplication of the original interim measure, which also needs the support of the courts, in case of persistent non-compliance by the party in breach of the original order.

For a long period of time, the issue of the enforcement of interim measures issued by arbitrators in the context of international arbitration had not been raised in national legislations. As pointed out by an author: '[t]he problem is the cross-border enforcement of an interim measure made by an arbitration tribunal or state court against a party situated in a different jurisdiction: the lack of a universal regime for cross-border enforcement is a curious gap in the modern system of international commercial

would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims'.

¹⁵³ See F. Tommaseo, *Lex fori e tutela cautelare nell'arbitrato commerciale internazionale*, *Riv. Arb.*, 1999, 28.

¹⁵⁴ See F. Poudret – S. Besson, *Comparative Law of International Arbitration*, London, 2007, 540.

¹⁵⁵ The Netherlands Code of Civil Procedure authorises arbitral tribunals to impose penalties for non compliance with their orders (Art. 1056); see final award in ICC case 7895, 11, 1 *ICC Ct. Bull.* 64, 65, 2000, imposing penalties for each product sold in violation of tribunal's provisional measures. See C. Jarrosson, *Réflexions sur l'Imperium, Etudes offertes à Pierre Bellet*, Paris, 1991, 269. In the final award (1998) in case 9154, the claimant sought interim relief and an order that, if the defendant failed fully to comply with the tribunal's award, a sanction of US\$1 million per day be imposed.

arbitration'.¹⁵⁶ That situation was (and still is) due to the inherent difficulties in developing a universal system and regime governing the matter, given different legal traditions regarding interim measures made in support of the arbitral process and, more significantly, '*the extreme variety of interim measures ordered by different state courts under their own national procedural laws*'.¹⁵⁷

Recently UNCITRAL,¹⁵⁸ on the occasion of the revision of its Model Law, introduced provisions specifically designed to deal with the enforcement of interim measures issued by arbitral tribunals, with particular reference to their enforcement abroad.¹⁵⁹ Some legislations have followed the path set down by UNCITRAL and adopted similar provisions. Many others, instead, continue to regulate the matter in a more parochial way.¹⁶⁰

Two issues, in particular, are worth mentioning in respect of the enforcement (especially abroad) of interim measures issued by arbitrators. These are: the extension of the applicability of the New York Convention and the judicial mechanism whereby that enforcement takes place.

The debate surrounding the controversial applicability of the New York Convention - originally conceived for awards on the merits which are final and binding - also to the enforcement of measures which are provisional in nature (thus possibly binding, but certainly not final),¹⁶¹ is well known. As the Convention neither deals with the topic of interim

¹⁵⁶ V. V. Veeder Q.C., *The Need for Cross – Border Enforcement of Interim Measures Ordered by a State Court in Support of the International Arbitral Process*, in A. J. van den Berg, *New Horizons for International Commercial Arbitration And Beyond*, ICCA Congress Series No. 12, 2005, 242 ff.

¹⁵⁷ V. V. Veeder Q.C., *The Need for Cross-Border Enforcement*, cit., *ibid*. The author points also to the fact that the subject matter is juridically complicated, technical and controversial; that the cross border enforcement of certain interim measures made by an arbitral tribunal requires strict safeguards to avoid the risk of forum shopping, oppression and injustice; that there is no international court imposing a uniform interpretation of a possible non legislative text or treaty.

¹⁵⁸ C. Huntley, *The Scope of Article 17: Interim Measures under the UNCITRAL Model Law*, 740 PLI/Lit. 1181, 92 – 95 (2005), who states that all States that have adopted the Model Law have included language permitting enforcement of provisional measures.

¹⁵⁹ See Art. 1041 (2) German ZPO; Art. 42 (1) and Art. 44 English Arbitration Act 1996; Art. 9 Ontario International Commercial Arbitration Act.

¹⁶⁰ For an overview of the different regime of enforcement of interim measures issued by arbitrators in England, Scotland, Germany, France and Switzerland see V. V. Veeder Q.C., *The Need for Cross-border Enforcement*, cit.

¹⁶¹ See *Michaelss v. Mariforum Shipping SA* 624 F. 2d 411 (2d cir. 1980); *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.* 43 N.Y. 2d 276 N.Y. 1977; Judgment of 22 May 1957 - 1958 ZJP 427 (*German Bundesgerichtshof*); *Resort Condominiums Int'l Inc. v. Bolwell XX Y.B. Comm. Arb.* 628 (Queensland S. Ct. 1993) (1995); *Hart Surgical Inc. v. Ultracision, Inc.* 244 f. 3d 231, 233 (1st Cir. 2001); *Publicis Comm. v. True North Comm.* 206 F. 3d, 725, 728-29 (7th Cir. 2000)).

measures of protection, nor contains any definition of the term award, the prevailing view is that it only applies to awards that finally determine matters submitted to arbitration.¹⁶² In addition, it appears rather contradictory to assume that the Convention governs interim measures only in the context of provisions relating to the recognition and enforcement of awards, while remaining irrelevant in respect of the part concerning the arbitration agreement. A systematic application of the Convention, would lead to the conclusion that, on the basis of its Art. II, only arbitrators have jurisdiction to issue those measures, with the exclusion of the concurrent power of state judges. Moreover, the Convention does not contain any provision concerning the possible modification or revocation of interim measures. Finally, many of the provisions concerning the recognition and enforcement of an award do not appear consistent with the content and form of interim measures (the pre-requisite of ascertaining the existence and validity of an arbitration agreement is inconsistent with the need to proceed on an urgent basis; the grounds for refusing recognition, for example, Art. V 1(1) (b) of the New York Convention is incompatible with *ex parte* interim measures of protection¹⁶³) and so on.¹⁶⁴

The new provisions of the UNCITRAL Model Law (Art. 17 H and 17 I) seem to reflect the view, supported by authorities in many jurisdictions,¹⁶⁵ that interim measures are *final* in the sense that they *finally*

¹⁶² See Note of the Secretariat on the Possible Future Work in the Area of International Commercial Arbitration, UN Doc. A/CN. 9/460, 121, UNCITRAL Y.B. 395, 410 (1999) ('the prevailing view, confirmed ... by case law in some states, appears to be that the Convention does not apply to interim awards'); *Pilkington Brothers Plc v. AFG Indus. Inc.* 581 F. Supp 1039 (D. del 1984) ('provisional injunctive relief issued by an English court in aid of international arbitration sited in London is not an 'award' entitled to recognition under New York Convention or FAA'). See J. Lew, L. Mistelis, S. Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International The Hague, 2003, 585 ff.; K. P. Berger, *International Economic Arbitration*, cit., 343; M. Pryles, *Interlocutory Orders and Convention Awards: the Case of Resort Condominiums v. Bolwell* 10 Arb. Int'l, 1994, 385-394.

¹⁶³ See, for a summary of the debate, A. Carlevaris, *The Enforcement of Interim Measures*, Int'l. Comm. Arb., AIA, 2005, 21 ff.

¹⁶⁴ See C. B. Lamm – F. Spoorenberg, *The Enforcement of Foreign Arbitral Awards under the New York Convention, Recent Developments*, Stock. Arb. Rep., 2001, n. 2, 1 ff.; P. Bernardini, *Il Nuovo Regolamento di Arbitrato della CCI*, Dir. Comm. Int., 1998, 131.

¹⁶⁵ See *Arrowhead Global Solutions Inc., v. Datapath Inc.*, 166 Fed Appx 39, 41 (4th Cir. 2006); *Publicis Comm. v. True North Comm., Inc.*, 206 F. 3d 725 (7th Cir. 2000); *Yasuda Fire & Marine Ins. Co. of Europe v. Continental Cas. Co.* 37, F. 3d, 345 (7th Cir. 1994); *Pacific Reins Mgt. Corp v. Ohio Reins Corp.* 935 F. 2d 1019 (9th Cir 1991); *Banco de Seguros del Estado v. Mutual Marine Offices Inc.* 230 F. Supp 2d 362 (S.D.N.Y. 2002) Aff'd 344 F 3d 255 (2d Cir. 2003). See A. T. von Mehren, *The Enforcement of Arbitral Awards under Conventions and United States Law*, 9 Yale J. World Pub. Order, 1983, 343, 362-63 and J. M. Gaitis, *The Federal Arbitration Act: Risks and Incongruities*

dispose of a request for relief pending the conclusion of the arbitration. In effect, orders granting provisional relief, which are meant to be complied with (and to be enforceable) outside the arbitral process, cannot be treated as equivalent to interlocutory arbitral decisions that merely decide certain procedural and/or organisational issues. Those provisions provide in particular that the enforcement of interim measures (possible also in a jurisdiction other than that of the seat) can be barred on the basis of the same exceptions which can be raised against an award (with the addition of special grounds dependent on the peculiar provisional nature of the measure to be enforced).¹⁶⁶

Such a regime is welcome, as, on one hand, it helps to overcome the ambiguities concerning the applicability of the New York Convention and, on the other hand, it provides a certain (and, in case of widespread adoption, *uniform*) regime for rendering effective and predictable a key step of the arbitration procedure. If this possibility did not exist, the parties would be able, and significantly *more likely and willing*, to refuse to comply with orders for provisional relief, resulting in precisely the serious harm provisional measures were meant to foreclose.

Finally, as to the mechanisms whereby judicial enforcement of interim measures takes place, two main approaches have been adopted. Under the first, and most common, one, courts limit their intervention to the granting of the *exequatur*, i.e. a mere formal assessment of the existence and validity of certain requirements, without interfering with the merits of the measure and without issuing any additional measure.¹⁶⁷ Under the second approach, state courts issue an autonomous, self-standing, order, which to some extent and under certain conditions can even integrate, modify or adapt the measure issued by the arbitrators.¹⁶⁸ In this second

Relating to the Issuance of Interim and Partial Final Awards in Domestic and International Arbitration, 16 *Am. Rev. Int'l Arb.* 2006, 1-135; U.S. FAA 9 USC Art. 16, 1. For France and Germany see Paris Court of Appeal, 1 July 1999, *Brasoil v. Gmra XXIVa Y.B. Comm. Arb.* 296; P. Schlosser, *Das Recht der Internationalen Privaten Schiedsgerichtsbarkeit* 776 (2d ed. 1989); K. H. Schwab & G. Walter, *Schiedsgerichtsbarkeit*, 30, 12, 7 ed. 2005.

¹⁶⁶ As to the principles on which the UNCITRAL Model Law provisions on recognition and enforcement of interim measures are based, see A/CN.9/524, para. 20.

¹⁶⁷ This approach has been adopted by most Model Law countries. See P. Binder, *International Commercial Arbitration and Conciliation*, cit., 154. In England the court may sanction the failure of a party to comply with its order to comply with a 'peremptory order' for interim measures issued by the arbitrators with the contempt of court.

¹⁶⁸ That is the case in Germany, where the court has certain discretion in enforcing an interim measure issued by the arbitrators. It is allowed to verify the validity of the arbitration agreement and to refuse interim measures which have a disproportionate

case, the measure eventually enforced will be a combination of an arbitral and a judicial decision.¹⁶⁹ Needless to say, the latter approach might be more effective in adapting the arbitral measure to the peculiarities of a particular legal system (especially when the measure has been issued by arbitrators who are not familiar with the principles and rules of the State in which that measure is to be enforced). However, where not properly implemented, it may represent a serious interference in the autonomy of the arbitrators' power and discretion.

D. The Provisions Concerning Supreme Court Assistance in Taking Evidence

Section 29 of the Mauritian Act deals with Supreme Court assistance in taking evidence. It enacts Art. 27 of the Amended Model Law, with no substantive modification. The Supreme Court is entitled to execute a request made by a party with the approval of the tribunal or directly by the tribunal. It will do so within its competence and according to its rules on the taking of evidence. Section 29(2) specifies (without limitation) two of the powers available to the Supreme Court under Section 29(1): *e.g.* issuing a witness summons, to compel the attendance of any person before a tribunal to give evidence or produce documents or other material; and ordering any witness to submit to examination on oath.

Section 29 of the Act codifies one of the most typical court functions in support of arbitration and is the consequence of the lack of coercive powers of arbitrators. The two (non-exhaustive) examples contained in Section 29(2) are a classic manifestation of *imperium*, which becomes essential when a tribunal's orders addressed to parties or third persons are not complied with voluntarily.

character. Section 1041(2) allows the court to recast an order for interim measures, if necessary, for the purpose of enforcing that measure. This reflects the conflict between the flexibility of interim relief available to arbitration tribunals and the limited class of measures available to German courts. Finally, a German court may, upon request by one party, in accordance with Section 1041(3) ZPO, cancel or amend a decision on enforcement.

¹⁶⁹ Some jurisdictions have adopted a somehow mixed approach. See, for example, German law, which adopts the *exequatur* model, but also authorises the court, if necessary, to re-qualify the order to adapt it to the types of measures available under German procedural law (see Section 1041, para. 2, ZPO). See K. P. Berger, *The New German Arbitration Law in International Perspective*, 26 *Forum Internationale*, 1, 10-11 (2000); J. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Compared* 2.2 *Eur. J. Comp. L.* 1998.

While Section 29 covers (or might cover) disclosure orders (*‘to produce documents or other material’*), it is silent on its possible application to assistance in respect of evidence to be used in foreign arbitration proceedings. However, arguing *a contrario* from the silence of Section 3(1)(c)(ii) (which lists the Sections of the Act which apply regardless of the location of the seat of the arbitration proceedings), the conclusion must be drawn that the Supreme Court is entitled to give assistance only to proceedings taking place in Mauritius.

The rules and procedures governing the taking of evidence vary greatly from country to country.¹⁷⁰ In the context of international arbitration,¹⁷¹ even when arbitration rules give arbitrators the power to order the production of documentary evidence and the attendance of witnesses, the courts have nevertheless an essential role (expressly provided for - or impliedly allowed - by the arbitration legislation of most developed jurisdictions),¹⁷² to the extent that only they can enforce any order to ensure

¹⁷⁰ Obtaining evidence usually depends on the law of the place where the arbitral hearings are held, which usually is the seat of arbitration. For such hearings, therefore, the relevant law is the law of the seat (*e.g.* the *lex arbitri*). However, it may be necessary or helpful for the tribunal to hold hearings in a country (or several countries), other than that of the seat of the arbitration. In these cases the ‘law of the hearings’ (to which all the activities related to obtaining of evidence are necessarily subject) may be different from the law of the seat.

¹⁷¹ On the issue of taking of evidence in international commercial arbitration, see also, the IBA *Rules on the Taking of Evidence in International Commercial Arbitration* (adopted on June 1, 1999), the purpose of which is to serve as a: ‘(...) *resource to parties and to arbitrators in order to enable them to conduct the evidence phase of international arbitration proceedings in an efficient and economical manner*’. The IBA Council adopted the revised IBA *Rules on the Taking of Evidence in International Arbitration* on 29 May 2010. For the analysis of other relevant Arbitration Rules (ICC, ICDR, LCIA) which deal with taking of evidence in international commercial arbitration, see P. J. Martínez – Fraga, *The American Influence on International Commercial Arbitration – The New Unorthodox Conception of Common Law Discovery in International Arbitration*, *cit.*, 67 ss.

¹⁷² To mention only a few see (also *infra*, for further reference) Art. 27 of the *UNCITRAL Model Law*, the legislative history of which clarifies the purpose of the provision by explaining that a court ‘(...) *may take the evidence itself (...) or it may order that the evidence be provided directly to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion*’ (*Report of the Secretary – General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration*, UN Doc. A/CN.9/264, Art. 27, 96 XVI Y.B. UNCITRAL 104, 132, 1985). See, also, Art. 184 of the Swiss Law on Private International Law; Art. 26 of the Swedish Arbitration Act; Art. 1969 (2) of the Belgian Judicial Code; Art. 1041 (2) of the Dutch Code of Civil Procedure; Art. 1050 of the German ZPO; Art. 35 of the Japanese Arbitration Law.

compliance¹⁷³ and only they have the power to issue orders aimed at (or which should be extended to) third parties.¹⁷⁴ In general, enforceable measures which might require the assistance of the courts include, for example, orders for the examination of witnesses within or outside the jurisdiction of the courts, orders for the production of documents or the conservation of evidence, the taking of samples out of a party's property, providing access to premises and so on.

Traditionally, obtaining or compelling evidence in the context of international arbitration, especially when the seat of arbitration is in a jurisdiction other than the place where the evidence is located¹⁷⁵ and when it is necessary to obtain evidence from third persons (e.g. persons not bound by the arbitration agreement),¹⁷⁶ has proved very difficult. State court mechanisms, in fact, has not always (at least, not on a regular basis) been available to provide assistance. The increased complexity and amounts in dispute in international arbitration have rendered such a lack of assistance a matter of serious frustration in a growing number of cases.¹⁷⁷ However, in the last few decades, most jurisdictions have shown a clear policy favouring

¹⁷³ See, *ex multis* (also *infra*, for further reference), Art. 7 of the U.S. F.A.A. 9 U.S.C., which authorises a tribunal to seek judicial assistance in compelling compliance. Many state legislations in the U.S.A. have adopted similar provisions. See also the *Revised Uniform Arbitration Act*, para. 17 (2000); N.Y. C.P.L.R. para. 7505, which permits arbitrators to require the attendance of third parties as witnesses at hearings. See also *In Re Minerals & Chem. Philipp Corp. v. Pan-American Commodities*, SA, 224, N.S. 2d, 763 (N.Y. App. Div. 1962), *appeal dismissed*, 230 N.Y.S. 2d, 732 (N.Y. 1962); *In Re Anne Mfg. Corp.* 149, N.Y.S. 2d 161 (Sup. Ct. N.Y. Co. 1955).

¹⁷⁴ Under German law a third party, the subject of an order of a tribunal under Section 142 ZPO, can refuse the production of documents *only* to the extent such production is *unreasonable*. The scope of such right of refusal has not been clearly established yet. See the *Recommended Resolution and Report of the Legal Committee for the Civil Procedure Reform Act*, B. T. Drucks 14/6036, p. 120; G. Wagner, *Urkunden Edition durch Prozeßparteien, Auskunftspflicht und Weigerungsrechte*, 2007 *Jur. Zeitung*, 706, 712. A third party can refuse to produce documents, if such production would facilitate raising claims against that party (*Bundesgerichtshof*, 2007, *Neue Jur. Woch.*, 155).

¹⁷⁵ See R. Wolff, *Judicial Assistance by German Courts in Aid of International Arbitration*, *Am. Rev. Int'l Arb.*, 2008, vol. 19, 145: '(...) accessing evidence abroad is usually highly complicated and may delay the proceedings substantially. This obstacle especially affects international arbitration, since the seat of the tribunal is often chosen in light of its neutrality so that evidence frequently is located abroad'.

¹⁷⁶ See, again, R. Wolff, *Judicial Assistance by German Courts*, *cit.*, 145: '(...) frequently the client's only knowledgeable employees have left the firm by the time the proceeding is initiated (...). Winning or losing a case may then depend on whether the witnesses can and will effectively be forced to give testimony or whether those in possession of the documents can actually be forced to release them as evidence'.

¹⁷⁷ See L. Shore, *State Courts and Document Production*, in *Dossier of the ICC Institute of World Business Law: Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, 2009, 57 ff.

arbitration, by providing for a more extensive assistance by a competent court.¹⁷⁸

As a matter of principle, unless specifically authorized by law, an arbitral tribunal cannot order persons, *who are not parties to the arbitration*, to attend arbitral hearings or provide information. However, the tribunal (or, when entitled to do so, the parties themselves) can ask the courts at the seat of arbitration, where the third person is resident (or physically present), to issue *subpoenas*.¹⁷⁹ Earlier drafts of Article 27 of the Model Law (a law which does not make any specific reference to the production of documents, but which, according to the Analytical Commentary on the draft text, covers with the phrase *taking of evidence*, both the production of documents and evidence obtained from examining witnesses),¹⁸⁰ show that provision was initially made for the arbitral tribunal or a party to be able to request the state court to compel a third person to provide evidence. The subsequent deletion of the reference to third persons suggests that there was no consensus among the drafters as to whether a third person could be compelled to provide evidence (either as a witness or by producing documents) in arbitral proceedings.¹⁸¹

Article 27 of the Model Law, in its final wording, does not expressly refer to the taking of evidence held by persons outside the proceedings. In practice however, Article 27 has often been referred to in different jurisdictions as a legal basis for obtaining evidence from third persons too, as the case law shows.¹⁸² The same can be said for similar

¹⁷⁸ It is quite controversial whether the parties can fully exclude any court assistance at all. See, for Germany, Stein / Jonas-Schlösser 2002 Art. 1050 para. 1.

¹⁷⁹ Indeed, a number of jurisdictions provide that writs of *subpoena* may be issued to compel a witness to appear before an arbitral tribunal or to produce documents. On *subpoenas* in arbitration see E. A. Brecher, *Use of Subpoenas in Arbitration*, N.Y.L.J., 18 July 1996, 1. It is widely accepted that the court in the jurisdiction of which the witness is resident or the documents to be produced or the objects to be submitted for inspection are located, is competent to issue those writs. See J. Bredow, I. Mulder, *Court Assistance in Arbitral Proceedings from the Perspective of Article 27 of the UNCITRAL Model Law*, in *Liber Amicorum in Honour of Robert Briner*, 2005, 143.

¹⁸⁰ See the *Report of the Secretary General, Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration*, UNCITRAL, 18th Session, Vienna, 3-21 June 1985, p. 60.

¹⁸¹ See H. M. Holtzmann & J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration [Legislative History and Commentary]*, T.M.C. Asser Institut / Kluwer, Deventer 1989, 742 and 745. The reference to third persons was last included in the third draft of July 1983, which provided: 'The court shall execute such request ... by ordering a party or third person to give evidence to the arbitral tribunal'.

¹⁸² See the relevant references in *Vibroflotation A.G. v. Express Builders Co. Ltd.*, High Court of Hong Kong, 15 August 1994 (in CLOUT database, www.uncitral.org, case N. 77) and in *Delphi Petroleum Inc. v. Derin Shipping and Training Ltd.*, Federal Court of

provisions patterned after Article 27 of the Model Law, such as Art. 1050 of the German ZPO, which likewise contains no specific reference to evidence held by a person, who is not a party to the arbitral proceedings.¹⁸³ In the U.S.A., the power of a tribunal to obtain judicial assistance when seeking discovery from third parties is rather undisputed. However, the controversy remains regarding whether discovery can be obtained also before the hearings or only during the hearings.¹⁸⁴

The *subpoena* mechanism and, in general, the assistance of courts to arbitral tribunals, appear particularly problematic when it is necessary to compel the attendance of witnesses located abroad,¹⁸⁵ or to obtain the production of documents in their possession.¹⁸⁶

At present, the majority of arbitration laws allow courts to provide assistance in taking evidence only to tribunals, the seat of which is within their jurisdiction and, when that assistance is exceptionally extended to foreign arbitral proceedings, the adopted approach is rather narrow. One possible explanation is that the principal legislation in this respect, the UNCITRAL Model Law, in both the 1985 and 2006 versions, does not cover judicial assistance for arbitration proceedings taking place abroad. According to its Art. 27, in fact: ‘*the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.*’ There was an attempt, within the Working Group entrusted with the revision of the Model Law, to redraft the provision so as to include assistance in aid of foreign arbitrations, by virtue of the cooperation between States based on the principle of reciprocity. However, that attempt failed. The Model Law approach is also rather narrow, to the extent that it grants state courts a *discretionary power* as to whether and how to provide assistance to an arbitral tribunal.

Canada, Trial Division, 3 December 1993 (in CLOUT database, www.uncitral.org, case N. 68.).

¹⁸³ See D. Leipold in E. Schilken, G. Kreft, G. Wagner & D. Eckhardt (eds.), *Festschrift für Walter Gerhardt*, Cologne, 2004, 570; M. Wirth, U. Hoffman-Nowotny, *Rechtshilfe Deutscher Gerichte Zugunsten Ausländischer Schiedsgerichte bei der Beweisaufnahme – ein Erfahrungsbericht*, 2005 *German Arb. J.* at 67.

¹⁸⁴ See G. Born, *International Commercial Arbitration*, cit., 1926 ff.

¹⁸⁵ In arbitration, in fact, absent a general duty incumbent on third persons to appear as witnesses before arbitral tribunals, as a matter of principle a witness cannot be compelled to appear in any location *other than* the place where he or she is resident: see J. Münch in *Münchener Kommentar zur Zivilprozessordnung*, 2d ed. (Munich, 2001) Art. 1050, No. 1.

¹⁸⁶ See J. M. H. Hunter- A. Panov, *Taking Evidence Abroad in International Arbitration in the 21st Century*, in K. Hober, A. Magnusson, *Between East and West: Essays in Honour of Ulf Franke*, Juris, Huntington, 2010, 213 ff.

German and Austrian laws constitute a relevant exception in this context, to the extent they provide for the assistance of national courts in taking evidence, *even when the relevant arbitral proceedings are abroad*.¹⁸⁷ The same solution has been adopted by Sections 26, 44 and 50 of the 1999 Swedish Arbitration Act; Art. 45 of the 2008 Peruvian Arbitration Act and Art. 1(2) and 31 of the 2008 Slovenian Law on Arbitration. In Germany,¹⁸⁸ in particular, Art. 1050 ZPO¹⁸⁹ broadens the scope of Art. 27 of the UNCITRAL Model Law, not only by extending the judicial assistance of German courts to foreign arbitral proceedings, but also by providing court assistance in the performance of other judicial acts (such as the service of process pursuant to Arts. 199 *et seq.* ZPO, applications to government authorities for permission for a civil servant to testify, requests for a preliminary reference to the ECJ pursuant to Art. 234 of the EC Treaty)¹⁹⁰ which the arbitral tribunal is not empowered to carry out. Each of these measures must be admissible under the state court's procedural rules and inadmissible in the arbitral proceedings.¹⁹¹

Since Art. 27 of the Model Law has been adopted in a number of countries including Bulgaria, Cyprus, Greece, Hungary, Lithuania and Malta, the national arbitration laws of these jurisdictions limit the court's direct judicial assistance to domestic tribunals and proceedings.¹⁹² Swiss

¹⁸⁷ See Art. 1050 of the German ZPO; for a commentary see K. H. Bockstiegel-S. Kroll-P. Nacimiento (eds.), *Arbitration in Germany: The Model Law in Practice*, cit., 342. See also Art. 602 of the Austrian ZPO, which is applicable also if the place of arbitration has not yet been determined.

¹⁸⁸ According to V. Fischer-Zemin & A. Junker, *Between Scylla and Charybdis: Fact Gathering in German Arbitration* 4, 2 J. Int'l Arb., 9, 28 (1987), German state courts lent their judicial assistance to foreign tribunals even pre-reform.

¹⁸⁹ The provision is not frequently invoked and no substantial case law has been published since its adoption. As assistance by the courts is intended to help parties to the arbitration proceedings, they are free to modify the applicability of this provision and the scope of court assistance (*MuenchKommZPO-Muench* 2001, Art. 1050, para. 7); a different issue is whether the courts will accept an extension of their duties under Art. 1050 ZPO by the parties.

¹⁹⁰ See *Muench KommZPO-Muench*, 2001, Art. 1050, para. 6; Stein-Schlosser 2002 Art. 1050 para. 4; T. Eilmansberger, *Die Bedeutung der Art. 81 und 82 EG fuer Schiedsverfahren*, 2006, *German Arb. J.*, 5, 11; H. Raeshke - Kessler - K. P. Berger, *Recht und Praxis des Schiedsverfahrens* 768, 3d ed. 1999; R. A. Schuetze, *Die Vorlageberechtigung von Schiedsgerichten an den EuGh* 2007, *German Arb. J.* 121, 124.

¹⁹¹ The same requirements are to be found in Swiss and Austrian Law (see, respectively, Art. 184, 2 Swiss Law on Private International Law and Art. 602, Sect. 3 of the Austrian ZPO in conjunction with Art. 39, para. 2 of the Austrian Exercise of Jurisdiction Act). In Switzerland, however, foreign procedural practices can be applied or considered, if necessary to enforce a claim abroad, unless there are important reasons pertaining to the affected party not to do so (see Art. 11 (2) PILA).

¹⁹² See R. Wolff, *Judicial Assistance by German Courts*, cit., 148.

Law provides for the assistance of national courts only when the seat of arbitration is within the jurisdiction of the courts.¹⁹³ In France, the law is silent regarding that issue, but it is widely acknowledged that, while assistance may be granted by French courts in aid of domestic arbitrations, it will not be achievable in respect of foreign arbitral tribunals.¹⁹⁴ In addition, although the power of the courts to order document production against third parties is recognised in the legal literature, other means of court support, such as orders against a party to produce documents or to appear, are deemed by most authors not to be within the courts' jurisdiction.¹⁹⁵ These uncertainties, originated by the lack of legal regulation, are perceived as a disadvantage of French arbitration law.

The situation in England and in the U.S.A. is more complex. In particular Section 43 of the 1996 English Arbitration Act (which empowers the court to '(...) *secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents*') is applicable only if arbitral proceedings are '(...) *being conducted in England*'. It is not quite clear whether an evidentiary hearing held in England suffices to constitute proceedings being conducted in England. However, the answer should be positive, considering that under the vast majority of modern arbitration laws and rules, hearings can be held in locations different from the actual seat of arbitration. Section 44(2)(a), in turn, provides for the direct examination of a witness by an English court, the testimony of whom will subsequently be used in an arbitration taking place abroad. The court's action under these Sections (as it is the case for most European jurisdictions¹⁹⁶) is subject to the rules and principles governing the taking of evidence in England. Therefore an English court is neither entitled to order a third party to make general disclosure of documents, nor an American-style pre-trial discovery from a third person. Moreover, the courts have discretion not to grant judicial assistance if, in their opinion, the foreign seat of arbitration makes it inappropriate to grant any such measure. English courts have declined to provide assistance in a number of instances.¹⁹⁷

¹⁹³ See Art. 184 (2) of the Swiss PILA.

¹⁹⁴ See Fouchard-Gaillard-Goldman on *International Commercial Arbitration*, cit., 1338; J. F. Poudret, S. Besson, *Comparative Law*, cit., 670.

¹⁹⁵ See J. F. Poudret, S. Besson, *Comparative Law*, cit., *ibid.*; E. Gaillard- J. A. Edelstein, *Practitioners Handbook, France* (Wiegand ed. 2002) part 4 C, 129.

¹⁹⁶ In Germany, for example, the court must (without discretion) refuse to provide assistance if the requested measure is inadmissible under German procedural law (*Bill of the Arbitration Law Reform Act*, B. T. Drucks 3/5274, p. 51).

¹⁹⁷ For example, in *Assimina Maritime v. Pakistan Shipping*, [2004] EWHC 3005 (Comm.) - [2005] 1 Lloyd's Rep. 525 on *Arbitration Act 1996*, s. 44, Colman J. made clear that Section 44 does: '*not include an order for disclosure by a non-party of documents relevant to an issue in the arbitration. ... Accordingly, it is only where it can be shown*

In the U.S.A., there has been a long debate about the applicability of 28 U.S.C. s. 1782 to foreign arbitration proceedings.¹⁹⁸ The relevant part of the provision reads: *'The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal (...)'*. The prevailing interpretation until 2006, expressed in cases like *NBC v. Bear Stearns & Co.*, 165 F. 3d 184 (2d Cir. 1999)¹⁹⁹ and *Republic of Kazakhstan v. Biedermann International* 168 F. 3d 880 (5th Cir. 1999), was that Section 1782 applied only to State-authorised tribunals, to the exclusion of private tribunals.²⁰⁰ A broad interpretation of

that a question arises in relation to a particular document or documents of a non-party which need to be inspected or photocopied [see the other provisions of Section 44] that an order under this section can be made.' In *Commerce and Industry Insurance Co. of Canada v. Lloyd's Underwriters* [2002] 1 Lloyd's Rep. 219 (see also R. Merkin, *Arbitration Act 1996*, 3rd ed., London 2005, p. 117), in turn, the Court explained that Section 44(2)(a) could not be used to support an arbitration seated in the United States, where the purpose of the application was not to obtain specific evidence, but instead to take a U.S.-style discovery deposition. In *Viking Insurance Co. v. Rossdale* [2002] 1 Lloyd's Rep. 219, the court, asked to examine two witnesses in England on a number of questions and to order documentary discovery in aid of a New York arbitration, held that: first, English civil procedural law did not allow for discovery of witness testimony before the trial and, secondly, that the request for documentary disclosure was deemed too broad as it primarily served to fish for evidence. It was an application merely to find out whether the witness had information which might assist in advancing the applicant's claim; thus it had to be rejected. Finally, in *Channel Tunnel Group Ltd. v. Balfour Beatty Construct. Ltd* [1993] AC 334, 358-59 (HL), the House of Lords denied aid because the court order would conflict with the law (and the court powers and authority) of the arbitral seat. A court would also reject an application to have evidence taken in England, if the applicant is not able to justify the relevance of the evidence the witness could give (which, for example, calls for the physical presence of some witnesses in England).

¹⁹⁸ On this issue see T. H. Webster, *Obtaining Evidence from Third Parties in International Arbitration*, 17 *Arb. Int'l* 143, 154 – 7 (2001); H. Smit, *American Assistance to Litigation in Foreign and International Tribunals*, 25 *Syracuse J. Int'l Law & Co.*, 1, 5 (1998); W. H. Stahr, *Discovery under 28 U.S.C. Section 1782 for Foreign and International Proceedings*, 30 *VA J. Int'l L.* 597, 619 (1990).

¹⁹⁹ The NBC's reading of the legislative history of Section 1782 was that the revisers of Section 1782 *'had in mind only governmental authorities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state'*. The popularity of arbitration is due in large part to its asserted efficiency and it would be at odds with broad-ranging discovery.

²⁰⁰ It must be observed that, before its complete revision in 1964, Section 1782 referred to *'any judicial proceedings pending in any court in a foreign country'*. The replacement with the current wording *'in proceedings in a foreign or international tribunal'* was intended, according to one of the draftsmen, to broaden the provision's scope to encompass, *inter alia*, international arbitral tribunals: see H. Smit, *International Litigation under the U.S. Code*, 65 *Colum. L. Rev.*, 1965, 1015; ID., *American Judicial Assistance to International Arbitral Tribunals*, 8 *Am. Rev. Int'l Arb.*, 1997, 153; ID., *The*

Section 1782 so as to encompass foreign arbitration proceedings was said to affect the efficiency and cost effectiveness of arbitration and to encourage the entering of the American concept and practice of discovery into arbitrations conducted in foreign countries,²⁰¹ the approach of which to evidentiary matters may differ from that in the U.S. Further concerns related to the fact that the application of Section 1782 to foreign private arbitration proceedings might lead to a procedural disparity, not only between U.S. parties and non-U.S. parties (since for U.S. parties, access to information and evidence in foreign countries is usually much more limited than in the U.S.), but also between international tribunals and domestic tribunals under Art. 7 of the F.A.A. regarding the competent courts and who is entitled to file the motion.²⁰² The *NBC* and *Republic of Kazakhstan* line of reasoning appeared to conflict with the well-established pro-arbitration policy underlining U.S. arbitration law, because it *de facto* precluded state court support in international arbitration. In addition, it was based on a rather distorted perception of foreign legal systems: even if they do not offer U.S. style discovery, many countries worldwide provide cross border judicial assistance to foreign private arbitrations. Therefore the *NBC* interpretation would often lead to exactly the same kind of non reciprocal discovery it seeks to prevent, the difference being that it puts non U.S. parties at a disadvantage to U.S. parties.

The U.S. Supreme Court finally stated, in *Intel Corp. v. Advanced Micro Devices Inc.*,²⁰³ that Section 1782 should be interpreted broadly and that an application under that Section in respect to a foreign tribunal could not be rejected as a matter of principle. In *Intel* the U.S. Supreme Court rejected the historical analysis of the Second Circuit in *NBC* and adopted the view that the term *tribunal* in Section 1782 included arbitral tribunals. The Supreme Court clarified that Section 1782 applications should not simply be granted on a nod, but on the basis of a discretionary assessment

Supreme Court Rules on the Proper Interpretation of Section 1782: its Potential Significance for International Arbitration, 14 *Am. Rev. Int'l Arb.*, 2003, 295, 304.

²⁰¹ Most arbitration rules are silent on the relation between discovery and international arbitration. Therefore, the decision whether to order discovery (save when otherwise agreed upon by the parties) is largely left to the tribunal's discretion, which exercises it depending on a variety of factors, such as the arbitrator's legal culture and the peculiar features of the case.

²⁰² See *Re Application of Medway Power Ltd.*, 985 F. Supp. at 404-05.

²⁰³ 542 U.S. 241 (2004). In this case the interpretation of tribunal was extended to encompass requests made by the *Directorate-General of Competition for the Commission of the European Union*.

which has to take into account several factors.²⁰⁴ Following *Intel*, the decision in *In re Roz Trading Ltd.* confirmed that an international arbitral tribunal is a ‘foreign or international tribunal’ within the meaning of Section 1782.²⁰⁵ This conclusion has been confirmed by many other U.S. decisions.²⁰⁶ Finally, the decision in *In Re: Patrizio Clerici*²⁰⁷ expanded the type of proceedings where Section 1782 discovery is obtainable, to include (*lato sensu*) enforcement procedure.²⁰⁸

As emerges from the foregoing analysis, many issues are still controversial in the area of the taking of evidence. In any event, any approach (whether based on international conventions, state legislation, case law or *communis opinio*) that wishes to foster efficiency in this area, without disrupting the autonomy of the arbitration proceedings and tribunals, should aim:

- to provide the courts with the power to offer assistance even to tribunals sitting abroad. At present, no uniform principles and rules seem to have emerged in this respect,²⁰⁹ but the rigid and narrow approach adopted by the UNCITRAL Model Law appears unreasonable. Assisting a tribunal in performing well and rapidly

²⁰⁴ Such as whether discovery is sought from parties versus third parties (being the latter case more justifiable, given that the foreign tribunal already had the parties under its jurisdictional reach); whether there is evidence to suggest that the foreign tribunal will not be receptive to the evidence; whether it appears that the application is being made in an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; whether the evidence requests are *unduly intrusive or burdensome*, in which case they could be rejected or trimmed. See J. Wessal, *A Tribunal by Any Other Name: U.S. Discovery in Aid of Non-US Arbitration*, 2005, *Int'l Arb. L. R.* 139. See, also, N. Blackaby and C. Partasides, *The Role of National Courts during the Proceedings*, *cit.*, 456 and R. Wolff, *Judicial Assistance by German Courts*, *cit.*, 152.

²⁰⁵ 469 F. Supp. 2d (N. D. Ga 2006). The case concerned an arbitral procedure pending before the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.

²⁰⁶ See, *ex multis*, the District Court of Minnesota, *In Re Hallmark Capital Corporation* 534 F. Supp. 2d 951, D. Minn. June 1, 2007; the Federal District Court of Colorado, *Re Application of Michael Wilson & Partners Ltd.* 2007, WL 2221438 t 2-4, D. Colo, July 27, 2007; the District Court of Massachusetts, *Re Application of Babcock Borsig AG*, 2008 WL 4748208, D. Mass Oct. 30, 2008.

²⁰⁷ *In re Clerici* 481 F 3d, 1324 (11th Cir. 2007).

²⁰⁸ P. J. Martinez – Fraga, *The American Influence on International Commercial Arbitration – Doctrinal Developments and Discovery Methods*, *cit.*, 61. The Author observes that with this decision the 11th Circuit extended Section 1782 far beyond its intended purpose (which is to be in support of a pending or imminent proceedings), to the extent it applied the provision to a procedure (post-judgment execution proceedings) that had already come to an end, with no possibility of any future adjudication on the merits.

²⁰⁹ G. Petrochilos, *Procedural Law in International Arbitration*, *cit.*, 104.

its tasks is a means to foster international arbitration rather than a way to interfere with its autonomy. It appears also contradictory to admit provisional relief in aid of foreign proceedings, but to deny the same assistance in taking evidence;

- to preclude a review of the jurisdiction of the tribunal by a court, or to limit its power so that it does so, only to the extent necessary to establish that the matter is before a real and credible tribunal.²¹⁰ The main reason why the latter view should be supported lies in the fact that, when a party wants to challenge the validity of the arbitration agreement, it can avail itself of an exclusive mechanism (which is provided for by most jurisdictions), which usually consists of submitting the complaint first, before the arbitral tribunal and then, by way of (immediate or postponed) review, before the courts at the seat of arbitration. If the validity of the arbitration agreement were to be subject, in the context of a request of assistance in the taking of evidence, to an additional (even though preliminary and limited) review by a court other than the one competent for the judicial review, there would be a duplication of procedures, with possible conflicting rulings and consequent problems of reciprocal coordination;²¹¹

²¹⁰ In Germany, for example, one view argues that in this context the competent court may undertake a *full review* of the arbitration agreement (see Schwab/Walter 2005, Chap. 17, para. 10; W. J. Habscheid, *Aus der Hoechststrichterlichen Rechtsprechung zur Schiedsgerichtbarkeit* 1958, in *Konkurs, Treuhand und Schiedsgerichtswesen* 177, 179; A. Schoenke – R. Pohle, in *Kommentar zur Zivilprozessordnung* para. 1036, Remark II n. 4). According to another view, the court should refuse assistance only if it is evident and obvious that the arbitration agreement is invalid (see Musielak-Voit, 2007, Art. 1050, para. 5 ZPO; Stein/Jonas-Schlösser 2002, Art. 1050 para. 7; U. Has, *Die Gerichtliche Kontrolle der Schiedsgerichtlichen Entscheidungszuständigkeit*, in *Festschrift fuer W. H. Rechberger zum 60 Geburtstag* 187, 192; with particular reference to the old law, see OLG Stuttgart 15.11.1957, NJW 1958, 1048). Another view, finally, denies any court competence whatsoever in this regard (see Higher Regional Court Berlin (*Kammergericht*) 1919, *Leipziger Zeitschrift fuer Deutsches Recht* 215; Higher Regional Court (*Oberlandesgericht*) Hamburg 42 *Zeitschrift fuer Zivilprozess* 1912, 200; *MuenchKommZPO-Muench* 2001, Art. 1050, para. 11 ZPO; Zoeller-Geimer 2007, Art. 1050, para. 6 ZPO; Weigan-Wagner 2002, Germany, para. 312).

²¹¹ However, a counter-argument might be that the prejudicial impact of the opposite solution would be diminished if only the rulings of the court in charge of the final judicial review – unlike the rulings of the court involved in the assistance in the taking of evidence (which, in some countries, such as Germany for example, are two different courts) – had final and binding effect on the issue of (in)validity of the agreement.

- to provide for a certain degree of uniformity in the different regimes governing the powers of the court requested to give assistance (at least as far as both the law of the seat of arbitration and the law where the court requested to assist the foreign arbitral proceedings has its seat are concerned), in order to avoid situations of unfair treatment of the parties. This might happen, for example, as already mentioned above, when an American party and a European party are involved in an international arbitration procedure. The European party is entitled to obtain extensive access to documents of the American party and a complete disclosure/discovery, availing itself of Section 1782, while the American party may find its right of access much more restricted;²¹²
- to entrust the arbitral tribunal with the direct power to request assistance from foreign courts or, in alternative, (at least preemptively)²¹³ to authorise a request made by the parties and, in the latter case, to give the tribunal the power to adapt the request to the real need of the dispute, taking into account all the circumstances. In Germany, Austria and England, for example, the parties are entitled to make a direct request to the courts for obtaining assistance in the taking of evidence, but the prior consent of the tribunal is always necessary.²¹⁴ The situation in the U.S.A. is less clear.

A further problem is represented by the identification of the body (court or tribunal) entitled to determine the legitimacy and scope of the evidence to be produced, save of course the exclusive power of the tribunal finally to determine the consequences, if a certain fact is not proven. In many jurisdictions, state courts are usually not entitled to review whether the requested measure (*e.g.* the taking of witness evidence) is necessary for the decision of the dispute pending in arbitration,²¹⁵ even though they may adjust a request, if they deem this appropriate in light of all the

²¹² See J. Fellas, *Using U.S. Court in Aid of Arbitration Proceedings in Other Countries*, 2008, *Int'l Arb. L. R.* 3; see also P. J. Martinez-Fraga, *Application and Avoidance of para. 28 U.S.C. para. 1782 Discovery in International Commercial Arbitration*, *cit.*, 3.

²¹³ In order to prevent completely ill-founded or irrational requests, not relevant for the decision of the dispute.

²¹⁴ See, for Germany, Stein/Jonas-Schlösser 2002, Art. 1050, para. 7 ZPO; Schwab/Walter 2005, Chap. 17, para 7.

²¹⁵ See, for Germany, Stein/Jonas-Schlösser 2002, Art. 1050, para. 7 ZPO; Schwab/Walter 2005, Chap. 17 para. 8; *MuenchKommZPO-Muench*, 2001, Art. 1050 para. 13 ZPO.

circumstances (denying, for example, the need of an oral deposition of a witness, when the submission of a written witness statement in replacement appears to suffice). The courts may also exercise a certain degree of control with regard to whether the arbitral tribunal itself would be able to undertake the requested measure, and may refuse the assistance if it is manifest that this is the case. A court might also reject a party's application of assistance if the specific type of evidence requested has been previously waived: if for example the parties have agreed that no witness testimony is to be given under oath and the application is for a *subpoena* to take an oath.²¹⁶

In conclusion, notwithstanding that judicial assistance in taking evidence (especially in its more invasive form as it may be said to be represented in the U.S.) might be perceived as an undue interference in arbitration, potentially reducing arbitral tribunal's autonomy over a key aspect of the arbitral process, when properly used, it fosters the efficiency of the whole process, remedying the occasional (objective) limited scope of the intervention of arbitrators. In addition, it still remains a useful and powerful instrument, in comparison with other instruments like the drawing of adverse inferences against the non-cooperative party, which might be problematic, at least when these inferences affect a party that cannot be held responsible for the unavailability of evidence. Finally, the mere fact that an easily accessible path to judicial assistance is available, will facilitate voluntary compliance with the tribunal's orders and thereby render the need for supportive intervention by state courts probably unnecessary in many cases.

E. The Option to Leave to the Parties, Through An Opt-In Mechanism, The Choice Whether or Not to Appeal Awards on Questions of Law

Among the provisions contained in the First-Schedule of the Mauritian Act, which are relevant in connection with the topic of the relation between courts and arbitration, Section 3(2), which gives the parties the possibility to lodge an appeal against an award on any question of Mauritian law, is in particular worth analysing.²¹⁷

²¹⁶ In Germany, see Sachs/Loercher in K. H. Bockstiegel- S. Kroll- P. Nacimiento (eds.), *Arbitration in Germany*, cit., 343.

²¹⁷ The provision is not directly applicable to international arbitration proceedings taking place in Mauritius, unless the parties so decide (*opt-in mechanism*). As explained in the *Travaux Préparatoires* (The International Arbitration Act (No. 37 of 2008) - *Travaux Préparatoires* - B. Structure of the Act - 19(a)(ii)), along with the other provisions of the

The provision derives from Section 5 of the Second Schedule of the New Zealand Act. The right to appeal is subject to obtaining leave from the Supreme Court, which needs to be satisfied that the determination of the question of Mauritian law could substantially affect the rights of one or more of the parties. If the appeal is upheld, the Supreme Court may vary or set aside the award (in the former case, the award as varied shall have effect as if it was the award of the arbitral tribunal) or remit it for reconsideration to the tribunal (or for new consideration to a different tribunal). Section 3(2) contains further provisions which are intended to conform the appellate proceedings with the provisions of the New York Convention.

The option adopted in Section 3(2) of the Mauritian Act does not have any equivalent in the UNCITRAL Model Law and in most Model Law²¹⁸ (and also non-Model Law²¹⁹) countries.²²⁰ Most jurisdictions

First-Schedule, this provision is at present too controversial for inclusion in a normal regime of a law governing international arbitration in Mauritius. Unlike other types of court intervention provided for by the Act (appointing functions, assistance in the taking of evidence, interim measures), which are essentially in support of the arbitral process, the provision on the right of appeal, by providing a review by the court of the arbitrator's decision on the merits (Section 3(2)), implies a substantial involvement of the judiciary in the most essential phase of the arbitral process (the *iurisdictio*), which might be perceived by international users as being in contradiction with the general principles underlying the Act (*in primis* that of non intervention of the courts codified in Section 3(8)). Both Sections are in fact introduced by the phrase '*Notwithstanding Section 3(8) (...) of the Act*'.

²¹⁸ See Germany (Art. 1059 ZPO), Austria (Art. 611 ZPO) and Japan (Art. 44 JAL). The fact that in Model Law jurisdictions awards are not subject to judicial review on the merits is underlined by a number of courts' decisions and commentators. See, for example, *Canada (Attorney General) v. S.D. Myers Inc.*, (2004) 3 FC 368 (Fed. Ct. of Canada), according to which: '*It is noteworthy that Article 34 of the Code [equivalent to Article 34 of the Model Law] does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal.*' For commentary see H. Hausmaninger, in H. Fasching, *Zivilprozessgesetze* para. 611, 3 (2d ed. 2007).

²¹⁹ That is the case in Switzerland (but see *infra*, for further details about the different applicable regimes), France (Arts. 1502 and 1504 NCCP), Sweden (Art. 34 SAA), Belgium (Art. 1704 (2) Belgian Judicial Code), The Netherlands (Art. 1065 NCCP). On the issue see M. Rubino-Sammartano, *Errori di diritto e riesame della decisione arbitrale (in Europa e oltre Oceano)*, *Il Foro Padano*, 2009, 1, II, 29; Hon. Justice E. Torgbor, *The Right of Appeal and Judicial Scrutiny of Arbitral Decisions and Awards*, *Arbitration*, 2010, 2, 229 ff.

²²⁰ Many national courts' decisions in these countries underlie the fact that judicial review of the merits of the arbitrator's award and reasoning is not permitted. For reference see T. Webster, *Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, *Arb. Int'l.*, 2006, n. 3; G. Born, *International Commercial Arbitration*, *cit.*, 2649 ff.; P. Rutledge, *On the Importance of Institutions: Review of Arbitral Awards for Legal Errors*, 19 *J. Int'l Arb.*, 81, 2002.

usually provide limited grounds for setting aside awards,²²¹ most of which correspond to the grounds contained in the New York Convention for refusing recognition and enforcement of foreign awards (*i.e.* mistakes of (fact and) law or errors of interpretation are generally excluded).

Historically finality (*e.g.* the lack of appeal on the merits)²²² has been counted among the advantages of private dispute resolution over court litigation.²²³ For a long time, parties selected arbitration because they considered that an award offered an effective and early end to the dispute, in a way that litigation, leading to a court judgment, did not.²²⁴ In this respect, an unrestricted right of appeal from arbitral awards was seen not only as implying a substantial replacement, by state courts, of the arbitrators' role and function (*i.e.* their *iurisdictio*), but also as a cause of long and expensive procedures, characterised by public hearings before national courts (in contrast with the parties' intention of keeping the whole dispute confidential) and the unpredictability of the outcome, depending on the greater or lesser friendly attitude towards arbitration of the local judges.²²⁵

²²¹ As to Roman law see R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford, 1996, 529.

²²² In the U.S. the courts have consistently recognised that the standards governing their review of arbitral awards are amongst: '(...) the narrowest standards of judicial review in all of American jurisprudence': *Lettimer-Stevens Co. v. United Steelworkers*, 913 F. 2d 1166, 1169 (6th Cir. 1990).

²²³ See W. H. Knull, III and N. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, *Am. L. R. Int'l Arb.*, Vol. 11, 532, 2000; A. Mourre, L. Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, *J. Int'l Arb.*, 23 (2), 2006, 171.

²²⁴ See P. Mayer & A. Sheppard, *Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Awards*, *Recommendation* 18 (a), 19 *Arb. Int'l*, 2003, 249, 250, according to which: *'The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances'*. Indeed, a survey conducted on annulment or setting aside proceedings in a number of countries shows that *only a very limited percentage of annulment applications succeed*. In Switzerland, in the period 1989 - 2006, between 5% and 7%; in France only 2 awards out of 46 challenges; in England less than 5% in the period 2002 - 2004; in the U.S.A. only 4 cases out of 48 applications. See G. Born, *International Commercial Arbitration*, *cit.*, 2561.

²²⁵ The policy underlying finality has been clearly explained by the ECJ in the famous decision *Eco Swiss China Time Ltd v. Benetton Int'l NV* (C-126/97 [1999] E.C.R. I-3055 (ECJ)), in the sense that: *'(...) it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'*. The same principle has been expressed by many national courts' decisions, such as the U.S. courts in respect of the provisions of the F.A.A., which repeatedly came to the conclusion that: *'the purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings. Accordingly, it is a well-settled proposition that judicial review of an arbitration award*

However, the overall justice of the current system has been recently put into question.²²⁶ Emphasising the disadvantages of a system in which an arbitral tribunal might render a decision that is completely at odds with the law or in any event excessive or irrational, yet which is nonetheless unreviewable, some commentators (as well as some categories of stockholders)²²⁷ have come to support the introduction of judicial review of the merits of awards (e.g. essentially for errors of law), which would safeguard against arbitrary or fundamentally unjust awards, thus increasing the integrity, quality and overall reliability of arbitration.²²⁸ Moreover, recent regional surveys of corporate lawyers from large corporations reveal that one of the reasons why those lawyers choose not to opt for arbitration is exactly the difficulty of appealing awards.²²⁹ Indeed, the amount and complexity of major transnational disputes have changed the perception towards the so called *one-shot* adjudication. It nowadays appears a risk rather than an advantage to have just one ruling on the merits, especially when the losing party is faced with awards containing ostensibly patent errors of law or awards which are patently unjust, arbitrary, biased,

should be, and is, very narrowly limited. See Diapulse Corp. of Am. v. Carba Ltd. 626 F. 2d 1108 (2d cir. 1980); *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F. 3d 133 (2d Cir. 2007); *Liberty Re (Bermuda) Ltd. v. Transamerica Occidental Life Ins. C.*, 2005 U.S. Dist. Lexis 9774 (S.D.N.Y. 2005).

²²⁶ See, in general, J. M. Gaitis, *International and Domestic Arbitration Procedure: the Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, *Trans. Disp. Man.*, 2006, vol. 3, issue 5; H. Smit, *Correcting Arbitral Mistakes*, 10 *Am. Rev. Int'l Arb.*, 2001, 225, 228.

²²⁷ For example, in the maritime and commodity markets, see D. B. Lipsky Y. & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 26 (1998); see also C. R. Drahozal, *Unfair Arbitration Clauses*, 2001 *U. Ill. L. Rev.* 695, 731.

