MIAC 2014

The Mauritius International Arbitration Conference 2014

The Litmus Test: Challenges to Awards and Enforcement of Awards in Africa

Papers from the joint conference of the Government of Mauritius,
LCIA-MIAC Arbitration Centre,
ICC, ICCA, ICSID, LCIA, PCA and UNCITRAL
held in Mauritius on 15 and 16 December 2014

Edited by

The International Bureau of the
Permanent Court of Arbitration

Printed by

Regent Press Co. Ltd.

ISBN: 978-99949-0-286-6

The Mauritius International Arbitration Conference 2014
was hosted by the Government of Mauritius
in collaboration with the LCIA-MIAC Arbitration Centre
and the Mauritius Board of Investment
and was supported by the following organisations:

The publication of the conference proceedings has been made possible with the financial support of the Government of Mauritius.

THE MAURITIUS INTERNATIONAL ARBITRATION CONFERENCE
15 & 16 DECEMBER 2014

THE LITMUS TEST: CHALLENGES TO AWARDS AND ENFORCEMENT OF AWARDS IN AFRICA

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Foreword

Hugo H. Siblesz[*]

It is with great pleasure that I present this volume of the proceedings of the Mauritius International Arbitration Conference ("MIAC") held in December 2014. As with the first two MIAC Conferences – held biennially since 2010 – this third conference brought to the region an impressive gathering of renowned practitioners specializing in international arbitration and related disciplines, senior public officials, and heads of major international arbitration institutions. The theme this time, "The Litmus Test: Challenges to Awards and Enforcement of Awards in Africa," explores, from a practical and multi-jurisdictional perspective, the varying approaches and difficulties arising in relation to challenges to awards at the seat of the arbitration and the recognition and enforcement of awards in court proceedings.

Mauritius launched itself as a new platform for international arbitration in Africa with the passing of the Mauritian International Arbitration Act 2008 ("IAA"). 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 center.

Since 2010, the project to develop Mauritius as an international arbitration center has continued apace. In July 2011, Mauritius signed a joint venture agreement with the London Court of International Arbitration ("LCIA") for the creation of a regional arbitration center, the LCIA-MIAC, which, as of July 2012, is fully operational. In 2013, Mauritius refined its international arbitration legislation with, *inter alia*, amendments designed to clarify and streamline the IAA and the introduction of new rules of court for international arbitration matters brought before the Supreme Court of Mauritius. In March 2015, Mauritius held the official signing ceremony of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, also known as the "Mauritius Convention on

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Transparency." In so doing, Mauritius played an important role in what is already being seen as a turning point in encouraging openness and accountability in investor-State arbitration. Now, Mauritius is preparing to host, in May of this year, the twenty-third International Council for Commercial Arbitration ("ICCA") Congress, which will be taking place in Africa for the first time in ICCA's fifty-year history. These developments show Mauritius's role as an increasingly important hub for international arbitration in the region and beyond.

Like the 2010 and 2012 MIAC Conferences, the 2014 conference was co-sponsored by six international organizations: the PCA, the LCIA, the United Nations Commission on International Trade Law, the International Centre for Settlement of Investment Disputes, ICCA, and the International Chamber of Commerce International Court of Arbitration.

Eminent speakers at the event included the Chief Justice, the Solicitor-General, the then Acting Attorney-General, and the former Parliamentary Counsel of Mauritius; serving and former judges from the International Court of Justice, the Iran-United States Claims Tribunal, the Supreme Court of Hong Kong, the Supreme Court of Mauritius, the Supreme Court of the United Kingdom, and the High Court of Justice of England and Wales; the President of ICCA; heads and senior representatives of the sponsoring arbitral institutions; and leading academics, arbitrators, and practitioners from around the world. Their diverse views were presented in six panel sessions, divided into two parts, each consisting of a series of paper presentations setting out the legal framework, a mock hearing and a panel-led discussion. This volume follows this structure and is accordingly divided into six sections. The first three sections (Part A) concern **challenges to arbitral awards at the seat**, and the latter three (Part B), **the recognition and enforcement of awards**.

The first section starts off the topic of **challenges to arbitral awards at the seat** with papers presenting perspectives from various jurisdictions. The Hon. Sir Bernard Eder examines ways in which a challenge to an award may be brought under English law, arguing that while limited supervision by the courts must sometimes be exercised, the court's role must be kept minimal as it represents an exception to the fundamental principle of non-intervention in international commercial arbitration. Ms. Olufunke Adekoya provides a detailed overview of the international arbitration law of Nigeria, with recent jurisprudential examples to help illustrate the importance of court decisions in this area. Ms. Aruna Narain addresses the Mauritian angle by examining the relevant IAA provisions and emphasizing how important it is that the courts get the standard of review right. Prof. Dr. Sébastien Besson – through a comparative analysis

of the subject from a Swiss, French, Mauritian, English and Model Law perspective – draws attention to the fact that despite international efforts to bring arbitration laws up to a recognized modern standard, there remain important cross-jurisdictional differences when it comes to challenges.

The second section brings a practical dimension to the topic by focusing on a hypothetical case presented at the conference in the form of a mock hearing that showed how difficult it is to challenge an award on the public policy ground. It begins with introductory remarks by Mr. John Beechey, who moderated the mock hearing, followed by a summary prepared by Ms. Khemila Narraidoo of the mock proceedings, at which submissions were presented by Ms. Rachael O'Grady and Mr. Kwadwo Sarkodie and heard by Prof. David Caron, acting as Presiding Judge, Hon. Mrs. Shaheda Peeroo and Mr. Jeremy Gauntlett Q.C.

The third section consists of a discussion on the wide array of issues raised during an open floor discussion on challenges, which was moderated by Dr. Jacomijn van Haersolte-van Hof and led by Mr. Peter Leaver Q.C. and Mr. Benoît Le Bars. Summarized for this report by Ms. Vanesha Babooa-Bissonauth, the engaging discussions that took place during this session drew on the wealth of experience present in the audience.

In Part B of this volume, the fourth section shifts the focus from challenges to arbitral awards at the seat to **the recognition and enforcement of awards**, with papers presented from the perspective of their respective different jurisdictions by The Rt. Hon. the Lord Mance (England), Mr. Ace Anan Ankomah (Ghana – also addressing Nigeria), Mr. Moorari Gujadhur (Mauritius) and Prof. Pierre Mayer (France).

The fifth section, presented in French, concerns a second mock hearing that took place at the conference, this time on a hypothetical case relating to the enforcement of an award that had been set aside in an OHADA State. It begins with introductory remarks by Prof. Albert Jan van den Berg, who moderated the mock hearing, followed by a summary prepared by Ms. Jessica Naga of the mock proceedings, at which submissions were presented by Ms. Carole Malinvaud and Mr. Christian Camboulive and heard by Judge Raymond Ranjeva, acting as Presiding Judge, Mr. Karel Daele and Mr. Iqbal Rajahbalee.

The final section consists of a discussion on the recognition and enforcement of awards, summarized for this book by Ms. Jennifer Konfortion. While I had the honor of moderating the session, it was led by Dr. Mohamed Abdel Raouf and Prof. Philippe Leboulanger and reflected, once again, the valuable input received from the audience, which led to some insightful and high-level debates.

I wish to express my gratitude to all those involved in planning the conference, particularly Mr. Salim Moollan Q.C., whose vision made this conference, and the preceding two, possible. The Government of Mauritius supported the conference through the work of the Board of Investment in organizing the event, and through the publication of the present volume. I would also like to thank the International Bureau of the PCA for editing and preparing the presenters' contributions for publication, in particular, the PCA Legal Counsel and Representative in Mauritius, Ms. Claire de Tassigny Schuetze and her predecessor PCA Senior Legal Counsel, Dr. Dirk Pulkowski; PCA Legal Counsel, Mr. Farouk El-Hosseny; PCA Assistant Legal Counsel and Mauritius Fellow, Ms. Nismah Adamjee; and PCA Case Managers, Ms. Helen Pin and Mr. Benjamin Craddock, as well as the Office Management Assistant of the PCA's office in Mauritius, Mr. Dewraj Taurachand, for taking care of the printing logistics.

To date, the PCA is witnessing unprecedented levels of activity. Of the arbitrations presently being administered by the PCA, roughly half involve parties from Africa, Asia, or the Indian Ocean. It is encouraging that Mauritius, given its unique geographical, cultural, and legal setting, is not only well-placed to cater for the arbitration of international disputes in the region, but is so actively committed to developing its capacity in this role. The MIAC Conferences are an important part of this on-going commitment. As emphasized by Mr. Salim Moollan Q.C. in his Welcoming Address to the Conference, these conferences are not only designed to bring cutting-edge thinking and practices in the field of international arbitration to the region, but are also a platform for leading practitioners from developing countries to have their say and influence that thinking and shape those practices. It is therefore my hope that the fruitful exchanges documented in this volume on the post-award phase of the proceedings will help make arbitration in Africa and beyond even more effective.

Hugo H. Siblesz
Secretary-General
Permanent Court of Arbitration
The Hague, April 2016

Welcoming Address

Salim Moollan[*]

Honourable Chief Justice,
Mr. Solicitor,
Excellencies,
Justices and Judges,
Distinguished Delegates,
Ladies and Gentlemen,

To those who have travelled from aboard, welcome to Mauritius. To all of you, welcome to the Mauritius International Arbitration Conference 2014.

The MIAC conferences are a central part of the Mauritian international arbitration project. They are designed to bring to our region cutting edge thinking and practices in the field of international arbitration so that we and our neighbours may gain a deeper understanding of that thinking and of those practices but also, and very importantly, so that we, as a region, may gradually influence that thinking and make those practices our own.

One of the conclusions of the ICCA Congress which was held in Miami earlier this year was that there is a worrying lack of specialist arbitration lawyers and arbitrators from developing countries and that this situation poses a threat to the very legitimacy of our field, not only in the developing world, but beyond. That concern has been at the heart of our project since its inception and our aim has, at all times, been to create a platform run for the benefit of the region as a whole to build capacity in the field of international dispute resolution so that, within a generation, Africa can draw on a pool of expertise of specialist African arbitrators and arbitration lawyers.

The practical steps that we have taken in the pursuit of that end since the project started in 2006 can be briefly stated. First, of course, we assessed objectively whether Mauritius had the requisite assets to become a platform for international arbitration in the region. That is to become two

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things: one, to become a safe seat to arbitrate in but also to become a centre of excellence for legal training in the field. We believe that we do.

In short, Mauritius has become the country in Africa in which to do business. The World Bank and other organisations have consistently ranked Mauritius first among African economies in terms of overall ease of doing business, governance and transparency. Mauritius is wholly integrated in the African region as a leading member of the African Union (AU), of the Southern African Development Community (SADC), of the Common Market for Eastern and Southern Africa (COMESA) but, like perhaps Singapore in South-East Asia or Switzerland in Europe, it is uniquely open to the rest of the world.

Our experience in the financial services industry demonstrates the confidence which foreign investors have in our jurisdiction and the ease of doing business in our country. Mauritius has some 50,000 offshore companies and a thriving global business sector channelling and servicing investment to Africa, India and China. We are one of the main channels for foreign direct investment into India and are fast becoming the hub for all transactions involving Africa, both for what have been our traditional clients, that is large and medium-sized US and European corporations, but also, now, for a new wave of investors coming, in particular, from China and India.

Mauritius also has an established and stable democratic system of government based on the Westminster model with a deeply rooted respect for the rule of law and a unique blend of civil and common law heritage.

Finally and crucially, Mauritius has the added advantage of being, and of being perceived, as a neutral country from both a developed world perspective and a developing world perspective.

A decision in light of all these factors was accordingly taken to start the systematic effort to use those assets to turn Mauritius into a safe and efficient place to arbitrate. We enacted a state-of-the-art new International Arbitration Act based on the Model Law in November 2008. We signed a Host Country Agreement with the Permanent Court of Arbitration (PCA) in The Hague, which has, for the first time in its history, appointed a permanent representative outside The Hague to Mauritius.

The project was then officially launched with our first MIAC conference in December 2010. We then signed a Joint Venture Agreement with the London Court of International Arbitration (LCIA) in July 2011 creating a state-of-the-art and independent arbitration centre, the LCIA-MIAC.

Finally, we have now shared UNCITRAL's work on transparency in investor-State arbitration over the past four years with results which I understand our Solicitor-General will tell you more about in a moment.

All these arguments convinced ICCA that the time had come for it to finally come to Africa, and the ICCA 2016 Congress will be held on our island in May 2016. The present conference has, therefore, now effectively become the final stepping stone to that major conference in 2016.

Following on from what perhaps can be described as an intensely theoretical conference back in 2010 in which we aimed to rethink key areas of international arbitration law and practice, and one equally divided between theory and practice two years ago where we aimed to delineate the contours of an African seat for the 21st century, MIAC 2014 will grapple with some very practical questions, I would say the questions that ultimately matter most to users of international arbitration. From their perspective, the worst of the arbitral process can only be judged by reference to the fate of the document which concludes that process, the arbitral award. That, as we have put it in the title of the conference, is the litmus test.

That question will be addressed over the next two days by six panels of internationally recognised experts. The first day will deal with the question of challenges to an arbitral award at the seat of the arbitration and the second day with the related, but I emphasise, quite separate question of recognition and enforcement of foreign awards. Both days have been structured in a similar manner with a first panel setting down the relevant legal concepts from a comparative law perspective befitting of Mauritius's dual civil and common law heritage, a second panel showcasing those concepts in a moot, and finally a third panel on each day designed to give us all a chance to debate the relevant issues.

This format means that we will have no question and answer sessions at the end of the first and second panels of each day but we will be heavily reliant on your questions and participation for the third panel of each day.

As in 2010 and 2012, our work over the next two days will be reported in the Congress series meticulously prepared by the PCA and will, we hope, continue to contribute to a legal framework and assist practitioners and judges alike in years to come.

I wish you all a thought-provoking conference and now give the floor to our keynote speaker, Mr. Kaplan.

Keynote Speech

Neil Kaplan, C.B.E., Q.C., S.B.S.[*]

Honourable Chief Justice,
Mr. Solicitor,
Distinguished Judges,
Speakers and Delegates,

It is a privilege and an honour to be invited to give this keynote speech at this very important conference. Although I have been to Mauritius before, about 25 years ago, it obviously long pre-dated the substantial efforts of so many people that have turned Mauritius into an exciting international arbitration venue.[1]

Mauritius sees itself particularly well placed to attract African-based disputes from the traditional European centres. However, I trust that it will look East as well as North and West because the great growth in arbitration in the last twenty years or so has been experienced in Asia. China, as you know, has had a long history of arbitration. Hong Kong and Singapore have followed in its wake. Today, both these centres are a magnet for international arbitration and Korea is fast catching up. As Asian capital moves westwards, counterparties need to be flexible in agreeing to arbitral venues and Mauritius needs to attract likely users from the East as well as from the traditional centres in Europe and America.

Growing an arbitral centre can be a slow process especially today when there is so much competition. In Hong Kong, in our first year, 1985, we had nine cases but there was very little competition in Asia at that time.

When it comes to looking at the user-friendly arbitration check list, Mauritius has most of the boxes ticked: an up-to-date law based on the Model Law; a strong and independent legal profession; an open house on

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[1] The enactment of the International Arbitration Act (IAA) in 2008, which is based on the UNCITRAL Model Law, and the Amended IAA 2013 were two stepping-stones. In 2013, the Supreme Court Rules were also enacted so as to address practitioners' need for clarity and efficiency. Finally, the Mauritius International Arbitration Centre, which has a joint venture with the LCIA since 2011, is widely recognised for its dynamism.

legal representation in international arbitration; and, of course and most importantly, an independent judiciary which understands arbitration.[2]

Further and crucially, the New York Convention has been in force in Mauritius since 1996 and the Washington Convention since 1969.

Mauritius is an attractive venue in many other respects, as we are all finding out over the last couple of days. As Salim Moollan said, ICCA is very excited that its 2016 Congress will be held in Mauritius in May 2016. This will certainly give Mauritius a great boost.

Mauritius is a new centre but arbitration is not new. As you know, it long pre-dated court systems. Its origins can be found millennia ago, and to quote my colleague, Professor Derek Roebuck:

> "Litigation is comparatively modern in the history of human society. It cannot pre-date the State which must set up the courts which litigation by definition requires."

Litigation and arbitration have been alternatives since at least the 18th century BC, when Syrian merchants employed them in ancient Mesopotamia. But arbitration and mediation must be even older than that. Pre-State societies must have had some other way, other than violence, to resolve their disputes.

What really fascinates me is that nearly everything we discuss in arbitration conferences like this has been discussed long before. I was reading Professor Roebuck's fifth volume in his excellent series on the history of arbitration called *The Golden Age of Arbitration*: *Dispute Resolution in the Reign of Elizabeth I,*[3] and I came across a debate in the House of Commons in 1601 where the then Mr. Francis Bacon moved the adoption of a Bill on marine insurance. He told the House of Commons that his committee had considered it necessary to make provisions for this for the protection of merchants. He also told the House that the committee proposed that all disputes arising from the Act should be dealt with by arbitration.

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2 The IAA Amending Act provides that six designated judges shall rule on applications submitted under the IAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001. The goal of this system is to allow these judges to develop their expertise in international arbitration matters.

3 D. Roebuck, *The Golden Age of Arbitration – Dispute Resolution Under Elizabeth I* (2015), Holo Books.

Why did he propose this? Shorn of the Elizabethan English, he gave two reasons: firstly, the courts were too slow for merchants and, secondly, the judges did not have the necessary subject matter expertise.

As a footnote to this, when he became Lord St. Albans, he must have been one of the first arbitrators to have been disgraced and removed from office for taking bribes and it was not much consolation or mitigation that he was even-handed and took bribes from both sides. However, his comments about the speed of the judicial process resonate today.

This conference highlights the role of the court in the international arbitration process at two different stages. I want to start off by saying a few words about the role of the court. In two cases of which I have knowledge, it took over ten years for the relevant Supreme Court to consider the matter and eventually enforce the award. This will simply not do and courts around the world have to recognise their State's obligation under the New York Convention as well as under certain bilateral investment treaties.

I am sure many of you have had similar experiences. Some jurisdictions are regrettably notorious for their delays in dealing with these matters and in some cases this delay has resulted in a claim against the State by investors under bilateral investment treaties. There can be a real incentive for judges in these jurisdictions to get a move on.

One simple arrangement to speed up the process is to ensure that matters relating to both international and domestic arbitration are dealt with by specialist judges. Fortunately, now in many jurisdictions around the world, specialist judges have been nominated to deal with international arbitration cases and this not only assists in speed, but also assists in relation to expertise. Section 43 of the International Arbitration Act of Mauritius achieves just that by providing for designated judges.[4]

As you know, the problem relating to enforcement was so severe in China that the Supreme Court set up a special reporting system to ensure that if a lower court was minded to refuse enforcement of an international award, it would first have to refer the matter to the Supreme People's Court for a decision. This reporting system has worked well but unfortunately there is a paucity of reliable statistics and too much is anecdotal.

In a perfect world, there would be no need for any interaction between the courts and the arbitral process. Agreements to arbitrate would be implemented, arbitrators would be appointed in accordance with the agreement, there would not be any challenges, everybody would produce the documents they have been asked to and the awards would be honoured,

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4 See footnote No. 2.

but that unrealistic and perfect world would put many of you here out of business. The reality is far different and thus the interplay between the arbitral process and the relevant judiciary is of crucial importance.

One has to have sympathy for judges in certain jurisdictions who have no experience in international arbitration and find it rather strange when asked to convert an award signed by three foreigners into a judgment of their own court against an individual or company of his country. That is one of the reasons why ICCA has published its Guide for judges to the New York Convention and it is why ICCA arranges New York Convention roadshows around the world to familiarise judges with the New York Convention and their role in the arbitral process. I am pleased to announce that the Guide has been translated into 13 languages including Farsi, Burmese, Georgian and Arabic. Hebrew and Turkish are in the pipeline.

It is, of course, interesting to observe how things, at least in my original jurisdiction, have changed over the years. In 1895, an anonymous letter to the London *Times*, thought to be written by a very distinguished judge, said this:

> "The Mercantile public is not fond of law if law can be avoided. They prefer even the hazardous mysterious chances of arbitration in which some arbitrator, who knows as much of the law as he does of theology, by the application of a rough and ready moral consciousness or upon the affable principle of dividing the victory equally between both sides decides intricate questions of the law and fact with equal ease."

Not many years later another judge in England made a famous observation about the relationship between the courts and the arbitral process. I imagine they would both be somewhat concerned if they read the Model Law as well as many other Acts including the English Arbitration Act which contains provisions, which basically say that no court shall intervene except as so provided in this Act.

This limitation of the power of the court to intervene in the arbitral process is crucial. The role of the court is essentially one of support for the arbitral process. If the process goes wrong, the court can usually put it back on track. Today, as we know, most courts are overwhelmed with cases concerning crime, divorce, children, public law and environmental law, and so courts rightly hold parties to their agreement to arbitrate. Arbitration has

the advantage of finality, privacy as well as ease of enforcement. I wish I could add reduced costs and speed to that list.

This conference will be considering issues relating to challenges at the seat and enforcement of awards wherever that is sought. However, what we see from time to time is State court judges not at the seat but at the home jurisdiction of one of the parties, usually the one most pessimistic of its chances, interfering in the arbitral process before any award has been issued by granting an injunction which has the effect of stopping the arbitration in its tracks.[5] What is worse is that they sometimes do so based on affidavit evidence only from the challenging party. I have come across this and I suspect several of you here today have as well.

No one is suggesting that a State court judge would not have been perfectly entitled to refuse enforcement of an award against a national of his country had an adverse award been taken to him for enforcement if he had been satisfied on one of the grounds under the New York Convention. Whether he was right or wrong would have been of no relevance to this discussion but he would have been at least playing by the rules. However, by making that decision whilst an arbitration is pending and on the basis of affidavit evidence alone a judge would in those circumstances, I suggest, simply be usurping his role.

As appeals on the merits against international arbitration awards are prevented, disgruntled litigants seek other means of challenging the process or the arbitrators. The vast majority of these are unmeritorious, and although courts cannot stop them being launched, they can and should, in my view, show their displeasure.

Firstly, such applications need to be heard swiftly or else the delay will be playing into the hands of the challenging party who is usually seeking to put off the date of payment. An obviously unmeritorious delaying application can be met by an order that the sum in dispute or part of it should be paid into court pending the result of the application. This gives the award holder some protection.

Finally, when the court does dismiss the unmeritorious application it should make its displeasure known by ordering the unsuccessful challenger to pay the award holder's costs on an indemnity basis. A trend to this effect is indeed apparent from Hong Kong and English authorities and doubtless elsewhere as well.

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5 See, for instance, the decision from the Indian's High Court in *Vikram Bakshi v. McDonald's India Pvt Ltd* (2014).

In Hong Kong, it was put neatly by Vice-President Tang in 2012 where he said:

> "Experienced judges of the construction and arbitration list have adopted the approach that in proceedings arising out of or in connection with arbitral proceedings in the absence of special circumstances the court will normally consider it appropriate to order costs on an indemnity basis."[6]

In Australia, at least in Victoria, the situation is not so clear. The Victorian court has held:

> "Unsuccessfully resisting enforcement of a foreign [a]ward is not an established category of special circumstances in Australia."[7]

To be fair to the Court of Appeal, the case before them was not unmeritorious because they allowed it, thus, their observation perhaps went wider than required for that case.

In any event, the Chief Justice of the Supreme Court of Western Australia has this year ordered indemnity costs in respect of an application for a stay where court proceedings were wrongly instituted where there was an arbitration clause. As the Hon. Chief Justice of the Federal Court of Australia, James L. B. Allsop A.O., has said:

> "The real question for Australian courts is whether the approach to enforcement proceedings adequately reflects the public policy considerations that should properly attend them."[8]

The shortcoming of Australia's position may be that while the presumption of party/party costs arguably delivers a just outcome in ordinary proceedings, enforcement proceedings in the context of arbitral awards are

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6 *Gao Haiyan & Anor v. Keeneye Holdings Ltd & Anor* (No. 2) [2012] 1 HKC 491.

7 *MC Aviation Solutions Pty Limited v. Altain Khuder* [2011] VSCA 248 at [55].

8 *The Enforcement of International Arbitration Awards and Public Policy, An AMTAC and Holding Redlich Seminar* (2014).

different in character. Perhaps, the jury is still out in Australia but hopefully not for too long.

I mentioned earlier the role of ICCA and I would like to add that in May 2015, ICCA held its first judges' forum in Hong Kong. Judges from several jurisdictions, primarily in the Asian Pacific region, attended and I hope that these judicial fora can be repeated in other parts of the world.

One exciting proposal that we have is to set up a virtual judges' forum to enable judges anywhere in the world to chat, I suppose is the terminology, in a highly confidential environment about problems which arise from international arbitration.

This is a truly groundbreaking and exciting venture. Being a judge can be a lonely life and having to deal with problems that are completely out with your professional experience is a daunting prospect. We hope that both the Guide and the virtual forum will assist.

Thus far, I have been discussing the pivotal role of the court in international arbitration. I would now like to say a few words about the equally important role of counsel in international arbitration.

It is a common complaint that we hear from arbitrators that they are overloaded with documents, submissions and witness statements. The record in some of these large cases extends to tens of thousands of pages. It is worth reminding ourselves what Lucy Reed has said:

> "Focus not so much on what may go on in an arbitrator's head but more on how much you can fit in an arbitrator's head."[9]

Although the Redfern Schedule for dealing with document requests has been a most useful tool, it has most recently, in my experience, become a vehicle for some extremely lengthy and complex document requests. It is worth noting that these document requests come at a stage in the process where the arbitrators themselves are unlikely to have a good feel for issues of relevance and materiality. I will return to this point later.

In one case, one of my arbitral colleagues was going through a 230-page Redfern Schedule and when he came to the last page, he noted that counsel for one of the parties, the responding party, on the last page had written "lost the will to live" and I can certainly sympathise.

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9 *Arbitral Decision-making: Art, Science or Sport?*, Kaplan Lecture 2012, Hong Kong.

I am not the only one to do so. In 1989, an Oklahoma Federal Judge issued a procedural order dealing with document production issues. He got a little carried away and at the end of his order, he said:

> "If there is a hell to which disputatious, uncivil, vituperative lawyers go let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."[10]

Another unfortunate feature of international arbitration is the inability of some counsel to exercise what I might term arbitral triage. Too many bad points are thrown into the mix and again this is simply, I would suggest, bad advocacy. This is no new point. The Roman jurist and rhetorician, Quintilian, said in the 1st century BC:

> "We must not always burden the judge with all the arguments we have discovered, since by doing so we shall at once bore him and render him less inclined to believe us."[11]

It seems to me that one of the problems we are suffering from stems from the recent trend to shy away from oral argument in favour of written material. Written material is all very well provided, you are satisfied that it has been read and, more importantly, understood. However, we should not fool ourselves. No ordinary mortal can digest and understand materials contained in 30 lever arch files or even a memory stick. It is just not possible without proper assistance. Of course, it may be said that assistance will come during the course of the hearing but I would suggest that is too late.

When I was at the Bar, one of the things I enjoyed most was opening my case before the judge or the arbitrator. In those days, the judge had rarely had an opportunity of reading into the case and so you gave him the agreed bundle and took him through and invited him to underline the various points you wanted him to remember and you made your submissions as you were going along. The end of the opening was the high watermark of your case. It could only get worse after that, but whether you

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10 Judge W.E. Alley, U.S. District, quoted by J. W. McElhaney in "Staying out of Jail. Keeping your license and staying out of trouble", *ABA Journal* (1993).

11 Quintilian, *Institutio Oratoria*, 5.12.8.

lost or whether you won, at least, you had an opportunity of keeping the judge on top of the documents.

Unfortunately, this does not happen today and I think we need to look for a compromise solution. There is no question of returning to a situation where the arbitrator has not read any of the papers before the hearing. Most arbitrators are, in my view, extremely assiduous, but however hard working they may be, it is not always possible to read huge volumes of documents and put them in context of the case being advocated.

We all talk about effective case management but I believe that there is not enough of it. The compromise I suggest is to require counsel to appear before the tribunal after the first round of pleadings of witness statements and open the case in advance of the main hearing. In my view, this procedure has a number of advantages. Firstly, it will ensure that the whole tribunal will read into the case at a far earlier stage than hitherto. It will enable the tribunal to understand the case going forward and will inform its subsequent case preparation. It will enable the tribunal to have a meaningful dialogue with counsel about peripheral points, unnecessary evidence and gaps in the evidence. It will facilitate the tribunal putting points to the parties to which they will then have time to consider and respond. It will enable the tribunal to meet and discuss the issues far earlier than hitherto and thus meet the aspirations of the Reed Retreat, that is, Lucy Reed's idea that arbitrators should meet in advance of the hearing for a brainstorming session.

It will, I think, assist in ensuring speedier and better awards. Of course, by bringing the parties together with their trial counsel in advance of the hearing, there is always a chance that at least part of the case may be settled or points of disagreement minimised.

Arbitration, as we know, has many virtues but one of the reasons it is chosen is that of privacy. Generally speaking, what goes on in the hearing is not reported next day in the press not even in GAR. The issue of confidentiality is a wider issue with no clear consensus. Some jurisdictions like Hong Kong have gone the route of statutory confidentiality.[12] However, one can still say that the vast majority of awards in commercial and construction cases are in fact confidential.

This is in sharp contrast to awards in investment cases where the award is in GAR and elsewhere before the ink is dry on the signatures. ICSID Awards are made public unless the parties agree otherwise.

This divergence of approach has had some interesting consequences. It is now possible to read investment awards in full that deal

[12] Hong Kong Arbitration Ordinance (Cap. 609), Section 18.

with a wide range of issues equally relevant to commercial cases. Of course, UNCITRAL has had in force since 2014 its transparency rules which deal with investment awards and all the pleadings can be in the public domain.

Although there is no precedent value in these awards, they do provide great assistance and are relied upon for their reasoning. I made a list of things that you can learn about by reading the awards. I will not go through all of them because of time but to highlight a few: you can read investment awards that deal with hornbook issues such as the burden of proof, onus of proof, drawing adverse inferences. You can read about legal professional privilege, even mediation privilege, public interest immunity, how to deal with issues of corruption, how to deal with interim measures, the consequences of non-compliance, challenges to arbitrators and how should they be dealt with. You can read about the approach to document production and the taking of evidence and, of course, costs. You can read about how to assess damages, and about discounted cash flows. You can learn quite a lot by reading these awards and seeing how other people deal with them.

I have one plea relating to any award that is likely to become public: would the tribunal please prepare a headnote so as to avoid having to read 450 pages to find that pearl of wisdom that you know is embedded somewhere. It is daunting to have placed before you a huge award said to be relevant without a route map to check that it is indeed relevant and where.

I said one plea but I have another. We hear constant complaints about delay and expense and there is limited scope for the tribunal to avoid these. So much as in the hands of the parties and their counsel. However, there is one thing the tribunal can do and that is to make its awards shorter. I am not advocating eliminating the discussion of the tribunal on the relevant issues but I am advocating the end of awards that run to hundreds of pages, a large chunk of which is the procedural history and the recitation of the parties' respective arguments.

Accordingly, I suggest the procedural history, which is after all a matter of record, be placed into a schedule so as not to clutter up the award. No useful purpose can be served by repeating the parties' contentions in full. They know what they contended and they do not need it all repeated verbatim. What they need to see is that when the tribunal deals with the issues, their contentions have been understood even when rejected.

I am minded to ask the question: what has happened to the art of *précis*? Anyone who has sat on a scrutinising committee and had to scrutinise awards written by others will, I am sure, support this approach.

The shorter and more succinct an award, the easier it is to follow. I know that at the coffee break someone is going to come up to me and say "what about your award in so and so, it was 300 pages." My answer is it was 500 before I started pruning, but I appreciate there is room for improvement.

We are all privileged to be involved in international arbitration, not only does it take us to places like Mauritius but it presents the most interesting legal, factual and cultural issues. I can do no better than end by quoting the wonderful language of Lord Mustill who said:

> "The world of arbitration is a fascinating mosaic. Lines of fracture run everywhere. Theory and practice. International and domestic. Status and contract. Civilian and common law. Court-free and court related. Factual and legal. Ritualistic and freewheeling. Macro and micro. Expert and legal."[13]

We have a fascinating and interesting programme ahead of us and I am sure by the end of this conference we will all be better acquainted, better fed as well as better informed.

Thank you very much for your attention. I now have the great privilege of inviting the Solicitor-General to give his address to us today.

[13] "Sources for the History of Arbitration", *Arbitration International* (1998), Vol. 31, Issue 3.

Opening Address

Dheerendra K. Dabee, G.O.S.K., S.C.[*]

Honourable Chief Justice,
Excellencies,
Honourable Judges,
Distinguished Delegates,
Ladies and Gentlemen,

Good morning. You may have seen in your conference brochure that the Opening Address was to be delivered by the then Hon. Attorney General. I am just stepping in for him before the new Attorney General is sworn in in the days to come.

This being said, it falls to me to open this third Mauritius International Arbitration Conference. Let me begin by extending a very warm welcome to representatives of the co-hosts of this conference: 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 am pleased that the heads of all these distinguished institutions are represented here today. The active support of the international arbitration community, represented by your institutions, has become a defining feature of this conference. It contributes to the uniqueness of the Mauritius International Arbitration Conference, not only in Africa, but indeed in the world.

Such support is not only symbolic. Each session in the next two days will be chaired and moderated by one of the heads of our co-hosting institutions. My special thanks go to you, Excellencies, Ladies and Gentlemen, for your enthusiastic commitment to this event.