²²⁸ See F. A. Mann, *Private Arbitration and Public Policy*, *Civil Justice Quarterly*, 1985, 257; P. J. McConaughay, *The Risks and Virtues of Lawlessness*, *cit.*, 453; M. Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 *Int'l & Comp. L. Q.* 1, 1985, 15. See also The Rt. Hon. The Lord Mayor of the City of London, Alderman Robert Finch, ICMA XV, in *The Cedric Barclay Lectures*, 2006, 113: 'I shall encourage the view that there should be more appeals from arbitrations to the Courts not less'. Contra J. Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 *Int'l & Comp. L. Q.* 1983, 53, 59; *Idem.*, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 *Int'l & Comp. L. Q.*, 1981, 358, 373; K. P. Berger, *The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective*, 12 *Ford. Int'l L.J.*, 1989, 605; S. Shackleton, *Challenging Arbitral Awards: Part III – Appeals on Questions of Law*, *New Law J.*, 2002, 1834.

²²⁹ See D. B. Lipsky & R. L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, *Cornell/PERC Institute on Conflict Resolution*. available at <www.ilr.cornell.edu/icr/research.html>, 26, 2000.

determined by sheer incompetence and so on.²³⁰ There are also public policy concerns, such as the need that the law be certain²³¹ and the need to ensure consistency of decisions, whenever the same or similar points come before different tribunals, each one of which is independent of the other.²³² Unlike other approaches in the past, the proposals to introduce an at least partial revision of the merits do not originate from a mistrust of the arbitral process, but from the proposition that the existence of judicial review represents an incentive for arbitrators to do their job properly. Nevertheless, scholars, practitioners and the business community are not always consistent in identifying the best solution in order to cope with the lack of a (general) remedy against 'mistaken' awards.²³³ Some suggest introducing in national arbitration laws an autonomous appeal on points of law or, within the already existing setting aside proceedings, an additional ground for errors of law. Some others suggest providing a second arbitral instance or internal appeal (patterned after the ICSID Appellate structure,²³⁴ or the internal review mechanisms typical of many commodity arbitrations rules²³⁵).²³⁶ Some others suggest allowing the parties contractually to

²³⁰ According to Sir M. Kerr, *Arbitration and the Courts: the UNCITRAL Model Law*, cit., 34, 15: 'No one having the power to make legally binding decisions in this country [England] should be altogether outside and immune from this system'.

²³¹ Considerations which do not come into question in case of mistakes of fact, which can only affect the parties involved in that particular proceedings. That is the reason why almost all states with developed arbitration laws refuse to allow appeals from arbitral tribunals *on issue of facts*. There are few exceptions, though: in Switzerland, for example, parties to an international arbitration may contract out to the Concordat, and thus be entitled to challenge the award as *arbitrary*, if *manifestly unsupported or unsupportable* on the facts.

²³² See N. Blackaby and C. Partasides, *Challenge of Arbitral Awards*, in Redfern and Hunter *on International Arbitration*, 5th ed., Oxford University Press, U.K., 2009, 607. See also H. Dundas, *Appeals on Questions of Law: Section 69 Revitalised*, *Trans. Disp. Man.*, 2004.

²³³ See E. Gaillard, *The Review of International Arbitral Awards*, IAI Forum, Dijon 12-14 September 2008, *Int'l. Arb. Inst.*, 2010; M. Rubino-Sammartano, *Errori di diritto e riesame della decisione arbitrale* cit., 29 ff.; Hon. Justice E. Torgbor, *The Right of Appeal and Judicial Scrutiny of Arbitral Decisions and Awards*, *Arbitration* 2010, 76, 2 229 ff.; W. Craig, *Uses and Abuses of Appeal from Awards* (1988) 4 *Arb. Int'l* 174, at 214.

²³⁴ See M. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 *ICSID Rev., Foreign Investment L. J.* 85, 1987.

²³⁵ An appeal option is also provided for by the Rules of the CPR Institute for Dispute Resolution Private Organisation in New York, which contain provisions permitting the tribunal 'to interpret' the award or to 'make an additional awards as to claims or counterclaims presented in the arbitration, but not determined in the award' (Rule 14.5).

²³⁶ Some rules, in effect, particularly in domestic arbitrations, provide for private appellate review of arbitral awards via arbitral appeals panels. Critical to this solution is J. M. Gaitis, *International and Domestic Arbitration Procedure*: cit., 29. See also G. Zekos,

expand the scope of judicial review.²³⁷ Others, finally, suggest limiting the setting aside of an award for errors of law only when those errors amount to a manifest disregard of law.

At present, the extent of the judicial review of arbitral awards by state courts varies quite significantly from country to country. On one side there are countries such as France, which exercises a minimum control over international arbitral awards, and Switzerland, which allows non-Swiss parties to contract out of controls altogether²³⁸ and where courts (under the setting aside regime of the PILA) have stated that an award cannot be reviewed merely on the basis that: ‘(...) *the evidence [is] improperly weighed, that a factual finding [is] manifestly false, that a contractual clause [has not been] correctly interpreted or applied or that an applicable principle of law has been clearly breached*’.²³⁹ In the middle of the scale are grouped a considerable number of States that have adopted (either in full

Court's Intervention in Commercial and Maritime Arbitration under U.S. Law, 14 *J. Int'l Arb.*, 1997, 124.

²³⁷ See A. S. Rau, *Contracting Out of the Arbitration Act*, *Am. Rev. Int'l Arb.* 8, 1997, 225, 227 n. 11; H. Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, A Postscript 8, *Am. Rev. Int'l Arb.* 1997, 273; *Idem.*, *Hall Street Associates v. Mattel: a Critical Comment*, *Am Rev. Int'l Arb.* 2007, 17, 4, 513.

²³⁸ Indeed, the situation in Switzerland is more complex. The parties to an international arbitration which takes place in Switzerland might choose among three options: 1) a *broad and extensive* judicial review of the award, on the basis of nine grounds provided for by the 1969 Intercantonal Convention of Arbitration (generally known as the *Concordat*) which, under grounds for setting aside the award such as arbitrariness, includes manifest unsupportability, lack of any objective reason, and serious violation of clear and undisputed legal norms or principles (see P. Jolidon, *Commentaire du Concordat Suisse sur l'Arbitrage*, Berne, 1984, 518 ff.; J. F. Poudret, C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, 212 ff.); 2) a complete autonomy if all parties are non-Swiss (*i.e.* none of whom has its domicile, habitual residence or business establishment in Switzerland) and have concluded an explicit agreement (*declaration expresse*) to exclude court challenge entirely (Art. 192 PILA) or to limit such proceedings to one or more of the grounds listed in the Act. Because waiver of the right to judicial review of the award must be explicit, reference to institutional arbitration rules containing renunciation of appeal provisions will not be sufficient to exclude review; 3) a limited court review for breaches of procedural fairness (Art. 190, 2 PILA), which contemplates five grounds for challenge of awards. However, in the case *LV Finance Group Limited v. IPOCI International Growth Fund Limited (Bermuda)* 4P.102 (2006) (1st Div SFT), the Swiss Federal Tribunal held that an ICC Tribunal's failure to consider facts which later became available, would be a ground to set aside the award; the Federal Tribunal was of the view that the ICC Tribunal would have come to a different judgment if those facts had been available in the proceedings.

²³⁹ See Swiss Federal Tribunal, 8 April 2005, DFT 4P. 253/2004; see also Swiss Federal Tribunal, 22 February 1999, 17 *ASA Bull.* 537 (1999). Similar statements can also be found in many French and German courts' decisions: for reference see G. Born, *International Commercial Arbitration*, *cit.*, 2650.

or with some minor modifications) the grounds of recourse laid down in the Model Law (such as Germany, Spain, Austria), which do not contemplate any revision of the award based on alleged errors of law. At the other end of the spectrum there are countries, such as England, which operate a range of controls, including a limited right of appeal on questions of law, that the parties may agree to waive.²⁴⁰ The express provision on a point of (only English) law is contained in Section 69 of the English Arbitration Act,²⁴¹ which requires very stringent conditions for an appeal to be considered admissible and to be upheld.²⁴² As a matter of fact, the court rarely grants leave to appeal on a question of law.²⁴³ English courts have adopted a narrow interpretation of those conditions, deprecating any attempt to dress

²⁴⁰ Traditionally English law provided for expansive judicial review of the substance of arbitral awards. Prior to the 1996 Act, English law forbid pre-dispute waivers of the right to appeal on points of law in 'special category' cases of admiralty, commodities and insurance contracts governed by English law. English courts have emphasised that '*a major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process*': see *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC 221 (HL); *ABB Attorney General v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm.).

²⁴¹ During consultation on the July 1995 Arbitration Bill in England, there were many suggestions made to the DAC that the right of appeal on point of law should be abolished in its entirety, as: '*(...) by going to arbitration the parties had agreed to abide by the ruling of the arbitrators and not to treat it as a preliminary step to judicial proceedings*' (see R. Merkin and L. Flannery, *Arbitration Act 1996, cit.*, 164). The DAC rejected these suggestions, on the ground that a limited right of appeal was not inconsistent with an agreement to arbitrate, and the parties may well: '*(...) have intended that the result is to comply with established legal principles, for example where they have specifically chosen the law applicable to their substantive agreement*' (DAC Report, para. 285).

²⁴² First of all, the agreement of all the parties involved or the leave of the court is required. The latter is granted only if the court determines that the following cumulative conditions have been satisfied: that the determination of the question will substantially affect the rights of one or more of the parties; that the question is one that the tribunal was asked to determine; that on the basis of the findings of fact in the award: (i) the decision of the tribunal on the question was obviously wrong or (ii) the question is of general public importance; that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. The point of law which has been appealed must have been raised in the proceedings and dealt with in the award. The aim of Section 69(3)(b) is to estop parties from seeking permission to appeal a point which they did not argue before the arbitrators. See D. Sutton, J. Gill and M. Gearing (eds.), *Russell on Arbitration* 23rd ed., London, 2007, paras 8-119-8-161; see also P. Clifford & O. Browner, *England – Scope of Challenges Following an Alleged Error of Foreign Law*, *Int'l Arb. L. R.*, 2010, 4, N-31.

²⁴³ As was held in *ABB Attorney General v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm.), the approach which courts should follow in revising an arbitral award is to: '*(...) read [it] in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it*'. In *Egmata AG v. Marco Trading Corp.* [1999] 1 Lloyd's Rep. 862, 865 (QB) it was stated that Art. 69 should be exercised sparingly, so as to '*respect the decision of the parties' choice*'.

up mere factual findings²⁴⁴ (including findings based upon a law other than English law) or procedural errors²⁴⁵ as errors of law. In any case, the parties may contract out of the right to appeal:²⁴⁶ a) by incorporating institutional rules, such as ICC and LCIA Rules, that limit the right of appeal to the extent permitted by law;²⁴⁷ b) by agreeing that the arbitrator does not have to give reasons with the award (which under Section 69(1) has the effect of excluding an appeal on a point of law); and, c) by agreeing under Section 46(1)(b) that the arbitrator may decide the dispute other than in accordance with substantive law.²⁴⁸ Section 69(2) requires that any internal appeal or other arbitral procedure be exhausted before applying to the court. A distinction is also drawn between a point of general public importance, where the test is whether the conclusion is open to serious doubt and other (one-off) cases, where the test is whether the tribunal is obviously wrong.²⁴⁹

In Italy, on the basis of the new arbitration law introduced by Legislative Decree N. 40/2006, an award can be set aside for errors of law, but only if the parties had opted in to this ground in their agreement (or when this ground is mandatorily provided for by the law).²⁵⁰ Other

²⁴⁴ See *Torch Offshore LLC v. Cable Shipping Inc.* [2004] 2 Lloyd's Rep. 446; *Mowlem Plc v. PHI Group Ltd* [2004] BLR 421.

²⁴⁵ See *Petroships Pte. Ltd. of Singapore v. Etec Trading & Investment Corporation* [2001] 2 Lloyd's Rep. 348; *Lesotho Highlands Developments Authority v. Impregilo SpA* [2003] 2 Lloyd's Rep. 497.

²⁴⁶ See *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896. The agreement of the parties must be in writing. However, the provision contained in standard form rules of arbitration to the effect that the award shall be final and binding, has been held to constitute a valid agreement to waive the right of appeal: see *S. Olyesters Ltd. v. The International Investor (KCFC)* [2001] 1 Lloyd's Rep. 480.

²⁴⁷ See *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC 221 (HL) stating that parties exclude right of appeal under para. 69 by way of Article 26 (6) of the ICC Rules.

²⁴⁸ In *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm.), [2010] 1 Lloyd's Rep. 109, the arbitration took place under the UNCITRAL Rules, which do not include an express provision that there will be no right of appeal on a point of law, as LCIA Rules do. The contract provided that the award would be final conclusive and binding and the court excluded that this meant that there would be no appeal. According to Gloster J.: 'sufficiently clear wording is necessary albeit that no express reference to Section 69 is required'. See the comments of Ramsey J. in *Essex County Council v. Premier Recycling Ltd* [2006] EWHC 3594 at paras. 24-26.

²⁴⁹ See R. Merkin and L. Flannery, *Arbitration Act 1996*, cit., 167, who submit that a point of law is of general public importance where it raises the construction of a standard form contract or where the facts are commonly encountered. By contrast, a case is one-off if the contract is individually negotiated, or contains unusual provisions or has arisen for construction in the light of unique facts.

²⁵⁰ Under the previous regime, on the contrary, challenges for errors of law were an opt-out solution. For commentaries on the new provision see S. Boccagna, *Art. 829. Casi di nullità*, in *Le Nuove Leggi Civili Commentate*, Padova 2007, 6, 1413 ff.; M. Bove, *L'impugnazione per nullità del lodo rituale*, *Riv. Arb.*, 2009, 1, 19 ff.; E. Marinucci,

jurisdictions which provide for annulment of (usually) domestic (but sometimes also international) arbitral awards based upon review, *lato sensu*, on the merits (but not, or only exceptionally, on the facts) are China,²⁵¹ Ireland²⁵² and Australia.²⁵³ As a matter of principle, the review/appeal on the merits in these jurisdictions is usually admitted only in cases of serious errors of law. A few jurisdictions, less arbitration-friendly and with a limited experience and familiarity with international arbitrations, tend to admit judicial review on the merits of the awards on the same grounds available to first instance court decisions.²⁵⁴

In the U.S.A., where federal and state arbitration statutes usually limit as much as possible the right of judicial review of arbitration awards,²⁵⁵ the ground known as manifest disregard of the law,²⁵⁶ which is

L'impugnazione del lodo arbitrale dopo la riforma: motivi ed esito, Milano, 2009, 247 ff.; E. Zucconi Galli Fonseca, Art. 829, *Casi di nullità*, in F. Carpi (a cura di) *Arbitrato: commentario al titolo VIII del libro IV del codice di procedura civile – Arts. 806-840*, 2 ed., Bologna, 2008.

²⁵¹ On the basis of Arts. 58 (4), (5), 63, 217 (4) of the Chinese Arbitration Law, an award may be annulled if the court concludes that the evidence was insufficient or the application of law was truly incorrect. See T. Houzhi & W. Shengchang, *China* 40, in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (update 1998); C. Hongda, *Judicial Supervision of Arbitration in China*, 17 (1) *J. Int'l Arb.*, 2000, 71, 75-76.

²⁵² Where it is possible to set aside an award for errors of law on the face of the award, as the Irish High Court recently did in the case *GLC Constr. Ltd. v. County Council of the County of Laois* [2005] IEHC 53.

²⁵³ In Australia, the right of appeal for errors of law (unless the parties have excluded it *per agreement*) is provided for by the Commercial Arbitration Acts only for awards that do not fall within the scope of the International Arbitration Act.

²⁵⁴ See Art. 29 (1) of the Portuguese Law on Voluntary Arbitration, which states that: 'Unless the parties have waived the right to appeal, the same appeals which are admissible regarding a judgment of the Court of First Instance may be lodged with the Court of Appeal against the arbitral award'; Art. 53 (1) of the Egyptian Arbitration Law; Art. 758 of the Argentinean National Code of Civil and Commercial Procedure. Broad grounds for review on the merits are also provided for by the Abu Dhabi Code of Civil Procedure (Art. 91 (2)(v)), the Saudi Arabian Arbitration Regulation (Art. 19) and the Libyan Code of Civil and Commercial Procedure (Art. 767). In The Netherlands, the *Proposal for the Amendment of the Dutch Arbitration Act*, submitted to the Ministry of Justice on 21 December 2006, contained recommendations for extensive alterations to the original Arbitration Act in the Dutch Civil Code of Procedure. Among other provisions it was stated that parties could limit – though not fully exclude – the grounds for setting aside an arbitral award. On 5 November 2009 the inquiries office at the Ministry of Justice advised that no work is presently being done by the Ministry regarding the Proposal and / or the amendment of the Arbitration Act. No indication has been given as to whether, or when, the Proposal would be further developed.

²⁵⁵ According to S. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, *The*

highly controversial²⁵⁷ and seldom raised as a ground for setting aside an award and even more rarely successful,²⁵⁸ represents an exception to the general exclusion of review for errors of law. It has been construed in the sense that arbitrators knew the law, but did not apply it in order to reach the result they did.²⁵⁹ The law which is alleged to have been disregarded should

George Washington Law Review, 1998, 445: 'Nothing in Section 10 (a) or elsewhere in the F.A.A. creates a guarantee of justice or expressly authorizes the courts to engage in substantive review of the merits (...) of commercial arbitration awards. (...) protections are properly viewed as primarily procedural in nature' and '[t]he scope of judicial review sanctioned by Section 10(a) of the FAA is 'extraordinarily narrow''. Among the express grounds provided for by Title 9 of the U.S. F.A.A. for setting aside an arbitral award, in fact, there is no express mention of mistakes of law, and U.S. courts have held that an award may not be set aside on such grounds (see *Baxter Int'l Inc. v. Abbott Labs*, 315 F3d 829, 7th Cir., 2003). For some applications of the narrow approach adopted by American courts in reviewing awards see *Lucas v. Philco-Ford Corp.* 399 F. Supp. 1184; *Miller v. Ruyon* 77 F. 3d 189; *Cobec Brazilian v. Isbrandtsen* 524 F. Supp 7; *Brown v. Rausher Pierce* 1992 796 F. Supp 496; *Sobel v. Hertz* 469, F. 2d 1211; *Merrill Lynch v. Jaros*, 70 f. 3d 418; *Jasper Cabinet Co. v. United Steel Workers of America*, 77 F. 3d 1025; *Service Employees Inter v. Local* 70 F. 3d 647. For a general overview see O. Armas – T. Pieper, *Achieving the Intended Purpose of Arbitration Agreements in the U.S. and Brazil – The Limited Scope of Judicial Review of Arbitral Awards under the U.S. Federal Arbitration Act and the Necessity of a Compromisso under the Brazilian Arbitration Law*, in *Revista Brasileira de Arbitragem*, 2008, 19, 91 ff.

²⁵⁶ Referred to for the first time in the decision *Wilko v. Swan* 346 U.S. 427, 74 S. Ct. 182 (1953). In this decision the Supreme Court stated that: '(...) the interpretations of the law by the arbitrators, in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation'.

²⁵⁷ Some U.S. lower courts have commented that the *Wilko* dictum is 'ungrammatical in structure' and 'unnecessary to the [*Wilko*] decision' (see *I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F. 2d 424, 430 n. 13, 2d Cir. 1974). Other U.S. courts have questioned whether the manifest disregard exception serves any useful purpose (see *Baravati v. Josephthal, Lyon & Ross*, 28 F. 3d 704, 706, 7th Cir. 1994, which highly criticised the dictum in *Wilko*). However, the Supreme Court's more recent observations in *First Options of Chicago, Inc. v. Kaplan* 514 U.S. 938, 1995 seem to have reinvigorated the doctrine, stating that: '(...) where [a] party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances (...) parties bound by arbitrator's decision not in manifest disregard of the law'.

²⁵⁸ See *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F. 3d 383 (2d Cir. 2003); G. Born, *International Commercial Arbitration*, cit., 2639 notes that out of 48 cases in the 2nd Circuit, the awards partially or entirely vacated were only 4.

²⁵⁹ See *Sidarma Società Italiana v. Holt Industries* 515 F. Supp. 1302. On manifest disregard of the law see N. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 *Brooklyn L. R.*, 1998, 471; S. L. Hayford, *Reigning in the 'Manifest Disregard of the Law Standard': the Key to Restoring Order to the Law of Vacatur*, 1998 *J. Disp. Resol.*, 1998, 117, 129; N. Rubins, *Manifest Disregard of the Law*

be well defined, explicit and clearly applicable so that the error is capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. The concept of *manifest disregard of law*, which has been given a narrow interpretation,²⁶⁰ is an error beyond simple misconstruction or misapplication of the law. The appellant must show that the arbitrator knew and understood the law, but deliberately chose to misapply it to the appellant's detriment. The persistent validity of this ground has been recently put into question by the U.S. Supreme Court's decision in *Hall Street Assoc. LLC v. Mattel Inc.*,²⁶¹ which affirmed that the FAA's statutory grounds for *vacatur* of an award are exclusive, apparently ruling out the possibility for invoking additional (and non-statutory) grounds, which includes that of 'manifest disregard'.

When considering the arguments in favour of reviewing arbitral decisions in order to guard against (serious) mistakes of law, it is our view that the solution can hardly be the introduction of an appeal for every possible error of law which, if provided for as a default option (e.g. applicable *de jure*, unless the parties have agreed to opt of it), always implies a full revision of the merits of the arbitral decision, thus nullifying one of the basic principles of arbitration, finality. A two tier-system, in addition, with its inevitable side effect of lengthier and more expensive proceedings, might indirectly favour better resourced participants over smaller players, who can be compelled to give up litigation to save additional costs. The situation might be even worse if the appeal is subject to no restrictive conditions (as those provided for by English law) or is to be decided by judges who are not familiar with arbitration or do not belong to specialised sections of the judiciary dealing only (or almost exclusively) with arbitration matters. Finally, a second level of dispute settlement risks undermining the authority of the first (arbitral) level decision: '(...) if first-

and the *Vacatur of Arbitral Awards in the United States*, 12 *Am. Rev. Int'l Arb.* 363, 377 (2001).

²⁶⁰ See *Hall Street Associates L.L.C. v. Mattel Inc.* 128 S. Ct. 1396, 2008 and *Prime Therapeutics LLC v. Omnicare, Inc.* 555 F. Supp 2d 993, 999 (D. Minn. 2008). See also J. P. Beraudo, *Egregious Error of Law as Grounds for Setting Aside an Arbitral Award*, 2006, *J. Int'l Arb.* 23 (4), 351-361.

²⁶¹ 128 S. Ct. 1396 (U.S. Ct. 2008). For some commentaries on the decision see A. Samuel, *The U.S. Supreme Court on Federal Pre-Emption and Appeals on Questions of Law by Consent – A Case Note*, 25 *Arbitration International*, 2009, 455; O. Armas, T. Pieper, *Limitations Lurking in Parties' Ability to Craft Arbitration Agreements. The Scope of Judicial Review of Arbitral Awards under the U.S. Federal Arbitration Act*, *Revista del Club Espanol del Arbitraje*, 2/2008; T. Tyler, A. Parasharami, *Finality over Choice: Hall Street Associates, L.L.C. v. Mattel, Inc.*, *Arbitration International*, Vol. 25, Issue 7, 25 *J. Int'l Arb.*, 613 (2008).

level decisions were regularly appealed, they might very well end up devalued.²⁶² It is noteworthy that those few countries (like England), which contemplate a form of appeal (see Section 69 of the English Arbitration Act), are now facing a great debate about the usefulness of an appeal on points of law and are discussing whether eventually to repeal it or not.²⁶³ For all these reasons, a reasonable compromise, *de jure condendo*, between the need to protect parties from patent mistakes (and misconducts) committed by arbitrators and the need to preserve the autonomy of arbitration (and its finality), is neither the introduction of an appeal on the merits for all possible errors of law, nor the radical exclusion of every possible revision of awards on the merits. Rather, appeals must be limited to cases of errors of law which reach a certain level of seriousness, *e.g.*, when they amount to a manifest disregard of law.²⁶⁴ In this respect, courts should be prevented from upholding applications of setting aside an award on the basis of merely questionable, incorrect or simply divergent interpretations or applications of the law by the arbitrators or to set aside an award only because arbitrators committed some factual or legal errors, or even clearly misinterpreted contractual provisions. By referring the dispute to arbitration, in fact, the parties agreed to submit to the arbitrators' view of the facts and the meaning of the contract and their construction of the law, however questionable, ambiguous or even wrong the result might be. Complaints of manifest disregard of law should be upheld only in exceptional circumstances. Indeed, manifest, as recalled by the 11th Cir.,²⁶⁵ referencing to the definition from *Black's Law Dictionary* and the *American*

²⁶² C. J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, in *Trans. Disp. Man.*, Vol. 4, Issue 5, 2007, 21, who recalls the experience of the WTO system, where a statistical analysis shows that between 1995 and 2000, 77% of WTO panel reports were appealed, so that many panel decisions seem to be little more than interim pronouncements on the long way towards a final decision.

²⁶³ It has been underlined that there have been few successful appeals over the years and a minimal experience of awards being wholly overturned; that the Section increases the cost of commerce without generating any corresponding benefit; that it decreases the attractiveness of the England as a seat for arbitration; finally, that there is no evidence that the Section has either avoided injustice or has added significant weight to the development of English commercial law and to the promotion of clarity and certainty of the latter. For this analysis see R. Holmes, M. O'Reilly, *Appeals from Arbitral Awards: Should S. 69 be Repealed?* 2003, 69 *Arbitration* 1 at p. 1. But, *contra*, see H. Dundas, *Appeals on Questions of Law*, *cit.*

²⁶⁴ See, *contra*, S. Wilske, N. Mackay, *The Myth of the 'Manifest Disregard of the Law' Doctrine: Is this Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned?*, *ASA Bull.*, 2006, Vol. 24, N. 1, 216 ff., for whom: '(...) the U.S. Doctrine runs contrary to the recognised principles of international arbitration'.

²⁶⁵ *Montes v. Shearson Lehman Bros. Inc.*, 128, F. 3d, 1456.

Heritage Dictionary of the English Language, means: ‘(...) *evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, visible, unmistakable, indubitable, indisputable, evident and self-evident*’. Cases of manifest disregard of law might occur, for example: when - to quote a famous U.S. court decision - ‘(...) *some egregious impropriety on the part of the arbitrators is apparent*’ and ‘*no judge or group of judges could conceivably come to the same determinations*’;²⁶⁶ when the tribunal is aware of controlling legal authority, which is clear and not vague or ambiguous, and deliberately chooses to disregard it; when the tribunal applies a different law than the one chosen by the parties; when the tribunal decides *ex aequo et bono* a dispute which the parties had expressly agreed to be governed by a certain law;²⁶⁷ when the tribunal decides on the basis of certain rules of law a dispute which the parties had expressly agreed to be decided *ex aequo et bono* (provided that, in the latter case, the tribunal erroneously thought to be bound by the rules of law or intentionally refused to decide *ex aequo et bono*);²⁶⁸ and, when a tribunal declares a contract to be binding between the parties, but then it refuses to apply to them its contractual provisions and clauses and *vice versa*. The latter example can also be characterised as irrational, illogic or contradictory decision, or even as a breach of public policy. After all, the *manifest disregard of law* ground is closer to a public policy breach rather than a pure error of law.²⁶⁹ Of all

²⁶⁶ *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F. 3d, 383 (2d Cir. 2003).

²⁶⁷ In this sense, under Italian law, E. Zucconi Galli Fonseca, *Art. 829 c.p.c.*, in F. Carpi (a cura di), *Arbitrato*, cit., 617; P. Bernardini, *Il diritto dell'arbitrato*, Roma, 1998, 115; E. Marinucci, *L'impugnazione del lodo arbitrale*, cit., 269 ff.

²⁶⁸ However, courts and commentators have not always been consistent as to the consequences of the occurrence of those mistakes. See *Alexander v. Blue Cross of Calif.* 106 Cal. Rptr. 2d 431, 438 (Cal. App. 2001), for which: ‘(...) *even where an arbitration agreement requires an arbitrator to apply a particular law or body of law, the arbitrator's failure to apply such a law is not in excess of an arbitrator's powers*’. See also S. Berti & Schnyder, in S. Berti et al. (eds.), *International Arbitration in Switzerland*, cit., Art. 190, 67, for whom: ‘*no annulment of award where arbitrators decide based on equity, rather than applicable law*’. See also G. Born, *International Commercial Arbitration* cit., 2600, who notes that in both cases [i.e. when a tribunal which is granted *amiable compositeur* or *ex aequo et bono* authority and instead applies national law or where is not granted *amiable compositeur* authority and nonetheless renders an award not based on legal principles] that: ‘(...) *it is not that the arbitrators have made a choice-of-law error or a mistake in substantive legal analysis, but they have instead adopted a fundamentally different arbitral procedure than that agreed by the parties*’.

²⁶⁹ See, in this sense, G. Born, *International Commercial Arbitration*, cit., 2641, who observes: ‘(...) *the manifest disregard standard is akin to a form of public policy analysis*’; M. Hwang S.C., A. Lai, *Do Egregious Errors Amount to a Breach of Public Policy*, 71 *Arbitration* (2005), 1, 7, who argue that: ‘(...) *awards containing fundamental*

the diverging interpretations given to the notion of manifest disregard of law in the U.S. system, the one which seems better to fit this view is that adopted by a decision of the 5th Cir. (Court of Appeals 1999, *Willias v. Cigna Fin. Advisers Inc.*),²⁷⁰ which has eliminated the motivational requirement on the part of the tribunal (deeming no more necessary that the tribunal actually intended to ignore or disregard the pertinent law),²⁷¹ only requiring that the award result in significant injustice, taking into account all of the circumstances of the case.²⁷² The requirement of the significant injustice seems to strike the best balance between the need to respect the autonomy of arbitration (such that it is not rendered just a first step in a subsequent litigation procedure) and the need to protect arbitration's reputation by preventing the circulation of patently illegal, unlawful (and thus significantly unjust) awards domestically and internationally. Significant injustice should be deemed to occur, *in re ipsa*, in many of the examples reported above, and also to cover other patent unlawfulness and/or mistakes of law. In order to prevent possible abuses, that ground might be subject to additional conditions, such as a minimum monetary threshold under which it would not be available, as well as cost shifting or

and serious errors so egregious as to undermine the public's confidence in the arbitral system conflict with 'fundamental notions and principles of justice' and therefore fall within the public policy exception in both ML Art. 34 and NYC Art. V (2)(b)'. contra, M&C Corporation v. Erwin Behr GmbH & Co., K.G., 87 F. 3d, 844 (6th Cir. 1996) 851, n. 2 for which: 'whatever may be meant by the manifest disregard doctrine applicable in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral award'.

²⁷⁰ 197 F. 3d, 752 (5th cir. 1999), 529 U.S. 1049 (2000).

²⁷¹ See, also, N. Rubins, *Manifest Disregard of the Law*, cit., 363, 377, for whom the elimination of the scienter requirement and the concurrent imposition of the substantial injustice limitation should be welcome as logical, clear, and appropriately deferential.

²⁷² In the U.S.A., the most common interpretation of the notion of m.d.i. adopted by the majority of the federal circuits still requires two conditions: that the law is clear and unambiguous and that the tribunal intentionally refuses or declines to apply it (in this sense see *Bowen v. Amoco Pipeline Co.*, 254 F. 3d, 925, 932 (10th Cir. 2001); *Hoffman v. Cargill Inc.*, 236 F. 3d, 458, 462 (8th Cir. 2001); *Prudential-Bache Securities Inc., v. Tanner*, 72 F. 3d, 234, 240 (1st Cir. 1995)). Another interpretation has been adopted by the Court of Appeals of the 7th Cir. in *George Watts & Son, Inc. v. Tiffany and Co.* (248, F. 3d, 577 (7th Cir. 2001)), according to which two different conditions should be met: '(...) an arbitral order requiring the parties to violate the law (...) and an arbitral order that does not adhere to the legal principles specified by contract and hence unenforceable under the FAA par 10, 4'.

sanctions for unmeritorious challenges (e.g. those which are spurious or raised only with dilatory intent).²⁷³

Special consideration in the context of judicial review of awards is to be given to agreements to narrow or expand the scope of judicial review, which are still rather controversial.²⁷⁴

It is generally accepted that parties may to some extent narrow or even exclude (directly in their agreement or by incorporating certain arbitration rules),²⁷⁵ the grounds upon which an award may be set aside by national courts.²⁷⁶ Some legislations (such as Sweden,²⁷⁷ Switzerland,²⁷⁸ Belgium²⁷⁹ and now France, with the new Art. 1522)²⁸⁰ enforce such agreements,²⁸¹ some others (like Italy,²⁸² Portugal²⁸³ and Egypt²⁸⁴) do not. Court decisions in Germany²⁸⁵ and Canada²⁸⁶ opted for the negative

²⁷³ See *B. L. Harbert International LLC v. Hercules Steel Co.*, Court of Appeal, 11th Cir. 2006. For further reference see also J. P. Duffy, *Opposing Confirmation of International Arbitration Award: Is It Worth The Sanctions?*, 17 *Am. Rev. Int'l Arb.*, 2006, 143.

²⁷⁴ On this issue see S. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitral Awards* 63 *Alb. L. Rev.*, 1999, 241-248. On the issue of form and interpretation of agreements expanding judicial review or, on the contrary, containing waiver of it see G. Born, *International Commercial Arbitration*, cit., 2666 ff.

²⁷⁵ See, for example, Art. 26.9 LCIA Rules, according to which: '(...) the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made'. See also Art. 27 (1) ICDR Rules.

²⁷⁶ See R. D. Fisher & R. S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 *W. M. Mitchell Rev.*, 1996, 941, 973.

²⁷⁷ See Lag om Skiljeman, s. 51 only in commercial cases.

²⁷⁸ See Art. 192 (1) of the Swiss Law on Private International Law.

²⁷⁹ See Art. 1717 (4) of the judicial code.

²⁸⁰ According to which "the parties may, by specific agreement, waive at any time their right to challenge the award".

²⁸¹ See *infra* U.S. case law.

²⁸² See Art. 829 (1) of the Italian Code of Civil Procedure, for which an application for setting aside an award is always available: '(...) notwithstanding any waiver'.

²⁸³ See Art. 28 (1) of the Portuguese Law on Voluntary Arbitration, which states that: '(...) the right to apply from setting aside of the arbitral award may not be excluded'.

²⁸⁴ See Art. 54 (1) of the Egyptian Arbitration Law, which provides that: '(...) the admissibility of the action for annulment of the arbitral award shall be prevented by the applicant's renunciation of its right to request the annulment of the award prior to the making of the award'.

²⁸⁵ The German BGH, in the decision 26 September 1985 (1986 NJW 1436), has stated that a complete waiver of judicial review of awards is not valid. Some commentators deem that a partial waiver (e.g. with respect to specific grounds of annulment, as long as these grounds do not protect public interests) is admissible. In support of this view see Geimer, in R. Zoeller (ed.), *Zivilprozessordnung*, Art. 1059, 80-82 (26th ed. 2007); A. Baumbach, W. Lauterbach, J. Albers & P. Hartmann, *Zivilprozessordnung*, Art. 1059, 3 (66th ed. 2008); K. H. Schwab & G. Walter, *Schiedsgerichtsbarkeit* Ch. 24, 53 (7th ed. 2005).

solution.²⁸⁷ Section 69 (1) of the English Arbitration Act, on the contrary, permits exclusion clauses, by which parties waive their rights to judicial review of the substance of the arbitral award.²⁸⁸ In Belgium the legislation before 1998 abolished any rights to apply to the Belgian courts for annulment of awards made between non-Belgian parties.²⁸⁹ The 1998 amendment restored the right to seek annulment of awards made in Belgium, but left the parties (when none of them is either a natural person with a Belgian citizenship or a resident in Belgium or a legal person having its main establishment or having a branch there) the freedom to agree, through an express declaration in the arbitration agreement or through a later agreement, to exclude or limit annulment applications.²⁹⁰ Even in the absence of any incorporation of arbitration rules, some legal systems (such as Switzerland) recognise the validity of exclusion agreements, whereby the parties restrict judicial review or eliminate it altogether.²⁹¹ In other

²⁸⁶ See *Noble China Inc. v. Lei* 1998 O.T.C. Lexis 2175, 38-51 (Ontario Court of Justice), for which parties may not validly exclude annulment application under Article 34; see also *Amos Inv. Ltd v. Minou Enterp. Ltd*, 2008 B.C.S.C. 332 (British Columbia S. Ct. 2008) for which: ‘(...) it is clear (...) that an arbitration agreement cannot waive judicial review such as is contemplated under s. 30 of the British Columbia Commercial Arbitration Act’.

²⁸⁷ Before the enactment of the new law on arbitration (*Decret* n. 2011-48, 13 January 2011), also court decisions in France were against these agreements. See Court of Appeal of Paris, 14 November 2004, 2005 Rev. Arb., 751, for which waiver of annulment rights: ‘(...) cannot deprive the parties not only of bringing annulment proceedings against the award, which is a matter of public policy, but also the corresponding right to invoke the general legal rights of the French New Code of Civil Procedure to seek to stop the provisional enforcement as has been ordered in this case’. For *Fouchard Gaillard Goldman on International Commercial Arbitration*, cit., 1594 (1999), an agreement excluding annulment was void under French law.

²⁸⁸ However, English law does not permit broader waivers of the right to set aside an award for either jurisdictional objections or serious irregularity affecting the tribunal or the proceedings: see Art. 68, Art. 4 (1), Schedule 1. R. Merkin, *Arbitration in London*, 20.40 (2004 & update 2007) observes that: ‘(...) the Arbitration Act 1996 does not permit the parties to agree in advance of the occurrence of serious procedural irregularity that there is no right to apply to the court in the event of any irregularity’.

²⁸⁹ Belgian Judicial Code, Art. 1717 (4).

²⁹⁰ For an overview of the Belgian legislation see A. Vandereist, *Increasing the Appeal of Belgium as An International Arbitration Forum? – The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards*, 3 (2) *J. Int’l Arb.*, 1986, 77 and, after the 1998 amendment, B. Hanotiau & G. Block, *The Law of 19 May 1998 Amending Belgian Arbitration Legislation*, 15 *Arb. Int’l*, 1999, 99.

²⁹¹ See Art. 192 PILA, which allows waivers of all judicial review grounds where all parties are non-Swiss. In the relevant part, the provision states the possibility for non-Swiss parties to: ‘(...) waive fully the action for annulment or (...) limit it to one or several of the ground listed in Art. 190 (2)’.

jurisdictions, some legislative provisions either expressly provide that parties (usually foreign, *i.e.* non – resident) may waive or limit the grounds for annulling an international arbitral award (as is the case in Sweden,²⁹² Tunisia²⁹³ and Turkey²⁹⁴), or the case law has declared that waiver admissible, even in the absence of any express provision. In the U.S.A., while few courts have concluded that agreements waiving or restricting the parties' rights to seek annulment of an award are unenforceable (including with regard to actions to vacate on manifest disregard grounds),²⁹⁵ others have declared that parties are free to waive judicial review of awards in an action to vacate, provided that the waiver is clear and explicit.²⁹⁶

Our position on agreements to narrow (or even to exclude) judicial review is rather critical. Each legal system has to guarantee basic principles of fair trial, which cannot be easily written out by agreement of the parties. At the end of the day, the retention of a minimum supervisory jurisdiction by the courts may arguably be a means of ensuring that the arbitral process does not get out of hand.²⁹⁷ Nobody denies that party autonomy is the sovereign of the arbitral procedure; however, that is true only to the extent (and in so far as) it is allowed and recognised by the law governing arbitration. Arbitration, in fact, is not a phenomenon outside or detached from the law. Rather, it is a mechanism which is given by the legislator a number of advantages (such as flexibility, informality, confidentiality, the power of the parties to appoint their own arbitrators..), provided that it

²⁹² See Art. 51 of the Swedish Arbitration Act, according to which: '[w]here none of the parties is domiciled or has its place of business in Sweden, such parties may in commercial relationships through an express agreement exclude or limit the application of the grounds for setting aside an award'.

²⁹³ Art. 78 (6) of the Tunisian Arbitration Act, according to which: 'The parties who have neither domicile, principal residence, nor business establishment in Tunisia, may expressly agree to exclude totally or partially all recourse against an arbitral award'.

²⁹⁴ See also Art. 15 (A)(2) of the Turkish International Arbitration Law.

²⁹⁵ See *Hoefl v. MVL Group, Inc.*, 343 F. 3d 57, 60, 66 (2d Cir. 2003), for which an agreement that an award: 'shall not be subject to any type of review or appeal whatsoever' does not waive the right to seek vacatur on manifest disregard grounds; '(...) parties seeking to enforce arbitration awards through federal court confirmation judgments may not divest the courts of their statutory and common law authority to review both the substance of the awards and the arbitral process for compliance with Art. 10 (a) and the manifest disregard standard'. For further reference see G. Born, *International Commercial Arbitration*, cit., 2663 ff.

²⁹⁶ See *Mactec Inc v. Gorelick* 427 F. 3d 821, 830 (10th Cir. 2005). For further reference see G. Born, *International Commercial Arbitration*, cit., 2663 ff.

²⁹⁷ As correctly pointed out by a commentator: '(...) the preparatory materials of the Model Law would surely discuss the possibility of exclusion agreements, had the drafters contemplated it. And the drafters did not contemplate that possibility, because in the system of the Model Law the imperative procedural provisions reflect procedural public policy': G. Petrochilos, *Procedural Law in International Arbitration*, cit., 86.

respects some fundamental principles (equality of the parties, *audiatur et altera pars*) and follows some basic procedural rules (application for enforcement of interim measures only to the state courts, applications for setting aside the award only to the competent court of the seat of arbitration and so on). These principles and rules are essential for this alternative mechanism of dispute resolution to be technically qualified as arbitration, and, more important, for its final outcome, the award, to be given the same final and binding effect of a judicial decision. A procedure which is conducted in disregard of those fundamental rules and principles cannot be qualified as an arbitration, and a decision which does not comply with the requirements provided for by the local law (including its being subject to scrutiny under a number of procedural grounds) cannot be qualified as an award. What is at stake, in the end, is the safeguard of the fundamental rights of the parties, as well as the reputation of arbitration. If the parties do not intend to submit to (and respect) those principles and rules, they are free to do so, by choosing another ADR mechanism (such as mediation, conciliation); however, they cannot shape the mechanism to such an extent that it completely changes its nature. As expressly stated by one commentator: '*No one having the power to make legally binding decisions in this country should be altogether outside and immune from this system*'.²⁹⁸ This should be true at least with respect to those grounds of annulment *lato sensu* related to public policy.²⁹⁹

As to agreements to expand the scope of judicial review of arbitral awards (in order to include errors of law or, less frequently, errors of fact), they also appear (if not even more) controversial.³⁰⁰ The rationale behind

²⁹⁸ See Sir M. Kerr, *Arbitration and the Courts: the UNCITRAL Model Law*, cit. 34, 15; see also F. A. Mann, *Private Arbitration and Public Policy*, cit., 257; W. Craig, *Uses and Abuses of Appeal from Awards*, 4 *Arb. Int'l*, 1988, 174, 198-202. *Contra* G. Born, *International Commercial Arbitration*, cit., 2663, for whom: '(...) where sophisticated companies freely decide that they wish to forego any review in annulment proceedings, it is difficult to see why that agreement should not be given effect, save in the most extraordinary circumstances (...)'

²⁹⁹ See J. B. Hamlin, *Contractual Alteration of the Scope of Judicial Review*, *J. Int'l Arb.*, 1998, at 47-55, who observes: 'Every case confronting the issue has held that the F.A.A. grounds for vacating an award may be invoked and applied notwithstanding anything to the contrary in the parties' agreement'.

³⁰⁰ See, on this issue, L. Montgomery, *Expanded Judicial Review of Commercial Arbitration Awards: Bargaining for the Best of Both Worlds*, 68, *U. Cin. L. R.*, 2000, 529, 530; C. R. Drahozal, *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, 16 (3) *Mealey's Int'l Arb. Rep.*, 2001, 27; L. Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 *Am. Rev. Int'l Arb.*, 1999 215; V. Holstein, *Co-opting the Judicial Review of Arbitral Awards Through Contract*, 12 *World Arb. & Med. Rep.*, 2001, 276; H. Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 *Am. Rev. Int'l Arb.*

the expansion of the grounds for judicial review is usually a concern of the parties about the fallibility of the arbitrators and the desire for additional procedural rights and broader scope to correct mistaken awards. In the U.S.A. (the jurisdiction which has the most extensive body of authorities on this issue), courts have adopted a contradictory approach. The Tenth Circuit has generally ruled out the possibility for the parties to expand contractually the scope of judicial review, stating that these agreements are inconsistent with the finality inherent in arbitration and give private parties the power to regulate the actions of public bodies (e.g. the courts) in their activity to review awards.³⁰¹ The Seventh³⁰² and Eighth Circuits have also ruled in the same vein.³⁰³ In contrast, the Third,³⁰⁴ the Fifth³⁰⁵ and the Ninth³⁰⁶ Circuits have upheld the validity and enforceability of agreements aimed at expanding the grounds for judicial review, emphasising the

147 (1997); S. J. Ware, 'Opt-In' for Judicial Review of Errors of Law under the Revised Uniform Arbitration Act, 8 Am. Rev. Int'l Arb., 1997, 263.

³⁰¹ See *Bowen v. Amoco Py-plenco*, 254 F. 3d, 925, 936 (10th Cir. 2001): "(...) no authority clearly allows private parties to determine how federal courts review arbitration awards" and that permitting such review would destroy the fundamental character of arbitration. See also *La Pine II - e.g. Kyocera Corp. v. Prudential Bache Trade Servs.*, 299 F. 3d 769 (9th Cir. 2002) - which vacated *La Pine Technology Corporation v. Kyocera Corporation*, 130 F. 3d 884 (9th Cir. 1997), for which: '(...) Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is accordingly legally unenforceable'.

³⁰² See *Chicago Typographical Union v. Chicago Sun - Times, Inc.*, 935 F. 2d 1501, 1505 (7th Cir. 1991), which stated that parties cannot contract for judicial review of arbitral awards because '(...) federal jurisdiction cannot be created by contract', but recognised that parties 'can contract for an appellate arbitration panel to review the arbitrator's award'.

³⁰³ See *UHC Management Co. Inc v. Computer Sciences Corp.* 148 F. 3d 992, 8th Cir. 1998, where the court expressed doubt as to whether the parties could ever expand the courts' scope of review by agreement.

³⁰⁴ See *Roadway Package Sys., Inc. v. Kayser*, 2001, WL 694508 (3d Cir. 2001), which affirmed that the parties may privately contract for grounds of judicial review other than those mandated by the F.A.A.; however, they must clearly express that choice in the agreement to arbitrate.

³⁰⁵ See *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F. 3d 993, 996-97 (5th Cir. 1995), which upheld the contractual expansion of judicial review for errors of law, primarily on the basis that arbitration is a creature of contract and that courts must attempt to honour the parties' intentions as much as possible. See also *Harris v. Parker College of Chiropractic*, 286 F. 3d 790 (5th Cir. 2002); *Hughes Training, Inc. v. MCI Telecommunications Corp.*, 64 F. 3d 993 (5th Cir. 1995).

³⁰⁶ See *La Pine Technology Corporation v. Kyocera Corporation*, 130 F3d 884 (9th Cir 1997), in which the Court of Appeals upheld an agreement whereby the parties ' (...) contracted for heightened judicial scrutiny [for errors of fact or law] of the arbitrators' award'.

contractual freedom reflected in the FAA.³⁰⁷ The question has been recently decided in the negative in *Hall Street Associates L.L.C. v. Mattell Inc.* (25 March 2008),³⁰⁸ where the U.S. Supreme Court held that the F.A.A.'s statutory grounds for *vacatur* were exclusive and that the '(...) *statutory grounds for prompt vacatur and modification may [not] be supplemented by contract*', adding that: '(...) *Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende(r) informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process*'. In most civil law countries, such agreements are considered invalid. French court decisions, for example, have stated that the New York Convention and the Civil code absolutely forbid parties from entering into contractual agreements intended to intrude into the area of judicial review.³⁰⁹

While some arguments indeed exist in favour of admitting those agreements,³¹⁰ it is our view that more reasons stand against their admissibility. First, it is not easy to admit that private litigants are permitted contractually to define the appellate review functions of a national court. Second, these agreements risk affecting the function of arbitration as a speedy and cost-efficient alternative to litigation, increasing the likelihood of lengthy and expensive challenges to awards (especially in particularly contentious legal environments), thus reducing to nothing (in terms of time and cost efficiency) the distinction between arbitration and litigation. Third, arbitrators would be less willing to craft creative remedies, for fear of being overturned on the merits and they would be required to write heavily reasoned opinions with conclusions of law and findings of fact, further sacrificing the simplicity, expediency and cost effectiveness of arbitration. Fourth, it would be difficult or impossible, for a court, to set a standard of review and for a uniform case law to develop. Finally, those agreements fundamentally change the nature of the arbitral process, and create new and

³⁰⁷ See also *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F. Upp. 240 (S.D.N.Y. 1984).

³⁰⁸ 128 S. Ct. 1396 (U.S. Ct. Ct. 2008).

³⁰⁹ See Paris Court of Appeal, Dec. 12, 1989, *Société Binat Maghreb v. Soc. Screg Routes*, *Rev. Arb.*, 1990, 863; *Cour de Cassation*, 6 April 1994, *Rev. Arb.*, 1995, 263; Paris Court of Appeal, 23 May 1991, *Rev. Arb.*, 1991, 661. On the French position see also L. Franc, *Contractual Modification of Judicial Review*, *cit.* 218-219.

³¹⁰ See C. R. Drahozal, *Default Rule Theory and International Arbitration Law (with Comments on Expanded Review and Ex Parte Interim Relief)*, *Trans. Disp. Man.*, 2005, Vol. 2, issue 5, 3; G. Born *International Commercial Arbitration cit.*, 2669, who states that: '(...) *it is also difficult to see why parties should not be permitted to contract for 'ordinary' judicial review, of the sort that would apply if the arbitral award was a first instance judgment. This accord with principles of party autonomy, and does not detract from (but enhances) the parties' 'judicial' protections*'.

different obligations for the courts (by requiring review on the merits). A number of practical problems also arise in the context of enforcing an award internationally in the presence of those agreements. If, for example, a court refused to review an award in the expanded manner requested by the parties, it might feel entitled to declare the entire arbitration agreement invalid, since it might interpret the conduct of the parties as if they had only agreed to arbitrate because of the possibility of expanded judicial review: if that review is denied, there is no longer any valid consent (for an agreement) to arbitrate. In turn, the party in whose favour the award was made, might be refused recognition and enforcement of the award in another jurisdiction, on the basis of Art. V(1)(a) of the New York Convention, if the law of the seat of arbitration forbids (or is not yet settled as to the admissibility of) expanded agreements. Moreover, if a court reviews the award on the merits on the basis of the expanded agreement and vacates it, the losing party on the appeal, in whose favour the arbitration award was granted, might successfully enforce the award abroad, alleging that the award was not vacated on one of the explicit grounds provided for by the law of the seat.

In conclusion, while basic principles of arbitration, such as party autonomy and freedom of contract, seem somehow in favour of permitting, rather than refusing, expanded or narrowed judicial review, if the parties want it, public policy concerns, along with the uncertainty in most jurisdictions as to whether courts will agree to provide such review and, finally, the uncertain reception, internationally, of awards which have been reviewed on the law pursuant to an agreement of the parties to this purpose, make expanded and narrowed judicial review currently not a safe choice for parties to an international arbitration (at least from a practical point of view).

Response to the Report

*The Rt. Hon. The Lord Phillips of Worth Matravers, K.G., P.C.**

The first thing that I would like to say is what a great pleasure it is to have been invited to Mauritius to take part in this conference. A great pleasure not just because Mauritius is such a beautiful island, not just because it is extremely cold in England at the moment, not just because Mauritian hospitality is extraordinarily generous, not just because it gives me the chance to enjoy the company of friends whom I have made in Mauritius and to make new ones, but because the reason for this conference is exciting – the launch of a new centre of international arbitration on the edge of Africa. This is a venture in which I have a present stake as President of the Supreme Court of the United Kingdom, which provides the members of Her Majesty’s Privy Council to which appeals lie under the Act – and when I speak of the Act I shall be speaking of the Mauritian International Arbitration Act unless I state to the contrary. But the possibility must be that it is a venture in which I also have a future stake, because I am only two years away from the judicial retirement age when it is not impossible that I may turn my hand to arbitrating.

My brief this afternoon is to make the first response to Albert Henke’s Report. That I can do in a single phrase: “*C’est magnifique*”. He has produced a comprehensive survey on the implications that the new Mauritian Arbitration Act has for the role of the Court. He presented it to me yesterday. It is a work of very considerable scholarship, 54 pages long with 149 footnotes. I have not, alas, yet had time to read it all, but I have read enough to appreciate its quality. And in the time allotted to him, Albert has been able to do no more than to give a trailer to a work that will deservedly receive study at leisure and in depth. How can I in 15 minutes respond to such a report? What I have decided to do is to provide a little coda to it; to give you the viewpoint of a judge and, moreover, a judge who may well have to consider appeals under the Act.

At the outset I think that I ought to make a confession. Section 3 subsection 8 of the Act provides that “in matters governed by this Act, no Court shall intervene except where so provided in this Act”. That echoes precisely the wording of Article 5 of the UNCITRAL Model Law, and Section 1(c) of the English Arbitration Act 1996 is to almost identical effect. In short, the Act says “court keep your nose out unless invited in”.

* President of The Supreme Court of the United Kingdom.

And the invitation that the Act gives to the court to get involved is very limited. In particular, there is no general provision entitling the court to rule on points of law raised in an arbitration. There is a possibility of a point of law going to the court, but only in very circumscribed circumstances. The position is quite similar under the English Act.

During my early days at the Bar, appeals on points of law lay from arbitrations to the High Court, and there were lots of them. My confession is that I was rather in favour of this. Quite a lot of appeals went all the way up to the House of Lords. And appeals such as these were the source of much of the development of our common law. I believe that the fact that appeals on points of law are now so rare poses a considerable impediment to developments of commercial law that are needed to meet the changing conditions of the 21st century. The instruction to the court to keep its nose out of arbitrations carries quite a heavy penalty for our common law.

There was, of course, another reason why I was in favour of appeals from arbitrators on points of law. These produced plenty of lucrative work for the lawyers. Let me give you one example of a case which produced a lot of work for the lawyers but which also established a very important point of law. It was a case called *The Tojo Maru*¹. How many have heard of that case? It originated in a very unlikely source for an appeal on a point of law – a Lloyds salvage arbitration.

The object of such arbitrations was to determine how much professional salvors should be paid for salvaging a vessel in distress. On this occasion the vessel in distress was a Japanese tanker, on her way in ballast to pick up a cargo. She had been in a collision which had opened a huge gash in her side by way of the engine room. A firm of Dutch professional salvors, Bureau Wijsmuller, had sent a salvage tug which had done a marvellous job. They had manufactured a steel patch, to be bolted over the hole under water by a diver using an appliance called a “cox bolt gun”. The job was almost complete and the crew had a party. The diver, called Vis, did not drink, and he was first up the next morning. He thought he would give his shipmates a surprise by finishing the job of bolting on the patch. He did give them a surprise. He fired a bolt in the wrong place, into a tank that was full of gas, and blew up the ship. In the Lloyds arbitration, the Japanese ship-owners counterclaimed for damages for negligence. The salvors argued that salvors were not liable in law for negligence. The arbitrator agreed, but in those days you could appeal on a point of law. The appeal went to the Admiralty Court, then to the Court of Appeal and finally to the House of Lords, where their Lordships ruled that professional salvors

¹ [1972] AC 242 (HL)

owed a duty of care in negligence. It seems to me a very good thing that this vital issue of the law of salvage was authoritatively determined by the courts. I should perhaps add that I was on the winning side.

What is the current position in relation to appeals to a court on a point of law? The UNCITRAL Model Law makes no provision for them at all. The English Act has some rather complicated provisions. Unless the parties to an arbitration have otherwise agreed, the court can, on the application of one of the parties, determine a question of law arising in the course of arbitration proceedings provided (1) that all the other parties agree, or (2) that the arbitral tribunal agrees and the determination of the problem is likely to save a lot of costs and the application is made without delay (Section 45). None of this happens very often. Reference to an English Court of a point of law arising in the course of an arbitration is almost unknown.

In England, provided the parties have not agreed to the contrary, there can also be an appeal from an arbitral award on a point of law if all the parties agree or the court gives permission, but the court can only give permission if, *inter alia*, it thinks that the decision of the tribunal was obviously wrong, or, if the question is one of general public importance, and the decision of the tribunal is at least open to serious doubt (Section 69). Once again it is unusual for a decision to tick all the right boxes so as to give rise to an appeal to the court on a point of law after the award has been published.

The provisions of the Mauritian Act are a little different. There can be no appeal from arbitrators on a point of law unless the parties opt in to the provisions of Schedule 1 of the Act when they make their arbitration agreement. Schedule 1 gives the Supreme Court the jurisdiction to determine any question of Mauritian law that arises in the course of an arbitration provided (1) that the tribunal, or all the parties, agree and (2) that determining the point might result in a substantial saving in cost and (3) that determining the question might, having regard to all the circumstances, substantially affect the rights of one or more of the parties. Schedule 1 also gives the Supreme Court power to entertain an appeal on any question of Mauritian law arising out of an award if the Court thinks that determination of the question could substantially affect the rights of one or more of the parties.

Let me emphasise that these powers of the Court will only exist where the parties to the arbitration agreed to opt in to the provisions of Schedule 1. It will be interesting to see how often the parties do so. In my experience parties usually agree to keep the court out of their arbitration until one of them loses, at which point the losing party starts desperately

looking round for some way of setting the award aside. So I do not anticipate that the work load of the Privy Council is going to be put under pressure by a large volume of appeals on points of law from Mauritian arbitrations.

Before looking at the particular areas where the Mauritian Supreme Court and, on appeal, the Privy Council are more likely to be involved, there are one or two general points I would like to make. The task of drafting of the Mauritian Arbitration Act has been assisted by three barristers, all members of Essex Court Chambers in London (Salim Moollan, Toby Landau Q.C. and Ricky Diwan). They also prepared and published some helpful *travaux préparatoires*. These comment:

“The act provides that all Court applications under the Act are to be made to a panel of three judges of the Supreme Court with a direct and automatic right of appeal to the Privy Council. This will provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists.”

I do not cavil with the “eminently qualified jurists” but I question whether any one familiar with our two systems would think that an application to a panel of three judges on the Supreme Court followed by an appeal to the Privy Council was the epitome of expedition. I have been talking to your Chief Justice and agreed that we must co-operate in putting in place procedures which will ensure that any application that is made to the Court in relation to an arbitration receives the fast track that is essential if there is to be guaranteed the business efficacy that should make arbitration so attractive.

You may, none the less, be relieved to learn that it is not every application to the Supreme Court that will carry an automatic right of appeal to the Privy Council. Section 42 of the Act provides that there will be a right of appeal to the Privy Council against any *final* decision of the Supreme Court under the Act. That raises a nice conundrum as to what is meant by a “final decision”. I do not propose to go into that now, but plainly decisions in relation to interim measures will not be final decisions, so those will not be coming to the Privy Council.

The other general point that I want to make relates to the role of the Permanent Court of Arbitration. The Act breaks new ground in conferring on the Permanent Court of Arbitration, which is based in The Hague, all decision making in relation to the appointment of arbitrators and a number of other administrative functions.

Let me now turn briefly to the circumstances in which the Act provides for intervention by the Supreme Court. The more significant areas where the Supreme Court of Mauritius is likely to be involved would seem to be:

- Referring to arbitration an action which is started in court in breach of an arbitration agreement. This the Supreme Court must do unless a party shows on a *prima facie* basis that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed (Section 5(2)).
- Where there is such a probability, determining whether the arbitration is in fact null and void, inoperative or incapable of being performed (Section 5(3)).
- Resolving a challenge to the jurisdiction of an arbitral tribunal after the tribunal itself has given a ruling on the matter (Section 20 (7)).
- Responding to applications for the issue of interim measures (Section 23).
- Responding to applications to set aside an award (Section 39).

Some of these – referring to arbitration an action started in breach of an arbitration agreement and issuing interim measures amount to ancillary action taken to support the efficacy of the arbitration process. But you cannot escape the fact that, although arbitrators are given the power to rule on their own competence, the court is given a final, overriding power, to set aside an award on a number of grounds, some of them potentially far reaching. These include invalidity of the arbitration agreement under the law agreed by the parties, an award that goes beyond the scope of the arbitration agreement, an award contrary to public policy, an award induced or affected by fraud or corruption, or where substantial prejudice has been caused to a party by a breach of the rules of natural justice.

As a judge I applaud these restrictions on the autonomy of arbitration. They are examples of the preservation of the most fundamental duty of any court - the upholding of the rule of law. And so, if international arbitration takes off in Mauritius, as I hope that it will, I believe that these residual powers of the Supreme Court, backed by the right of appeal to the Privy Council, will provide reassurance to the international clientele that

will make them more, not less, happy with their chosen jurisdiction. And if that be the case, it will provide some compensation for the increase in the work load that will be likely to fall on me and my colleagues in the Privy Council.

Response to the Report: Le juge dans le droit français de l'arbitrage international

Jean-Pierre Ancel*

L'arbitrage idéal est celui qui ne rencontre jamais le juge, puisque l'institution elle-même a pour objet principal d'éviter le juge. Cependant, aucun système d'arbitrage ne peut se passer de la justice étatique, à la condition toutefois que la fonction du juge étatique ne soit jamais de juger – cette fonction étant strictement réservée à l'arbitre.

Mon propos sera de présenter le système français de l'arbitrage international, en ce qui concerne les rapports entre le juge et l'arbitrage. Le système français repose sur l'idée que le juge ne doit jamais remplacer l'arbitre dans sa fonction de jugement, et qu'il ne peut intervenir dans l'arbitrage que de manière accessoire et ponctuelle. Et la jurisprudence française se montre ici particulièrement rigoureuse, spécialement dans l'application qu'elle fait de l'effet négatif du principe *compétence-compétence*.

Il faut donc le redire – pour la quatrième fois, je crois, depuis ce matin – : en présence d'une convention d'arbitrage, le juge étatique est incompétent. La règle est absolue : lorsqu'un tribunal est saisi d'un litige pour lequel il existe une convention d'arbitrage, le juge étatique doit se déclarer incompétent et renvoyer à l'arbitrage, sous réserve d'une seule exception : le cas où la convention d'arbitrage est *manifestement nulle ou inapplicable*. C'est le seul cas dans lequel le juge a le pouvoir d'apprécier l'existence et la validité de la convention d'arbitrage : lorsqu'elle est, *prima facie*, nulle ou inapplicable, sans que ce caractère souffre la moindre discussion ; la convention doit être, à l'évidence, nulle ou inapplicable.¹ Hors ce cas précis, le principe *compétence-compétence* s'applique : c'est à l'arbitre qu'il appartient, en priorité, de statuer sur sa propre compétence, c'est-à-dire sur la contestation relative à la convention d'arbitrage. Il s'agit là – comme l'a dit Emmanuel Gaillard – non d'une question théorique, mais

* Président de chambre honoraire à la Cour de cassation

¹ Exemples : nullité manifeste, celle d'une clause d'arbitrage en matière de divorce, ou destinée à organiser une corruption. Inapplicabilité manifeste de la clause d'arbitrage stipulée dans un contrat à un autre contrat, conclu entre les mêmes parties, mais contenant une clause attributive de juridiction à un tribunal étatique.

d'une question de pratique, favorable à l'exécution de la convention d'arbitrage.

L'on peut en conclure qu'il n'existe pas, en droit français de l'arbitrage, d'action – préalable à la procédure arbitrale – devant le juge pour contester la convention d'arbitrage. Le système ainsi mis au point apparaît très proche des dispositions de la loi mauricienne du 25 novembre 2008, selon lesquelles le juge saisi d'un litige faisant l'objet d'une convention d'arbitrage doit renvoyer les parties devant l'arbitre, sauf si la partie adverse « *démontre prima facie qu'il existe une très forte probabilité que ladite convention soit caduque, inopérante ou non susceptible d'être exécutée* ». La proximité avec le droit français a été opportunément soulignée.² Le juge ne doit donc jamais remplacer l'arbitre dans sa fonction de juge. En revanche, il peut être appelé à intervenir ponctuellement dans l'arbitrage, mais seulement, à la demande des parties ou des arbitres, soit pour apporter son assistance à l'arbitrage, soit pour contrôler la sentence arbitrale au moyen du recours en annulation.³

Le juge intervient donc selon deux modalités distinctes :

- I. Mission d'assistance et de coopération à l'arbitrage
- II. Mission de contrôle de la sentence arbitrale

I. MISSION D'ASSISTANCE ET DE COOPÉRATION À L'ARBITRAGE

Ce juge est appelé « juge d'appui »,⁴ car il intervient pour renforcer l'arbitrage, le mettre en place, le consolider, ou prêter assistance aux arbitres, en cas de difficulté.

Ainsi, ce juge va-t-il pouvoir :

- Aider à la constitution du tribunal arbitral, en procédant à des nominations d'arbitres à la place de la partie défaillante
- Statuer sur les demandes de récusation d'arbitres
- Proroger, en cas de besoin, le délai d'arbitrage

² V. Salim A. H. Moollan, « *Brève introduction à la nouvelle loi mauricienne sur l'arbitrage international* », Rev. Arb. 2009, p. 933, spécialement p. 937.

³ Nous avons volontairement laissé de côté l'intervention du juge étatique pour accorder l'exequatur de la sentence arbitrale, intervention de grande importance pratique, certes, mais qui ne pose pas de questions juridiques majeures.

⁴ Qui pourrait être traduit par « support judge ».

Le juge compétent est le président du Tribunal de grande instance de Paris, spécifiquement désigné par le code, afin de concentrer le contentieux de l'arbitrage international à Paris, juridiction considérée comme particulièrement adaptée pour répondre aux exigences de l'arbitrage international. Il faut noter ici une convergence du droit français avec la récente loi mauricienne sur l'arbitrage international. L'objectif est de désigner un « organisme neutre, réputé et expérimenté »⁵ de nature à apporter toutes garanties aux utilisateurs internationaux. C'est ainsi que la loi mauricienne du 25 novembre 2008 a, sur ce point, adopté une solution radicale et novatrice, en confiant la fonction de juge d'appui à la Cour Permanente d'Arbitrage de La Haye – du moins pour tout ce qui a trait aux nomination et récusation d'arbitres.

Le recours au juge peut également se montrer indispensable pour que soit ordonnées des mesures provisoires ou conservatoires, lorsque l'arbitre n'est pas en mesure de les prendre. Soit, il n'en a pas reçu le pouvoir des parties ou du règlement d'arbitrage, soit il n'est pas encore saisi, et une situation d'urgence se présente. Le juge est alors le recours naturel. De très longue date, la jurisprudence française a jugé que l'existence d'une convention d'arbitrage ne faisait pas obstacle à la saisine du juge étatique pour prendre de telles mesures, à la seule condition qu'il y ait *urgence*. Le juge compétent ici est le *juge des référés*⁶ – juge de l'urgence, qui prend des décisions provisoires, sans aborder le fond du litige.

Ainsi, ce juge pourra ordonner une mesure d'instruction, prendre une décision commandée par l'urgence (pour la sauvegarde d'une créance menacée, ou pour ordonner la cessation de travaux, ou d'actes de contrefaçon), ou ordonner des saisies conservatoires. Il a même le pouvoir de condamner le débiteur au paiement d'une somme à titre de *provision*, lorsque la créance ne paraît « pas sérieusement contestable ». Ce dernier pouvoir pourrait être dangereux pour l'arbitrage, et rendre quasiment inutile la procédure arbitrale, dans la mesure où le créancier aurait ainsi obtenu une satisfaction qui lui paraîtrait suffisante. Mais la pratique démontre que les juges font ici preuve de prudence, afin de sauvegarder le pouvoir de l'arbitre.

II. MISSION DE CONTRÔLE DE LA SENTENCE ARBITRALE

La seconde modalité d'intervention du juge dans l'arbitrage est l'exercice de son pouvoir de contrôle de la régularité internationale des sentences par

⁵ Expression employée par Salim A. H. Moollan, dans l'article précité.

⁶ « judge in chambers »

l'usage du recours en annulation pour les sentences internationales rendues en France, ou du recours contre la décision de reconnaissance et d'exécution en France pour les sentences rendues à l'étranger. Ici encore, il faut constater une certaine convergence avec le droit mauricien, puisque la loi mauricienne du 25 novembre 2008 (article 39) reprend le concept de la Loi-type du CNUDCI : le recours en annulation comme seul recours contre la sentence (article 34 : « La demande d'annulation comme recours exclusif contre la sentence arbitrale »).

Le recours ne tend donc pas à faire juger de nouveau le litige par le juge étatique, mais à soumettre la sentence à un contrôle tendant à vérifier que les règles essentielles d'une bonne justice ont été respectées par les arbitres. Les cas d'annulation prévus par la loi mauricienne rejoignent ceux que prévoit le droit français (article 1502 du Code de procédure civile). Cinq cas sont prévus en droit français : absence, nullité ou expiration de la convention d'arbitrage, désignation irrégulière des arbitres, méconnaissance de leur mission par les arbitres, violation du principe de la contradiction (procédure), contrariété à l'ordre public international. Ces cas d'ouverture sont très strictement interprétés ; spécialement, tout recours qui tendrait, même indirectement, à demander au juge étatique de réviser la sentence sur le fond du litige, est jugé irrecevable – et cela, même en cas d'erreur dans l'application du droit.

Il faut également noter que le droit français ne prévoit pas, parmi les causes d'annulation de la sentence internationale, le cas où une sentence rendue à l'étranger, aurait été annulée dans son pays d'origine.⁷ Le juge français en a déduit qu'une sentence annulée dans son pays d'origine pouvait être accueillie et exécutée en France, si elle répondait par ailleurs aux critères de régularité internationale prescrits par le droit français.⁸

En résumé, il est possible d'affirmer que le droit français instaure un système de non-intervention du juge dans l'arbitrage – selon l'expression de Thierry Koenig, ce matin. Dans le droit français de l'arbitrage international, le rôle du juge est strictement limité : aucun recours sur le fond du litige, une intervention ponctuelle à titre d'assistance et de coopération à l'arbitrage, et un contrôle *a posteriori* de la sentence, contrôle lui-même très strictement délimité.

⁷ Au contraire de ce que prévoit la Convention de New York (Article V(1)(e)).

⁸ Jurisprudence *Hilmarton* (1994) – *Putrabali* (2007).

A Mauritian Perspective

*Satyajit Boolell S.C.**

I. INTRODUCTION

It gives me great pleasure to share with you some of my thoughts on the present topic “Rethinking the Role of the Courts in International Arbitration and Interim Measures”. I was Parliamentary Counsel at the time the International Arbitration Bill was in preparation and was closely associated with its preparation and drafting. The Government then had a clear objective in mind; to make Mauritius an attractive, innovative and arbitration-friendly jurisdiction to further enhance the Mauritian services sector.

In this paper, I propose to consider, from a Mauritian perspective, an area of international arbitration which can be highly contentious: the relationship between State justice and arbitration. I shall therefore look, firstly, at the Mauritian experience with arbitration albeit domestic arbitration and, secondly, consider the provisions of the Mauritian International Arbitration Act, which in my view clearly define and limit the role and functions of the Mauritian Supreme Court when its jurisdiction is being seized under the Act.

II. THE MAURITIAN ARBITRATION EXPERIENCE

There can be no doubt that, historically, Mauritius has always been an arbitration-friendly jurisdiction. Arbitrations have been held in Mauritius, since time immemorial, in accordance with established rules to be found in *Livre Troisième* of our *Code de Procédure Civile*. Of course, these would relate to domestic arbitrations. There can be no reason, however, why international arbitration should not now find a safe haven in Mauritius, especially since the enactment of the International Arbitration Act 2008 (“IAA” or “the Act”).

Judges of our Supreme Court have often been called upon to decide, in their capacities as Judge in Chambers, applications to compel a party to proceed to arbitration. What can be gathered from the decided

* Director of Public Prosecutions, Republic of Mauritius; Co-drafter of the Mauritius International Arbitration Act 2008; Chair of the Arbitration Committee of the Mauritius Law Reform Commission.

cases is that our judges are fully alive to the sacrosanct principle of ‘party autonomy’ which forms the backbone of arbitration in general. Judges will always ensure that the will of the parties are respected.

Mauritian judges are also aware that, in a fit and proper case, parties can seize the jurisdiction for ancillary orders. Thus, in *Food and Allied Industries Ltd. v. Dhamarajsing Ujoodha*¹, the learned Judge in Chambers was of the view that:

“[T]he fact that the parties have decided that any dispute arising out of a contract should be referred to arbitration, does not prevent the Judge in Chambers from issuing an injunction as a provisional measure in a matter of urgency, *provided that the Judge in Chambers does not tread on the merit of the case which is to be decided by the arbitrator.*” (emphasis added)

Our judges have in effect acknowledged the fact that whilst they may have a discretion to grant an interim order in support of an arbitration, they should tread with care and respect the choice of tribunal to which the parties have consented. This principle is well illustrated in the case of *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*² where the House of Lords held that it had jurisdiction to issue an injunction sought by one of the parties but felt that it should refrain from doing so because it felt that:

“[T]here is always a tension when the Court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff’s claim is strong enough to merit protection, and on the other hand the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone.”

I am confident that our Supreme Court will have no difficulty in adopting the same approach whenever they are being called upon to grant interim measures in support of an arbitration.

¹ [2007] SCJ 99

² [1993] AC 334

Judges of the Mauritian Supreme Court are also aware of parties' attempts to stifle an arbitral process in spite of their clear and unambiguous intention to arbitrate disputes expressly providing for an arbitration clause in their contracts. It is clear that our judges would not condone such attempts and that they would be minded to give a liberal interpretation to arbitration clauses.

Thus, in *G.R. Carcasse & others v. The Central Electricity Board Staff Pension Fund*³, the learned Judge in Chambers held that:

“[I]t is also well known that whenever a party to a “*clause compromissoire*” attempts to resort to that clause for the purpose of resolving a dispute, the other party tends to retreat in some form of defence with the fear that the demanding party may win in arbitration. It is obvious that such fear is not justified. The case law in France, from which country we have inspired ourselves to enact the provisions of the *Code de Procédure Civile* on “*arbitrage*”, shows that the judges are minded to give a liberal interpretation to arbitration clauses. . .”

The IAA provides that in matters governed by the Act, no Court shall intervene except where so provided under the Act. The Act reproduces Article 5 of the Model Law at section 3(8), in that, courts are not to intervene in the international arbitration agreement governed by the Act except where the Act provides that they are to do so. One instance where the Supreme Court can intervene is in relation to interim measures under section 23. But even that limited power of the Supreme Court to grant interim relief is further circumscribed by the need for the Supreme Court to:

“...exercise that power in accordance with the applicable Court procedure in consideration of the specific features of international arbitration.” (see section 23(1)).

In other words, the Supreme Court should adopt established and well known principles of international arbitration when exercising its powers under that section. In that respect, it is interesting to note that, at a time when the IAA had not even been enacted, and was still at drafting stage, one of the judges of the Mauritian Supreme Court did decide to refer a matter to arbitration while paying heed to the principle of separability, a legal fiction used in the

³ [2009] SCJ 160

field of international arbitration to sever the arbitration clause from the contract itself.

Thus, in *Mauritius Estate Development Corporation Ltd. v. Systems Building Ltd.*⁴, the applicant prayed the learned Judge in Chambers for an order to compel the respondent to submit itself to arbitral proceedings as per the contractual agreement between the parties in connection with a dispute related to water tanks which the respondent had supplied and installed for the applicant. The respondent responded by saying that since the warranty period had lapsed, the arbitration clause had also lapsed.

Relying on the doctrine of separability, the learned Judge in Chambers was of the view that the issue of whether the warranty was applicable or not or whether there was a dispute or not, was one for the arbitral tribunal to decide. Referring to the well known text book of *Redfern and Hunter - Law and Practice of International Commercial Arbitration* - the learned Judge was of the view that:

“[T]he practical question that arises in cases such as the above is whether an arbitration clause may be regarded as part of the contract or as a clause separate from it having an autonomous existence. The prevalent view is the latter”

And the learned Judge concluded that it made good sense to hold that:

“[I]f the tribunal is to decide on its own jurisdiction, it must first assume that jurisdiction.”

III. THE MAURITIAN INTERNATIONAL ARBITRATION ACT

The IAA, as we have already heard, establishes a distinct and separate regime for international arbitration. It is premised on one of the cardinal principles of international arbitration, the need to respect the autonomy of parties and the prohibition of a *révision du fond*, manifested in the non-interventionist approach of the Supreme Court save in extremely limited circumstances. It was a decision of principle that Supreme Court (or any court in Mauritius for that matter) will not intervene in the arbitral process “*save to support that process and to ensure that the essential safeguards expressly provided for in the Act are respected*”. I have already referred to section 3(8) of the Act for that purpose.

⁴ [2008] SCJ 69

The advantage that the Mauritian Act offers to its users largely due to the intention of the legislator to make the Act certain as regards the role and functions of the Court and innovates in many respects. First, under section 42, it is provided that all applications to the court are to be made to a panel of three judges of the Supreme Court with a direct and automatic right of appeal to the Judicial Committee of the Privy Council. International users resorting to Mauritius as the seat of arbitration will have the assurance that court applications relating to their arbitrations will be dealt with promptly and by experienced judges.

Moreover, in relation to interim measures and in order to buttress the non-interventionist approach that permeates throughout the Act, section 23 provides that the court will only intervene to support the arbitral process (and not disrupt it) when two conditions are satisfied, namely (i) there is real urgency and (ii) the arbitral tribunal is unable to act effectively. The Act departs from the Model Law in that respect by providing expressly for the circumstances in which the court shall intervene.

The non-interventionist approach adopted in the Act is further reaffirmed in uniquely providing for the Permanent Court of Arbitration (“PCA”) to have all appointing functions as well as a number of administrative functions under the Act. The PCA has adopted a policy of concluding Host Country Agreements with its Member States to make its dispute resolution services more accessible. Through the Host Country Agreements, host countries and the PCA establish a legal framework under which future PCA-administered proceedings can be conducted in the territory of the host country on an *ad hoc* basis. Mauritius has taken the Host Country Agreement one step further by having a permanent presence of the PCA in its territory and also by prescribing the role of the PCA as an appointing authority in the Act. In effect, through its Permanent Representative in Mauritius, we shall have all the services and facilities it offers in Mauritius.

Of major importance, is the fact that the appointing and administrative functions of the Secretary-General of the PCA under the Act are final and not subject to appeal or review until the award itself is subject to challenge before the Supreme Court under section 39 of the Act. This was deliberately intended by the Legislator to ensure a smooth arbitral process and hinder any possible dilatory tactics from the parties to an arbitration.

As the learned Singaporean judge, Justice Rajah succinctly puts it in the case of *Tjong Very Sumito v. Antig Investments*⁵:

⁵ [2009] SGCA 41 at para. 29

“...Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals. It is meant to be the first and only step...Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration... concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process... If the courts are seen to be ready to entertain frivolous jurisdictional challenges or exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase cost all round. In short, the role of the courts is now to support and not to displace, the arbitral process.”

IV. CONCLUSION

To conclude let me quote Justice Rajah further:

“[T]here was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind us.... It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with.”⁶

There are obviously numerous challenges that lay ahead for Mauritius as a new international arbitration jurisdiction. I am confident that there already exists in Mauritius an unequivocal judicial policy in favour of arbitration and that Mauritius will no doubt rise up to the challenges.

⁶ [2009] SGCA 41 at para. 29

PANEL IV

**RETHINKING THE RECOGNITION AND ENFORCEMENT
OF ARBITRAL AWARDS**

Introductory Remarks

*Corinne Montineri**

In a message to the Conference, the Secretary-General of the United Nations, Mr. Ban Ki-moon,

“[n]oted with appreciation the efforts made by the Republic of Mauritius in launching an International Arbitration Centre and establishing itself as a regional centre for international commercial conciliation and arbitration. The harmonious development of international trade relationships between States contributes significantly to economic growth and the maintenance of peace and security. In that context, the availability of well-functioning dispute resolution mechanisms is essential. The United Nations Commission on International Trade Law (“UNCITRAL”) is mandated to enhance international trade and development by promoting certainty and predictability in the rules governing international commercial transactions. This work has contributed to sustained economic progress and to the promotion of friendly relations among States. The new platform created by the Government of Mauritius for international commercial and investment arbitration is welcomed as a further important contribution to achieving these aims, after the recent enactment by Mauritius of legislation inspired by the UNCITRAL Model Law on International Commercial Arbitration.”

Our panel today is tasked with re-thinking the recognition and enforcement of arbitral awards, and it will do so in light of issues arising under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (“New York Convention” or “Convention”).¹

The New York Convention is one of the most important and successful United Nations treaties in the area of international trade law. The Convention is widely recognised as a foundation instrument of international arbitration. It seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and

* Legal Officer in the Secretariat of UNCITRAL (Vienna); Secretary, UNCITRAL Working Group II on Arbitration and Conciliation.

¹ United Nations, *Treaty Series*, Vol. 330, No. 4739.

enforcement of foreign and non-domestic arbitral awards. The General Assembly adopted on 6 December 2007 resolution 62/65 in which it expresses its conviction that the New York Convention strengthens respect for binding commitments, inspires confidence in the rule of law and ensures fair treatment in the resolution of disputes arising over contractual rights and obligations. In that resolution, the General Assembly emphasises the need for further national efforts to achieve universal adherence to the Convention, together with its uniform interpretation and effective implementation.²

In line with resolution 62/65 of the General Assembly, UNCITRAL decided, at its forty-first session in 2008, that a guide to the enactment of the New York Convention should be developed, with a view to promoting a uniform interpretation and application of the Convention.³ This project is in the process of being implemented by UNCITRAL, through its Secretariat, and will be submitted for consideration of States at a future session of UNCITRAL.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges States parties to ensure that such awards are recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards. The Convention defines, in its article V, grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked. The grounds include incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, and setting aside or suspension of an award in the country in which, or under the law of which, that award was made. The Convention defines two additional grounds upon which a court may, on its own motion, refuse recognition and enforcement of an award. Those grounds relate to arbitrability and public policy.

The Convention aims at encouraging recognition and enforcement of awards in the greatest number of cases as possible. That purpose is achieved through article VII(1) of the Convention by removing conditions for recognition and enforcement in national laws that are more stringent than the conditions in the Convention, while allowing the continued

² In December 2010, there were 145 States parties to the New York Convention. The status of the Convention is available on the website of UNCITRAL at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

³ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17)*, paras. 353-360.

application of any national provisions that give more favourable rights to a party seeking to enforce an award.

An ancillary purpose of the Convention is to require States parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. Article II(1) of the Convention provides that States parties shall recognise written arbitration agreements. In that respect, UNCITRAL adopted, at its thirty-ninth session in 2006, a Recommendation that seeks to provide guidance to States on the interpretation of the requirement in article II(1) of the Convention that an arbitration agreement be in writing, and to encourage application of article VII(1) of the Convention to allow any interested party to avail itself of the rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.⁴ That Recommendation was echoed by the General Assembly in its resolution 61/33 of 4 December 2006.

States parties to the Convention may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement. A survey jointly undertaken by the UNCITRAL Secretariat and the Arbitration Committee of the International Bar Association on how the New York Convention has been incorporated into national legal systems and how it is interpreted and applied, illustrates the diverging solutions provided by States to the many different procedural requirements that govern the recognition and enforcement of awards under the Convention.⁵ The different national rules of procedure on matters such as the requirements applicable to a request for enforcement, the correction of defects in applications, the time period for applying for recognition and enforcement of an award, and the procedures and competent courts for recourse against a decision granting or refusing enforcement of an award under the Convention, can have a major practical impact on the recognition and enforcement of foreign arbitral awards, and on the ability for a party to have its rights enforced in a State party to the New York Convention.⁶ Two of our panellists will provide us with insight on the application of the New York Convention in India and Mauritius.

⁴ *Ibid.*, Sixty-first Session, Supplement No. 17 (A/61/17), annex II.

⁵ *Ibid.*, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 401-404; *Ibid.*, Sixty-third Session, Supplement No. 17 (353-360); see also A/CN.9/656 and Add. 1.

⁶ More information, including a database on the legislative implementation of the New York Convention may be found on the UNCITRAL website at: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html>.

Beforehand, the report to the Conference presented by the first panellist, Mr. Ricky Diwan, will address two key aspects of the existing framework of recognition and enforcement of arbitral awards: firstly, the question of enforceability of an award that has been set-aside in the State of origin, in particular whether a court may recognise and enforce an arbitral award set-aside by the State courts of the seat pursuant to article V(1)(e) of the Convention, and if so under what criteria. It may be useful to note that this matter was considered by States when discussing the possible work programme of UNCITRAL in the field of arbitration in 1999.⁷ On that matter, States considered that cases of enforcement of an award that had been set aside in the State of origin, while rare, were potentially a source of serious concern; they gave rise to polarised views, and, if harmonised solutions were not found, could adversely affect the smooth functioning of international commercial arbitration. At that session, without fully discussing the merits of each one, several were mentioned.⁸ The possible usefulness of UNCITRAL issuing a statement of principles was also noted.

The second question presented in the report to the Conference relates to public policy, its definition within the meaning of article V(2)(b) of the Convention and the conditions for invoking it. The question of how to promote a uniform interpretation of public policy was on the agenda of the UNCITRAL Congress on “Modern Law for Global Commerce”, held in 2007 to celebrate the 40th annual session of UNCITRAL. It was noted on that occasion that in an increasingly interdependent world, there is certainly a need, as also expressed by the international arbitration community, for an international public policy shared by all States, which would only include the narrow, basic fundamental safeguards that every arbitration proceeding should observe. At that Congress, it was suggested that this might be a topic of future work for UNCITRAL.

⁷ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 333-380.

⁸ *Ibid.*, paras. 374-376.

Report to the Conference

Ricky Diwan^{*}

I. INTRODUCTION

The New York Convention for the Recognition and Enforcement of Arbitral Awards of 1958 (“the New York Convention”) is probably the single most important and successful document in international arbitration today with over 140 country signatories to this international treaty. As Lord Mustill put it in 1989¹:

“[T]his Convention has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law. Scores of nations have acceded to the Convention, and important accessions are continuing up to the present day.”

The New York Convention was intended to provide an effective, simple and uniform mechanism for the recognition and enforcement of arbitral awards by removing recognition and enforcement of arbitral awards out of the hands of local legislation applicable to court judgments.

Thus, pursuant to Article IV(1) of the New York Convention all that is required to obtain recognition and enforcement of an arbitral award is to present a duly authenticated original award or a duly certified copy of the award plus the original arbitration agreement or a duly certified copy of the arbitration agreement.

For this reason, the New York Convention is often said to have inherent in its arrangements a pro-enforcement bias², given the limited and exclusive grounds available for seeking to resist recognition and enforcement of an arbitral award prescribed by Article V.

This paper covers two particular aspects of Article V of the New York Convention that raise important questions as to the proper approach to

^{*} Barrister-at-Law, Essex Court Chambers (London); Senior Lecturer in International Commercial Arbitration, King’s College London.

¹ *Arbitration: History and Background*, Lord Mustill, *Journal of International Arbitration* (1989) Vol. 6, Issue 2 pp. 43-56)

² See, for example, the recent observations of Lord Collins in *Dallah v. Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at para. 101

be applied by the Courts of a jurisdiction faced with a question of recognition and enforcement of an arbitral award. Those aspects are as follows:

- *Annulled Awards.* What is the proper approach to be applied to awards annulled by the courts of the seat of the arbitration? In particular, may a court recognise and enforce an arbitral award that has been annulled by the courts of the seat pursuant to Article V(1)(e) of the New York Convention, and if so what criteria should it apply?
- *Public Policy.* How is “*public policy*” to be defined within the meaning of Article V(2)(b) of the New York Convention?

II. RELEVANT PROVISIONS UNDER THE MAURITIAN INTERNATIONAL ARBITRATION ACT 2008

For the purposes of considering the two identified issues in the context of the newly enacted International Arbitration Act (No. 37 of 2008) in Mauritius (“the IAA”), four points are of note:

1. Section 40 of the IAA makes clear that the New York Convention applies to the recognition and enforcement of arbitral awards under the IAA.
2. The IAA only applies to “*international arbitration*” as defined in Section 3(2). It does *not* apply to domestic arbitration. Thus, the problem sometimes faced in other jurisdictions in shaping a single rule (such as a rule of public policy) for different regimes where different policies may apply does not exist.
3. Section 39 of the IAA limits recourse against an arbitral award rendered in Mauritius under the IAA to New York Convention grounds by adopting Article 34 of the UNCITRAL Model Law (as amended in 2006) with one minor modification to clarify that a right of recourse lies where the making of the award was induced or affected by fraud or corruption, or the rules of natural justice have been infringed.
4. The more favourable domestic regime for the recognition and enforcement of arbitral awards previously in existence in Mauritius

will be abolished. It, therefore, will not be possible to invoke that regime under Article VII of the New York Convention.

III. ISSUE 1: ARTICLE V(1)(E) OF THE NEW YORK CONVENTION

This paper strives to breathe life into the issue by postulating a simple scenario and conundrum, which has some of the hallmarks of a recently decided case on the issue:³

An award is rendered in favour of private entity A, against State B. The seat of the arbitration was State B and State B successfully challenged the award before the Courts of State B on the grounds of lack of due process and that the law of State B had been misapplied. Private entity A had participated in and opposed the challenge. Private entity A nevertheless proceeds to apply to enforce the award in State C under the New York Convention, where State B has assets. State B opposes recognition and enforcement on the grounds that the award has been annulled, invoking Article V(1)(e) of the New York Convention. Private entity A contends that the Courts of State B are biased and their decision should be ignored and it was not appropriate for the Courts of State B to re-open the tribunal's determinations of law.

What should the Courts of State C do? This paper seeks to answer the question by way of a series of propositions that seek to encapsulate the varied positions that have been adopted in international arbitration jurisprudence to date.

First, the familiar starting point is that as a matter of textual analysis there is nothing in the official English language version of the New York Convention to prevent the Courts of State C from recognising and enforcing the annulled award given that Article V uses the discretionary language of “may”⁴ in the context of the listed grounds for refusal of recognition and enforcement.

³ Consider *Yukos Capital Sarl v. OAO Rosneft*, Court of Appeal of Amsterdam (28 April 2009)

⁴ *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, Professor Jan Paulsson, *Arbitration International* (1998) Vol. 14, Issue 2 pp. 227-230. *Comparative Law of International Arbitration*, Poudret Besson (2007, 2nd Ed.) at 902 (p.

Unsurprisingly, this was recently and unequivocally re-affirmed by the Supreme Court of the United Kingdom in *Dallah* at para. 126 in considering Article V of the New York Convention generally. This is supported equally by the Russian and Chinese versions, which are also official versions of the New York Convention.

It has nevertheless been argued by some (including Professor Albert Jan van den Berg) that the French text is more ambiguous, and that no conscious decision was made by the drafters of the New York Convention to use “*may*” rather than “*shall*”.⁵

Second, the next familiar point is that the New York Convention replaced the Geneva Convention of 1927 (“the Geneva Convention”) and addressed some of the perceived problems in the recognition and enforcement regime under the Geneva Convention. In particular, it is of note that:

- One of the mandatory grounds for refusal of recognition and enforcement under the Geneva Convention was if the award had been annulled in the country in which it had been made. This was provided in Article 2(a) of the Geneva Convention. The word “*shall*” was used in Article 2(a) of the Geneva Convention in contrast to the word “*may*” used Article V of the New York Convention.
- The *double exequatur* requirement under the Geneva Convention was removed by the New York Convention. In other words, under the New York Convention, the party seeking recognition and enforcement of an arbitral award no longer has to establish that the award is “*final*” in the country where it has been made; that is to say no longer open to any challenge process before the courts of the seat. The term “*final*” as used in Article 1(d) of the Geneva

829), where the authors recognise the textual discretion but suggests that the power is extremely limited.

⁵ *Enforcement of Arbitral Awards Annulled in Russia*, Professor Albert Jan van den Berg, Journal of International Arbitration (2010) Vol. 27, Issue 2 pp. 179-198: No distinction should be made between “*may*” or “*shall*” as there is nothing in the *travaux préparatoires* to suggest that this was a conscious decision and the French text is said to support the absence of discretion. Conclusion: an award that has been set aside no longer exists – “*ex nihilo nil fit*.” But as regards the *travaux préparatoires* see also *Enforcement of Nullified Foreign Arbitral Awards*, Garry Sampliner, Journal of International Arbitration (1997) Vol. 14, at p. 140 *et seq.* which points to the fact that an earlier draft providing that enforcement “*shall be refused*” when an award had been annulled in its country of origin was not adopted.

Convention was replaced in Article V(1)(e) of the New York Convention with the term “*binding*” for this very purpose.

Third, if the courts of State C sought to have regard to how other jurisdictions have interpreted the New York Convention to see if this would provide it with some assistance on the question of approach it would find that:

- There is no consistent or uniform approach to the application of Article V(1)(e);
- The approach of a particular jurisdiction will depend upon its view of the scheme of the New York Convention and potentially its perception of the role of the courts of the seat of the arbitration.

At this juncture one could embark on a detailed analysis of the various theories of international arbitration that might be said to inform or classify the differing jurisprudential approaches. This paper, however, will not cover that issue which has been lucidly and famously addressed by Professor Emmanuel Gaillard⁶, identifying three theories: “monolocal” (or “territorial”), “multilocal” and “international arbitral order”. Rather, this paper will focus on some of the approaches that have been taken by courts faced with the issue and how one might classify those approaches according to the different arbitral theories that have been identified by Professor Gaillard.

A. U.S. Approach

*TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P.*⁷ That case concerned an application for recognition and enforcement of an ICC award rendered in Colombia that had been set aside by the Colombian courts on the grounds that the arbitration had not been conducted in accordance with Colombian law. Recognition and enforcement proceedings were commenced before the courts of the District of Columbia (U.S.A.). Recognition and enforcement of the award was refused on the grounds that: (1) the Colombian courts had primary jurisdiction over the award and were

⁶ *Legal Theory of International Arbitration*, Professor Emmanuel Gaillard (Nijhoff 2010). *C.f. Arbitration in Three Dimensions*, *Arbitration in Three Dimensions*, Professor Jan Paulsson, *International & Comparative Law Quarterly* (2011) Vol. 60, Issue No. 2 pp. 291-323

⁷ U.S. Court of Appeal, D.C. Circuit, 25 May 2007

competent to set it aside; (2) there was nothing to suggest that the Colombian court proceedings were tainted in any way and therefore the award had been lawfully nullified and a U.S. court was bound to respect that decision. The U.S. Court of Appeal observed (at para. 54):

“[T]he Convention does not endorse a regime in which secondary States routinely second guess the judgment of a court in a primary State when the court in the primary State has lawfully acted pursuant to competent authority to set aside an arbitration award made in its country.”

The approach of the U.S. Court of Appeal in this case could be classified as “territorial”. It firmly embeds the award and its jurisdiction in the legal order of the seat of the arbitration and looks to the judgment at the seat. Hence, once an award is set aside, it no longer exists and that court judgment must be respected save in exceptional circumstances challenging the integrity of the judicial process itself and therefore giving rise to a public policy ground for not recognising the judgment.

B. French Approach

*Ste P.T. Putrabali Adyamulia*⁸. That case concerned an arbitral award (dated 10 April 2001) rendered in England pursuant to the Rules of the International General Produce Association Ltd., which was subsequently set aside by the High Court of England on 19 May 2003. Recognition and enforcement of the award was sought and granted in France. Amongst other things the *Cour de cassation* observed:

“[a]n international arbitral award – which is not anchored in any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.”

This decision has been relied upon (by Professor Gaillard amongst others) in support of the notion that an arbitral award is part of an autonomous transnational order and therefore can be recognised and enforced

⁸ Cass. Civ. 1, 29 June 2007. See *The Status of Vacated Awards in France: the Cour de cassation Decision in Putrabali*, Philippe Pinsolle, *Arbitration International* (2008) Vol. 24, Issue No. 2. pp. 277-295

notwithstanding its annulment elsewhere given that its juridicity does not depend upon the law of the seat.

However, it is also to be observed that the Court further justified its decision under Article VII of the New York Convention and the more-favourable domestic regime for the recognition and enforcement of international arbitral awards available in France. This Article VII route would not be an avenue available under the IAA in Mauritius (as addressed above).

C. English Approach

The English approach could best be described as in a state of transition. There have been some recent observations by the Supreme Court in *Dallah* (not directly concerned with this issue), to the effect that it is for the courts of each jurisdiction, whether the courts at the place of enforcement, or the courts of the seat, to take their own view as to the status of the award and that therefore, for example, a decision not to challenge the award at the courts of the seat has no impact on a party's ability to challenge it at the place of recognition and enforcement.

This implies a pragmatic multilocal approach and the acknowledgment that there will be a number of overlapping jurisdictions that may be required to consider the issue and may come to different views. In the same case and in a similar vein, Lord Justice Moore-Bick of the Court of Appeal, observed⁹:

“[I] think it may be necessary to consider on another occasion whether the discretion to permit enforcement may be somewhat broader than has previously been recognised and in particular whether there may be circumstances in which the court would be justified in exercising its discretion in favour of allowing enforcement of a foreign award notwithstanding that it had been set aside by the supervisory court.”

All of this is consistent with the recognition of a practical and fluid reality of arbitration identified by Professor Paulsson¹⁰; namely that arbitration and arbitral awards are subject to overlapping legal orders including the courts

⁹ [2010] 1 Lloyd's Rep. 119 at p. 132

¹⁰ *Arbitration in Three Dimensions*, *Arbitration in Three Dimensions*, Professor Jan Paulsson, International & Comparative Law Quarterly (2011) Vol. 60, Issue No. 2 pp. 291-323

of the seat and the courts of the place of recognition and enforcement, each of which may provide support and jurisdiction to arbitration.

However, not all of the observations coming from England are entirely consistent with this fluid reality. It was also suggested *obiter* by the Court of Appeal in *Dallah*¹¹ and then quoted with approval and applied at first instance in a subsequent recent decision, *HJ Heinz Co. Ltd. v. EFL Inc.*¹² that a party who had participated in proceedings before the courts of the seat that successfully challenged the award might then be estopped from seeking recognition and enforcement elsewhere by reason of the court judgment at the seat.

It is not at all clear that it was ever intended that in the context of the New York Convention an estoppel could apply so as to preclude the exercise of the discretion afforded under Article V. Indeed, this seems inconsistent with the scheme of the New York Convention. What is more, the notion of an estoppel arising out of a court judgment in the context of arbitration has the hallmarks of a “territorial approach” in that it elevates a court judgment over the arbitral award. It should further be noted that earlier pronouncements of two first instance judges, corrected on appeal, in *Svenska v. Government of Lithuania*¹³, went still further and opined that a failure to challenge an award at the seat could also give rise to an estoppel at the place at which enforcement of an award was sought. Such pronouncements are in substance only explicable on the basis of a territorial attitude towards an arbitral award that firmly embeds the award in the territory of the seat of the award.

D. Dutch Approach

Yukos Capital Sarl v. OAO Rosneft, Amsterdam Court of Appeal 28 April 2009. That case concerned recognition and enforcement proceedings brought in the Netherlands in respect of arbitral awards rendered against a Russian state entity that had been set aside by the Russian courts (being the courts of the seat). The Court of Appeal of Amsterdam granted recognition and enforcement under general Dutch law (as opposed to the New York Convention) on the basis that the Russian court decision could not be recognised as it was likely to be partial and dependent.

¹¹ [2010] 1 Lloyd’s Rep. 119 at paras. 56 and 90

¹² [2010] EWHC 1203 (Comm.) at para. 38

¹³ [2005] 1 Lloyd’s Rep. 515 (Teare J.); [2006] 1 Lloyd’s Rep. 181 (Gloster J.); [2007] 1 Lloyd’s Rep. 193 (CA)

It would therefore appear that the Amsterdam Court of Appeal was not focussing on the award but the Russian court judgment. It therefore has the hallmarks of the U.S. approach and the narrow exception identified there in the event that there is an issue as to the integrity of the court process at the seat of the award.

Fourth, and finally if the Court of State C is satisfied that it does have a discretion under Article V(1)(e) of the New York Convention whether or not to recognise and enforce an award set aside by the Court of the seat, what criteria is Court C to apply in exercising any discretion?

Once again, there is no easy answer to this question as there is nothing in the language of Article V of the New York Convention that provides any guidance as to how the discretion is to be applied.

The most creative answer to date is that provided by Professor Paulsson, which is similar to the answer expressly adopted under Article IX of the Geneva Convention but not provided in terms in the New York Convention. His solution is that in order to avoid giving effect to idiosyncrasies of local arbitration law at the seat of the arbitration (including merits review)¹⁴ one should distinguish between an international standards annulment (“ISA”) as opposed to a local standards annulment (“LSA”)¹⁵.

¹⁴ Consider for example error on the face of the record that still exists under the Nigerian Federal Arbitration Act and effectively gives rise to a merits review of the award, which is not intended by the New York Convention (*see*, for example, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Professor van den Berg (1981) at p. 269).

¹⁵ Enforcing Arbitration Awards under the New York Convention (UN, 1999), *Awards set aside at the place of arbitration* at pp. 24 *et seq.* Professor Jan Paulsson; *Enforcing Arbitral Awards Notwithstanding a LSA (Local Standard Annulment)*, Professor Jan Paulsson (May 1998) 9 ICC Int’l Ct. of Arb. Bull. No.1; *Towards Minimum Standards of Enforcement: Feasibility of a Model Law*, Professor Paulsson, ICCA Congress Series, Paris (1998) Vol. 9, at pp. 574-582. *C.f.* *Comparative Law of International Arbitration*, Jean Francois Poudret and Sebastien Besson (2007, 2nd Ed.) at pp. 854-855, which takes the view that Professor Jan Paulsson’s approach is not consistent with the language of the New York Convention as currently drafted (in contrast to Article IX of the 1961 Geneva Convention) and that the enforcing judge should only admit the recognition and enforcement of the award if the setting aside is a manifest disregard of the arbitration law of the seat. *C.f.* The views expressed by Professor Albert Jan van den Berg that to the extent a residual discretion exists it can only be applied where: (a) an estoppel arises out of a failure to take a point in the arbitration proceedings; (b) the ground for refusal concerns a *de minimis* case (insignificant violation of the arbitral rule in question). *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation*, Professor Albert Jan van den Berg (1981) at pp. 265-266 and also pp. 355-366 (discussing the Geneva Convention solution). *Enforcement of Arbitral Awards Annulled in Russia*, Professor Albert Jan van den Berg, *Journal of International Arbitration* (2010) Vol. 27, Issue 2 pp. 179-198.

In other words, if the courts of the seat have set aside an award on one of the grounds contained in Article V(1)(a) to (d) of the New York Convention concerned with jurisdiction and due process, then the enforcing courts should be giving deference to that, otherwise the discretion becomes real. The problem identified by Professor Albert Jan van den Berg is the fact that this approach is not consistent with the language of the New York Convention. For this reason he has suggested an amendment to the New York Convention to make express the solution that Professor Paulsson contends for¹⁶:

“[E]nforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that:

- (g) the award has been set side aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph.”

IV. ISSUE 2. THE ARTICLE V(2)(B) QUESTION: THE VEXED QUESTION OF PUBLIC POLICY

In the early nineteenth century an English judge famously described “*public policy*” as: “a very unruly horse, and once you get astride it you never know where it will carry you”¹⁷.

The drafters of the New York Convention were well aware of the problem of definition with the term “*public policy*”. In the summary analysis of record of the United Nations Conference of May/June 1958 (dated 1 October 1958) relating to the drafting of the Convention it was stated at page 71:

“[C]ertainly ‘public policy’ will provide considerable scope for the ingenuity of defence counsel and it is quite likely that a variety of interpretations will be forthcoming from the courts of different countries.”

It perhaps could be said that one knows what “*public policy*” is when one sees it. A recent example of a Court refusing recognition and enforcement of an arbitral award on the grounds of public policy is the decision of the

¹⁶ *Enforcement of Arbitral Awards Annulled in Russia*, Professor Albert Jan van den Berg, *Journal of International Arbitration* (2010) Vol. 27, Issue 2 pp. 179-198.

¹⁷ *Burroughs J. in Richardson v. Mellish* (1824) 2 Bing 229, 130 ER 294

Federal *Arbitrazh* Court, District of Tomsk (Russia) of 7 July 2010. The Court refused recognition and enforcement of an ICC award on the ground that the arbitration had been set up as a sham between two companies that were part of the Yukos group as part of an illegal scheme to avoid tax liabilities and expropriation by the Russian government. That decision appears right in principle (assuming the facts were as found), but the question of definition remains difficult.

What can be stated with some confidence is that the drafters of the New York Convention deliberately chose to move away from text of the Geneva Convention and in particular Article I(e). Article I(e) of the Geneva Convention provided:

“[T]o obtain such recognition or enforcement, it shall, further, be necessary:—

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.”

The drafters of the New York Convention deliberately and consciously rejected the inclusion of the words “*or with fundamental principles of law*” after public policy. This is clear from the debates on the provision.¹⁸ This is not surprising. No merits review or the re-opening of the tribunal’s findings of fact or law was intended under the New York Convention. Thus, it is possible to immediately identify an area of complaint that was not intended to be covered by the term “*public policy*”.¹⁹

However, it remains more difficult to positively define what is intended to be covered by public policy. Some helpful guidance can be found in the non binding 2002 Recommendations of the International Law Association on Public Policy as a Bar to Enforcement of International Arbitral Awards²⁰, which was derived from and is consistent with much State practice.

First, public policy refers to a country’s international public policy, *i.e.* not domestic. Recommendation 1(c) provides as follows:

¹⁸ See again Summary Analysis of Record of United Nations Conference May/June 1958 (1 October 1958) at p. 68

¹⁹ As discussed below, there in fact remains some controversy even on this issue having regard to State practice.

²⁰ Resolution 2/2002 70th Conference of the International Law Association held in New Delhi, India, 2-6 April 2002.

“[T]he expression “international public policy” is used in these Recommendations to designate the body of principles and rules recognised by a State which, by their nature may bar the recognition or enforcement of an arbitral award rendered in a context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).”

The distinction between domestic and international public policy is important because different considerations as to policy may apply in the context of a purely domestic and an international situation.

The IAA of course applies only to international arbitration and this was done for clear policy reasons as are set out in Section 7 of the *Travaux Préparatoires*; namely to avoid the problems in some jurisdictions where no distinction is made between domestic and international arbitration with the result that terms such as “*public policy*” are defined by reference to policy concerns that afflict both domestic and international situations and therefore gives rise to a broader rather than narrower definition.

Second, public policy can be procedural (due process, impartial tribunal) or substantive (abuse of rights). See again Recommendation 1(c).

Third, so far as attempts to positively define “*public policy*”, Recommendation 1(d) provides as follows:

“[T]he international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “*loi de police*” or “public policy rules” and (iii) the duty of the State to respect its obligations towards other States or international organisations.”

Fourth, the Recommendations distinguish public policy from mandatory rules. Recommendation 3(a) provides as follows:

“[A]n award’s violation of a mere “mandatory rule” (*i.e.* a rule that is mandatory but does not form part of the State’s international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law

governing the contract, the law of the place of performance of the contract or the law of the seat of arbitration.”

The distinction between mandatory rules and public policy is important. Not all mandatory rules rise to the level of falling within the definition of a State’s international public policy as Recommendation 3(a) makes clear. There have been several recent U.S. Court decisions that have treated U.S. mandatory law as falling within U.S. public policy for the purposes of the New York Convention without necessarily considering the distinction between the two.

In particular, a number of recent decisions have invoked the famous footnote 19 to the Supreme Court’s decision *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*²¹ to refuse to stay court proceedings in favour of arbitration on the grounds of “public policy” (under the New York Convention). This was on the basis that since the effect of the choice of law and arbitration clause gave rise to a clear and certain prospective waiver of U.S. law and U.S. statutory remedies (including treble damages) which the Courts in question considered would apply but for the choice of law and arbitration clause, staying the court proceedings amounted to a violation of public policy under the New York Convention.

See, for example, *Thomas v. Carnival Corporation*²², a case concerning a claim by a head waiter against his cruise liner employer for injuries suffered on board. The parties’ contractual arrangements provided for arbitration under Panamanian law in the Philippines. The U.S. Court of Appeal refused to compel arbitration pursuant to the New York Convention on the basis that it would be contrary to public policy because the choice of Panamanian law and Philippines arbitration would lead to the non-application of Thomas’s statutory rights under the Seaman’s Wage Act. A similar conclusion was arrived at by the Florida District Court in *Mayakin v. Carnival Corporation* (14 June 2010).

Whether this really amounts to international public policy for the purposes of the New York Convention as opposed to mandatory (domestic) U.S. law is questionable²³. It does, however, bring sharply into focus once again the vexed question of whether a “manifest disregard of law” could amount to a violation of public policy under the New York Convention even

²¹ (1985) 473 US 614

²² 573 F.3d 1113 (11th Cir. 2009)

²³ See *The Myth of the ‘Manifest Disregard of the Law’ Doctrine: Is this Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned*, Wilske Mackay, ASA Bulletin (2006) Vol. 24, Issue 2 pp. 216-228

though the drafters of the New York Convention intended to remove “fundamental principles of law” from the scope of “*public policy*” (as noted earlier in this paper).

It has been suggested by some practitioners and academics that where an error of law is so fundamental or egregious as to undermine the public’s confidence in the arbitral system then it could amount to a breach of public policy²⁴. What seems clear is that once one accepts the concept of manifest disregard of law as falling within the scope of public policy then one is in danger of embarking into a merits review that was deliberately excluded from the New York Convention. One need look no further than the Indian Court approach²⁵ and its ramifications for international arbitration that has been met with international criticism, to see the dangers of reviewing an award for error of law under the guise of public policy.