There is another unique feature of our conference of which we are particularly proud, and that is the particular mix of speakers. Our distinguished panellists include academics, judges, and practising lawyers. They are representatives of civil law and common law traditions and speak, at a minimum, English and French. All of them are leading voices of the

[*] Solicitor-General of the Republic of Mauritius.

discipline in jurisdictions in Africa, Asia and Europe. I am deeply grateful to all of you for being with us.

The unique mix of speakers at this conference in fact reflects something very "Mauritian". As you may already know, Mauritius is a bilingual country, whose legal system was shaped by the French *Code Napoléon* and British common law. As you will discover in the course of your stay, Mauritius is also a country with a naturally international outlook. Our geography places us within Africa; yet, we are equally close to many countries in Asia. Our culture is a blend of European, African and Asian. And our economy thrives on bringing Africa, Asia and Europe together – through commerce, tourism, financial services, and, last but not least, international arbitration.

Seen from this angle, it is quite natural to develop international arbitration in Mauritius. Mauritius is already a preferred place to do international business; it is only logical to arbitrate here as well. But to develop into a "hub" for international arbitration, certain conditions must be aligned. Arbitration requires, as it were, a particular ecosystem to thrive:

- In Mauritius, the legal framework governing arbitration proceedings is as good as in any leading arbitral jurisdiction. Our International Arbitration Act 2008 is based on the UNCITRAL Model Law, with a number of significant improvements. International users can be assured that Mauritius is an efficient, neutral and predictable seat.

- Any law is only as good as the courts that apply it. Mauritius prides itself of the quality of its judiciary. Oversight of arbitration proceedings in Mauritius is centralised with our Supreme Court, which in turn has a panel of judges dedicated to arbitration-related matters. We welcome a number of Supreme Court Justices including the designated judges and magistrates of other courts of Mauritius to this conference. You may have heard about a recent court judgment in the *Cruz City* case[1] in which the Supreme Court expounded on the role of a reviewing court vis-a-vis the arbitral tribunal. If you have any doubts about the approach of our Supreme Court, I invite you to consult this ruling which can be accessed on the Supreme Court of Mauritius website.

[1] *Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor* [2014] SCJ 100.

- Another unique characteristic of the International Arbitration Act is that certain key functions under the Act have been entrusted to one of the world's oldest and most respected international arbitral institutions – the Permanent Court of Arbitration in The Hague. For instance, under the Act, arbitrator appointments may be made, and challenges to arbitrators resolved, by the Secretary General of the PCA. Users may thus be assured that such decisions are taken in line with the highest international standards and drawing from the widest pool of arbitral talent.

- At an institutional level, the Government of Mauritius has established formal partnerships with two leading players in international arbitration, the Permanent Court of Arbitration in The Hague, and the London Court of International Arbitration with the support of which we have created the LCIA-MIAC Arbitration Centre. The LCIA-MIAC provides a state-of-the-art solution for those who seek an integrated Mauritian solution to their arbitration needs; a Mauritian institution for our Mauritian seat, but the seat has been created and exists for all forms of arbitration to thrive, be they under the ICC Rules, the SIAC Rules or the SCC Rules or, of course, *ad hoc* proceedings under the UNCITRAL Arbitration Rules.

- A major improvement of the arbitration infrastructure in Mauritius is planned for 2015, i.e. the opening of a brand new hearing centre designed and dedicated to dispute settlement proceedings. Here again, the centre will be available for *any* type of arbitral proceedings, regardless of institutional pedigree. I shall say no more at this stage, but at the very least, I can tell you confidently that the centre will be state-of-the-art.

The ecosystem for international arbitration in Mauritius is in place. I am glad to say that arbitral professionals worldwide are beginning to discover and, as is it seems, to like what they find here in Mauritius. 2014 has been a highly successful year for arbitration in Mauritius:

- The LCIA-MIAC has registered its first set of cases on the Centre's own rules of procedure. Everything suggests that this is only the beginning of substantial growth of the Centre – LICA-MIAC clauses are increasingly being used in Africa-related transactions.

- The Permanent Court of Arbitration held a hearing this year in Mauritius in a significant dispute between an African private company and an African State. The PCA Representative in Mauritius at the time acted as secretary to the Tribunal. We expect that this type of public-private dispute involving an African State will become one of the pillars of the PCA's activity in Mauritius.

- The PCA's Secretary-General has also dealt with applications by parties under the International Arbitration Act, including in respect of challenges to arbitrators. I expect that some of our Mauritian attorneys and barristers in this room have had direct involvement in these applications and have experienced first-hand the quality of the PCA's services.

- I have it from good sources that a number of hearings in arbitrations organised *ad hoc* or under the rules of other arbitral institutions, have indeed taken place in Mauritius. I stress this point, because – as much as we are happy to see the institutions based in Mauritius thrive – all types of arbitration are welcome in Mauritius.

- Finally, arbitration lawyers have embraced Mauritius as a platform for academic exchange at the highest level. The success of this conference, following that of MIAC 2010 and MIAC 2012, confirms that there is a genuine interest in, and need for, a centre of training of excellence in the African region. We are thrilled by the number of your registrations which has exceeded our expectations.

I suspect many of you will already have marked the dates 8 to 11 May 2016 in your diaries, when more than three times as many arbitration lawyers will flock to Mauritius to attend the world's largest summit of the profession, the biennial ICCA Congress. Mauritius is proud to be the first country ever in Africa to host this Congress.

Perhaps less significant in numbers but not in political significance is an event that will be held in March 2015 in Mauritius: the signing ceremony for UNCITRAL's Convention on Transparency in Treaty-based Investor-State Arbitration. The extent to which the general public has a right to be informed about the investment arbitration proceedings is one of the truly controversial issues in international arbitration. After all, public accountability is at stake. Mauritius has chaired and led work on

transparency in investor-State arbitration of the UNCITRAL – both at the level of the Working Group and at the level of the Commission. The international treaty that resulted from this discussion was adopted by the UN General Assembly last Wednesday, 10 December, and it will be known as the "Mauritius Convention on Transparency".

It is fair to say today, as we are about to open this third Mauritian International Arbitration Conference, that Mauritius has found its place on the world map of international arbitration. This is not to say that we are at the end of our journey – by no means – but we have come a long way since 2008, when the International Arbitration Act was adopted.

The beginning of a success story, but for whom? There is one obvious answer and two more subtle ones.

Obviously there are tangible collateral economic benefits for a country that hosts arbitration hearings – the legal services industry, hotels, and ancillary service providers stand to benefit. Moreover, to the extent that the legal seat of arbitration proceedings is in Mauritius, Mauritian lawyers may be engaged in so-called satellite litigation proceedings before the Mauritian courts that relate to arbitration, although our international Arbitration Act is designed to ensure that these are kept to a minimum and that our courts will at all times support rather than disrupt arbitral proceedings.

There is a deeper reason why Mauritius is building up capacity in international dispute settlement: promoting arbitration means promoting the rule of law. By establishing itself as a preferred arbitration venue, Mauritius stands for legal certainty and good governance. While Mauritius proudly markets its beaches (and we hope we will have the opportunity of enjoying them), textiles, IT expertise, and financial services, we feel that we have an even more precious asset to offer: a predictable legal framework and a stable political system. Suffice it to note here that Mauritius consistently ranks first in Africa in relevant indexes measuring good governance.

The third reason for promoting arbitration in Mauritius has something to do with inclusiveness. As our distinguished keynote speaker, Neil Kaplan, has just reminded us, arbitration has a long history, and a history that is not only European or Western. Yet, it is hard to deny that contemporary arbitral practice is still largely defined in the developed world. Several institutions have identified that problem, and I may point out that ICCA, in particular, is playing a constructive role in overcoming the perceived bias in the geography of international arbitration.

If one looks at the statistics that ICSID issues about its registered investment cases, it turns out that only 2% of the arbitrators are from the

sub-Saharan Africa, and 4% from North Africa and the Middle East; and that despite 27% of all cases originating in Africa and the Middle East. To my knowledge, no official figures exist that would demonstrate the frequency of investor-State hearings held in Africa, but I would venture to suggest that the figure is close to zero, and this, to make the point again, in spite of more than a fourth of the respondent States being African or Middle Eastern.

I do not state those facts with a view to stoke controversy. The point is that Africa and other parts of the developing world are embracing arbitration today, and rightly so. In doing so, however, we must become owners of the system not only users. We must learn the professional codes of the discipline to appropriate it and shape it in our own ways. Mauritius is committed to making its contribution to capacity building, so that international arbitration can progressively become part of the legal and cultural DNA in our region.

Ladies and Gentlemen, the Mauritius International Arbitration Conference is a key element in Mauritius's plan to develop a hub for arbitration in Africa. The conference is not only intended to be an intellectually stimulating encounter, which I am certain it will be, judging from the most experienced speakers and delegates that we have gathered here. It is also intended as a vehicle to form the next generation of arbitration lawyers in our region.

With these preliminaries, and hopefully without having tried to fit too much in your head, it remains for me to wish you two constructive, engaging and perhaps inspiring days. I have now the pleasure to declare the Mauritius International Arbitration Conference 2014 open. Thank you.

PANEL I

CHALLENGES TO ARBITRAL AWARDS AT THE SEAT: THE LEGAL FRAMEWORK

Introductory Remarks

Renaud Sorieul[*]

I was asked to moderate this first panel on the challenges to arbitral awards at the seat of the arbitration. Before we start with our panel discussion and before introducing the panel, I would like to take a few minutes to give you a brief update on the work of UNCITRAL in recent years. I would like to focus on our work on transparency in investment arbitration.

I just wish to remind everyone that we have been, since 2008, working, as a matter of priority – as our Member States asked us to do – on providing for transparency, on the assumption that, a failure to include in the UNCITRAL Arbitration Rules provisions allowing for transparency, would give the impression that the United Nations would approve a lack of transparency in investor-State arbitration. Such misguided endorsement of secrecy would be contrary to the fundamental principles of good governance and human rights upon which the United Nations is founded. This was a statement from one of our Member States at the time when the decision was made by UNCITRAL to embark on that discussion.

Following on the excellent remarks made earlier by Mr. Neil Kaplan Q.C., it is obvious that asking a group of specialists in commercial arbitration to start working on issues of transparency, may be a bit of a challenge. I would note that at that time, a number of States made express statements that the composition of the Working Group should be revised entirely and commercial arbitrators should be replaced by investment arbitrators. Of course, at the following session, the Group was essentially the same, and every delegation told us what brilliant experts they were in the field of the investment arbitration.

I have to say that the negotiation that followed demonstrated an incredible amount of good faith on the part of speakers – newly converted perhaps to the virtues of transparency – who worked hard to establish a set of rules that would effectively promote transparency.

I will not bore you with the details of the negotiation, but I should mention that we are greatly indebted to Mauritius and to Mr. Salim Moollan for very actively and very tirelessly chairing our Working Group, and subsequently the Commission which was to finally adopt the UNCITRAL

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[*] Secretary, United Nations Commission on International Trade Law (UNCITRAL); Director, International Trade Law Division (ITLD) of the United Nations Office of Legal Affairs.

Rules on Transparency in Treaty-based Investor-State Arbitration. This year, the draft Convention on Transparency in Treaty-based Investor-State Arbitration which, as just mentioned by the Solicitor-General, was finally adopted by the General Assembly of the United Nations. We now have, as of 10 December 2014, a "Mauritius Convention on Transparency" in investor-State arbitration. Of course, we look forward to the signing ceremony which is expected to take place next March, but I am sure more about that will be said in the course of this conference.

It is essential, from the perspective of the United Nations as a political organisation, to promote, as I indicated, principles of good governance and the right of access to information of the general public which has a direct interest in investment arbitration cases. I shall conclude on that point.

It is to be noted that investment arbitration is undergoing a rather deep crisis. It is being challenged not only in Latin America but in other parts of the world including the developed world. New treaties or renewal of treaties offer opportunities to denounce previous clauses that were favourable to investment arbitration. Therefore, every effort must be made by the international community to rescue, or to restore the credibility of, investor-State arbitration, as of course, the only workable compromise or the only workable balance between, on the one hand, gunboat diplomacy or a variation on that theme, and on the other hand, doctrines founded on the Calvo Doctrine, the practical application of which may also at times err on the excessive.

Therefore, this attempt by the United Nations to bring back some credibility to investment arbitration is going to be crucial in the next years. We already heard from some circles that this was "too little, too late" but we are still hopeful that this text will have a positive impact.

With this, and without wasting more of your time, I will introduce the panel on a more usual topic in the context of commercial arbitration which is the "Challenges to Arbitral Awards at the Seat" of the country of arbitration.

I have, of course, a very distinguished panel to introduce, as always, and as in the case of every panel I have seen, I have to mention that the speakers need no introduction. Should they, in fact need some introduction or should they require or like some introduction, I can only refer you to the very detailed and carefully worded texts that have been included in the programme of this conference.

I would first introduce the Honourable Mr. Justice Eder, Justice of the High Court of England and Wales, who will give the first presentation.

Report to the Conference: An English Law Perspective

The Hon. Sir Bernard Eder[*]

I. INTRODUCTION

To adapt a well-worn quote by Congreve[1], hell hath no fury like an arbitration lost! The purpose of this paper is to examine how such "fury" may be vented (legally!) by the disgruntled party to an arbitration award and how such fury is controlled by the English Courts. To be clear, this paper is not an exhaustive study; rather, my intention is to provide a general overview and to focus, in particular, on recent case law.

In the context of this international arbitration conference, I readily acknowledge that this whistle-stop tour of English law may seem somewhat parochial. But we are all here to learn from each other and I hope that this overview of English law and practice will assist in our discussions. As Charles Darwin stated: "*In the long history of humankind (and animal kind, too) those who learned to collaborate and improvise most effectively have prevailed.*"

The starting point is the Arbitration Act 1996 ("1996 Act") which sets out the statutory framework for any arbitration where the seat of the arbitration is in England and Wales or Northern Ireland [s.2]. In broad terms, any possible challenges are set out in Part 1 of the 1996 Act and fall under three main heads viz.

(i) challenging an award of the arbitral tribunal as to its "substantive jurisdiction" under s.67 of the 1996 Act;

(ii) challenging an award on the ground of "serious irregularity" under s.68 of the 1996 Act; and

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[*] Then Judge of the High Court of England and Wales; International Judge, Singapore International Commercial Court.

[1] William Congreve's Zara, Act III, Scene 1.

(iii) an appeal to the Court on a "question of law" arising out of an award made in the proceedings under s.69 of the 1996 Act[2].

At the outset, it is important to note that whereas any potential appeal under s.69 can be excluded by agreement of the parties, the right to challenge an award under s.67 and s.68 cannot be excluded.

Before examining these possible ways of challenging an award, it is important to mention some preliminary points.

II. GENERAL PRINCIPLE OF NON-INTERVENTION BY THE COURT EXCEPT AS PROVIDED BY THE 1996 ACT

First, it is important to bear in mind the overall statutory framework of the 1996 Act and the general approach of the Court to any challenge or appeal. In particular, the statutory provisions to which I have just referred i.e. ss.67, 68 and 69 of the 1996 Act have to be viewed in the context of the general principles upon which Part 1 of the 1996 Act is founded. These general principles are set out in s.1 of the 1996 Act. For present purposes, it is s.1(c) which is all-important because it provides that in matters governed by Part 1 of the 1996 Act (including ss.67, 68 and 69) "*... the Court should not intervene except as provided by this Part*". This general principle of "non-intervention" by the Court except as provided by the 1996 Act is important because it serves to define the nature of the interface between, on the one hand, the arbitral process and, on the other hand, the Court.

Thus, the possible ways of challenging an award under s.67 and s.68 or appealing under s.69 are, in effect, exceptions to the general principle of non-intervention. This is important because, as can be seen in the relevant case law, the general approach of the Court is one which strongly supports the arbitral process. By way of anecdote, it is perhaps interesting to recall what I was once told many years ago by Michael Kerr, a former judge in the Court of Appeal and one of the leading figures in the recent development of the law of arbitration in England, when I was complaining about an arbitration that I had just lost and the difficulties in way of challenging the award. I told him that the award was wrong and unjust. He looked baffled and said: "*Remember, when parties agree arbitration they buy the right to get the wrong answer*". So, the mere fact that an award is "wrong" or even "unjust" does not, of itself, provide any basis for challenging the award or intervention by the Court. Any challenge

[2] Although the different modes of challenge under ss.67, 68 and 69 are discrete, it is important to bear in mind that the position in practice is often more complicated because a disgruntled party may seek to make multiple joined applications.

or appeal must bring itself under one or more of the three heads which I have identified.

III. STATISTICS

My second preliminary point is to say something about statistics – and the number of challenges, both successful and unsuccessful which are actually made under the 1996 Act. This is important because when one considers the possible challenges to an award, there is a great danger in thinking that such challenges are the "norm" or, at least, that they are not uncommon. That would be a very great mistake.

The main difficulty in this area is obtaining – and collating – the necessary data. In particular, there are no hard figures available as to the number of arbitrations which take place each year where the seat of the arbitration is in England and which result in the publication of an award. Certain figures are available from the main institutional bodies like the ICC, the LCIA and the LMAA. However, I would guess that there is, in addition, a large number of *ad hoc* arbitrations for which no figures at all are available. My own estimate is that there are, on average, perhaps up to about 2,000 or so English-seat awards made each year – but this may be completely wrong.

Whatever the correct total figure of published awards may be, the number of challenges made under ss.67, 68 and 69 of the 1996 Act would appear to be relatively small. Again, reliable figures are not easy to find or to analyse – in particular, because (i) challenges launched in one calendar year may not be heard or disposed of until the following year; and (ii) challenges may be launched and then settled before any determination by the Court.

In any event, I have carried out my own analysis of the cases actually determined by the Court as reported on www.bailii.org for the last three calendar years i.e. 2012, 2013 and 2014 which shows the following:

(a) Under s.67 (no "substantive jurisdiction"): in 2012, there was a total of 7 challenges of which 3 were allowed and 4 were rejected; in 2013, there was a total of 5 challenges of which 2 were allowed and 3 were rejected; in 2014, there was a total of 6 challenges of which only 1 was allowed and 5 were rejected.

(b) Under s.68 ("serious irregularity"): in 2012, there was a total of 7 challenges all of which were rejected; in 2013, there was (again) a

total of 7 challenges of which only 1 was allowed and the remaining 6 were rejected; in 2014, there was a total of 8 challenges of which 2 were allowed and the remaining 6 were rejected.

(c) Under s.69 (appeal on a "question of law"), the difficulty is that there are no published figures with regard to applications for leave to appeal. As considered further below, this procedure provides an important "sifting process". My guess is that many applications for leave to appeal are rejected. In any event, where leave to appeal is granted and determined by the Court, the relevant figures as reported on www.bailii.org are as follows. In 2012, there was a total of 14 appeals of which 8 were allowed at least in part and 6 were rejected; in 2013, there was a total of 12 appeals of which 6 were allowed at least in part and 6 were rejected; and in 2014, there was a total of 8 appeals of which 7 were allowed at least in part and 1 was rejected.

By way of a "health warning", I should emphasise that these are not "official" figures and may not be completely accurate. In addition, it is important to bear in mind that certain challenges/appeals are made simultaneously under more than one section with the result that there is some overlap of the figures.

In any event, I think that these figures are interesting and significant. In particular, they indicate at the very least that the number of successful challenges is small both in absolute terms and (if I am right as to the likely total number of awards) also in relative terms, reflecting the broad general principle of non-intervention by the Court except as provided in Part 1 of the 1996 Act.

A further analysis of these cases over this three year period also reveals what I think are two additional significant features.

First, with regard to challenges under s.68 (i.e. "serious irregularity"), the number of such challenges which were successful is very tiny indeed viz during this period covering 2012-2014, I calculate that there was a total of 22 challenges under s.68 of which only 3 succeeded.

Second, although the underlying subject-matter of cases which were the subject of challenge under s.67 or s.68 was quite broad, the underlying subject-matter of cases which were the subject of an appeal on a question of law under s.69 was relatively narrow. Thus, during this period covering 2012-2014, there was a total of 34 appeals under s.69 and, of these, the vast majority – on my calculation, some 27 i.e. approximately

80% – were shipping cases primarily charterparty disputes. This pattern reflects the long tradition in England of parties involved in such contracts being apparently keen generally to retain the right of appeal to the Court on a point of law. Apart from one insurance case, the remainder of the cases during this period involved appeals from GAFTA, FOSFA, LME and the Cotton Association – all with a similar tradition. Outside of these particular categories of cases, I suspect that parties generally agree to exclude the right of appeal on a question of law under s.69 – as, of course, they are entitled to do under the 1996 Act – although, in contrast and as I have already mentioned, parties cannot exclude the right to challenge an award under either s.67 or s.68.

IV. SUPPLEMENTARY PROVISIONS

Third, it is important to note that s.70 contains various provisions which apply generally to any application or appeal under ss.67, 68 or 69 of the 1996 Act. Although described as "supplementary provisions", they are of great practical significance to any such application or appeal and, to the extent that they are of general effect, it is convenient to consider the most significant aspects of these provisions at the outset, viz:

- **Exhaustion of remedies:** Under s.70(2), any such application or appeal may not be brought if the applicant has not first *"exhausted"* any "*available arbitral process of appeal or review*". This is particularly relevant – and indeed important – in the context of certain arbitrations governed by institutional rules which provide for an internal appeal or review process[3].

- **Time limit:** Any such application or appeal must be brought (i.e. application issued) within 28 days of the award although s.80(5) in effect gives the Court a jurisdiction to extend that time limit[4].

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[3] See, for example, the recent decision of Andrew Smith J in *A Limited v. B Limited* [2014] EWHC 1870 (Comm) with regard to the arbitration rules of the International Cotton Association Limited.

[4] The principal factors of relevance to an application for extension of time are set out in *Kalmneft v. Glencore* [2002] 1 Lloyd's Rep. 128 at [59]; see also *The Amer Energy* [2009] 1 Lloyd's Rep. 293 at [13]; *Broda Agro Trade (Cyprus) Ltd v. Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100 at [51]-[58]; [2010] 1 Lloyd's Rep. 533. For a recent illustration of a case where the Court granted an extension, see *PEC Ltd v. Asia Golden Rice Co Ltd* [2012] EWHC 846 (Comm); [2013] 1 Lloyd's Rep. 82.

- **Security for costs:** Under s.70(6), the Court has power to order the applicant or appellant to provide security for costs of the application or appeal and may direct that the application or appeal be dismissed if the order is not complied with[5]. However, it is to be noted that s.70(6) imposes a restriction i.e. the power to order security shall not be exercised on the ground that (i) the applicant or appellant is an individual ordinarily resident out of the jurisdiction or (ii) is a corporation or association incorporated or formed under the law of a country outside the United Kingdom or whose central management and control is exercised outside the United Kingdom. There is no other formal fetter on the Court's discretion. However, in broad terms, the exercise of the discretion is exercised on the basis of the principles summarised by the Court of Appeal in *Republic of Kazakhstan v. Istil Group Inc*[6] viz. (i) the Court has to act in accordance with the overriding objective when exercising its jurisdiction under s.70(6); and (ii) the correct approach is the same as that applied by the Court in the context of its own civil procedure rules i.e. under CPR 25.12 and 25.13. For example, the Court will generally order security for costs if there is "reason to believe" that the applicant/appellant will be unable to pay the respondent's costs (cf: CPR 25.13(2)(c))[7]; or if the applicant/appellant has taken steps in relation to its assets that would make it difficult to enforce an order for costs against it[8].

- **Security for the amount payable under the award:** S.70(7) provides that the Court may order that any money payable under the award shall be brought into Court, or otherwise secured, pending the determination of the application or the appeal and may direct that the application or appeal be dismissed if the order is not complied with. The scope and effect of this provision is a matter of some controversy. On its face, it appears to give the Court a broad general discretion to order security for the amount payable under an award pending determination of the application or appeal. However, there is a line of authority to the general effect that

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5 See, e.g., *Azov Shipping Co v. Baltic Shipping Co* [1999] 2 Lloyd's Rep. 39; *X v.* Y [2013] EWHC 1104 (Comm); [2013] 1 Lloyd's Rep. 230; *Konkola Copper Mines v. U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm); [2014] 2 Lloyd's Rep. 507.

6 [2005] EWCA Civ 1468; [2006] 1 WLR 596 at [31]-[32].

7 The test is not one of balance of probabilities but one of "real risk": see *X v. Y* [2013] EWHC 1104 (Comm); [2013] 1 Lloyd's Rep. 230 at [18].

8 *Konkola Copper Mines v. U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm) at [25]-[26]; [2014] 2 Lloyd's Rep. 507.

although there are no hard and fast rules, the Court should not (at least generally) order security unless the applicant/ appellant can demonstrate that the challenge to the award is (i) "flimsy" and (ii) will itself prejudice the applicant's ability to enforce it or diminishes the respondent's ability to honour it[9]. This approach is consistent with what is stated in paragraph 380 of the Departmental Advisory Committee Report on the Arbitration Bill, February 1996 (which forms part of the legislative history to the 1996 Act) i.e. that the purpose of s.70(7) was only "…*to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may (by design or otherwise) be diminished*".

However, this line of authority is the subject of trenchant criticism in the leading textbook *The Arbitration Act 1996*, Merkin & Flannery (5th Edition, 2014) at pp. 346-348. In essence, the authors suggest that if an applicant is serious about its challenge to the award and confident in its success, it ought not to baulk at being asked to "put up or shut up"; and that the power to order security for the amount payable under an award should be used more readily in support of the arbitral process. I had to consider these arguments recently myself in *Konkola Copper Mines v. U&M Mining Zambia Ltd*[10]. In the event and whilst recognising that there are no hard and fast rules, I decided to follow the approach in *A v.* B and *X v. Y.*

V. REMEDIES

Fourth, depending on the outcome of any challenge or appeal, the Court is empowered to grant a range of possible orders.

Thus, on an application under s.67, challenging an award of the tribunal as to its substantive jurisdiction, and pursuant to s.67(3), the Court may by order (a) confirm the award; (b) vary the award; or (c) set aside the award in whole or in part.

On an application under s.68 and pursuant to s.68(3), if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the Court may (a) remit the award to the tribunal, in whole or in part, for reconsideration; (b) set aside the award in whole or in part; or (c) declare the award to be of no effect, in whole or in part.

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9 See, in particular *A v. B* [2011] EWHC 3302 (Comm); [2011] 1 Lloyd's Rep. 363 and *X v. Y* [2013] EWHC 1104 (Comm); [2013] 1 Lloyd's Rep. 230.

10 [2014] EWHC 2146 (Comm); [2014] 2 Lloyd's Rep. 507.

On an appeal under s.69 and pursuant to s.69(7), the Court may by order (a) confirm the award; (b) vary the award; (c) remit the award to the tribunal, in whole or in part, for reconsideration in light of the Court's determination; or (d) set aside the award in whole or in part.

Of this range of possible orders, it is probably only necessary to comment briefly on the power of the Court to order remission under s.68(3) and/or s69(7): although these provisions appear to give the Court a general power of remission, the Court will consider carefully whether or not it is appropriate to do so in the particular circumstances of each case[11].

Against that background, I turn to consider the three main potential challenges.

A. Section 67: No "Substantive Jurisdiction"

There is much learned writing – and debate – about the nature of a tribunal's "substantive jurisdiction", the so-called doctrine of *kompetenz-kompetenz* and the question as to whether an arbitral tribunal has jurisdiction to decide its own jurisdiction. This is not the time or place to engage in these topics. For present purposes, I simply note that under s.67 of the 1996 Act, a party may (upon notice to the other parties and 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. As to the scope and effect of this section, I would make the following observations:

1. Unfettered right to challenge under s.67

First, it is important to note that there is an unfettered right of any party to arbitral proceedings to make an application under this section i.e. such party

[11] See e.g. *Icon Navigation Corporation v. Sinochem International Petroleum (Bahamas) Co Ltd* [2003] 1 All ER (Comm) 405 at [22]; *The Tzelepi* [1991] 2 Lloyd's Rep. 265 at pp. 269-270; *MRI Trading AG v. Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm) [37]-[39]; [2012] 2 Lloyd's Rep 465; [2013] EWCA Civ 156 [26]-[28]; [2013] 1 Lloyd's Rep. 638, CA. *Brockton Capital Llp v. Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm); [2014] 2 Lloyd's Rep. 275; *E D And F Man Sugar Ltd v. Unicargo Transportgesellschaft GmbH* [2013] EWCA Civ 1449 at [20]; [2013] 2 Lloyd's Rep 412.

does not need any special "permission" either from the tribunal or the Court to make such application. There is no sifting process. This is in stark contrast to the procedure which exists under s.69 of the 1996 Act where a party seeks to appeal on a "question of law" – although as expressly provided in s.67(1), a party may lose the right to object (see s.73) and the right to apply is subject to certain restrictions as set out in s.70(2) and (3).

2. Substantive jurisdiction

Second, what is meant by the tribunal's "substantive jurisdiction"? By virtue of the definition in s.82(1), this refers to the matters specified in s.30(1)(a) to (c) i.e. (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. It should also be noted that s.30 provides that, unless otherwise agreed by the parties, an arbitral tribunal may rule on its own substantive jurisdiction[12] although any such ruling will not be binding on the parties.

3. Recent illustrations

The issues which arise in relation to such matters are diverse and often give rise to difficult questions of both fact and law as shown by a number of recent cases e.g.:

(a) *Abuja International Hotels Ltd v. Meridien SAS*[13] – where the main issues were whether the arbitration agreement was unconstitutional, null and void under the Nigerian Constitution or otherwise invalid as being contrary to the public interest or on the basis of force majeure.

(b) *Tang Chung Wah & Anor v. Grant Thornton International Limited & Ors*[14] – where the main issue concerned certain provisions of the relevant agreement pursuant to which a Request for Arbitration was made to the LCIA which stipulated steps to be taken as a condition precedent to any arbitral process and whether such steps were not taken prior to that Request (or at all).

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12 This reflects the principle of *kompetenz-kompetenz*: see *USC-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenorgorsk Hydropower Plant LLP* [2013] UKSC 35; [2013] 1 WLR 1889 (SC) at [35].

13 [2012] EWHC 87 (Comm); [2012] 1 Lloyd's Rep. 461.

14 [2012] EWHC 3198 (Ch); [2013] 1 Lloyd's Rep. 11.

(c) *Ases Havacilik Servis Ve Destek Hizmetleri AS v. Delkor UK Ltd*[15] – where the main issue was whether an arbitration clause had been effectively incorporated into the contract between the parties or was inapplicable as the governing agreement was a different contract which was subject to Swiss law and which provided for arbitration in Switzerland.

(d) *Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor/ Arsanovia Limited v. Cruz City 1 Mauritius Holdings*[16] – where the main issue concerned the identity of the party allegedly bound by the arbitration agreement.

(e) *Lisnave Estaleiros Navais SA v. Chemikalien Seetransport GmbH*[17] – where the main issue was whether a certain Framework Agreement incorporated the arbitration clause in certain General Conditions notwithstanding the absence of any reference within it to the General Conditions.

(f) *Habas Sinai Ve Tibbi Gazlar Isthihsal Endustrisi AS v. VSC Steel Company Ltd*[18] – where the main issue before the court was whether there had been a valid and binding arbitration agreement. This, in turn, depended on questions of ostensible authority.

(g) *Beijing Jianlong Heavy Industry Group v. Golden Ocean Group Ltd & Others*[19] – where the main issue was whether if an English law guarantee is unenforceable because it involves the commission of acts in a foreign country that are unlawful under local law is its provision for London arbitration also unenforceable?

(h) *The London Steam-Ship Owners' Mutual Insurance Association Ltd v. (1) The Kingdom of Spain (2) The French State*[20] – where the main issue was whether certain claims advanced in the arbitration proceedings and which had been determined by the tribunal by way of a declaration of non-liability did not fall within

15 [2012] EWHC 3518 (Comm); [2013] 1 Lloyd's Rep. 254.
16 [2012] EWHC 3702 (Comm); [2013] 2 All ER (Comm) 1137.
17 [2014] EWHC 338 (Comm); [2013] 2 Lloyd's Rep. 203.
18 [2013] EWHC 4071 (Comm); [2014] 1 Lloyd's Rep. 479.
19 [2013] EWHC 1063; [2013] 2 Lloyd's Rep. 61.
20 [2013] EWHC 3188 (Comm); [2014] 1 Lloyd's Rep. 309.

the substantive jurisdiction of the tribunal on the grounds that France and Spain were not bound by the arbitration agreement as their direct action rights resulting from the oil spillage following the casualty of the M/T Prestige were in essence independent rights under Spanish law rather than contractual rights, non-arbitrability and (in relation to France only) waiver.

(i) *Sun United Maritime Ltd v. Kasteli Marine Inc.*[21] – where the only outstanding issue in certain arbitration proceedings concerned the costs of the arbitration and one of the parties alleged that that question had been already "settled" by agreement of the parties. On this basis, it was said that the tribunal no longer had any substantive jurisdiction to deal with the question of costs. This was rejected by Hamblen J. in trenchant terms:

> "18. In my judgment, where there is a dispute as to whether the claim (or a claim) which has been referred to arbitration has been settled that will generally fall within the reference made to the arbitral tribunal. The alleged fact of settlement will be a defence to the continuing claim and, like any other defence, a matter for the arbitral tribunal to determine. The same applies where the only remaining claim in the arbitration is one for costs. The alleged settlement is a defence to the claim for a costs order and within the reference made. An arbitration reference generally includes the power to make an award on costs, as the Act makes clear (see sections 59 to 65). Even where there is an agreed settlement that does not generally of itself bring the reference to an end (see section 51)."