V. CONCLUSION

In conclusion, it may be said that the two issues identified in this paper continue to remain important questions for the courts of all countries that apply the New York Convention. How the courts of a particular jurisdiction approach these questions will strongly impact international arbitral perception of the jurisdiction in question. Mauritius has a unique opportunity to build international confidence in choosing Mauritius as a seat for arbitration through the way it chooses to address these issues.

²⁴ *Do Egregious Errors Amount to a Breach of Public Policy?*, Michael Hwang & Amy Lai, Arbitration (2005) pp. 1-7; *see also Egregious Error of Law as Grounds for Setting Aside an Arbitral Award*, Jean-Paul Beraudo, Journal of International Arbitration (2006) Vol. 23, Issue 4 pp. 351-361

²⁵ *ONGC v. Saw Pipes Ltd.*, A.I.R. 2003 S.C. 2629; *Venture Global Engineering v. Satyam Computer Services Ltd.*, A.I.R. 2008 S.C. 1061

Response to the Report

*Prof. Dr. Albert Jan van den Berg**

I wish to start my comment with the recent decision of the United Kingdom Supreme Court in *Dallah v. Pakistan*.¹ Many speakers and commentators referred to it as being remarkable. From the point of view of the New York Arbitration Convention of 1958 (“the Convention”), the judgment is not remarkable, except in two respects.

First, in the 1980s and 1990s Jan Paulsson and I organised a New York Convention workshop at the end of the annual meeting of the IBA Conference. It was like a live television talk show. Part of the show was a contest for which court had rendered the best decision of the year in interpreting and applying the New York Convention. Most of the time, the Swiss Federal Supreme Court got the award. If the contest would be held this year, I would predict that the *Dallah* judgment of the United Kingdom Supreme Court would end at the top of the list. It is an excellent decision in which the Supreme Court interprets and applies the Convention in an exemplary manner. The case concerned the classic question of whether a non-signatory is bound by the arbitration clause. The Court articulated well the ground for refusal of enforcement regarding an invalid arbitration agreement contained in Article V(1)(a) of the Convention. It did so in a very modern way by using the comparative case law method. It looked at how courts in other Contracting States had interpreted and applied the Convention. Moreover, the Supreme Court judgment is rich with comparative law observations.²

The second reason why the judgment is remarkable is the arbitral award involved. Paragraph 33 of the judgment tells us what happened. Unsurprisingly, *Dallah* had argued that Saudi Arabian law applied, whilst Pakistan had pleaded that Pakistani law applied. The Tribunal rejected both positions, and relied on what it believed to be “international general principles which the Arbitrators would consider to meet the fundamental requirements of justice in international trade”. Where and what are those

* Professor of Law (Arbitration Chair), Erasmus University (Rotterdam); Partner at Hanotiau & van den Berg (Brussels).

¹ [2010] UKSC 46

² On 17 February 2011, the *Cour d'appel* of Paris rendered a decision in the annulment proceedings against the *Dallah* award, ruling that there was no ground for setting it aside. It is submitted that the “beauty contest” between the two courts was clearly in favour of the English court.

requirements? Only the highly sophisticated French arbitration specialist will be able to tell you.

This brings me to a caveat. We heard here much about French international arbitration law. The intellectual content of that law is undeniable. However, French international arbitration law is unconventional. In contrast, the arbitration law of Mauritius is mainstream as it is based on the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 (“the Model Law”). The Model Law has been implemented by more than 65 countries.

Let me now comment on Ricky Diwan’s first issue, which he presented so eloquently. It concerns the enforcement of arbitral awards annulled in the country where made (also called “country of origin”). In my opinion, there are at least five different legal possibilities regarding that question, which I will discuss below.

With regard to the five possible possibilities, it is important to make a distinction between the application of the New York Convention (to which possibilities I through III relate), application outside the scope of the Convention (to which possibility IV relates), and finally a change in the New York Convention (to which possibility V relates).

I. FIRST LEGAL POSSIBILITY: APPLICATION OF ARTICLE V(1)(E) OF THE CONVENTION

The most obvious approach is to apply the text of the Convention. The text states as a ground for refusal the fact that the arbitral award “*has been set aside . . . by a competent authority of the country in which . . . that award was made.*” Based on this text, the enforcement court should refuse to enforce an award if the party against whom enforcement is sought asserts and proves three elements, *i.e.*, that the arbitral award:

- (i) has been set aside;
- (ii) by the competent authority (*i.e.*, court);
- (iii) in the country in which it was made.

The text of the Convention specifies no additional conditions for the setting aside of an arbitral award in *the* country of origin as a ground for refusal of enforcement. Moreover, the legislative history of the New York Convention makes no mention of any discussion concerning such

conditions. The same is true of the 1927 Geneva Convention, the predecessor of the New York Convention.

The case law under the New York Convention follows the first possibility almost unanimously. In those cases where enforcement of a foreign arbitral award has been refused due to annulment by the court in the country of origin, the enforcement court has applied the text of Article V(1)(e) of the Convention and refused to grant leave for enforcement without imposing further conditions on the method or grounds of annulment in the country of origin:

- The U.S. Court of Appeals for the Second Circuit refused to allow enforcement in *Baker Marine*³ with regard to two arbitral awards that were made in Lagos and annulled by the court in Nigeria. The Nigerian court annulled the first arbitral award based on the fact that the arbitrators had, among other things, wrongly awarded damages as a penalty, had gone beyond the scope of the dispute submitted to the arbitrators, wrongly admitted extrinsic evidence to the contract and made inconsistent decisions. The Nigerian court annulled the second arbitral award on the basis of the fact that it was not supported by evidence.
- The U.S. Court of Appeals for the District of Columbia refused to allow enforcement in *TermoRio*⁴ with regard to an ICC arbitral award, made in Bogota, that was annulled by the Council of State (Consejo del Estado) in Colombia on the ground that the arbitral proceedings had taken place on the basis of the ICC Arbitration Rules, the application of which was not permitted by Colombian law at that time.
- The U.S. District Court for the Southern District in New York refused to allow enforcement in *Spier*⁵ with regard to an arbitral award that was set aside by an Italian court due to violation by the arbitrators of their mandate.

³ *Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd. et al.*, U.S. Court of Appeals, Second Circuit, 12 August 1999, Y.B. COM. ARB. Vol. XXIV 909–913 (U.S. No. 288) (1999).

⁴ *TermoRio S.A. E.S.P. et al. v. Electranta S.P. et al.*, U.S. Court of Appeals, District of Columbia, 25 May 2007, No. 06-7-58, Y.B. COM. ARB. Vol. XXXIII 955–969 (U.S. No. 621 sub 1-20) (2008).

⁵ *Martin I. Spier v. Calzaturificio Tecnica S.p.A.*, U.S. District Court, Southern District of New York, 22 October and 29 November 1999, Y.B. COM. ARB. Vol. XXV 1042-1056 (U.S. No. 325) (2000).

- The German *Oberlandesgericht* (Court of Appeal) in Rostock refused to grant leave of enforcement on an arbitral award that was set aside by a Russian court.⁶
- The *Oberlandesgericht* (Court of Appeal) in Dresden refused to enforce an arbitral award, made in Minsk, Belarus, that was set aside by the Belarusian court based on the lack of a valid arbitration agreement and the failure by one of the arbiters to participate in the deliberations.⁷
- In a special case, the Netherlands Court of Cassation (*Hoge Raad*) in *SEEE*⁸ reached the conclusion that the returning of the arbitral award by the court in Vaud Canton qualifies as annulment as provided in Article V(1)(e) of the Convention.

II. SECOND LEGAL POSSIBILITY: RESIDUAL DISCRETIONARY POWER UNDER ARTICLE V TO ALLOW ENFORCEMENT DESPITE THE EXISTENCE OF GROUNDS FOR REFUSAL

One of the characteristics of the grounds for refusal of enforcement named in Article V of the New York Convention is that they constitute a limitative enumeration. Enforcement “*may be refused . . . only if*”. Thus, the enforcement court may not refuse enforcement on the basis of a ground that is not set forth in the Convention. That principle has been generally accepted in the case law under the Convention.

Conversely, however, the question arises of whether an enforcement court must refuse enforcement under all circumstances if one of the grounds expressly set forth in Article V(1) has been asserted and proven. If this question is answered in the affirmative, the next question is

⁶ *Oberlandesgericht* (Court of Appeal), Rostock, 28 October 1999, Y.B. COM. ARB. Vol. XXV 717-720 (FR Germ. No. 51 sub 4-7) (2000). The reasons for annulment cannot be identified from the published decisions. After the aforementioned decision of the Court of Appeal in Rostock, the Russian court revised the annulment of the arbitral awards and declared them to be once again legally valid. On this basis, the arbitral award could then still be recognised and enforced in Germany pursuant to the New York Convention, see *Bundesgerichtshof* (Federal Supreme Court), 22 February 2001, Y.B. COM. ARB. Vol. XXIX 724-746 (FR Germ. No. 63 sub 6-8 en 10) (2004).

⁷ *Oberlandesgericht* (Regional Court of Appeals), 31 January 2007, Y.B. COM. ARB. Vol. XXXIII 510-516 (FR Germ. No. 110) (2008).

⁸ *Société Européenne d'Etudes et d'Entreprises - SEEE v. Federal Republic of Yugoslavia*, Hoge Raad (Court of Cassation), 7 November 1975, NJ 1975 No. 274, Y.B. COM. ARB. Vol. I 195-198 (Netherlands No. 2D) (1976).

whether such a power can be applied to all the grounds listed in Article V(1).

In a number of judgments under the New York Convention, courts (especially in Hong Kong) have upheld the possibility that Article V(1) of the Convention can be interpreted in such a way that the court deciding on enforcement has a “*residual discretionary power*” to allow enforcement despite the fact that a ground for refusal of enforcement has been advanced and proved.⁹

This power is based specifically on the wording of the English text of Article V(1) of the Convention: “Recognition and enforcement of the award *may* be refused . . .” (italics added), wording that also appears in the Chinese, Russian, and Spanish texts. In contrast, the French text of Article V(1) appears to offer no leeway for a residual discretionary power: “*seront refusées*” (shall be refused).¹⁰ Contrary to what some commentators claim, the drafters of the Convention did not consciously choose the word “*may*.” The *travaux préparatoires* do not mention any discussion regarding a choice between “*may*” and “*shall*” in relation to Article V(1)(e).¹¹ Nor, in my opinion, does Article 33(4) of the Vienna Convention offer any consolation in this case.¹²

⁹ See A. J. van den Berg, *Residual Discretion and Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards under the New York Convention* in Current Legal Issues in International Commercial Litigation, SICBL Publications Vol. VIII (1996).

¹⁰ Article XVI of the New York Convention stipulates that “*the Chinese, English, French, Russian and Spanish texts shall be equally authentic*”.

¹¹ The English text of the Geneva Convention of 1927 (Article 2) and ICC Preliminary Draft Convention of 1953 (Article IV) contain the word “*shall*”. Without any discussion, it was changed in the draft from ECOSOC of 1955 into “*may*” (Article IV). The proposal from the Netherlands (authored by Professor Sanders) of 26 May 1958 also contained the word “*may*” (UNDOC E/CONF.26/L.17). A German amendment of 28 May 1958 (Article V), however, contained the word “*shall*” (UN DOC E/CONF.26/L.34). The “Three Power Working Paper” of 2 June 1958 once again contained the word “*may*” (Article IV). (UN DOC E/CONF.26/L.40). Some commentators believe to be able to deduce from this course of events that the drafters of the Convention “consciously” chose the word “*may*”. Nothing supports this. On the contrary, the explanation by the German delegate during the plenary meeting does not make mention of any reason for changing “*may*” to “*shall*” (UN DOC E/CONF.26/SR/14 pp. 2-3). In addition, Germany was one of the three powers that proposed the “Three Power Working Paper” of 2 June 1958, which proposal, as stated, contained the word “*may*”. The German amendment with the word “*shall*” was not even brought to a vote at the New York Conference. See: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.htm>.

¹² Article 33(4) provides: “*Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*”

To the extent that courts in the Contracting States interpret the Convention as giving them a residual discretionary power with regard to the enforcement of arbitral awards, they make use of it with restraint, and only in two situations:

- (i) the ground for refusal concerns a *de minimis* case (e.g., an insignificant violation of the applicable rules of arbitration), and;
- (ii) if the party that invokes the ground for refusal has failed to invoke that ground in a timely fashion in the arbitral procedure.

These two situations can arise with respect to the grounds for refusal (a) through (d) of Article V(1) of the Convention (*i.e.*, lack of a valid arbitration agreement; violation of the right to equal treatment and the ability to present one's own case; violation of the rules for the appointment of arbitrators or the arbitral procedure). The Convention itself contains no estoppel or waiver provision with respect to the grounds for refusing enforcement of foreign arbitral awards.

It is, however, important to note that in the more than 1,600 published decisions, not one court has applied the residual discretionary power with respect to Article V(1)(e) of the Convention in a case where an arbitral award had been set aside in the country of origin.¹³

This is understandable because an award that has been set aside in the country of origin no longer exists legally. It is not possible that an arbitral award that has been set aside would be brought back to life during an enforcement procedure under the Convention in its country of origin or abroad. The maxim "*ex nihilo nil fit*" applies here.¹⁴

This is also the point of view of one of the "founding fathers" of the New York Convention. Shortly after returning from New York, Professor Sanders wrote that if an award was set aside in the country of origin, the:

¹³ *Chromalloy Gas Turbine Corporation v. The Arab Republic of Egypt*, a possible exception might be the decision of the U.S. District Court for the District of Columbia, Y.B. COM. ARB. Vol. XXII 1001-1012 (1997) (U.S. No. 230). The reasoning in this case, however, is unclear, and in subsequent decisions, the American courts have distanced themselves from the *Chromalloy* opinion. See paras. 63-64 below.

¹⁴ See A. J. van den Berg, *supra* note 10, at 650: "Within the framework of the Convention it is difficult to conceive that the residual power to enforce would also apply to the case where the award has been set aside in the country of origin (ground V(1)(e), see para. 516 below) as the award no longer legally exists."

“[C]ourts will ... refuse the enforcement as there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement”.¹⁵

III. THIRD LEGAL POSSIBILITY: RECOGNITION OF FOREIGN COURT JUDGMENT UNDER ARTICLE V(1)(E)

In *Yukos Capital*, which case concerned four awards that had been annulled by the Russian courts, the Court of Appeal of Amsterdam opted for a different approach. It opined that “the Dutch court is, in any event, not obliged to refuse enforcement of an arbitral award that has been set aside if the foreign judgment setting aside the arbitral award cannot be recognised in the Netherlands”.¹⁶ According to the Court of Appeal, “it must first be considered, on the basis of general law (*commune recht*), whether the decisions by the Russian civil court to set aside the arbitral awards of 19 September 2006 can be recognised in the Netherlands”.¹⁷

The Court of Appeal was obviously considering the recognition of a foreign court judgment as developed in the Dutch case law.¹⁸ In doing so, the Court of Appeal created a “a mirror recognition in the reverse”: a foreign arbitral award can be recognised if a foreign court judgment is not recognised. Here, the Court of Appeal turns the New York Convention upside down.

The Convention itself requires that a foreign arbitral award not be recognised if it is set aside by a foreign court judgment. It, therefore, does not concern a recognition under general law, as the Court of Appeal

¹⁵ P. Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, NETHERLANDS INTERNATIONAL LAW REVIEW 43, 55 (1959); “*The New York Convention*” in P. Sanders, *Rapporteur Général, Union Internationale des Avocats*, 2 ARBITRAGE INTERNATIONAL COMMERCIAL-INTERNATIONAL COMMERCIAL ARBITRATION 293, 321 (1960). An interview with Professor Sanders concerning the origins of the Convention is available at <<http://www.arbitration-icca.org/index.html>>. See, e.g., *IPOC International Growth Fund Limited v. L.V. Finance Group Limited*, Court of Appeal, British Virgin Islands, 18 June 2008, Y.B. COM. ARB. Vol. XXXIII 406-432 (2008) (BVI No. 1 sub 3) with regard to an arbitral award made in Switzerland: “*The decision of the Swiss Supreme Court confirms the Second Convention Award. Had that court set aside the award, the appeal would have fallen away altogether because there would be no Award that could be the subject of enforcement proceedings.*”

¹⁶ Court of Appeal decision at *supra* note 3, sec. 3.5.

¹⁷ Court of Appeal decision at *supra* note 3, sec. 3.6.

¹⁸ See L. STRIKWARDA, *INLEIDING TOT HET NEDERLANDS INTERNATIONAAL PRIVAATRECHT* [Introduction to Dutch International Private Law] 267 (9th ed., 2002).

incorrectly assumes, but a recognition under treaty law. The Convention provides that an arbitral award that “*has been set aside . . . by a competent authority of the country in which . . . that award was made*” may not be recognised. The courts in the Contracting States are therefore required to follow the Convention under international law.

IV. THE FOURTH LEGAL POSSIBILITY: APPLICATION OF DOMESTIC LAW OUTSIDE THE NEW YORK CONVENTION (ARTICLE VII(1))

The three legal possibilities described above each relate to a possible interpretation of the New York Convention itself. However, there is also a legal possibility *outside* the Convention. In my opinion, this is an important distinction because the discussion concerning the enforcement of an arbitral award set aside in the country of origin is frequently clouded by mixing up the possibilities within and outside the Convention.

Article VII(1) of the New York Convention provides:

“[T]he provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon”.

This provision is also known as the “*more-favourable-right provision*”. It is based on the consideration that, if another treaty or the national law has a more favourable regime for the enforcement of foreign arbitral awards, a party is free to invoke that regime.

An example is Article 1076 of the Dutch Code of Civil Procedure (“DCCP”), which cites this possibility in so many words: “. . . if an applicable treaty permits recourse to the law of the country where the recognition or enforcement is sought”. Parliamentary history makes it clear that the regime of Article 1076 DCCP was included in the Dutch arbitration law precisely because of Article VII(1) of the New York Convention.¹⁹

Article 1076 DCCP is unhelpful in the *Yukos Capital* case because it also contains as a ground for refusal of enforcement the fact that “the

¹⁹ Dutch Lower House of Parliament, 1983-1984 session, 18 464, No. 3 at 35.

arbitral award has been set aside by the competent authority of the country in which that award was made” (Article 1076(1)(A)(e) DCCP).²⁰

It is to be noted here that if an applicant opts for the national regime regarding enforcement of foreign arbitral awards on the basis of the *more-favourable-right-provision* of Article VII(1) of the Convention, it is generally assumed that this regime applies in its entirety. A combination of both (“cherry picking”) is not allowed due to the interrelationship of the provisions of the Convention.²¹ The Dutch legal system follows this principle by making a clear distinction between enforcement of foreign arbitral awards according to a Convention (Article 1075 DCCP) and according to the national (Dutch) regime on the enforcement of foreign arbitral awards (Article 1076 DCCP).²²

In France, the domestic law on the enforcement of arbitral awards made in an international arbitration outside France is more liberal than the New York Convention. This also explains why there is relatively little French case law concerning the interpretation and application of the New York Convention. The parties seeking enforcement in France, and with them the courts, invoke *en masse* Article VII(1) of the Convention, in order to subsequently apply the French national regime concerning the enforcement of awards made outside France.

One striking aspect of the French domestic law on the enforcement of foreign awards is that annulment of the arbitral award by the court in the country of origin does not constitute a ground to refuse enforcement. France is one of the few countries that offers such an option based on domestic law concerning the enforcement of foreign awards.

As discussed in my article “*Enforcement of Annulled Awards?*” (pp. 16-17), the French theory leads to inconsistent and bizarre results, as shown by the famous *Hilmarton* case, in which setting aside judgments by the Swiss Federal Tribunal were ignored by the French courts.²³

²⁰ *Id.* at 36: “Ground (e) was included as a final ground for refusal in article 1076, based on the example of article V of the New York Convention, which contains an analogous provision.”

²¹ A. J. VAN DEN BERG, *supra* note 5, at 85-86.

²² Some commentators argue that a combination is possible. See e.g., D. DI PIETRO & M. PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS 171-173 (2001). This leads to confusing situations, as demonstrated by the *Chromalloy* case (see para. 63 above). However, the vast majority of court judgments are based on a separate treatment.

²³ See, *inter alia*, *Hilmarton v. Omnium de Traitement et de Valorisation (OTV)*, *Cour de cassation*, 23 March 1994, Y.B. COM. ARB. Vol. XX YBCA 663 (1995) and *Cour de Cassation*, 10 June 1997, reported in Y.B. COM. ARB. Vol. XXII 696-698 (1997) (France No. 27), which includes an overview with references to the various judgments made in these proceedings by Swiss and French courts.

An illustrative example is *Putrabali*.²⁴ This case concerned a sale of pepper by Putrabali to Rena Holding. The contract provided for dispute resolution in London according to the arbitration regulations of the International General Produce Association (“IGPA”). Following a dispute, an arbitral award was made on 10 April 2001. On an application by Putrabali, the arbitral award was partly set aside by the High Court in England. The IGPA arbitration tribunal subsequently made an improved arbitral award on 21 August 2003. In the meantime, Rena Holding sought enforcement of the first award dated 10 April 2001 in France. In spite of the fact that this award had been set aside in England, the French court granted leave for enforcement. The *Cour de cassation* motivated the decision as follows:

« Mais attendu que la sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées ; qu'en application de l'article VII de la Convention de New-York du 10 janvier 1958, la société Rena Holding était recevable à présenter en France la sentence rendue à Londres le 10 avril 2001 conformément à la convention d'arbitrage et au règlement de l'IGPA, et fondée à se prévaloir des dispositions du droit français de l'arbitrage international, qui ne prévoit pas l'annulation de la sentence dans son pays d'origine comme cause de refus de reconnaissance et d'exécution de la sentence rendue à l'étranger ;

Que dès lors, c'est sans encourir les griefs du pourvoi que la cour d'appel a décidé, à bon droit, que la sentence du 10 avril 2001 devait recevoir l'exequatur en France. »

[Informal translation:

An international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Under

²⁴ *Société PT Putrabali Adyamulia c/ SA Rena Holdings, Cour de cassation, 29 June 2007, Y.B. COM. ARB. Vol. XXXII 299 -302 (2007) (France No. 42), original texts are available at* http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_10607.html.

Art. VII of the (1958 New York Convention), Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules and could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country;

Hence, the court of appeal properly decided that the award of 10 April 2001 must be granted leave for enforcement in France.]

This is a purely French point of view that is shared by hardly any other country. The argument that the arbitral award is not related to any national legal system is contradicted by the English Arbitration Act 1996, which provides that an arbitration – including an arbitral award – is governed by the Arbitration Act in England (and Wales and Northern Ireland).²⁵

The French point of view becomes even more eccentric by qualifying the English arbitral award as “*une décision de justice internationale*.” The *Cour de cassation* does not specify the origin of the “*justice internationale*,” but it states that the “*justice internationale*” is controlled in the country where enforcement is sought. This means in concrete terms: by the French court based on French (international) arbitration law.

The *Cour de cassation* refers to the *more-favourable-right-provision* of Article VII(1) of the New York Convention, and declares the application to be admissible. In other words, the entire French *démarche* regarding the partially annulled English arbitral award takes place outside of the New York Convention, and is based on French law.

The *Cour de cassation* then reasons that French international arbitration law does not contain the ground for refusal to enforce an arbitral award that has been annulled in its country of origin. In this way, the partially annulled arbitral award of 10 April 2001 is declared enforceable by the French court in France.

Putrabali, in turn, had sought leave for enforcement of the improved English arbitral award of 21 August 2003. This was refused by the French court, based on the fact that leave for enforcement had already

²⁵ English Arbitration Act 1996, Section 2(1) (“*The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland*”).

been granted on the arbitral award of 10 April 2001 (that had been partially annulled in England).²⁶

The consequence is that the partially annulled arbitral award of 10 April 2001 cannot be enforced in any Contracting State with the exception of France (due to Article V(1)(e) New York Convention), while the improved arbitral award dated 21 August 2003 can be enforced in all Contracting States with the exception of France. This incongruent result is highly undesirable and certainly does not deserve to be imitated outside of France.²⁷

V. THE FIFTH LEGAL POSSIBILITY: AMENDMENT OF THE NEW YORK CONVENTION

It becomes clear from the above that the current version of the New York Convention offers no possibility to recognise and enforce an arbitral award that has been set aside in the country of origin. This requires a legal solution based on a treaty. Such a basis is offered by Article IX of the European Convention on International Commercial Arbitration of 1961,²⁸ which, however, does not apply in the *Yukos Capital* case, since the Netherlands is not a Contracting State to this Convention.

At the occasion of the celebration of the 50th anniversary of the New York Convention held on 10 June 2008 in Dublin, I proposed that a number of the provisions in the Convention be amended.²⁹ The proposed text contained in Article V of the “*Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*” reads as follows:

²⁶ *Société PT Putrabali Adyamulia c/ SA Rena Holdings*, Cour de cassation, 29 June 2007, available at <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_10608.html>.

²⁷ Within France there is the same degree of inconsistency. The notion of “*la sentence internationale, qui n’est rattachée à aucun ordre juridique étatique*” applies to arbitral awards made outside of France. A “*sentence internationale*” made in France is connected to the French “*ordre juridique étatique*”: Articles 1492-1507 of the *Code de procédure civile* concerning international arbitration in France apply to a “*sentence internationale*” made in France. This also includes the annulment (“*annulation*”) of the judgment (Article 1504).

²⁸ Done at Geneva, 21 April 1961, United Nations, Treaty Series, Vol. 484, p. 364 No. 7041 (1963-1964).

²⁹ Text and commentary are available at <www.newyorkconvention.org>.

“3. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that:

(. . . .)

(g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph;

In the *Explanatory Note*, I explained this proposal as follows:

Ground (g) - Award Set Aside in Country of Origin

88. The action to set aside (annul, vacate) an arbitral award is contemplated by virtually all arbitration laws. The competence to consider and decide on the setting aside of an arbitral award belongs exclusively to the courts of the country where the award was made (the country of origin, which is equivalent to the place of arbitration). Setting aside is to be distinguished from enforcement which can be considered and decided by courts of any country insofar as it concerns the courts’ (territorial) jurisdiction.

89. Ground (g) adopts the solution offered by Article IX(2) of the European Convention on International Commercial Arbitration of 1961. Accordingly, the refusal of enforcement is limited to cases where the award has been set aside on grounds equivalent to grounds (a) to (e) of Article 5(3) of the Draft Convention. Grounds (a) to (e) of Article 5(3) correspond in turn to generally recognised grounds for setting aside an arbitral award resulting from international arbitration (*see* Article 34(2)(a) of the UNCITRAL Model Law).

90. The term “equivalent” is chosen since the wording of the grounds for setting aside may differ under domestic law. The expression refers to grounds that may be semantically different but are comparable in content and scope.

91. The solution proposed in ground (g) of Article 5(3) of the Draft Convention means, in particular, that a setting aside on (domestic) public policy or parochial grounds in the country of

origin is not a ground for refusal of enforcement under the Draft Convention.

92. Ground (g) offers a solution between two extreme positions. On the one hand, Article V(1)(e) of the New York Convention provides as a ground for refusal of enforcement an award that has been set aside on any ground in the country of origin. On the other hand, according to French courts, the setting aside of the award in the country of origin is no ground for refusal of enforcement at all in France. The French courts take that position outside an application of the New York Convention.

93. Ground (g) concerns the situation that the award has been set aside in the country of origin. If an action for setting aside the award is pending in the country of origin, the provisions of Article 6 apply.

94. Ground (g) does not include the expression “under the law of which” the award was made as it is the case for Article V(1)(e) of the New York Convention. Having regard to the observations made in section 36 above, the reference to the country where the award was made suffices. In practice, parties almost never agree to the applicability of arbitration law other than the law of the place of arbitration.”

The explanation quoted above provides a summary of what, in my opinion, applies *de lege lata*. Whether the proposed amendment of the text of the Convention possibly applies *de lege ferenda* remains an open question. But I suggest that we should start rethinking the present New York Convention of 1958.

Response to the Report: Issues to Consider Regarding Recognition and Enforcement of Arbitral Awards in India

*Zia Mody**
*Shreyas Jayasimha***

Arbitration in India enjoys a prominent place as an effective alternative to court-based litigation for the resolution of disputes, particularly in the field of commercial disputes. Arbitration in India was earlier governed by separate enactments, relating to the character of the arbitral proceeding: domestic arbitration proceedings were the concern of the Arbitration Act 1940, foreign awards issued in Contracting Parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ (“New York Convention”) were enforceable under the Foreign Awards (Recognition and Enforcement) Act 1961, and awards issued under the Geneva Convention on the Execution of Foreign Arbitral Awards² were enforceable under the Arbitration (Protocol and Convention) Act 1937.

However, particularly with respect to the arbitral proceedings covered by the Arbitration Act 1940, the grounds for challenge of awards were wide and thereby the courts in India could extensively examine the arbitral award. Such provision eroded the efficacy of the arbitration as a means of speedy redress of disputes. In response to arbitration being rendered a dysfunctional mechanism of dispute resolution, the Arbitration and Conciliation Act 1996 (“Arbitration Act”), was enacted to consolidate the enactments concerned with the enforcement of arbitral awards in India, and promote arbitration as an effective alternative for dispute resolution.

* Managing Partner, AZB & Partners (Mumbai, India)

** Partner, AZB & Partners (Bangalore, India)

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958, 330 U.N.T.S. 3)

² Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927, 92 L.N.T.S. 301)

I. PROMINENT ISSUES IN ARBITRATION IN INDIA

A. Requirement of Notification

Under the Arbitration Act, foreign awards issued in Contracting Parties of the New York Convention are enforceable as decrees in India when:

- the award is recognised as enforceable in the state where it has been made;
- the award is issued in a country notified by the Central Government as a reciprocating state;
- the court is satisfied that the award is enforceable under the Indian Arbitration Act.

When India became a signatory to the New York Convention, it reserved the right to limit the applicability of the New York Convention to the Contracting Parties of the Convention. However, it significantly departed from the ‘reciprocity’ reservation stipulated in the New York Convention by requiring that a foreign award issued in a Contracting Party to the New York Convention will be enforceable under the Arbitration Act when it has been issued in a country that has been notified by the Central Government as a Contracting Party to the New York Convention.

In pursuance of this provision, the list of notified countries includes Austria, Belgium, Botswana, Bulgaria, the Central African Republic, Chile, Cuba, Czechoslovak Socialist Republic, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Malaysia, Mexico, Morocco, Nigeria, the Netherlands, Norway, Philippines, Poland, Romania, San Merino, Singapore, Spain, Sweden, Switzerland, Syria, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Union of Soviet Socialist Republics, the United Kingdom and the United States of America. It should be noted that Mauritius is NOT included in this list of notified countries, and thus arbitral awards issued in Mauritius would not be enforceable as a decree under the Arbitration Act.

In this respect, the Malaysian Federal Court in *Lombard Commodities v. Alami Vegetable Oil Products Sdn. Bhd.*³ interpreted a similar requirement of notification as being evidence of a State being a

³ [2010] 2 MLJ 23

reciprocating State rather than a requirement for permitting enforcement of a foreign award. A similar ruling, or a legislative amendment to the Arbitration Act, will be required to encourage the use of arbitration in international commercial disputes.

B. Public Policy

Under the Arbitration Act, both domestic arbitral awards and foreign arbitral awards can be challenged on the ground of public policy. Domestic awards can be set aside under the provisions of Part-I of the Arbitration Act on this ground⁴, while foreign arbitral awards issued under the New York Convention can be refused recognition on this ground under Part-II of the Arbitration Act⁵. Part-I of the Arbitration Act ordinarily applies to domestic awards, while Part-II concerns itself with foreign awards. However, the Supreme Court has ruled that unless Part-I is expressly or implicitly excluded from applying to an arbitration agreement, the provisions of Part I are applicable to the arbitral proceedings conducted pursuant to such agreement.⁶ This has led to significant anomalies and unintended consequences, requiring nothing short of legislative changes.

The Supreme Court of India, in *Renusagar Power Company Limited v. General Electric Company*⁷, while considering an application to resist enforcement of a foreign award on the ground of public policy under the Foreign Awards (Recognition and Enforcement) Act 1961, ruled that the term should be narrowly construed to refer to (i) the fundamental policy of India, (ii) interests of India, or (iii) justice and morality. This narrow construction of public policy was applied in respect of foreign arbitral awards under the Arbitration Act as well. This narrow construction required the foreign award to be contrary to the national public policy of India, with such contraventions being fundamental to the foreign award, for the exception of 'public policy' to be applicable and brought into play.

However, subsequently, the Supreme Court of India expanded the definition of public policy to include 'patent illegality', for the purpose of domestic awards.⁸ This inclusion into the ground of public policy significantly expanded the scope of enquiry of the court, as it permitted the setting aside of awards that 'merely' violated a legal provision in India. This expanded definition was applied by the Supreme Court in a subsequent

⁴ Section 34 of the Arbitration Act

⁵ Section 48 of the Arbitration Act

⁶ *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432

⁷ *Renusagar Power Company Limited v. General Electric Company*, AIR 1994 SC 860

⁸ *ONGC v. SAW Pipes*, AIR 2003 SC 2629

case, *Venture Global*,⁹ to set aside a foreign award. Thus, pursuant to *Venture Global*, where the arbitration agreement outside India did not specifically exclude the applicability of Part-I of the Arbitration Act, a party resisting enforcement could employ the unhappily expanded definition of public policy to set aside a foreign arbitral award.

Recent developments in Indian law, however, suggest a favourable trend to scale back what is an anti-arbitration reading and construction of the ground of ‘public policy’ with respect to the enforcement of foreign arbitral awards. The Delhi High Court has ruled that with respect to applications resisting the recognition of foreign arbitral awards, the narrow construction of public policy should be adopted.¹⁰ The Delhi High Court has reverted to the earlier position as enunciated by the Supreme Court in *Renusagar Power Company Limited v. General Electric Company*¹¹ where the narrow construction of public policy was employed with respect to foreign arbitral awards.

Such a construction also appears to be in line with the intent of the legislature which is clear from the consultation paper on proposed amendments to the Arbitration Act, published by the Ministry of Law and Justice.¹² The paper proposes to restrict the construction of public policy in terms of the narrow construction with respect to foreign arbitral awards, and employ the expansive interpretation with respect to domestic award.

II. CONCLUSION

While recent developments in India suggest a trend toward reducing the role of the court in arbitral proceedings, particularly foreign arbitral proceedings, this is a space to be closely watched as the winds of change tend to blow rather swiftly. In practical terms, the real anxiety over the enforcement of foreign awards is not only whether such awards would be recognised and enforced, but the time and cost involved in the enforcement proceedings. In many cases, the time and cost considerations may compel successful foreign parties to cede the strategic advantage of having won a foreign arbitration, and enter into settlements with recalcitrant Indian parties so as to avoid prolonged enforcement proceedings.

⁹ *Venture Global Engineering v. Satyam Computer Services Limited*, AIR 2008 SC 1061

¹⁰ *Fittydent International GmbH v. Brawn Laboratories Ltd*, C.S. (OS) 2447/2000 and I.A. 12332/2008; *Penn Raquet v. Mayor International*, 2011(122) DRJ 117.

¹¹ *Supra*, note 7.

¹² Consultation Paper of the Ministry of Law and Justice, Government of India on the Proposed Amendments to the Arbitration and Conciliation Act 1996, available at <<http://lawmin.nic.in/la/consultationpaper.pdf>> (last visited May 19, 2011).

A Mauritian Perspective

*Anwar Moollan**

It has been said time and again during this conference that Mauritius is a blank canvas in the field of international arbitration. That is correct. In the specific field of recognition and enforcement, although we have incorporated the New York Convention into our laws in 2001 (through the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001*, hereinafter “the NYC Act”), we do not as yet have any relevant case law on recognition and enforcement under the New York Convention. That does not mean that we will not be able to follow what is occurring in other jurisdictions and I am sure we will draw from every possible source to be able to resolve the issues we have heard about this morning in line with international standards and practice. But it also means that I am treading on matters of which we – in Mauritius – still have very limited experience. I will accordingly only make some brief remarks, structured around four general points.

First, I will refer to the use made of Article I of the New York Convention in our new legislation. Secondly, I will discuss the express incorporation into Mauritian law of the 2006 UNCITRAL Recommendations, quite a novel matter if I understand it properly. Thirdly, I will talk about the potential use of Article VII of New York Convention. And fourthly, the subject Ms. Zia Mody has been addressing earlier, public policy.

The first point I would like you to draw attention to, is Section 40 of the *Mauritian International Arbitration Act 2008* (“the IAA”). It provides that the NYC Act shall apply to the recognition and enforcement of awards rendered under the IAA. So there is one simple and clear rule: whether you want to enforce a foreign arbitral award or an award rendered in Mauritius in an international arbitration under the Act, you go to the New York Convention. This allows for contracting states to the New York Convention to apply the regime of the Convention to arbitral awards not considered as domestic awards in the country where recognition and enforcement is sought, as indicated by the second sentence of Article I of the Convention.

So, this is how we have made use of Article 1 paragraph 1 of the New York Convention and specifically its second sentence. There is a

* Barrister-at-Law, Chambers of Sir Hamid Moollan Q.C. (Mauritius)

comparison between the new regime for international arbitration and the offshore sector here which becomes even more apposite. The result of arbitration proceedings rendered under the Act are awards that are given the same status as foreign awards, in the same way as an offshore company – while of course a Mauritian company – is treated in some ways as non-domestic, or “offshore”. We will to have see how the Supreme Court would deal with a situation where a challenge has been made under Sections 20 or 39 of the IAA and has failed, and recognition and enforcement is nonetheless sought in Mauritius under the New York Convention pursuant to Section 40 of the IAA. As noted in paragraph 128 of the *Travaux Préparatoires* to the IAA, it will be for the Supreme Court to determine to what extent questions of *res judicata*, issue estoppel *etc.*, may arise on any subsequent resistance to enforcement in Mauritius.

Secondly and perhaps unique to the IAA is the fact that the IAA expressly makes provision – in Section 43(b) – to take into account the Recommendation regarding the interpretation of Articles II(2) and VII(1) of the New York Convention which was adopted by UNCITRAL in July 2006. That is, from what I understand, a rather unique stand. Mauritius is the first country to have expressly included such a provision in its law. Section 43(b) of the IAA has amended Section 3 of the NYC Act which now reads as follows: “In applying the [New York] Convention, regard shall be had to the Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention adopted by UNCITRAL at its Thirty-Ninth session on 7 July 2006”. The Court will accordingly therefore be empowered to go and look into the whole of the discussion revolving around those two articles to be able to see how they ought to be applied in line with international practice. In other words, Mauritius will not have to address the issues which have been raised by some about the status of this UN interpretative instrument adopted by UNCITRAL as a matter of international law, and Mauritian courts will not have to struggle with the exact legal nature or status of the instrument, as they are simply enjoined to have regard to it as an interpretative aid under the NYC Act.

Importantly, this means in particular that the requirement of writing for an arbitration agreement under Article II of the New York Convention is to be interpreted under the NYC Act, in accordance with the 2006 Recommendation. The requirement of writing is defined as follows in Article II(2) of the New York Convention: “agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegraphs”. The 2006 Recommendation has updated this 1958 text, and recommends that

Article II, paragraph 2 of the Convention, be applied, recognising that the circumstances described therein are not exhaustive.

Therefore, the requirement of writing should in Mauritius be applied with the relaxation of that written requirement for which the Recommendation was issued by UNCITRAL. As has been explained in the *Travaux Préparatoires* of the UNCITRAL Recommendation, this means that in interpreting Article II of the New York Convention, the courts, and I am sure they will pay attention to that, can view the function of the writing requirement as being only an evidentiary one rather than a cautionary one. What matters is that the existence and the terms of the intention to arbitrate be clearly ascertainable, not that the parties be warned in any particular way of what has become today a usual manner of resolving business disputes. This is undeniably a further pro-arbitration stance. As for the requirement of writing in the IAA, the legislator has chosen Option 1 of the UNCITRAL Model Law, as amended in 2006. This means that one will still have to establish an agreement in writing, but that the mode of proof of such writing is relaxed to allow oral agreements evidenced in writing.

Thus, Section 4(2)(a) of the NYC Act recognises the following arbitration agreements: First, it recognises arbitration agreements concluded orally or by conduct, the contents of which are recorded in some written form. Secondly, those that are concluded through the exchange of mails, which is recognised expressly, and thirdly, those that are concluded by the exchange of pleadings. Further, there may be incorporation by reference.

These provisions of the NYC Act and of the IAA should greatly assist the Courts when dealing with issues of recognition of what is an agreement in writing under Article II(2) of the New York Convention, as well as for the purposes of the IAA.

The third point I wanted to make was regarding Article VII of the New York Convention. You have already heard from this panel about the possibility of a particular New York Convention signatory country applying a more favourable domestic regime to the recognition and enforcement of arbitral awards under Article VII of the New York Convention.

I do not believe this will happen in Mauritius. My brother, Salim, has expressed the view in the brief introduction to the IAA which he has prepared in the handbook published for this conference, that the provisions governing arbitration before the enactment of the International Arbitration Act 2008¹ which relate to the recognition and enforcement of foreign awards (*viz.* Articles 1028 to 1028(11) of the Mauritian *Code de Procédure*

¹ These were codified together in Book 3, Articles 1003 to 1028 of the Mauritian *Code de Procédure Civile*.

Civile) have been implicitly repealed by the incorporation of the New York Convention into Mauritian law.

While I have little doubt that this must have been the intention of those who enacted the NYC Act in 2001, I am not sure the answer is clear cut as a matter of construction. This is because Article VII of the New York Convention is premised on the basis that there may be co-existing regimes for the recognition and enforcement of foreign awards, one under the New York Convention and one under domestic law. It is premised on the fact that one can apply the domestic regime when it is more favourable. The enactment of the New York Convention into Mauritian law cannot therefore have had the effect of implicitly repealing the pre-existing regime, and I believe it would be safer to effect an express repeal by way of appropriate legislative action. Indeed, I understand that this is one of the “fixes” to the IAA which will be implemented in the near future.

But coming back to the recognition of annulled awards under Article VII of the Convention, this will not happen in Mauritius in any event because the domestic regime for recognition of arbitral awards is in fact more stringent and more strict than the regime under the New York Convention. See in particular Article 1028(3) *alinéa* 3 of the Mauritian *Code de Procédure Civile* which provides that “*une sentence arbitrale prononcée à l'étranger doit pour obtenir les exequatur de la Cour Suprême être définitives dans le pays où elle a été prononcée*”. Article 1028(4) *alinéa* 1 of the *Code de Procédure Civile* further expressly provides that, “*une sentence arbitrale prononcée à l'étranger ne peut obtenir un exequatur de la Cour Suprême lorsqu'elle avait fait l'objet d'une décision juridictionnelle d'annulation dans le pays où elle a été prononcée*”. This deals quite clearly with the matter even on the premise that the New York Convention has not abrogated these domestic provisions. There can accordingly be no prospect in Mauritius of the problem identified by Professor Albert Jan van den Berg, rearing its head.

Finally, I wish to touch on the issue of public policy. Mr. Zia Mody has very ably spoken of it today and we have heard of the difficulties by an earlier panel of defining public policy under Article V(2)(b) of the New York Convention. Ultimately, the fact is that this is a question for each country within certain restrictions intended by the Convention itself, including the distinction between international and domestic public policy. This is likely to be an important area for consideration by the Mauritian courts who are familiar with the term public policy, and we need to reconsider it within the context of the IAA. What I would say is that if necessary, the Mauritian Courts will have no difficulty in distinguishing between, on the one hand, those values which deserve specific protection

regarding acts closely connected to Mauritius – what our French colleagues have termed the *ordre public interne* – and, on the other hand, those values which require protection even where the matter has no such connection – the French *ordre public international*. This is a matter where as with arbitrability, I respectfully agree with Professor Seraglini, that trust in our courts is necessary.

I do not say this only because I appear before our Courts, but my practice of Mauritian law and experience before the Mauritian Courts leaves me in no doubt that that trust will be repaid. Let me just try to pick an example which may seem extreme. You have all been in Mauritius for a few days, and many of you of course live in this country. You have seen, or know, the intricate social structure whereby we are people of various origins and of various religions. Languages also are not uniform except for Creole which we all speak. Out of the very intricate and delicate social fabric, there has emerged a consensus on certain matters which all Mauritians now agree to touch public morality. As a matter of domestic Mauritian law, public morality is something which is fiercely protected. Take the example of pornography. We have a very, very strong policy against pornography. However, I am not sure that this will mean that Mauritius will refuse the recognition and enforcement of an award relating to trade in pornographic material, where that trade was lawful in the countries where it was conducted.

If the trade in question was perfectly lawful in the countries of performance of the relevant agreement, the enforcement of such an award would itself in no way adversely impact on the morality of the public and of Mauritian citizens themselves. In other words, domestic public policy against pornography does not rise to the level of truly international public policy. By contrast bribery or corruption may well rise to that level.

This reminds me of the anecdote of the Welshman who was being prosecuted before a Welsh Court. At the end of his address to the Jury, the Welsh defending lawyer asked if he could say a few words in Welsh to the Jury and he was given leave by the Judge. He said a few words and after five minutes the Jury came back and dismissed the case to the great astonishment of the Judge. He turned to his clerk and said, “what did he say just before the recess?” The clerk answered: “oh well, My Lord, he said the Police Officer is English, the Prosecutor is English, the Judge is English, do your duty”. I am quite sure that Mauritius will know not to adopt such parochial attitudes in matters of international arbitration.

PANEL V

**RETHINKING THE NEGOTIATION
OF INVESTMENT TREATIES**

Introductory Remarks

*Meg Kinnear**

I would like to start by thanking our Mauritian hosts both for this terrific conference as well as the chance to visit your very beautiful country.

The next two presentations are going to shift the focus to international investment arbitration and international investment law. As you may know, there are some significant differences between international commercial arbitration and international investment arbitration. Most of the international investment arbitration cases are based on what is known as a bilateral investment treaty and you will hear the shortened form of that, which is a “BIT”. Essentially, a BIT is a treaty between two States where each State agrees to treat the investors of the other State consistent with specific legal standards. The treaty parties further agree that disputes about the host State’s treatment of the foreign investor can go to a neutral international tribunal. Of course, the policy rationale behind this is to promote investor confidence by guaranteeing treatment in accordance with treaty undertakings and offering recourse to a neutral international tribunal to resolve disputes that arise. In turn, this should enhance overall confidence about investing in the host State and, at the end of the day, provide jobs, fuel the economy, and encourage the transfer of technology. The most usual promises that you will find in these treaties are first, the promise not to expropriate without fair compensation; second, a promise to treat foreign investors in a fair and equitable manner; and third, a promise not to discriminate against the foreign investor on the basis of nationality.

In the last 20 years we have seen a dramatic increase in the number of BITs. To give you an idea of the order of magnitude, towards the late 1980’s there were about 400 known BITs; today there are about 2700 and counting. So there has been a remarkable proliferation of these treaty instruments. Virtually all BITs have a special dispute settlement mechanism known as investor-State dispute settlement. Investor-State dispute settlement gives the foreign investor (who is often an individual or a corporation) the right to directly sue the host state in which they are investing. In fact, the BIT generally contains the host State’s advance consent to arbitration, and all the investor has to do to crystallise the arbitration is to start the proceedings. So it is a very interesting mix of commercial arbitration and public international law.

* Secretary-General, International Centre for Settlement of Investment Disputes (ICSID), World Bank (Washington, D.C.)

You will probably not be surprised to hear that the increase in BITs with investor-State dispute settlement clauses has also expanded the case law interpreting these treaties. Roughly 50% of all investor-State cases have been decided in the last 15 years. What that means is that we are in a very exciting, evolving and dynamic period in investor-State arbitration, and some of this jurisprudence has been controversial. In particular, some have suggested that the way in which international investment tribunals interpreted the obligations in BITs does not accurately reflect what the State assumed it had negotiated. As a result, a number of States have thought about whether they need to amend their existing treaties or whether they need to change the wording and approach of some of the new BITs that they are negotiating.

This morning our first panel will address this dynamic between case interpretation and treaty drafting. The second panel will address the actual obligations, or the substantive standards, that States undertake in their bilateral investment treaties and we will look at the extent to which a government should have freedom to regulate and freedom to act before it engages liability under a bilateral investment treaty. The organisers of the conference have pulled together an absolutely top-notch set of panellists, so you will have a very expert and interesting presentation this morning.

It is my privilege to introduce the first panel of experts. First, Andrea Menaker, who is counsel at White & Case LLP and a leading practitioner of investor-State arbitration. Andrea was formerly counsel to the United States Department of State where she defended against NAFTA Chapter Eleven cases. In the course of that work Andrea gained a lot of experience drafting international investment agreements, including the United States model BIT and the CAFTA. After Andrea, Emmanuel Gaillard, will respond to Andrea's report and he has been asked to respond in particular from the perspective of the foreign investor. Professor Gaillard is the head of Shearman & Sterling's International Arbitration Practice and he is one of the foremost investor-State counsel and arbitrators, so again a wonderful presentation can be expected. Makhdoom Ali Khan is going to give a State perspective on the jurisprudence and interpretation of the BITs. Mr. Ali Khan is the former Attorney General of Pakistan and has significant experience in that capacity both negotiating BITs as well as defending against BIT claims. He is currently in private practice and also acts as an arbitrator in a number of investor-State disputes. Last but not least, we are delighted that Ali Mansoor is here to give us a Mauritian perspective on these issues. Mr. Mansoor is currently the Financial Secretary at the Ministry of Finance and Economic Development in Mauritius and has wide experience in international economic organisations including the World

Bank and the International Monetary Fund. So we have a terrific panel and I will now pass it over to Andrea to deliver the main report.

Report to the Conference

Andrea J. Menaker*

I. INTRODUCTION

This paper examines how States have been rethinking the negotiation of investment treaties in light of the explosion of investor-State cases¹ and controversy surrounding the interpretation of some of the provisions that appear in many of those agreements. As will be seen, although certain States have reacted to these developments by denouncing the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“the ICSID Convention”) or withdrawing from particular bilateral investment treaties (“BITs”), most States have taken a more moderate approach and have focused their efforts on renegotiating the language of the investment treaty provisions that have generated the most controversy.

To date, two States have withdrawn from ICSID.² On May 2, 2007, Bolivia provided notice of its denunciation of the ICSID Convention.³ In accordance with Article 71 of the Convention, that denunciation became effective six months later,⁴ *i.e.*, on November 3, 2007. The following year,

* Partner, White & Case LLP (Washington, D.C.)

¹ Of the 357 known treaty-based cases at the end of 2009, 202 of them (57%) have been initiated since 2005. See UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Issue Note No. 1, 2 (2010).

² See generally Andrea J. Menaker, *What the Explosion of Investor-State Arbitrations May Portend for the Future of BITs*, in *THE FUTURE OF INVESTMENT ARBITRATION* 161 (Catherine A. Rogers, Roger P. Alford, eds., OUP 2009).

³ ICSID, List of Contracting States and Other Signatories of the Convention (as of 7 Jan. 2010), [available at](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

⁴ *Id.*; ICSID Art. 71 (“Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.”). One month before the effective date of Bolivia’s denunciation, a Dutch claimant filed an ICSID claim against Bolivia. See *E.T.I. Euro Telecom Int’l N.V. v. Plurinational State of Bolivia*, ICSID Case No. ARB/07/28, List of Concluded Cases at <http://icsid.worldbank.org>. Although Bolivia initially objected to jurisdiction in the case on the basis of its denunciation of the ICSID Convention, it subsequently agreed to discontinue the case and to submit the dispute to an identical panel of arbitrators under *ad hoc* arbitration rules. See Sebastian Perry, *Bolivia Asks U.S. Court to Block Telecoms Claim*, *GLOBAL ARB. REV.*, 12 October 2010, [available at](http://www.globalarbitrationreview.com/news/article/28806/bolivia-asks-us-court-block) <http://www.globalarbitrationreview.com/news/article/28806/bolivia-asks-us-court-block>.

Ecuador terminated nine BITs, including those with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Uruguay, and Romania.⁵ Ecuador also amended its constitution to restrict its Government from concluding any international treaties that provide consent to arbitration of investor-State disputes, except in cases brought by nationals of Latin American States to be arbitrated in regional fora.⁶ Ecuador provided notice of its denunciation of the ICSID Convention on July 6, 2009.⁷ Thereafter, in September 2009, Ecuador's President terminated BITs with Argentina, Bolivia, Canada, Chile, China, France, Germany, the Netherlands, Sweden, Switzerland, the U.K., the U.S., and Venezuela.⁸ Based on the 2008 constitutional amendment, Ecuador's Constitutional Court recently issued two decisions finding the State's BITs with Germany and the U.K. to be unconstitutional. Similar decisions may follow for Ecuador's other BITs.⁹

Other States also have terminated specific investment treaties. For example, Venezuela notified the Netherlands of its intent to terminate their BIT, which thus expired according to its terms on November 1, 2008,¹⁰ and

telecoms-claim/. Later, however, Bolivia filed a complaint in U.S. District Court seeking to enjoin the *ad hoc* proceeding and also reportedly pursued criminal charges against its former Minister of Legal Defense for brokering the agreement to submit the dispute to *ad hoc* arbitration. See Bolivia's Application to Enjoin E.T.I. (Telecom Italia) Arbitration, Compl., *Bolivia v. E.T.I.*, Case No. 1:10-cv-01704-RBW (D.D.C. October 5, 2010), available at <http://www.iareporter.com/downloads/20101010>. The claim has since been settled. See Sebastian Perry, *Telecom Italia Wins Payout From Bolivia*, GLOBAL ARB. REV., 12 November 2010, available at <http://www.globalarbitrationreview.com/news/article/28899/telecom-italia-wins-payout-bolivia/>.

⁵ UNCTAD, *Recent Developments in International Investment Agreements (2008-June 2009)*, IIA MONITOR NO. 3, 6 (2009); see also Luke Eric Peterson, *Ecuadorian President Reportedly Asks Congress to Terminate 13 BITs: Move Comes on Heels of Earlier Termination of Multiple BITs*, IA REPORTER, 30 October 2009, available at http://www.iareporter.com/articles/20091124_8.

⁶ *Id.*; see also Eric Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*, 19 AM. REV. INT'L ARB. 269 (2008).

⁷ ICSID, List of Contracting States and Other Signatories of the Convention (as of 27 December 2010), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

⁸ Gillman, *The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008*; Luke Eric Peterson, *Ecuadorian President Reportedly Asks Congress to Terminate 13 BITs*; Sebastian Perry, *Ecuador Champing at the BITs*, GLOBAL ARB. REV., 11 August 2010, available at <http://www.globalarbitrationreview.com/news/article/28642/>.

⁹ Perry, *Ecuador Champing at the BITs*.

¹⁰ See, e.g., Luke Eric Peterson, *Venezuela surprises the Netherlands with termination notice for BIT*, 1(1) IA REPORTER, 16 May 2008.

it has been reported that in 2008 the El Salvador-Nicaragua BIT was terminated as well.¹¹ Russia also announced in July 2009 that it would not become a Party to the Energy Charter Treaty (“ECT”), which it had signed but not ratified, thereby terminating the treaty’s provisional application.¹²

It is not yet clear whether these or other States will withdraw entirely from the investment treaty arbitration process. In a “Public Statement on the International Investment Regime” dated August 31, 2010, 50 legal academics encouraged States to do so.¹³ This Statement contended that “[a]wards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties” that “have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples.”¹⁴ The Statement took particular issue with recent decisions relating “to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation (“MFN”) treatment, non-discrimination, and fair and equitable treatment,” claiming that all of these concepts “have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act.”¹⁵ Based on this perceived unfairness, the Statement argued that “[t]here is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose.”¹⁶ The Statement thus advised States, among other things, to “review their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above,” and to “take steps to replace or curtail the use of investment treaty arbitration.”¹⁷

¹¹ UNCTAD, *Recent Developments in International Investment Agreements (2008-June 2009)* at 6.

¹² See, e.g., Rafael Leal-Arcas, *Towards the Multilateralization of International Investment Law*, 6 (10) JOURNAL OF WORLD INVESTMENT & TRADE (2009) (citing Emmanuel Gaillard, Letter to the Financial Times, 18 August 2006, available at <http://www.shearman.com/files/upload/IA-081809-FINANCIALTIMES-Russia-cannot-walk-away-from-legal-obligations.pdf>); see also Marinn F. Carlson and Joshua M. Robbins, *Russia Withdrawing from Energy Charter Treaty*, 3 September 2009, available at <http://arbitration.practicallaw.com/7-422-4842>.

¹³ Public Statement on the International Investment Regime, 31 August 2010, available at http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf.

¹⁴ *Id.* ¶ 5.

¹⁵ *Id.* ¶ 5.

¹⁶ *Id.* ¶ 8.

¹⁷ *Id.* ¶ 14.

With the few exceptions noted above, the international community as a whole has reacted much more moderately to the controversial aspects of investment treaty arbitration and has not resorted to any wholesale abandonment of this regime. In fact, in 2009, 211 new international investment agreements were concluded, including 82 new BITs.¹⁸ At the end of 2009, 2,750 BITs and 295 other international investment agreements were in force.¹⁹ Based on available information, the Czech Republic concluded the greatest number of new BITs (eight) in 2008,²⁰ and Canada concluded the greatest number of new BITs (four) in 2009.²¹ Notably, the Czech Republic and Canada are two of the seven States that have had the most investment-treaty arbitration claims filed against them.²² It therefore appears that even States that frequently have been respondents in the arbitration process have chosen, by and large, to continue negotiating investment treaties rather than to withdraw from them.

Some renegotiation of BITs has taken place in the context of issues specific to the European Union (“EU”). The Czech Republic and Romania, for instance, were especially active in renegotiating BITs, largely as a consequence of their accession to the European Union.²³ The European Court of Justice (“ECJ”) also ordered three member states – Finland, Austria, and Sweden – to renegotiate or terminate BITs that were deemed to be incompatible with the EC Treaty.²⁴

¹⁸ UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* 81 (2010).

¹⁹ *Id.*

²⁰ UNCTAD, *Recent Developments in International Investment Agreements (2008-June 2009)* at 13-14.

²¹ *Id.* At the same time, Canada also completed negotiations with Bahrain, Hungary, Kuwait, Madagascar, and Slovakia to conclude new foreign investment protection agreements, and it is in negotiations to do the same with China, Indonesia, Mongolia, Poland, Tanzania, Tunisia, and Vietnam. See Foreign Affairs and International Trade Canada, Canada’s Foreign Investment Promotion and Protection Agreements (“FIPAs”): Canada’s FIPA Program, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx>.

²² UNCTAD, *Latest Developments in Investor-State Dispute Settlement* at 13; see also Andrea J. Menaker, *What the Explosion of Investor-State Arbitrations May Portend for the Future of BITs* at 159-160 (noting that Canada, Mexico, and the United States have continued to negotiate new investment treaties notwithstanding their experiences as respondents in multiple NAFTA Chapter Eleven cases).

²³ UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* at 86.

²⁴ *Id.*; see also N. Bernasconi-Osterwalder & L. Johnson, *Belgium’s Model Bilateral Investment Treaty: A Commentary* 8 (2010 Draft; International Institute for Sustainable Development) (noting the ECJ decision against Finland); Leal-Arcas, *Towards the Multilateralization of International Investment Law* (citing *Case-C-205/06 Commission v. Republic of Austria*; *Case C-249-06 Commission v. Kingdom of Sweden*; *Case C-118/07 Commission v. Republic of Finland*). Under a draft regulation, the European Commission

For the most part, in order to address issues that have arisen in recent arbitral awards, States have renegotiated their BITs, revised their model BITs, or added new language to recent agreements. Such revisions have focused on issues relating to fair and equitable treatment (“FET”), MFN treatment, and expropriation, as well as umbrella clauses and essential security interest provisions. Some of the changes that have been made by States to these various provisions are discussed below.

II. FAIR & EQUITABLE TREATMENT

The fair and equitable treatment standard “is a core concept embedded in nearly all international investment agreements.”²⁵ Unlike national or MFN treatment, it is an absolute, rather than a relative, standard of treatment in the sense that a host State’s obligation to accord such treatment is not necessarily met by providing treatment equivalent with that given to investments of its own nationals or other foreign investors.²⁶ FET is the most frequently and successfully invoked protection in investment arbitration,²⁷ often because the test for expropriation is too difficult to meet. It therefore has become a “preferred way for tribunals to provide a remedy” to aggrieved investors.²⁸

The standard is phrased in vague terms, and there exists an important divergence as to whether FET reflects the minimum standard of treatment under customary international law or a standard autonomous from and additional to that contained in customary international law.²⁹ This variance is illustrated in some early arbitral decisions made under Chapter Eleven of the North American Free Trade Agreement (“NAFTA”). In those

authorized EU member states to retain their existing agreements, subject to review, but also reserved the right to require the member states to include “appropriate clauses, for example with respect to (a) the termination of the agreement in the event of the conclusion of a subsequent agreement between the Union, or the Union and its Member States, on the one hand, with the same third country on the other hand. . . , (b) transfer provisions or (c) most-favored nation treatment with a view to ensuring equal treatment of all EU investors in the relevant third country.” http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf.

²⁵ JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* 218 (OUP 2010).

²⁶ See, e.g., Katia Yannaca-Small, *Fair and Equitable Treatment Standard*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 385 (Katia Yannaca-Small, ed., OUP 2010).

²⁷ See SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 218 (citing RUDOLPH DOLZER AND CHRISTOPHER H. SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 119 (OUP 2008)).

²⁸ Yannaca-Small, *Fair and Equitable Treatment Standard* at 385.

²⁹ See, e.g., SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 222.

cases, the NAFTA Parties advanced the position that the FET standard was reflective of the customary international law minimum standard of treatment.³⁰ Some tribunals, however, adopted an interpretation that the FET standard required treatment in addition to or beyond the customary international law minimum standard.³¹ In July 2001, the NAFTA Parties, through the NAFTA Free Trade Commission (“FTC”), issued an interpretation affirming that the Article prescribed treatment in accordance with the minimum standard of treatment under customary international law.³²

The NAFTA States have incorporated this interpretation into their recent BITs and free trade agreements (“FTAs”). For example, the 2004 Canadian Model Foreign Investment Promotion and Protection Agreement (“FIPA”) reproduces essentially verbatim the NAFTA Interpretation, providing that:

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

³⁰ See, e.g., *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Fourth and Fifth (Article 1128) Submission of the United States of America, dated 1 November 2000 and 1 December 2000, respectively, available at <http://www.state.gov/s/l/c3747.htm>; Article 1128 Submission of the United Mexican States, dated 5 November 2000, available at <http://www.naftaclaims.com/Disputes/Canada/Pope/PopeMexicoArticle1128> Sub SecondPhaseMeritsIssues.pdf; Post-Hearing Article 1128 Submission of the United Mexican States, dated 1 December 2000, available at <http://www.naftaclaims.com/Disputes/Canada/Pope/PopeMexicoArticle1128PostHearingSubReSecondPhaseMerits.pdf>; see also Andrea J. Menaker, *Treatment of Non-Disputing State Party Views in Investor-State Arbitration*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION, THE FORDHAM PAPERS 71-72 (2008) (Arthur Rovine ed., Martinus Nijhoff Publ. 2009) .

³¹ See, e.g., *Pope & Talbot, Inc. v. Canada*, UNCITRAL (Award on the Merits of Phase 2 of 10 April 2001) ¶¶ 105-18.

³² See Interpretation of the Free Trade Commission of Certain Chapter Eleven Provisions, dated 31 July 2001, <http://www.state.gov/documents/organization/38790.pdf>; see also generally Andrea J. Menaker, *Treatment of Non-Disputing State Party Views in Investor-State Arbitration* at 64-67.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.³³

Canada has included this language in its recent FIPAs with Peru (2006)³⁴, Latvia (2009),³⁵ the Czech Republic (2009),³⁶ Romania (2009),³⁷ and the Slovak Republic (2010),³⁸ as well as in its recent FTAs with Colombia (2008),³⁹ Peru (2009),⁴⁰ and Panama (2010).⁴¹ The minimum standard of treatment article in the investment chapter of the draft text of Canada's pending Comprehensive Economic and Trade Agreement with the EU also mirrors the model FIPA formulation.⁴²

Similarly, some of Mexico's recent bilateral investment treaties have tied FET to the minimum standard of treatment under customary international law and clarified that the standard does not require treatment in addition to or beyond that standard, and that a breach of another provision of the agreement or another treaty does not, in and of itself, establish a breach of the FET article. This type of provision is included in

³³ Model FIPA of Canada (2004), Art. 5, Minimum Standard of Treatment.

³⁴ Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments, 14 November 2006, *entered into force* 20 June 2007, Art. 5 (suspended following entry into force of the parties' Free Trade Agreement).

³⁵ Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, 5 May 2009 (not in force) Art. 2(2) (hereinafter "Canada-Latvia FIPA").

³⁶ Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments, 6 May 2009 (not in force), Art. 3(1) (hereinafter "Canada-Czech Republic FIPA").

³⁷ Agreement between the Government of Canada and the Government of Romania for the Promotion and Protection of Investments, 8 May 2009 (not in force), Art. 2(2) (hereinafter "Canada-Romania FIPA").

³⁸ Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, 20 July 2010 (not in force), Art. 3(1) (hereinafter "Canada-Slovak Republic FIPA").

³⁹ Free Trade Agreement between Canada and the Republic of Colombia, 21 November 2008 (not in force), Art. 804.

⁴⁰ Free Trade Agreement between Canada and the Republic of Peru, 29 May 2008, *entered into force* 1 August 2009, Art. 804 (hereinafter "Canada-Peru FTA").

⁴¹ Free Trade Agreement between Canada and the Republic of Panama, 14 May 2010 (not in force), Art 9.06 (hereinafter "Canada-Panama FTA").

⁴² See Draft Consolidated Text dated 13 January 2010, Article 10..5, *available at* http://www.bilaterals.org/IMG/doc_Draft_EU-Canada_FTA_12_Jan_2010.doc.

Mexico's BITs with the United Kingdom (2006),⁴³ Panama (2005),⁴⁴ Trinidad and Tobago (2006),⁴⁵ as well as in its FTA with Japan (2004).⁴⁶ Mexico's 2008 BIT with China is similar to these other agreements in substance, but in lieu of using the terminology of "customary international law," the article uses the well-accepted definition of customary international law as "[consistent] State practice and *opinio juris*." The FET article thus provides that the concepts of FET and full protection and security "do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidence of State practice and *opinio juris*". Then, echoing the NAFTA Interpretation, the article adds that "a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."⁴⁷

The United States 2004 Model BIT formulation is similar to the NAFTA Interpretation and Canada's FIPA, but it also provides that the FET standard "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."⁴⁸ The

⁴³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, 12 May 2006, *entered into force* 25 July 2007, Art. 3 (hereinafter "U.K.-Mexico BIT").

⁴⁴ Agreement between the United Mexican States and the Republic of Panama for the Promotion and Reciprocal Protection of Investments, 11 October 2005, *entered into force* 14 December 2006, Art. 6(2).

⁴⁵ Agreement between the Government of the United Mexican States and the Government of the Republic of Trinidad and Tobago for the Promotion and Reciprocal Protection of Investments, 3 October 2006, *entered into force* 16 September 2007, Art. 5.

⁴⁶ Agreement between Japan and the United Mexican States for Strengthening of the Economic Partnership, 17 September 2004, *entered into force* 1 March 2005, Art. 60 (hereinafter "Japan-Mexico FTA").

⁴⁷ Agreement between the Government of the People's Republic of China and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, 11 July 2008, *entered into force* 6 June 2009, Art. 5 (hereinafter "China-Mexico BIT").

⁴⁸ Model BIT of the United States (2004), Art. 5. Additionally, in a footnote, the Model clarifies that the FET provision must be interpreted in accordance with Annex A, which provides that, "The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. *Id.*, No. 9. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens." See *id.*, Art. 5; see also generally Andrea J. Menaker, *Benefiting From Experience: Developments in the*

U.S. has used this formulation in its recent BITs with Uruguay (2005)⁴⁹ and Rwanda (2008),⁵⁰ as well as in its FTAs with Chile (2003),⁵¹ Singapore (2003),⁵² Morocco (2004),⁵³ Oman (2006),⁵⁴ Peru (2006),⁵⁵ Colombia (2006),⁵⁶ Panama (2007),⁵⁷ and Korea (2007),⁵⁸ as well as in the CAFTA-DR (2004).⁵⁹ This type of provision also appears in the 2008 Canada-Colombia FTA.⁶⁰

Similar clarifications of the FET standard have begun to spread beyond the practice of the three NAFTA States, and are now employed by countries such as China.⁶¹ For example, much like China's 2008 BIT with

United States' Most Recent Investment Agreements, 12 U.C. DAVIS J. INT'L LAW & POLICY 1, 123 (2005)

⁴⁹ Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 4 November 2005, *entered into force* 1 November 2006, Art. 5(2)(a) (hereinafter "United States-Uruguay BIT").

⁵⁰ Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, 19 February 2008 (not in force), Art. 5(2)(a).

⁵¹ United States-Chile Free Trade Agreement, 9 June 2003, *entered into force* 1 January 2004, Art. 10.4 (hereinafter "United States-Chile FTA").

⁵² In lieu of an annex defining customary international law, the parties exchanged letters on the same subject matter. See Letter from Robert B. Zoellick to George Yeo, 6 May 2003 and Letter from George Yeo to Robert B. Zoellick, 6 May 2003, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file665_4057.pdf.

⁵³ United States - Morocco Free Trade Agreement, 15 June 2004, *entered into force* 1 January 2006, Art. 10.5 (hereinafter "United States-Morocco FTA").

⁵⁴ Agreement between the Government of the United States of American and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, 19 January 2006, *entered into force* 1 January 2009, Art. 10.5 (hereinafter "United States-Oman FTA").

⁵⁵ United States-Peru Trade Promotion Agreement, 12 April 2006, *entered into force* 1 Feb. 2009, Art. 10.5 (hereinafter "United States-Peru FTA").

⁵⁶ United States-Colombia Trade Promotion Agreement, 22 November 2006 (not in force), Art. 10.5 (hereinafter "United States-Colombia FTA").

⁵⁷ United States-Panama Trade Promotion Agreement, 28 June 2007 (not in force), Art. 10.5.

⁵⁸ United States-Korea Free Trade Agreement, 30 June 2007 (not in force), Art. 11.5.

⁵⁹ Dominican Republic-Central America - United States Free Trade Agreement, 5 August 2004, *entered into force* 1 January 2009, Art. 10.5 (hereinafter "CAFTA-DR").

⁶⁰ Canada-Colombia FTA, Art. 805.

⁶¹ See Jose E. Alvarez, *The Evolving BIT*, 7(1) TRANSNATIONAL DISPUTE MANAGEMENT ("TDM") (2010) (noting that the "provisions of the 2004 U.S. Model appear to be influencing other states, particularly China" and citing Stephan W. Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroads*, 10(2) JOURNAL OF WORLD INVESTMENT & TRADE 189 (2009), for proposition that the "Chinese BIT program has been evolving, with some understandable lag times, to emulate the current U.S. model.").

Mexico, China's 2008 FTA with New Zealand provides that "[i]nvestments of investors of each Party shall at all times be accorded FET and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law."⁶² This FTA also clarifies that FET includes the obligation, with regard to general principles of law, not to deny justice, and that a breach of another BIT article does not constitute a breach of the FET article.⁶³

Additionally, Japan has recently concluded BITs and FTAs that tie FET to the minimum standard of treatment under customary international law, similar to the provisions adopted by the NAFTA Parties. Its 2008 BIT with Laos, for example, includes interpretive notes providing that FET:

"[p]rescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. . . . A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach of this Article."⁶⁴

Similar formulations appear in Japan's Economic Partnership Agreements with Chile (2007),⁶⁵ Brunei (2007),⁶⁶ Thailand (2007),⁶⁷ the Philippines (2006),⁶⁸ and Mexico (2004).⁶⁹

⁶² Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China, 7 April 2008, *entered into force* 1 October 2008, Art. 143 (hereinafter "New Zealand-China FTA").

⁶³ *Id.*

⁶⁴ Agreement between Japan and the Lao People's Democratic Republic for the Liberalisation, Promotion and Protection of Investment, 3 August 2008, *entered into force* 3 August 2009, Art. 5 (hereinafter "Japan-Laos BIT").

⁶⁵ See Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership, 27 March 2007, *entered into force* 1 September 2007, Art. 75 (hereinafter "Japan-Chile EPA") (additionally clarifying that, "The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.").

⁶⁶ See Agreement between Japan and Brunei Darussalam for an Economic Partnership, 18 June 2007, *entered into force* 1 December 2008, Art. 59 (but not providing that a breach of another provision does not establish a breach of the minimum treatment obligation).

⁶⁷ See Agreement between Japan and the Kingdom of Thailand for an Economic Partnership, 3 April 2007, *entered into force* 1 May 2009, Art. 95.

Several of Singapore's recent FTAs also obligate the parties to provide the international minimum standard of treatment in relation to FET. For example, Singapore's 2005 FTA with Korea obligates the parties to provide treatment "in accordance with the customary international law minimum standard of treatment, including fair and equitable treatment and full protection and security."⁷⁰ The article further provides that FET does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard treatment of aliens" and does not "create additional substantive rights." The article also clarifies that FET includes the obligation "not to deny justice in criminal, civil or administrative adjudicatory proceedings," that the customary international law minimum standard of treatment of aliens "refers to all customary international law principles that protect the economic rights and interests of aliens," and that a breach of another provision of the agreement does not establish breach of the FET article. The same language is found in Singapore's 2006 FTA with Panama and its 2008 FTA with Peru.⁷¹

Another example of an investment treaty referencing the minimum standard of treatment under customary international law in the FET provision is the 2009 India-Korea Comprehensive Economic Partnership Agreement, which provides that:

"[E]ach Party shall accord to an investment of an investor of the other Party in its territory 'fair and equitable treatment' and 'full protection and security.' The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."⁷²

⁶⁸ See Agreement between Japan and the Republic of the Philippines for an Economic Partnership, 9 September 2006, *entered into force* 1 November 2008, Art. 91 (hereinafter "Japan-Philippines EPA").

⁶⁹ See Japan-Mexico FTA, Art. 60.

⁷⁰ Singapore-Korea Free Trade Agreement, 4 August 2005, *entered into force* 2 March 2006, Art. 10.5 (hereinafter "Singapore-Korea FTA").

⁷¹ Panama-Singapore Free Trade Agreement, 1 March 2006, *entered into force* 24 July 2006, Art. 9.5 (hereinafter "Panama-Singapore FTA"); Peru-Singapore Free Trade Agreement, 29 May 2008, *entered into force* 1 August 2009, Art. 10.5 (hereinafter "Peru-Singapore FTA"). Art. 10.5 of the Peru-Singapore Free Trade Agreements includes a footnote clarifying that "[c]ustomary international law results from a general and consistent practice of States that they follow from a sense of legal obligation." See *id.*

⁷² India-Korea Comprehensive Economic Partnership Agreement, 7 August 2009, *entered into force* 1 January 2010, Art. 10.4 (hereinafter "India-Korea CEPA").

The article continues to clarify that “[t]he obligation in paragraph 1 includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process,” and that a “determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”⁷³

At least two other countries’ model BITs include similar formulations. For example, the 2007 Colombia Model BIT provides for FET “in accordance with customary international law, and full protection and security”⁷⁴ The Model further clarifies that FET does “not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law.”⁷⁵ And, like other formulations, the Model provides that a breach of another BIT provision “does not imply that the minimum standard of treatment of aliens has been breached.”⁷⁶ FET is further clarified in that Agreement to include the “prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process”⁷⁷ In a more concise formulation, Norway’s now-shelved 2007 draft Model provides that the parties shall accord to investors and their investments “treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”⁷⁸

In the wake of uncertainty concerning the meaning of FET, States also have taken steps to restrict the scope of this obligation. For example, in their 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation, China and the Association of Southeast Asian Nations (“ASEAN”) appear to have significantly curtailed the scope of the obligation by providing that “fair and equitable treatment refers to the obligation of each Party not to deny justice in any legal or administrative proceedings.”⁷⁹

⁷³ *Id.*

⁷⁴ Model BIT of the Republic of Colombia (2007), Art. 3.

⁷⁵ *Id.*, Art. 3(4).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Draft Model BIT of Norway (2007), Art. 5. Norway’s draft model BIT was released to the public in December 2007, but received such polarized feedback that the country “abandoned” its model indefinitely. See Damon Vis-Dunbar, *Norway shelves its draft model bilateral investment treaty*, Investment Treaty News, 8 June 2009, available at <http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx>.

⁷⁹ Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People’s Republic of China and the Association of Southeast

Finally, although, as noted above, both Singapore and India have entered into recent international investment agreements that include the obligation to provide FET and clarify that obligation in terms similar to those adopted by the NAFTA Parties,⁸⁰ in their 2005 Comprehensive Economic Cooperation Agreement (“CECA”), those two States omitted an FET clause altogether.⁸¹ Indeed, that Agreement provides that: “Nothing in this Chapter shall be construed to prevent (a) a Party or its regulatory bodies from adopting, maintaining or enforcing any measure on a non-discriminatory basis; or (b) the judicial bodies of a Party from taking any measures; [sic] consistent with this Chapter that is in the public interest, including measures to meet health, safety or environmental concerns.”⁸² And while the FET obligation is understood to encompass the obligation not to deny justice, the Singapore-India Agreement provides, in an article entitled “Access to Courts of Justice,” simply for non-discriminatory treatment with respect to access to courts, administrative agencies, and tribunals.⁸³ To date, it does not appear that this more drastic approach has been emulated by other States concluding investment agreements.

III. FULL PROTECTION AND SECURITY

As seen above, the obligation to accord full protection and security is typically encompassed in the FET provision. While the FET standard has received the most attention from parties and tribunals, some debate likewise has ensued in connection with the full protection and security obligation. “Traditionally, tribunals have interpreted provisions guaranteeing protection and security as protecting investors and their investments from physical injury caused by the actions of host governments, their agents, or third parties.”⁸⁴ Several tribunals, however, have held the term’s scope “to include protection against allegedly unjustified governmental actions that injure an investor’s legal rights but cause no physical injury.”⁸⁵

Asian Nations, 4 November 2002, *entered into force* 1 January 2010; Art. 7.2 (hereinafter “China-ASEAN FTA”); *see also* UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* at 87.

⁸⁰ *See, e.g.*, Korea-Singapore FTA, Art. 10.5; Panama-Singapore FTA, Art. 9.5; Peru-Singapore FTA, Art. 10.5; India-Korea CEPA, Art. 10.4.

⁸¹ *See* India-Singapore Comprehensive Economic Cooperation Agreement, 29 June 2005, *entered into force* 1 August 2005 (hereinafter “India-Singapore CECA”).

⁸² *Id.*, Art. 6.10.

⁸³ *Id.*, Art. 6.18.

⁸⁴ SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 213-16.

⁸⁵ SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 213-16 (*citing* awards in *CME Czech Republic v. Czech Republic*, UNCITRAL (Final Award and Separate Opinion of March 14, 2003); *Azurix v. Argentina*, ICSID Case No. ARB/01/12 (Award of June 23, 2006);

In response, some States have taken steps to clarify in their BITs and FTAs that this standard does not impose liability for nonphysical harm to investments. The 2003 Netherlands-Malawi BIT, for example, guarantees “full *physical* security and protection,”⁸⁶ “making clear that the standard does not apply to nonphysical harm.”⁸⁷ Likewise, the 2008 Australia-Chile FTA contains a full protection and security clause indicating that “each Party [must] provide the level of *police* protection required under customary international law,”⁸⁸ and, thus, some commentators have concluded that the obligation in that treaty extends only to physical security.⁸⁹

IV. MOST-FAVORED-NATION TREATMENT

MFN clauses are a regular feature of BITs and investment chapters of FTAs. Their primary purpose is to ensure “that investments or investors of contracting parties . . . receive the best treatment that each [Party] has granted to investments or investors of any other third country. Thus the MFN standard establishes, at least in principle, a level playing field between all foreign investors protected by [an investment treaty].”⁹⁰ It is generally accepted that MFN clauses can be used to import into an investment treaty substantive protections from another investment treaty.⁹¹ Considerable controversy remains, however, over whether such clauses extend to procedural rights.⁹²

Siemens v. Argentina, ICSID Case No. ARB/02/8 (Award and Separate Opinion of February 6, 2007).

⁸⁶ Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Republic of Malawi and the Government of the Kingdom of the Netherlands, 11 December 2003, *entered into force* 1 November 2007, Art. 3.1 (emphasis added).

⁸⁷ KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 244 (OUP 2010).

⁸⁸ Australia – Chile Free Trade Agreement, 30 July 2008, *entered into force* 6 March 2009, Art. 10.5 (hereinafter “Australia-Chile FTA”) (emphasis added).

⁸⁹ UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* at 87.

⁹⁰ UNCTAD, *Bilateral Investment Treaties: 1995-2006: Trends in Investment Rulemaking* 38 (2007); see also Abby Cohen Smutny & Lee A. Steven, *The MFN Clause: What are its Limits? in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 353 (Katia Yannaca-Small, ed., OUP 2010).

⁹¹ CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 254 (OUP 2007).

⁹² See, e.g., Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroads* at 189 (“While broad agreement exists that MFN clauses apply to the substantive protection granted under investment treaties and can be used to circumvent restrictions regarding the admissibility of investor-State disputes, irreconcilable differences have emerged as to whether MFN

The earliest investment treaty case to address this issue was *Maffezini v. Spain*,⁹³ where the tribunal allowed the investor to invoke an MFN clause to circumvent a provision in the treaty obligating the claimant to pursue litigation in domestic courts for 18 months before being permitted to resort to arbitration by relying on a treaty that Spain had concluded with another State, under which the parties had granted their consent to arbitration without any such precondition. The tribunal reasoned that dispute settlement provisions of investment treaties were “inextricably related to the protection of foreign investors” and were “closely linked to the material aspects of the treatment accorded,” such that if a dispute settlement provision in a third-party treaty was more favorable than in the treaty between the host State and the investor’s country, then such dispute settlement provisions could be extended to the investor under the MFN clause.⁹⁴ In a line of cases following *Maffezini*, tribunals allowed claimants to rely on MFN clauses to avoid certain dispute settlement preconditions, such as first submitting a dispute to local courts,⁹⁵ although in one case a tribunal denied the claimant that ability.⁹⁶

In other cases, claimants have attempted to use an MFN clause to extend the tribunal’s jurisdiction by incorporating dispute resolution provisions to cover claims not otherwise arbitrable or alternative forms of arbitration.⁹⁷ In *Plama v. Bulgaria*, the tribunal rejected using an MFN

clauses can broaden the jurisdiction of arbitral tribunals.”) (footnotes omitted); SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 252 (“While it is generally agreed that an appropriately drafted MFN clause will import into an investment treaty substantive protection standards, controversy exists as to whether the clause also extends to procedural rights, particularly those relating to dispute settlement in other treaties.”); Smutny & Steven, *The MFN Clause: What are its Limits?* at 352 (“The extent to which MFN clauses may be used to secure procedural rights, however, remains somewhat controversial. . . .”).

⁹³ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Decision on Jurisdiction of 25 January 2000).

⁹⁴ *Id.*, ¶ 54.

⁹⁵ See, e.g., *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 (Decision on Jurisdiction of 3 August 2004); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7 (Decision on Jurisdiction of 10 June 2005); *Gas Natural SDG S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10 (Decision on Jurisdiction of 17 June 2005); *National Grid Plc. v. Argentine Republic*, UNCITRAL (Decision on Jurisdiction of 20 June 2006); *Suez and others v. Argentine Republic*, ICSID Case No. ARB/03/17 (Decision on Jurisdiction of 16 May 2006); *Suez and others v. Argentine Republic*, UNCITRAL (Decision on Jurisdiction of 3 August 2006).

⁹⁶ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Award of 8 December 2008).

⁹⁷ See *Salini v. Jordan*, ICSID Case No. ARB/02/13 (Decision on Jurisdiction of 9 November 2004); *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24 (“*Plama*”) (Decision on Jurisdiction of 8 February 2005).

clause in such a fashion unless the “MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”⁹⁸ The *RosInvestCo v. Russia* tribunal, however, came to the opposite conclusion, finding that “an arbitration clause . . . is of the same protective value as any substantive protection afforded,” and that, consequently, the widening of jurisdiction was “a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.”⁹⁹

The United Kingdom appears to have foreseen this potential controversy and included in its draft 1991 Model BIT (which predated the *Maffezini* case by nearly a decade) language expressly providing that “[f]or the avoidance of doubt, it is confirmed that the treatment provided for in [the MFN provision] shall apply to the provisions of Articles [1-11, which include the investor-State dispute resolution provisions] of this Agreement.” Many of the United Kingdom’s recent BITs and investment agreements, such as those with Sierra Leone (2000),¹⁰⁰ Serbia (2002),¹⁰¹ Bosnia (2002),¹⁰² Mozambique (2004),¹⁰³ and Ethiopia (2009)¹⁰⁴ likewise contain

⁹⁸ *Plama* ¶ 223; see also Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroads* at 191; see also *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Award of 13 September 2006); *Berschader v. Russian Federation*, SCC Case No. 080/2004 (Award of 21 April 2006).

⁹⁹ *RosInvestCo U.K. Ltd. v. Russian Federation*, SCC Case No. V 079/2005 (Award on Jurisdiction of October 2007) ¶¶ 131-132; see also *Renta 4 S.V.S.A v. Russian Federation*, SCC Case No. 24/2007 (Award on Preliminary Objections of 20 March 2009) ¶ 97 (citing *RosInvestCo U.K. v. Russian Federation*); Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroads* at 191.

¹⁰⁰ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sierra Leone for the Promotion and Protection of Investments, 13 January 2000, *entered into force* 20 November 2011, Art. 3(3).

¹⁰¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Yugoslavia for the Reciprocal Promotion of Investments, 2 November 2002, *entered into force* 3 April 2007 (succeeded by Serbia), Art. 3(3).

¹⁰² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and Bosnia and Herzegovina for the Promotion and Protection of Investments, 2 October 2002, *entered into force* 25 July 2003 (hereinafter “U.K.-Bosnia BIT”), Art. 3(3).

¹⁰³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Mozambique for the Promotion and Protection of Investments, 18 March 2004, *entered into force* 12 May 2004, Art. 3(3).

language clarifying that the MFN provision applies to both substantive and procedural protections. Interestingly, however, some of the United Kingdom's agreements, like those with Vietnam (2002)¹⁰⁵ and Mexico (2006),¹⁰⁶ do not contain this clarifying language, leaving the question of whether the Parties intended for the MFN clause to cover procedural issues unanswered.

On the other hand, a greater number of States have included language in their agreements expressly excluding the MFN provision's application to dispute settlement. For example, the State Parties to the CAFTA-DR, *i.e.*, the United States, El Salvador, Guatemala, Costa Rica, Honduras, Nicaragua, and the Dominican Republic, included in a draft of that Agreement a footnote to the MFN clause expressing the Parties' disagreement with the *Maffezini* tribunal's interpretation of that clause.¹⁰⁷ That footnote does not appear in the final text of the Agreement, but it is part of the treaty's negotiating history.

Similarly, the investment chapter of the recent FTA between Canada and Peru includes an interpretive annex clarifying that MFN treatment "does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements."¹⁰⁸ The 2008 China-New Zealand FTA likewise confirms that the MFN obligation does "not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those

¹⁰⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Ethiopia for the Promotion and Protection of Investment, 19 November 2009 (not in force), Art. 3(3).

¹⁰⁵ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments, 1 August 2002 (not in force).

¹⁰⁶ U.K.-Mexico BIT.

¹⁰⁷ See CAFTA Draft Text, 28 January 2004 No. 1, in ASIL, International Law in Brief, 6 February 2004, available at <http://www.asil.org/ilib0703.cfm#t1> ("The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. [citation omitted]. By contrast, the Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of the investments. The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.") (italics omitted).

¹⁰⁸ Canada-Peru FTA, Annex 804.1.

set out in this Chapter.”¹⁰⁹ A nearly identical formulation is found in the 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China.¹¹⁰

Chile also has limited the extension of MFN treatment in its recent FTAs. The MFN article in the investment chapter of its 2008 FTA with Australia includes an interpretive footnote that clarifies that the treatment “does not apply to the dispute settlement procedures set out in Section B of this Chapter, including requirements as to time.”¹¹¹ Similarly, the investment chapter of its 2006 FTA with Colombia includes an annex that clarifies that MFN does not extend to procedural issues, including dispute resolution.¹¹²

Notably, the recent Model BITs of at least two countries include language that expressly excludes the reach of the MFN clause to dispute settlement provisions. For example, the 2007 Colombian Model BIT clarifies that the MFN provision “does not encompass mechanisms for the settlement of investment disputes”¹¹³ Article 4 of the 2007 Norway Model BIT contains a nearly identical formulation.¹¹⁴

Besides adding new language to their recently-concluded treaties, some States have also taken steps to clarify the scope of MFN provisions in pre-existing treaties. Argentina and Panama, for example, exchanged diplomatic notes sometime after 2004 providing that the MFN clause in their 1996 BIT did not cover dispute resolution provisions.¹¹⁵

Finally, India, Korea, and Singapore have eliminated altogether the MFN clause from some of their treaties. Thus, for example, the investment chapters of the 2009 India-Korea Comprehensive Economic Partnership

¹⁰⁹ New Zealand-China FTA, Art. 1392(2); *see also* NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 348 (OUP 2009).

¹¹⁰ China-ASEAN FTA, Art. 5(4) (“For greater certainty, the obligation in this Article does not encompass a requirement for a Party to extend to investors of another Party dispute resolution procedures other than those set out in this Agreement.”).

¹¹¹ Australia-Chile FTA, Footnote 10-[4].

¹¹² Chile-Colombia Free Trade Agreement, 27 November 2006, *entered into force* 8 May 2009, Annex 9.3 (hereinafter “Chile-Colombia FTA”) (“Las Partes acuerdan que el ámbito de aplicación del Artículo 9.3 . . . no será aplicable a materias procedimentales, incluyendo mecanismos de solución de controversias como el contenido en la Sección B de este Capítulo.”).

¹¹³ Model BIT of Colombia (2007) (“The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international investment agreements.”).

¹¹⁴ Draft Model BIT of Norway (2007), Art. 4.

¹¹⁵ *See* Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroads* at 224 (*citing* the jurisdictional decision in *National Grid* ¶ 85).

Agreement,¹¹⁶ the 2005 India-Singapore Comprehensive Economic Cooperation Agreement,¹¹⁷ and the 2005 Korea-Singapore FTA¹¹⁸ all lack MFN clauses.

V. EXPROPRIATION

Protection against expropriation and nationalization of foreign investment was a principal goal of capital-exporting States that negotiated the earliest investment treaties in a period marked by nationalizations and disagreement about expropriation and compensation standards in international law.¹¹⁹ Investment treaties nearly always protect foreign investors from direct expropriations or nationalizations by host States – direct expropriation being most often characterized by a physical taking of an investment or a taking of legal title to an investment. Such expropriations have become increasingly rare in comparison to indirect expropriations, which can occur when a host State invokes “legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without changing or canceling investors’ legal title to their assets or diminishing their control over them.”¹²⁰ While States have a legitimate right to regulate and exercise police powers in the interests of certain public welfare objectives,¹²¹ discerning what constitutes a legitimate, non-compensable regulatory measure as opposed to an indirect expropriation can be difficult in practice. In this regard, there has been a trend in investment agreements of including “language that draws a line between a compensable indirect expropriation and the adverse effects endured by a foreign investor as a result of *bona fide* regulation in the public interest.”¹²²

The 2004 U.S. Model BIT and the 2004 Canadian model FIPA, for example, provide guidance to determine whether regulatory measures may amount to an indirect expropriation.¹²³ The text of the 2004 U.S. Model

¹¹⁶ India-Korea CEPA.

¹¹⁷ India-Singapore CECA.

¹¹⁸ Korea-Singapore FTA.

¹¹⁹ See, e.g., SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 287 (2010).

¹²⁰ *Id.*, 297.

¹²¹ See *id.* 298-99 (citing, among other sources, the RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. g (1987)).

¹²² UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* at 87.

¹²³ See SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 318-20; Andrea J. Menaker, *Benefiting From Experience: Developments in the United States’ Most Recent Investment Agreements*, 12 U.C. DAVIS J. INT’L LAW & POLICY 1, 123-24 (2005).

BIT includes a fairly standard expropriation provision,¹²⁴ but clarifies that Article 6(1), the expropriation article “shall be interpreted in accordance with Annexes A and B.” Annex A provides a standard definition of customary international law, while Annex B provides the following detailed guidance regarding the factors to be considered when determining whether there has been an indirect expropriation. Specifically, that Annex provides:

The Parties confirm their shared understanding that:

1. Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 6(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 6(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment,

¹²⁴ Article 6(1) provides “Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).” Model BIT of the United States (2004), Art. 6(1).

standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

- (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Article 13 of Canada's 2004 Model FIPA takes the same approach,¹²⁵ with nearly verbatim language setting forth the factors that ought to be considered when determining whether an indirect expropriation has occurred.¹²⁶ The United States and Canada have used these or very similar formulations in their recent investment agreements and FTAs with investment chapters.¹²⁷

¹²⁵ Model FIPA of Canada, footnote 4 ("For greater certainty, Article 13(1) shall be interpreted in accordance with Annex B.13(1) on the clarification of indirect expropriation.").

¹²⁶ See *id.*

¹²⁷ See, e.g., United States-Rwanda BIT; United States-Uruguay BIT; United States-Chile FTA; United States-Singapore Free Trade Agreement, 6 May 2003, *entered into force* 1 January 2004 (hereinafter "United States-Singapore FTA"); CAFTA-DR; United States-Colombia FTA; United States-Morocco FTA; United States-Oman FTA; United States-Korea FTA, Annex 11-B; United States-Peru FTA; United States-Panama FTA; Canada-Slovak Republic FIPA; Canada-Latvia FIPA; Canada-Czech Republic FIPA; Canada-Romania FIPA; Canada-Panama FTA; Canada-Peru FTA; Canada-Colombia FTA, Art. 811(1)(a).

The United States-Singapore FTA refers to an exchange of letters between the parties, rather than an interpretive Annex. See United States-Singapore FTA, Art. 15.26.

The Annex on Expropriation in the United States-Korea FTA clarifies in additional footnotes that: "whether an investor's investment-backed expectations are reasonable depends in part on the nature and extent of governmental regulation in the relevant sector. For example, an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector" and "the list of 'legitimate public welfare objectives' in subparagraph (b) is not exhaustive." See United States-Korea FTA, Annex 11-B.

Art. 10.7 of the United States-Peru FTA also clarifies the meaning of "public purpose": "For greater certainty, for purposes of this article, the term 'public purpose' refers to a concept in customary international law. Domestic law may express this or a similar concept using different terms, such as 'public necessity,' 'public interest,' or 'public

Some of the United States' and Canada's treaty partners have incorporated language similar to that found in their agreements with the U.S. and Canada into agreements with other States as well. Thus, for example, Singapore's 2005 CECA with India includes an Exchange of Letters on Expropriation with language nearly identical in substance to the U.S. Model BIT.¹²⁸ Additional examples of investment chapters containing language similar to the U.S. Model BIT are found in the 2005 Guatemala-Taiwan FTA,¹²⁹ the 2006 Chile-Colombia FTA,¹³⁰ the 2006 Panama-Singapore FTA,¹³¹ the 2008 Peru-Singapore FTA,¹³² and the 2008 Chile-Australia FTA, which is nearly identical to that of the U.S. Model.¹³³ Colombia's 2007 Model BIT also follows a very similar pattern.¹³⁴

While the 2009 ASEAN-Australia-New Zealand FTA ("AANZFTA") also incorporates aspects of the U.S. Model BIT approach,¹³⁵ that agreement contains an annex that differs from the annex to the U.S. Model in two significant respects.¹³⁶ First, whereas the annex to the U.S. Model cites "the extent to which the government action interferes with distinct, reasonable investment-backed expectations" as a factor to consider, the annex to AANZFTA specifies instead that consideration should be given to "whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document."¹³⁷ Second, whereas the annex to the U.S. Model provides that non-discriminatory regulatory measures to advance certain legitimate public welfare objectives do not constitute expropriations "except in rare circumstances," the annex to AANZFTA

use." *Id.*, No. 5. Moreover, the Annex clarifies, as in the case of the Korea FTA, that "the list of 'legitimate public welfare objectives' in this subparagraph is not exhaustive." *Id.*, Annex 10-B, No. 20. See United States-Korea FTA, Annex 11-B, No. 19.

Footnote 7 of the Canada-Colombia FTA similarly clarifies the meaning of "public purpose" in Art. 811(1)(a). See Canada-Colombia FTA. Footnote 4 to Art. 812(1) of the Canada-Peru FTA also explains the meaning of "public purpose." See Canada-Peru FTA.

¹²⁸ India-Singapore CECA, Ch. 6, Annex 3.

¹²⁹ See Guatemala-Taiwan Free Trade Agreement, 22 September 2005, *entered into force* 1 July 2006, Art. 10.07, Annexes 10-B and 10-C.

¹³⁰ See Chile-Colombia FTA, Art. 9.10, Annex 9-C.

¹³¹ See Panama-Singapore FTA, Art. 9.7, Annex 9A.

¹³² See Peru-Singapore FTA, Art. 10.10, Annex 10-A. Footnote 10-9 also clarifies the meaning of "public purpose." *Id.*

¹³³ Chile-Australia FTA, Art. 10.11, Annex 10-B.

¹³⁴ See Model BIT of Colombia (2007), Art. 6.

¹³⁵ ASEAN-Australia-New Zealand Free Trade Agreement, 27 February 2009, *entered into force* 1 January 2010 (hereinafter "AANZFTA"), Chapter 11. Art. 9.

¹³⁶ *Id.*, Chapter 11, Art. 9, No. 7 (providing that the articles are to be interpreted in accordance with an Annex that is very similar to that found in the U.S. Model Annex.).

¹³⁷ *Id.*, Annex on Expropriation and Compensation 3(b).

does away with any such qualifier;¹³⁸ such measures thus would not appear to constitute expropriations under AANZFTA under *any* circumstances.

China also has begun to include similar provisions in some of its recent agreements. For example, its 2008 FTA with New Zealand contains an Annex on Expropriation that includes elements of both the AANZFTA and the U.S. Model BIT.¹³⁹ In addition to generally defining indirect expropriation, the Annex provides that:

3. In order to constitute indirect expropriation, the state's deprivation of the investor's property must be:
 - (a) either severe or for an indefinite period; and
 - (b) disproportionate to the public purpose.
4. A deprivation of property shall be particularly likely to constitute indirect expropriation where it is either:
 - (a) discriminatory in its effect, either as against the particular investor or against a class of which the investor forms part; or
 - (b) in breach of the state's prior binding written commitment to the investor, whether by contract, licence, or other legal document.
5. Except in rare circumstances to which paragraph 4 applies, such measures taken in the exercise of a state's regulatory powers as may be reasonably justified in the protection of the public welfare, including public health, safety and the environment, shall not constitute an indirect expropriation.

This formulation, with some additions, is also used in the 2009 China-Peru FTA.¹⁴⁰

¹³⁸

Id.

¹³⁹

New Zealand-China FTA, Annex 13.

¹⁴⁰

Annex 9 of the China-Peru FTA includes the same language as AANZFTA but also includes a paragraph explaining that determining whether an action constitutes indirect expropriation requires a "case-by-case, fact-based inquiry" considering the economic impact of the action. See China-Peru Free Trade Agreement, 28 March 2009, *entered into force* 1 March 2010 (hereinafter "China-Peru FTA"), Art. 133 and Annex 9 on Expropriation (also including a clarifying footnote on "public purpose").

And, although the 2010 New Zealand-Hong Kong, China Closer Economic Partnership Agreement (“CEP”) does not include an investment chapter, the parties exchanged letters on the Conclusion of an Investment Protocol, with negotiations to conclude within two years of the CEP’s entry into force. The parties agreed that the Investment Protocol shall include several elements, including MFN and National Treatment, FET “in accordance with customary international law,” and protection from expropriation “while also affirming the right of each Party to regulate in the public interest.”¹⁴¹ They also agreed that the Investment Protocol would build on and be broader in scope than the existing BIT between the parties and that its “provisions shall be drafted with reference to the New Zealand-China Free Trade Agreement.”¹⁴²

VI. UMBRELLA CLAUSES

So-called “umbrella clauses” are provisions that obligate a host State to “observe any obligation it may have entered into,” “observe any obligation it has assumed,” or “constantly guarantee the observance of commitments it has entered into” with respect to foreign investments.¹⁴³ As explained by Christoph Schreuer:

¹⁴¹ Exchange of Letters on the Conclusion of an Investment Protocol to the New Zealand-Hong Kong, China Closer Economic Partnership Agreement dated 29 March 2010.

¹⁴² *Id.*

¹⁴³ Katia Yannaca-Small, *What About This “Umbrella Clause”?* in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 479 (Katia Yannaca-Small, ed., OUP 2010); *see also, e.g.*, U.K.-Bosnia BIT, Art. 2(2); Agreement between the Federal Democratic Republic of Ethiopia and the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, 24 April 2001, *entered into force* 21 August 2005, Art. 2(3); Agreement between the Government of the Kingdom of the Thailand and the Argentine Republic for the Promotion and Reciprocal Protection of Investments, 18 February 2002, *entered into force* 7 March 2002, Art. 4(2); Agreement between the Government of the Republic of Austria and the Government of the Republic of Armenia for the Promotion and Protection of Investments, 17 October 2001, *entered into force* 1 February 2003, Art. 9(1); Agreement on the Promotion and Protection of Investments between the Government of the Republic of Finland and the Government of the Republic of Armenia, 5 October 2004, *entered into force* 20 March 2007, Art. 12(3) (including the obligation to “observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party”) and Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Kazakhstan on the Promotion and Reciprocal Protection of Investments, 25 October 2004, *entered into force* 1 August 2006, Art. 2(4); Treaty between the Federal Republic of Germany and the Democratic Republic of the Timor-Leste concerning the Encouragement and Reciprocal Protection of Investments, 10 August 2005 (not in force), Art. 8(2); Agreement between the Swiss Federal Council and the Government of the

“[Umbrella clauses] have been added to some BITs to provide additional protection to investors beyond the traditional international standards. They are often referred to as umbrella clauses because they put contractual commitments under the BIT’s protective umbrella. They add the compliance with investment contracts, or other undertakings of the host State, to the BIT’s substantive standards. In this way, a violation of such a contract becomes a violation of the BIT.”¹⁴⁴

As some have pointed out, despite the “apparent clarity and brevity” of standard umbrella clauses, the arbitral jurisprudence interpreting such clauses has been far from uniform.¹⁴⁵ This has raised “concerns with respect to the consistency and development of the law of investment treaties.”¹⁴⁶ Some explanation for inconsistent outcomes may be found in differing treaty language in individual cases.¹⁴⁷ It is unlikely, however, that the slight variation in treaty language satisfactorily explains the state of flux in arbitral jurisprudence. Rather, different tribunals have had differing conceptions of the nature of the clause and, in particular, the intended scope of application that contracting states were seeking when they agreed to it.”¹⁴⁸

Some writers estimate that of approximately 2,700 BITs in existence, only about 40 percent contain an umbrella clause.¹⁴⁹ “While Switzerland, the Netherlands, the United Kingdom, and Germany often include umbrella clauses in their BITs, France, Australia, and Japan include

Algerian Democratic and Popular Republic on the Promotion and Reciprocal Protection of Investments, 30 November 2004, *entered into force* 16 May 2006, Art. 10(2).

¹⁴⁴ Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses, and Forks in the Road*, 5 J. WORLD INVESTMENT & TRADE 231, 250 (2004); *see also* Yannaca-Small, *What About This “Umbrella Clause”?* at 480 (noting that umbrella clauses protect investors by providing a “mechanism to make host States’ promises ‘enforceable’” and an “additional protection of investor-state contracts.”); VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* at 257 (noting that umbrella clauses address the enforceability of a host State’s contractual obligations to an investor).

¹⁴⁵ *See* SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 280; *see also* Bernasconi-Osterwalder & Johnson, *Belgium’s Model Bilateral Investment Treaty: A Commentary* at 8.

¹⁴⁶ SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 280.

¹⁴⁷ *See, e.g.*, Yannaca-Small, *What About This “Umbrella Clause”?* at 488-503 (describing the arbitral cases to date and the specific treaty language found in each instance).

¹⁴⁸ SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 280; *see also* Yannaca-Small, *What About This “Umbrella Clause”?* at 488-503.

¹⁴⁹ *See* Yannaca-Small, *What About This “Umbrella Clause”?* at 483.

umbrella clauses in only a minority of their BITs.”¹⁵⁰ Umbrella clauses may also appear in multilateral investment agreements, as is the case with the ECT.¹⁵¹ The ECT, however, permits States to opt out of investor-State and State-State dispute settlement for claims concerning alleged breaches of the umbrella clause.¹⁵² Australia, Canada, Hungary, and Norway have chosen to opt out in this manner.¹⁵³

Some countries that have included umbrella clauses in their recent model BITs are Belgium (2002),¹⁵⁴ Austria (2008),¹⁵⁵ and Germany (2008).¹⁵⁶ A larger number of States, however, have omitted such clauses from their recent model investment treaties. The 2004 U.S. Model BIT, for instance, does not have an umbrella clause, even though some earlier models did contain such a clause.¹⁵⁷ Like those earlier models, and unlike the NAFTA, however, the 2004 U.S. Model BIT does provide, in Article 24(1), for arbitration of disputes where an investor alleges a breach of investment authorization or investment agreement.¹⁵⁸

¹⁵⁰ *Id.*

¹⁵¹ See ECT, 17 December 1994, *entered into force* 16 April 1998, Art. 10(1) (stating, “Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”).

¹⁵² See *id.*, Arts. 26(3)(c), 27(2), Annex IA, “List of Contracting Parties Not Allowing an Investor or Contracting Party to Submit a Dispute Concerning the Last Sentence of Article 10(1) to International Arbitration (In Accordance with Articles 26(3)(c) and 27(2)).”

¹⁵³ See *id.*, Annex IA; see also Yannaca-Small, *What About This “Umbrella Clause”?* at 482-83.

¹⁵⁴ Model BIT of Belgium (2002), Art. 11 (“Each Contracting Party undertakes to ensure at all times that the commitments it has entered into in respect of the investment by investors of the other Contracting Party shall be observed.”). Article 12 extends investor-state disputes to “any dispute relating to an investment between an investor of one Contracting Party and the other Contracting Party.” *Id.* See Bernasconi-Osterwalder & Johnson, *Belgium’s Model Bilateral Investment Treaty: A Commentary* at 9, No. 9.

¹⁵⁵ Model BIT of Austria (2008), Art. 9 (“Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party.”); see also OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, Working Papers on International Investment 12 (Number 2006/3), available at: <http://www.oecd.org/dataoecd/3/20/37579220.pdf>.

¹⁵⁶ Model BIT of Germany (2008), Art. 7(2) (“Each Contracting State shall fulfill any other obligations it may have entered into with regard to investments in its territory by investors of the other Contracting State.”).

¹⁵⁷ See, e.g., Model BIT of the United States (1992), Art. 2(2)(c); Model BIT of the United States (1987), Art. 2(2); Model BIT of the United States (1984), Art. 2(2). Like the 2004 Model BIT, the 1994 U.S. Model did not contain an umbrella clause; see also Andrea Menaker and Nicole Thornton, *U.S. Model Bilateral Investment Treaty (2004)*, WORLD ARBITRATION REPORTER at 17 (2nd ed., 2010).

¹⁵⁸ See Model BIT of the United States (2004) Art. 1 (defining “investment authorizations” and “investment agreements”).

Other States that have omitted umbrella clauses from their model BITs are Colombia (2007),¹⁵⁹ Canada (2004 FIPA),¹⁶⁰ Russia (2001/2002),¹⁶¹ India (2003),¹⁶² Norway (2007),¹⁶³ and France (2006).¹⁶⁴ The France model, however, provides for amicable settlement and submission to ICSID arbitration after six months of “any dispute concerning the investments occurring between one Contracting Party and a national or company of the other Contracting Party.”¹⁶⁵ This broad dispute settlement provision thus may yet act as an umbrella clause.¹⁶⁶

After omitting an umbrella clause from its 2007 Model BIT, Colombia apparently prevailed upon Belgium not to include an umbrella clause in their BIT. Indeed, although Belgium often has included umbrella clauses in its BITs, including in its recent model BIT,¹⁶⁷ the 2009 Belgium/Luxembourg-Colombia BIT does not contain an umbrella clause. Similarly, the 2009 Canada-Czech Republic was based on the Canada 2004 Model BIT and accordingly does not contain an umbrella clause,¹⁶⁸ notwithstanding the fact that the Czech Republic had previously included an umbrella clause in its 1995 BIT with Singapore.¹⁶⁹

China’s practice varies with respect to its recently concluded agreements. Although the second and third generation model Chinese BITs, dating, respectively, from 1989 and 1997, contain umbrella clauses, fewer than half of all Chinese BITs contain them.¹⁷⁰ China’s 2009 BIT with Switzerland may be characterized as a traditional BIT without any notable

¹⁵⁹ Model BIT of Colombia (2007).

¹⁶⁰ Model FIPA of Canada (2004).

¹⁶¹ See OECD Investment Policy Reviews, *Russian Federation: Enhancing Policy Transparency* 72 (2006).

¹⁶² Model BIT of India (2003).

¹⁶³ Draft Model BIT of Norway (2007) (currently shelved).

¹⁶⁴ Model BIT of France (2006).

¹⁶⁵ *Id.*, Art. 7.

¹⁶⁶ See, e.g., Yannaca-Small, *What About This “Umbrella Clause”?* at 479.