[21] [2014] EWHC 1476; [2014] 2 Lloyd's Rep. 386.

4. De novo rehearing

Fourth, the s.67 application is not, in form, an appeal or review of any decision which the tribunal may itself have reached as to its substantive jurisdiction (as to which see below). Rather, the application involves a complete rehearing *de novo*. That approach has been confirmed by the Supreme Court in *Dallah Real Estate & Tourism Holding Company v. Ministry of Religious Affairs of the Government of Pakistan*[22], which also makes clear that the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) that reasoning will inform and be of interest to the Court[23]. Thus, as stated by Lord Mance at paragraph 10, a party who has not submitted to the arbitrator's jurisdiction is entitled to a "full judicial determination on evidence of an issue of jurisdiction before the English Court".

In practice, on the hearing by the Court of a challenge under s.67, it is at least sometimes agreed that the documents disclosed and evidence adduced in the arbitration (including, for example, written witness statements and transcripts of evidence) may be relied on in Court without the necessity of the witnesses giving live evidence. But, an important question arises as to whether or not a party may seek to disclose new material not previously disclosed and adduce new evidence not previously adduced in the arbitration on the hearing by the Court of a s.67 challenge. This has been considered in a number of cases including, most recently, in *Central Trading & Exports Ltd v. Fioralba Shipping Company*[24] where Males J. reviewed the earlier authorities[25]. In summary, he concluded (see paras. 29-33) that, in general, a party is entitled to adduce evidence in a s.67 challenge which was not before the arbitrators; that the Court is not bound

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22 [2010] UKSC 46, [2011] 1 AC 763.

23 See, *Central Trading & Exports Ltd v. Fioralba Shipping Company* [2014] EWHC 2397 (Comm); [2014] 2 Lloyd's Rep. 449*; Stellar Shipping Co LLC v. Hudson Shipping Lines* [2010] EWHC 2985; *Pacific Inter-Link SDN BHD v. EFKO Food Ingredients Ltd* [2011] EWHC 923; *Habas Sinai Ve Tibbi Gazlar Isthihsal Endustrisi AS v. VSC Steel Company Ltd* [2013] EWHC 4071; [2014] 1 Lloyd's Rep. 479.

24 [2014] EWHC 2397 (Comm); [2014] 2 Lloyd's Rep. 449.

25 In particular, *Azov Shipping Co v. Baltic Shipping Co* [1999] 1 Lloyd's Rep. 68**;** *Kalmneft v. Glencore International A.G.* [2002] 1 Lloyd's Rep. 128 *Electrosteel Castings Ltd v. Scan-Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (Comm), [2003] 1 Lloyd's Rep. 190; *The Joanna V* [2003] EWHC 1655 (Comm), [2003] 2 Lloyd's Rep. 617; *The Ythan* [2005] EWHC 2399, [2006] 1 Lloyd's Rep. 457.

by procedural rulings made by the arbitrators, for example as to the scope of disclosure to be provided by the parties; that the Court does not have an unfettered discretion to exclude relevant evidence; and that the mere fact that the admission of new evidence would cause "prejudice" in the abstract is not a free standing ground on which such evidence may be excluded. However, the parties' right to adduce evidence is subject to the Court's own rules of procedure; and such control will be exercised in accordance with established principles, in particular the overriding objective and the interests of justice. The result is that the Court may refuse to allow a party to produce documents selectively that would prejudice the other party or to allow evidence which does not comply with the Court's own rules for ensuring that evidence is presented in a fair manner. For example (see para. 33), depending on the circumstances of the particular case, a party's failure to comply with an order made by the arbitrators may be a "highly relevant consideration".

5. Waiver

Fifth, as stipulated in s.73(1) a party may lose the right to object that the tribunal lacks substantive jurisdiction. In particular, a party will lose such right and be precluded from raising any such objection, if such party takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or any provision of Part 1 of the 1996 Act, any objection to the tribunal's substantive jurisdiction "*... unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.*"

In broad summary, this imposes a burden on a party who knows (or with reasonable diligence should know) that there is a potential objection to the tribunal's jurisdiction, to make plain that objection; and, if such party does not do so, he will lose the right to object. (This last point ties in with s.31(1) and (2) which deal with objections that the tribunal lacks substantive jurisdiction at the outset or during the course of the proceedings. That is not the focus of this paper and I do not propose to consider them in detail save to note that if and when such objections are raised, s.31(4) provides that the tribunal may either (a) rule on the matter in an award as to jurisdiction; or (b) deal with the objection in its award on the merits.)

A recent illustration of a case where it was held that a party had

lost the right to object is *Konkola Copper Mines v. U&M Mining Zambia Ltd*[26].

B. Section 68: Serious Irregularity

S.68(1) provides that a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the Court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. By s.68(2), "serious irregularity" is defined to mean an irregularity of one or more of the kinds specified in that subsection "*... which the Court considers has caused or will cause substantial injustice to the applicant ....*" The kinds of irregularity are then set out in 9 separate subsections viz.

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it[27];

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

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26 [2014] EWHC 2374; [2014] BUS LR D21 at [21]-[35].

27 See, e.g., *Transition Feeds LLP v. Itochu Europe Plc* [2013] EWHC 3629 (Comm); *Primera Maritime (Hellas) Ltd & Ors v. Jiangsu Eastern Heavy Industry Co Ltd & Anor* [2013] EWHC 3066 (Comm); [2014] 1 Lloyd's Rep. 255.

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

At the outset, some general observations.

1. Unfettered right

First, like s.67 but unlike an appeal under s.69, there is an unfettered right to bring a challenge under s.68 on the ground of serious irregularity. The applicant does not need permission to make the challenge.

2. Closed list

Second, s.68 sets out a closed list of irregularities which is not open to the Court to extend; and reflects the internationally accepted view that the Court should be able to correct serious failure to comply with the "due process" of arbitral proceedings[28].

3. Conduct of arbitration

Third, it is important to bear in mind that s.68 is generally concerned with the arbitrators' conduct of the arbitration, not with the correctness of the arbitrators' decision[29]. Thus, it is clear that a finding of fact is a matter for the tribunal and, absent serious irregularity of one or more of the kinds specified, cannot properly be challenged under s.68. As stated by Field J. in a recent case[30]:

> "… the duty to act fairly is distinct from the autonomous power of the arbitrators to make findings of fact and it will only be in the most exceptional case, if ever, that a

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28 See, in particular, *The Petro Ranger* [2001] 2 Lloyd's Rep. 348 at 351.

29 See, e.g. *Abuja International Hotels v. Meridian SAS* [2012] EWHC 87 (Comm) at [48] to [49]; [2012] 1 Lloyd's Rep. 461; *Flame SA v. Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm) at [102]; [2013] 2 Lloyd's Rep. 653. A possible exception drawn to my attention by Prof. Besson would seem to be under s.68(2)(g) where the award itself is contrary to public policy.

30 *Brockton Capital Llp v. Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm); [2014] 2 Lloyd's Rep. 275. See also *Bulfracht (Cyprus) Ltd v. Boneset Shipping Co Ltd* [2002] 2 Lloyd's Rep. 681; *Sonatrach v. Statoil* [2014] EWHC 875 (Comm) at [14], [17] & [18].

> failure to refer to a particular part of the evidence will constitute a serious irregularity within s68. Findings of fact were for the tribunal …".

4. Substantial injustice

Fourth, it is perhaps obvious but nevertheless crucial to understand that any applicant seeking to challenge an award under s.68 must not only show the existence of some "serious irregularity" of the kind specified but also that this has caused or will cause "substantial injustice" to the applicant and that, as appears from paragraph 280 of the DAC Report, this is a very high threshold:

> "… The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected …." (emphasis added)

As stated by Tomlinson J. in *ABB AG v. Hochtief Airport GmbH*[31], there are many other judicial pronouncements to similar effect, e.g.

- *Fidelity Management v. Myriad International Holdings*[32] (Morison J.: a *"long stop"* to deal with *"extreme cases where ... something ... went seriously wrong with the arbitral process"*);

[31] [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep. 1 at [63].
[32] [2005] EWHC 1193 (Comm); [2005] 2 Lloyd's Rep. 508.

- *World Trade Corporation Ltd v. Czarnikow Sugar Ltd*[33];

- *Cameroon Airlines v. Transnet*[34] (Langley J.: *"the test is indeed an extreme case"*);

- *The Pamphilos*[35] (Colman J.: *"the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration"*);

- *Profilati Italia v.* PaineWebber[36] (Moore-Bick J.: *"it is intended to operate only in extreme cases"*);

- *The Petro Ranger*[37] (Cresswell J.: "*S68 is designed as a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in s68, that justice calls out for it to be corrected"*);

- *Egmatra v. Marco Trading*[38] (Tuckey J.: "*no soft option clause as an alternative for a failed application for leave to appeal*")[39].

5. Serious irregularity

As recognised by Cooke J. in the recent decision of *Konkola Copper Mines v. U&M Mining Zambia Ltd*[40], there is a slight tension in some of these cases[41] as to the extent to which a party applying under s.68 needs to show that the alleged "serious irregularity" has affected the ultimate result. He dealt with this aspect at para. 19 of his Judgment as follows:

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33 [2004] 2 All ER (Comm) 813, 816 (Colman J.).
34 [2004] EWHC 1829 (Comm) at para. 94.
35 [2002] 2 Lloyd's Rep. 681, 687.
36 [2001] 1 All ER (Comm) 1065, 1071.
37 [2001] 2 Lloyd's Rep. 348, 351.
38 [1999] 1 Lloyd's Rep. 826, 865.
39 See also, most recently, *Lorand Shipping Limited v. Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm).
40 [2014] EWHC 2374 (Comm); [2014] BUS LR D2.
41 See, e.g., *Vee Networks Ltd v. Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 Lloyd's Rep 192*; ABB AG v. Hochtief Airport GmbH* [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep 1; *London Underground Ltd v. Citylink Telecommunications Ltd [2007] EWHC 1749 (TCC);* [2007] 2 All ER (Comm) 694.

> "19 … S68 is concerned with the fairness of the process but the ultimate question is one of substantial justice. The claimant is thus required to show that, had he had an opportunity to address any point where he says he was not given that opportunity, "the tribunal might well have reached a different view and produced a significantly different outcome". To my mind it is plain that, since it is necessary for the applicant to show that the serious irregularity "has caused or will cause substantial injustice to the applicant", he cannot succeed in that unless he can establish that he had at least a reasonably arguable case contrary to the findings of the tribunal."[42]

As to what constitutes "serious irregularity", the statutory categories which I have already set out above largely speak for themselves. I do not propose to examine each separate category in turn; and time certainly does not allow such an exercise. In any event, that is perhaps unnecessary and a little tedious given that most of the decided cases turn very much on their own particular facts.

6. Duty to act fairly

However, I would draw specific attention to the very first stated kind of serious irregularity i.e. s.68(2)(a) which concerns the failure by the tribunal to comply with s.33 of the 1996 Act. This is important because s.33 sets out the general duty of the tribunal in very broad terms i.e. a duty (a) to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and (b) to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. Recent cases illustrate both the breadth and limitations of this category.

Again, the recent decision of Cooke J. in *Konkola Copper Mines v. U&M Mining Zambia Ltd*[43] is of particular interest because it raised the question (which is not uncommon) of what a tribunal should do in circumstances where one of the parties simply decides not to participate in a particular hearing. What should the tribunal do? Carry on regardless? Adjourn? There is no doubt that in such circumstances, the tribunal may

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42 *Brockton Capital Llp v. Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm) at [31]; [2014] 2 Lloyd's Rep. 275.

43 [2014] EWHC 2374 (Comm); [2014] BUS LR D2.

continue with the proceedings in the absence of that party[44]. However, this is subject to the tribunal's general duty under s.33 including the duty to act "fairly". In the event, Cooke J. had no hesitation in that case in concluding that the tribunal did not act in breach of its duty under s.33 in adopting the procedure which it did; and that there was therefore no serious irregularity under s.68(2)(a).

The duty which arises under s.33 involves affording the parties a right to be given a fair opportunity to deal with any issue which will be relied upon by the tribunal when arriving at its conclusion and making its award[45]. Thus, a tribunal that makes an award on the basis of points not advanced by the parties or in respect of which they were not given a fair opportunity to comment will amount to a breach of s.33 and therefore constitute a serious irregularity under s.68(2)(a)[46]. The position is otherwise if, for example, a party fails to recognise or take a point which exists. Generally, this will not involve a breach of s.33 or a serious irregularity[47].

There is a particular danger of infringing the duty to act fairly where the arbitration takes place on paper[48]. A good recent example of this happening is *Lorand Shipping Ltd v. Davof Trading (Africa) BV MV "Ocean Glory"*[49] where, in an arbitration conducted on paper without an oral hearing, the clamant and the respondent had each sought a particular form of relief and the tribunal adopted what would appear to have been a "third way" or "half-way house" which had not been raised by either party. In the event, I held that this constituted a serious irregularity and, accordingly, I remitted the award to the tribunal for further consideration.

Difficult questions sometimes arise where a party is not represented at the hearing. For example, to what extent is the tribunal obliged – as part of its duty to act fairly – to put questions to a party's witness in the absence of the other party? And if the tribunal fails to do so, will this constitute a serious irregularity? This point was recently considered in the context of a s.68

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44 This is expressly recognised as a possible course of action under s.41(4) of the 1996 Act; and certain institutional rules also deal expressly with such situation.

45 *Zermalt Holdings SA v. Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, 15; *The Vimeira* [1984] 2 Lloyd's Rep. 66, 74–75: *Vee Networks Ltd v. Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 Lloyd's Rep. 192, 208.

46 *London Underground Ltd v. Citylink Telecommunications Ltd* [2007] EWHC 1749; [2007] 2 All ER (Comm) 694.

47 *Terna Bahrain Holding Company WLL v. Bin Kamil Al Shamsi and others* [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep. 86 at para. 85(5); *Brockton Capital Llp v. Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm) at [22]; [2014] 2 Lloyd's Rep. 275.

48 See e.g., *Pacol Ltd v. Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep. 109, 115.

49 [2014] EWHC 3521 (Comm).

challenge in *Interprods Ltd v. De La Rue International Ltd*[50] where Teare J. stated as follows:

> "36. It cannot be said that an arbitrator must always put points to a party's witnesses in the absence of the other party. Whether fairness requires him to do so depends upon all the circumstances of the case, including the nature of the point, its importance and whether the witness has sufficiently dealt with the point …"

In the event, on the facts of that case, the challenge was rejected by the Court.

7. Failure to deal with all issues

I should also briefly mention s.68(2)(d) (i.e. failure by the tribunal to deal with all the issues that were put to it) if only because (i) this is a matter of great practical importance to arbitrators when considering and writing their award; and (ii) it is often used as a basis of challenge. In essence, there are four questions for the Court: (i) whether the relevant point or argument was an "issue" within the meaning of the subsection; (ii) if so, whether the issue was "put" to the tribunal; (iii) if so, whether the tribunal failed to deal with it; and (iv) if so, whether that failure has caused substantial injustice[51]. As to the first of these questions, I can do no better than refer to paragraph 16 of the Judgment of Andrew Smith J. in *Petrochemical Industries Co v. Dow Chemical* where he stated as follows:

> "…A distinction is drawn in the authorities between, on the one hand "issues" and, on the other hand, what are variously referred to as (for example) "arguments" advanced or "points" made by parties to an arbitration or "lines of reasoning" or "steps" in an argument (see, for example, *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83, 97 and *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The*

[50] [2014] EWHC 68 (Comm); [2014] 1 Lloyd's Rep. 540.

[51] See *per* Andrew Smith J. in *Petrochemical Industries Co v. Dow Chemical* [2012] EWHC 2739 (Comm); [2012] 2 Lloyd's Rep. 691 at [15]; and also, generally, the decision of Flaux J. in *Primera Maritime (Hellas) Ltd & Ors v. Jiangsu Eastern Heavy Industry Co Ltd & Anor* [2013] EWHC 3066 (Comm); [2014] 1 Lloyd's Rep. 255.

> *"Pamphilos")* [2002] 2 Lloyd's Rep 681, 686). These authorities demonstrate a consistent concern to maintain the "high threshold" that has been said to be required for establishing a serious irregularity (see *Lesotho Highlands Development Authority v Impergilo SpA and Ors* [2005] UKHL 34 paragraph 28 and the other judicial observations collected by Tomlinson J in *AAB AG v Hochtief Airport GMBH and anor* [2006] EWHC 388 paragraph 63). The concern has sometimes been emphasised by references to "essential" issues or "key" issues or "crucial" issues (see respectively, for example, *Ascot Commodities NV v Olam International Ltd* [2002] 2 Lloyd's Rep 277, 284; *Weldon Plant v Commission for New Towns* [2001] 1 All ER 264, 279; and *Buyuk Camlica Shipping Trading and Industry Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm)), but the adjectives are not, I think, intended to import a definitional gloss upon the statute but simply allude to the requirement that the serious irregularity result in substantial injustice: *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 at paragraph 10. They do not, to my mind, go further in providing a useful test for applying section 68(2)(d)."

8. "Dealt with"

As to the question whether the tribunal has "dealt with" an issue, this depends upon a consideration of the award. As Mr. Gavin Kealey Q.C. said in *Buyuk Camlica Shipping Trading and Industry Co Inc v. Progress Bulk Carriers Ltd*[52] at paragraph 38:

> "It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section [68(2)(d)] is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties

[52] [2010] EWHC 442 (Comm); [2011] BUS LR D99.

> (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined."

However, in considering whether a tribunal has "dealt with" an issue, the approach of the Court (on this as on other questions) is to read the award 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[53]. Further, a tribunal does not have to "set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration"[54]; nor does a tribunal fail to deal with an issue that it decides without giving reasons (or *a fortiori* without giving adequate reasons)[55]; and a tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". For example, it can "deal with" an issue by making clear that it does not arise in view of its decision on the facts or its conclusions[56].

C. Section 69: Appeal on a Question of Law

At the risk of repetition, it is important to note that the structure of s.69 is quite different from either s.67 or s.68. In particular, there is no automatic entitlement or "right", as such, to appeal against an award. Rather, by s.69(1), unless otherwise agreed by the parties[57], a party may (upon notice to the other parties and to the tribunal) appeal to the Court "... *on a question of law arising out of an award made in the proceedings* ...*";* and, by s.69(2), an appeal only lies either (i) with the agreement of all of the parties or (ii) with the leave i.e. permission of the Court; and the circumstances in which the Court may grant such leave are strictly circumscribed by the express terms of s.69(3) which provides as follows:

> "3) Leave to appeal shall be given only if the court is satisfied–

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53 *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd*. [1985] 2 EGLR 14 at p.14F *per* Bingham J.

54 *Hussman (Europe) Ltd v. Al Ameen Development and Trade Co and Ors* [2000] 2 Lloyd's Rep. 83 para. 56.

55 *Margulead Ltd v. Exide Technlogies* [2004] EWHC 1019 (Comm) at para. 43; [2005] 1 Lloyd's Rep. 324.

56 *Petrochemical Industries Co v. Dow Chemical* [2012] EWHC 2739 (Comm); [2012] 2 Lloyd's Rep. 691 at [27].

57 Clear words are needed to exclude the right of appeal. Thus, a provision in an arbitration agreement that the award shall be "final and binding" or even "final, conclusive and binding" will not be effective: see, e.g., *Essex County Council v. Premier Recycling Ltd* [2006] EWHC 3594; *Shell Egypt Wesrt Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm); [2010] 1 Lloyd's Rep. 109.

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award–

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) 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."

1. The application for leave

The application for leave to appeal is a crucial sifting stage of the process; and there are detailed Court rules governing such application including the service of written evidence both by the applicant in support – and by the respondent in opposition – to the grant of leave to appeal: see CPR 62.15.

In general, the applicant will serve written evidence in order to seek to persuade the Court that the statutory requirements for the grant of leave are satisfied i.e. that:

(i) a "question of law" arises out of the award;

(ii) the determination of such question will "... *substantially affect the rights of one or more of the parties*";

(iii) the question is one which the tribunal was asked to determine;

(iv) on the basis of the facts in the award, the decision was either (a) "obviously wrong" or (b) one of "general public importance" and the decision of the tribunal is at least "open to serious doubt"; and

(v) it is "*just and proper in all the circumstances for the Court to determine the question*." I attach as an Appendix a flow-chart describing the questions which need to be considered by the Court when considering an application for leave to appeal under s.69.

2. "Question of law arising out of an award"

A threshold requirement of any would-be appeal under s.69 is that it involves a question of law arising out of the award. In this context, the reference is to a question of English law as opposed to any other system of law.[58] But what is meant by a "question of law"?

At first blush, the answer would seem relatively straightforward. The intention is obviously to limit the scope of any possible appeal and, in particular, to exclude any appeal on a question of fact[59]. In many cases, the distinction between a question of law and a question of fact is perfectly clear; and there are many instances in the authorities of questions of law which have been considered by the Court by way of an appeal under s.69 including, for example, the question whether a shipowner claiming damages for charterers' repudiation of a time charter must give credit for the capital value of having sold the vessel upon repudiation for a greater sum than the value of the vessel at the contractual date for redelivery under the charter[60]? Or what are the proper legal principles applicable to the assessment of damages[61]? But, it is important to emphasise that, as a matter of English law, the proper construction of a contract is equally a question of law: the law reports are littered with appeals of this kind[62].

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58 See, e.g., *Schwebel v. Schwebel* [2010] EWHC 3280; [2011] 2 All ER (Comm) 1048.

59 In *Guangzhou Dockyards v. ENE Aegiali I* [2010] EWHC 2826; [2011] 1 Lloyd's Rep. 30, the Court rejected the argument that the parties had agreed to an appeal on a question of fact and stated that it was "very doubtful" that the Court had inherent jurisdiction to hear an appeal on questions of fact even if the parties were to agree such an appeal.

60 *Fulton Shipping Inc of Panama v. Globalia Business Travel S.A.U. (formerly Travelplan S.A.U) of Spain* [2014] EWHC 1547 (Comm).

61 *Flame SA v. Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm); [2013] 2 Lloyd's Rep. 653.

62 See, e.g., *E D And F Man Sugar Ltd v. Unicargo Transportgesellschaft GmbH* [2013] EWCA Civ 1449; [2014] 1 Lloyd's Rep. 412 which concerned the meaning of the term "mechanical breakdown".

The position is complicated by the fact that, in truth, many questions of law involve what might be described as a "mixed" question of law and fact. That was the situation in one of the very first cases which came before the Court under the old Arbitration Act 1979 – which was (in relevant respect) the predecessor to the present 1996 Act. The main issue in that case[63] was whether a consecutive voyage charterparty had been "frustrated" in whole or in part. The sole arbitrator upheld the shipowner's argument that it had been frustrated in part. The charterer sought leave to appeal on the basis that the question as to whether the charterparty was frustrated was a question of law arising out of the award. The shipowner opposed the grant of leave on the basis that such question was, in effect, a question of fact (or at least a "mixed" question of law and fact). Such argument was given short shrift indeed by no less a judge than Robert Goff J.:

> "… Now, with the utmost respect to Mr. Diamond, this is an old warhorse that has been trotted out of the stable. The last time it was seen on the battlefield was in *The Angelia* [1972] 2 Lloyd's Rep. 154, some seven years ago. After that unsuccessful appearance, it was returned to the stable and so far as I know has been munching hay happily for the last seven years, so much so that everyone has forgotten about it. But, here it is again and I am simply going to say this, that I find myself in total agreement with every word of what Mr. Justice Kerr said in *The Angelia*. I had thought that this was now accepted law. Mr. Justice Kerr there pointed out that not only was *In re Comptoir Commercial Anversois and Power, Son and Co.*, [1920] 1 K.B. 868 C.A., not cited to Mr. Justice Devlin in Citati, but that since Citati water has been flowing very rapidly under the bridge indeed and in *Tsakiroglou and Co. Ltd. v. Noblee Thorl G.m.b.H.,* [1961] 1 Lloyd's Rep. 329; [1962] A.C. 93, and *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] A.C. 696, both decisions of the House of Lords, it was made clear beyond doubt that frustration is, in the ultimate analysis, a question of law …."

And so, on this basis, Robert Goff J. granted leave to appeal. However, a very different view was expressed on the substantive hearing by both the

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[63] *B.T.P Tioxide Ltd v. Pioneer Shipping Ltd (MV Nema)* [1980] 1 Lloyd's Rep. 519 (Note). [1980] 2 Lloyd's Rep. 83.

Court of Appeal and the House of Lords. In particular, Lord Diplock, in a seminal judgment, stated that, what was then the new Arbitration Act 1979 gave effect to the "turn of the tide" in favour of finality as against "meticulous legal accuracy"; and that *The Nema* was the sort of case in which leave to appeal on a question of construction ought not to be granted. It is difficult to underestimate the importance of this speech by Lord Diplock: it fundamentally changed the process under English law of appealing against an arbitration award and thereby changed the shape of modern arbitration in England.

The result is that the Court will not generally give leave to appeal or substitute its own decision for that of the tribunal on points which might be said to involve a question of law (e.g., whether on the particular facts a party had wrongfully repudiated or renounced a contract) unless the Court decides that the arbitral tribunal had or might have misdirected itself in point of law[64]. In considering the question whether or not an award can be shown to be wrong in law, the modern approach is to be found in the Judgment of Mustill J. in *Vinava Shipping Co Ltd v Finelvet AG ("The Chrysalis")*[65] i.e. the answer is to be found by dividing the arbitrator's process of reasoning into three stages viz.

"(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.

(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.

(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision."

However, difficulties remain. Take, for example, the question (which often arises) as to the meaning or proper construction of the terms of a written contract. As I have already stated, that is, as a matter of English law, a "question of law". As explained by Lord Diplock in *The Nema*, the reason for this is a legacy of the system of trial by juries; and, despite the

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64 See, e.g., *Compagnie General Maritime v. Diakan Spirit S.A. (The Ymnos)* [1982] 2 Lloyd's Rep. 574.

65 [1983] 1 QB 503.

disappearance of juries in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract as being a "question of law"[66]. The law reports are littered with examples of appeals from awards on that basis. However, following the decision of the House of Lords in *ICS v. West Bromwich Building Society*[67], there has been a marked trend in favour of parties seeking to rely on what is often described as "factual matrix" evidence or expert evidence as an aid to construction[68]. The result is that the question of construction may depend upon an assessment of such factual matrix or expert evidence and, to that extent, will rest upon factual conclusions reached by the arbitrators. In such cases, although there is no doubt that the question of construction is ultimately a question of law, any appeal may, in practice, be difficult, if not impossible. Equally, if and to the extent that the tribunal may rely upon such factual matrix or expert evidence in reaching its conclusions with regard to the construction of the contract, it is important that such material is properly set out in the award because, on any appeal, the Court will not be able to look outside of the award[69].

It is important to note that s.69 requires that the question whether the tribunal's decision was "obviously wrong" or "open to serious doubt" must be determined "on the basis of the facts in the award". Thus, it is not open to an applicant to seek to introduce or otherwise to refer to facts outside of the award; and consequently, the pleadings and the evidence in the arbitration will be inadmissible[70]. This is sometimes ignored by the applicant but the Courts (rightly) adopt a very strict approach in this regard[71]. Generally, the application for leave is almost always considered on "paper" i.e. there is generally no oral hearing; the Court does not deliver a formal Judgment but will make an order – either granting or refusing leave – with very brief reasons.

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66 [1982] AC 724 at p. 736A-G.

67 [1991] 1 WLR 896 in particular *per* Lord Hoffmann at pp. 912-913. See, generally, *Chitty on Contracts*, 31st Edition, Vol. 1 paras. 12-117 to 12-120.

68 See, e.g., *MRI Trading AG v. Erdenet Mining Corp LLC* [2013] EWCA Civ 156; [2013] 1 Lloyd's Rep. 638.

69 See, again, *MRI Trading AG v. Erdenet Mining Corp LLC* [2013] EWCA Civ 156; [2013] 1 Lloyd's Rep. 638 in particular at [25]-[28]. In such a case, the respondent may be well advised to serve what is called a respondent's notice and to make an application for an under s.70(4) that the tribunal states further reasons.

70 See, e.g., *Dolphin Tanker Srl v. Westport Petroleum Inc* [2010] EWHC 2617 (Comm); [2011] 1 Lloyd's Rep. 550.

71 In order to get around this stricture, the applicant may seek an order under s.70(4) for further reasons.

3. "Obviously wrong"

The "obviously wrong" test has been considered in a number of cases – most colourfully perhaps by Lord Donaldson:

> "This is not however to say that, even in a one-off case, an arbitrator is to be allowed to cavort about the market carrying a small palm tree and doing whatever he thinks appropriate by way of settling the dispute. What it does amount to is that the Courts will normally leave him to his own devices and leave the parties to the consequences of their choice. They will only intervene if it can be demonstrated quickly and easily that the arbitrator was plainly wrong."[72]

More recently still, Colman J. described the test as follows:

> "What is obviously wrong? Is the obviousness something which one arrives at…on first reading over a good bottle of Chablis and some pleasant smoked salmon, or is 'obviously wrong' the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter."[73]

D. Appeals

Finally, I should mention the possibility of further appeals to the Court of Appeal but it is important to emphasise that there is no automatic right of appeal. In summary, it is possible to appeal a decision of the High Court in respect of a challenge under s.67 or s.68 or for leave to appeal under s.69 but only with the leave of the Court itself[74]; and on the decision of the High Court on a substantive appeal under s.69, s.69(8) expressly provides in effect that no appeal lies without the leave of the Court which shall not be given unless the Court considers that the question is one of "general

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72 *The Kelaniya* [1989] 1 Lloyd's Rep. 30.

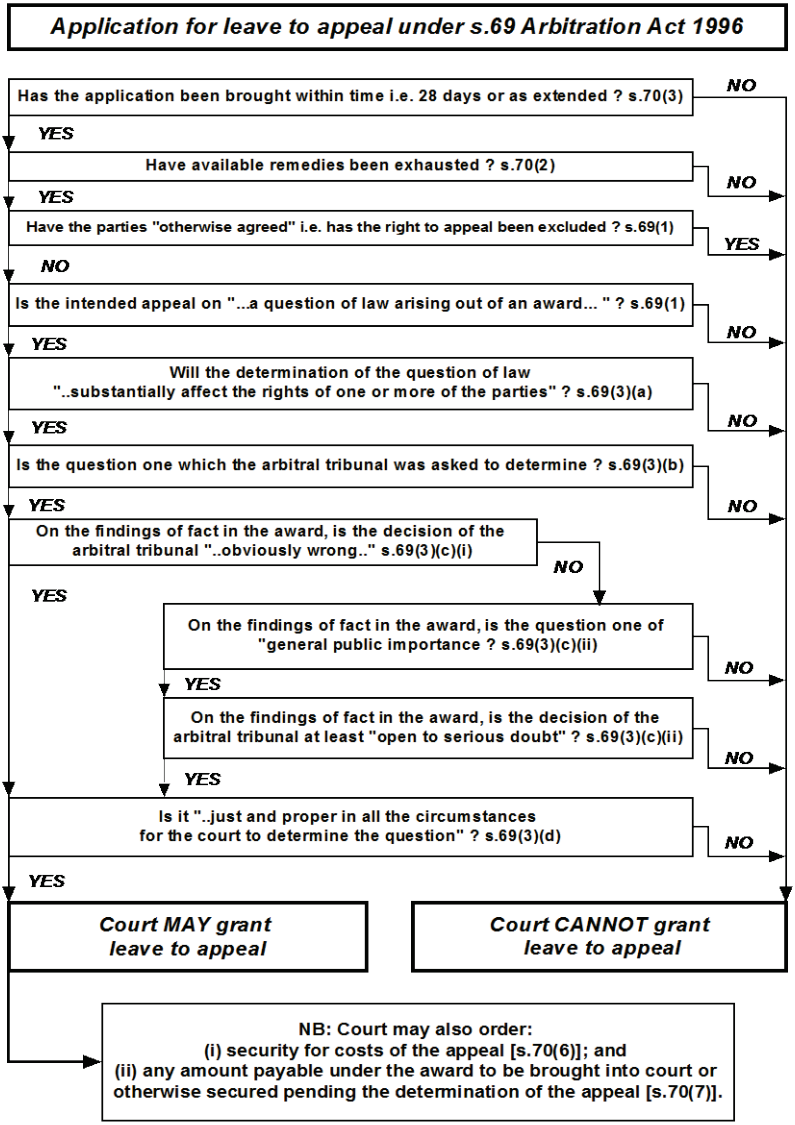
73 The Master's Lecture, entitled 'Arbitration and Judges – How much interference should we tolerate?' (London, 14/03/2006) cited by Coulson J. in *Amec Group Ltd v. Sec of State for Defence* [2013] EWHC 110 (TCC); 146 Con LR 152.

74 See s.67(4), s.68(4) and s.69(6) respectively. This is subject to a possible exception in circumstances involving a breach of Art 6 of the European Convention of Human Rights: see *ASM Shipping Ltd v. TTMI Ltd* [2006] EWCA Civ 1341; [2007] 1 Lloyd's Rep. 136.

importance" or is one which for some other special reason should be considered by the Court of Appeal.

The prospect of such further appeals is often the subject of criticism when compared to some other jurisdictions. However, it is (again) important to emphasise that, in practice, such appeals are extremely rare indeed. Thus, my analysis of the cases reported on www.bailii.org during the three year period 2012-2014 shows that there were no appeals at all to the Court of Appeal in respect of challenges under either s.67 or s.68. As to s69, there was a total of only 6 appeals from the High Court to the Court of Appeal (i.e. 2 in 2012, 3 in 2013 and 1 in 2014) – all of which were rejected by the Court of Appeal. In addition, I should mention that although there is the possibility of further appeals from the Court of Appeal to the Supreme Court, there were in fact no such appeals at all during this period under s.67, s.68 or s.69. This pattern strongly underlines the robust approach of the English Courts in supporting speed and finality in the arbitral process.