¹⁶⁷ Model BIT of Belgium (2002).

¹⁶⁸ Canada-Czech Republic FIPA; see also UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* at 88.

¹⁶⁹ See Agreement between the Czech Republic and the Government of the Republic of Singapore on the Promotion and Protection of Investments, 8 April 1995, *entered into force* 8 October 1995, Art. 15(2) (“Each Contracting Party shall observe commitments, additional to those specified in this Agreement it has entered into with respect to investments of the investors of the other Contracting Party.”); see also OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, Working Papers on International Investment 9 (No. 2006/3), available at <http://www.oecd.org/dataoecd/3/20/37579220.pdf>.

¹⁷⁰ See GALLAGHER & SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICES at 221; Norah Gallagher, Wenhua Shan & Sheng Zhang, *Bilateral Investment Treaty Overview – China*, Investment Claims, IC-OV 6 CN (2008).

innovations, and that BIT contains an umbrella clause,¹⁷¹ as do its 2003 BITs with Djibouti¹⁷² and Germany¹⁷³ and its 2006 BIT with Russia.¹⁷⁴ By contrast, China's 2008 BIT with Mexico,¹⁷⁵ 2008 FTA with New Zealand,¹⁷⁶ and 2009 FTA with Peru¹⁷⁷ do contain many innovations and do not contain umbrella clauses.

The Netherlands has concluded at least six BITs since 2006, and its BITs continue to include umbrella clauses.¹⁷⁸ Japan, on the other hand, has included umbrella clauses in several of its recent investment agreements,¹⁷⁹ although not in all or even, it appears, the majority, of them. The 2010 India-Korea CEPA also does not include a traditional umbrella clause and

¹⁷¹ See Agreement between the Swiss Federal Counsel and the Government of the People's Republic of China Concerning the Promotion and Reciprocal Protection of Investments, 15 March 2010, *entered into force* 13 April 2010.

¹⁷² See Agreement between the Government of the People's Republic of China and the Government of the Republic of Djibouti on the Promotion and Protection of Investments, 18 August 2003 (not in force), Art. 10(2).

¹⁷³ Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and the Reciprocal Protection of Investments, 1 December 2003, *entered into force* 11 November 2005, Art. 10(2).

¹⁷⁴ Agreement between the Government of the Russian Federation and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, 9 November 2006 (not in force), Art. 11(2).

¹⁷⁵ China-Mexico BIT.

¹⁷⁶ New Zealand-China FTA.

¹⁷⁷ China-Peru FTA.

¹⁷⁸ See Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Sultanate of Oman, 19 September 1987, *entered into force* 1 February 1989; Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Macao Special Administrative Region of the People's Republic of China, 22 May 2008 (not in force); Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Burundi, 30 May 2007 (not in force); Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Algerian Democratic and Popular Republic, 20 March 2007, *entered into force* 1 August 2008; Agreement on the Promotion and Protection of Investments between the Government of the Kingdom of Bahrain and Government of the Kingdom of the Netherlands, 5 February 2007 (not in force); Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Dominican Republic, 30 March 2006, *entered into force* 1 October 2007.

¹⁷⁹ For example, the 2008 Japan-Uzbekistan BIT, 2008 Japan-Laos BIT, and the 2009 Japan-Switzerland Economic Partnership Agreement each contains an umbrella clause. See Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment, 15 August 2008, *entered into force* 24 September 2009, Art. 3.3; Japan-Laos BIT, Art. 5(2); Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation, 19 February 2009, *entered into force* 1 September 2009, Art. 86(2).

restricts dispute settlement to breaches of obligations under the Agreement's investment chapter.¹⁸⁰

Umbrella clauses requiring the observance of all obligations are very broad and some States have sought to "reduce the scope of the umbrella clause by introducing qualifications into the language."¹⁸¹ Such qualifications may include, for instance, a requirement that the obligation be made in writing with respect to a specific investment, that the obligation must be respected subject to domestic law, or that disputes may be addressed only under the terms of the underlying contract (thereby excluding investor-State arbitration).¹⁸²

Examples of treaties that contain such limitations can be found in the Greece-Mexico BIT (2000), which requires the Contracting Parties' obligations to be in writing to fall under that BIT's protective umbrella, and the Australia-China BIT (1988), which contains a clause specifying that "written undertakings" by a Contracting Party shall be "adhere[d] to" subject to the Contracting Party's law.¹⁸³

VIII. ESSENTIAL SECURITY INTEREST

Many international investment agreements include provisions allowing contracting Parties to enact measures that might otherwise breach treaty obligations in exceptional circumstances where the host State's national or essential security interests are at stake.¹⁸⁴ States may include such exceptions in order to protect a variety of important national interests, including "essential security," "national security," "public order," "extreme emergency," "public morals," and "international peace and/or security."¹⁸⁵

¹⁸⁰ India-Korea CEPA.

¹⁸¹ SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 278.

¹⁸² See SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 278-79 (citing UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* 56 (1998); UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* at 73).

¹⁸³ See Agreement between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, 30 November 2000, *entered into force* 17 September 2002, Art. 19(2); Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, 11 July 1988, *entered into force* 11 July 1988, Art. 11.

¹⁸⁴ See, e.g., SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 342; UNCTAD, *The Protection of National Security in IIAs* (2009). Security exception clauses are also framed in investment agreements as "non-precluded measures," because the language often provides that nothing in the agreement will preclude parties from taking measures in such circumstances. See SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 342.

¹⁸⁵ UNCTAD, *The Protection of National Security in IIAs* at 72-80.

These security exception clauses benefit host States by allowing a greater degree of legislative and regulatory flexibility to respond to threats to important national interests, although it remains unclear to what extent such clauses encompass not only military threats, as historically understood, but wider issues such as threats to domestic industry (e.g., from foreign takeover) or economic crises.¹⁸⁶

Controversy surrounding these provisions has arisen in connection with the dozens of cases filed against Argentina in the wake of its economic crisis. In those cases, Argentina raised the defense that it was not liable under both the customary international law principle of the state of necessity and, where the applicable BIT contained an essential security clause, under that provision as well.¹⁸⁷ In the cases where a BIT's essential security provision was at issue, Argentina repeatedly argued that the clause was "self-judging," i.e., that invocation by the respondent State could not be questioned by a tribunal.¹⁸⁸ In every such instance, the tribunal rejected that notion, finding that it had the competence to determine whether the criteria for invoking the clause were satisfied.¹⁸⁹

In light of the prominence that these clauses have attained in recent arbitral jurisprudence, it is not surprising that States have reconsidered their inclusion in their international investment agreements. An UNCTAD survey revealed that as of March 2009, national or essential security exception clauses were present in only 12 percent of BITs, although they still were present in the majority of recent FTAs.¹⁹⁰

Because such security exceptions may be open to abuse by host States, many investment treaties include language circumscribing the scope of the exception. While some of these clauses are "self-judging" in nature, their scope is rather limited. Thus, for example, NAFTA Article 2102 provides that:

¹⁸⁶ See *id.*, 9 *et seq.*; SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 345 (noting that "all tribunals that have considered the matter thus far have interpreted the clauses broadly enough to include [economic] crises and emergencies within the scope of essential security and public order provisions").

¹⁸⁷ See, e.g., *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8 ("CMS") (Award of 12 May 2005) (partially annulled on other grounds; see Decision on Annulment of 25 September 2007) ¶ 308; *LG&E v. Argentina*, ICSID Case No. ARB/02/1 ("LG&E") (Decision on Liability of 3 October 2006) ¶ 202; *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9 ("Continental Casualty") (Award of 5 September 2008) ¶ 160.

¹⁸⁸ See, e.g., *CMS*, ¶ 367; *LG&E*, ¶ 208; *Continental Casualty*, ¶ 183.

¹⁸⁹ See, e.g., *CMS*, ¶¶ 373-74; *LG&E*, ¶ 212; *Continental Casualty*, ¶¶ 186-88.

¹⁹⁰ UNCTAD, *The Protection of National Security in IIAs* at 3.

“[n]othing in this Agreement shall be construed . . . to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to the traffic in arms . . . undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons . . .”

The 2004 Canada Model FIPA contains a provision modeled on the NAFTA text – that is, the potential application of security measures are related to the same listed categories.¹⁹¹ Canada’s recent FIPAs with Latvia, the Czech Republic, the Slovak Republic, Romania, and Jordan all contain such clauses.¹⁹² Additionally, Canada’s recent FTAs with Peru, Panama, and Colombia also contain the same language.¹⁹³

In the 2004 U.S.-Morocco FTA, the essential security exception clause is followed by language clarifying that:

“[m]easures that a Party considers necessary for the protection of its own essential security interests may include, *inter alia*, measures relating to the production of or traffic in arms, ammunition, and implements of war and to such traffic and transactions in other goods, materials, services, and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment.”¹⁹⁴

Japan also has recently concluded several investment agreements with similarly-styled provisions. For example, the 2006 Economic Partnership Agreement with the Philippines allows a party to adopt measures it considers necessary for the protection of essential security interests “(i) taken in time of war, or armed conflict, or other emergency in that Party or in international relations; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of

¹⁹¹ See Model FIPA of Canada (2004), Art. 10(4)(b).

¹⁹² See, e.g., Canada-Latvia FIPA, Art. 17; Canada-Czech Republic FIPA, Art. 17; Canada-Romania FIPA, Art. 17; Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments, 28 June 2009, *entered into force* 14 December 2009, Art. 10; Canada-Slovak Republic FIPA, Art. 9.

¹⁹³ See Canada-Peru FTA, Art. 2202; Canada-Panama FTA, Art. 23.03; Canada-Colombia FTA, Art. 2202.

¹⁹⁴ United States-Morocco FTA, Art. 21.2.

weapons.”¹⁹⁵ Such language is also present in Japan’s investment agreements with Uzbekistan, Laos, Vietnam, Peru, and Korea.¹⁹⁶ Singapore has done much the same. For example, its 2005 CECA with India provides that nothing shall prevent a Party:

“[f]rom taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable and fusionable materials or the materials from which they are derived; (ii) in time of war or other emergency in international relations; (iii) relating to the production or supply of arms and ammunition; or (iv) to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures.”¹⁹⁷

Singapore’s 2005 FTA with Korea includes a similar clause, without listing protection of public infrastructure.¹⁹⁸ And the 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China contains a security exception clause very similar to that contained in the Singapore-India CECA.¹⁹⁹

Some treaties also contain language restricting the host State’s ability to invoke the essential security provision. For example, the 2002 Japan-Korea BIT provides that: “The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”²⁰⁰ The 2007 draft Norway model

¹⁹⁵ Japan-Philippine EPA, Art. 99.

¹⁹⁶ See Agreement between Japan and the Republic of Uzbekistan for the Promotion and Protection of Investment, 15 August 2008, *entered into force* 29 September 2009, Art. 17; Japan-Laos BIT, Art. 18; Agreement between Japan and the Socialist Republic of Vietnam for the Liberalization, Promotion and Protection of Investment, 14 November 2003, *entered into force* 19 December 2004, Art. 15; Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment, 22 November 2008, *entered into force* 10 December 2009, Art. 19; Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion, and Protection of Investment, 22 March 2002, *entered into force* 1 January 2003, Art. 16; *see also* Japan-Chile EPA, Art. 193.

¹⁹⁷ India-Singapore CECA, Art. 6.12(b).

¹⁹⁸ Korea-Singapore FTA, Art. 21.3.

¹⁹⁹ China-ASEAN FTA, Art. 17.

²⁰⁰ Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, 22 May 2002, *entered into force* 1 January 2003, Art. 16(1)(d).

contains similar language,²⁰¹ and further clarifies that measures falling within its exceptions must not be applied in a manner that would constitute a “means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction in international [trade or] investment. . . .”²⁰² Similarly, the 2003 India Model BIT provides that measures to protect essential security interests in circumstances of extreme emergency are not precluded by a Contracting Party when such measures are taken “in accordance with its laws normally and reasonably applied on a non-discriminatory basis.”²⁰³ Recently, the Advisory Committee evaluating possible changes to the 2004 U.S. Model BIT recommended that the security exception clause be amended “to provide that a Party should not apply measures . . . to advance predominantly economic objectives and . . . will be guided by principles of non-discrimination . . . transparency and predictability, regulatory proportionality and accountability, as the United States has agreed in the OECD.”²⁰⁴

At the far end of the spectrum are a few States that have placed unrestricted self-judging essential security clauses in their agreements. The U.S. 2004 Model BIT notably includes an express acknowledgment that the provision allowing for measures necessary to protect a Party’s own essential security interests is “self-judging.”²⁰⁵ Article 18(2) of the U.S. Model thus states that nothing in the BIT is to be construed “to preclude a Party from applying measures that *it considers necessary* for the fulfillment of its obligations with respect to the maintenance or restoration of international

²⁰¹ Draft Model BIT of Norway (2007), Art. 24, No. 7 (providing that the “public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”).

²⁰² Draft Model BIT of Norway (2007), Art. 24.

²⁰³ Model BIT of India (2003), Art. 12(2).

²⁰⁴ *Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty*, Recommendation 13, presented to the Department of State, 30 September 2009.

²⁰⁵ *Compare, e.g.,* Treaty between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, 1 December 1998, *entered into force* 3 March 2005, Art. 14(1) *and* Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, 29 September 1999, *entered into force* 30 May 2001, Art. 14(1) (“This Treaty shall not preclude a Party from applying measures that *it considers necessary* for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests”) (emphasis added) *with* Model BIT of the United States (1994), Art. 18(1) (“Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests”).

peace or security, or the protection of its own essential security interests.”²⁰⁶ This very broad self-judging essential security exception clause is found in the recent U.S. BITs with Uruguay and Rwanda, as well as recent U.S. FTAs including the DR-CAFTA, and those with Peru, Colombia, Oman, Panama, and Korea.²⁰⁷ Singapore likewise has included broad, U.S.-style essential security exception clauses in its FTAs with Panama and Peru.²⁰⁸ Despite the self-judging nature of these essential security exception clauses, some commentators have suggested that Article 26 of the Vienna Convention on the Law of Treaties, which provides that treaties must “be performed by [States] in good faith,” arguably leaves essential security measures open to tribunal review.²⁰⁹ Perhaps to foreclose such possibility, several States have expressly excluded the issue of application of such measures from the dispute settlement provisions of their investment agreements. Some recent U.S. FTAs, for instance, including those with Peru,²¹⁰ Colombia,²¹¹ Panama,²¹² and Korea,²¹³ exclude the possibility that a tribunal may review the application of such exceptions.

The 2005 India-Singapore CECA similarly provides that the essential security interest clause “shall be interpreted in accordance with the understanding of the Parties on non-justiciability of security exceptions,” and the Exchange of Letters on Non-justiciability of Security Exceptions

²⁰⁶ Model BIT of the U.S. (2004), Art. 18(2) (emphasis added).

²⁰⁷ See United States-Uruguay BIT, Art. 18; United States-Rwanda BIT, Art. 18; CAFTA-DR, Art. 21.2; United States-Peru FTA, Art. 22.2; United States-Colombia FTA, Art. 22.2(b); United States-Oman FTA, Art. 21.2; United States-Panama FTA, Art. 21.2; United States-Korea FTA, Art. 23.2.

²⁰⁸ See Panama-Singapore FTA, Art. 18(2) (providing that nothing in the agreement shall be construed to “preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”). A footnote in the text clarifies that: “For greater certainty, nothing in this Agreement shall prevent a Party from taking any action which it considers necessary for the protection of critical communications infrastructure from deliberate attempts intended to disable or degrade such infrastructure.” The 2008 Peru clause is the same, without the footnote.

²⁰⁹ See UNCTAD, *The Protection of National Security in IIAs* at 39-40; SALACUSE, *THE LAW OF INVESTMENT TREATIES* at 345 (citing William W. Burke-White & Andreas von Staden, *Investment Protection in Extra-Ordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT’L L. 307 (2008)).

²¹⁰ See United States-Peru FTA, Ch. 22, No. 2. (providing that “For greater certainty, if a Party invokes Article 22.2 [essential security clause] in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.”).

²¹¹ United States-Colombia FTA, Art. 22.2, No. 2.

²¹² United States-Panama FTA, Art. 21.2, No. 2.

²¹³ United States-Korea FTA, Art. 23.2 No. 2.

clarifies that the security exception is non-justiciable in international arbitration: “any decision of the disputing Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.”²¹⁴

Several other investment agreements fully or partially exclude the availability of investor-State dispute resolution concerning measures adopted for national security reasons. For example, Mexico’s 1998 BIT with the Netherlands excludes recourse to investor-State dispute resolution in the event a party adopts such measures,²¹⁵ and Mexico’s 2005 BIT with Iceland excludes investor-State dispute resolution with respect to measures relating only to the acquisition of an investment.²¹⁶

This approach also has been used recently by Canada in several of its FTAs. Its FTA with Panama, for example, provides that: “A decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of the other Party, or its investment, under Article 23.03 (Exceptions – National Security) shall not be subject to the dispute settlement provisions of Section C of this Chapter or of Chapter Twenty-Two (Dispute Settlement).”²¹⁷ Canada’s FTAs with Colombia²¹⁸ and Peru²¹⁹ as well as an annex in the draft text of Canada’s pending Comprehensive Economic and Trade Agreement with the EU²²⁰ provide the same.

VIII. CONCLUSION

As the number of international investment treaties continues to grow, States are increasingly rethinking, renegotiating, and modifying the provisions of

²¹⁴ India-Singapore CECA, Art. 6.12, Annex 5.

²¹⁵ Agreement on Promotion, Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Mexican States, 18 May 1998, *entered into force* 1 October 1999, Schedule on Settlement of Disputes, Art. 12.

²¹⁶ Agreement between the Government of the United Mexican States and the Government of the Republic of Iceland on the Promotion and Reciprocal Protection of Investments, 24 June 2005, *entered into force* 28 April 2006, Art. 23; *see also* UNCTAD, *The Protection of National Security in IIAs* at 100-01.

²¹⁷ Canada-Panama FTA, Annex 9.37.

²¹⁸ *See* Canada-Colombia FTA, Annex 837.

²¹⁹ *See* Canada-Peru FTA, Annex 844.1.

²²⁰ *See* Draft Consolidated Text (at unnumbered proposed chapter on exceptions) dated 13 January 2010, *available at* http://www.bilaterals.org/IMG/doc_Draft_EU-Canada_FTA_12_Jan_2010.doc.

investment treaties that have garnered the most controversy in investor-State arbitrations, most notably the provisions governing fair and equitable treatment, full protection and security, most-favored-nation treatment, expropriation, umbrella clauses, and essential security interests. In continuing to make adjustments to their investment treaties, these States have chosen to clarify the meaning of provisions in accordance with agreed-upon terms, rather than risk having arbitral tribunals arrive at contrary interpretations. To the extent that claimants continue to test novel theories and interpretations of investment treaty provisions, States will likely continue this trend.

Response to the Report

*Prof. Emmanuel Gaillard**

Today, Mauritius is a thriving offshore financial and business centre attracting corporations from all over the world, many of which have opted to set up a registered presence on the island. The island nation achieved this success over a period of just a few years by cleverly enacting a favourable and efficient regulatory regime and concluding numerous double-taxation treaties.

As a next endeavour, Mauritius is now aiming to be on the list of international arbitration hotspots, especially for Africa-related disputes. There are many reasons to favour Mauritius as a new world centre for international arbitration: in addition to its unique, strategic geographic location at the cross-roads of Africa and Asia, it is a multicultural and multilingual country with a legal system that is a hybrid between common law and civil law. It has a large and diverse legal community that has substantial experience with domestic arbitration and Alternative Dispute Resolution (“ADR”). Mauritius is also a party to the ICSID and the New York conventions. In 2008, it adopted a modern International Arbitration Act that confers a wide range of functions on the Secretary-General of the Permanent Court of Arbitration (“PCA”) which in turn led to the signing of a Host Country Agreement between Mauritius and the PCA, providing for the PCA’s institutional presence in Mauritius.

The success of the government-supported first Mauritian International Arbitration Conference is a promising sign that the international arbitration community is also ready to support Mauritius’ ambitious project. Just as the Dubai International Arbitration Centre developed from scratch and now represents one of the key places for arbitration in the Middle East, so too can Mauritius achieve the same with respect to Africa.

A lucky coincidence may help to further boost Mauritius’ chances of realising its goals in the field of international arbitration. Recent changes brought about by the Treaty of Lisbon in the promotion and protection of investments involving member states of the European Union (“EU”) and their investors have triggered a power struggle in the EU, which has left

* Professor of Law, Paris XII University; Head of the International Arbitration Group, Shearman & Sterling LLP. The author acknowledges the assistance of Veronika Korom, associate in the International Arbitration Group of Shearman & Sterling LLP, in the preparation of this article.

investors facing uncertainty about the future protection of their investments. Mauritius could seize the opportunity offered by the controversial post-Lisbon transition from member-state-level investment protection to EU-level investment protection (I), and encourage investors who do business in the EU, as well as investors from the EU who do business in third states, especially African states, to channel their investments through Mauritius (II).

I. TURMOIL SURROUNDING THE FUTURE OF EUROPEAN INVESTMENT PROTECTION

Prior to the entry into force of the Treaty of Lisbon on 1 December 2009, there was a division of roles in relation to foreign investment between what was then the European Community and the member states. While the European Community was actively pursuing the liberalisation and promotion of foreign investment, the member states were the dominant factor in shaping the protection of investment flows through their network of bilateral investment treaties (“BITs”).¹

Following the failure of the Treaty Establishing a Constitution for Europe, the Treaty of Lisbon was adopted to reinforce and further integrate the European Union (“EU”) by giving it new competencies. Thus, the Treaty of Lisbon shifted the competence for investment policy from the member states to the EU, bringing investment policy (encompassing both investment liberalisation and investment protection) within the sphere of policy areas developed exclusively at the European level.

However, the Treaty on the Functioning of the European Union (“TFEU”)² does not define the exact scope of the new EU competence, and it does not contain transitional arrangements for the current member states’ BITs either. The uncertainties arising from this have sparked a fierce power struggle between the EU institutions and the member states. The European Commission sees itself as the only actor of the new comprehensive European investment policy, yet the member states are far from willing to entirely cede control of this domain to the EU. While this struggle is ongoing, one thing is certain: the TFEU brings fundamental changes in investment protection both for European investors doing business in third states, and for third state investors doing business in the EU. The impact of

¹ However, exceptionally, the Community and the member states have together concluded a few international agreements with third states that contain provisions in the field of protection of foreign direct investment (*e.g.*, Energy Charter Treaty in 1998, EU-Chile Association Agreement in 2002).

² The Treaty of Lisbon renamed the Treaty establishing the European Community as the Treaty on the Functioning of the European Union.

the TFEU is groundbreaking for the more than 170 BITs concluded between EU member states (intra-EU BITs)³ and the more than 1200 BITs concluded by EU member states with third states (extra-EU BITs)⁴ – all of which are doomed to disappear subsequently.

A. Uncertainty Over the Scope of the New Exclusive Competence of the EU

The legislative competence of the then European Community did not extend to foreign direct investment involving third states before 2009.⁵ The TFEU added “foreign direct investment” to the list of matters falling under the common commercial policy.⁶ The EU has exclusive competence with respect to matters falling under the common commercial policy - only the EU may legislate and adopt legally binding acts in this area, while member

³ Number of BITs signed/in force on 1 June 2011 between EU member states according to the UNCTAD website: Austria (11/11), Belgium and Luxembourg (12/12), Bulgaria (22/22), Cyprus (9/8), Czech Republic (19/19), Denmark (9/9), Estonia (15/15), Finland (10/10), France (11/11), Germany (13/13), Greece (12/12), Hungary (21/21), Ireland (1/1), Italy (5/4), Latvia (21/21), Lithuania (20/20), Malta (12/12), Netherlands (11/11), Poland (23/23), Portugal (10/10), Romania (21/21), Slovakia (19/19), Slovenia (19/19), Spain (10/10), Sweden (11/11), United Kingdom (11/11).

⁴ Number of BITs signed/in force on 1 June 2011 between EU member states and third states according to the UNCTAD website: Austria (53/47), Belgium and Luxembourg (81/54), Bulgaria (46/35), Cyprus (18/12), Czech Republic (59/47), Denmark (46/37), Estonia (12/7), Finland (61/54), France (90/80), Germany (123/114), Greece (31/27), Hungary (37/35), Ireland (0/0), Italy (89/70), Latvia (24/22), Lithuania (30/28), Malta (10/7), Netherlands (87/78), Poland (39/36), Portugal (43/30), Romania (61/51), Slovakia (34/25), Slovenia (18/16), Spain (66/53), Sweden (59/55), United Kingdom (93/81).

⁵ Opinion 1/94 of the Court of Justice of 15 November 1994.

⁶ Article 206 TFEU: “By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.” Article 207(1) TFEU: “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.” Article 207(2) TFEU entrusts the European Parliament and the European Council with the task of adopting measures defining the framework for the implementation of the common policy on foreign investments (co-decision). The role of the Commission is to make recommendations to the Council and, if so authorised by the Council, to conduct the negotiations with third states with a view to concluding investment agreements. *See also* articles 207(3)-(6) and 218 TFEU.

states are allowed to act only if empowered by the EU or for the purposes of implementing EU acts.⁷ Thus, “foreign direct investment” was brought within the exclusive competence of the EU, while at the same time member states lost their competence to negotiate and conclude investment treaties.

However, the TFEU does not define “foreign direct investment”, nor does EU law provide any conclusive guidance as to the exact scope of the term. As a consequence, it remains unclear whether the new, exclusive competence of the EU extends only to foreign direct investments or whether it is also supposed to cover other forms of investment, such as portfolio investments or intellectual property rights. These would typically be covered by member state BITs, as traditionally, member state BITs do not make a distinction between direct and portfolio investments. Instead, they include both under “cross-border investment”, for which they provide for a number of guarantees, such as protection against unlawful expropriation and unfair and inequitable treatment, as well as access to dispute resolution mechanisms, notably investment arbitration.

The European Commission claims to have implied competence with respect to portfolio investment derived from the internal market chapter on free movement of capital,⁸ and thus to be the only competent actor to implement the EU’s comprehensive investment policy. But the member states insist that even under the TFEU, investment-related agreements will have to be concluded as “mixed agreements” under shared competence, requiring the participation of both the EU and the 27 member states.⁹ It remains to be seen whether the Commission or the member states comes out as the winner of this debate, and who will be entitled to shape the external investment policy of the EU in the future.¹⁰

⁷ See articles 2(1) and 3(1) TFEU.

⁸ On the basis of the TFEU’s chapter on capital and payments (see article 63 TFEU) and article 3(2) TFEU. See also Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, “Towards a comprehensive European international investment policy”, 7 July 2010, COM (2010) 343 final (“Commission Communication”), pages 8 and 11; see also Commissioner Karel De Gucht, The implications of the Lisbon Treaty for EU trade policy, S&D seminar on EU Trade Policy, Oporto, 8 October 2010, p. 2.

⁹ Articles 4(1) and 2(2) TFEU.

¹⁰ In detail on direct investment and portfolio investment see J. Kleinheisterkamp and S. Woolcock, The EU Approach to International Investment Policy after the Lisbon Treaty, European Parliament Directorate-General for External Policies, Policy Department, INTA 2010, p. 12 ff.; see also Markus Burgstaller, The Future of Bilateral Investment Treaties of EU Member States, in M. Bungenberg, J. Griebel, S. Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht*, 2010, Baden-Baden, Nomos, p. 123 ff.

B. Uncertainty Over the Transitional Arrangements for Member State BITs with Third States

One of the major challenges posed by the EU's new exclusive competence is to manage the transition from the current fragmented investment policies, defined and developed at member state level, to the harmonised EU-level investment policy. In order to ensure the smooth transition from the member state BITs to "European BITs", the European Parliament ("EP") and the Council will have to adopt a Regulation providing for transitional measures, a draft of which has already been submitted for consideration by the Commission and which has been reviewed by the EP and the Council.¹¹

The Commission's draft Regulation sets out the terms, conditions and procedure under which the Commission will give member states authorisation to maintain in force or amend their existing BITs, or to conclude new BITs with third countries, while reserving for the Commission ultimate control over the negotiation of the new "European BITs" (or investment agreements with provisions on investment protection). The European Parliament's International Trade Commission reviewed the draft Regulation and suggested a number of amendments.¹² Most importantly, it suggested introducing a "sunset" clause limiting the provisional authorisation for the existing BITs of EU member states to a maximum of 13 years (8 years, extendable by another 5 years), requiring all member state BITs to be terminated by the end of the 13 year period at the latest.¹³ This proposal caused much controversy among practitioners and member state governments, and was finally rejected by the EP in its

¹¹ Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 7 July 2010, COM(2010)344 FINAL ("draft Regulation").

¹² Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (COM(2010)-344 – C7-0172/2010 – 2010/0197(COD)), Committee on International Trade, *Rapporteur*: Carl Schlyter, 18 November 2010.

¹³ The draft Report suggested the insertion of a new article 12a in the Regulation: "1. This Regulation shall expire eight years after its entry into force. By this time, all existing bilateral agreements of Member States with third countries shall be replaced by an agreement of the Union concerning investment. 2. No later than six years after the entry into force of the Regulation, the Commission shall present to the European Parliament and the Council a report on the progress achieved in the replacement of bilateral agreements of Member States with third countries by an agreement of the Union concerning investment. Where the report recommends extending the application of the Regulation, it shall be for a period of no longer than five years and shall be accompanied by an appropriate legislative proposal to the European Parliament and the Council."

Resolution adopted on 10 May 2011.¹⁴ The EP Resolution of May 2011 also suggested other amendments that aim to weaken the Commission's power to review and de-authorise existing BITs.

With the adoption of the EP Resolution, the ball is now back in the Council's court. At a meeting of trade ministers on 13 May 2011, the Council confirmed that it will seek a negotiated agreement with the EP to allow the Regulation to enter into force quickly.¹⁵ Indeed, unless the Council fully accepts the EP's version of the draft Regulation, the draft will go into a second reading, in accordance with the rules on co-decision.¹⁶ Time is of the essence now; almost two years have passed since the entry into force of the Lisbon Treaty. The longer the adoption of the Regulation takes, the longer the limbo period and legal uncertainty for investors will last.

C. Uncertainty Over the Content of the Future EU Common Investment Policy

The inclusion of investment policy under exclusive EU competence was motivated by the objective of ensuring a level and high quality playing field for investors from all EU member states, as not all member states have an equally strong network of BITs in place.¹⁷ Given the considerable role of the EU in the world economy, and its position as world leader in both inward and outward investment, the EU was seen as better placed than the individual member states to represent investors' interests in international investment negotiations, and to attract investors from third countries to invest in the EU.

In pursuit of implementing these objectives, the European Commission presented on 7 July 2010 a Communication in which it sought to identify the strategic orientation of the future external investment policy of the EU, as well as broad principles which would serve as the basis for investment negotiations with third countries.¹⁸ The Communication

¹⁴ European Parliament legislative resolution of 10 May 2011 on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (COM(2010)0344 – C7-0172/2010 – 2010/0197(COD)), Ordinary legislative procedure: first reading.

¹⁵ Council of the European Union, Press Release 3086th Council meeting, Foreign Affairs/Trade, Brussels, 13 May 2011, p. 9.

¹⁶ "Ordinary legislative procedure", article 294 TFEU.

¹⁷ On the high end of the scale is Germany, which has signed 137 BITs, while Ireland has signed only 1 BIT (*see* UNCTAD website, updated 1 June 2011.)

¹⁸ Commission Communication, *supra* n° 8.

identified strategic countries for the new investment protection negotiations, envisaged developing an “EU Model Investment Treaty” that will serve as a check-list of elements to be included in future investment agreements, and promoted a high level of transparency in investment arbitrations. The Commission suggested introducing into the new investment agreements principles and objectives from other EU policy areas, traditionally not part of member state BITs, such as environmental protection, promotion of the rule of law, and human rights that investors would have to recognise and respect. These new principles have attracted quite a lot of criticism from worried investors and legal practitioners alike, who think that such policies do not belong to the field of investment protection and should be pursued elsewhere.

In response to the Commission’s Communication, on 25 October 2010 the European Council adopted a set of Conclusions, in which the Council set clear boundaries to what had been proposed by the Commission. It stressed that while the social and environmental dimension of foreign investment is important, the main focus of international investment agreements should continue to be market access and effective and ambitious investment protection.¹⁹

Following a hearing of different experts and a Report prepared by the Committee on International Trade,²⁰ the European Parliament adopted its Resolution on 6 April 2011 on the future European international investment policy. The EP suggested significant changes to the current dispute settlement mechanisms to enhance transparency and due process, warned against the risk of forum shopping, and highlighted the need to ensure proper protection of the states’ right to regulatory and public intervention.

These aforementioned documents are the first seeds of tomorrow’s European international investment policy. It is clear that much more negotiation and consultation, involving various stakeholders, will have to take place before a satisfactory set of principles can crystallise, based upon which the future EU investment policy will be able to respond to the expectations.

¹⁹ Council of the European Union, Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council meeting, Luxembourg, 25 October 2010, paras. 14, 16, and 18.

²⁰ Report on the future European International Investment Policy, (2010/2203 (INI)), Committee on International Trade, *Rapporteur*: Kader Arif, 22 March 2011.

D. Uncertainty Over the Future of Intra-EU BITs

There are currently over 170 intra-EU BITs in force between the 27 member states of the EU.²¹ They were typically concluded in the 1990's between the then already member states and candidate states of Central and Eastern Europe,²² and played an important part in the transition from planned economy to market economy in the latter countries.²³ As a result of the 2004 and the 2007 EU enlargements, the former candidate states have become member states of the EU, while the BITs entered into prior to enlargement remain in force. The future of these BITs, and in particular the protection they guarantee to investors who have invested relying on them, has become increasingly uncertain as a result of the changes brought about by the TFEU.

The changes introduced by the Treaty of Lisbon do not automatically invalidate intra-EU BITs or request member states to terminate them, as from an EU point of view, cross-border investment between member states is not foreign investment. The European Commission has deliberately excluded these BITs from the scope of its draft Regulation²⁴ and its Communication on the comprehensive European international investment policy, thereby excluding intra-EU BITs from the scope of the future EU investment policy. Indeed, in the Commission's opinion, these BITs represent an "anomaly within the EU internal market"²⁵ and should therefore be terminated.²⁶ The Commission has not shied away from (ab)using its *amicus curiae* interventions before several investment arbitration tribunals in order to further promote its "anti intra-EU BIT"

²¹ We note that for the purposes of investment protection, Belgium and Luxembourg count as one state, because they conclude their BITs together.

²² There are two exceptions to this rule: the Germany-Greece BIT concluded on 27 March 1961 and the Germany-Portugal BIT concluded on 16 September 1980, before these countries acceded to the EU in 1981 and 1986 respectively. These BITs are still in force today, but to date they have not served as the basis for any investment claim.

²³ The Europe Agreements signed between the European Communities and their member states on the one part, and the candidate states on the other, all contained provisions encouraging the entry into BITs between existing member states and candidate states. This was seen as essential to the economic and industrial reconstruction of the candidate states. See for example Europe Agreement with Hungary, article 72; Europe Agreement with Poland, article 73; and Europe Agreement with Romania, article 74.

²⁴ See Preamble to the draft Regulation, *supra* n° 12, point (15).

²⁵ *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 177.

²⁶ See Annual EFC Reports to the Commission and the Council on the Movement of Capital and the Freedom of Payments for the period between 2006 and 2010, in which the Commission repeatedly calls upon member states to review the need for their intra-EU BITs and to terminate them.

views, and it has even threatened member states with infringement proceedings should they refuse to voluntarily terminate their intra-EU BITs.²⁷ The Commission alleges that intra-EU BITs are not compatible with mandatory provisions of EU law (particularly the prohibition against discrimination) and the EU's judicial system, as the BITs promote competing judicial and arbitral mechanisms that may lead to forum shopping by investors. The Commission is of the opinion that the rules on the internal market, in particular the freedom of movement of capital, provide a sufficient level of protection to intra-EU investors.

Investors and practitioners alike agree that the Commission's requirements are disproportionate to the harm it anticipates from intra-EU BITs. The consequences of terminating the intra-EU BITs and cancelling their "survival clauses" would be disastrous for the member states' economies and employment markets. It would mean that while non-EU companies' investments would continue to be protected in the EU, those of EU companies would not. Consequently, companies like EDF, for instance, would no longer seek to invest in Romania, for example, where its investment would cease to enjoy BIT protection, but invest in Turkey, where they will continue to benefit from the France-Turkey BIT (including its dispute resolution clause). Similarly, multinational firms would no longer use their European subsidiaries to channel investments into another EU member state. Microsoft, for instance, would no longer invest in Poland through its United Kingdom subsidiary but would use subsidiaries located in non-EU jurisdictions which maintain BIT protection with the host state of the investment.

II. A CHANCE FOR MAURITIUS TO SEIZE

While in Europe both investors and member states are left hoping that current BITs will remain in force as long as possible, and that the transition to the new EU investment policy will go smoothly, the uncertainty created by the TFEU and the Commission's interventions present an attractive opportunity for Mauritius to become a non-EU jurisdiction through which EU investments are channelled.

To benefit from the current uncertainty over the future of EU BITs, Mauritius could consider taking the following four steps:

²⁷ *Eureko B.V. v. The Slovak Republic*, para. 182; *Eastern Sugar B.V. v. The Czech Republic* (UNCITRAL), SCC No. 088/2004, Partial Award, 27 March 2007, paras. 119 and 126.

A. Enter into BITs with EU Member States

Mauritius could try to enter into BITs with all EU member states. Mauritius currently has BITs with Belgium and Luxembourg, the Czech Republic, Finland, Germany, Portugal, Romania, Sweden and the United Kingdom. Its BIT with France is not yet in force.²⁸ Before the “Regulation establishing transitional arrangements for member state BITs” is adopted, which will regulate member states’ right to conclude BITs with third states, Mauritius could use the transition period to conclude BITs with the other seventeen EU member states. It should of course ensure that these BITs enter into force as soon as possible. Mauritius might also consider concluding BITs with candidate states, such as Croatia, whose EU accession is scheduled for 2013.

This way, Mauritius could attract those EU investors wishing to invest in another EU member state who, because of the hostile environment towards intra-EU BITs, or the looming termination of these treaties, would prefer to channel their investments through Mauritius - provided the latter has concluded a BIT with the host EU state of the investment. To use the example from before, if EDF still wanted to invest in Romania, it might be more inclined to do so via a Special Purpose Vehicle (“SPV”) incorporated in Mauritius, so as to benefit from the protection guaranteed by the Mauritius-Romania BIT, rather than to invest directly through an entity incorporated in France.

The BITs that Mauritius would thus conclude with EU member states are unlikely to be automatically terminated once the EU investment policy is implemented; rather, the disappearance of the member state BITs will happen gradually. Thus, these BITs would continue to provide protection for investors until the EU concludes a “European BIT” with the same country.

Mauritius might also want to develop a broad network of BITs with non-EU countries, even with those with whom it does not do direct business. Provided that Mauritius has the appropriate BITs in place, this might encourage both EU businesses investing in third states, as well as third state investors investing in the EU, who are suspicious about the protection offered by the new “European BITs” and the responsibilities they impose on investors, to channel their investment through Mauritius. For example, Mauritius could sign a BIT with Venezuela, a country that has seen several treaty claims brought against it through subsidiaries of multinationals in the Netherlands.

²⁸ Information based on the UNCTAD website, “Total number of Bilateral Investment Treaties concluded, 1 June 2011” for Mauritius.

Although Mauritius has signed many BITs with African states, only a few of these treaties are currently in force. Mauritius may wish to ensure that these treaties enter into force in the near future. It could also strive to sign new BITs with other African countries with whom there are no BITs in place yet, in order to benefit from the recent investment-friendly policies in many African states as these may increasingly attract foreign investment.

B. Definition of “Investor”

The wording of BITs plays a very important role, and can either ensure Mauritius’ success in attracting investment arbitrations, or lead to failure. One key term in every BIT is the definition of “investor”. With respect to legal person investors, BITs have essentially relied on one of three different criteria to determine their nationality: i) place of incorporation, ii) location of the company’s seat (real seat, *i.e.* place of central administration or management), and iii) nationality of the controlling shareholders. For example, the place of incorporation criterion was used in the Mauritius-U.K. BIT,²⁹ while the company seat criterion was used in the Mauritius-Switzerland BIT.³⁰

The ‘place of incorporation’ is the easiest criterion to identify and it is also the one that allows for the greatest flexibility, as it does not require the investor to have any significant connection with the place of incorporation. This could be an important consideration for Mauritius in the preparation and negotiation of new BITs. An EU company or an international company will likely want to incorporate only an SPV in Mauritius, through which it channels its investment, and through which the investment claim would be rooted. Such an SPV would not have real economic activities in Mauritius, which means that it would fall outside the protection of a BIT defining investors based on their ‘effective place of management’ or ‘real seat’.

The criterion used to determine the nationality of the legal person investor usually reflects the criterion used in domestic company law and private international law for identifying a company. EU member states belonging to the civil law system adhered traditionally to the ‘real seat’ criterion, but recent case law of the Court of Justice of the European

²⁹ Agreement between the Government of the Great Britain and Northern Ireland and the Government of Mauritius for the Promotion and Protection of Investments, 20 May 1986, article 1(d).

³⁰ Agreement between the Swiss Federation and the Republic of Mauritius concerning the promotion and mutual of investments, 26 November 1998, article 1(3)(b).

Union³¹ has led to reforms of domestic company laws and private international laws, shifting the criterion used from the ‘real seat’ to the ‘place of incorporation’ of the company.³² These developments will make it easier for Mauritius to ensure that any BIT it negotiates contains a definition of “investor” based on the ‘place of incorporation’. As such, treaties along the U.K. model would be the best example to follow in future negotiations.

C. Admission Requirements

Third, Mauritius may also wish to consider reducing or removing from its future BITs any “admission requirements” like those contained in the Mauritius-India BIT³³ or the Mauritius-China BIT.³⁴ Admission clauses reflect a balancing between the need for foreign investments and the need to protect certain domestic interests, and they mean that protection is granted only if the host government approves the investment in advance. Such clauses are one of the distinguishing features of European model BITs, usually conditioning treaty protection on compliance with the host state’s national laws and regulations. However, if a treaty claim arises, an admission clause may give rise to questions regarding the extent of the protection enjoyed by the investment.³⁵ Therefore, if Mauritius wants to succeed in positioning itself as an arbitration-friendly jurisdiction and to

³¹ ECJ, Case C-212/97 *Centros Ltd v. Erhvervs- og Selskabsstyrelsen* [1999]; ECJ, Case C-208/00 *Überseering B.V. v. Nordic Contraction Company Baumanagement GmbH* [2002]; ECJ, Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art* [2003].

³² See, e.g., the German Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG), in force 1 November 2008, which abolished the requirement both with regard to the GmbH and the AktG according to which the real seat and the statutory seat of the company had to coincide and be located in Germany (new §4a GmbHG and §5 AktG). For a company to be a German incorporated company it suffices if its registered office is located in Germany. See also for Hungary Act LXI of 2007 amending § 7(1) of the Act V of 2006 on the Register of Companies, Public Company Information and Court Registration Proceedings, which now says that the seat of the company is its registered office.

³³ Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments, 4 September 1998, article 2.

³⁴ Agreement between the Government of the Republic of Mauritius and the Government of the People’s Republic of China for the Reciprocal Promotion and Protection of Investments, 4 May 1996, article 2.

³⁵ See, e.g., *Aguas Del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objection to Jurisdiction, 21 October 2005; see also *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007.

attract investors willing to channel their investments through Mauritius, it should try to negotiate liberal admission conditions in its future BITs or to remove such conditions outright. This way, the investments would benefit more easily from the full protection of the BIT, without needing to go through express admission or authorisation procedures.

D. Remove Out-of-Date Provisions

Finally, Mauritius should renegotiate its existing BITs so as to remove any out-of-date provisions. For example, the Mauritius-China BIT,³⁶ like many Chinese BITs, provides that the investor can only bring an arbitral claim regarding the amount of compensation for an expropriation, not – at least not clearly – regarding the principle of the expropriation itself. This hostile approach to foreign investment is characteristic of investment-importing developing countries. At the time the BIT was concluded, China was trying to accentuate the country's sovereign right to regulate foreign investments by controlling the entry of investment, regulating foreign investors and nationalising foreign property without having to pay compensation. However, this traditional attitude towards investment law has changed with China's rapid economic rise. Since the late 1990's, China has become an investment-exporting, as well as investment-importing country, and this development is well-reflected in the new, investment-encouraging provisions found in its latest generation of BITs. China has already agreed to strike the out-of-date provisions from its BITs with other states - it has recently renegotiated older BITs with the Netherlands, Finland and Germany, among others. Mauritius should only have to ask to achieve the same.

In addition, Mauritius should also ensure that the breach of other treaty standards, such as the fair and equitable treatment standard, are adequately covered by its future BITs.

If Mauritius were to achieve the above, it would stand a good chance of being solicited as a place for investment arbitration in the future.

³⁶ Agreement between the Government of the Republic of Mauritius and the Government of the People's Republic of China for the Reciprocal Promotion and Protection of Investments, 4 May 1996, para. 13(3).

Response to the Report

*Makhdoom Ali Khan S.A.**

The views expressed here are the product of my experience as one who had some involvement in investment treaty arbitrations and bilateral investment treaty (“BIT”) negotiations on behalf of an investment importing country.

The first ever BIT of its kind was signed on 25 November 1959 between Pakistan and Germany.¹ Yet when the first BIT claim was brought against Pakistan, by a Swiss investor, on 12 October 2001², more than 40 years later, it was not at all prepared to defend it properly. It was the first time that the Government of Pakistan came to know that a BIT can result in a massive claim by a disgruntled investor. By then it had signed 45 BITs.³ There is no evidence available to suggest even remotely that any one of these more than two score treaties was signed after any meaningful negotiations or any consideration of the ensuing consequences. Most of these treaties were signed when a dignitary from Pakistan was visiting a foreign country or a foreign dignitary was visiting Pakistan. When the Government could not think of any other document to sign, it signed a BIT. The reasons were simple: it wanted to sign something unproblematic and it had been signing BITs since the 1950s which had caused no problems. There was nothing else to sign, so it signed a BIT.

A BIT was, therefore, the perfectly innocuous document to sign. As everyone involved was convinced that it had no consequences, no one felt the need to spend any time on drafting or negotiating it. None of the line agencies or ministries were consulted except for the Law Ministry. Its only contribution was to run a spell check and add a few punctuation marks. It never crossed the mind of anyone in that Ministry that there was any need

* Senior Counsel, Fazle Ghani (Pakistan); Former Attorney-General, Islamic Republic of Pakistan.

¹ It came into force on 28 April 1962.

² *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13). The ICSID website reports an earlier case: *Occidental of Pakistan Inc. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/87/4) as having been registered on 7 October 1987. It arose out of the failure of the Government of Pakistan to implement a decision of the Income Tax Appellate Tribunal which was favourable to the investor. It was settled before the proceedings in the case commenced. As no other information is available about this case, for all practical purposes, *SGS v. Pakistan* remains the first case which drew attention in Pakistan to the fact that BITs can result in investor-state claims.

³ The figure may not be accurate. Every time I asked the department concerned I was given a different response.

to examine the substance of the BIT. No such consultation with others or examination of the text was felt to be necessary because Pakistan had been signing these treaties for decades without any adverse consequences. The result was that invariably the investment producing country produced a draft and invariably without any application of mind the Government of Pakistan signed it. Everyone involved got a good photo opportunity and no one was unhappy.

In 2001, when SGS commenced an ICSID arbitration against Pakistan⁴ it was for the first time that we learned that BITs can bite. At that time no one in the Ministry of Law or the office of the Attorney-General for Pakistan was aware what BITs were all about or for that matter what and where ICSID was. The size of the claim created a panic. It received immediate attention. In a few days the Government lawyers, via internet searches and talking to friends among the international legal community discovered the first few essentials of investor-state arbitration. The next step was to get hold of a text of the Pakistan-Switzerland BIT.

In order to understand the meaning of the BIT provisions and the reasons which led to it being signed and ratified, the lawyers asked for the file(s) containing the *travaux préparatoires*. It was not easy. Various ministries at various levels during various periods of time had been responsible for BITs. As the mandate changed, the files were moved. Since post-ratification no one had asked for these materials no one recalled how and where these had been filed. After much effort and time, when the file was found the lawyers discovered that they had been involved in a futile exercise. There was nothing in the file save a terse note to the Prime Minister recommending that the BIT be signed and a few sentences from the minutes of the Cabinet meetings which authorised initially the signing and later the ratification of the BIT.⁵

In spite of this false start when the Government lawyers looked at the SGS claim they were not unduly perturbed. Three factors, in particular, gave them comfort:

- i. there was a contractual arbitration pending between the same investor and Pakistan where more or less the same claims were being pursued by the investor;

⁴ See *Société Générale de Surveillance S.A. v. Pakistan, through Secretary Ministry of Finance, Revenue Division, Islamabad* (ICSID Case No. ARB/01/13) 8 ICSID Reports 352.

⁵ The Swiss-Pakistan BIT file was at least available. The Italy-Pakistan and the Turkey-Pakistan BIT files were not found during the course of the ICSID proceedings.

- ii. the claim had been unsuccessfully litigated by the investor up to the highest forum in the Host as well as the Home State; and
- iii. issues of public policy of the Host State were involved, and serious allegations of corruption in procuring the contract were levelled by the State against the investor.⁶

The lawyers also thought that arguments of *forum non conveniens*, issue estoppel and public policy should hand them an easy victory. They soon realised that none of these may work. They also discovered that things unheard of by them, like “umbrella clauses”, could be pleaded and done so seriously. With the help of an international legal team, Pakistan was able to secure a happy ending albeit on grounds completely unfamiliar to its domestic legal team. Two more BIT claims were filed against Pakistan in quick succession.⁷ One of these was settled after the decision on jurisdiction was delivered and Pakistan won the other. One, however, shudders to think what would have happened had Pakistan lost.

At the relevant time, the combined quantum of these three claims brought by three different investors as a consequence of three different BITs, was in excess of a billion dollars. The foreign exchange reserves of the country after setting apart the amount for service of foreign debt were less than a billion dollars. So, had all three claims succeeded, they would have wiped out Pakistan’s foreign exchange reserves. Even if one of these had succeeded, Pakistan would not have been able to pay without adding to the burden of its already staggering foreign debt.

The Pakistan team thought that it had learnt a few lessons from this experience. The first was that while international legal teams were excellent they were expensive and particularly so for a poor country. A local legal team was, therefore, required not only to defend such claims in the future but also to negotiate BITs. The obvious place to start was the office of the legal advisor to the Foreign Office. That did not work out as it was a one-lawyer office far more sensitive to territorial concerns than legal issues. The bureaucracy was averse to allocating any funds for creating even a small office where lawyers could be retained to work on these issues. The official view was that this was a passing phase and three cases did not justify setting up an office no matter how small. A temporary solution was

⁶ The criminal cases which were tried in Pakistan much later resulted in acquittal.

⁷ See *Impregilo SpA v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) 12 ICSID Reports 242 and *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29).

found for the duration of the cases. Competent young Pakistani lawyers were retained to work with the international legal team. This gave them exposure to international legal issues and some experience with international arbitral tribunals.

The second lesson learned by the Pakistani team was that BITs can have seriously adverse financial consequences. Pakistan should take a close look at its BITs which were close to expiry and re-negotiate these. At the same time it should proceed cautiously in executing new BITs for these created international obligations which once entered upon must be honoured. The BITs contained a number of innocuous sounding expressions. These were open-ended and could have far reaching consequences for the sovereignty and regulatory space of the State. There was a need to educate the bureaucracy about the potential impact of executing a typical BIT. It had to be made aware that investor-state arbitration could lead to the judicial review of the executive, legislative and judicial actions of Pakistan, by a tribunal of three private arbitrators.

These efforts produced mixed results. The initiative to re-examine the already concluded BITs and to re-negotiate those which were nearing expiry got lost in the bureaucratic maze. A seminar was started where, from time to time, eminent lawyers lectured on the subject. It was always well-attended. The Board of Investment, in the Ministry of Investment, which was at that time responsible for BITs, realised the importance of speaking to other ministries and departments before executing BITs. It started a regular consultative process. A serious effort was made to negotiate the BITs with Germany and the United States.⁸ It was far more difficult however, to convince those involved that the text of the BITs must be scrutinised more carefully. The usual response was that since we do not intend to nationalise or treat anyone unfairly or inequitably or to discriminate against foreign investors or deny justice to anyone, we have nothing to fear. It proved impossible to convince them that the expressions can mean much more than what was apparent. They also found it hard to believe that there was any danger of the concepts being as widely interpreted as was suggested and were sure that they would be able to persuade arbitral tribunals if the need arose. This was understandable as Cassandras seldom get a fair hearing.

⁸ As the teams changed the negotiations became more one-sided. Pakistan went back to its old ways. There was no institutional memory about why it was necessary to negotiate BITs. The new administration felt that it was necessary to sign these in order to improve its diplomatic relations. The Pakistan-Germany BIT was signed and ratified following the patterns of the past. While in Germany it received wide media coverage, in Pakistan the event received hardly any press coverage. Most concerned Pakistanis learnt about it from the internet or from their friends abroad.

Of course, one could leave it to international arbitral tribunals to mark out the contours of concepts like “expropriation” or “fair and equitable treatment” or “full protection or security” or “national treatment” or “most favoured nation treatment.” One could hope that their decisions will not go beyond the minimum standard of customary international law and will be in accord with the human rights and environmental concerns of the investment importing world. One could also expect that while not failing in their duty to provide adequate protection to foreign investors and their investments, the tribunals will not unnecessarily constrict the regulatory space of the Host State.

Such hopes must, however, be tempered with the fact that much of the investor-state jurisprudence is not more than a few years old. It is emerging through a series of decisions and awards rendered by tribunals whose composition varies. The quality of representation before these tribunals can be very uneven. The rule of *stare decisis* does not bind subsequent tribunals. Not all the awards and decisions are consistent. One of its leading practitioners recently observed that even, “the doctrinal foundations of international investment law have remained highly contested: it is easier to draw up a list of disputed than agreed propositions.”⁹ In such circumstances, in the interests of clarity and certainty, the Host States would be well advised to articulate their understanding of these concepts in the express language of the BIT. For instance, a BIT can list the conditions under which and the areas in which the host State may qualify investors’ rights. Likewise, where it desires greater regulatory space without being constricted in its actions by the threat of BIT claims the Host State may articulate a margin of appreciation for itself, in the text of the BIT.

It is an uncontested fact of life that a financial emergency or other similar circumstances may at times leave a State little choice. A government does not have to be of socialist inclinations to interfere with free markets or investor autonomy. In 2008, a Republican administration in the United States found that it had to intervene if a global meltdown was to be avoided. It exerted pressure on some investors to sell and facilitated others to buy, it compelled a few banks to merge, it provided bailouts to some and let others fail and in some cases its actions resembled takeovers. There are clear lessons in this for developing countries. They are much more vulnerable to market forces and fluctuating fortunes than those of the developed world. They must, therefore, demarcate the boundary between expropriation and non-compensable regulation far more carefully.