APPENDIX:
Questions to be considered by the Court on an application for leave to appeal under s.69



Report to the Conference: A Nigerian Perspective

Olufunke Adekoya[*]

Even among the best of trading partners, disputes occasionally arise from commercial transactions, whether they are trans-border or within national boundaries. While it is agreed that disputes within national boundaries appear easier to resolve – or at least, the avenues for resolution are usually agreed or known by parties, the same may not be said of trans-border commercial disputes. However, with the need to preserve good relationships and resolve disputes quickly, among other factors, arbitration has become the accepted dispute resolution mechanism used by parties in commercial transactions across national boundaries.

The ability to challenge an award rendered in international arbitration proceedings is dependent on the provisions of the arbitration agreement between the parties and any institutional arbitration rules incorporated thereby; the law of the seat of the arbitral proceedings; and finally any international treaties [such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the ICSID Convention of 1965] which the country has acceded to.

Nigeria's federal legislation is the Arbitration and Conciliation Act of 1988[1], while many States also have their own arbitration laws. The Arbitration and Conciliation Act is an enactment of the UNCITRAL Model Law with very slight modifications, while the Lagos State Arbitration Law 2009 is more up to date, being an enactment of the UNICTRAL Model Law inclusive of UNCITRAL's 2006 amendments.

The international Convention most relevant to arbitration proceedings in Nigeria is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (also known as the "New York Convention") which Nigeria has acceded to and accordingly it is binding in Nigeria. The New York Convention is set out in full in the Second Schedule to Nigeria's Arbitration and Conciliation Act.

Notwithstanding the obvious advantages and the quick resolution of disputes through the delivery of an arbitral award, in many instances obtaining recognition and enforcement of the award has not been as easy as

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[1] Chapter A18, Laws of the Federation, 2004.

proceeding to arbitration has been. Sometimes, a party in whose favour an award is made may encounter difficulty in enforcing the award. Needless to say, obtaining an arbitral award that cannot be enforced is a waste of time and resources.

Although, the New York Convention provides grounds for the refusal of recognition and enforcement of an award, it does not provide the procedure for setting aside an award. One must look to national laws for guidance since a challenge to an award at the seat will be governed exclusively by domestic legislations and national courts.[2]

I. SEAT VERSUS VENUE

Determining the seat of the arbitration is vital, as in addition to the mandatory national laws of the seat possibly having an impact upon the arbitration, it is the arbitral law of the seat that will normally determine the procedural law which governs the arbitration as well as the extent of the involvement or interventionist powers of the courts at the seat.

For example, the basis upon which an arbitral award may be challenged depends on the law of the seat of the arbitration. The extent to which judicial review of an award is permitted is also determined by the law of the seat.

'Venue' is not the same as 'seat' of arbitration as venue usually refers to the geographical location of the arbitration proceedings and may be chosen on the basis of convenience to the parties and/or the arbitrator(s). However, where the arbitration agreement is silent as to the seat, then the 'venue' of the arbitral proceedings will become crucial in deciding the appropriate supervisory procedural legislation that will govern the proceedings.

If the wording of the arbitration agreement in unclear, how is the seat determined? The matter came up for a decision in ***NNPC v. Lutin Ltd***[3]. At the request of the respondent, the sole arbitrator agreed to hold a hearing in London, in order to take the evidence of the respondent's sole witness, who allegedly feared for his safety in Nigeria and had fled abroad. The appellant sought to set aside the proceedings, contending that the agreement entered into by the parties provided that any arbitration will be governed by

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2 Article III of the Convention mandates contracting parties to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.

3 (2006) 2 NWLR (Pt. 965) 506.

Nigerian law and as such impliedly the place agreed by the parties for the hearing must be anywhere within Nigeria and that the arbitrator had exceeded his jurisdiction by holding hearings outside Nigeria. In deciding that the arbitrator had not acted wrongly, the court construed section 16(1) of the Act which provides that unless the parties have agreed otherwise, the arbitral tribunal shall determine the place of arbitration; together with subsection 2 thereof which confers powers on the arbitration tribunal, unless the parties agree to the contrary, to decide the place it considers appropriate for consultation among its members, for the hearing of witnesses, experts or the parties; or for the inspection of documents, goods or other property. Having found no agreement between the parties as to the place of arbitration nor a restriction of the powers of the arbitrator, the court held that the decision of the arbitrator to go to London to take evidence of the 1st respondent's witnesses, was not in violation of the terms of the arbitration agreement, and that Nigerian law was the law of the contract.

The court specifically stated that except if the parties expressly agree to the contrary in their arbitration agreement, a place decided upon by the arbitral tribunal for its hearings may be different from the seat of the arbitration.

Anxious to preserve Nigeria's territorial integrity, many arbitration clauses in contracts to which the government is a party now state that the "venue of the arbitration shall be anywhere within Nigeria". Where such wording is found, does this automatically make Nigeria 'the seat' of the arbitral proceedings if Nigerian law is not the law of the contract? In the presence of such wording, can the arbitral tribunal still hold one or more hearings outside Nigeria? Some panels have taken the view that 'venue' is different from 'seat' and that in spite of such wording, the seat may be in Nigeria, while the arbitrators use their discretion under section 16(2) to hold some part of the hearings abroad, as long as a part [the preliminary meeting for instance] is held within Nigeria.

II. COMMENCING CHALLENGE PROCEEDINGS

How does one commence a challenge in Nigeria? Where an award is challenged, whether local or foreign, the challenge must be by way of a written application to be filed before a court of competent jurisdiction. Section 29(1)(a) of Act states that a party who is aggrieved by an arbitral award may, within three months from the date of the award, by way of an application for setting aside, request the court to set aside the award. Although, initially our courts were of the opinion that since section 29(1) did not specifically prohibit the making of an application to set aside an

arbitration award after the three month period, a court had the power to extend the period for deserving applicants who could show good reason for their failure to apply within time and who can also show substantial grounds for wanting to set aside an arbitration award.[4] This position has however since changed. Our Supreme Court considered the impact of section 29 in ***Araka v. Ejeawu***, and Katsina-Alu, JSC (as he then was)[5], stated in the leading judgment that:

> "Consequently, since the motion on notice to set aside the award was filed long after three months in violation of section 29 (1) of the Arbitration and Conciliation Act it was incompetent and the trial court had no jurisdiction to entertain it."

In ***Daewoo Nigeria Ltd. v. Project Masters (Nig) Ltd***[6]*,* the lower court had [based on powers under its procedural rules], granted the appellant an extension of time within which to challenge the award. On appeal in 2010, the respondent challenged the jurisdiction of the lower court to do so. Relying on ***Araka's*** case, the Court of Appeal reiterated the position that a court had no jurisdiction to extend the period to set aside an arbitral award beyond the three month period and held that where the law provides for the bringing of an action within a proscribed period in respect of a cause of action, proceedings cannot be brought after the times prescribed by such a Statute.

So, the first thing to note is the short and inflexible time frame within which a challenge to an award may be brought. Although a similar three month [actually 90 days] time frame exists for filing civil and criminal appeals in regular litigation proceedings; time within which to appeal will be extended where an applicant can show good reasons for the delay. One wonders why our courts have taken the view that in arbitration proceedings the three month time frame amounts to a limitation period which cannot be extended.

Depending on the subject matter of the dispute, the dissatisfied party to the arbitral proceedings can file the challenge action before either the Federal High Court or a State High Court seeking for the award to be set aside on any of the grounds specified in the Arbitration and

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4 *Alhaji Albishir & Sons Ltd v. B.U.K* (1996) 9 NWLR (Pt. 470) 37 C.A.
5 (2001) FWLR (Pt. 36) 830 at 850.
6 (2010) LPELR-4010 (CA).

Conciliation Act.

Unlike the Federal enactment which is silent on the documents required for a challenge [as opposed to enforcement proceedings], the Lagos State Law provides in section 59[7] the format for how the challenge proceedings are to be initiated.

The procedural Arbitration Rules in the First Schedule to the Arbitration and Conciliation Act ("Arbitration Rules") are mandatory only for domestic arbitrations (where both parties are Nigerian-based, irrespective of the place of incorporation). The Arbitration Rules are based on the UNCITRAL Model Law and do not indicate any specific documents required to support a challenge. It goes without saying however that the award being challenged must be placed before the court.

III. GROUNDS FOR CHALLENGING AN ARBITRATION AWARD IN NIGERIA

Even where the relevant rules of procedure provide that the award is final and binding, it may be possible in limited circumstances to challenge an arbitral award. If an award is successfully challenged, in whole or in part, then it will usually be treated as being invalid and therefore not enforceable by the courts of the seat of arbitration. Discussion is ongoing as to whether national courts elsewhere should recognise an award that has been successfully challenged at the seat.

Where Nigeria is the seat of the arbitral proceedings, the grounds for challenging an award will be found in either Part I or Part III of the Arbitration and Conciliation Act. Part I of the Act governs domestic arbitration, while Part III regulates international arbitration. Nigerian law requires that [except unless waived by the government in certain limited circumstances][8], all entities doing business in Nigeria must incorporate a local entity. The effect of this is that many 'domestic' arbitrations usually have an international dimension.

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7 "(2) All applications to the Court in respect of any matter governed by this Law shall be in accordance with the Rules set out in Section 3 of the Schedule."

8 Section 54(1) of the Companies and Allied Matters Act provides that, "[s]ubject to sections 56 to 59 of this Decree every foreign company which before or after the commencement of this Decree was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Decree."

However, because section 43 of the Act states that, "*[t]he provision of this Part of this Act shall apply solely to cases relating to international commercial arbitration and conciliation in addition to the other provisions of this Act*", the grounds upon which a domestic award can be challenged are also relevant and applicable to international awards with Nigeria as the seat. In addition, what would ordinarily be a domestic arbitration under Nigerian law would be classified as international if the parties denominate it as such[9].

In respect of domestic awards, only three grounds of challenge are available; that the tribunal exceeded its jurisdiction [section 29(2)][10]; misconduct by the arbitrator and procurement of the award [section 30(1)][11].

If the award can be classified as an 'international' award[12] then the grounds for challenge will be found in §48 of the Arbitration and Conciliation Act.

Section57 of the Lagos State Arbitration Law also provides that an award can be challenged on grounds that are similar to those stated in the Federal legislation in respect of international awards.

Since the Nigerian Act is based on the UNICTRAL Model Law, as with UNCITRAL grounds, the basis for challenge listed in section48 of the Act covers incapacity of a party, an invalid agreement to arbitrate, lack of notice of the arbitration proceedings or inability to present a case, or extent of the submission or excess jurisdiction of the arbitrators; challenge to the composition of the arbitral tribunal, or the arbitral procedure; arbitrability or that the award is against public policy of Nigeria.

The following is an example of how Nigerian courts have responded to challenges brought under some of these grounds.

A challenge to enforcement of a UK award before the Nigerian court on the lack of knowledge of arbitral proceedings ground failed in the case of ***Continental Sales Limited v. R. Shipping Inc***.[13]. In the case, the appellant was given notice of arbitration by an e-mail dated the 31st August

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9 Section 57(2)(d) provides that, "the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration."

10 Section 29(2) provides that, **"**[t]he court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on maters which are beyond the scope of submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside."

11 Section 30(1) provides that, "[w]here an arbitrator has misconducted himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on application of a party set aside the award."

12 Section 57 of the Act defines 'international' arbitration.

13 (2012) LPELR-7905 (CA).

2009 sent by the respondent and invited to nominate its own arbitrator. The appellant acknowledged receipt of the notice but did not participate. The arbitrator appointed by the respondent, having accepted to act as the sole arbitrator invited the parties to make submissions and subsequently found in favour of the Respondent.

The appellant brought an unsuccessful application to set aside the order of registration by the trial court, on the basis that it was not notified of the London arbitration proceedings in accordance with law. Its argument was that since the service was by electronic mail he was not given 'proper notice of the appointment of the arbitrator or of the arbitral proceedings' as required by section 52(2)(a)(iii) of the Nigerian Arbitration Act. It then appealed against the confirmation of the registration of the arbitral award by the trial court. In deciding that the appellant did have 'proper' notice of the arbitration proceedings, the Nigerian court construed the provisions of sections 76(1), (2), (3), (4)(a) and (b) of the English Arbitration Act 1996[14] in relation to service of notices to a party to an arbitration and held that in international commercial transactions, the use of e-mail was an "effective means" of service.

Most challenges to awards with Nigeria as the seat have been based on arbitrator misconduct. The Act does not define what constitutes misconduct; happily however Nigerian case law[15] has spelt out some conduct that would amount to misconduct within the ambit of the Act. Some of these are:

(1) Where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;

(2) Where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitrator makes an award which on grounds of public policy ought not to be enforced;

(3) Where the arbitrator has been bribed or corrupted;

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[14] Section 76 provides as follows: "Service of notices, &c.
(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.
(2) If or to the extent that there is no such agreement the following provisions apply.
(3) A notice or other document may be served on a person by any effective means. [Underlining supplied].

[15] *Taylor Woodrow (Nig.) Ltd. v. Suddeutsche Etna-Werk GMBH* (1993) 4 NWLR (Pt. 286) 127.

(4) Technical misconduct, such as where the arbitrator makes a mistake as to the scope of the authority conferred by the agreement of reference. This however does not mean that every irregularity of procedure amounts to misconduct;

(5) Where the arbitrator or umpire fails to decide all the matters which were referred to him;

(6) Where the arbitrator or umpire has breached the rules of natural justice;

(7) If the arbitrator or umpire has failed to act fairly towards both parties, as for example:

(a) by hearing one party but refusing to hear the other; or

(b) by deciding the case on a point not put by the parties.

Outside of the Statute, a challenge to an award on the basis of an error of law on the face of the award is the other most common form of challenge. Our courts have determined an error of law on the face of the award to mean that one can find in the award or in a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which one can then say is erroneous. Our courts have established the general principle in arbitration proceedings that it is not misconduct for an arbitrator to come to a wrong conclusion in law unless the error in law appeared on the face of the award, and that a *de minimis* error will not be sufficient to set aside an award.

Upon reviewing the grounds for challenging domestic and international awards, it becomes clear that whereas, initially it seemed as if because the legal framework for international arbitrations in Nigeria included a reference to the framework for domestic arbitrations, international awards would be subject to challenge in two separate sets of circumstances, this turns out not to be the case. In essence, actions that would constitute misconduct under the law in respect of a domestic award, are the same actions statutorily enacted as part of section 48 of the Act where an international award is being challenged at its seat in Nigeria.

IV. EXTENT OF COURT INTERVENTION – SECTION 34

In spite of its wide powers, our courts have always borne in mind that the parties before them have provided in their agreement that their dispute or difference is to referred to arbitration rather than the regular courts of competent jurisdiction. As a result, they have generally shown a reluctance to interfere with the arbitrator's jurisdiction as the sole judge of law and fact unless compelled to do so. Courts regularly remind themselves of the provisions of section 34 of the Act which provides that "*[a] Court shall not intervene in any matter governed by this Act except where so provided in this Act."*

V. CAN A NON-PARTY CHALLENGE AN AWARD?

This issue is currently generating interest within the Nigerian arbitration community. Sections 12(3)(a) and (4) of the Act state that a plea of lack of jurisdiction can be raised by any party to the agreement in the course of the arbitral proceedings. What are the rights of a non-party? In the very recent case of ***Statoil (Nigeria) Ltd. & Anor v. FIRS & Anor***[16], the appellant sought to overturn on appeal its unsuccessful challenge to the standing of the Federal Inland Revenue Service (FIRS) [the 1st respondent] to institute proceedings in respect of arbitration proceedings to which it was not a party. At the lower court, the appellant's preliminary objection to the standing of the FIRS to challenge the jurisdiction against the arbitration proceedings was brought on the grounds that the Service which was not a party to the arbitration agreement had no *locus standi* to appear before the arbitration tribunal [as a witness] to challenge its jurisdiction to hear and determine the issues in dispute between the parties. It also argued that section 34 of the Act precluded the Service from instituting proceedings to challenge the award. However, the appellate court in upholding the decision of the lower court which confirmed the standing of the Service to intervene, held that, if a party to an arbitration agreement can challenge the jurisdiction of the arbitration tribunal, or that the arbitration agreement was *ab initio*, null and void, under section 29 of the Act, then, "*a person or authority, such as the 1st respondent"*, who was not a party to the agreement but complains that if an award is eventually made it would constitute an infringement of some provisions of the Constitution or the laws of the land or impede its constitutional and statutory functions or powers, may also do so.

16 (2014) LPELR-23144 (CA), decided in June 2014.

The panel of judges held that where issues of arbitrability are raised, the provisions of section 34 of the Act which states that "[a] *court shall not intervene in any matter governed by this Act except where so provided in this Act.*" must be read in light of section 35 which states that:

> "[t]his Act shall not affect any other law by virtue of which certain disputes- (a) may not be submitted to arbitration; or (b) may be submitted to arbitration only in accordance with the provisions of that or another law."

The court was of the view that since the Arbitration and Conciliation Act recognised in section 35 that certain issues may not form part of an arbitration agreement, for example, if they will violate the Constitution or any other statutory enactment nor could they be submitted to arbitration tribunals, section 34 did not debar a non-party to the arbitration agreement from bringing proceedings to intervene on the point. Even though the court acknowledged the principles enshrined in decided cases that only an injured party in an agreement that has been breached may sue the other party for redress, it however based its decision on the legal maxim, "[w]here there is proved a wrong, there has to be a remedy".

At present, it would seem that a non-party to an arbitration dispute can challenge an award on the basis of arbitrability, and also that the non-party is not required to wait for an award to be issued and then seek to set it aside; it could bring independent proceedings to challenge the arbitration proceedings. In the same case the court said:

> "I am of the humble opinion that it will be in the best interest of the 1st respondent not to wait or stand by for the Arbitration Tribunal to complete the proceedings and make an award. 1st respondent has the locus standing to act timeously to arrest the situation by a declaratory action or originating summons in a Court of law. Where the claim succeeds, the Court may make a declaration that the arbitral agreement was void ab initio or that the Arbitral Tribunal lacked the jurisdiction to have entertained the dispute on grounds of constitutional or statutory illegality, etc."

It is not yet clear whether the non-party must be directly affected by the arbitration proceedings, as the respondent claimed it was in the matter, or

any person can intervene on the basis of a constitutional challenge. It must also be noted that this decision was based solely on the standing of a non-party to intervene in arbitration proceedings, the issues of arbitrability raised by the Service have not yet been determined in the substantive action.

VI. CONCLUSION

An arbitration agreement only brings disputing parties to the arbitration table, but does not necessarily ensure the enforcement of an arbitral award. Any situation that frustrates the enforcement of an arbitral award should be avoided as much as necessary.

As is the experience in a few other regions, for Nigeria and sub-Saharan Africa, a critical step in the journey towards easing away current challenges of enforcing arbitral awards is to strengthen the knowledge interface between regular courts and arbitral tribunals.

Report to the Conference: A Mauritian Perspective

Aruna Narain[*]

I hasten to say that, unlike most of you today, I am not an international arbitration expert. I have, however, worked with a few experts on the 2013 amendments to the International Arbitration Act and on our 2013 Rules which is probably the reason I am here today.

My distinguished co-panellists have exhaustively described the position under English law and Nigerian law and it remains for me to move forward with this *tour d'horizon* by outlining the position under Mauritian law, before Professor Besson does a comparative analysis of the law of the three jurisdictions.

My own task has been made easier by the fact that an overview of the main principles governing this area of the law has already been given by those preceding me albeit in relation to their own jurisdictions. Further, many of you will have seen in your delegates' pack, this handy compilation of the *Text and Materials* on the Mauritian International Arbitration Act 2008 (updated 2014 edition) (hereinafter "2014 Handbook") which contains *inter alia* the text of our International Arbitration Act ("IAA") incorporating the amendments made in 2013; the official *Travaux Préparatoires* of this Act, as amended; and the Supreme Court (International Arbitration Claims) Rules 2013 which I shall refer to as the "2013 Rules".

I shall, therefore, be covering in my short *exposé* today, the relevant provisions of the IAA, as elaborated upon in the *Travaux Préparatoires,* and the 2013 Rules as well as our local case law on the subject.

I. RELEVANT PROVISIONS OF THE IAA

Section 20 of the IAA provides for "competence as to jurisdiction", that is, the power of an arbitral tribunal to rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. Subsections (3) to (5) set out when a plea that the arbitral tribunal does not have jurisdiction or is exceeding the scope of its authority should be made. Subsection (6) goes on to state that the arbitral tribunal

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may rule on such a plea either as a preliminary question or in an award on the merits.

Subsection (7) is, in my view, significant enough to be read out verbatim instead of being paraphrased. It provides as follows:

> "Where the arbitral tribunal rules on the plea as a preliminary question, any party may, within 30 days after having received notice of that ruling, request the Supreme Court to decide the matter, and, while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make one or more awards."

Section 39 of the IAA provides for the exhaustive grounds on which an arbitral award may be set aside by the Supreme Court of Mauritius. These are not unlike what Sir Bernard Eder referred to as a closed list earlier, and include incapacity of a party to the arbitration agreement; inadequate notice of the appointment of an arbitrator; the award dealing with a dispute not being contemplated by the submission to arbitration; the award being in conflict with the public policy of Mauritius; fraud or corruption in the making of the award; and breach of the rules of natural justice in the course of the arbitral proceedings or in the making of the award.

II. TRAVAUX PREPARATOIRES

As our *Travaux Préparatoires* make clear,[1] section 20 of the IAA substantially enacts Article 16 of the UNCITRAL Model Law on International Commercial Arbitration adopted in 1985 and amended in 2006. It enshrines the two following cardinal principles: "compétence-compétence" and separability.

I shall resist the temptation of reopening an academic discussion on "compétence-compétence" and instead refer any distinguished member of the audience who is interested in the matter to the record of the MIAC 2010 proceedings which contains a lively debate on the issue led by Mr. Salim Moollan, Professor Jan Paulsson and Professor Brigitte Stern, amongst others. The debate is, of course, ongoing.

Suffice it to say that in line with the Amended Model Law, sections 29 and 39 of the IAA do provide for the jurisdiction of arbitral tribunals to determine their own jurisdiction subject to the Supreme Court's

[1] 2014 Handbook, pp. 194-195.

control. However, section 20 deliberately departs from the Amended Model Law in that it allows a losing party to refer the matter to the Supreme Court not only when the arbitral tribunal has ruled that it has jurisdiction but also where it has no jurisdiction. Such challenges to jurisdiction are, we believe, also allowed under English law and New Zealand law.

This seems to be a reasonable extension of the Model Law provisions. As the *Travaux Préparatoires* point out,[2] it is difficult to see why the tribunal should not be allowed to determine conclusively that it has jurisdiction (which can be subject to a re-hearing by the Court on a challenge application) but be allowed to determine that it does not. Both scenarios involve the consequence that if the decision was wrong, proper effect would not have been given to the parties' agreement to arbitrate.

If an arbitrator, deciding wrongly that she has jurisdiction, is pulling herself up by her own bootstraps, then perhaps an arbitrator deciding wrongly that he does not have jurisdiction is jumping out of the saddle where the parties put him, and settling down for a snooze under a tree.

The *Travaux Préparatoires* also unambiguously set out that any hearing before the Supreme Court as a supervisory court on issues of jurisdiction should take place by way of a full re-hearing. This is said to be well established, and I shall come back to that later when I deal with our Mauritian case law.

With regard to general grounds for setting aside an arbitral award, the *Travaux Préparatoires*[3] highlight that section 39 of the IAA "*enacts the all-important provisions of Article 34 of the Amended Model Law without any significant modifications*". We have just heard Sir Bernard Eder refer to *inter alia* sections 67 and 68 of the English Arbitration Act 1996. Now the legislator in Mauritius declined after anxious consideration to expand Article 34 along the lines of the English provisions on the ground that this would be too substantial a departure from the Amended Model Law.

On the other hand, we have introduced a minor modification to Article 34 of the Amended Model Law by expressly and clearly including fraud or corruption as grounds for setting aside an arbitral award. This is not to say that an award induced by fraud or corruption could not be set aside under the Model Law: it is generally acknowledged that a breach of public policy or of the tribunal's mandate has occurred in that situation.[4] But we took the decision in Mauritius to express in clear terms that such matters can give rise to the setting aside of an award provided that the fraud or corruption "*induced or affected"* the making of the award.

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2 *Travaux Préparatoires* to the IAA, para. 76.
3 2014 Handbook, pp. 216-217.
4 UNCITRAL Report A/40/17 of 21 August 1985.

The IAA also adds to the Model Law by including, as an express ground for setting aside, that "*a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of a party have been substantially prejudiced*". Again, this may not introduce a whole new ground for setting aside awards compared to the Model Law but typically courts have relied upon the public policy ground under the Model Law to find that the breach of natural justice (for example, *audi alteram partem)* has occurred.[5]

III. THE 2013 RULES

The Supreme Court (International Arbitration Claims) Rules 2013[6] were made last year by the Chief Justice, after consultation with the Rules Committee and the Judges, under section 198 of the Courts Act.

Under the Rules, a challenge to an arbitral award will be treated as an arbitration claim under Part II of the Rules, to be started by way of motion supported by written evidence.

The contents of the written evidence are prescribed at Rule 6(2) and, interestingly under our law, the written evidence may be either by way of affidavit or in the form of one or more witness statements accompanied by any supporting document.

I said that this is an interesting development in Mauritius because previously written evidence in support of court proceedings had always taken the form of affidavits. The benefits of using witness statements in international matters are clear because that removes the difficulty of swearing documents in foreign jurisdictions. The arbitration claim will be determined on the basis of the written evidence filed, unless the Supreme Court orders that oral evidence be heard. This is consistent with the ideal approach to applications to challenge awards, namely that there is no reopening of factual matters unless it is clear that it is necessary to determine the challenge, something which we can expect the courts in Mauritius to ask the party who is seeking permission for oral evidence to be heard, to show.

The Rules also provide for case management by the Chief Justice in respect of the hearing of any arbitration claim before the Supreme Court. Each

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5 See, for example, the Federal Court of Australia in *TCL Air Conditioner (Zhongsan) Co. Ltd. v. Castel Electronics Pty Ltd.* [2014] FACFC 83, finding that breaches of the rules of justice could amount to the award being in conflict with public policy under the Australian International Arbitration Act (based on the Model Law) and liable to be set aside, but only if the breaches were such as to give rise to "unfairness or practical injustice".

6 2014 Handbook, pp. 111-148.

arbitration claim will be heard by a panel of three Designated Judges selected from six Supreme Court Judges who have undergone and will be undergoing specialised training in the field of international arbitration.

The Rules also provide that the Supreme Court may order that any part of the arbitration claim be heard in private in the circumstances set out in the new section 42(1B) of the IAA. Finally, the hearing of an arbitration claim may be facilitated by means of secure telephone lines or video conferencing facilities or other means of communication deemed proper by the Court.

IV. CASE LAW

Here, I must say I have rather enviously listened to Sir Bernard Eder and Ms. Olufunke Adekoya analyse England's and Nigeria's rich case law. Our own body of case law is rather more slender but it is getting there. I believe that tomorrow morning a lot will be said about the judgement of *Cruz City* which was mentioned by the Solicitor-General this morning.

For my part, I shall focus on the Supreme Court judgment of *Liberalis Limited and Anor v. Golf Development International Holdings Ltd and Others.*[7]

In this case, which involves a dispute in relation to an integrated resort scheme, or IRS project, an application was made under section 20(7) of the IAA for an order setting aside the ruling of an arbitrator that he had jurisdiction to hear the case and declaring the relevant arbitration agreement null and void.

The Supreme Court rightly, in my submission, stated that its role when determining the question of jurisdiction under section 20(7) is **not** to sit on appeal against the ruling of the arbitral tribunal. It may, therefore, express its agreement or disagreement with views expressed by the arbitral tribunal but would not adopt "*the normal appellate perspective focusing on errors and misdirections on the part of the arbitral tribunal"*.

The Court then proceeded to look into the four points that were raised by the applicants before it, which were the same points raised before the arbitrator. On two of the points, the Court undertook an assessment of the evidence of the expert witness on the South African law applicable in insolvency matters who had deponed before the arbitral tribunal and it came to the conclusion that: firstly, only the provisional liquidator could under South African law bind the company under provisional liquidation; and, secondly, the arbitration agreement had been lawfully ratified by the

7 [2013] SCJ 211.

resolution of the board of directors of respondent No 1. I have to say, I have no quarrel with the determination of the court on these points.

On the first point, however, after rightly giving its own views on the sources of law applicable to international arbitration in Mauritius, the Court "incidentally", in its own words, stated that it found nothing in the ruling of the arbitrator which would indicate that he acted in breach of section 3(10) of the IAA, which precludes reliance on domestic arbitration law in applying and interpreting the IAA. This provision is now found in Section 2C(1) of the amended IAA.

It is respectfully submitted that the issue of whether the arbitrator acted in breach of the IAA is irrelevant in a *de novo* re-hearing as envisaged under section 20(7) of the Act because the Court is itself carrying out a reconsideration of the issue and will, one would expect, do so without any breach of section 2C(1).

In relation to the fourth point, it would appear again, with due respect, arguable that the Court, despite its own admonition regarding the role of the Court when determining a request under section 20(7) of the IAA, did adopt the perspective of an appellate court. The Court was required here to determine if the applicant's consent to the arbitration agreement had been initialled by *dol* and should, it is submitted, have analysed the evidence which was before the Court to determine if this was indeed the case.

Instead, the Court found that the contention of counsel for the applicants cannot hold in view of the clear findings of fact of the arbitrator which should, as in an appeal and *a fortiori*, not be lightly interfered with. It is submitted that, in so doing, the Court may have acted as an appellate court rather than a court hearing an application *de novo.* Whether the outcome would have been any different is of course a separate question and I am not seeking to give any view on that.

The case of *Liberalis* demonstrates two things for practitioners of international arbitration in Mauritius to keep in mind: firstly, that the court considering a challenge to a finding on jurisdiction will, as a matter of principle, consider the issue *de novo;* secondly, however, depending on the evidence relied upon, the prospects of the court's finding being different from that of the arbitrators may be limited and even a court reviewing a finding *de novo* must at least read the tribunal's decision.

As Lord Mance, whom we are fortunate to have amongst us, said in the context of enforcement in *Dallah v. the Ministry of Religious Affairs, Government of Pakistan:*

> "This is not to say that a court seised of an issue under [the English enforcement provisions] will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination. Courts welcome useful assistance."[8]

I thank you for your kind attention.

[8] [2010] UKSC 46 at para. 31.

Report to the Conference: A Comparative Law Perspective

Prof. Dr. Sébastien Besson[*]

I. INTRODUCTION

Honourable Chief Justices, Honourable Justices, Excellencies, dear colleagues, it is a great pleasure for me to be here this morning in this pleasant environment. I would like to thank and congratulate the organisers for the initiative and perfect organisation.

What I propose to do as the last speaker of this session is to try and examine the challenges to arbitral awards at the seat from a comparative law perspective.

Taking a comparative law perspective is always interesting in arbitration but it has a special importance for challenges to the award, and for two main reasons:

(i) First, because differences are marked in the jurisdictions; contrary to, for instance, the arbitral procedure where common trends and best practices have emerged, the specificities of the different national laws have played and continue to play a role when examining the challenges to the award.

(ii) Secondly, these specificities are critical in order to assess the extent to which the parties will be under the supervision of the courts of the seat. This assessment is essential when choosing the seat of the arbitration. Comparative law perspective is hence necessary when dealing with challenges to the award.

Comparative law implies to make a choice of the laws under scrutiny. I will deal with the UNCITRAL Model Law, with Swiss, French, English and Mauritius laws, which are laws of excellent places to arbitrate. Of course there are other places, and I am sorry for the countries that I had to leave aside but time constraints dictate this choice.

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[*] Then Partner at Python & Peter (Geneva); Partner, Lévy Kaufmann-Kohler (Geneva); Extraordinary Professor, University of Neuchâtel (Switzerland).

II. STATUTORY FRAMEWORKS

I will not go into the details on the statutory framework. The relevant provision of the UNCITRAL Model Law ("ML") is Article 34, which sets out the grounds for challenging the award.

In Mauritius, the relevant provisions are sections 3B, 39, 39A, and 42 as well as the First Schedule of Mauritian International Arbitration Act 2008, as amended in 2013 ("MIAC").

In France, Articles 1518 to 1524 of the French Code of Civil Procedure ("CPC") govern the challenges to the award, and in Switzerland, Article 190 of the Swiss Private International Law Statute ("PILS") is the relevant provision, in relation to Article 77 of the Swiss Supreme Court Act ("SSCA") which establishes specific rules for challenges before the Swiss Federal Tribunal when the subject matter of the challenge is an arbitral award.

In England, the relevant provisions are Sections 67 to 71 of the English Arbitration Act ("Arb. Act").

III. COMPETENT COURTS FOR CHALLENGING THE AWARD

In Switzerland there is one unique level of recourse, the Swiss Federal Tribunal, which is also the Supreme Court in Switzerland. This is a unique feature of Swiss arbitration law which is designed to make arbitration as attractive as possible. However, this choice of the legislature has an important consequence for the intensity of the control of awards in Switzerland. Like other supreme courts, the Swiss Federal Tribunal has a marked tendency to look at the case with a distant look and it will focus its analysis on a rather cursory review of the award. The "one-top" approach is hence not neutral and significantly impacts the intensity of the review of the award in Switzerland.