⁹ Professor James Crawford, Foreword to Roland Klager *Fair and Equitable Treatment in International Investment Law*, (Cambridge University Press, Cambridge, 2011) p. xiii

Let this not be understood for what it is not. It is not an argument against executing BITs. Even if they would want to go down that road, it may not be possible for investment importing States to altogether refuse to execute BITs. They can, however, refuse to execute BITs without any meaningful negotiation. They must negotiate carefully and robustly. They should insist on precise definitions and insofar as possible avoid open-ended expressions. The exceptions should be clearly stated. The margin of appreciation which the State desires must be specifically articulated in the BIT. The approach should be better informed and more transparent. Negotiating and executing BITs in great secrecy without pondering the consequences may lead to nasty surprises.

A Mauritian Perspective

*Ali Mansoor**

I start with a slightly different perspective telling you a story of a couple who had been happily married for fifty years. They went out to celebrate and at the end of the evening, a fairy appeared and said “you know, I am so moved to see people still in love after fifty years, when these days divorce is so common, I must give you two a wish”. The wife without hesitating said “I have always wanted a cruise around the world with my husband”. The fairy granted the wish, saying “here you are. Two tickets on the Queen Mary, around the world.” The husband had much more hesitation. He was wondering, should he or should he not, and then, he said “look, I am only going to get this chance once in a lifetime”. He asked the fairy, “can I have a wife twenty five years younger than me?” No sooner had he wished for this, then the fairy turned him into a 95-year old man.

You need to be careful about the type of contracts that you enter into and I think this is one of the messages emerging from the presentations. One can also see contracts from another perspective. If you look at the contract which Hades and Orpheus made, it is clear that Orpheus accepted a contract which he found very hard to respect. He could not help but turn back to see if his beloved was following him out of the gates of hell and therefore lost her again.

We clearly need to have dispute settlement mechanisms. There must be a legal system that people have trust in so that if disputes arise, they will be resolved effectively and fairly. But perhaps it is also more important to have the framework which would largely avoid the need to go to dispute resolution. This could be achieved by pursuing the efforts which Mauritius has been making to bring more certainty and transparency to decision-making and the way rules and regulations apply. I would also like to talk about some of the efforts we are making in the wider region, to have an investment climate that does not result in disputes on expropriation or fair and equitable treatment or most favoured nation (“MFN”) because you have an investment regime which is investor friendly.

Mauritius has always tried to have an investment friendly approach, but I think this has been further reinforced since we lost preferences in Europe and the Multi-Fibre Agreement. This has forced us

* Financial Secretary, Ministry of Finance and Economic Development, Government of Mauritius

to think about being globally competitive instead of being dependent on preferences for our development. With the reforms that were ushered in with these events, we have tried very hard to improve our business climate including making efforts to ensure that the court system works and that we would not be perceived to be denying justice because of long delays before cases are settled. We need to be able to administer court rulings within a reasonable amount of time including making the necessary investments both financial and material to make that possible. But, beyond trying to put in place the business climate here which has resulted in foreign investment rising more than fivefold since the reforms were implemented, we have also tried very hard to work with our neighbours in the Southern African Development Community (“SADC”) and in the Common Market for Eastern and Southern Africa (“COMESA”) so that we can have a similar approach in the whole region.

We have just launched very recently with the World Bank’s assistance what I hope will be an interesting initiative to try to say that we should not compete with each other in doing business. What we should try to do is to collectively work to improve the overall business climate and this initiative is just about to get off the ground. We are trying to get countries in Eastern and Southern Africa on a voluntary basis to participate. The programme targets those States who want to improve their investment climate. It proposes that they work together to say “let us look at what we need to do in each of the areas of ‘doing business’ so that we can catch up with what was the best standard achieved in Africa in 2010”. While that may not sound ambitious, if you took the best standard in each of the indicators in any African country in 2010, and if all the countries that participated in the initiative were to achieve that, we would certainly have a region which was in the top fifteen and perhaps in the top ten in terms of a positive ‘doing business’ environment. This challenge is important because Africa is starting to emerge after having had policies which were counter productive for growth and development for a long time. Africa has started reaching and sustaining significant growth rates and this is even more true if we do not talk of Africa, but if we try to look at the breakdown of separate States.

There is a group of about seventeen or so African countries that are adopting policies which are friendly to growth, friendly to investment and which are really moving ahead. If you look at all of Africa, their performance is a little bit offset by those who have not gone in the same direction and are performing poorly. The challenge of course is to bring more countries into this group of fast growing reformers.

As you know, investment and especially foreign direct investment (“FDI”) has a strong impact on the economic development of a country. As we try to push for greater economic regional integration, we try to encourage greater cross-border trade and investment. Flows of foreign aid to the developing world have been dwindling in recent years as a share of overall capital flows. To make up for the shortfall in aid, many governments have turned to FDI. However, the share of foreign investment coming to Africa is still low - it is less than 10%, but it has grown from about 7 or so percent ten years ago.

If we want to succeed, our region will need a business environment with a stronger and more stable legal and regulatory framework which will, in turn, help create a more transparent, predictable and level playing field for investors.

Let me also share with you some of things that we did in Mauritius. In 2006, we embarked on a series of bold economic reforms. One pillar of the reform was opening up the economy and improving the ease of doing business. This has been high on our agenda. Today the results are evident and are reflected in our strong rankings in the Mo Ibrahim Index of African Governance, the Economic Freedom Index of the Wall Street Journal, the Global Competitiveness Report, the Africa Competitiveness Report and the World Bank “Doing Business Report”, to name a few.

Therefore, business environment matters. The question we should ask today is whether our frameworks are good enough to give protection to investors to compete with other jurisdictions? Are the dispute resolution mechanisms effective in addressing disputes or litigation? Is it opportune to review our frameworks in light of developments in international jurisprudence and investment law?

However, things are starting to move. Referring to some of the ideas that Professor Gaillard mentioned, Mauritius perhaps needs to make a more focused effort to see how to service this emerging Africa and emerging Asia. We are in the middle of, what could be, the fastest growing region in the world as we go into the next decade. Mauritius is very well placed in two ways: (1) as a member of the different associations to ensure there is a better business environment in the region, not just in Mauritius and (2) to do the things necessary so that Mauritius can be the preferred platform from which international companies wanting to do business in the region go into Africa. Some of the things which you have been saying at the Mauritius International Arbitration Conference are important to guide our continuing reform agenda. We will pay careful heed to your proposals both in terms of the content of treaties and their coverage. However, very

often as a small country, we do not have too much leverage and I think this explains some of the variations in our treaties.

We would all like the U.K.-type of treaty, but these days it is much harder to get that and we may need to be much more pro-active than in the past. In this regard, the recent budget has announced an economic diplomacy initiative. Government departments and institutions that are interested in promoting investment into the country or exports need to have a much more coordinated approach. The economic diplomacy initiative can build on the proposals which you make here and your recommendations should certainly be very useful to guide us.

PANEL VI

**RETHINKING THE SUBSTANTIVE STANDARDS OF
PROTECTION UNDER INVESTMENT TREATIES**

Introductory Remarks

*Brooks W. Daly**

The previous panel dealt with the existing framework of over 2,500 investment treaties and new approaches to negotiating treaties. We learned from Mr. Ali Khan, the former Attorney-General of Pakistan, of the dismay, in fact, shock of the government to find its executive, legislative and judicial acts subject to review by an international arbitral tribunal. I am sure that Pakistan is not the only country to have felt, as Mr. Ali Khan put it, that these treaties restrict the regulatory space and indeed, sovereignty of states. The previous panel outlined new approaches to the negotiation of treaties, but what can be done about the existing framework of treaties outside of renegotiation? Is there any possibility for deference to state interests by investment treaty tribunals? This panel will examine whether there is any room for deference to the regulatory or judicial acts of the state.

We commence with a report by Dr. Stephan Schill. He is a lawyer qualified in Germany and New York. He is currently a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. He has also worked at the International Court of Justice ("ICJ") and for Judge Charles Brower at the Iran-U.S. Claims Tribunal. Our first response to Dr. Schill will come from His Excellency Sir Christopher Greenwood Q.C., Judge of the International Court of Justice and member of the Permanent Court of Arbitration. Prior to joining the ICJ he was a leading international arbitrator, barrister and professor of international law. We will then turn to Toby Landau Q.C., a barrister at Essex Court Chambers and a leading arbitrator and counsel in investor-State disputes, among other areas of practice. Our final comments will come from Judge Rajsoomer Lallah Q.C., the former Chief Justice of Mauritius who since retirement has been active as an arbitrator and a member of the London Court of International Arbitration. With that introduction, I will hand over to Dr. Schill for his report.

* Acting Secretary-General and Principal Legal Counsel, Permanent Court of Arbitration at The Hague.

Report to the Conference: How Much Deference Should Investment Treaty Tribunals Pay to the Regulatory or Judicial Acts of Host States?

*Dr. Stephan W. Schill**

I. INTRODUCTION

The current backlash against international investment law and investor-State arbitration¹ not only gives rise to considerations about how to renegotiate, and thus recalibrate, investment treaty obligations in view of arbitral decisions that are perceived as interpreting investment treaties as overly restrictive of State sovereignty.² The backlash should also prompt arbitral tribunals themselves to reconsider both the interpretations they give to the often vague substantive standards of protection contained in international investment treaties and their own role in relation to the State parties to the treaty. Arbitral tribunals, in other words, should ask themselves about the level of scrutiny they exercise in relation to government acts, or, as put by the question guiding this report, about the degree of deference to be paid to the regulatory or judicial acts of host States.

The answer to this question may help to alleviate one central concern in international investment law, namely that arbitral tribunals use

* Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law (Heidelberg); Rechtsanwalt (admitted to the bar in Germany); Attorney-at-Law (New York); LL.M. in European and International Economic Law (Universität Augsburg, 2002); LL.M. International Legal Studies (New York University, 2006); Dr. iur. (Johann Wolfgang Goethe-Universität Frankfurt am Main, 2008). He can be contacted at schill@nyu.edu.

¹ See Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010). See further Peter Muchlinski, 'Trends in International Investment Agreements, 2008/2009: Review of the Model Bilateral Investment Treaties of Norway, South Africa and the United States' 2 *Ybk. Int'l Inv. L. & Pol'y* 35 (2009/2010). Furthermore, just in April 2011, Australia announced that it will discontinue including investor-State dispute settlement provisions in future investment treaties. See Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, at 14, available at <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity-pdf>>.

² See José E. Alvarez, 'Why are we 'Re-calibrating' our Investment Treaties?' 4 *World Arbitration & Mediation Review* 143 (2010).

the vague standards of investment protection to restrict the regulatory space of host States, to oust domestic courts and domestic regulators of the legitimate exercise of jurisdiction, and to become the ultimate controller of central public policy decisions.³ Conceptualising the applicable standard of review, or degree of deference, is all the more important as investment treaty tribunals are not simple *bouches de la loi*, passively finding and applying international investment law to the disputes at hand; instead, they are actors in their own right who impact, concretise, and further develop international investment law through their jurisprudence.⁴

In consequence, part of system-internal efforts at improving the acceptance and legitimacy of investment treaty arbitration must be to reflect on the balance of power between States and arbitral tribunals and to develop appropriate standards of review that lead to a sufficient protection of foreign investments against undue government interference, while leaving host States sufficient room to regulate in the public interest.⁵ Developing adequate standards of review for investment treaty tribunals, and, where appropriate, paying deference to the regulatory and judicial acts of host

³ See the recently published Public Statement on the International Investment Regime, 31 August 2010, available at <http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf>; see further Muthucumaraswamy Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* 39-45 (2008); Ari Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11' 25 *Northwestern JILB* 279, 282 (2005); Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' 73 *Fordham LR* 1521 (2005); Ari Afilalo, 'Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis' 17 *Georgetown IELR* 51 (2004); Charles H. Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter' 36 *Vanderbilt JTL* 37 (2003); Charles N. Brower, Charles H. Brower II & Jeremy K. Sharpe, 'The Coming Crisis in the Global Adjudication System' 19 *Arb. Int'l* 415 (2003); Charles N. Brower, 'A Crisis of Legitimacy' *Nat'l LJ*, 7 October 2002, B9; see also Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' 9 *Chicago JIL* 471 (2009).

⁴ Benedict Kingsbury and Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, in Albert Jan van den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series No. 14, 5-68 (2009), also available as IILJ Working Paper 2009/6 (Global Administrative Law Series) at <<http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf>>.

⁵ See William Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' 48 *Virginia JIL* 307 (2008); William Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' 35 *Yale JIL* 283 (2010).

States, in other words, are ways of (re-)injecting legitimacy into the system of international investment law and arbitration and can ensure its long-term viability without the imminent need to redraft investment treaties or make institutional changes to investment treaty arbitration as it currently stands.

This paper will proceed as follows: First, I will give a brief overview explaining commonalities, but above all relevant differences, between investment treaty arbitration and commercial arbitration; this overview will also explain why deference to be paid to State parties involved in investment treaty arbitration can be an issue in an arbitral process (Part II); second, I will look more closely at how investment treaty tribunals make use of the notion of deference and introduce the different alternatives available to conceptualise deference (Part III); and third, I will provide a framework that can serve to concretise deference in investment treaty arbitration (Part IV). In doing so, I will not suggest an easy-to-apply formula for deference, but rather a conceptual framework, a theory of deference. This framework, I argue, needs to draw on a comparative analysis of the standards of review in investment treaty arbitration with those applied by other dispute settlement mechanisms under international law and by domestic courts as part of their doctrines of separation of powers.

II. WHY DEFERENCE? COMMONALITIES AND DIFFERENCES BETWEEN COMMERCIAL AND INVESTMENT TREATY ARBITRATION

Paying deference to States involved in international arbitrations would appear as an alien concept, if not even an arbitral heresy, if investment treaty arbitration was but another form of commercial arbitration. Indeed, from the perspective of traditional international commercial arbitration, an arbitral tribunal granting deference to only one of the parties could be considered in breach of one of the fundamental concepts of arbitration: the equality of the parties.⁶ However, investment treaty arbitration is not commercial arbitration. Although it makes use of the arbitral process in order to resolve disputes between two parties, employing procedural rules that are either directly made for commercial arbitrations, or tailored after the

⁶ Accordingly, the words “deference”, “margin of appreciation”, or a comparable term, regularly do not appear in the indexes of treatises on international commercial arbitration. Cf. Gary Born, *International Commercial Arbitration*, Vol. II (2009); William W. Park, *Arbitration of International Business Disputes* (2006); Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (2003).

model of commercial arbitration,⁷ and resulting in awards, mostly for damages, that can be enforced similarly to those rendered in commercial arbitrations, investment treaty arbitration differs from commercial arbitration in several regards, namely the subject matter of disputes, the applicable law and resulting causes of action, the relationship of the parties, and the nature of consent.⁸ Most importantly, far from involving private law disputes, which we regularly see in international commercial arbitration, investment treaty arbitrations are concerned with resolving what are in essence public law disputes about the lawfulness, and thus limits, of the exercise of public powers of States under standards of protection contained in international investment treaties. The disputes resolved in investment treaty arbitration, in other words, regularly concern public law matters.⁹

Let me illustrate this point with two representative examples. Consider first the case in *CMS Gas Transmission Company v. Argentina*.¹⁰ It concerned a claim for breach of the bilateral investment treaty (“BIT”) between the United States and Argentina brought by a U.S. investor who had participated in the privatisation program of Argentina’s gas transportation and distribution sector and purchased shareholding interests in a local gas distributing company after a public bidding process. Pursuant to the regulatory framework adopted in view of the privatisation process, the local company was granted a long-term license with the right to calculate gas tariffs in U.S. dollars and to convert them into Peso at the

⁷ See Andrea Bjorklund, ‘Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working’ 59 *Hastings LJ* 241, 251 (2007).

⁸ See in depth Gus Van Harten and Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ 17 *EJIL* 121, 139–40 (2006); Thomas W. Wälde, ‘The Specific Nature of Investment Arbitration’ in Philippe Kahn and Thomas W. Wälde (eds.), *Les Aspects Nouveaux du Droit des Investissements Internationaux/New Aspects of International Investment Law* 43, 112 *et seq.* (2007); *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL/NAFTA, Arbitral Award, 26 January 2006, Separate Opinion by Thomas Wälde, para. 12.

⁹ Gus Van Harten, *Investment Treaty Arbitration and Public Law* 45 *et seq.* (2007); Santiago Montt, *State Liability in Investment Treaty Arbitration – Global Constitutional and Administrative Law in the BIT Generation* 1–17 (2009); Stephan W. Schill, ‘International Investment Law and Comparative Public Law – An Introduction’, in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* 3 (2010).

¹⁰ *CMS Gas Transmission Co. v. The Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005. There are a total of approximately 40 disputes against Argentina relating to the effects of the country’s economic emergency legislation of 2001/2002. See Paola Di Rosa, ‘The Recent Wave of Arbitrations Against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues’ 36 *U. Miami Inter-Am. LR* 41 (2004).

prevailing exchange rate. In addition, the tariff regime included the right to have tariffs adjusted every six months based on the United States Producer Price Index. The framing of the tariff regime was particularly designed against the backdrop of Argentina's major currency instability and hyperinflation in the 1980s and early 1990s and aimed at attracting foreign capital for the privatisation of the state-owned gas sector. As part of Argentina's larger approach to create economic stability and prosperity, the country also pegged its local currency to the U.S. dollar with an exchange rate of one-to-one.¹¹

After the country's economic crisis began to unfold in the late 1990s, a further increase in the gas tariffs was considered to be detrimental to the national economy and social peace in Argentina.¹² The Argentine Government, therefore, asked for a suspension of the tariff adjustment in late 1999 and agreed with the licensee on a temporary tariff freeze. Consecutive agreements to the same end were reached, but never completely implemented. In particular, contrary to these agreements the gas distributor was neither indemnified for resulting losses, nor were the costs of the deferral recouped in subsequent tariff adjustments. Instead, following the adoption of the "Emergency Law,"¹³ Argentina lifted the Peso convertibility, transformed all internal U.S. dollar denominated claims at a one-to-one ratio into Peso and abrogated the tariff adjustment clauses (so-called "pesification"). Concerning the gas distribution sector, Argentina insisted on a renegotiation of the prior arrangements with the local gas distributors and their foreign shareholders and on a fundamental restructuring of the tariff regime. Due to the non-observance of the promises relating to the tariff regime made before the privatisation of the gas sector, CMS initiated arbitration under the BIT between the United States and Argentina and invoked a violation of indirect expropriation, fair and equitable treatment, and the BIT's umbrella clause, in addition to alleging discriminatory and arbitrary conduct on behalf of Argentina. As a consequence, it sought damages in excess of US\$ 260 million, equalling the decline in value of its shareholding.¹⁴

Argentina, in turn, argued that the emergency legislation it adopted was geared towards dealing with the economic and social emergency that

¹¹ See the "Convertibility Law" No. 23.928 of 27 March 1991, modified by Law No. 25.445 of 21 June 2005.

¹² For the background of Argentina's economic crisis, see Di Rosa, *supra* note 10, at 44 *et seq.*

¹³ Law No. 25.561 of 6 January 2002, B.O. No. 29.810.

¹⁴ For Claimant's arguments in a nutshell see *CMS v. Argentina*, *supra* note 10, paras. 53-90.

had arisen out of its catastrophic financial and economic situation.¹⁵ In its view, it was entitled to pass the emergency legislation in question, and breach any promises made to investors in the gas distribution sector, because it was in a state of necessity both as a matter of its own constitutional law as well as under customary international law. For Argentina, the question at stake thus concerned core governmental powers relating to a public emergency and had a constitutional law dimension in which the rights and interests of private investors clashed against the core governmental power to react to a severe economic and social emergency. These constitutional dimensions thus distinguish *CMS v. Argentina* clearly from the typical international commercial arbitration.

The second case I would like to mention is an arbitration for breach of the Energy Charter Treaty in *Vattenfall v. Germany*.¹⁶ It concerned a claim by a Swedish electric power producer who intended to build a coal-fired power plant in the City of Hamburg involving the alleged breach of representations made by the Mayor of Hamburg during negotiations about the environmental standards the prospected plant had to conform to. During these negotiations, and before applying for the necessary operating license, the city government, then under the sole control of the Christian Democrats, allegedly had indicated that an operating licence under German administrative law with certain environmental parameters could be granted. In reliance on this statement the investor applied for an operating license and was granted a preliminary permission to start the construction of the plant.

Before the final operating license was issued, however, parliamentary elections in Hamburg led to a change in government, with the Green Party, who had won a significant share in the elections precisely because of its opposition to the coal-fired power plant in question, joining the government alongside the Christian Democrats. This change in government led to significant changes to the operating license for the power plant as it was finally granted; most importantly it contained additional environmental obligations and standards that aimed at protecting fauna and flora in the adjacent Elbe river. The investor claimed that these subsequent changes breached its legitimate expectations under the fair and equitable treatment standard contained in the Energy Charter Treaty and constituted a

¹⁵ For Argentina's arguments in a nutshell see *CMS v. Argentina*, *supra* note 10, paras. 91-99.

¹⁶ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6), Request for Arbitration 30 March 2009. The case has meanwhile been settled. See *Vattenfall v. Germany*, Award, 11 March 2011.

measure tantamount to expropriation because the additional requirements destroyed the economic viability of the project. It accordingly claimed more than US\$ 1 billion in damages.¹⁷

From the perspective of German domestic law, the dispute in *Vattenfall v. Germany* primarily raises questions of administrative law. In particular, the construction and operation of a power plant is not construed as involving contractual relations or questions of contract law. Instead, from a German domestic law perspective, all issues involved revolve around the proper application of domestic administrative law. Furthermore, under German administrative law, it is most likely that any possible concessions made orally to the power producer during negotiations before the operating license was granted would not have been binding on the city government or required the government to compensate for any additional environmental standards imposed contrary to such representation. Thus, neither any oral concession made, nor the permission preliminary to start with the construction of a project before the final operating license is issued, are actionable under German administrative law.

Both *CMS v. Argentina* as well as *Vattenfall v. Germany* are representative of the type of disputes heard in investment treaty arbitration. Unlike in international commercial arbitration, which primarily involves disputes between private commercial actors about the rights and duties under contractual arrangements, investment treaty arbitrations are characterised by the following distinctive features:¹⁸ First, unlike in typical commercial arbitrations, one party to an investment treaty arbitration, usually the respondent, is a State or State entity; second, investment treaty arbitrations regularly involve questions not of private, but of public law, that is, disputes about the limits of the State's or State entity's administrative, legislative, or judicial powers; third, investment treaty arbitrations do not primarily involve questions of contractual liability under domestic law, but of State responsibility under international law, that is, whether the host State's conduct was in accordance with the principles contained in an international investment treaty; fourth, the parties to an investment disputes are not equals: instead, investors and host States stand in a relationship of super- and subordination with the State being able to impose binding decisions on a foreign investor; and fifth, investment treaty arbitration is "arbitration without privity":¹⁹ the host State's consent is not

¹⁷ *Ibid.*, paras. 50 *et seq.*

¹⁸ Van Harten and Loughlin, *supra* note 8, at 140-5.

¹⁹ See Jan Paulsson, 'Arbitration Without Privity' 10 *ICSID Rev. - FILJ* 232 (1995); Bernardo Cremades, 'Arbitration in Investment Treaties: Public Offer of Arbitration in Investment-Protection Treaties', in Robert Briner, L. Yves Fortier, Klaus Peter Berger &

based on contract, but on a unilateral offer in an investment treaty in generalised and prospective form, which any investor covered by the treaty's provisions can accept simply by initiating arbitration.²⁰

As a consequence of these distinctive features, party autonomy plays a somewhat more limited role in investment treaty arbitration than in commercial arbitration. Instead, investment treaty arbitration is essentially an adjudicatory process under public law for resolving investor-State disputes, which follows a predetermined procedure and involves the application of substantive rules not negotiated by the parties to the arbitration, much like the process involved in case of a State's submission to the jurisdiction of an international human rights court or to administrative or constitutional judicial review at the domestic level.²¹ Most notably, investment treaty tribunals essentially replace domestic courts, which otherwise would be competent to resolve disputes between foreign investors and the host State.

In that sense, investment treaty tribunals functionally assume the same role as that of domestic courts in public law disputes.²² Like courts, investment treaty tribunals engage in the finding of facts and the application of the governing law to those facts. Most importantly, arbitrators in investment treaty disputes are required to reach their decisions based on their impartial and independent judgment. Investment treaty arbitration, in other words, is an adjudicatory process that has little in common with commercial arbitration, where the parties under the principle of party autonomy have full liberty to determine not only which law to apply, but also whether to render a decision based in law or *ex aequo et bono*.²³

Yet, the public law dimensions in international investment law are not limited to the aspect of restraining governmental action in the interest of investor rights granted in an investment treaty. Public dimensions also

Jens Bredow (eds.), *Law of International Business and Dispute Settlement in the 21st Century* 149 (2001); Andrea K. Bjorklund, 'Contract Without Privilege: Sovereign Offer and Investor Acceptance' 2 *Chicago JIL* 183 (2001).

²⁰ See Barton Legum, 'Investment Treaty Arbitration's Contribution to International Commercial Arbitration' 60(3) *Dispute Resolution Journal* 71, 73 (2005).

²¹ See *International Thunderbird Gaming v. Mexico*, Separate Opinion of Thomas Wälde, *supra* note 8, para. 13; Van Harten and Loughlin, *supra* note 8, at 145; Wälde, *supra* note 8, at 112; Schill, *supra* note 9, at 12.

²² The reason for this is that foreign investors, in particular in developing and transitioning economies, often have reservations about the neutrality, impartiality, and independence of the host State's courts to settle disputes with the government. See Stephan W. Schill, 'Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement', in Waibel *et al.*, *supra* note 1, p. 29.

²³ See Susan D. Franck, 'International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?: The Role of International Arbitrators' 12 *ILSA JICL* 499, 503 (2006).

surface when focusing on the effects that the decision-making of arbitral tribunals has beyond the resolution of a specific investor-State dispute. In particular, arbitral decision-making in investment treaty arbitration not only has effects on the host State involved in an actual arbitration, thus raising concerns about accountability and legitimacy in relation to the host State's population. Much more, investment treaty arbitration also has effects on investors and States that are neither party to the specific proceedings nor to the investment treaty at issue.²⁴

This is the case, because investment treaty tribunals concretise and further develop the vague standards of investment protection contained in international investment treaties through their jurisprudence into treaty-overarching principles of international investment law²⁵ that affect the expectations and the behaviour of investors and States more generally. Arbitral tribunals do so in a highly self-referential system of arbitral jurisprudence reminiscent of a common law system of precedent, in which subsequent tribunals make reference to and draw on the decisions of earlier arbitral tribunals and the ways in which they have interpreted the standards in question.²⁶ By concretising and developing international investment law, investment treaty tribunals therefore exercise public authority beyond a specific dispute. This effect of the decision-making of arbitral tribunals illustrates that challenges about accountability and legitimacy in investment treaty arbitration go to the concern that tribunals, which only derive their legitimacy from the consent of two disputing parties, in fact exercise global regulatory powers.²⁷

If we take the function and effect of investment treaty arbitration

²⁴ Kingsbury and Schill, *supra* note 4.

²⁵ On the development of jurisprudence in investor-State arbitration into a highly self-referential system of persuasive precedent see Stephan W. Schill, *The Multilateralization of International Investment Law* 321 *et seq.* (2009); see also Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' 23 *Arb. Int'l* 357 (2007).

²⁶ Cf. also the quantitative citation analyses conducted by Jeffrey Commission, 'Precedent in Investment Treaty Arbitration—A Citation Analysis of a Developing Jurisprudence' 24 *J. Int'l Arb.* 129 (2007), and Ole K. Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis' 19 *EJIL* 301 (2008).

²⁷ On the legitimacy problems of this governance function for the principle of democracy see A. von Bogdandy and I. Venzke, 'Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung' 70 *ZaöRV* 1 (2010); Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute? International Judicial Institutions as Lawmakers' 12 *German LJ* (2011 – forthcoming). More generally on the approach to understand phenomena of global governance as an exercise of public authority see Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds.), *The Exercise of Public Authority by International Institutions—Advancing International Institutional Law* (2010).

seriously, and see how States are currently reacting to some interpretations of investment treaties by arbitral tribunals, the reasons for thinking about deference become clear. The reason is that the dispute settlement activity of arbitral tribunals does not only concern the parties to the dispute but has much wider implications. It has public dimensions in at least two regards. First, given that one party to the disputes is a State, or State entity, and that the disputes regularly involve matters of public policy, the effects of an arbitral decision are not contained to the State in the abstract, but have real impact on its population. This can be seen from the many cases involving the limits of States to act in the public interest, for example, arbitrations involving water concessions in Bolivia, Argentina, and Tanzania;²⁸ an arbitration challenging an affirmative action program that aims at remedying injustices of the apartheid system in South-Africa;²⁹ arbitrations challenging the ban of harmful petrol additives or pesticides in the United States and Canada;³⁰ arbitrations challenging measures for the protection of the environment in Germany, Canada, or Mexico;³¹ an arbitration challenging anti-tobacco legislation in Uruguay;³² or arbitrations involving the structure of the domestic health-care insurance system in the Slovak Republic.³³ These cases all involve the relation between investment protection and competing public interests and merit a degree of deference because investment treaty tribunals in most cases are functional substitutes for domestic courts, which in turn often apply limited standards of review in relation to such public interest matters.

²⁸ See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2004; *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction of 21 October 2005; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19) and *AWG Group v. The Argentine Republic*, Decision on Liability, 30 July 2010.

²⁹ *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), Award, 4 August 2010.

³⁰ See, e.g., *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL (NAFTA), Award, 2 August 2010.

³¹ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6), Request for Arbitration, 30 March 2009; *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB (AF)/97/1 (NAFTA)), Award, 30 August; *S.D. Myers Inc. v. Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000.

³² *FTR Holding S.A., Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), registered 26 March 2010 (pending).

³³ See *HICEE B.V. v. Slovak Republic*, UNCITRAL (PCA Case No. 2009-11), Partial Award, 23 May 2011, and *Eureko B.V. v. Slovak Republic*, UNCITRAL (PCA Case No. 2008-13), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

Second, the interpretations of international investment treaties by arbitral tribunals, unlike in the commercial arbitration context, become public, with the effect that arbitral decisions increasingly serve as (albeit non-binding) precedents that shape the way international treaty obligations are interpreted. Although the primary obligation of investment treaty tribunals is to resolve the disputes before them, they have a considerable law-making function in light of the “normative flexibility” inherent in the principles of international investment law, which tribunals concretise and shape through arbitral jurisprudence. Inevitably, this creates tensions with States as the principal, and traditionally exclusive, law-makers in international law. Deference, in this perspective, may be needed to avoid that a single one-off arbitration tribunal makes too far-reaching statements about the interpretation of international investment law as a whole.

III. DIFFERENT CONCEPTS OF DEFERENCE IN INVESTMENT TREATY ARBITRATION AND POSSIBLE ANALOGIES

Investment treaty tribunals, unlike international commercial tribunals, quite often make reference to the notion of deference: yet, they attribute different meanings to it. First, it can refer to the idea that international courts and tribunals have to respect the treaty-making power of States, and that tribunals should not rewrite treaty obligations they disagree with for policy reasons³⁴ or disregard authoritative interpretations by the Contracting Parties.³⁵ This meaning of deference concerns the limits of a court’s or tribunal’s power to interpret the governing law *vis-à-vis* States as the masters of the treaty in question.

Second, deference can also refer to the principle of interpreting international treaties, including investment treaties, in a State-friendly (or sovereignty-friendly) manner. This *in dubio mitius*-principle has occasionally been applied by international courts and tribunals, including by

³⁴ See *Siag and Vecchi v. Republic of Egypt* (ICSID Case No. ARB/05/15), Decision on Jurisdiction, 11 April 2007, para. 127 (“On the matter of interpretation of the international instruments involved in this case it was submitted that the Tribunal should give deference to the negotiated language of the treaty, including how Egypt and Italy chose to define ‘natural person’ and ‘protected investment’. The Tribunal should not rewrite the BIT to achieve policy ends. If it did so, the Tribunal would be replacing its judgment for that of the Contracting States.”).

³⁵ Consider how various tribunals, some deferential, others not, have dealt with the FTC Note of Interpretation on fair and equitable treatment under Article 1105(1) NAFTA. See Schill, *supra* note 25, at 268-275.

investment treaty tribunals,³⁶ but is rightly rejected in the great majority of cases as a principle alien to the Vienna Convention on the Law of Treaties and to customary law principles of treaty interpretation.³⁷ It is inappropriate as a principle of treaty interpretation because being deferential to one Contracting State's sovereignty means disregarding the other Contracting State's entitlement to have its treaty rights enforced.³⁸

Finally, and that is the relevant concept in the present context, deference is used to designate a "margin of appreciation", a certain space for manoeuvre, within which action taken by the host State is in conformity with its treaty obligations and exempt from in-depth review by an international court or tribunal.³⁹ Deference in that sense refers to a limitation in a court's or tribunal's review of decisions taken, or of determinations made, by a State. Respect for such decisions or determinations can involve several issues. It can refer to the respect an arbitral tribunal should pay to the determination of facts by a domestic

³⁶ See, e.g., *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 171 (pointing out that "the appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*").

³⁷ See most recently *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, para. 48, available at <<http://www.icj-cij.org>> (pointing out that "[w]hile it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way"). For cases in investment arbitration rejecting this principle see, e.g., *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3 (NAFTA)), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, para. 51; *Ethyl Corporation v. Canada*, UNCITRAL/NAFTA, Award on Jurisdiction, 24 June 1998, para. 55; *Eureko v. Poland*, Partial Award, 19 August 2005, para. 258; *United Parcel Service of America, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Award on Jurisdiction, 22 November 2002, para. 40; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002, para. 43; *Amco Asia Corporation and Others v. The Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction, 25 September 1983, para. 14(i); *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004, para. 81. See generally also Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' 21 *EJIL* 681 (2010).

³⁸ International treaties do not only impose obligations on one of the parties, but correlate with a right vested in the other Contracting Party. As both States are exercising their sovereignty in entering into a treaty, an interpretation in favour of one State's sovereignty would equally result in a detriment to the other State's sovereignty.

³⁹ See Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law' 16 *EJIL* 907 (2005).

agency or a domestic court relating to the case at hand; to the substantive policy choices a State makes, including the weight it attributes to non-investment interests (so-called “regulatory space”); and to the interpretation of law, both domestic and international.

The Tribunal in *S.D. Myers v. Canada* perhaps most clearly caught this meaning of deference when it stated:

“[...] a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.”⁴⁰

Although arbitral jurisprudence is not uniform in conceptualising deference, most tribunals accept the concept in one way or another. In fact, many tribunals even seem to depart from a presumption in favour of deference. For example, the Tribunal in *S.D. Myers v. Canada*, followed by a number of other tribunals, stated that the determination of whether a State has violated the fair and equitable treatment standard

“[m]ust be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”⁴¹

Likewise, the Tribunal in *Tecmed v. Mexico* observed that in determining whether a regulatory act of a State constituted an indirect expropriation it needed to yield to the principle of deference, resulting in no more than a reasonableness test:

⁴⁰ *S.D. Myers Inc. v. Canada*, *supra* note 31, para. 261.

⁴¹ *S.D. Myers Inc. v. Canada*, *supra* note 31, para. 263. The same, or a very similar statement, was repeated by the tribunals in *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 304 *et seq.*; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, para. 505; *cf.* also *Glamis Gold Ltd. v. United States of America*, UNCITRAL/NAFTA, Award, 8 June 2009, para. 617; *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Award, 5 September 2008, para. 181.

“[A]lthough the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining [...] whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.”⁴²

Similarly, as regards decisions by domestic courts, several investment treaty tribunals have emphasised that they are not courts of appeal, but have a more limited mandate. This could also be interpreted as a form of deference towards domestic courts. Thus, the Tribunal in *Azinian v. Mexico*, for example, observed:

“[T]he possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. [...] What must be shown is that the court decision itself constitutes a violation of the treaty.”⁴³

The reasoning of other tribunals, by contrast, suggests a more restrictive approach to deference. The Tribunal in *Chevron v. Ecuador*, for example, stated in a case dealing with denial of justice for undue delay and manifestly unjust judgments of domestic courts:

“[...] the uncertainty involved in the litigation process [...] is taken into account in determining the standard of review. [...] if the alleged breach were based on a manifestly unjust judgment rendered by the Ecuadorian court, the Tribunal might apply

⁴² *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, para. 122.

⁴³ *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2), Final Award, 1 November 1999, para. 99. See also *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1), Final Award, 9 January 2003, para. 190; similarly concerning the restriction of a NAFTA Chapter 11 tribunal to find breaches of NAFTA, not of general international law or domestic law *Roy Feldman Karpas v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Interim Decision on Jurisdiction, 6 December 2000, para. 61; *Mondev v. United States of America*, *supra* note 37, para. 136.

deference to the court's decision and evaluate it in terms of what is "juridically possible" in the Ecuadorian legal system. However, in the context of other standards such as undue delay [...] no such deference is owed."⁴⁴

Likewise, the arbitral tribunals in *CMS v. Argentina*,⁴⁵ *Sempra v. Argentina*,⁴⁶ and *Enron v. Argentina*,⁴⁷ did not grant Argentina much policy space in examining whether Argentina's emergency legislation constituted the "only way" to react to its economic and financial crisis under the international law concept of necessity, while other tribunals were more deferential, notably the tribunals in *LG&E v. Argentina*,⁴⁸ *Continental Casualty v. Argentina*,⁴⁹ and *Total v. Argentina*.⁵⁰

As the above mentioned statements show, the notion of deference is frequently dealt with in investment treaty arbitration. Yet, arbitral jurisprudence is unsettled on how to conceptualise deference and what factors influence the appropriate level of deference. In particular, arbitral tribunals do not apply a principled approach that could furnish predictable standards for States and investors. Moreover, arbitral jurisprudence does not explain why deference should be paid to certain acts and determinations of host States but not to others, and how to distinguish between them. To the extent deference is mentioned as influential in the decision-making of investment treaty tribunal, as was done, for example, by the tribunals in *S.D. Myers v. Canada*⁵¹ or *Tecmed v. Mexico*,⁵² it reminds one more of a mantra that is taken for granted and repeated almost endlessly, than of the result of a well-reasoned and deliberate decision.

⁴⁴ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL (PCA Case No. 34877), Partial Award on the Merits, 30 March 2010, para. 379. Critical also *Chemtura v. Canada*, *supra* note 30, paras. 123-134 (no deference with regard to fact-finding, but no second-guessing of science-based decision-making).

⁴⁵ *CMS v. Argentina*, *supra* note 10, paras. 304-394.

⁴⁶ *Sempra Energy International v. The Argentine Republic* (ICSID Case No. ARB/02/16), Award, 28 September 28, 2007, paras. 325-397 (this award has meanwhile been annulled).

⁴⁷ *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3), Award, 22 May 2007, paras. 288-345 (this award has meanwhile been annulled).

⁴⁸ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006, paras. 201-266.

⁴⁹ *Continental Casualty v. Argentina*, *supra* note 41, paras. 160-236.

⁵⁰ *Total S.A. v. The Argentine Republic* (ICSID Case No. ARB/04/1), Decision on Liability, 27 December 2010, paras. 135-184, 219-231.

⁵¹ *See supra* notes 40 and 41.

⁵² *See supra* note 42.

As suggested in Part II, looking at the commercial arbitration model provides little help in light of the significant differences that exist between investment treaty arbitration and international commercial arbitration. By contrast, both public international law and public law analogies appear helpful to conceptualise deference, and to provide a guiding framework that can then be further concretised depending on the State organ taking a measure, the applicable law and treaty standard, and the circumstances of each specific case.

As a first step, it is important to look towards the standards of review and the concepts of deference applied by other international dispute settlement mechanisms. After all, investment treaty tribunals are creatures of international law that share commonalities with other international courts and tribunals, above all because they determine the legality of a State's conduct under public international law. In that perspective, the concept of deference has to be seen as part of the public international law underpinnings of investment treaty arbitration. It is a facet of the dialectic relationship between the static concept of sovereignty conceived of in times when the task of international law was primarily to delineate the power spheres of different States and a modern international law of cooperation implemented, *inter alia*, by international courts and tribunals.⁵³

Deference, in that context, is reminiscent of the way international tribunals understood the customary international law minimum standard. This standard was circumscribed by the United States-Mexican General Claims Commission in the 1926 *Neer* case as follows:

“[t]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.”⁵⁴

Deference, in other words, is a concept deeply rooted in the public international law discourse about the relationship between States and

⁵³ On the changes in the governance structures and institutions in international law, see Mehrdad Payandeh, *Internationales Gemeinschaftsrecht* (2010).

⁵⁴ *L. F. H. Neer and Pauline E. Neer (United States of America) v. Mexico*, Opinion, 15 October 1926, U.N.R.I.A.A., Vol. IV, 61-62. For more on the international minimum standard see Edwin M. Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ 38 *Michigan LR* 445 (1940).

international courts and as regards the relationship between international and domestic law.

Accordingly, it is not surprising that every international dispute settlement body has to grapple with its relationship to State sovereignty when conducting proceedings, when interpreting international law, and also when choosing how much, or how little, deference to pay to States. The standard of scrutiny, or the amount of deference, in this context, is one criterion of the success and acceptance of the respective dispute settlement body. Investment treaty arbitration, as a creature of public international law, cannot escape this context. In consequence, one source of inspiration for developing criteria for the appropriate degree of deference to be applied by investment treaty tribunals can be found in the practice of other international dispute settlement bodies and how they implement their standard of review, for example, the International Court of Justice,⁵⁵ the WTO Dispute Settlement Body,⁵⁶ or the European Court of Human Rights.⁵⁷

Second, drawing analogies between investment treaty arbitration and traditional inter-State dispute settlement under international law, however, also has its limits, in particular as the type of disputes entertained in investment treaty arbitration and other international dispute settlement systems can be considerably different. Furthermore, deference in classical public international law dispute resolution is primarily conceptualised in a dichotomist framework that juxtaposes sovereignty and restrictions of sovereignty through international law. This somewhat simplifying framework disregards that the State is not a unitary actor, but consists of many organs whose conduct may have to be treated according to more nuanced standards of review. Furthermore, investment disputes often penetrate deeper into the domestic realm than the traditional inter-State international law of co-existence that was primarily concerned with separating different spheres of sovereignty and which could, in

⁵⁵ See Stephan W. Schill and Robyn Briese, ‘“If the State Considers”: Self-Judging Clauses in International Dispute Settlement’ 13 *Max Planck UNYB* 61 (2009).

⁵⁶ Claus-Dieter Ehlermann and Nicolas Lockhart, ‘Standard of Review in WTO Law’ 7 *JIEL* 491 (2004); Steven P. Croley and John H. Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Government’ 90 *AJIL* 193 (1996); Matthias Oesch, ‘Standards of Review in WTO Dispute Resolution’ 6 *JIEL* 635 (2003); Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (2003).

⁵⁷ On the margin of appreciation doctrine applied by the ECHR see Howard C. Yourrow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996); Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002); Jeffrey A. Brauch, ‘Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’ 11 *Columbia J. Eur. Law* 113 (2005).

consequence, rely on a more schematic vision of the State as a unitary international actor.

As a result, it is also helpful to draw analogies between investment treaty arbitration and (administrative or constitutional) judicial review at the domestic level.⁵⁸ This analogy relies mainly on a functional understanding of investment treaty tribunals. Unlike in classical inter-State dispute settlement, where disputes about the limits of a State's power over foreign investors were first a matter for the domestic courts of that State, and only subsequently a matter for inter-State dispute resolution, investment treaty arbitration, because of the direct access foreign investors enjoy without needing to exhaust local remedies, has a function that is largely equivalent to that of domestic courts in settling disputes between the State and private individuals. Deference, in this context, can then be understood and justified as part of the constitutional law concept of separation of powers. In this perspective, investment treaty tribunals should exercise deference because the courts in virtually all domestic legal orders exercise some degree of deference *vis-à-vis* the acts of the legislature and acts of domestic regulatory agencies.

IV. CRITERIA FOR DETERMINING THE APPROPRIATE LEVEL OF DEFERENCE

Determining the appropriate level of deference consists in the search for a balance between scrutiny by investment tribunals and room for host State autonomy. The appropriate standard, and the circumstances under which such a standard is applicable, will be influenced by a number of factors, having regard to both the public international law underpinning of investment treaty arbitration and its public law implications. The appropriate degree of deference, in other words, will depend on criteria that are relevant under public international law rules and that determine a court's mandate and power under domestic public law.

Analogies with how other international dispute settlement bodies fashion the standard of review they apply to State action, as well as the fact that investment treaty tribunals determine the lawfulness of State conduct under an international investment treaty, furnishes several criteria that are relevant for determining the standard of review to be applied in investment treaty arbitration. First, the text of treaty provisions matters. Thus, a self-judging clauses, such as Article 22(2) of the Australia-United States Free

⁵⁸ See Burke-White and von Staden, *Private Litigation*, *supra* note 5, at 314-322. See more generally *supra* notes 8 and 9.

Trade Agreement, providing that “[n]othing in this Agreement shall be construed to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests,”⁵⁹ will require international tribunals to be more respectful to the State’s determination of what it considers necessary than comparable clauses that are not self-judging.⁶⁰ Second, the circumstances and the subject-matter of measures taken by the host State will matter. The necessity of measures taken by a State in order to tackle an emergency or crisis situation, for example, will, in principle, merit more deference than measures taken during the regular course of things.⁶¹

⁵⁹ Australian Treaty Ser. 2005, No. 1, signed 18 May 2004 (entered into force 1 January 2005).

⁶⁰ The applicable standard for self-judging clauses is generally accepted to be restricted to “good faith review”, entailing significant deference to the State invoking the clause. *See Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, para. 145 (noting that “while it is correct ... that the terms of [the self-judging clause] provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties”). On self-judging clauses and the standard of review applicable in an international court or tribunal, *see generally* Schill and Brieze, *supra* note 55.

⁶¹ *See Elettronica Sicula SpA (ELSI) Case (United States of America v. Italy)*, Judgment, 20 July 1989, I.C.J. Reports 1989, 15, at 81, para. 74 (“Clearly the right [to control and manage a company] cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like.”); *see also National Grid P.L.C. v. The Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 166; *Continental Casualty v. Argentina*, *supra* note 41, paras. 160-236 (in the context of a so-called non-precluded-measures-clause); *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/5), Award, 6 June 2008, para. 201. *Cf. Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, (ICSID Case No. ARB/04/19), Award, 18 August 2008, para. 347 (concerning a case relating to an energy crisis and national supply shortage); *Total v. Argentina*, *supra* note 50, paras. 135-184. *See also Ireland v. United Kingdom*, ECtHR, Ser. A, No. 25, Judgment, 1 January 1978, para. 207 (observing in regard of the emergency clause in Article 15 of the European Convention on Human Rights that “[i]t falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.”). *See further Brannigan and McBride*, ECtHR, Ser. A. No. 258-B, Judgment, 26 May 1993, para. 43.

Third, the function of the international court or tribunal matters for determining the appropriate standard of review. The function depends on the institutional and procedural relations between the national and international level, including the mode of access to an international tribunal, the applicable law in the international proceeding, and the procedural posture. It makes a difference, for example, whether the international level is only available after having exhausted local remedies, as is the case before the Strasbourg Court, or whether, as in investment treaty arbitration, there is direct access to an international forum. In addition, the applicable law can affect the standard of scrutiny, that is, whether an international court or tribunal determines the lawfulness of a State's conduct only against international legal standards, which may merit deference towards the State's determination of its own domestic law,⁶² or whether the international court or tribunal also determines the lawfulness of State conduct under domestic law.

Fourth, the cause of action at issue matters, that is, the breach of the standard of treatment the investor invokes. It makes a difference, for example, if an investor claims that a State has not fulfilled its obligation to grant foreign investments full protection and security by failing to enact legislation or whether a State is alleged to have actively discriminated against foreign investors and thus breached national treatment. Thus, the distinction between action or omission, but also whether a State has acted intentionally in a discriminatory manner, or violated objective, but vague, standards of investment protection, may call for differences in the standard of review to be applied by an investment treaty tribunal.

The public international law framework, however, leaves certain blind spots in fashioning the standard of review applicable in investment treaty arbitration. In particular, this framework does not sufficiently take into account that acts of different organs of the State may be at the origin of a breach of an international investment treaty. While public international law's perspective to treat the State as a unitary actor under international law clarifies that no organ is exempt from triggering a State's international responsibility,⁶³ it obscures that the differences in the mandate and function

⁶² Cf. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, para. 70 (observing that "it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts. Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation" (internal citation omitted).)

⁶³ See Article 4(1) of the International Law Commission's Articles on State Responsibility.

of internal organs of the State may militate for different standards of review to be applied by an international court or arbitral tribunal. For example, one can argue that acts by a democratically elected legislator merit more deference than the acts of a bureaucratic administrative agency. Likewise, one can consider whether domestic courts, while not enjoying a specific privilege in relation to triggering a State's international responsibility,⁶⁴ enjoy some deference in their function of controlling the other branches of government under domestic law. A pure public international law perspective, by contrast, may obscure that the identity of the organ having taken a measure at the domestic level can influence the standard of review to be applied by an international arbitral tribunal.

Furthermore, the framework provided by a public international perspective on investment treaty arbitration and the standard of review to be applied by investment treaty tribunals remains rather abstract. More precise criteria thus need to be searched elsewhere. In view of the public law implications and nature that investment treaty arbitration has, these criteria arguably can be derived from a public law analogy, namely by drawing on how domestic public law systems conceptualise and implement deference in administrative and constitutional review as part of the constitutional separation of powers framework.⁶⁵ The relevant criteria, in this context, of course, cannot be the one applicable in the host State's domestic legal order, or the one of the investor's home State. Instead, the international legal character of international investment law and investment treaty arbitration require developing standards that are independent from a specific domestic legal order.

The degree of deference to be paid by investment treaty tribunals, in other words, should be determined by recourse to a comparative public law approach that takes account of how public law systems more generally conceptualise the relationship between judicial review, on the one hand, and law and policy-making by domestic regulators, both administrative and legislative, on the other. This approach aligns with a perspective that international investment treaties are not purely bilateral treaties, but form part of one treaty-overarching, quasi-multilateral system of international investment protection.⁶⁶ It is difficult to imagine, in other words, that the standard of review to be applied by an investment tribunal constituted under

⁶⁴ See Jan Paulsson, *Denial of Justice in International Law* 38-44 (2005).

⁶⁵ See the contributions cited *supra* note 5.

⁶⁶ On the argument that international investment law constitutes a multilateral system of law despite it being based largely on bilateral treaties that are applied by one-off arbitral tribunals see Stephan W. Schill, *The Multilateralization of International Investment Law* (2009).

the BIT between Mauritius and India should be different from that applied by a tribunal established under the BIT between Germany and Chile.

At the domestic level there are usually three levels of scrutiny that can be found in different shades in virtually any domestic legal system: (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis review.⁶⁷ The choice of which level of scrutiny to apply depends, similarly to the factors influencing the amount of deference international courts and tribunals pay to acts by States, on a number of factors, including the effect of a governmental measure on individual rights, the purpose of the measure, difficulties of fact-finding, etc.

In the present context, it is not possible to go into the details of how different domestic legal orders handle their standard of review in concrete circumstances. Instead, I would like to address the conceptual factors that influence the choices made by domestic courts in choosing which type of scrutiny to adopt. These criteria, I submit, are equally applicable in investment treaty arbitration and should accordingly be used by investment treaty tribunals for guidance in making choices about the appropriate standard of review. Furthermore, apart from pointing to the relevant criteria, I will discuss not only the straightforward answers that one would derive from them, but rather point to the paradoxes they produce.

The criteria used in constitutional law for conceptualising the separation of powers can be summarised as the constitutional values of “voice, expertise, and rights.”⁶⁸ Voice, in this context, refers to the (democratic) mandate of the relevant institution to represent the relevant political will; expertise refers to the superior knowledge or institutional capacity of an institution; and rights refers to the better claim to protecting individual rights.⁶⁹ These criteria affect the relation between different

⁶⁷ The terminology used here is the one used by the U.S. Supreme Court for standards of review in litigation about constitutional rights; see Burke-White and von Staden, *Private Litigation*, *supra* note 5, at 315-316. Similar approaches, however, can also be found in other jurisdictions, for example in Germany (Inhaltskontrolle, Vertretbarkeitskontrolle, Evidenzkontrolle), see Burke-White and von Staden, *Private Litigation*, *supra* note 5, at 321, or France (*contrôle maximum*, *contrôle normal*, *contrôle minimum*); see Schill and Briese, *supra* note 55, at 132. While the emphases in different jurisdictions are not always comparable, many jurisdictions conceptualise the issue of deference as a question of the separation of powers between courts and the other branches of government.

⁶⁸ See in detail Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in Jeffery L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* 326, 328 (2009).

⁶⁹ *Ibid.* at 337. For Halberstam, these criteria are used by different actors within a constitutional framework to support their legitimate claim to constitutional interpretation. I use them more broadly as factors that can explain the relation between different

branches of government at the domestic level. Yet, they can also be used to conceptualise the relationship between arbitral tribunals and host States and to determine the appropriate level of deference arbitral tribunals should pay to host State regulatory or judicial acts.

The criterion of voice generally would seem to mitigate for a large degree of deference to the acts of domestic institutions, because they are closer to the political will of the host State's population.⁷⁰ Similarly, voice militates for granting deference to a host State's determination of the content of domestic policies, of determining what is in the domestic public interest, whether an expropriatory measure served a public purpose, or whether a measure taken is generally suitable and necessary to achieve its aim. Yet, one also needs to consider that the host State's constituency is not always the relevant reference group. Instead, investment treaty arbitrations also touch upon interests that transcend the host State, and that are either those common to the two Contracting States of the bilateral investment treaty at issue, or even interests of the international community as a whole in the functioning of the system of international investment protection.⁷¹ This is particularly the case concerning the application and interpretation of issues of international law. Paying deference to the views and actions of the host State in this respect would disregard that the State has its own interests in interpreting questions of international law in its favour.

Expertise is a criterion that plays a significant role in attributing claims for legitimacy and authority in the relations between arbitral tribunals and regulatory and judicial acts of host States in several regards.⁷² Expertise, for example, favours the interpretation of international law by investment treaty tribunals. In relation to the interpretation and application of domestic law, by contrast, expertise weighs in favour of domestic institutions, most importantly domestic courts, thus militating for greater deference in that regard.⁷³ Expertise can also favour respecting factual

branches of government in a separation of powers framework, in particular between courts, on the one hand, and the legislator and the executive, on the other.

⁷⁰ Accordingly, voice is one of the reasons why the European Court of Human Rights has developed its margin of appreciation doctrine. Cf. *Handyside v. United Kingdom*, Judgment, 7 December 1976, ECHR Series A, No 24, paras. 47 *et seq.* See Halberstam, *supra* note 68, at 338-343.