In France, the "classic" solution has been chosen by the legislature with two levels of instance, namely Court of Appeal followed by an appeal to the *Cour de cassation*.

I understand that Mauritius is also a two-stop system. Challenges to the award are centralised with the Supreme Court (Section 39(1) MIAC) but an appeal to the Judicial Committee of the Privy Council remains available to the parties (Section 44 MIAC).

In England, it is in theory a three-stop review process (High Court, Court of Appeal, Supreme Court) but tempered by the concept of "leave to appeal" which is granted only exceptionally (Sections 67(4), 68(4), 69(8)

Arb. Act). Accordingly, as a matter of practice, I understand that English law is often in fact a one-stop process.

IV. TIME LIMITS

I will be short on time limits. The laws under scrutiny provide for different times limits: twenty days in England (Section 79(3) Arb. Act), one month in France (Article 1519(2) CPC) and 30 days in Switzerland (Article 100(1) SSCA), and three months in Mauritius (Section 39 (4) MIAC). The latter time limit is taken from the Model Law (Article 35(4) ML) and can hence be described as the dominant and most common approach in comparative law.

The starting point of the time limit also varies. In Switzerland and in Mauritius it is the communication of the award to the parties, which is the starting point, and such communication does not require any special form (Article 190(3) PILS applicable to all awards; Section 39(4) MIAC).

In France, I understand that the approach is more complicated. If the parties have agreed that the award will be communicated in a private form, this communication is the starting point of the time limit for the annulment action (Articles 1519(2) and (3) CPC). If, however, there is no such explicit agreement, the time limit starts as from the official service ("*signification*") of the decision by a public official ("*huissier*").

In England, the time limit is surprisingly not from the communication but from the rendering of the award (Section 70 Arb. Act "28 days of the date of the award"). The court may, however, extend the time limit "whether or not the time has already expired" (Sections 79(1) and (4) Arb. Act).

V. GROUNDS FOR CHALLENGE

From a comparative law perspective, it is possible to identify common features and specificities in the different legislations.

Starting with the common features, the grounds for challenging the award are exhaustively listed in the Statute and are narrow in international arbitration. They focus on the jurisdiction of the arbitral tribunal and on procedural irregularities. They allow a review of the constitution and composition of the arbitral tribunal, of the jurisdiction of the arbitrators, including the validity and scope of the arbitration agreement, and of due process principles (encompassed under the notion of *contradictoire* in France and *droit d'être entendu* in Switzerland).

With respect to the merits, the grounds are typically limited to public policy and do not allow a full review of the award.

However, a closer look at the grounds for review of the award reveals that the differences in the various legislations are not insignificant. The first difference relates to the review of the merits. In England and Mauritius, an appeal on a point of law is available under some circumstances. In England, the appeal on point of law is governed by Section 69 Arb. Act. Such appeal only concerns the application of English law (Section 82(1) Arb. Act). It can be waived by the parties (Section 69(1) Arb. Act), and a waiver results e.g. from the submission of the parties to arbitration rules providing, like the ICC Rules, that the award shall be binding on the parties and that the parties waive their right to any form of recourse (Article 34(6) ICC Rules). Further, the appeal can only be brought with the agreement of all parties to the proceedings or with "the leave of the court" (Section 69(2) Arb. Act), such leave being granted only under restrictive conditions (Section 69(3) Arb. Act).

Under Mauritian law, the appeal on point of law is optional in international arbitration (Section 3B MIAC) which means that the parties have to contract *in* an appeal on point of law in order to benefit from such remedy in court. The review is limited to Mauritius law (Section 2 First Schedule MIAC).

In Switzerland and in France, an appeal on point of law is not possible in international arbitration and it is not possible for the parties to broaden the scope of the court's review and permit such appeal even if it is provided for in the arbitration agreement.

The second difference relates to the extent of the review in relation to the arbitral procedure. In most countries, including the Model Law countries, England (Section 68(2)(c) Arb. Act), Mauritius (Section 39(2)(a)(iv) MIAC) and France (Article 1520(3) CPC violation of the mission), the court can review failures by the arbitral tribunal to conduct the proceedings in accordance with the procedure agreed by the parties. Such ground is also a ground for refusing the recognition and enforcement of the award under the New York Convention (Article V(1)(d) NYC).

In Switzerland, there is no such general ground for reviewing the award in the event of procedural breaches, even if the breaches concern the procedure *agreed* by the parties. Only due process ("*droit d'être entendu en procédure contradictoire*") constitutes a ground for challenge under Article 190(2)(d) PILS. In that respect, Swiss law is specific and more restrictive than other jurisdictions.

The grounds associated with the notion of excessive power are also different under the different legislations. Again, Switzerland is the most

restrictive jurisdiction as it only permits a review of the award in case of *ultra* (or *extra*) *petita* principle (Article 190 (2)(c) PILS). Such principle is engaged only if the arbitral tribunal has made, in the dispositive section of the award, a ruling that is not covered by the prayers for relief made by the parties, i.e. a rare situation.

French law has a broader concept, at least compared to Swiss law, which is the violation by the arbitral tribunal of its "mission" (Article 1520(3) CPC). Such notion encompasses a variety of breaches of a procedural nature, including a violation of the principle *ultra petita* – like in Switzerland – but also a breach of the agreed procedure, or "usurpation of powers" by arbitrators who wrongly claim to be *amiable compositeurs* while they do not have such powers, or even a manifest disregard of a choice of law clause by the arbitral tribunal.

In England, Section 68(2)(b) refers to the notion of "excess of powers" by the arbitral tribunal which has some analogy with the French concept of the "violation of the mission". In Mauritius, the legislation mirrors the text of the New York Convention (Article V(1)(c) NYC) and prohibits *ultra petita* as well as other forms of excess of powers (Section 39(2)(a)(iii) Arb. Act).

In summary, all legislations provide that arbitral tribunals cannot go beyond the prayers for relief of the parties; some, unlike Swiss law, add that the mission or the scope of the power of the arbitrators can also be reviewed but they vary as to the precise contours of such violation of the mission or excess of power.

With respect to the form and drafting of the award, Section 68(2)(h) Arb. Act provides for a ground of challenge in case of "failure to comply with the requirements as to the form of the award", namely a limited review of the drafting of the award. Such ground is not provided for in Switzerland, France and Mauritius. More generally, it may be stressed that the grounds for challenge of the English Arbitration Act are based on former common law rather than copied from the UNCITRAL Model Law. In that respect, English law is specific and different from all other legislations.

Apart from the grounds to challenge the award as established in the legislation, the interpretation of such ground may also differ significantly from one jurisdiction to another. The relation between due process, on the one hand, and the application of the substantive law by arbitrators, on the other hand, is a striking example. In Switzerland, the principle *iura novit curia* applies to arbitrators.[1] It follows from this principle that arbitrators

[1] ATF 116 II 594, para. 3b; ATF 120 II 172, para. 3a.

apply the law *ex officio* and that they may decide to deviate from the parties' submissions concerning legal arguments and do not have to provoke a debate of the parties on such legal arguments. As an exception to this rule, they must give the parties an opportunity to be heard on legal arguments in the – restrictive – situation where they envisage to rely on a legal analysis that would come as a complete surprise to the parties, e.g. apply a piece of legislation that has not been argued at all by the parties.[2] Apart from this restrictive situation, the right to be heard does not apply to legal issues.

In England, the approach is different and it is expected that any point of law be submitted to a contradictory debate. Arbitrators may take some liberty with the parties' position in law and do not have to call the parties' attention to any deviation from what the latter have argued. However, it would not be permissible for arbitrators to freely rely on legal arguments not presented and discussed by the parties.

France can be classified as half-way between the Swiss and the English approach. The case law appears to prohibit arbitrators from raising *ex officio* legal arguments that have not been discussed by the parties but, at the same time, it does not consider that arbitrators must provoke a discussion on the legal reasoning that they envisage following in their award.[3]

VI. EXTENT OF THE COURT REVIEW AS TO THE FACTS

Another important difference in the various jurisdictions is the extent of the court's power of review concerning the facts. Such difference has a major impact on the outcome of the challenge.

In England, in particular with respect to challenge on jurisdiction, the court has a complete *de novo* power of review allowing judges to hear witnesses, experts, and to examine the whole file of the arbitration. The court will not be bound by conclusions of facts drawn by the arbitral tribunal in support of its decision to assume or decline jurisdiction.

As the UK Supreme Court stressed it in *Dallah v. Pakistan* (hereinafter "*Dallah*"), the Court has unlimited power of review to examine the issue of jurisdiction: *"…[t]he [arbitral] tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all*"[4];

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2 ATF 130 III 35, para. 6.

3 See C. Seraglini & J. Ortscheidt, *Droit de l'arbitrage interne et international*, Paris 2013, (hereinafter "Seraglini & Ortscheidt"), p. 732, para. 803.

4 [2010] UKSC 46, at para. 30.

and quoting paragraph 31 and approving the Government's position according to which *"*[*i*]*n making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them*".

In this case, the Supreme Court examined the facts in great detail and came to the conclusion that the Government was not a party to the arbitration agreement, the arbitral tribunal's reasoning being "*neither conclusive nor on examination persuasive*".[5]

In Switzerland, the approach is different if not the opposite. The Swiss Federal Tribunal is bound by the facts as established by the arbitrators.[6] If the jurisdiction of the arbitral tribunal is at stake, the Swiss Federal Tribunal will examine with unlimited power of review all legal issues that are relevant for determining the jurisdiction, in particular the validity of the arbitration agreement, including preliminary legal issues of substantive law that may affect the jurisdictional issue (e.g. the existence of the valid power of attorney or the validity of an assignment of the arbitration agreement).[7] However, the facts as they appear in the award are binding on the parties (and on the court). The Swiss Federal Tribunal will hence base its decision on the facts as established by the arbitral tribunal in the award (and not on the basis of a fresh review of the arbitration file).[8]

Such difference has particularly important consequences when arbitrators reach a conclusion – and write this expressly in the award – as to the "subjective and common" intent of the parties in relation to their will to arbitrate. Such conclusion is considered to be a question of fact and the Swiss Federal Tribunal is hence bound by this "fact" (i.e. the "subjective" intent) even if such "fact" determines the existence or scope of the arbitration agreement and, accordingly, the jurisdiction of the arbitrators.

French law can again be described as half-way between the English *de novo* power of review of the arbitral tribunal's jurisdiction and the ultra restrictive approach of Swiss law. Under French law, the Court of Appeal claims to have full power to review the facts and the law in connection with the jurisdiction of the arbitral tribunal in challenge proceedings but, in practice, witnesses are not heard before French courts in arbitral matters and the review of the file will not be as intense as before English courts. The comparison between the UK Supreme Court decision in *Dallah* and the Paris Court of Appel decision of 17 February 2011 in the

5 *Dallah*, para. 66.
6 ATF 129 III 727, para. 5.2.2.
7 ATF 117 II 94, para. 5a; ATF 129 III 727, para. 5.2.2.
8 ATF 129 III 727, para. 5.2.2.

same case,[9] where the very same legal issue was at stake, shows notably that the extent of the factual review was not the same in England and in France which explains at least partly the contradictory results of the two decisions.

The difference in the court's power of review also plays an important role when the challenge to the award is based on grounds of public policy, in particular because there is an allegation that the award is in breach of competition law. To which extent is it possible for the court to review the facts on which the arbitrators have based their rulings? Competition law implies the assessment of many important facts and economic data (e.g. to establish the relevant market) and it is critical to determine if, in a challenge based on public policy, the court can review the facts upon which the competition law analysis has been made.

In Switzerland, the answer is clear. The Swiss Federal Tribunal will not make any review of the facts and is bound by the facts as established in the award. The review is superficial and an annulment becomes virtually impossible for competition law where fact findings are often outcome determinative.

In France, the review is not restricted to the facts established in the award but the case law limits the control to breaches of public policy that are "manifest, effective and concrete".[10] This case law is far from being uncontroversial and has resulted in intensive scholar debates.[11]

In England, I have not found competition law cases but there are cases of corruption allegations where English courts have taken a "contextual approach". The intensity of the factual review depends upon the seriousness of the alleged defect; the more severe the allegations, the deeper the fact review. This is a case by case approach and some have spoken in this context of a "balance" between finality and illegality.

These differences are important because the intensity of the court review as to the facts has an incidence on the outcome of the challenge. They also show that the mere comparison of the grounds of challenge in the legislations is not sufficient to provide a clear picture and that the practice of the court is an additional critical factor to take into account when assessing the level of control in a given jurisdiction.

Statistics and empirical data are interesting tools to complete the legal analysis. I was very interested by the English statistics which were presented by Sir Bernard Eder.

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9 JDI 2011, p. 395.

10 Cytec, Cas. 4 June 2008, Rev. arb. 2008, p. 473.

11 See Seraglini & Ortscheidt, *op. cit*., fn. 3, p. 891-894.

In Switzerland, statistics have been compiled by Professor Dasser and published in the Bulletin of the Swiss Arbitration Association.[12] They show that, from the entry into force of the Swiss Private International Law Statute in 1989 until 2013 approximately 435 challenges were filed against international awards and 331 decisions were rendered on the merits of the challenge (discounting decisions on inadmissibility). The rate of successful challenges in commercial matters amounts to less than 7%. The rate depends on the ground that is raised. The most promising is jurisdiction with a rate of success of approximately 10% and the worst is public policy. There has been only one case annulled in Switzerland for a breach of substantive public policy and the case was related to a sport dispute before the Court of Arbitration for Sport in Lausanne.[13]

In commercial cases, as from the entry into force of the law, no award has ever been annulled in Switzerland for breach of substantive public policy. Such data is in itself telling about the level of non-interference of the Swiss Federal Tribunal in arbitrations taking place in Switzerland.

VII. CONSEQUENCE OF SUCCESSFUL CHALLENGES

The consequences of a successful appeal also vary from one jurisdiction to another.

In England, judges have a broad flexibility based on Section 71 Arb. Act. They can set aside the award and refer the case back to the arbitrators; remit the case, in whole or in part, to the arbitrators for reconsideration without formally setting aside the award (Section 71(3) Arb. Act); or even "vary" the award so that the "variation has effect as part of the tribunal's award" (Section 71(2) Arb. Act). The remedy depends on the ground for challenge that is invoked and on the specificity of the situation.

In Mauritius, the new Section 39A of the revised Act also confers broad powers and discretion to the courts in order to identify the proper remedy in case of setting aside proceedings. The judge can remit the case to the existing tribunal for reconsideration, or give directions relating to "the commencement of a new arbitration" or "the future conduct of any proceedings".

In Switzerland and in France, it is simpler but also more rigid. The court can only set aside the award. In Switzerland, the Swiss Federal Tribunal has however established an exception to this rule when the

[12] ASA Bulletin 2007, pp. 444-473; and updated in ASA Bulletin 2010, pp. 82-100 and ASA Bulletin 2014, pp. 460-466.

[13] ATF 138 III 322, para. 4.3.

challenge relates to the jurisdiction or to the composition of the arbitral tribunal; the court can in such cases determine itself in its judgment the jurisdiction (or lack of jurisdiction), or the proper composition of the arbitral tribunal, so as to avoid a conflict with the arbitral tribunal.[14]

Even if the challenge results in the setting aside of the award, Swiss law and French law differ on another important aspect. In Switzerland, the setting aside of the award implies that the case is referred back to the same arbitral tribunal (unless the ground is related to the jurisdiction or to the composition of the arbitral tribunal). Accordingly, if a party claims that the arbitral tribunal has breached its right to be heard and if that party is successful before the Swiss Federal Tribunal, it will find itself back before the same arbitrators.

In France, the case is referred by the court to arbitration but to a new arbitral tribunal to be constituted.[15]

Neither approach is perfect. The Swiss approach is more efficient but the parties may feel uncomfortable to be back before the same arbitrators with whom they may have been disappointed.

VIII. WAIVER OF THE RIGHT TO CHALLENGE THE AWARD

Both French law and Swiss law empower the parties to waive their right to challenge the award (Article 1522 CPC and Article 192 PILS). Such waiver can be made at the time of the conclusion of the arbitration agreement or at a subsequent stage.

The conditions of the waiver are however not the same. In Switzerland, the waiver is possible only if "none of the parties have their domicile, habitual residence, or a business establishment in Switzerland" (Article 192(1) PILS). Such conditions do not apply in France where a waiver is possible even if the parties have a connection to France.

It must be added that the waiver does not imply that the award can be recognised and enforced without any control. A control remains available at the enforcement stage. In Switzerland, such control will be made under the grounds of the New York Convention (Article 192(2) PILS) which is applied "by analogy" to a domestic award. In France, the decision of exequatur can be appealed for the same grounds that would be available for setting aside the award (Article 1522(2) referring to Article 1520 CPC).

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14 ATF 117 II 94, para. 4; ATF 128 III 50, para. 1b; ATF 136 III 605, para. 3.2.4.

15 See Seraglini & Ortscheidt, *op. cit.*, fn. 3, p. 872-873, para. 959.

If the award is enforced in a foreign country, the New York Convention will be applicable.

In Mauritius and in England, a waiver of the right to challenge the award is not available, except in relation to an appeal on a point of law as described above.

IX. CONCLUSIONS

This short presentation is not meant to be exhaustive or even detailed. It aims at showing that significant differences exist in the challenge to the award at the seat of the arbitration. Such differences result not only from the statutory provisions but also from the practice and policy developed by the courts (e.g. on the review of the facts in an action for setting aside the award). This variety in national legislations is important to consider when assessing the level of control of the courts and when opting for a suitable seat of arbitration.

PANEL II

CHALLENGES TO ARBITRAL AWARDS AT THE SEAT: A PRACTICAL APPLICATION

Introductory Remarks

John Beechey[*]

We now have a mock presentation to make in the form of an application to the Supreme Court of Olmea to set aside an award under Section 39 of the Olmean Arbitration Act which is more or less a clone of the Mauritian International Arbitration Act.

For the purposes of the application we have assembled a tribunal of the Supreme Court of Olmea which is presided over by Prof. David Caron. David will be well known to many of you, if not all of you, as a very eminent U.S. academic who had a long career at the University of Berkley and then for reasons which I fail to comprehend he decided to move from the sunny climes of Berkley to London where he has taken up, fortunately for us, a very eminent position at King's College London. He serves as an adviser to the State Department on matters of public international law. My greatest pleasure in seeing him here today is that it renews a friendship which goes back many years to the Institute of Transnational Arbitration in Dallas.

David will be in command and he will set out the procedure that the Court will adopt, with Jeremy Gauntlett Q.C., a senior member of the Cape Town and Johannesburg Bar as well as the English Bar. I am delighted to say with them is the Hon. Justice Shaheda Peeroo, a member of the Supreme Court of Mauritius, if I may say so, one of the Designated Judges who deals with arbitration matters when they come to the Supreme Court.

I am reminded too by some remarks of the Solicitor-General this morning and by Aruna Narain that the first judgment of the Designated Judges made earlier this year in the *Cruz City* case actually turned on a question of public policy. I suspect that might have something to do with the debate we hear this afternoon.

One last thing from me and then I will introduce the advocates. Please bear in mind that this is indeed nothing more nothing less than a role play. This is not in any sense intended to be any form of statement of the law, be it at the fictional State of Olmea, Mauritius or anywhere else. This is a tribunal set up to deal with the application as they hear it today from our advocates, Kwadwo Sarkodie and Rachael O'Grady, who have been brave enough to put themselves on the platform here to argue the case. Rachael

[*] The Then President of the ICC International Court of Arbitration; Independent Arbitrator.

has drawn the short straw in that she is acting for the Republic of Olmea and Kwadwo is going to do his best for the respondent.

Presentation of the Practical Problem

Khemila Narraidoo[*]

Counsel for the Applicant:	Rachael O'Grady[**]
Counsel for the Respondent:	Kwadwo Sarkodie[***]
The Supreme Court of Olmea:	Prof. David Caron[****]
	Hon. Shaheda Peeroo[*****]
	Jeremy Gauntlett Q.C.[******]

I. BACKGROUND TO THE DISPUTE

The Mauritian sugarcane industry has, for decades, been extremely successful. Sugarcane is presently cultivated on 85% of the arable land in Mauritius and approximately 600,000 tonnes of sugar is produced annually, most of which is exported.

Hessington Sugar Inc. ("**Hessington**"), a Mauritian company, has been dealing in the sugar industry for decades. In 2011, given its success in the Mauritian market, Hessington decided to expand and commence operations in the neighbouring island of Olmea.

A. Entry into the Licence Agreement

Hessington entered into negotiations with Olmea's Ministry of Agriculture, with a view to obtaining a licence to cultivate sugarcane in Olmea, on a plantation in the north of the island ("**North Plantation**"). After a period of negotiation, a licence agreement was entered into on 1 April 2011 ("**Licence**") between Hessington itself and the State-owned Sugarcane Corporation of the Republic of Olmea Ltd. ("**SCROL**").

The Licence stated that any disputes that arose would be resolved via ICC arbitration, with three arbitrators. Olmean law would apply, and

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[*****] Judge, The Supreme Court of Mauritius.
[******] Barrister-at-Law, Brick Court Chambers (London).

Olmea would also be the seat of any arbitration. Note that the Olmean Arbitration Act bears an uncanny resemblance to the Mauritian International Arbitration Act (No. 37 of 2008).

B. Early Operations under the Licence

For the first few months of operations of the Licence, business boomed. Hessington found that it rapidly needed to expand its operations to cope with increasing demand from international importers, who quickly discovered the new and distinctive taste of Olmean sugar.

The Minister of Agriculture, who was receiving fixed royalties from Hessington for each tonne of sugar exported on behalf of the government, therefore agreed that a plantation in the south-east of the island ("**South Plantation**") could also be cultivated by Hessington. As both parties were keen to have operations start in this second plantation as soon as possible, no further written agreement was actually entered into with respect to South Plantation. However, both parties acted as if the terms and conditions of the Licence applied to South Plantation as they did to North Plantation (for example, with respect to royalties).

After a while, it became clear that the amount of sugar able to be cultivated in South Plantation far exceeded that able to be produced in North Plantation. This was due to the southern Olmean climate and the fact that the soil in the south of the island was far richer than that of the north. Hessington, therefore, took the decision to wind up its operations at North Plantation and shift all its resources to South Plantation.

During this time, the Olmean President decided to restructure various governmental departments. SCROL, along with the Olmean tea and cocoa corporations, were dissolved and all matters with which they previously dealt were brought under the direct control of the Ministry of Agriculture.

C. Termination of the Licence by Olmea

All seemed to be going 'sweetly' when the Licence was suddenly revoked in November 2011, via presidential decree, which was televised throughout the island. Olmean police immediately took up positions at the entrance to South Plantation, physically preventing Hessington's employees from continuing activity there.

The Minister of Agriculture informed Hessington that the Licence was terminated due to the fact that Hessington had not been paying enough royalties to the government. He explained that, as Hessington was

obtaining a higher price for the sugar that it exported from South Plantation than it had previously been for the sugar from North Plantation (due to the mineral-rich soil giving the sugar an even sweeter flavour), government royalties should have also increased. It later emerged that several requests had been made by the government to Hessington to increase royalty payments, but that Hessington had refused, referring to the fixed fee scheme under the Licence.

D. Commencement of Arbitration Proceedings

Shocked and outraged at the termination of the Licence, Hessington immediately launched ICC arbitration proceedings directly against the Republic of Olmea. In so doing, Hessington relied upon the arbitration clause that had been included in the Licence.

During the arbitration proceedings, Olmea relied on the following arguments:

(i) That the Republic of Olmea was never itself a party to the Licence and could not therefore be a party to any arbitration proceedings;

(ii) That the subject of the Licence was North Plantation, and that no arbitration agreement existed with respect to South Plantation; and

(iii) That the issue of royalties was a matter of public policy and therefore not arbitrable.

Olmea also brought a challenge against the Claimant's arbitrator, Mr. X, disputing his independence given that his granddaughter, drawn by the white sand and sunny climate, recently married in Mauritius, with the wedding reception being held at the Hessington estate itself. Mr. X's granddaughter was also allegedly given a discount by Hessington on the sugar and icing sugar used to make her five-tier wedding cake. Olmea therefore alleged that Mr. X could not have been wholly independent in light of this link to the Claimant. Pursuant to Article 14(3) of the ICC Rules of Arbitration, the challenge was rejected by the ICC Court, which did not give reasons for its decision.

The Tribunal ultimately rendered its final arbitral award in September 2014 ("**Award**"), ruling that:

(i) In accordance with Olmean law, it did have jurisdiction *rationae personae* (i.e. having jurisdiction over the person of the State) over the Republic of Olmea given that Licence had been negotiated, performed and terminated by the government, which had therefore implicitly consented to the Licence;

(ii) It did have jurisdiction *rationae materiae* (i.e. subject matter jurisdiction) over disputes arising from operations at South Plantation as, in accordance with Olmean law, the scope of the arbitration agreement contained in the Licence extended to such disputes. The Tribunal reasoned that, as a matter of Olmean law, the parties' conduct had made it clear that the Licence had been intended to extend to activities at South Plantation; and

(iii) That the Licence was clear in providing for fixed royalties and, thus, the increased revenue from South Plantation should not have resulted in higher payments by Hessington to the Olmean government.

In November 2014, Olmea brought an action before the Olmean Supreme Court to set aside the Award. It is this action that is being heard today.

Note that the three issues argued in the arbitration will be the grounds for the set-aside application, together with a fourth ground concerning the challenge of Mr. X. These are brought on the following grounds under section 39 of the Olmean Arbitration Act:

(a) *Rationae personae* standing of the Republic of Olmea – Section 39(2)(a)(i);

(b) *Rationae materiae* jurisdiction over South Plantation – Section 39(2)(a)(iii);

(c) Royalties are a matter of public policy – Section 39(2)(b)(ii);

(d) Challenge to Mr. X – Section 39(2)(a)(iv).

E. Relevant Statutory Provisions

The Olmean Arbitration Act

Section 39: Application for setting aside as exclusive recourse against arbitral award

(1) Any recourse against an arbitral award under this Act may be made only by an application to the Supreme Court for setting aside in accordance with this section.

(2) An arbitral award may be set aside by the Supreme Court only where –

(a) the party making the application furnishes proof that –

(i) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Republic of Olmea; or

(ii) it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or

(iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or,

failing such agreement, was not in accordance with this Act; or

(b) the Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Olmea; or

(ii) the award is in conflict with the public policy of the Republic of Olmea; or

(iii) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

(iv) a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award by which the rights of any party have been or will be substantially prejudiced.

(3) Notwithstanding subsection (2)(a)(iii) and (iv) –

(a) where decisions on matters submitted to arbitration can be separated from decisions on matters which were not so submitted, only those parts of the award which contain decisions on matters not submitted may be set aside;

(b) the Court shall not set aside an award on a ground specified in subsection (2)(a)(iv) where the agreement of the parties was in conflict with a provision of this Act from which the parties cannot agree to derogate.

(4) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 38, from the date on which that request had been disposed of by the arbitral tribunal.

(5) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(6) Where an application is made to set aside an award, the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

II. SUBMISSIONS OF THE PARTIES

A. First Ground: *Rationae Personae* Standing of the Republic of Olmea

1. Submission on behalf of the Applicant

Rachael O'Grady: Many thanks, my Lord. Honourable Judges, members of the public gallery, it is a pleasure to be here today.

As just stated, the first ground upon which Olmea challenges the Award rendered by the tribunal is that Olmea itself was not a party to the arbitration agreement. Indeed, under Olmean law, this arbitration agreement, in order to be valid, must follow the usual rule in international arbitration which states that only parties who have actually executed an agreement to arbitrate are bound to arbitrate their disputes. In our case, the arbitration clause was in the Licence and SCROL signed the Licence. It, therefore, cannot be bound *rationae personae*. This is so for four reasons.

As I have said, SCROL signed the Licence and SCROL is a separate legal entity to the State of Olmea. Just because it is a State-owned entity, this does not afford it any special status. International arbitral tribunals have recognised this. In our case, Olmea could very well have entered into the Licence but it did not; it chose SCROL to enter it and, therefore, Hessington knew that it was contracting with SCROL and not the State.

Secondly, even though the Licence, and I concede, was signed by a Minister on behalf of SCROL, this does not automatically bind the State.

You will all know, Honourable Judges, the famous *Pyramids* case[1] which demonstrates this point. There was a contract between a private entity and a State-owned entity. The Egyptian Minister, just like the Olmean Minister, signed the agreement and at a later date, the government terminated the project and arbitration proceedings were commenced against it just like in Olmea's case. The State denied jurisdiction on the grounds that it had not agreed to be bound by the arbitration agreement. As in our case, the tribunal disagreed and the State ultimately brought an action to set aside the award in Paris. The Paris Court of Appeal ruled in Egypt's favour and it set aside the award and that decision was upheld by the *Cour de Cassation*.

Again in ICC Case No. 8035, the tribunal followed the reasoning in the *Pyramids* case which had similar facts and a similar result. In the *Westland* case[2], another ICC case first heard in 1984, again similar facts were involved.

Thirdly, just because the Olmean Minister signed the Licence does not alone raise a presumption that Olmea as a State is a party to the agreement. Professor Emmanuel Gaillard has suggested that if a contract is to be signed by a State-owned entity or a State official and its intended that the government itself be bound by the arbitration agreement contained within it, that specific wording is included to that effect. No such wording can be in found in our case.

The arbitral tribunal has ruled that, as a matter of Olmean law, it had jurisdiction over Olmea because, apparently, the Licence had been negotiated, performed and terminated by the State. Leaving aside the factual burden, the arbitral tribunal was not bound to apply Olmean law when deciding this point. The ICCA's Guide to the Interpretation of the 1958 New York Convention states that there is actually no uniform consensus about the law that should apply in deciding whether a non-signatory is bound or not by an arbitration agreement. Some, like the arbitral tribunal in this case, have decided that it should be assessed according to the law governing the seat or the contract itself. However, ICCA's guidelines state that some courts, including the French and English courts, have assessed the issue "*through the application of international principles or* lex mercatoria *considering it mainly a matter of fact and evidence"*.

One of the most famous international principles and examples of *lex mercatoria* is that of the doctrine of *pacta sunt servanda*. It means that

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1 Cass. civ. 1ère, 6 January 1987, *SPP v. Egypt,* Rev. arb. 1987, p. 469, note Ph. Leboulanger; *JDI* 1987, p. 638, note B. Goldman (hereinafter "*Pyramids*").

2 ICC Interim Award of March 5, 1984 in case No. 3879, XI Y.B. COM. ARB. 127 (1986).

each party must carry out their obligations as stated in the contract in good faith and interpret them reasonably.

In *Petroleum Developments v. Qatar*[3], the arbitral tribunal rejected the laws of Abu Dhabi and England and, instead, applied "*principles rooted in the good sense and common practice of the generality of civilised nations"* and that is exactly what the tribunal should have done here. It should have applied, or at least have considered applying, international principles because if it had done so, it would not have concluded that Olmea was bound.

My final point in regard to this ground, even if Olmea was somehow bound by the Licence, it does not mean that it was also bound by the arbitration clause. Pursuant to the doctrine of autonomy and separability, it is not because the contract is valid that the arbitration clause contained within it would necessarily also be so and vice versa. In fact, Olmean law provides that agreements to arbitrate may only be valid if in writing. Because of the autonomy of the arbitration agreement from the main contract, the existence and extent of a parties' consent to it, is necessary to establish jurisdiction and that does not exist in this case. In effect, the tribunal has stated that jurisdiction *rationae personae* over Olmea is established because it had implicitly agreed to the Licence and so it completely missed the point.

For those reasons, I request that the Award rendered against the State of Olmea be set aside under Section 39(2)(a)(i) of the Olmean Arbitration Act.

2. Submission on behalf of the Respondent

Kwadwo Sarkodie: Honourable Judges, good afternoon to all of you in the public gallery. The application to challenge the arbitral Award in favour of my client, Hessington, is misconceived and bound to fail.

The relevant statute is the Olmean Arbitration Act. I submit to you today the extremely limited circumstances in which the Court should intervene in an arbitration award.

Coming now to the first point raised by my learned friend, it was SCROL who entered into the Licence. It was a 100% State-owned entity. The Licence provided for the development of a public resource at the State of Olmea. Royalty payments were paid under the Licence and collected by the Olmean government. When SCROL was dissolved, this was solely due to the decision of the Olmean government. Following the dissolution,

3 *Petroleum Development (Qatar) Ltd. v. Ruler of Qatar* (1950) 18 ILR 161.

SCROL's rights and responsibilities were henceforth exercised and discharged by the Olmean Ministry of Agriculture.

My learned friend has been at great pains to claim that SCROL, who signed the Licence, is a separate entity to the State of Olmea. However, no regard has been paid to the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") which provides assistance in the present case. Article 4 of the ILC Articles provides that the conduct of any State organ shall be considered an act of that State. This is supported by Article 5 of the ILC Articles which goes on to say that, the conduct of a person or an entity which is empowered by the law of that State and acting accordingly, as was SCROL and the Minister in this case, shall constitute an act of that State.

It follows, therefore, that the Minister and SCROL, upon entering into the arbitration agreement, did so on behalf of the State and bound the State of Olmea to that agreement. Issues of attribution of conduct of a State to a State entity are considered in the case of *Maffezzini v. Kingdom of Spain*[4]. The respondent in that case opposed the jurisdiction of the tribunal arguing that the dispute was not against the State but rather against the private corporation.

*Prof. David Caron***:** You are referring to a bilateral investment treaty case while here we are sitting and considering a contract case in commercial arbitration. Does that make a difference?

Kwadwo Sarkodie: The principles to be considered in investor State disputes and in treaty disputes with regard to international trade can be applied equally to situations such as the present one where a significant investment is being made by an investor into a State following the case of *Texaco v. Libya*[5]. Therefore, conduct that has the essential elements of governmental function which is not merely commercial should result ordinarily in the attribution of the conduct of the State-owned entity to the State.

To address my learned friend's second point, I would point out that the cases that have been relied on and cited in support of the contentions that, signature by the Minister does not bind the State, can be distinguished from the present set of facts. In the present instance, we have a situation where the Minister's signature was added to the Licence simply to bind to

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4 *Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7 (Decision on Jurisdiction of 25 January 2000) (hereinafter "*Maffezini*").

5 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of Libya* (1979) 53 ILR 389.

that Licence. No statement was made as to the capacity of the Minister in the signing of that Licence, save that it was binding SCROL and, indeed, binding the State of Olmea to that Licence, as entered into with Hessington.

As to my learned friend's third point, simply because Olmea did not sign the Licence itself in no way means it is automatically excluded from the scope of the arbitration clause as Olmea has tried to argue. Perhaps, the most relevant authority here is the decision in *Dallah v. Pakistan*[6] as delivered by the French courts.

In *Dallah*, Pakistan was not a signatory to the agreement in question but it, indeed, negotiated and had taken various additional steps in relation to it. The Supreme Court of the United Kingdom found Pakistan not to be bound by the agreement, the French court found the opposite. The reason for the difference primarily stems from the fact that the English Court took the common intention approach. However, the French court took an involvement approach under which it took account of the extensive involvement on the part of the State of Pakistan and found that Pakistan was to be bound. It is respectively submitted today that the French approach offers a more predictable approach on a given set of facts. Further, I would submit that, were that approach adopted, it would be clear that the State of Olmea is indeed bound to the agreement under the present set of facts.

Jeremy Gauntlett Q.C.: If you are wrong on that and we go the other way, what then, if we do not follow the French approach?

Kwadwo Sarkodie: What I would submit is that, when following the English approach, it was then necessary, in order to discern intention, to look to the law of the seat, in that instance it was French law. French law in that instance permitted them recourse to matters under Pakistani law which assisted the court in reaching the conclusion that it did.

What I would submit to you today is that there is not a similar permission under Olmean law to permit that line of inquiry into the underlying law governing the government in question. I would still submit the same conclusion would ultimately be reached and in that case would not be of assistance to my learned friend.

My learned friend has also mentioned business principles and *lex mercatoria* and why these should apply instead of Olmean law. That is not sufficient to displace the applicability which the tribunal chose perfectly in this instance to apply Olmean law to the question.

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6 *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 (hereinafter "*Dallah*").

In any event, I would submit that the conduct of the State of Olmea in the present case has been entirely contrary to good faith. What we have here is a State which has received substantial investment to develop an important natural resource, received significant royalties in relation to that, has then sought to increase those royalties when that business has flourished and then when it was not able to pursue its negotiating position to the outcome it wanted, it then sought to extinguish the investment.

Prof. David Caron: The question here is whether Olmea is a party to the arbitration agreement, not whether it acted in good faith. That would be a subsequent question.

Kwadwo Sarkodie: I acknowledge that.

As to the fourth point that has been raised by my learned friend, notwithstanding the separability of the arbitration agreement from the remainder of the Licence, once again, the conduct of the State of Olmea has consistently been that it has been bound to the Licence in its entirety including the arbitration agreement. It would be inequitable for the State to be able to deny the impact of the arbitration agreement which it signed up to and bound itself to.

As a fifth and final point in addition, I submit, that SCROL's winding up automatically made the state of Olmea bound in any event. I refer you to Section 7(1) of the Olmean Arbitration Act which provides that an arbitration agreement is not discharged by the winding up of a party and indeed may be enforced by or against the representatives of that party.

To the extent that the State of Olmea was not bound at the outset, when it took the decision to dissolve SCROL, it acted as a representative and did become a successor of SCROL and it adopted and assumed its rights and obligations under the arbitration agreement.

In summary, taking each of the points my learned friend raised, the acts of SCROL can properly be attributed to the State. A signature of the Minister was not qualified in any way and is, therefore, apt to bind the State. Having regard to SCROL's conduct in relation to the Licence, it is capable of being bound by that Licence even to the extent that it is deemed not to have signed it. While separable from the Licence, the arbitral agreement was part and parcel of the agreement to which Olmea signed up and, in any event, upon the dissolution of SCROL, adopted the rights of SCROL under the Licence.

Prof. David Caron: Thank you counsel. Going back to the applicant, the Court does have questions. Do you wish to have a brief rebuttal?

3. Rebuttal by Counsel for Applicant

Rachael O'Grady: May I have a brief rebuttal.

In relation to my learned friend's first point, as Lord Caron rightly pointed out, the ILC Articles and the *Maffezzini* case have absolutely no place whatsoever in the current matter.

With regard to my learned friend's second point, you have stated that the ICC cases which I referred to bear no weight. I refute that. The principle remains that the act of a Minister does not automatically bind the State. In fact, the confusion thrown upon by these cases goes to my point: that specific wording must be included if the intention is to bind the State.

If I may, I would like to answer Lord Gauntlett's question: what then? If we did follow the *Dallah* approach that the English courts took, then the tribunal would have looked at the intention of the parties at the execution of the agreement and realised that there was no intention on the part of Olmea under Olmean law to enter into the agreement. In this case, Hessington has provided no evidence at all of any intention on the part of Olmea.

In relation to your fourth point, good faith, I must answer this point even though it is not specifically relevant to this. It is Hessington, by trying to take advantage of getting a price for sugar which it knows is worth more than it is paying – that cannot be allowed. We have acted in good faith all along.

Finally, regarding the winding up issue, the arbitral tribunal has absolutely no jurisdiction over bankruptcy claims. This is a private contract. If you do wish to pursue SCROL, then you must do so through the normal bankruptcy procedures with the creditors.

Prof. David Caron: If I could ask one question to the applicant. Part of the argument, you put aside the signature of the Licence. The argument by Hessington is that Olmea succeeds to, not only the benefits, but also the obligations. In the stipulated facts that we have, there is a period of time between the restructuring and dissolving of SCROL and the Licence being revoked. There was a period of time when Olmea stood in the shoes of SCROL, did it not?

Rachael O'Grady: I think actually SCROL was dissolved before the South Plantation Licence was entered into and if Olmea had stood in SCROL's shoes at any time, it would have been under the first Licence only.

We are not any longer concerned with the first Licence. We are under the second Licence, and at all times, Hessington has been participating with Olmea in a second Licence and this is a separate contract.

B. Second Ground: *Rationae Materiae* Jurisdiction over South Plantation

Prof. David Caron: Counsel, I will save you from this argument! We can proceed to the next ground. You have three other grounds I gather, the applicant in this case. If we go to the second, it is that you dispute the question of whether the tribunal possessed subject matter jurisdiction over the South Plantation that was later added to the Licence. That is the issue in the case that is brought under Section 39(2)(a)(iii). Please present your arguments on that question.

1. Submission on behalf of the Applicant

Rachael O'Grady: In relation to the second ground, Olmea maintains that the arbitral tribunal did not have jurisdiction over disputes arising from South Plantation essentially because the South Plantation activities arose as a result of a different contract by conduct.

First, the arbitration agreement is not in writing and, therefore, does not comply with the requirements of Olmean law. You could have, like in our case, a contract that has arisen orally in relation to South Plantation but that would not mean a valid arbitration clause had also arisen. Section 4(2) of the Olmean Arbitration Act as well as Chapter VII of the UNCITRAL Model Law provides that an agreement is only in writing if its contents are recorded in any form, and there is nothing to suggest that in our case.

Jeremy Gauntlett Q.C.: Does this whole argument depend on what you have done in splitting what you have termed the Licence Agreement from what I would term a South Plantation Agreement?

What we know from the factual statement is that in writing in paragraph 4 there is an arbitration reference, it is in the Licence. Then in paragraph 6 the Minister of Agriculture thereafter agrees what I would put to you is an extension of the agreement to the South Plantation: not two agreements, not a lapsing of the Licence, no oral agreement, as I think you are suggesting.

Rachael O'Grady: It is the State of Olmea's case that a separate agreement arose, for a separate area, sugar of a completely different quality, a new employment workforce. Therefore, it is not enough to presume that the arbitration agreement could also be extended to cover disputes arising from South Plantation.

Prof. David Caron: As far as the facts have been presented, everything about the South Plantation is conducted in the same way as the North Plantation. There is no separate Licence to even be on the South Plantation and, presumably, that is a requirement of Olmean law.

Rachael O'Grady: It is. We see that in the facts as well: there was no time to enter into a new Licence and Hessington should have known that a new Licence should have been entered into, but a new Licence was created orally but that does not mean that the arbitration agreement can also be created orally.

Justice Peeroo: It is said that the Minister of Agriculture agreed that the plantation in the South could also be cultivated and that no further agreement was actually entered into. Both parties acted as if the terms and conditions of the Licence applied to the South Plantation. In what way are you saying that these facts do not show that there has been an extension?

Rachael O'Grady: What I am saying is that the facts, in Olmea's submission, suggest that an oral agreement has arisen through the conduct of the parties and it is through the conduct of the parties that the parties are now operating in South Plantation. What they did not do was put an arbitration agreement in writing in respect of the second one. If you read, as you are well aware, according to the Olmean Arbitration Act, this is a strict requirement.

Prof. David Caron: If I might turn to the representative for Hessington.

2. Submission on behalf of the Respondent

Kwadwo Sarkodie: I would submit that the arguments by the applicant on the present ground rely on technicalities, nit-picking, and alleged non-compliances such as failure to record the agreement in writing.

Before I actually address that, I would comment on the general approach in relation to international arbitration which I submit is in the

entirely opposite direction. I refer to an extract from Lord Hoffmann's judgment in the *Fiona Trust* case[7] noting that:

> "The construction of an arbitration clause should start from the assumption that parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they entered or purported to enter to be decided by the same tribunal."

As far as the requirement that the agreement be in writing, as set out in Section 4(1)(b) of the Olmean Arbitration Act, it is not denied that this is a requirement. However, while there was no separate written arbitration agreement pertaining to the South Plantation, the original Licence and the original arbitration agreement still stands.

I entirely refute my learned friend's contentions about there being two separate licences or two distinct projects. It is clear from the facts that following successful operations in relation to the North Plantation under a Licence, those operations then expanded into the South Plantation, and subsequently were at all times subject to the same written Licence containing a written agreement to adjudicate.

Further, it is common and, indeed, an invariable business practice that transactions such as this one would provide for international arbitration. The parties expressly included this in the Licence.

If there were a separate Licence or a separate agreement in relation to the South Plantation, it is, I submit, unthinkable that either party would have intended or considered that there would be no international arbitration agreement within that Licence.

Further, and in any event, the requirement with regard to writing is fully met in the present case. What we had is an agreement by conduct simply to expand the scope of the Licence, but all other terms remained unchanged and binding between the parties.

Prof. David Caron: Are there questions from the panel? Could I ask briefly if we are in agreement that there is a Licence for the North Plantation and a valid arbitration agreement there? Is this not simply, as counsel just suggested, a case of interpreting the geographical scope of the Licence that was given for the North Plantation?

Rachael O'Grady: It is Olmea's case that it is not and that Olmea wanted different royalties because of the different sugar, and it was a different

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7 *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others* [2007] UKHL 40.

location. In order to be able to extend the arbitration agreement, it would have to be, first, absolutely certain that the contract was very closely connected to the original one and, in my submission, it was not.

It must also be established that the parties' intention at the outset of the agreement was that, when the arbitration agreement was drafted, that disputes arising under supplementary or ancillary agreements could be included. No one even knew that the South Plantation possessed such great sugar and so, at the outset, when the arbitration agreement was drafted, it is Olmea's submission that disputes arising from another agreement in South Plantation would never have arisen and, therefore, it is unjust to assume Olmea's consent.

C. Third Ground: Royalties are a Matter of Public Policy

Prof. David Caron: If we can turn to the third ground raised by the applicant, and this is assuming the tribunal had jurisdiction both over the subject matter and over Olmea, there is an objection concerning that royalties are a matter of public policy. This is under Article V(2)(b) of the New York Convention. Could you please present the arguments of applicant on this question?

1. Submission on behalf of the Applicant

Rachael O'Grady: Olmea's third ground to set aside the Award is based on the contradiction of Olmean public policy. International arbitration has emanated from the will of States which reserve a zone for arbitration in their respective national legal systems. In essence, it means that the State is giving up jurisdiction over certain matters and disputes and entrusting private bodies to resolve them. It also means entrusting those private bodies in rendering proper justice and observing the rule of law.

It is, therefore, completely legitimate and normal for States to supervise and keep control over this process. Our case involves the exploitation of a natural public resource of Olmea. States cannot afford to sacrifice jurisdiction over such matters which is why they, and therefore Olmea, have a sovereign right to keep matters that are so fundamental to the social, economic and political equilibrium of the country out of the arbitral tribunal's jurisdiction and that is exactly what Olmea has done here.

The ILA's Recommendations on Public Policy recognise the inherent and ultimate right of a State to determine by itself what constitutes issues of public policy in its territory and in its jurisdiction. The principle is

also embodied in the New York Convention, Article V(2)(b) and the Model Law. The ILA's Recommendations on Public Policy also provide that public policy exceptions should serve the economic and social and political interest of the State. Thus, Olmea's decision to deem royalties arising out of sugar exports as a matter of public policy must be respected.

Olmea is a small island. Almost its entire income is generated from the sugar exports. These are exactly the kinds of economic and social matters that Olmea has a sovereign right to regulate the way it sees fit and which falls squarely within the realms of public policy. I, therefore, urge you to set aside the Award on this ground.

Jeremy Gauntlett Q.C.: How do you distinguish the judgment of the Court to which we would sometimes have regard to from the *Cruz City* judgment[8] of the Supreme Court of Mauritius?

Rachael O'Grady: The *Cruz City* judgment held that the domestic public policy of a State should not be a ground to set aside an award, and instead it should be the international public policy of a State. Olmea begs to differ and urges that you take into consideration the specific facts and circumstances of this case and apply domestic public policy.

In the alternative, I also submit that, in any event, two grounds of international public policy have been breached here. I am reading from the ILA Report on Public Policy which sets out examples of international public policy. The first example – and this is the ground we are coming onto in a minute – of procedural fundamental principle is the requirement that tribunals be impartial.

An example of a substantive fundamental principle is the principle of good faith. I submit that Hessington is trying to take the sugar for a lower price than it should pay. Therefore, I submit that, on the ground of good faith, which is a matter of international public policy that this Award could also be set aside.

Justice Peeroo: It would be good to know exactly what point was raised before the arbitral tribunal in respect of the royalties being a public policy matter. When we look at the decision of the arbitral tribunal, it says that Licence was clear in providing for fixed royalties and thus the increased revenue from South Plantation should not have resulted in higher payments

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8 *Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor* [2014] SCJ 100 (hereinafter "*Cruz City*").

by Hessington to the Olmean government. What was Hessington asking the tribunal to decide?

Rachael O'Grady: Olmea relied on the four grounds which it is today relying upon throughout the arbitration. In the arbitration, Olmea submitted that the subject matter of royalties on sugar exports were a matter of public policy which should be excluded from the arbitration agreement, but the tribunal could have been said to have acted *ultra petita*.

I want to refer to the facts. It decided that the Licence was clear for providing fixed royalties and thus the increased revenue from South Plantation should not have resulted in higher payment from Hessington. What Olmea requested the tribunal to rule upon was the issue of public policy and, in fact, it could be argued that the tribunal did not do that, which is yet another reason to set the Award aside.

Justice Peeroo: This has not been raised as a ground. You have not made this submission one of the grounds that the arbitration tribunal acted *ultra petita*.

Rachael O'Grady: May I seek leave to submit further grounds?

Prof. David Caron: No, you cannot, and in the interests of the Court's time and in the interests of the gallery we will proceed to comments on this ground.

2. Submission on behalf of the Respondent

Kwadwo Sarkodie: What I would like to submit is that public policy essentially relates, and I am quoting from the *Parsons & Whittlemore v. Société Générale* case[9], that the forum states most basic notions of morality and justice, that is, the moral, political, economic order of the State.

Olmea's arguments, however, would seem to put a far wider and more subjective conception of public policy whereby an issue which may touch on public interest and rights in any way. I would submit to you that, if such an interpretation were adopted, it is difficult to see how any arbitral decision involving a State and a major investment project would be safe.

Thankfully, however, the clear prevailing trend in international arbitration is that public policy should be subject to a restrictive interpretation. What I would submit is that, it is illustrative of the general

[9] *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA)* 508 F.2d 969 (2d Cir. 1974).

trend towards a restrictive interpretation of public policy and a trend towards avoiding using public policy objections to stand in the way of upholding and enforcing awards. This has been touched in the *Cruz City* v. *Unitech* judgment. It is firmly recognised that the public policy applicable, as my learned friend has set out, was not domestic public policy but was rather international public policy.

I submit that no basis is established to set aside the Award for being contrary to the public policy of Olmea.

A. Fourth Ground: Challenge to Mr. X

Prof. David Caron: Do my colleagues have any questions to raise? Then we proceed to the last ground. You raise an objection under Section 39(2)(a)(iv) and this involves the resolution of the challenge to Mr. X. The Court notes that, as to Mr. X, it was found by the ICC Court that the challenge was rejected. Perhaps you could proceed from that point.

1. Submission on behalf of the Applicant

Rachael O'Grady: As you have seen from your facts, Mr. X's granddaughter got married in Mauritius on Hessington's estate and received a financial discount on the sugar for her wedding cake. Yes, the ICC Court has already ruled against the challenge. However, this Court does have authority to revisit that decision if it could, on the facts, which have been manifestly wrong and it is Olmea's case that it was.

May I remind the Honourable Judges that the standard for arbitrators to remain independent and impartial is very high.

Prof. David Caron: The Court would agree with very high standards. You mentioned that you brought your challenge quickly and appropriately. The Court would wish to refer you to Section 14(3) of the Olman Arbitration Act which says: if your challenge is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request the Permanent Court of Arbitration ("PCA") to decide on the challenge. Would that have been the timely option in this case?

Rachael O'Grady: The State of Olmea brought its challenge before the ICC Court extremely quickly and upon rejection, Olmea states that the provision which you have quoted provides an option, not an obligation at all, upon a State to bring a further challenge before the PCA. If it had been an

obligation, then of course, Olmea would have brought an immediate further challenge before the PCA.

Jeremy Gauntlett Q.C.: That argument turns entirely on the word "may".

Rachael O'Grady: That is correct.

Jeremy Gauntlett Q.C.: This provision, Section 14(3), you would agree mirrors Article 13 of the Model Law?

Rachael O'Grady: That is correct.

Jeremy Gauntlett Q.C.: Surely the "may" is quite obviously permissive in saying you do not have to bang on if you do not want to proceed with a challenge but you may. Is it not saying, if you do wish to do that you have to go through the hoop of the PCA? You cannot simply say I am going to deviate and go off to some other forum.

Rachael O'Grady: Absolutely not. The Model Law was debated and discussed at length and if that had been the intention, then that would have been reflected as an obligation. I believe the Model Law was created to allow parties a certain amount of discretion.

Jeremy Gauntlett Q.C.: Section 14(3) of the Olmean Arbitration Act provides that: *"[w]here a challenge under any procedure agreed by the parties or under the procedure set out in subsection (2) is not successful, the challenging party may, within the 30 days [go to the PCA]."*

Rachael O'Grady: That is my submission.

Jeremy Gauntlett Q.C.: It would have an obligatory further appeal.

Rachael O'Grady: Yes.

Justice Peeroo: I refer you to Section 2(d) of the law of Olmea about waiver of right to object. Would the fact that the State did not use the option to go to PCA amount to a waiver?

Rachael O'Grady: No. Upon the receipt of the decision by the ICC Court, Olmea took the decision based on its circumstances to instead reserve all of

its rights in relation to Mr. X's challenge so that it may bring a later appeal and it was because of a lack of legal funding at that time.

Prof. David Caron: In the interests of time, I turn to opposing counsel. The Court would like to understand the significance of the fact that the ICC Court's rejection of the challenge is done without reason and what reasons and what significance should the Court give to that?

2. Submission on behalf of the Respondent

Kwadwo Sarkodie: I would respectfully submit that the Court should ascribe very little or no significance to the absence of reasons. The ICC Rules of Arbitration do not require reasons to be given in respect of such decision.

It has often been observed that courts should accept jurisdiction over a challenge to arbitrators only if the arbitration rules do not provide for another body to first resolve the issue. In the present instance, this issue had been resolved by reference to the ICC fully in accordance with its Rules.

I refer you to the *Republic de Guinée* case[10], a French case. The tribunal of first instance there observed that, by selecting an arbitral institution, what parties were doing was agreeing to adhere to its procedural rules and therefore empowered the institution to resolve any difficulties that might arise. That, I would submit, is no more or no less than what has taken place in the present case.

If I might address you briefly further about the nature of the objection of Mr. X?

Prof. David Caron: Very briefly.

Kwadwo Sarkodie: I want to refer you back to Sections 13(a) and 13(c) of the Olmean Arbitration Act. The present case before us is a wedding which took place on the Hessington estate in Mauritius. The closest that my learned friend can come to pointing to anything unusual is a discount on the sugar on the wedding cake.

It is submitted that such a small gesture is entirely within the range of what one would usually expect from a wedding venue. As an alleged connection between the arbitral member and Hessington, this really is most tenuous, indeed. Having regard, for instance, to the IBA Guidelines on

[10] TGI Paris, réf, Oct. 30, 1986, *République de Guinée v. Chambre arbitrale de Paris*, 1987 Rev. arb. 371.

Conflict of Interest, I am not sure this would even make the bottom of the green list.

It is for those reasons which I would respectfully submit that there is no basis for challenging or contesting or failure to enforce this Award on the grounds of Mr. X's appointment which, in any event, has been fully and properly dealt with by the ICC Court.

III. DECISION OF THE SUPREME COURT OF OLMEA

Prof. David Caron: In this instance, the Court will deliver its unanimous judgment. The judgment on ground 1 will be given by Judge Gauntlett Q.C. Judge Peeroo, will you go with ground three first?

Justice Peeroo: I will give my judgment on ground 3 on the assumption that there is jurisdiction. It has been contended on behalf of the Republic of Olmea that the issue of royalty is a matter of public policy and is, therefore, not arbitrable. The question that arises is what is meant by public policy of the Republic of Olmea.

In the case of *Cruz City*, the Court held that it is a public policy in the international context that will matter and not the public policy that will normally apply when challenging a domestic award. Since the law of the Republic of Olmea is more or less the same as Mauritian law, this case is applicable to the present matter.

On the issue of royalties, the question appears to be whether Hessington had to increase royalties in view of the increase in revenue derived from the South Plantation.

The facts presented show that there was a commercial agreement whereby royalties were paid by Hessington to the Minister of Agriculture for the account of the government of Olmea. The facts further reveal that the government of Olmea had made a payment of royalties a term and condition of the Licence Agreement which seems to have been subsequently extended to the South Plantation. I am saying this because I consider that this tribunal would have decided that in fact the State of Olmea was a party and there has been an extension.

If that is not the case, if there is a change, then I would say, if at all, this has been decided otherwise, but still on the issue of public policy, which I am dealing with, this is what I would have decided. Payment of royalties was a term and condition of the Licence Agreement itself and that Licence Agreement itself contained a statement that any dispute will be resolved by arbitration.

The Licence bears the signature of the Minister. In my view, the government of Olmea has, therefore, itself subjected the issue of royalties to an arbitration clause. It is, therefore, unlikely that the argument that the issue of royalties is not arbitrable and is a matter of public policy will be accepted by this Court.

However, if Hessington had sought to interfere with the government of Olmea's decision to stop Hessington from cultivating sugarcane, it could then have been argued that there could and there would have been an issue of public policy to be determined. The matter in issue here relates to the financial implications of an agreement to which the State is a party and which contains an arbitration clause. Obviously, a private arbitrator would not have been allowed to interfere with the sovereign decision of the State. However, even then, the consequences of such a decision would probably have remained arbitrable such as a demand for compensation, so it would have been arbitrable as to the extent of compensation payable as a result of the sovereign decision. In these circumstances I consider it reasonable to conclude that there is no issue of public policy that arises and the third ground therefore fails.

Prof. David Caron: Judge Gauntlett and I are now co-ordinated. I will give the judgment on ground 1 where it was argued that Olmea was not within the jurisdiction of the arbitral tribunal.

We do not view the issue as one of significance of the signature on the Licence but rather we rest it on the fact that there was a period of time where the Republic of Olmea, having dissolved SCROL, continued to receive the benefits under the contract, under the Licence, and assumed the position of SCROL in that Licence Agreement.

We find this to be correct under Olmean law, which we believe to be the applicable law, and so the first ground is denied as well.

I turn to my colleague, Judge Gauntlett, to speak on the second ground: jurisdiction.

Jeremy Gauntlett Q.C.: The second jurisdictional issue which is raised goes to the question of subject matter. As was argued on behalf of Olmea, what was termed a completely different agreement arose between the parties; one which, secondly, was not on the facts before us in writing and, thirdly, and most catastrophically, it was suggested that Hessington lacked an arbitration agreement such as would comply with the Olmean Arbitration Act which we must apply, namely because it was not reduced to writing. It seems to me that the argument fails at each of those levels.

Firstly, it is evident that there was no completely different agreement which arise between the parties. The original agreement was one which took the form of a Licence Agreement in relation to which there was a provision for arbitration reference in extremely wide terms. These, as they are reflected to us, are simply that any disputes that arose would be resolved via ICC arbitration. What happened subsequently is an extension of the agreement to embrace the South Plantation and the parties acted entirely as if the terms and conditions of the original Licence applied to South Plantation as to North Plantation including the issue of royalties.

We would hold that there was no completely different agreement. We would hold that the arbitration reference remained unchanged in its original recorded written form.

The Olmean Arbitration Act provides in Section 39(2)(a)(iii) the very limited grounds on which one can seek to bring the form of attack we have before us. The section stresses that this is an exclusive recourse against the Award and provides that the ground is that it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains a decision on a matter beyond the scope of the submission to arbitration.

Reluctantly, I return to the point to hold that on the factual characterisation we have, it is quite evident, in our view, that the challenge on the grounds of subject matter jurisdiction must fail.

All that then leaves us to the fourth point. This raises the issue regarding the particular generosity of Hessington displayed in relation to the arbitrator, Mr. X. We would hold that in terms of Section 39(2)(b)(iv), this would potentially be such an irregularity but we do not sit, as it were, in this regard without any reference to the strict procedural requirements imposed by the Olmean Arbitration Act.

We have in Section 14(3) which introduces into the law of Olmea the provision that the PCA may be approached in relation to any challenge following a timeless challenge to the arbitrator. We assume in favour of Olmea that Section 14(2) was timelessly complied with, although this is an assumption made with perhaps disproportionate confidence by Olmea in its argument.

As regards Section 14(3), it is evident to us on the facts stated that there was no such recourse to the PCA. We do not agree with Olmea that the word "may" offers a mere election to Olmea as regards where it might go. We hold that in those circumstances, it cannot succeed.

If greater time were permitted, attention could be drawn to two other things to which I merely make passing reference: paragraphs 62 and 74 of the *Travaux Préparatoires* to the Mauritian International Arbitration

Act. There are important underpinnings for the conclusion which we reach. There is also the enlightening discussion in the 2012 *MIAC Book of Conference Papers* at page 89, in particular the observations by Lord Hoffmann as regards recourse to the PCA.

Prof. David Caron: I thank my colleagues. The application is rejected and at this point, the Court will turn the proceedings over to the sheriff, Mr. Beechey.

PANEL III

CHALLENGES TO ARBITRAL AWARDS AT THE SEAT: PANEL-LED DISCUSSION

Report to the Conference

Vanesha Babooa-Bissonauth[*]

Moderator: Dr. Jacomijn van Harsolte van-Hof[**]

Discussion Leaders: Mr. Peter Leaver Q.C.[***]
Mr. Benoît Le Bars[****]

I. EFFECTIVE MANAGEMENT OF ARBITRATION PROCEEDINGS

A. The New LCIA Rules

At the outset, the moderator, Dr. van Haersolte-van Hof introduced the topic meant to be discussed, which was the challenge of awards at the seat of arbitration. Dr. van Haersolte-van Hof was of the opinion that being able to challenge awards at the seat of arbitration is very important as it is a safety net of protection of the Courts, which should nonetheless be used as a last resort. She referred to Mr. Justice Eder's paper which outlined that indeed this option of a challenge at the seat is truly the exception rather than the norm.

Dr. van Haersolte-van Hof added that lots of efforts need to be made to ensure that recourse to arbitration is effective and successful, and for that to happen institutions can help in various ways like helping the parties get good, diverse and independent arbitrators. Institutions may also set up good institutional arbitration rules that would guide the process and the institutions can monitor the tribunals in applying the rules. She then proceeded to identify a few themes taken from the recent revision of LCIA rules which would show how rules can help in making arbitration more effective and successful for parties.

The first theme identified from the revision of the LCIA rules is the enhancing of the effectiveness and efficiency of arbitration proceedings. One way to make proceedings more efficient is for the rules to provide for the setting up of a timetable for the proceedings by parties soon after the

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tribunal is constituted. The institution must however make sure that tribunals apply those rules and must chase arbitrators to make sure they apply those rules correctly.

The second theme identified by Dr. van Haersolte-van Hof is the inclusion of emergency arbitration provisions in the LCIA rules. She stated that although courts, for example the High Court in London, for instance, may efficiently grant injunctions where needed, this recourse is not always feasible and some parties may prefer going to arbitrators instead of courts for such reliefs. The institution should here ensure that the right kind of arbitrator is provided who can efficiently and effectively issue that kind of relief.

The third and final theme which was identified was parties' representatives' conduct during arbitration. Two aspects of the LCIA arbitration rules were highlighted by Dr. van Haersolte-van Hof.

Firstly, the new LCIA rules, ensure that there is control over the change of counsel by parties in view of the potential abuse that may arise by parties changing counsel or adding members to their legal team at the last minute. Change of counsel now requires approval of the tribunal. Secondly, the new rules also provide in its annex substantive guidance as to how counsel should behave in an arbitration and in fact, parties who sign on to LCIA arbitration effectively agree that their counsel will abide by these rules. Dr. van Haersolte-van Hof concluded by acknowledging that although there were at the moment limited rules to ensure the good conduct of parties' representatives, the revision of the LCIA rules was still an important step forward. The panellists were then invited to proceed with the topics for discussion on the agenda.

B. Counsel Conduct in International Arbitration

Mr. Leaver started by explaining how the new rule regarding counsel conduct came about in the LCIA rules and his contribution thereto. He explained that after the Slovenia case whereby the panel refused to allow counsel to appear, he decided to insert into his terms of appointment, his Terms of Reference and all his procedural orders, a provision that required the notification by a party to the other party and to the tribunal of any change of legal representation within 24 hours of the making of that change. As he found that this provision did not go far enough because of the lack of sanction in case of non-compliance, he further added in the provision that the tribunal reserves the right to refuse to permit a legal representative to appear in the interests of protecting the integrity of the proceedings. Mr. Johnny Veeder came to know about this provision and requested Mr. Leaver

to send it to him, and this is how Article 18 of the new LCIA Rules was created. Moreover, Mr. Leaver was of the view that instead of having numerous protocols and guidelines which provide for forms of conduct, he believes that certainty is needed during arbitration proceedings and similar provisions regarding conduct should be introduced directly in the arbitration agreement signed by parties. He was pleased that LCIA had in fact incorporated this in its new rules but noted that such provisions were in the Annex of the rules under the heading of General Guidelines and believed that they should instead have been in the rules themselves.

Mr. Leaver further shared with the audience the first and only case which he had chaired whereby he had made use of the provision relating to counsel conduct which parties had signed. In this case, the Statement of Defence was signed by a member of Julian Lew's Chambers, that is, the Chambers to which Mr. Leaver belongs. The Claimant objected to this and the tribunal ruled that that particular counsel would not be permitted to appear in the arbitration. As the chairman, he thought that it was necessary to take this position even at such early stage of proceedings and the tribunal even went further to restrict any other counsel from the Julian Lew's Chambers to appear.

Mr. Leaver then spoke about the issue of counsels behaving badly during the course of hearings. He said that he could not envisage situations where this might happened and although it can happen, he could not see himself sanctioning counsel for behaving badly. He ended by highlighting the fact that the presence of client's representative during hearings could be very useful to proceedings as he believed that they get involved into the process and helped matters to progress faster.

II. SECURITY FOR COSTS IN INTERNATIONAL ARBITRATION

As a matter of policy, when a losing party (in particular a defendant) seeks to challenge an award in Court proceedings, ought the Court to order that any amount payable under the award be paid into Court or otherwise secured as a precondition to the making of such challenge?

When addressing this this question, Mr. Le Bars referred to recent reforms under French Law which related to the Arbitral Tribunal's powers to decide on the question of payment of award. He stated that the motivation of the arbitral panel regarding this power was required in order to give background to any judge applying the award regarding the enforceability of the award once the challenge has started. This issue is, in his view, vital because challenging an award and trying to delay payment affects clients, which mostly want awards to be applied and want to be paid

immediately. Mr. Le Bars added that the solution adopted varies from jurisdiction to jurisdiction, and the solution may change depending on where the award needs to be paid or where the enforcement thereof will take place. It was suggested that the rule of law at the seat of enforcement or place of enforcement was an important factor to be discussed between counsel and client as a result.