⁷¹ On public or community interests in international dispute settlement see Markus Benzing, 'Community Interests in the Procedure of International Courts and Tribunals' 5 *LPIC* 369 (2006); Markus Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten* (2010).

⁷² Cf. Halberstam, *supra* note 68, at 344-348.

⁷³ See, e.g., *RosInvestCo U.K. Ltd. v. The Russian Federation* (SCC Case No. V 079/2005), Final Award, 12 September 2010, para. 446 (observing that "[t]he Tribunal, having to consider only Respondent's alleged liability under the IPPA, is neither an appeal body for

determinations made by domestic institutions, rather than supporting full-blown review by investment treaty tribunals at the international level. Thus, expertise in particular militates for respecting science-based determination by domestic agencies, for example about the effect and harmfulness of chemical substances that a State has decided to ban.⁷⁴ Investment treaty tribunals, even with the help of experts, will usually have little authority in that respect. Investment treaty tribunals, by contrast, are experts in determining what procedural requirements international investment treaty standards require a State to provide, for example under the fair and equitable treatment standard.⁷⁵ Expertise, finally, militates in favour of respecting policy choices made by domestic institutions. It is them who have the relevant societal knowledge and are usually better placed than investment treaty tribunals to assess the need of certain government measures and the suitability and effectiveness of means to address the identified need for government intervention.⁷⁶

Rights, finally, are the third value that plays a role in legitimising authority in a separation of powers framework. Rights generally militate in favour of courts,⁷⁷ respectively investment treaty tribunals. However, the

the determination of Russian tax law nor claims that it has expert knowledge of that law"). See also *Ahmadou Sadio Diallo*, *supra* note 62, para. 70.

⁷⁴ See *Chemtura v. Canada*, *supra* note 30, para. 134. Similar considerations can also be found in *Mondev v. United States*, *supra* note 37, para. 136 (noting that "[q]uestions of fact-finding on appeal are quintessentially matters of local procedural practice. Except in extreme cases, the Tribunal does not understand how the application of local procedural rules about such matters as remand, or decisions as to the functions of juries *vis-à-vis* appellate courts, could violate the standards embodied in Article 1105(1). On the approach adopted by *Mondev*, NAFTA tribunals would turn into courts of appeal, which is not their role. Conceivably there might be a problem if the appellate decision took into account some entirely new issue of fact essential to the decision and there was a substantial failure to allow the affected party to present its case. But LPA had (and exercised) the right to apply for a rehearing and then to seek *certiorari* to the Supreme Court. In these circumstances there was no trace of a procedural denial of justice."). See also WTO Appellate Body Report, *U.S. - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998). Cf. Giacinto della Cananea, 'Beyond the State: the Europeanization and Globalization of Procedural Administrative Law' 9 *Eur. Pub. Law* 563 (2003). For a parallel in domestic law see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). From a comparative perspective see also Jan Oster, 'The Scope of Judicial Review in the German and U.S. Administrative Legal System' 9 *German LJ* 1267 (2008).

⁷⁵ See Stephan W. Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in Schill, *supra* note 9, at 151, 170-174.

⁷⁶ Thus, expertise plays an important role for the European Court of Human Rights to accord Member States a margin of appreciation as regards the determination of what is necessary in a democratic society. Cf. *Handyside v. United Kingdom* Judgment, 7 December 1976, ECHR Series A, No 24, paras. 47 *et seq.*

⁷⁷ See Halberstam, *supra* note 68, at 348-353.

dimension of rights does not unilaterally weigh in favour of the authority of investment treaty tribunals to review acts by the host State interfering with property interests by foreign investors. The category of rights can also militate in favour of deference towards a host State's conduct, if that conduct has the objective to protect rights and interests of third parties affected by conduct of foreign investors. Thus, in many cases where investment protection competes with non-investment concerns, investment treaty tribunals may not be as well-placed as domestic institutions in protecting such other interests by means of government interference. The protection of conflicting non-investment related rights militates for a level of deference to related host State policy choices, even if they restrict property rights of foreign investors.

I have focused here mainly on situations where only one of the constitutional values of voice, expertise, and rights was at stake. The combination of two or three elements in a given case further increases the complexity of the relevant considerations. Furthermore, it is important to note that these criteria most likely will not produce *one* right result for every possible circumstance and case arising in investment treaty arbitration. Notwithstanding, the three constitutional values allow answering the question of why arbitral tribunals should exercise deference and how they should conceptualise and concretise deference in specific circumstances. The matrix that can be developed from the values of voice, expertise, and rights thus should help to develop appropriate standards of review to be applied by arbitral tribunals in determining whether a State's conduct is in conformity with its investment treaty obligations and whether there is an appropriate balance between investment protection and competing public interests.

V. CONCLUSION

International investment law and investor-State arbitration perform the important function of protecting foreign investments against illegitimate government interference. At the same time, it is important that States do not feel unduly prejudiced by the system of international investment protection and continue to be able to both accept arbitration as a legitimate way for settling investment disputes and remain able to implement legitimate domestic public policies. Achieving this may not, as many critics argue,⁷⁸ require a fundamental redesign of the institutional structure of

⁷⁸ See Van Harten, *supra* note 9, at 180 *et seq.* (suggesting the establishment of a permanent international investment court). Some even suggest to get rid of investor-State arbitration altogether; see Public Statement, *supra* note 3.

international investment law, but it requires investment treaty tribunals to reflect more about their institutional role and their relationship to States and the latter's legitimate power to regulate in the public interest. The reason why such reflections in the current practice are still scarce is arguably a certain dissonance between the commercial arbitration model, which stresses the function of investment arbitration to settle individual investor-State disputes, and the governance functions arbitral tribunals exercise beyond those disputes.

Thus, what currently is perhaps most needed in order to react to criticism of international investment law are conceptual approaches that help parties, tribunals, and commentators to classify, evaluate, and form arbitral jurisprudence in ways that are sustainable for the system and acceptable for the system's environment. Such a system-internal approach, above all, would allow leaving untouched the trust investors have developed *vis-à-vis* international arbitration as an independent and impartial dispute resolution mechanism, while making necessary concessions towards demands coming from outside international investment law in terms of transparency and openness and as regards respect for non-investment concerns. The aim in this context must be to develop concepts that enhance the predictability of investment arbitration and make the decisions of investment tribunals comprehensible and acceptable for States and investors alike. One element of such efforts consists in developing appropriate standards of review that balance deference and scrutiny in the relation between arbitral tribunals and States and reconcile tensions between the protection of foreign investments and the furtherance of competing public interests.

Comparative public law approaches appear most helpful in this respect, that is, approaches that analyse how investment treaty tribunals should act in settling disputes and concretising international investment law by drawing on the experience of other more advanced public law systems, both at the domestic, but also at the international level. Thus, rethinking the substantive standards of investment protection is not only a question of recalibrating investment treaty obligations by changing the texts of these treaties or modifying the dispute settlement mechanism. Rethinking investment treaties starts with recognising the system's differences with commercial arbitration, its considerable public law implications, and the need to react to these implications with sophisticated public law concepts applied to and by investment treaty tribunals. This may be one piece of the puzzle in order to enhance the legitimacy of the current system of international investment protection.

Response to the Report

*Toby Landau Q.C.**

I would like to begin by echoing the congratulations of those who have spoken before me as to the setting up of this tremendous conference, but I would also like to put on record what I consider to be cruel and unusual management for all of us in sitting in this room with these three doors occasionally swinging open with the wind in order to allow a view of this glorious beach outside with people scantily clad and my advice is that there is one factor upon which the success of a Mauritian Arbitration Centre depends, it is location. It must be located in an industrial part of the island far away from this particular place.

My focus is on the practical impact of this issue of delimiting deference. What happens when you are a tribunal in this field and you are back in your deliberation room and you are faced with the question – do you pay deference or not to the state? And if so, to what extent? What are the analytical tools that are available to you? What is the standard of approach the tribunal in this field actually takes in terms of nuts and bolts?

Now, one has to start here by painting the scene again because for all the passing similarity with the deliberation room in commercial arbitration, this setting is totally different. As you have heard already, it would be a tribunal in place because of inter-State consent as well as investor consent, but your very existence depends upon two or more states having agreed to you being there. Your mandate unlike commercial arbitration is to review the exercise of discretion by a sovereign by way of its executive, its legislative even its judiciary. You are tasked in this exercise with applying extremely broadly worded standards. They do not give you much guidance. They are skeletal. They are skeletal because of the dynamics normally of inter-State negotiations as Judge Greenwood has already explained and so you are faced with a very concrete problem. You are supposedly to rule upon the interest of an individual investor and yet in doing so, you may well impact upon a whole community. If you are going to rule that a carbons emission quota system is contrary to a Bilateral Investment Treaty (“BIT”), in order to safeguard the interest of a particular coal-fired power plant in a country, then, you may well be impacting upon a

* Barrister-at-Law, Essex Court Chambers (London); Member of the Board of Directors of the LCIA; Visiting Professor of International Arbitration, King’s College London; United Kingdom delegate to the UNCITRAL Arbitration Working Group. This text is an edited version of the transcript of Mr. Landau’s remarks at the conference.

whole environment policy of an entire nation.¹ If you are going to rule upon the rights of an investor in the water system of Tanzania, you may well be affecting 350 000 water users in Dar Es Salaam.² If you are going to question and rule upon South Africa's policy in favour of black economic empowerment, in order to safeguard the interest of the individual mining interest before you the wider impact is obvious.³ And, you do so with the ability to impose damages unlike many public law municipal systems and those damages may be significant. You have the power to affect the most extraordinary allocation of public funds. Let me give you an example that will be very familiar to many people in this room, but not all and I use this just because it is a good example and it might wake you up at twenty past three on a hot afternoon next to the beach.

In the case of *CME Czech Republic B.V. v. The Czech Republic* in 2001, there were two arbitrations. This one, the Swedish one, the Tribunal ordered The Czech Republic in a BIT case to pay 353 million U.S. dollars to the investor. I say nothing about the rights or wrongs of that determination. But, just think about the significance in terms of amount because if you convert that figure for population and gross national income, that is equivalent to an award against the United Kingdom of 19 billion U.S. dollars, an award against Germany for 26 billion U.S. dollars, an award against the United States of America for 131 billion U.S. dollars done in an arbitration where there is no appeal, where there is limited court supervision and, if you needed more to wake up, a regime of recognition and enforcement. So, where does this take us? It takes us to a critical issue and the issue is the interface between the interest of that individual investor as compared to wider sovereign discretion, the ability of a state to regulate its own affairs in the public welfare for the public good. It is now well settled. States do have the rights to regulate, they have what is called in technospeak 'regulatory space', but they must exercise that regulatory discretion so as not to breach basic principles such as good faith, non discrimination, not to breach the prohibition against unjustified objects. And these are memorialised in the BITs, but they are done so at the highest level of abstraction. And, so, as a Tribunal, what are the tools available to you to

¹ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Request for Arbitration of 30 March 2009. The parties, however, agreed to settle the case; see: *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Award of 31 March 2011.

² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2004

³ *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award of 4 August 2010

draw that line? What level of enquiry do you make about due process, good faith, non-discrimination, justifiable purposes? Where is the point beyond which there may be so-called 'regulatory discretion'? And these fears, the Tribunals do not necessarily draw the line correctly, are the same fears that give rise to what is called 'the legitimacy crisis'. Right or wrong, there are people who will cry impending doom in this area, whether it is the 2010 public statements that Andrea Menaker mentioned this morning which criticised Tribunals in this area, or whether it is the increasing clamour of NGOs in this field.

Now, Stephan Schill's approach is to say that you draw the border, the line here, the interface, by reference to identifying different levels of scrutiny. And the key analogy that he has drawn is a public law analogy between, for example, strict scrutiny, intermediate scrutiny and national basis review. In my view, my suggestion to you, there may be difficulties with this because it involves importing administrative law concepts into a public international law field. To do so, one must have some basis, some methodology to actually allow, to impose these kinds of standards on an inter-State relationship. In fact, where the line is to be drawn may be dictated by a prior and much more fundamental question. This is not, in my view, an issue about a crisis in arbitration. It is not about treating the parties unequally before you. If you are an arbitrator, you have to treat them equally. You do not just give the benefit of the doubt to one side, that would be a breach of due process. Rather, the issue here depends upon the nature and calibration of the actual substantive standards themselves. This notion of deference with all its various components that you have heard itemised, turns upon the actual definition of the substantive standards themselves, indirect expropriation, fair and equal treatment, non-discrimination, each one entails a balancing act. When, as a tribunal, you are applying the substantive protection, in so doing, in finding a breach of a treaty, you have to make a determination as to where the state's discretion ends and the investors' rights begin. Now, how do you do that?

In terms of analytical tools, most tribunals in this area fall back on a treaty interpretation. There is a question as to how well they do this. The practical issue of interpreting and applying broadly worded treaty standards raises difficulties. What is the method to do so? We are left, of course, with the Vienna Convention guidelines and more generally with customary international law. And, the main rule is Article 31 ordinary meaning with a very strong reliance on context, object and purposes. And, if one does not get an answer there, you might then move to supplementary means of interpretation under Article 32. Your purpose is to establish the common intention of the parties, this is, after all, normally a bilateral or trilateral

relationship. It may not be a contract but you are looking for the shared intention of the parties, mostly the mere interpretation of the words themselves will be insufficient. It simply does not give you enough guidance. So most Tribunals in this area are forced back onto the notion of object and purpose.

What was intended by the contracting states? Why do contracting states conclude BITs? And, very often there are broad assertions about this. You heard a broad assertion earlier from Professor Gaillard, that you conclude BITs to improve the environment and the track for foreign direct investment. Indeed in many cases you get what are largely glib statements as to the objects and purposes of BITs. For example, *SGS v. Philippines*, a case in which it was held by looking at the preamble of the Philippines/Switzerland BIT that the BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble, it is intended to create and maintain favourable conditions for investments by investors of one contracting party in the territory of the other and, therefore, the Tribunal held:

“[I]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.”

But this, with due respect to all involved - and you know what is coming when I use the expression ‘due respect’ – is superficial. It is inadequate. We know that there is a basic *quid pro quo* that there will be investor protection in order to somehow solicit the contribution or the flow of capital. But that itself does not give you very much guidance. The issue is much more dimensioned and in particular there is a raging debate at the moment as to whether or not BITs work. And, in order to answer that question, whether or not they work, you have to answer the prior question what are they intended to do? It is not just about protecting foreign investment now, there is a whole body of scholarship that says BITs are actually about setting norms, setting standards of good governance, imposing standards not just to attract foreign investment now, but there is a temporal factor in order to improve local, legislative, executive and judicial standards, in order to attract foreign investment in the future. This is being put by one commentator as follows:

“[T]he role of investment treaties is to provide an external anchor for economic policies that are in the long term sensible for national economies and the global economy but which are imperilled by forces of usually short term domestic pressures ... By providing

external disciplines applied by an international adjudicatory process, much like the WTO inter-State trade litigation system, investment treaties provide sanctions for non-compliance in individual cases, but, and perhaps more importantly, they provide a signal for the domestic policy discussion on how economic governance should be ... The accountability that arises in litigation before an investment Tribunal may not be fully immune, but is less subject to political manipulation than any domestic processes ... political, administrative or judicial”.⁴

So, the idea is that, by way of a BIT, you are actually in a long term development process in order to improve standards. And, there is another dimension, of course, which is to improve investor standards as well. There is a growing doctrine of investor responsibility in this area.

Now, the significance of this is that, unless you decide which of these objects and purposes actually underpinned and justified the BIT, you cannot then move to the next question, because each of these different objectives gives rise to a different demarcation. If you are talking about simply promoting and protecting foreign direct investment, then that gives rise to a certain measured level of scrutiny, a level of deference. But, if you are subscribing to this development model, that, in fact, it is the external imposition of good governance norms, then a tribunal is in place to impose much tougher scrutiny. At that point, there is no justification for any particular degree of deference because the very BIT has been concluded in order to fill the regulatory space. And, that means through the Vienna Convention route, a Tribunal is justified in drawing this line in an entirely different process.

But, we are now in a curious position because we have not agreed as to why we are concluding BITs and yet, we are still concluding BITs. There are thousands of BITs that have been concluded and, even since this debate about objects and purposes has been raging, 750 BITs have been signed if one starts for example from the year 2001. Applying basic arithmetic, if you look at the period 2001 to June 2009, the world States have signed more than three BITs every second week, but we do not know why. I mean, I am not getting any guidance from the *travaux préparatoires* or indeed from the scholarship in this area. Makhdoom Ali Khan, this morning, explained why we do not get guidance from the documents.

⁴ T.W. Wälde, ‘The Present State of Research Carried Out by the English Speaking Section of the Centre for Studies and Research’, in P. Kahn and T.W. Wälde (eds.), *New Aspects of International Investment Law* (2007) 63 at 104, 106, and 107.

He was less than completely candid with you. He told me on a strictly confidential basis – which I cannot disclose to you – that in the *SGS v. Pakistan* case – it was not just a question of looking at the file for the BIT and finding the BIT with a note to the Prime Minister. What he told me confidentially was that there was nothing in the file when the claim was brought against Pakistan and the first thing that Pakistan did was to contact its Ambassador to Switzerland to ask gently whether the Ambassador might be able to obtain a copy of the treaty. In *Impregilo v. Pakistan* I am told, Pakistan was able to secure a copy of its treaty with Italy because the then Attorney-General, a certain Makhdoom Ali Khan had since discovered that the UNCTAD website had a copy.

This curious situation brings to mind a reference that was made in an ICSID hearing last week. And, arguably, one of the most significant United States contributions to the World's Cultural Heritage namely, as I am sure you will know already, the cult 1970's Hollywood science-fiction epic 'Planet of the Apes'. This as you may know, was a story of American astronauts who crash-landed on earth in the future, in the year 3900, a period long after some cataclysmic event at a time when apes had taken over the world and established their own advanced civilisation but, in particular, there was a group of subterranean apes who lived in a forbidden zone and they worshipped an atomic bomb. It was housed in the remains of what was St Patrick's Cathedral in what was once New York many thousands of years previously. No one knew why they were worshipping the atomic bomb. Some suggested it was an instrument of peace but nobody knew exactly, but they did know it had been worshipped for thousands of years. The reason was long lost in the annals of time, but because they have done so for ever, they continued to do so. And, it seems at the moment that our enthusiasm for BITs is missing the basic foundation. We need to improve the quality, make more robust the analysis of objects and purposes in order to empower Tribunals and facilitate their tasks in interpreting the standards in order to draw the demarcation that needs to be drawn. Because also, one has to bear in mind the so-called legitimacy crisis that is growing alongside. If the line is drawn incorrectly so the opposition will grow in enthusiasm, and we must all ultimately recall what happened at the end of the so called 'The Planet of the Apes'. When everything was brought to an abrupt and terrible close as the divine atomic bomb was ultimately detonated.

Response to the Report

*His Excellency Judge Sir Christopher Greenwood, C.M.G., Q.C.**

May I begin by thanking the Government of Mauritius for inviting me to take part in this Conference and also by thanking Salim Moollan and his team who have put together such a very interesting programme for us. I am particularly pleased that they chose to widen the scope of the conference beyond commercial arbitration to encompass investment treaty arbitration. Not only did this give me an excuse to attend, more importantly it gave all of us the opportunity to listen to a number of most interesting papers, particularly those of Andrea Menaker, this morning, and Dr. Schill, on whose report I will offer some comments in a minute.

As these two papers make clear, investment arbitration is one of the fastest growing areas of international litigation. There are now approximately 2,500 bilateral investment treaties (“BITs”) in force and over 350 awards have been given. By contrast, only a generation ago proceedings of this kind between an investor and a foreign State were almost unknown. The change is one which has, perhaps, crept up almost unseen until a few years ago. Whether that is a good or bad development depends, I suppose, on where you are standing, as the very different presentations by Prof. Emmanuel Gaillard and Mr. Makhdoom Ali Khan demonstrated. From the standpoint of governments, it has been an uncomfortable development to say the least. Yet it has also been one which offers considerable potential to governments, as well as to investors, since it is capable of providing a guarantee of fair treatment which may serve as a valuable incentive to inward investment.

Before I turn to the report, I want to make a few brief comments of a more general character regarding investment treaty arbitration. First, I believe that it is important not to lose sight of the unique character of investment treaty arbitration as, in Jan Paulsson’s words, “arbitration without privity”.¹ In marked contrast to “ordinary” commercial arbitration, in which the legal basis for the arbitrators’ jurisdiction is usually an agreement between the two parties to the arbitration, in investment treaty arbitration that jurisdiction is derived from a treaty between two States to which the investor is not party. While it is, of course, possible to analyse

* Judge of the International Court of Justice

¹ J. Paulsson, “Arbitration without Privity”, 10(2) ICSID Review-Foreign Investment Law Journal (1995), p. 232.

the treaty as an offer by each State to submit to arbitration which is then accepted by the investor when the investor commences arbitration proceedings, the fact remains that the arbitration is grounded in the treaty and that interpretation of the extent of the arbitrators' jurisdiction and the rules which the treaty enjoins them to apply requires recourse to the public international law rules on treaty interpretation,² rather than the contractual principles with which many arbitrators will be more familiar.

Secondly, while I agree that some investment arbitrations have characteristics of public law – judicial review – cases, I think the comparison should not be taken too far. The essence of judicial review is that the judicial branch of government within a State scrutinises decisions of the executive branch (and, indeed, sometimes of the legislative branch) of that State. In investment arbitration, however, the scrutiny is undertaken not from within the State but by an arbitration tribunal which is independent of the State and usually sits in another jurisdiction. Moreover, the defendant is not an arm or agency of the government but the State itself. Since the judiciary is a part of the State, it is possible that the process of arbitral scrutiny may involve a challenge to the behaviour of the courts, as much as that of the executive or the legislature.³

Thirdly, although investment treaty arbitration forms part of international law, it differs in a number of respects from the international law developed in the context of diplomatic protection, where one State brings a claim against another in respect of the latter's treatment of one of its nationals. An obvious difference is that in diplomatic protection, it is the State of the investor's nationality which decides whether to claim and then controls any claim which might be brought, whereas in investment arbitration, the investor is the claimant and may claim even if its State of nationality is opposed to any claim being brought. The differences, however, go further. Thus, while the International Court of Justice has held that the State of nationality of an investor does not normally have standing to bring a claim in respect of injury caused indirectly to one of its nationals who has invested in another State through the medium of a company incorporated in the latter State,⁴ most BITs recognise the right of an investor to claim for a wrong done to a company incorporated in the respondent State to the extent that that company is owned or controlled by the investor. Moreover, although the rules of customary international law relevant to the

² These are generally considered to have been codified in Articles 31-33 of the Vienna Convention on the Law of Treaties, 1969.

³ For an example, see *The Loewen Group Inc. and Raymond L. Loewen v. United States of America* (2003) 128 ILR 334.

⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections), I.C.J. Reports, 2007, p. 582; (Merits) (2011) 50 ILM 37.

treatment of foreign investments developed in the context of the law of diplomatic protection, BITs sometimes embody different standards usually conferring a higher level of protection on the investor. Indeed, one of the most contentious issues in investment treaty arbitration is the extent to which standards such as the “fair and equitable treatment” standard contained in a majority of BITs are intended to reflect customary international law “minimum standards” or subject the behaviour of the State to a more stringent standard.

In reality, one can discern “commercial”, “public law” and “international law” strands in investment treaty arbitration. It uses the procedure (and frequently the personnel) of commercial arbitration; it deals with many of the issues which arise in judicial review and it adopts many of the principles which are applicable in inter-State litigation.

With those preliminary remarks in mind, let me turn to one of the most interesting matters raised in the report, namely the extent to which an arbitral tribunal in a case brought under a BIT should defer to the judgement of State authorities. That is a question of the utmost importance but I want to sound a note of caution. I think that this is one of those questions where there is a serious risk of falling into the trap which Salim Moollan warned us about in the first panel yesterday. If you elevate the notion of deference, there is a real danger of losing sight of what is really going on. Deference is not a single, large, overarching legal concept. Rather it is a common sense approach which is adopted in a variety of different contexts to a variety of different problems and which may produce a variety of different outcomes. Let me briefly comment on three instances in which it is said that tribunals demonstrate a degree of deference.

The first such instance is the deference said to be due to the States as the legislators who created the BIT. The BIT (or a comparable agreement such as NAFTA or the Energy Charter Treaty) plays a central role in investment arbitration. It is both the basis for the jurisdiction of the tribunal and, in most circumstances, the source of the substantive legal standards which the tribunal must apply. A treaty is, of course, neither a contract nor a statute. It is an agreement between States which is governed by public international law and its interpretation is a matter of seeking the shared intention of the parties, as manifested in the text which they chose to adopt. Of course, this can be something of an artificial exercise at times. An old adage, much quoted by international lawyers, is that “a treaty is a disagreement reduced to writing”! Moreover, all of the main capital-exporting States have model BITs and any agreement with them tends to take the form of an adaptation of the relevant model, which the other State party may have had little real opportunity to negotiate.

Nevertheless, the principles of treaty interpretation (generally accepted as codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969) place considerable emphasis upon the views of the States parties to a treaty. In particular, Article 31(3)(b) of the Vienna Convention requires that, in the interpretation of a treaty, account shall be taken of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, so that a tribunal must have regard not only to what States thought at the time of conclusion of the treaty but what their subsequent actions tell us about their view of the treaty’s meaning. NAFTA goes even further. The Free Trade Commission (“FTC”), which comprises the representatives of the three NAFTA States and is therefore an institutional vehicle for the expression of a collective practice, is empowered to issue statements of interpretation regarding the provisions of NAFTA. Article 1131(2) of NAFTA then provides that any such interpretation shall be binding upon an arbitration tribunal hearing an investment case under NAFTA Chapter XI.

To many arbitrators, the notion that the practice of the States party to a treaty – including, of course, the respondent State, which occurs after the conclusion of a treaty and frequently after the events giving rise to the arbitration, can be an authoritative guide to the meaning of a treaty provision involves showing too great a degree of deference to the States concerned. In one NAFTA arbitration, the Tribunal went so far as to say that the FTC’s interpretation of one provision was so far removed from the wording of that provision – at least as the Tribunal read it – that it should not be characterised as an interpretation.⁵ I have to say that I do not find that view at all persuasive. Had it been carried to its logical conclusion – with the Tribunal declining to apply the FTC’s view on the ground that it was not an interpretation and therefore fell outside Article 1131(2) – it would have amounted to the Tribunal arrogating to itself the right to have the last word on interpretation when the treaty expressly gave that right to another. In fact, the Tribunal did not go that far. Yet its manifest unease with what the three States, through the FTC, had done is an interesting illustration of the difficulties which may exist in reconciling the “commercial”, “public law” and “international law” elements in investment treaty arbitration. The importance of subsequent practice is well recognised in international law but may seem counterintuitive to a commercial lawyer accustomed to construing contracts and may look like a retroactive moving of the goal posts to a public lawyer.

To my mind, this is an area in which international law considerations have to dominate. As I have already mentioned, in this type

⁵ *Pope and Talbot v. Canada* (2002) 126 ILR 127.

of arbitration it is a treaty which confers and defines the jurisdiction of the tribunal and which lays down the substantive law to be applied. It must, therefore, be the international law principles of treaty interpretation, rather than municipal law considerations of contract or constitutional law which have to be applied. In truth, recognising the importance of subsequent practice in this context is not a matter of deference (which suggests that the tribunal is engaged in some kind of balancing exercise) as of applying the correct governing law. Nevertheless, it is important to remember that it is only practice which establishes the agreement of the States parties to a treaty which possesses that special significance; the view of one party is not material unless the other party (or parties) can be shown to have accepted it.

The second instance of deference on which I wish to comment is quite a different matter. That is the deference which an arbitration tribunal should show to the decisions of national courts. In one sense, the need for deference here is beyond question. The courts of a State are obviously best placed to determine what is the law of that State – both substantive and procedural. I am not saying that an arbitration tribunal can never depart from a national court's view of national law but it should clearly be reluctant to do so. In my view, only the most compelling considerations would justify such a course.

The problem, I believe, comes when it is the decision of the national court itself which is the cause of action, which will be the case where that decision is said to amount to a denial of justice by the respondent State. Here a tribunal cannot simply defer to the views of the national judge. Even then, however, a degree of caution is called for. It is true that the decision of the national court – for example in applying an unjust law or grossly misapplying a law which is not in itself unjust but whose misapplication causes injustice – may violate the fair and equitable treatment provisions of a BIT (or other provisions, such as those on discrimination or full protection and security). But unless the national court in question is one from which there is no appeal, the legal system of the State concerned must be given the opportunity to correct the injustice before a tribunal pronounces upon it. That is not a matter of the local remedies rule (which may or may not be applicable in such a case). Rather, it is a matter of looking to see when the conduct of the courts of a State can amount to a violation of that State's treaty obligations towards foreign investment. In my view, that will usually occur only when there has been a failure of the legal *system* of the State concerned, rather than merely a failure of a court whose decision can be corrected by procedures of appeal,

review or cassation which exist within that system.⁶ The decision of a court of first instance regarding a foreign investor may be fundamentally flawed but it is not that decision by itself which amounts to a breach of the treaty standard of fair and equitable treatment but the failure of the national legal system to correct it. What is at issue is, in one sense, deference but it is deference to the national legal system and deference which lasts only for so long as that system can be shown to be genuinely capable of putting a matter right.

The last instance of deference on which I wish to comment concerns the role of the State as regulator. I agree with Dr. Schill that, in applying a treaty provision which requires that an investor may be subjected to particular measures only where these are “in the public interest”, an arbitration tribunal should normally defer to the judgement of the national authorities on what that State’s public interest requires. Whether or not it is in the public interest that smoking should be banned in public places, pornographic films be freely available for sale or firearms sold across the counter is inherently a matter for national authorities and it is difficult to see how an arbitration tribunal could be qualified to reject – or even question – the view which they take.

Of course, that is not necessarily the end of the matter. A decision may have been taken in the public interest and still violate a treaty standard – for example, if it discriminates between foreign and domestic investors to the detriment of the former. Moreover, an arbitration tribunal should always be alert to the risk that measures which are in fact designed to penalise foreign investors or to shift the costs of a policy onto them in a way which is unfair and inequitable are disguised as measures of a genuinely objective character. Deference, in this instance, must not be blind acceptance and a tribunal should always be clear on which issues a degree of deference is appropriate and on which it is not.

This is an area of international law which will undoubtedly continue to develop as the years go by. For those whose responsibility it is to undertake that development, Dr. Schill’s report contains much valuable material.

⁶ See the *Loewen* case (note 3, above) and C. Greenwood, ‘State Responsibility for the Decisions of National Courts’ in M. Fitzmaurice and D. Sarooshi, *Issues of State Responsibility before International Judicial Institutions* (2004), p. 55.

A Mauritian Perspective

*Rajsoomer Lallah Q.C., G.O.S.K.**

I. INTRODUCTION

I ought to explain, in the first place, what I understand by a Mauritian perspective. I would say that a Mauritian perspective cannot be any different from that of any other country with the following, among others, basic characteristics:

- where first, the concepts of democracy, separation of powers, of the impartiality, independence and security of tenure of the judiciary and the rule of law are firmly entrenched in a constitution, the relevant provisions of which cannot be amended except by an affirmative weighted majority;
- where secondly, fundamental rights and freedoms are similarly entrenched and are in conformity with multilateral treaties governing the protection of human rights and freedoms, whether concluded under the aegis of the United Nations, in accordance with its purposes and principles¹, or of the African Union;

* Former Chief Justice, The Supreme Court of Mauritius; Member and Former Chairman of the UN Human Rights Committee; B.A. (*Hons.*) (*Oxon.*) in Jurisprudence; Of the Middle Temple, Barrister-at-Law.

¹ Articles 1(3), 55 (c) and 56 of the Charter of the United Nations, which read as follows:

1 : The purposes of the United Nations are :

.....

(3) To achieve international co-operation in solving problems of an economic, social and cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

55 : With a view to the creating conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

.....

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion

56 : All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

- where thirdly, the judiciary is charged with the responsibility of nullifying any law, past or present, or any executive or administrative action inconsistent with the constitution and of giving effect to arbitral awards;
- where lastly, the legitimacy or otherwise of a State's behaviour or that of its organs, including its judiciary itself, in those areas is subject to the competence and review of not only its highest courts but also relevant international judicial or quasi-judicial institutions, bearing in mind that the obligations undertaken by the State under various treaties may themselves, on occasion, turn out to be in conflict with one another.

I will not take time to review the many judgments over the last 40 years or so, both of the Judicial Committee of the Privy Council, the Mauritian Supreme Court and the relevant international organs, to illustrate those principles. They are hopefully familiar to any practicing lawyer. I would rather take a few moments to make some observations on certain aspects of the most valuable report before us.

The report analyses, first, the notion, concept and use of deference in investment treaty arbitration, secondly, the justification for deference and, lastly, the criteria affecting the level of deference. Like the *Rapporteur*, I am not enamoured of the term "Deference". It may give rise to the wrong perception of some kind of double standard that is applied to the host State to the detriment of the investor or to its parent State. I must confess that, like the *Rapporteur*, I have not found any more appropriate shorthand or succinct term. What then is Deference in this respect?

II. THE NOTION AND CONCEPT OF DEFERENCE AND ITS JUSTIFICATION

That term is intended to suggest that the culture or approach of international arbitral tribunals should enable them to take account of, and respect, the exclusive quality and capacity of a State, as such, to subscribe to treaties with another State or with other States parties, whether with regard to their own common understanding of the treaty or the governing law that it prescribes, or indeed their common understanding of any other provision of

the treaty. That culture or approach should also, the report suggests, enable international arbitral tribunals to recognise and respect the legitimate exercise of State powers for the protection of non-investment concerns, not only in normal times but also in an emergency or an economic crisis.

I would offer a few observations on the nature of the approach and the justification for it as they, more often than not, straddle both aspects of the approach.

Perhaps the most illuminating aspect which the report brings into sharp focus is first, the juridical difference between a State and an investor who comes to conduct activities within the internal domain of the State, under the umbrella of an investment treaty between that State and the investor's parent State and, secondly, the inevitable consequences which necessarily flow from this difference. An investment treaty, after all, is an international treaty. It could be bilateral, regional or multilateral.

The report suggests, correctly in my view, that the reality of this juridical difference removes this kind of arbitration from the category of a purely commercial arbitration, together with its own particular approach, and places it squarely in the class of international adjudication process, with an approach akin to that adopted by standing independent treaty bodies within world-wide or regional systems, when adjudicating upon the legitimacy or otherwise of State behaviour which violates obligations freely assumed under a treaty. In this context, the report makes reference to the approach of the European Court of Human Rights, to the WTO Tribunals and to the International Court of Justice.

III. THE APPROACH OF INTERNATIONAL ADJUDICATING INSTITUTIONS AND INDEPENDENT TREATY QUASI-JUDICIAL BODIES REGARDING THE REGULATORY SPACE OF STATES IN ACCORDANCE WITH BINDING INTERNATIONAL NORMS

I would suggest that a perhaps wider perspective could usefully be adopted by enlarging the quest for a proper approach to include the practice and jurisprudence of other international institutions like the Court of the European Union, the UN Human Rights Committee, the African Court of Human Rights and the Inter-American Court of Human Rights. I say so, not because of any unintended perception of a narrow *eurocentric* attitude, but because of the growing tendency of all these international institutions to

look at the rich jurisprudence² which they have each developed, over the last 35 years or so, with a view to achieving just and acceptable solutions to conflicts between the State and the individual. There is also great virtue in looking at all legal systems in the world.

In this regard, one striking instance is the Advisory Opinion of the International Court of Justice ("ICJ") on the construction of a wall in the Occupied Palestinian Territory. Faced with the stand of Israel that its obligations to protect Covenant rights are limited to its own territory, the ICJ³, in support of its own interpretation, referred with approval to the interpretation given by the Human Rights Committee and the jurisprudence it had developed by its constant practice, as evidenced by its case law⁴ and its concluding observations on the periodic report of Israel in 1998⁵.

The periodic reports of States parties to the Covenant, in particular, grow in number every year to indicate the amendments made to their laws to respond to the concerns of the Human Rights Committee and the extent to which their highest domestic courts derive appropriate solutions from the decisions in cases brought before the Committee under the Optional Protocol. There is no reason to think that international investment tribunals might not, on any relevant matter, benefit from the thinking of the Committee in its case law, the examination of States parties' reports, including the General Comments, which the Committee makes on each of the rights and obligations under the Covenant.

These General Comments are based on the experience of the Committee in the hundreds of cases brought before it and in its examination of periodic reports of States parties to implement each right protected under the Covenant. These General Comments are generally well received by the States parties themselves (though not always welcome), the legal profession and the academic sector, among others.

² For a review of the case law of the Human Rights Committee, see *Defining Civil and Political Rights* by Alex Conte and Richard Burchill, (Ashgate 2nd ed.) and *United Nations Human Rights Committee Case Law 1977-2008, A Handbook* by Jakob Th. Moller and Alfred de Zayas (N.P. Engel). Vide also <www.universalhumanrightsindex.org>.

³ Advisory Opinion on The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, at paragraphs 109 and 110. See also observations in similar vein by the ICJ in the Case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)* (30 November 2010).

⁴ *Lopez Burgos v. Uruguay*, Communication No. 52/1979 (29 July 1981); *Celiberti de Casariego v. Uruguay*, Communication No. 56/1997 (29 July 1981); *Pereira Montero v. Uruguay*, Communication No. 106/198 (31 March 1983).

⁵ Concluding observations of the Human Rights Committee: Israel, 21 August 2003 (CCPR/CO/78/ISR), paragraph 11.

A. Inter-Treaty Conflicts and Conflicts with Customary International Law

Standing independent judicial or quasi-judicial international institutions, like the Human Rights Committee, deal primarily with conflicts or disputes between the State and individuals or private entities, on the basis of treaty obligations undertaken by the State. International arbitral tribunals are essentially no different in this respect. The purpose of these international institutions is to achieve a fair balance between private interests and the legitimacy or otherwise of State legislative, judicial, executive or administrative action, not only with regard to the responsibilities and obligations deriving from the particular treaties giving those international institutions adjudicative competence, but also in the context of, generally, coercive universal treaties or binding resolutions of the Security Council which all may have an impact on the regulatory space of States.

Conflicts between different international treaty obligations and between these obligations and customary international law have increasingly arisen since the middle of the last century, when a new world order was established after the horrors of two devastating world wars. The adoption of the Charter of the United Nations in the mid 1940s was closely followed by the adoption in 1948 of the Universal Declaration of Human Rights.⁶

The Universal Declaration was itself implemented by two separate treaties, the International Covenant on Civil and Political Rights and its sister Covenant, the International Covenant on Social, Economic and Cultural Rights. Both Covenants entered into force in 1976, after some 16 years study and exchange of views among all States of the United Nations.

Some years before that, in the early 1950s, what is now the European Union had already adopted its own Convention for the Protection of Human Rights and Fundamental Freedoms, based on the first drafts of the Covenant on Civil and Political Rights and has over the years

⁶ The first 3 preambles to the Universal Declaration of Human Rights read:
Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law....

supplemented its Convention by means of additional Protocols to cover some of the rights that eventually became part of the Covenant. There still remain, however, some differences between the European Convention and the UN Covenant though, for our present purposes, these differences do not greatly matter.

The Covenant has established the Human Rights Committee consisting of 18 members, all of them judges or jurists, elected by the States parties to serve in their individual and personal capacity to monitor and supervise the application of the Covenant. Some 165 States are now parties and they include all the member States of the European Union, the Latin American and the Caribbean States, North America, all the States which were formerly part of the Soviet Union and a great many of the African States but, so far, a lesser number of Asian States. This overwhelming adherence by States indicates that the binding norms of the Covenant, barring certain reservations some of which may, arguably, be void, have reached a great measure of the universality proclaimed in the soft law of the Universal Declaration.

What is perhaps equally important, however, is that some 110 of those States parties are also parties to the First Optional Protocol to the Covenant. This Protocol confers jurisdiction on the Human Rights Committee to receive and deliver their “Views”, as the Covenant technically calls them, on complaints by individuals against States parties for the violation of their Covenant rights. It is mainly on the basis of these “Views” that the Committee, like the European and Inter-American Courts, has built up its body of jurisprudence.

With regard to conflicts between one treaty and another or between a treaty provision and customary international law, international adjudicating institutions have wrestled with ways to resolve these conflicts. For this purpose, they often resort to the rules of interpretation under the Vienna Convention on the Law of Treaties with a view to ascertaining, among other interpretation criteria, the object and purpose of each treaty and to deciding which treaty provision is applicable in the matter at issue.

One such example is the case of *Schremelis & Others v. Greece*⁷. A majority of members of the Human Rights Committee reached a conclusion similar to that adopted by the European Court in like cases⁸. The majority relied on the customary law doctrine of State immunity as

⁷ *Schremelis & Others v. Greece*, Communication No. 1507/2006 (25 October 2010).

⁸ *Kalogeropoulos & Others v. Greece and Germany*, Application No. 5902100, ECHR 2002 – X (12 December 2002), which also referred to earlier cases.

overriding the otherwise applicable provisions of the Covenant⁹ to justify the refusal of Greece to enforce a judgment obtained by the claimants against Germany for massacres committed against civilians in the past.

Both in the European Court and the Human Rights Committee, there have been vigorous separate dissenting opinions. This clearly suggests that, even for seasoned institutions, the search for the correct approach may not always be easy.

Another instance worth referring to is the perceived conflict between the Covenant and mandatory resolutions of the Security Council, taken under Chapter 7 Charter of the United Nations, in the Council's pursuit of the so-called "*war against terror*". These Resolutions require States to adopt legislative and other measures, restrictive of certain fundamental rights and freedoms, *e.g.*, to freeze the assets and bank accounts of persons whose names appear on a "black list" established by the Sanctions Committee of the Security Council and to prevent the departure of those persons from their territory. The list is compiled by the Sanctions Committee and contain the names of Al-Qaeda, Osama bin Laden, the Taliban, and all groups, companies and other persons or entities associated with them. The list is widely available on the internet, presumably with the listed persons being open to opprobrium. There is no process before the Sanctions Committee to hear the listed persons, either before or after the listing. This is somewhat like a Big Brother list and flies in the face of basic norms and substantive rights protected by the Covenant.

In the case of *Mr. and Mrs. Sayadi v. Belgium*¹⁰, Belgium had too hastily provided the victims' names to the Sanctions Committee before the relevant criminal investigation by the Belgian authorities was complete. The investigation eventually showed that Mr. Sayadi and his Belgian wife were not implicated in any terrorist venture or association with any of the blacklisted persons or entities. Belgium vainly attempted to have the names removed from the list. The Security Council resolutions had empowered the Sanctions Committee alone to remove names from the list. Belgium contended that the Human Rights Committee had no competence to pronounce on the legitimacy or otherwise of the acts of the Security Council or the Charter of the United Nations to the extent that it confers certain powers on the Security Council, even in the face of what would be violations of the Covenant.

⁹ International Covenant on Civil and Political Rights, Article 14(1) relating to the concept of a fair trial and Article 2(3) relating to the obligations of States parties to enforce Court judgments.

¹⁰ *Nabil Sayadi and Patricia Vinck v. Belgium*, Communication No. 1472/2006 (22 October 2008).

Not surprisingly, the Human Rights Committee found that, in the circumstances of the case, there was no need for any interpretation regarding the legitimacy or regularity of the Security Council's action. The Committee is an independent treaty body and is not part of the United Nations organs, though it is financed by the UN and is serviced by the Secretary General of the UN. The Committee found no difficulty in basing its competence on the relevant provisions of the Optional Protocol to examine the acts of Belgium in supplying the victims' names in the first place, thus violating the Covenant rights of the victims to freedom of movement¹¹ and to the protection of their honour and reputation, which are part of their right to privacy.¹²

However, the question still remains to be answered as to whether the Human Rights Committee itself or any other independent treaty body, in an appropriate case, would or would not be competent to pronounce on whether the Security Council would be acting *intra vires* or *ultra vires* its powers in adopting coercive resolutions violative of Covenant provisions guaranteeing and protecting particular human rights and of the Charter's provisions relating to the purposes and principles of the Charter.¹³

IV. CRITERIA DETERMINING THE LEVEL OF DEFERENCE

In his report, Dr. Schill has benefited us with a detailed analysis of the factors arising both from the international law background of investment treaties and from the domestic public law analogy that could usefully guide investment arbitral tribunals in determining the appropriate level of deference that should be paid to actions of different organs of the State. There is little to disagree with, in principle. Every decision in that regard

¹¹ Article 12 of the Covenant on Civil and Political Rights.

¹² Article 17 of the Covenant on Civil and Political Rights. (Note: The victims have subsequently informed the Human Rights Committee that the Sanctions Committee has now de-listed their names but that they are still waiting for compensation from Belgium).

¹³ *Vide* (a) Article 103 of the Charter of the United Nations which reads as follows:
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail,

and (b) Article 24 (1) and (2) of the Charter which read as follows:

(1) *In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.*

(2) *In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.....*

(c) For the "Purposes and Principles", see paragraph 2, second subparagraph and Footnote 2.

would depend, in particular, on the terms of the investment instrument, the public interest that is at issue and the nature of the action taken. There is one matter on which something could, however, be said.

V. EMERGENCIES AND ECONOMIC CRISES

Dr. Schill refers to measures taken in an emergency or crisis situation. The conjunction of the terms “emergency” and “crisis” is an opportune one. “Crisis” is an appropriate term in relation to investments in a situation of economic meltdown, where the adage “*as safe as a bank*” has been emptied of all meaning. And the term “bankruptcy”, in its lay meaning, threatens to become applicable as much to States as to the private sector entities. Being an exceptional situation, the crisis inevitably requires exceptional measures, as what is at stake is nothing less than the “life of the nation” in more ways than one can imagine.

All international instruments¹⁴, whether world-wide or regional, do recognise the exceptional public regulatory space of States in a state of emergency to derogate from certain rights otherwise protected during normal times. In this regard, the report assumes all its significance when it refers to the arbitrations concerning measures adopted by Argentina in the face of the financial crisis of 2001-2002 and, indeed to the vital interests facing a number of other countries.

It is to be hoped that international arbitral tribunals, and the legal profession which practices before them, will be guided by the approach adopted by the relevant international and regional treaties and the international institutions charged with the responsibility to supervise their application with respect to analogous exceptional situations. But there are clearly difficulties here. Whereas emergencies are well defined in multilateral treaties and national constitutions, economic or financial crises are not so defined. They are simply dealt with by *ad hoc* financial measures, sometimes with a sunset clause, designed to respond to the crisis.

There is clearly much thought to be given by States and international arbitral tribunals alike to these exceptional situations with a view to determining what the fair balance should be between the interests of the investors and those of the population for which States bear responsibility in their quality as States. Presumably investors themselves will have no interest in continuing their operations in a State which faces

¹⁴ See Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 27 of the American Convention on Human Rights.

economic collapse, unless exceptional measures are taken and accepted, whether grudgingly or not, by the population and investors alike. The question is not merely academic. The question might possibly arise as to what response international arbitration might be called upon to give to the measures which Ireland and Greece might have to adopt to give some relief and sustenance to their population in their present dire plight as well as to investors.

CLOSING REMARKS

Closing Remarks

*Hon. Y. K. J. Bernard Yeung Sik Yuen, G.O.S.K.**

It falls on me to close our conference. I have listened with great interest to your intervention together with my brethren from the Mauritian Supreme Court, not to mention Lord Phillips, Judge Ancel, and our distinguished judges and attorneys-general from Africa and Asia. We have all greatly benefited from the lucid *exposés* made by our *rapporteurs*, and from the scholarly interventions.

We have learned from our first panel that we – as Mauritian judges – are well equipped under the new International Arbitration Act (“the Act”) to deal with issues of jurisdiction. The decision of the legislator to enshrine the negative effect of *compétence–compétence* in Section 5 of the Act to ensure that parties who come to Mauritius to arbitrate will not spend significant time in court arguing thorny issues of jurisdiction needs special mention. After a quick summary hearing, the parties will be sent off to arbitrate all their issues – including any issues relating to jurisdiction that may be raised – save in the most exceptional of cases. The Court will be able to reach that summary decision to refer the parties to arbitration without hesitation, unless a party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed.

The Court, however, remains the ultimate guardian of the fundamental legality of the arbitration proceedings, given that an aggrieved party has the option of coming back to ask it to determine any jurisdictional issue by way of a full rehearing under Sections 20(7) or 39 of the Act. The point of interest of section 20(7) remains the fact that although a party who is unhappy with a ruling of the arbitral tribunal on a preliminary question may request the Supreme Court to decide the matter, the arbitral tribunal may continue its proceedings and make one or more awards pending the decision of the Supreme Court on the matter.

The second panel, chaired by Senior Puisne Judge Matadeen, has given us a useful insight into the difficult area of arbitrability, and especially of the arbitrability of company disputes, a field which our courts need to be ready to grapple with, given the specific provisions contained in the Act for the arbitration of shareholder disputes in offshore companies. There, as in all other fields, the court must stand ready to aid arbitration

* Chief Justice, The Supreme Court of Mauritius.

whenever possible. I have noted with interest Professor Seraglini's views that the provisions of Schedule 1 of the Act on consolidation and joinder – which apply mandatorily to such disputes – can provide the court with the tools to alleviate, if not altogether remove, the traditional obstacles to the arbitrability of such disputes: the *effet relatif* of the arbitration clause and the lack of *erga omnes* effect of an arbitral award.

The third panel was of even more direct relevance to our task as judges, and it was a great privilege – in particular – to be able to hear the views of Lord Phillips and of Judge Ancel on this crucial topic. As we have heard, the International Arbitration Act has adopted a number of very innovative solutions to minimise the points of contact between the arbitral process and the courts. In particular, an innovative role has been given to the Secretary-General of the Permanent Court of Arbitration at The Hague (“PCA”) with respect to a number of matters arising during the life of the arbitration. The decisions of the Secretary-General in that respect will be final and non-appealable, with the only possible remedy lying against awards ultimately rendered by the arbitral tribunal. This will ensure that arbitral proceedings can proceed smoothly, with court applications relegated to the end of the process. Similarly, the powers of the court to render interim measures have been reined in, in order to give priority to the arbitral tribunal whenever it can act efficiently.

Ultimately however, much depends, as we are all aware, on the attitude of the judiciary. As some of you may already know, my initial reaction when I saw the first draft of the International Arbitration Bill was to say that the Bill still gave the courts too prominent a role in international arbitrations, especially with respect to challenges of arbitral awards. I do understand however the reasons which underlie the decision which has been taken to adopt, without modification, the grounds of challenge which appear in Article 34 of the Model Law. Section 39 of the Act which follows on Article 34 of the Model Law sets out an internationally accepted balance between the need for finality of arbitral awards and essential safeguards such as that of due process. I only recount the anecdote to give you an example of the general attitude of our judiciary towards arbitration. I believe that Mauritian judges have usually been friendly to arbitration. The judiciary has never considered arbitration to be an “annex, appendix or poor relation to court proceedings” to use the famous words of Lord Wilberforce in the House of Lords on the second reading of the English Arbitration Bill in 1996. As such, it stands ready to assist – and not disrupt – international arbitrations held in Mauritius, and to interpret the Act with that aim in mind and paying proper regard to the international nature of the Model Law as required by sections 3(9) and 3(10) of the Act.

The fourth panel has addressed some of the topical issues which our courts will need to deal with in the context of the recognition and enforcement of awards. As we have heard, that discussion does not only concern foreign awards properly speaking, but also international arbitral awards rendered in Mauritius under the International Arbitration Act: *see* Section 40 of the Act. In particular, the panel addressed the potential pitfall of ‘public policy’ under Article V(2)(b) of the New York Convention. This limited ground of challenge should not be allowed to be expanded so as to disguise the review of awards on the merits. Other jurisdictions have made that mistake and have thereby attracted the immediate disaffection of international users.

The fifth and sixth panels discussed issues of international investment law. The discussions were fascinating, and of great relevance to the continued development of that specialised sector of the law in our region. The Mauritian courts will have less of a role – if any – to play in that context. In particular, it will have no role to play in International Centre for Settlement of Investment Disputes (“ICSID”) proceedings, save perhaps at the enforcement stage under the Washington Convention which Mauritius signed and ratified some forty years ago in 1969. It is however hoped that the ICSID will in due course consider using our logistical facilities to hold some of its hearings closer to the centre of gravity of the relevant disputes. In the context of United Nations Commission on International Trade Law (“UNCITRAL”) arbitrations – another favoured means of resolving investment disputes – our courts stand ready to assist, and not interfere with, the arbitral process if ever necessary.

I am convinced that this conference, attended as it has been by a great number of our judges and magistrates and members of our legal profession, will significantly contribute to the development of our law of international arbitration. That law, it is fair to say, is in its embryonic stage. But it is also fair to say that the gene reserves appear sound and healthy.

There is still work to be done though. First, as mentioned by the Honourable Prime Minister, work is ongoing on the drafting of specific Rules of Court for International Arbitration. The aim – as with the Act – is to draw an international precedent and to make these Rules simple and user friendly. As part of this exercise, we intend to set up a specialist arbitration panel of the Mauritian Supreme Court from which the three judges who are to hear any court application under section 42 of the International Arbitration Act will be drawn. These specialist judges will receive continuous training in international arbitration, hopefully, with the assistance (in particular) of the institutions which have kindly co-hosted this

event so that they are tuned with the developments in the field through regular attendance at international conferences such as the present one.

Secondly, we need to ensure that this conference is but the first step in a continuous training programme which will be put in place for the benefit of our Bar and Bench, and for that of the entire region. I, like the Honourable Prime Minister, am confident that Mauritius has the necessary ingredients to become a leading arbitral jurisdiction. In particular, there are ever increasing trade flows from the rest of the world into India and from China into Africa, many of which are already financially structured through our offshore sector. The international arbitration platform put in place by the Government will guarantee to such users of our financial services good facilities in a neutral and user-friendly forum for the resolution of disputes arising from these trade flows.

For all of us who belong to the Bench or the legal profession in Mauritius, this conference has been a “*Grande Première*”. I believe that this conference can indeed be qualified as a “*World Première*” since such an important gathering of high ranking officials from the major international arbitration institutions have never met before under the same roof for a single event. But this conference has well served everyone in the sense that it has provided us with an opportunity to meet and know each other, and possibly also provided us with more than a glimpse of the facilities available in Mauritius as a good seat for international arbitration.

It has been a pleasure for us, Mauritians, to welcome all the international participants. I hope that you have enjoyed your stay and will consider coming back for other major events.

I am sure you will all join me to acknowledge our appreciation for the good work done by the respective staff of the Prime Minister’s Office, the Board of Investment, the Police Force, the Intercontinental Hotel and all those who have helped to make this conference a success.

Finally, I shall fail in my duty if I were not to single out one person without whose initiative we would not have met for the past two days. I believe that Salim Moollan stands out as the major convener of this very successful event and that he deserves a good round of applause.

I thank you all for attending this conference and declare the conference closed.