Mr. Leaver stated that the financial circumstances of the party against whom the award had been made was an important factor he would have considered. If the party was wealthy, he would not have been inclined to make an order but if the party was impecunious or was in danger of insolvency, then other factors would come into play and he might be much more inclined in those circumstances to make such an order. In the English jurisprudence, there is no definitive solution for this issued, and each case has to be judged on its merits.

Mr. Kaplan believes that another factor which needs to be considered when answering this question is the probability that a challenge will be successful or not. If a case is so obviously going to fail, a party cannot be stopped from bringing the case, but then it would be appropriate to order the whole or part of the award to be paid in Court.

A question put to Mr. Kaplan was to what extent he would take into account the fact that granting security does improve potentially drastically the position of the party who would otherwise need to go out and find assets. Mr. Kaplan stated that if the view is that the challenge the award is going to fail, then he does not think that there is any reason why the award holder should not be given some protection, but such power should be exercised only for appropriate cases. Ordering payment of an award, security for costs together with indemnity costs are all part of the armoury the Court should have to prevent challenges from being delaying tactics.

A speaker from the floor then asked the panel whether the fact that the party challenging an award comes from a jurisdiction where enforcement is difficult is a factor which would be considered for ordering the payment of the amount claimed for Mr. Leaver responded by saying that it would be a consideration to put in the scales but would not necessarily be a decisive factor.

Another issue raised was the ordering of the payment of an award in a case where it is a State which is challenging the award. Mr. Leaver stated that if the State had entered into a commercial agreement and an award was delivered against it in its capacity as a commercial trader, then the State would be just as liable to have an order made against it as any other litigant, although the Court would be hesitant there. On the other

hand, if the only place that it was likely that the award could be enforced was in that State then that might be a factor that would drive the Court towards making such an order.

Mr. Le Bars added that very often, in African countries, an Arbitration award is a tool used as a means to negotiate with the State and an award is not only a way to enforce a decision. For example, most States may have reasons, which can be of political nature, to resist an arbitral procedure but due to public interest, they may be forced to change position and negotiate instead in order to move forward quicker in the interest of its population.

Mr. Justice Eder took the view that there should be a distinction as to whether a party is seeking to enforce an award in a country which is not the seat of the arbitration or in a country which is the seat of the arbitration. In the first case, if a party in England sought to enforce an award under the New York Convention, the Courts would have the power to grant an order for security for the amount as a pre-condition of the enforcement proceedings continuing. As regards the second case, Mr. Justice Eder referred to the DAC Report, which sets out the purpose of Section 77 of the Arbitration Act, which is in effect to allow the court to order security where challenge itself will cause problems with regard to the enforcement of the award. According to him, if the challenge in England does not of itself make the enforcement of the award more difficult pending the challenge, then the English courts take the view there should not be in general an order for security for the amount in dispute.

III. CHALLENGES TO ARBITRATORS

What Mr. Moollan wanted to highlight was the vastness of the powers which the International Arbitration Act conferred to the Permanent Court of Arbitration in relation to the challenge of arbitrators. He referred to Section 14 of Act, which relates to the challenge of arbitrators, and which provides that such challenge will lie before the arbitrators themselves and should the challenge not be successful, the mandatory provisions in Section 14(3) and (4) provide that if the party wants to pursue the challenge he may go to the PCA. Under the Model Law, on the other hand, the challenge of an arbitrator would lie before the Court, such that it could this be said that the PCA was actually fulfilling a role which would normally fall to a Court. Mr. Moollan added that the idea behind this was that the party challenging the arbitrator would then not be able, under a recourse provided for under Section 39 of the Act (Article 34 of the Model Law), to ask the Court to reconsider the challenge after the PCA has dismissed the application.

Following a question from Dr. van Haersolte-van Hof regarding the Privy Council being effectively ousted, Mr. Moollan stated that the party challenging an arbitrator before the PCA would not have the power under Section 39 of the Act to raise that issue anew and have another chance of challenging the award. He further referred to the categorisation of jurisdictions as one-tier, two-tier or three-tier jurisdictions and said that what was desired was to attract users to one-tier. The one tier in Mauritius would have been the Privy Council, but with the level of expertise from the Mauritian Judges of the Supreme Court, it made no sense to go straight to the Privy Council. On the other hand, the Privy Council was made the court of last instance of Mauritius. What Mauritius opted for in the end was three designated judges and then an automatic right of appeal to the Privy Council.

He referred to the issue raised by Lord Mance in relation to whether there ought to be an automatic right of appeal and whether there should be a filter for vexatious cases. His view was that, from the three cases which were heard before the three designated Judges in Mauritius, it did not seem like vexatious litigants were automatically going to the Privy Council.

The next question that was put to Mr. Moollan was from Mr. Leaver who wanted to know what the position would be under Mauritian law if the point on independence and impartiality had not been raised at the stage of trying to set aside the award but was raised on enforcement under the Convention. Mr. Leaver further asked Mr. Moollan whether the point on independence and impartiality of the arbitrator could have been raised then (ie on enforcement) or would Mauritian law prevent the point from being raised on the basis that the litigant had not exhausted its remedies by failing to first go to the PCA. Mr. Moollan replied that the answer would depend on the procedure applicable to particular proceedings. If a party is under the New York Convention, then the seat would be outside Mauritius such that the discussion about Section 14 would not apply. If a party is under the Model Law and that party does not bother going to the ICC Court (equivalent to the PCA), then that party's right to object is deemed to have been waived. Particularly if the point relates to the tribunal not being correctly constituted because of lack of independence or impartiality, then it is incumbent upon the party to say so at an early stage of proceedings and not raise it at the last minute thereby letting the whole procedure go infected.

On that issue, Mr. Leaver made reference to a contrary decision in Singapore whereby a party could raise, on an enforcement, a point on the independence and impartiality of the tribunal which had never been raised.

A speaker from the floor, being from Singapore, pointed out that she was aware of the decision in question but thought that it was an odd decision given the general trend towards supporting arbitration in Singapore. Dr. van Haersolte-van Hof, for her part, spoke about a case of the European Court of Human Rights where a notion was enunciated to the effect that if the issue was so profound that one might still want to have the chance to correct it at a late stage. She however conceded that this could possibly encourage bad behaviour and people sitting on issues which they should raise sooner.

IV. ARBITRATION IN THE OHADA REGION

The next topic which was included into the discussion by Mr. Le Bars was dedicated to arbitration in the OHADA region, which is the system of uniform law in Africa. The question related to the Article 29.2 of the CCJA regulations which states that the challenge to the validity of an award is admissible only if, in the arbitration agreement, the parties have not renounced. The question was whether this regulation to renounce was used today and what was its efficiency.

As per Mr. Le Bars, such regulation is not used by the practitioners today because most people do not know that this regulation even exists, and in his experience, he had not seen any arbitration under the OHADA rules or CCJA rules specifically using this possibility to renounce any challenge of the award. Mr. Le Bars opined that a reason why people did not use the possibility to renounce could be that if there is an arbitration under the CCJA regulations, the party obtaining an award did not need to carry out any execution procedure or enforcement procedure because the award itself was directly enforceable in any country of the OHADA region, which meant 18 countries in Africa, i.e. 30% of the territory of the whole continent.

Dr. Gaston Douajni expressed the view that this provision of the CCJA rules was in contradiction with the Uniform Act on Arbitration, in that the Uniform Act on Arbitration foresees the possibility to set aside an award whereas this provision seems to specify that there is a possibility for the parties to prevent the setting aside of an award by renouncing to challenge the award.

Mr. Moollan agreed to the remark made by Gaston and in his opinion, it is not right to have rules like Rule 29.2 of the CCJA rules in rules of arbitration as it is generally recognised that there should be a recourse against an award where the issue challenged is so fundamental (such as failure of due process or public policy) that one cannot contract out of it

privately unless under one exception. He added that the Swiss Private International Law did seemingly provide for such an exception but same had stoked a lot of controversy and is now rejected by the Swiss.

Dr. Besson, on the other hand, stated that his understanding was that it was possible to waive completely any possibility to set aside the award but then it would be possible to raise the same defect at the enforcement stage in Switzerland with a paradox which is if one is a party in Switzerland, and the other is not a party in Switzerland because the other party must have his domicile or residence outside of Switzerland in order for the waiver to be valid but he has waived his right to set aside the award and then he goes for enforcement in Switzerland, the grounds that he can raise are those of the New York Convention which are in fact broader than those of setting aside proceedings. Therefore, in fact the control is more extended if he has waived his right to set aside the award. It is a great paradox in Dr. Besson's view.

Mr. Le Bars added that the issue of the waiver was a main concern in Africa and has been the subject of debates in many jurisdictions in cases where a party would try to obtain a judgment from the local court for breach of public order or due process. He further discussed about the timing for waiving one's right to challenge and he stated that, depending on the legal tradition, in civil law it is difficult to waive a right before one has the right to appeal. It will really be in connection with the legal culture and also the seat of arbitration.

Dr. Gaston Douajni then put a question to the delegates as to whether it is possible to conceive a system of arbitration with no possibility to challenge the award. Dr. Besson pointed out that in Switzerland it was argued that the waiver of the right to set aside the award might be contrary to Article 6 of the European Convention on Human Rights. The Swiss Federal Tribunal very firmly decided that this was not the case and that waiver of the right to set aside the award was valid also under the standards of Article 6 of the Human Rights Convention. Dr. Besson's view was that the point that the waiver was contrary to Article 6 of the Human Rights Convention was a valid one and one could disagree with the case law of the Swiss Federal Tribunal. He also believed that such a case could have resulted in a different outcome had it gone before the Human Rights Court instead.

Further on the subject of the waiver, Dr. van Haersolte-van Hof referred to a new arbitration law in the Netherlands whereby the setting aside proceedings would be centred in five Courts of Appeal and appeals on issues of law would be before the Supreme Court, but parties will be able to contractually opt out of that review. This would however again potentially

bring one within the realm of the limitations of Article 6. Mr. Leaver argued that when a party is waiving its right to appeal, the waiver will only be work if it is done consciously and with the party's consent, such that the question of how there can any infringement of human rights in such a case arises.

V. CORRUPTION IN INTERNATIONAL ARBITRATION

Mr. Leaver raised the said topic in view of the importance it has gained over the recent years. He referred to arbitrations he was involved in and in which corruption had been pleaded. On each occasion, the party pleading and alleging corruption had only been able to identify the red flags showing corruption but had not been able to prove it. He requested for the views of the delegates as to what a tribunal should do when corruption is raised, when a party relies on red flags that any party should have realised give rise to a *prima facie* case of corruption, without any real evidence, and where the other party simply denies that there is a reason why he should have realised this. He requested for their views on a further issue whereby a tribunal raises corruption of its own motion and declines to continue with the hearing. He referred to the case of Uzbekistan in which corruption had not even been pleaded but the tribunal took the view that there was evidence which satisfied it that there was corruption in the case.

Mr. Le Bars acknowledged that corruption was a very difficult issue to address and tribunals were often faced with difficulties in deciding which elements of proof should or should not be considered for determining corruption, which most of the time are hard to identify.

Kathleen Paisley, a speaker from the floor, stated that in her experience there would be a fair amount of burden shifting. If the party alleging corruption has raised a *prima facie* case that had not been rebutted by the other side, then one can put the parties on notice. Not putting them on notice would be a more difficult question. What Ms. Paisley found difficult to conceive was when the issue of corruption is not raised by the parties but by the tribunal which thinks that there is something suspicious happening but where there would be a legitimate reason for neither side to want to raise it. She questioned whether it would be the tribunal's responsibility to do so.

At that point, Mr. Leaver again referred to the case of Uzbekistan when neither side had actually pleaded corruption but the tribunal itself thought there was corruption there and investigated it and decided that it would not entertain the arbitration any further. Mr. Leaver's view was that this was not right as it was not the parties who raised the issue.

Dr. van Haersolte-van Hof, here, drew an analogy with a discussion on competition law ten years ago when people felt that if the parties did not raise issues one could just ignore them and they would go away. Then the European Court of Justice said there are certain issues that basically have to be raised as a tribunal. Even if both parties are in agreement during the arbitration at least that there are no issues of fundamental European law, specifically competition law, then the tribunal just has to raise it itself.

Upon a question of Mr. Leaver regarding the juridical basis upon which an arbitral tribunal exercises that power, Dr. van Haersolte-van Hof replied that she believed that an award would be jeopardised and undermined because of breach of public policy or due process, such that the juridical basis for exercising the above power would fall under the header of public policy.

Mr. Leaver further questioned how the award would be jeopardised if the parties themselves have not raised the issue of corruption. Ms. Adekoya, was of the opinion that arbitrators have an obligation to issue an enforceable award. Therefore, even if the parties do not raise it, if the arbitrators have their doubts then they have an obligation to raise the issue of corruption and address on it making a determination on the matter, such that any award given at the end of the day would be more likely to be enforced.

Another question put by Mr. Leaver was in what circumstances would the tribunal raising the issue of corruption would be able to tell the parties to produce evidence in order to prove that they have not done anything wrong. Ms. Paisley's view was that although it was difficult to articulate a juridical basis other than lack of enforceability, it was important for the tribunal to raise the issue. The problem would however still remain the parties not satisfying the tribunal once the issue is raised.

Mr. Burn, a delegate from the floor, further discussed the matter, by stating that he was not convinced that evidentially there would be a lot of difficulties, and he gave the example of a scenario where one can tease it out with a series of fact specific questions bringing out the local legal issues, and bringing out the evidential issues. He believes that there are real due process issues in terms of the impact of these debates, not just on the entities which will usually be corporate entities who are parties to the proceedings, but its impact on individuals who may be affected by these allegations. It could have all sorts of implications for those individuals ultimately in criminal courts so that Mr. Burn thought that arbitrators needed to tread with a lot of caution in terms of due process not just with an eye on the corporate parties but the individuals who could be affected.

As regards the standard and burden of proof, Mr. Burn was of the view that the type of evidence one would normally expect to see in relation to an allegation of corruption or fraud would be evidence which, in its nature is something that is hidden and is, therefore, not something one will usually see with clear evidence. Mr. Burn referred to the famous *World Duty Free v. Kenya* case which was a very unusual situation where the relevant party actually tendered evidence proving its own corruption in detail. However, he said that usually one would have to spot those red flags that Mr. Leaver referred to earlier and one would have to look for how those stacked up and looked to see whether that amounts to a real case of corruption. Although it is difficult task, the arbitrator had a duty to carry out this exercise and to think critically about the evidence that is being tendered and things not being said. Mr. Burn, who often acted against State parties, found that the State parties often kept important material from the arbitrator and such material would get disclosed inadvertently during proceedings. Arbitrators thus have to look for such little fragments of evidence and interpret them in a realistic and tough way to make a decision on the issue of corruption.

Mr. Moollan, who spoke lastly on the issue of corruption, was of the opinion that, as a point of principle, arbitrators should feel that it is part of their duty to bring up issues of corruption and that it goes with the whole idea of arbitrators deciding cases behind closed doors. In terms of legal issues, he discussed firstly about the juridical basis for arbitrators to raise the issue on their own accord and, secondly, about proving corruption. Mr. Moollan believes that enforceability of the award is a legal basis which is promising enough and which the Courts should be able to accept. Regarding the proving of corruption, he stated that even though we are used to the adversarial way of going about things, the International Arbitration Act itself says that tribunals can adopt an inquisitorial approach, such that there is no need to go about it in an adversarial manner. It would therefore still be possible for the tribunal to get proof in some other ways with due respect to due process. Mr. Moollan finally observed that red flags, referred to earlier, had become a substitute for proper analysis in the field and that a balance needed to be struck.

Dr. van Haersolte-van Hof closed the discussion and thanked the audience for its attention.

PANEL IV

RECOGNITION AND ENFORCEMENT OF AWARDS: THE LEGAL FRAMEWORK

Introductory Remarks

Aurélia Antonietti[*]

I am Aurélia Antonietti, Team Leader and Legal Counsel at ICSID where I have been for nine years. I am mostly in charge of the French speaking cases. It is a great pleasure for me to be here today. I would like to thank our hosts for this amazing conference and for the warm welcome we have received. The Secretary-General of ICSID, Ms. Meg Kinnear, asked me to convey her apologies for not being able to be here today.

Before I introduce the distinguished members of the first panel, I would like to draw your attention to an important distinction as far as investment awards are concerned. As you may know, ICSID administers arbitration and conciliation cases between foreign entities or foreign physical persons and States on the basis of contracts, laws and, more commonly, investment treaties.

We have currently 150 contracting States and 159 signatories. We have had about 500 cases so far and approximately 200 of them are currently pending. By default, the place of arbitration is Washington, D.C. unless the parties agree otherwise, but it is worth noting that half of our hearings are taking place in Europe and can take place anywhere in the world if the parties request it.

You might also be interested in knowing that about 23% of our cases involve a respondent State from Africa and, more specifically, 16% of our cases involve a respondent State from a sub-Saharan country. You can find detailed statistics published twice a year on our website as part of our commitment to transparency as well as information on tribunals, status of cases, together with Awards and Decisions.

What is important to realise this morning is that 90% of our case load is actually administered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention") and the blue booklet, entitled "ICSID Convention, Regulations and Rules". When an ICSID Award is issued, there are no recourses to local courts. ICSID is a self-contained system with its own post-Award remedies, the most common being the annulment proceeding which is available on five limited grounds including excess of power,

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breach of a fundamental rule of procedure, and failure to state reasons. Another post-Award remedy is revision.

An ICSID Award is binding on the parties. If the losing party refuses to abide by this obligation, any pecuniary obligation can be enforced in the territory of each Contracting State as if it were a final judgment of a court in that State, the idea being that there is no review at that stage. This is a simplified recognition mechanism.

A Contracting State can make a designation to the Centre, of a court and tribunal in charge of such recognition and enforcement. For Mauritius, it is the Supreme Court; for the U.K., it is the High Court. In practice, a certified copy of an ICSID Award is presented to the enforcement court. The ICSID Convention left it to Contracting States to decide the exact procedure to be followed, namely whether it is an *ex parte* proceeding or not, if there is a notice to be served or not. By now, the Award has the same authority as a final judgment of that State and the procedure for the enforcement is governed by the law on execution of judgment of the States where the enforcement is sought and that includes provision on immunity from execution.

To my knowledge, there have been very few cases where a party actually tried to enforce an ICSID Award. This is because in the vast majority of cases the respondent State complied with the Award on its own or the parties find an agreement after the Award was issued.

For the sake of completeness, I should mention, however, that in the last year it was reported that enforcement proceedings were initiated in Argentina although I am personally not aware of the final outcome of those proceedings. In short, the ICSID system is self-contained with no recourse to local courts of the place of arbitration and with a simplified recognition and enforcement mechanism.

We also have different types of Awards available at ICSID under the Additional Facility Rules which is called, in French, *Mécanisme supplémentaire*, that is, the yellow booklet. That represents less than 10% of our cases. These Rules apply when the respondent is not a Contracting State or when the claimant is not a national of a Contracting State, for example cases involving Mexico, South Africa or Equatorial Guinea.

There is no self-contained system in the Additional Facility Rules, so an Additional Facility Award can be challenged before the courts of the place of arbitration, and the New York Convention would be applicable. In that respect, an Additional Facility Award is similar to an UNCITRAL Award and today's discussion is of particular relevance for Additional Facility Awards.

On that note, it is actually my privilege to introduce our distinguished panellists. Lord Mance, Justice of the Supreme Court of the United Kingdom, will speak of the legal framework in England, Wales and Northern Ireland. We will then move to the legal framework in Ghana and Nigeria with Mr. Ace Ankomah, a barrister in Ghana. Mr. Moorari Gujadhur who is a barrister and practises here in Mauritius will look at the Mauritian perspective and will discuss the *Cruz City* case which I understand he pleaded himself. Finally, Professor Mayer, professor at Paris-Sorbonne and Partner at Dechert LLP will examine the very liberal position taken by France on recognition and enforcement of awards. He will speak in French and you might need headphones for the interpretation.

As indicated yesterday, we will not take any questions after the panel, but please keep your questions for the afternoon session. I now leave the floor to Lord Mance.

Report to the Conference: An English Law Perspective

The Rt. Hon. the Lord Mance, P.C.[*]

I. INTRODUCTION: THE GENERAL APPROACH OF ENGLISH COURTS TO THE NEW YORK CONVENTION

The Arbitration Act 1996 (the "Act") was enacted to modernise English and Welsh and Northern Irish arbitration law – "to give it an entirely new face, a new policy, and new foundations"[1], and to make it "as far as possible, and subject to statutory guidelines, … a freestanding system, free to settle its own procedure and free to develop its own substantive law"[2].

The Act contains provisions which would have enabled domestic and foreign arbitration awards to be treated differently, but these were not implemented, and all awards fall basically under the same regime, with a special supplementary regime for New York Convention awards[3].

The special supplementary regime for New York Convention awards is found in Part III (sections 99 to 104) of the Act. It provides for the recognition and enforcement of a foreign award made in a state outside the U.K. which is party to the New York Convention. It remains possible in relation to a New York Convention award to rely on the Act's general provisions regarding enforcement (in particular section 66). But in practice, Part III will offer the more favourable route to recognition and enforcement.

In *Dardana Ltd. v. Yukos Oil Company*[4], the English Court of Appeal analysed the two-stage approach taken by Articles IV and V of the New York Convention and mirrored in Part III of the Act:

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[*] Justice of the Supreme Court of the United Kingdom.

1 *Commercial Arbitration: 2001 Companion volume* to 2nd ed. preface, by Mustill and Boyd, quoted with approval in *Lesotho Development Agency Ltd v. Impreglio SpA* [2005] UKHL 43, [2006] 1 AC 221, para. 17.

2 Lord Wilberforce, Hansard (HL Debates), 18 Jan. 1996, col. 778, quoted in the *Lesotho* case, para. 18.

3 Arbitration falls outside the Brussels Regulation which addresses recognition and enforcement of judgments within the European Union, and it has been held on that basis that a judgment enforcing an award is also not capable of recognition and enforcement under the Brussels regime: *Arab Business Consortium International Finance and Investment Co v. Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep. 485, pp. 487-488.

4 *Dardana Ltd v. Yukos Oil Company* [2002] 1 All ER (Comm) 819 (hereinafter "*Dardana*").

(i) The first stage is that a party who can "*produce [a] duly authenticated award or a duly certified copy and the original arbitration agreement or a duly certified copy*"[5] … *"has a prima facie right to recognition and enforcement*".[6] At this first stage, the Court is not concerned to examine the award to see if it is for any reason invalid.

(ii) At the second stage, the other party may resist recognition or enforcement by relying upon one of the exceptions contained in Article V of the New York Convention and section 103 of the Act. But the burden is on him or it to prove that the exception applies.[7]

In *Dardana Ltd. v. Yukos Oil Company*, an arbitration award had been made against Yukos Oil Company ("Yukos") – that was at a time when Yukos appeared to be an inviolable and enormous company – on the basis that it had become party to a contract between Dardana and a third party which contained an arbitration clause. Yukos denied that it had ever become party to the contract or therefore to the arbitration clause. The arbitrators concluded that it had. But arbitrators' conclusions on such a point is not binding (unless of course the parties agreed that it should be). Accordingly, Yukos submitted that, in order to satisfy the first stage of the enforcement process, Dardana must be able to prove not only that there had been a duly authenticated award but also that there had been an original arbitration agreement. Yukos also argued in support of this that, the second stage did not afford it proper protection, since Article V and section 102 of the Act merely provide that the court "may" refuse recognition or enforcement if one of the specified objections applies. The Court of Appeal disagreed with these submissions.

The word "may" did not make the refusal of recognition or enforcement at the second stage discretionary if one of the objections was shown to exist. The court would have to find some concrete reason, such as an estoppel, before it could then recognise or enforce an award. As to the more general argument, it would, if accepted, reverse the two-stage process clearly envisaged by the New York Convention and the Act. The two stages envisaged would in effect overlap or merge, and it would reverse the intended onus of proof. The party seeking enforcement would, at the first

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5 *Dardana*, *ibid*.

6 *Dardana*, *ibid*., *per* Mance L.J., para. 10. See also Article V of the New York Convention and section 102 of the Act.

7 *Dardana*, *ibid*., *per* Mance L.J., paras. 11-12.

stage, have to prove all the matters, which the second stage envisaged would have to be disproved by the party resisting enforcement.

Accordingly, the Court held that:

> "the first stage must involve the production of an award which has actually been made by arbitrators. ... [I]t would not, for example, be sufficient to produce an award which had been forged. However, it must be irrelevant at that stage that the award is as a matter of law invalid, on any of the grounds set out in s.103(2), since otherwise there would have been no point in including s.103(2). The award so produced must also have been made by arbitrators purporting to act under whatever is the document which is at the same time produced as the arbitration agreement in writing. That… is probably sufficient to satisfy the requirement deriving from the combination of s.100(1) and s.102(1) to produce "an award made, in pursuance of an arbitration agreement, ….". The words "in pursuance of an arbitration agreement" could in other contexts require the actual existence of an arbitration agreement. But they can also mean "purporting to be made under". Construed in the latter sense the overlap and inconsistency …. are avoided."

This two-stage approach recognises that "*there is an important policy interest ... to ensure the effective and speedy enforcement of... international arbitration awards*".[8] In that respect, Part III of the Act reflects the U.K.'s treaty obligations under the New York Convention.

II. LOCAL AND FOREIGN AWARDS

Under Article III of the New York Convention, "the method for obtaining the recognition and enforcement of a foreign award should not be substantially more onerous than that which applies to the recognition and enforcement of local awards". As explained above, this requirement is clearly satisfied in England.

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[8] *Norsk Hydro ASA v. State Property Fund of Ukraine* [2002] EWHC 2120, *per* Gross J., para. 17.

III. REVIEWING AWARDS

Section 103 of the Act reproduces the exhaustive list of exceptions to recognition and enforcement recognised in Article V of the New York Convention.

A. Want of Jurisdiction

The most basic exception covers situations in which there is no or no valid arbitration agreement at all. A parallel, though, less extreme situation occurs where arbitrators deal with a dispute outside the scope of a valid arbitration agreement.[9] Where the basic exception applies, any "award" must be wholly invalid. Where the less extreme situation applies, it will – depending on whether the valid parts can be severed – be either wholly or at least *pro tanto* invalid and unenforceable. As stated in *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan*[10] in relation to the former situation:

> "Although Article V(1)(a) (and section 103(2)(b)) deals expressly only with the case where the arbitration agreement is not valid, the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement[11]."

Article V(1)(c) and section 103(2)(d) cover the less extreme situation where arbitrators with jurisdiction over one or more matters go beyond their jurisdiction by dealing with other matters.

The *Dallah* case involved an application to enforce in England an award made by an ICC arbitral tribunal sitting in Paris. The award was made on the basis that the defendant (the Ministry) had become party to a contract containing an arbitration clause made originally between Dallah and a Pakistani trust. The Ministry denied that it had, but the tribunal

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9 Article V(1)(c) of the New York Convention and section 103(10)(b) and (c).

10 *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 (hereinafter "*Dallah*") *per* Lord Collins, para. 77.

examined its own jurisdiction, concluded that the Ministry had become party to the contract, and made an award against the Ministry accordingly.

Absent specific agreement, arbitrators have no power to determine their own competence (no "*competence-competence"*). The Supreme Court held accordingly that the tribunal's decision about its own jurisdiction was not capable of being regarded as a binding award within Article IV(1) of the New York Convention and section 102(1)(b) of the Act[12]. It merited attention, of course[13], but was in no way binding on the Supreme Court. It was further argued that, since this was a French arbitration and award, it was up to the Ministry to try to have it set aside in France, and that the Supreme Court should not question the award so long as it stood in France. The Supreme Court rejected that submission too. The question of jurisdiction was one for the English courts to decide on an application for recognition and enforcement[14]

It is, however, important to distinguish between issues which go to the existence or validity of a binding agreement to arbitrate, and issues which go to the question of whether the commercial or other contract containing an arbitration clause should be regarded as valid or be set aside. Not infrequently, a party to an arbitration clause will complain that the contract containing the clause was induced by misrepresentation or worse, e.g. by bribery. The House of Lords in *Fiona Trust & Holding Corp v. Privalov*[15] established authoritatively that arbitration clauses are to be regarded as separable from the contracts containing them. They are not invalidated on grounds which go only to invalidate the contracts in which they are contained. To invalidate an arbitration clause, some ground would have to be shown which was specifically related to the arbitration clause itself. In the same case, the House of Lords also swept away nice

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12 *Dallah*, para. 11, *per* Lord Mance.

13 *Dallah*, para. 31.

14 *Dallah*, paras. 28-29. Subsequent to the Supreme Court's decision, the Paris Court of Appeal in fact reached a contrary conclusion to the U.K. Supreme Court's on the question whether the Ministry had become party to the contract, and so upheld an application by Dallah to recognise and enforce the award in France. Evidently, there is no relevant doctrine of issue estoppel in France on such a question. Had the Paris Court of Appeal's decision preceded the English court's determination of the issue of jurisdiction, it might (perhaps – I express no view) have been arguable that there could be such an issue estoppel: see e.g. *The Sennar (no. 2)* [1985] 1 WLR 490. Issue estoppel in relation for foreign decisions is however subject to exceptions where special circumstances make it unjust to recognise the foreign decision: *Carl Zeiss Stiftung v. Rayner & Keeler* [1967] 1 AC 853, 947 D per Lord Upjohn and *Arnold v. National Westminster Bank* [1991] 2 AC 93, 107C *per* Lord Keith of Kinkel, *Yukos Capital Sarl v. OJSC Rosneft Oil Company* [2012] EWCA Civ. 855, para 147.

15 [2007] UKHL 40.

distinctions about the proper construction of differently worded arbitration clauses, saying that the time had come for a fresh start which ceased to attach significance to minor differences in wording between, for example, disputes arising "under" and "out of" a contract or between contractual disputes and tortious disputes arising from the contractual relationship. The parties were likely to have intended that any dispute arising out of their relationship should be decided by one and the same tribunal.

B. Natural Justice and Fundamental Rights

"[T]he Convention introduced a "pro-enforcement" policy for the recognition and enforcement of arbitral awards. …But [A]rticle V safeguards fundamental rights.[16]"

Natural justice and fundamental rights are protected to ensure the integrity of international arbitration. But what is not permissible is to seek to dress up what is no more than a possible error of law or fact by arbitrators as a breach of natural justice or of fundamental procedural rights. As Lord Clarke said recently in *Cukurova Holding AS v. Sonera Holding BV*[17]*:*

> "It is important to note the narrow grounds upon which the court can refuse to enforce an award made under the Convention …. In particular the court cannot refuse to enforce an award on the ground of error of law or fact."

The general English approach is the same in relation to non-Convention awards, to which section 68 applies. The concept of "serious irregularity" which applies under and is defined in section 68 looks to the protection of fundamental procedural rights, or "natural justice". In L*esotho Development Agency Ltd v. Impreglio SpA*[18], the relevant construction contract provided that the currency of account was to be Maloti, but the ICC arbitrators converted the claim into hard currencies against which the Maloti had fallen heavily by the date of their award. The losing party relied upon this as an "excess of power" under section 68(2)(b) of the Act. By a majority, the House of Lords held that any such error was no more than an error of law in the exercise of the powers conferred on the arbitrators, and did not affect their competence.

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16 *Dallah*, paras. 101-102, *per* Lord Collins.
17 [2014] UKPC 15, para 4.
18 [2005] UKHL 43, [2006] 1 AC 221.

Lord Steyn noted the close affinity in this respect between the principles applicable under section 68 and those applicable under the New York Convention, pointing out that the Convention had in part inspired the wording in section 68. He also added with regard to the Convention:

> "30. …. It is well established that article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award: Parsons & Whittemore Overseas Co Inc v Sociéte Générale de l'Industrie du Papier (RAKTA) 508 F 2d 969 (2nd Cir 1974); Albert Jan van den Berg, The New York Arbitration Convention of 1958 (1981), pp 311-318; Domenico Di Pietro and Martin Platte, Enforcement of International Arbitration Awards: The New York Convention of 1958 (2001), pp 158-162. By citing the Parsons decision counsel for the contractors alerted the House to this analogy. It points to a narrow interpretation of section 68(2)(b). The policy underlying section 68(2)(b) as set out in the DAC report [the Departmental Advisory Committee report, which led to the Act] similarly points to a restrictive interpretation."

Examples of the rare situations in which an English court has refused to recognise or enforce a New York Convention award under section 103 are:

(i) *Irvani v. Irvani*[19], where the Court of Appeal declined to grant a declaration affirming the validity of a Canadian award because the appellant had not been given a proper opportunity to present his case in the arbitration, there being evidence that the arbitrator had relied upon material which had not been communicated to the appellant.

(ii) *Kanoria v. Guinness*[20], where a party to an Indian arbitration had been unable to present his case, having not been informed of the case he had to answer. Lord Phillips C.J. found that this was "*an extreme case of potential injustice*"[21] and May L.J. commented that

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19 *Irvani v. Irvani* [2000] 1 Lloyd's Rep. 412.

20 *Kanoria v. Guinness* [2006] 2 All ER (Comm) 413 (hereinafter "*Kanoriva*").

21 Kanoriva, *ibid.*, para. 26.

> this exception to enforcement was concerned with the "*fundamental structural integrity of the arbitration proceedings*."[22]

The reluctance of English courts to refuse recognition and enforcement is well-illustrated by the judgment in *Minmetals Germany GmbH v. Ferco Steel Ltd*[23], in which the respondent resisted the enforcement of a Chinese award.

In September 1995, arbitrators in China found in favour of the plaintiff and assessed quantum by reference to an award which they had made in a previous, related, arbitration. The defendant, who had not been shown the related award or been given the opportunity to make representations on it, contended that the arbitrators had breached their own procedural rules and asked the Chinese court to revoke the award against it. Instead, the court remitted the case to the arbitrators, who invited the defendant to explain the basis of its complaint. The defendant's Chinese lawyer failed to do so and the arbitrators upheld the initial award.

In rejecting the submission that the English court should refuse to enforce the award on the basis that the defendant had not been able to put his case, the judge came to the conclusion that:

> "… the inability to present a case to arbitrators … contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment bring himself within that exception to enforcement under the convention."[24]

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22 Kanoriva, *ibid.*, para. 30.

23 *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 (hereinafter "*Minmetals*").

24 *Minmetals, ibid*. *per* Colman J., para. 327.

C. Public Policy

More controversial, and perhaps the better litmus test of whether a jurisdiction is pro-enforcement or not, is a judiciary's approach to the public policy exception.

A narrow interpretation of public policy demonstrates a judicial commitment to transnationalism in upholding foreign arbitral awards, but a broad interpretation that focuses on national or local interests may invite accusations of parochialism. The risks can be well expressed in the words of Burrough J. nearly 200 years ago in *Richardson v. Mellish*[25]: "[Public policy is] *a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law."*[26]

This is certainly true, and *Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor*[27] underlines very appropriately that public policy must be understood in an internationalist spirit; the public policy exception should only be applied in respect of matters which can be said to be truly central to the State's interests, viewed from an international perspective.

The U.K. courts have heeded that warning and adopted a narrow, strict test of public policy. As Gross J. made clear in the *IPCO (Nigeria) v. Nigerian National Petroleum* case[28] (the underlying dispute in which arose out of a contract for the construction of a petroleum export terminal in Nigeria):

> "Considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution. The reference to public policy in s.103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in s.103(3) is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice."[29]

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25 *Richardson v. Mellish* 130 E.R. 294; (1824) 2 Bing. 229 (hereinafter "*Richardson*").
26 *Richardson*, *ibid.*, para. 252.
27 [2014] SCJ 100 (hereinafter "*Cruz City*")
28 *IPCO (Nigeria) Ltd v. NNPC* [2005] EWHC 726 (Comm) (hereinafter "*IPCO (Nigeria)*").
29 *IPCO (Nigeria), ibid.*, para. 13.

In the words of Sir John Donaldson M.R.:

> "It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."[30]

IV. RECOURSE AGAINST AN ORDER GRANTING OR REFUSING ENFORCEMENT

The primary means of challenging a decision to enforce (or not to enforce) an arbitral award is to appeal against the court's order. Arbitration appeals are restricted in the U.K. but they do occur: *Dallah* being one example, and *Dardana Ltd. v. Yukos Oil Company*, being another.

Once a judgment has been entered to enforce an award, a stay of execution pending appeal may be granted as with any other judgment: *Far Eastern Shipping Co v. AKP Sovcomflot*[31]. A stay pending appeal is not a "refusal" to recognise and enforce. It is simply a temporary measure designed to preserve the *status quo* pending a final decision as to whether there should be recognition and enforcement.

But, prior to entry of such a judgment, the only basis for a stay of an order enforcing a New York Convention award may well be section 103(2)(f) of the Act – *i.e.* that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made: *Arab Business Consortium International Finance and Investment Co v. Banque Franco-Tunisienne*[32]. By extension, it was held by Hamblen J. in *Continental Transfer Technique Ltd v. Nigeria*[33], that an enforcement order may also be stayed pending a foreign curial challenge.

It is slightly paradoxical that one should be less able to get a stay before entry of judgment than after, but those are only first instance authorities – perhaps that point will be investigated in future times.

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30 *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras al-Khaimah National Oil Co* [1987] 2 Lloyd's Rep 246, para. 254.

31 *Far Eastern Shipping co v. AKP Sovcomflot* [1995] 1 Lloyd's Rep. 520.

32 *Arab Business Consortium International Finance and Investment Co v. Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep. 485, 492, with reference to section 5(2) of the Arbitration Act 1975, which was the predecessor of section 103(2) of the English Arbitration Act 1996.

33 *Continental Transfer Technique Ltd v. Nigeria* [2010] EWHC 780 (Comm).

V. THE ENFORCEMENT OF AN AWARD WHICH HAS BEEN SET ASIDE IN THE SEAT OF ARBITRATION

In following the New York Convention, the Act provides, at section 103(2)(f), that recognition and enforcement "may" be refused if it is proved that:

> "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which it was made."

As the foreign court of the seat or arbitration might set aside an award in a manner which is at best questionable, and at worst contrary to English public policy, it seems right that the English courts should be able – in limited circumstances – to recognise and enforce an annulled award.

In *Dallah*[34], I said that the word "may" in section 103 of the Act does not have a purely discretionary force. Instead, it confers a discretion to enforce an annulled award which must be exercised in accordance with recognised legal principles.[35] In terms of the New York Convention, the discretion may be viewed as arising from the word "may" in Article V(I) and/or from Article VIII, which provides that the Convention does not deprive any interested party of any additional right to enforcement that is provided under national law.

No direct decision on the point has been made by English courts. However, in *Yukos Capital Sarl v. OJSC Rosneft Oil Company*[36], four Moscow awards which had been set aside by the Russian courts were subsequently enforced by the Dutch courts on the basis that the Russian judicial process had been neither impartial nor independent. The English Court of Appeal, in determining whether to order enforcement of the awards, held that the Dutch judgments did not create an issue estoppel as to the standing of the Russian judgments, since the issues of public policy arising could vary according to whether they were viewed through Dutch or English legal eyes, and in any event the doctrine of issue estoppel was subject to relevant exceptions. It went on to hold that it could and should

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34 *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the government of Pakistan* [2011] 1 AC 763.

35 *Dallah*, *ibid.*, para. 67, *per* Lord Mance.

36 *Yukos Capital Sarl v. OJSC Rosneft Oil Company* [2012] EWCA Civ 855.

examine the Russian proceedings for itself to see whether they had been subject to State interference.

Examples of circumstances in which English courts might enforce an award which had been set aside in the seat of arbitration could include these:

(i) If the decision to set aside the award emanated from a breach of natural justice;

(ii) If the decision to set aside the award was based on a technical or trivial reason which it would be contrary to English public policy to recognise or follow; or

(iii) On the basis of an estoppel or another agreement, e.g. if the parties had expressly agreed that the award would not be the subject of recourse to the courts of the seat.[37]

The subject of issue estoppel is also touched on in *Cruz City*, and it was the ground of decision by Mr. Justice Eder in *Diag Human Se v. Czech Republic*[38]. If issue estoppel is a permissible approach at all, then, of course, it could apply in the sort of situation considered in *Diag*. It could enable the enforcement of an award which was set aside in the seat of the arbitration.

I had better not express any final view on this, since it might come to us one day, but I did, as counsel about 30 years ago, lose the case which was relied on by Mr. Justice Eder, that is *The Sennar (No.2)*[39], in which the House of Lords held that a Dutch decision as to the existence of a jurisdiction clause could bind the English courts.

VI. CONCLUSION

In principle, courts are different from arbitration tribunals. Arbitration tribunals can present a splendid anarchy. Every arbitration tribunal is free to reach its own result. Courts tend to regard themselves as a worldwide system and to take the view that you should not be free to litigate the same point over and over again. The same parties do not of course litigate the

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37 U.S. law takes this approach: *Chromalloy Aeroservices v. Arab Republic of Egypt* (1996) 939 F Supp 907; compare *Baker Marine (Nigeria) Ltd v. Chevron (Nigeria) Ltd* (1999) 191 F 3d 194.

38 [2014] EWHC 1639 (Comm) (22 May 2014) (hereinafter "*Diag*").

39 [1985] 1 WLR 490.

same point over and over again in successive arbitrations, but, without some restraining mechanisms, there is a risk that, when it comes to enforcing or resisting enforcement of an arbitration award, the same point may be litigated between the same parties over and over again in successive court proceedings.

Report to the Conference: A Ghanaian and Nigerian Perspective

Ace Anan Ankomah[*]

Nigeria is Africa's most populous nation and recently, has become its largest economy, overtaking South Africa. Ghana's economy currently places a very distant second to Nigeria's in West Africa. Nigeria operates a federal system of governance, while Ghana's is unitary. However, there are many striking similarities between them. Nigeria has been an 'oil economy' since the 1970s; Ghana is only now taking baby steps as an 'oil economy,' with a smaller, yet significant hydrocarbon domain. They are two, out of only five, English-speaking countries in West Africa. They belong to the Commonwealth of Nations. Although geographically separated by French-speaking Togo and Benin, there appear to be much closer economic, social and legal relationships between Ghana and Nigeria, than there are between each of them and Togo or Benin. This may be due, in part, not only to the shared official language, but to the shared British colonial history and shared common law legal systems.

After independence from Britain in 1957, in the case of Ghana, and 1960, in the case of Nigeria, they went through rather turbulent political evolutions, oscillating between civilian democratic regimes and military coups and dictatorships. In the case of Nigeria, there has even been a civil war, the Biafran war. But today, both Ghana and Nigeria are fairly stable democracies, under fairly stable civilian regimes, and operating constitutions that uphold the rule of law, constitutionalism and respect for international law. They are not only prominent members of the democratic circle of world nations, but are good citizens of the international community in words and deeds. For instance, under Article 40 of Ghana's Constitution,

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the government has an obligation to "promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means." Article 73 also provides as follows:

> *The Government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana.*

Ghana acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") on 9th April 1968 with no reservations, while Nigeria's accession was on 17th March 1970 with two reservations. The two countries have passed domestic arbitration statutes that are largely based on the UNCITRAL Model Law. Ghana passed the Alternative Dispute Resolution Act[1] ("ADRA") in 2010, which repealed and replaced the 1961 Arbitration Act.[2] Nigeria's 1998 Arbitration and Conciliation Act[3] ("ACA") applies throughout the Federation, although there is also the 2009 Lagos State Arbitration Law,[4] which was passed to provide for the resolution of disputes by arbitration in Lagos State. The Lagos Law "retained some provisions of the [ACA], modified others and included some entirely new provisions."[5]

This paper considers the respective domestic legal frameworks for the recognition and enforcement of international arbitral awards in Ghana and Nigeria, and is divided into 8 parts. Part I discusses the status of the Convention in the two countries, and their courts' approach to it. Part II considers the types of awards that are recognised and enforced in the two countries, and will seek to address issues surrounding the status of interim arbitral awards, particularly, anti-suit injunction awards. Part III discusses the recognition of awards, and Part IV, the enforcement of them. Part V examines the circumstances under which the courts would refuse to enforce awards, and Part VI, the circumstances where the courts would set awards aside. Part VII will discuss challenges to the courts' orders granting or refusing enforcement of awards. Part VIII contains my concluding

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1 2010 (Act 798).

2 *Id.*, section 137(1): "The Arbitration Act, 1961 (Act 38) is repealed."

3 Cap A18, Laws of the Federation of Nigeria 2004.

4 Law 18 of 2009.

5 Rhodes-Vivour, Adedoyin, "The Federal Arbitration Act and the Lagos State Arbitration Law – A Comparison." www.drvlawplace.com/media/Federal-Laagos-Arbitration.pdf. A full discussion of the Lagos Law is outside the scope of this paper. But it is important to note that section 56 of the Lagos Law, on recognition and enforcement of arbitral awards, is largely a reproduction of section 51 of the ACA, which is fully discussed in this paper.

comments, which highlights the new phenomenon where developing countries that are parties to Bilateral Investment Treaties ("BITs") are likely to face multiple arbitral awards with respect to the same dispute from both foreign-owned operating companies under arbitration agreements, and the shareholders of those companies under BITs. In general, I conclude that notwithstanding the broad acceptance of the Convention in Ghana and Nigeria, there are still many uncertainties (and nuances) and procedural rules that a party seeking recognition and enforcement of awards cannot afford to either disregard or take for granted.

I. STATUS OF AND APPROACH TO THE CONVENTION

In Nigeria, the Convention is specifically incorporated into the ACA, and reproduced as the 'Second Schedule'. The Preamble to the ACA specifically proclaims that it was passed to, among others, "make applicable the Convention… to any award made in Nigeria or in any contracting State arising out of international commercial arbitration." The status of the Convention was confirmed in the 2010 decision of the Nigerian Court of Appeal in ***Tulip Nigeria Ltd. v. Noleggioe Maritime SAS***,[6] as follows:

> *[a] foreign arbitration award is now enforceable in Nigeria directly pursuant to the New York Convention to which Nigeria is a signatory… foreign arbitral awards shall be recognised and enforced irrespective of their country of origin.*[7]

The ACA also provides in section 54(1) that where recognition and enforcement of an award arising from an "international commercial arbitration" are sought, the Convention "shall apply" to the award, whether made in Nigeria or another Convention State. However, that section contains two provisos that reflect Nigeria's aforesaid reservations. The first is that that other State must have reciprocal municipal legislation on enforcement of awards made in Nigeria. The second is that the differences between the parties to the arbitration must have arisen from a contractual relationship.

Ghana has also incorporated the Convention into its municipal law. It was first reproduced as a schedule to the erstwhile 1961 Arbitration Act,[8] and has been retained as the "First Schedule" to the ADRA. In section

6 (2011) 4 NWLR (Pt 1237) 254.
7 *Id.*
8 1961 (Act 38).

59(1)(c) of the ADRA, the High Court is mandated to enforce foreign arbitral awards that are made under the Convention. The provision states specifically as follows:

> *The High Court* ***shall enforce*** *a foreign arbitral award if it is satisfied that… the award was made under the international Convention specified in the First Schedule to this Act* [Emphasis added.]

This specific incorporation of the Convention into municipal law is particularly necessary because both Ghana and Nigeria are dualist States, so that domestic law does not automatically incorporate public international law, including treaties. Thus, absent specific incorporation, international treaties will not have the force of law, locally. For example, in ***Republic v. High Court, Ex parte Attorney-General (NML Capital Limited & Republic of Argentina – Interested Parties)***[9], Ghana's Supreme Court found that most of the provisions of the United Nations Convention on the Law of the Sea ("UNCLOS") had not been incorporated into Ghana law, and confirmed that because Ghana is a dualist State, it must specifically incorporate international treaties into domestic law, before they would have the force of law of domestic legislation. Dr. Date-Bah J.S.C., reading the unanimous decision of the Court, delivered himself of the following:

> *…treaties, even when the particular treaty has been ratified by Parliament, do not alter municipal law until they are incorporated into Ghanaian law by appropriate legislation.*[10]

II. TYPES OF AWARDS

The ADRA in Ghana and ACA in Nigeria recognise and give effect to both domestic and foreign awards. There is no specific definition of "foreign arbitral award" in the main body of either the ADRA or ACA. However,

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9 (Unreported, 20th June 2013, Civil Motion No. J5/10/2013).

10 *Id.* The court specifically considered the jurisdiction of "the international tribunal established under UNCLOS, most of whose provisions have not been incorporated into Ghanaian law by appropriate legislation, … Under a dualist approach, orders of the Tribunal cannot be binding on Ghanaian courts, in the absence of legislation making the orders binding on Ghanaian courts. In any case, the orders of the Tribunal given subsequent to the orders and ruling of the High Court cannot be a valid basis for the grant of *certiorari*, according to the authorities governing the grant of that remedy in this jurisdiction."

Article I of the "incorporated" Convention contains two applicable definitions of "foreign awards," namely, (i) "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought," and (ii) awards not considered as domestic awards in the country where recognition and enforcement are sought. It only stands to reason that an award made in an enforcement State is a "domestic award."

However, as noted above, in Nigeria, the ACA limits recognition under the Convention, in section 54(2) as follows: "the Convention shall apply only to differences arising out of **legal relationship which is contractual**" [Emphasis added.] This is a reservation that Nigeria made when acceding to the Convention, on the basis of Article I(3). Ghana did not make any reservations. In the award of the arbitral tribunal in ***Balkan Energy (Ghana) Ltd. v. Republic of Ghana***,[11] it was held that the wrongful arrest and detention of an officer of Balkan by personnel of Ghana's Bureau of National Investigations (which was tortious in nature) was an "interference with the ordinary conduct of the business of the Claimant," and the tribunal awarded a specific head of damages to the Claimant against the Respondent for that act.[12]

It is also important to note that in Ghana, the ADRA expressly provides in section 1 that its provisions do not apply to matters relating to "(a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; or (d) any other matter that by law cannot be settled by an alternative dispute resolution method." Arguably, an award involving or touching on any of these matters cannot be enforced in Ghana under the provisions of the ADRA.

One area that appears uncertain and for which a firm judicial pronouncement or statutory intervention may be required in both Ghana and Nigeria would be the status of interim arbitral awards, particularly anti-suit injunction awards.[13] To the extent that such awards are "interim" as

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11 Permanent Court of Arbitration Case No. 2010-7.

12 *Id.* The tribunal stated that in its view, "*when the normal conduct of business is affected by such an arrest the question is no longer one that involves a personal claim by the person concerned. It is the business as a whole that suffers the consequences. The Respondent's assertion that Mr. Everhart has no standing in this arbitration because he is not a party to the arbitration agreement will accordingly not be sustained by the Tribunal because what is at issue here is not only the personal inconvenience of the person arrested but also the interference with the ordinary conduct of the business of the Claimant. The Tribunal cannot disregard either of these considerations.*"

13 The recent ***Balkan Energy Limited v. Republic of Ghana*** (see *supra.*, note 10 and accompanying text) case presented an interesting scenario where, although the Respondent had invoked the arbitration agreement and then submitted to arbitration, it obtained an anti-arbitration injunction in the High Court, and then challenged the jurisdiction of the arbitral tribunal on the ground that the arbitration raised constitutional

opposed to "final," (even if there is no pending appeal against them) would they qualify for recognition and enforcement by domestic courts, even before the tribunal has concluded hearings and issued a final award? Would an anti-suit injunction issued by a tribunal be recognised and enforced by domestic courts, if a party disregards the award and initiates or continues domestic or other litigation? And is it feasible to expect that a domestic court that might be tolerating or even entertaining a matter that has been or should properly be referred to arbitration, would cite the recalcitrant party for contempt, thereby enforcing the injunctive orders of an international arbitral tribunal?

In my humble view, even though there are no express statutory provisions in the Ghanaian and Nigerian statutes with respect to anti-suit injunction awards, the spirit of those statutes and the Convention would definitely support respect for all types of arbitral awards, including anti-suit injunction awards, to the fullest extent permissible. I make two suggestions in this regard:

(i) First, an anti-suit injunction award should, at the very least, be of strong persuasive force in any application to stay litigation proceedings pending arbitration, (which is in essence an anti-suit injunction obtained from the domestic court) except where any of the circumstances that would ordinarily justify a court refusing to enforce any arbitral award, applies.[14]

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issues that only the Supreme Court of Ghana had the jurisdiction to consider. The Claimant counterclaimed for an anti-suit injunction. The tribunal rejected the two claims in its interim award. First, it asserted jurisdiction based on the principles of separability and *kompetenz-kompetenz*, among others. Second, it refused the anti-suit injunction request, stating that it was interested in hearing what the Supreme Court had to say on the constitutional questions raised in the arbitral proceedings. To accommodate the anticipated proceedings before the Supreme Court, the tribunal, in the interim award, put in place a liberal filing calendar. When the tribunal came to deliver its final judgment, which was after the Supreme Court had delivered its judgment, the tribunal agreed with the court's constitutional interpretation that the underlying transaction between the parties was an "international business and economic transaction," for which parliamentary approval should have been obtained under Ghana's Constitution. But the tribunal disagreed with the Supreme Court that the transaction was void, holding that the "international" nature of the transaction meant that international law principles of estoppel would apply to estop the Respondent from claiming that the contract was void, based on its own failure to obtain the parliamentary approval. This reasoning of the tribunal was subsequently followed by the tribunal in the ***Bankswitch Limited v. Republic of Ghana*** case, which was based on largely similar facts.

[14] See *infra.*, Part V.

(ii) Second, arbitral tribunals granting anti-suit injunction awards should expressly state that they would consider full compensatory damages that would completely indemnify a non-breaching party for all expenses, cost and value (including the entire judgment obtained, if any) of proceedings commenced or continued by another party, in breach of the anti-suit injunction award. I agree with the view that damages are, potentially, a more far-reaching and adequate remedy for the breach of anti-suit injunction awards, than contempt proceedings in domestic courts.[15]

III. RECOGNITION

Article III of the Convention states that "[e]ach Contracting State shall **recognise** arbitral awards as binding and **enforce** them in accordance with the rules of procedure of the territory where the award is relied upon…". In both Ghana and Nigeria, awards are "recognised as binding," and upon an application to the High Court for leave, are enforced as if it was the decision-making court. Indeed, section 57(1) of the ADRA and section 31(3) of the ACA contain the same wording, that arbitral awards are to be "enforced in the same manner as a judgment or order of the Court to the same effect."

In Ghana, section 57(2) of the ADRA provides that the grant of leave may result in the conversion of the award into a judgment of the Court. The provision specifically states that "[w]here leave is so given, judgment may be entered in terms of the award." And in ***Strojexport v. Edward Nassar & Co. (Motors) Ltd.***,[16] the High Court held that an award obtained from a non-reciprocal State at the time the award was given, would be recognised and enforced where at the time of enforcement, that State has become a reciprocal State.

In Nigeria, section 51(1) of the ACA provides that an arbitral award shall be recognised as binding "irrespective of the country in which it is made." In ***Ras Pal Gazi Construction Company Limited v. Federal Capital Development Authority***,[17] the Supreme Court held that "[a]n award made pursuant to arbitration proceedings constitutes a final judgment on all

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15 See also Tan, Daniel, "Anti-Suit Injunctions and the Vexing Problem of Comity," 2005 Virginia Journal of International Law [Vol 45:2] 283.

16 [1965] GLR 591.

17 (2001) 10 NWLR (Pt 722) 559.

matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court, be enforced by the court."[18]

IV. ENFORCEMENT

In Ghana, section 59 of the ADRA provides for the enforcement of awards after obtaining "leave" of the High Court. This is, however, subject to the following conditions:

(i) the award was made by a competent authority under the *lex loci arbitri* [e.g. MIAC, LCIA];

(ii) there is either a reciprocal arrangement between Ghana and the other country (the seat of arbitration), or the award was made under the Convention or any other international arbitration convention "ratified by Parliament" (ref: ***Argentina Case***);[19]

(iii) the applicant provides the Court with the award and the arbitration agreement (or duly authenticated copies of them), and with a certified English translation of them, where required; and

(iv) there is no pending appeal against the award in any court "under the law applicable to the arbitration."

In Nigeria, section 51(1) of the ACA provides for enforcement following a written application to the High Court. Just like in Ghana, the applicant is required to provide the court with the award and arbitration agreement (or duly certified copies of them), and where necessary, translated into English. However, unlike Ghana, if the Convention applies to the award, section 54(1) contains the two additional requirements, based on Nigeria's reservations: first, that there is an existing reciprocal arrangement between Nigeria and the country (the seat of arbitration), and, second, that the Convention only applies to "differences arising out of a legal relationship which is contractual."

An application for enforcement is prepared as an originating notice of motion. As in the case of any other motion, evidence is normally given by affidavit, and the award and the arbitration agreement (and the English translation of them, where necessary) must be brought into evidence by

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[18] *Id.*, at 562. See also Nwadialo, Fidelis; *Civil Procedure in Nigeria* (2nd ed., University of Lagos Press, 2000), p. 1113.

[19] *Supra.*, see notes 9 and 10, and accompanying text.

"exhibiting" them to the supporting affidavit. It is rare for the court to call and hear witnesses. The application is moved, and opposed, by counsel for the parties in open court. The court may give a ruling immediately after hearing counsel or might adjourn to deliver a ruling.

V. GROUNDS FOR REFUSAL OF ENFORCEMENT

The enforcement of awards is not automatic in either Ghana or Nigeria, and it is open to a party to challenge and resist the enforcement of an award against it. The court in Ghana will refuse an application for leave to enforce an award if it does not meet any of the conditions for enforcement imposed by section 59(1) of the ADRA. In Nigeria, the award will not be enforced if the enforcement requirements of section 51(1) and 54(1)) are not met. The party resisting enforcement of an award bears the burden to establish that the award is not enforceable.

In Ghana, section 59(3) of the ADRA additionally provides that the court "shall not enforce a foreign award" on any of the following grounds:

(i) the award has been annulled in the country where it was made;

(ii) the losing party was not given sufficient notice of the proceedings to enable it to present its case;

(iii) a party who lacked legal capacity was not properly represented in the proceedings; or

(iv) the award either does not deal with the issues submitted for arbitration or contains a decision beyond the scope of the matters submitted for arbitration.

In Nigeria, the ACA provides that an award will not be enforced where the losing party satisfies the court that:

(i) a party was suffering from an incapacity;

(ii) the arbitration agreement was invalid under either the *lex contractus* or *lex loci arbitri*;

(iii) there was a failure to give proper notice to a party of either the appointment of arbitrators or the arbitral proceedings;

(iv) the party, for some reason, was unable to present its case;

(v) the award is beyond the scope of submission to arbitration;

(vi) the composition of the tribunal, or the arbitral procedure, did not comply with the agreement of the parties, or, in the absence of a specific agreement, the *lex loci arbitri*;

(vii) the award is not yet binding; or

(viii) the award has been set aside or suspended by a court of the country in, or under the law of, which the award was made.

Additionally, the court in Nigeria will refuse enforcement (arguably even *suo moto*) where the subject matter of the arbitration was non-arbitrable under Nigerian law, or where the recognition or enforcement of the award is against the public policy of Nigeria.[20]

However, note that a refusal to enforce an award in either Ghana or Nigeria is not a pronouncement on the award's validity. That refusal is limited to the geographical jurisdiction of the court refusing enforcement. The courts in other Contracting States are, in principle, not bound by such refusal.

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[20] The rule on non-enforcement of foreign awards on grounds of "public policy" is contained in Article V(2)(b) of the Convention, and arguably also applies in Ghana, although the ADRA does not specifically mention that as a ground for refusal of enforcement. The common law position on non-enforcement on grounds of public policy is aptly captured in the following dictum of Lord Simon of Glaisdale in ***Vervaeke v. Smith*** [1983] AC 146 at 164: "[t]here is abundant authority that an English court will decline to recognize or apply what would otherwise be the appropriate foreign rule of law when to do so would be against English public policy; although the court will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved". And in the ***Argentina Case***, Ghana's Supreme Court stated emphatically that: "[s]eizing military assets, particularly a warship, carries with it an inherent risk of generating military conflict, or at least diplomatic rows likely to undermine the security of the State. In principle, the law ought to allow the exclusion of foreign law, on public policy grounds, where the enforcement of a right under that foreign law contributes to such risk of military conflict or insecurity. It may well be that this is a novel perspective of what may be included in the category of public policy in relation to conflict of laws and the enforcement of foreign law, but it seems to us reasonable and legitimate to insist that the enforcement in the Ghanaian courts of a right under the law of a foreign country should not imperil the security of the Ghanaian [S]tate, broadly defined. The fundamental public policy of the State should surely include the need to preserve its security".

VI. SETTING AWARDS ASIDE

Under the ADRA, the court in Ghana "may"[21] set an award aside on application by a party, made within three (3) months of the award, and showing any of the following:

(i) that party was under disability or incapacity;

(ii) the applicable law of the arbitration agreement is not valid;[22]

(iii) the applicant was not given notice of appointment of the arbitrator or the proceedings, or was unable to present its case;

(iv) the dispute either was not within the scope of or was outside the agreement (and here, the court has the power to set aside only the offending parts of the award);

(v) the arbitration did not conform to agreed procedure; or

(vi) the arbitrator failed to disclose a personal conflict or interest in the matter.

However, the court "shall"[23] set an award aside if the subject matter was incapable of being settled by arbitration,[24] or the award was induced by fraud.

In Nigeria, section 48 of the ACA provides largely the same grounds for setting awards aside as it does for refusal to enforce, *to wit*., incapacity, invalidity of agreement, breach of notification requirements and

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21 Interpretation Act, 2009 (Act 792), section 42: "In an enactment the expression "may" shall be construed as permissive and empowering, and the expression "shall" as imperative and mandatory."

22 This appears to be a rather curious formulation of the rule contained in Article V(1)(a) of the Convention, thus: "the said agreement is not valid under the law to which the parties have subjected it," and could be a drafting error.

23 Interpretation Act, *supra.*, note 21.

24 Note again, section 1 of the ADRA, which provides as follows:
This Act applies to matters other than those that relate to
(a) the national or public interest;
(b) the environment;
(c) the enforcement and interpretation of the Constitution; or
(d) any other matter that by law cannot be settled by an alternative dispute resolution method.

inability to present one's case, and the award being outside the scope of agreement. The ACA, however, contains the following additional provisions:

(i) where the scope of the award extends beyond the agreement, then any decision within the scope will stand while those beyond the agreement will be set aside;[25]

(ii) the composition and procedure of the tribunal must conform with the agreement, unless the agreement conflicts with the ACA (and, parties are not allowed to derogate from the Act);

(iii) where there was no agreement between the parties on the composition and procedure, or either the composition or the procedure was contrary to the ACA; or

(iv) where dispute was incapable of settlement by arbitration, or the award is against public policy.

These provisions in the Ghanaian and Nigerian Statutes can only apply to domestic awards because of the generally accepted rule that the setting aside of arbitral awards pertains to the exclusive jurisdiction of the courts in the country of origin. As such, the courts in both Ghana and Nigeria would not have the jurisdiction to set aside an award that is obtained outside their respective geographic jurisdictions.[26] However, a valid setting aside of an award in the country of origin has extra-territorial effect of precluding its enforcement in other Contracting States.

VII. CHALLENGING ORDERS GRANTING OR REFUSING ENFORCEMENT

In Ghana, there is a constitutional right of appeal from every decision of the High Court, to the Court of Appeal. The Constitution provides in Article 137(2) that subject to the Constitution's provisions, "an appeal shall lie as of right from a judgment, decree or order of the High Court … to the Court

[25] See also Nwadialo, Fidelis; Civil Procedure in Nigeria, *supra.*, p. 1112.

[26] The jurisdiction of every common law court is geographically limited. In ***McDonald v. Mabee*** 243 U.S. 90 (1917), Justice Oliver Wendel Holmes, Jr. famously stated that "the foundation of jurisdiction is physical power." And in ***Republic v. Accra Circuit Court; Ex Parte Appiah*** [1982-83] GLR 129, Roger Korsah J.A. stated at page 163 that "Our Constitution gives us no extra-territorial jurisdiction…"

of Appeal." This provision is reinforced in section 11(2) of the Courts Act,[27] which states that "[e]xcept as otherwise provided in the Constitution, an appeal shall lie as of right from a [decision] of the High Court and Regional Tribunal to the Court of Appeal." The ADRA applies this general principle to the specific decisions of the High Court to either enforce or refuse to enforce awards, when it provides in section 58(6) that an appeal would lie against such a decision, to the Court of Appeal.

Similarly in Nigeria, there is a right of appeal against any decision of the High Court, based on section 241(1) of the Nigerian Constitution, which grants a right of appeal with respect to "civil… proceedings before the Federal High Court or a High Court sitting at first instance."[28]

VIII. CONCLUDING COMMENTS

Arbitration, especially international arbitration, is not inexpensive. Yet, arbitral awards are not self-enforcing, and unless the losing party pays the award-debt voluntarily, the victorious party has to take enforcement steps in domestic courts, a process the parties might have sought to avoid by entering into the arbitration agreement in the first place. Resorting to domestic courts for enforcement is necessary because the proceedings seek to attach assets in the country where the proceedings are filed. However, Ghanaian and Nigerian courts do not enforce arbitral awards (or even their own civil judgments) automatically. It is for the successful party to decide when and how best to enforce them. The proper time to consider enforcement is not when the case is concluded but before the Notice of Arbitration is filed and proceedings are begun. I recommend the following rule-of-thumb: enter into the arbitration agreement with enforcement in mind. If the other party is not worth pursuing, even arbitration might just be sending good money after bad. You must always consider the following: (i) can you find the other party?; (ii) does the party have any assets, and if so in which country(ies)?; (iii) are those assets available for enforcement?

Before concluding this paper, I think it is important to highlight an evolving, embryonic, but burgeoning development in international arbitration, by which host nations risk facing multiple arbitral awards arising from the same dispute. It would appear that after an award has been made against a host nation under an arbitration agreement, in favour of a foreign-owned entity operating in its territory, the shareholders of the operating entity may be able to commence and sustain separate arbitral proceedings, this time for "loss of investment" claims under BITs against

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27 1993 (Act 459).

28 See also Nwadialo, Fidelis; Civil Procedure in Nigeria, *supra.*, pp. 771-772.

the same host nation. The argument is that a BIT claim by a shareholder is separate and distinct from, and does not depend on, the claims by the operating entity that might have been resolved at arbitration. There is therefore a new trend, "BIT-Shopping," where investments in developing countries are being made through special holding companies established in countries that have BITs with the host country. It is difficult to predict how this "multiple award syndrome" is going to play or pan out, but it is important to highlight and draw attention to it now.

In conclusion, the New York Convention and its broad acceptance in Ghana and Nigeria have made resolving international disputes through arbitration (and getting paid) more certain now than ever. However, many uncertainties still remain, and a successful party must pay very close attention to potential grounds and arguments for refusing to enforce awards in Ghana and Nigeria, and the specific procedural rules in these jurisdictions before filing.

Report to the Conference: A Mauritian Perspective

Moorari Gujadhur[*]

I. INTRODUCTION: THE MAURITIAN LEGAL FRAMEWORK

Until 1996, the enforcement of any arbitral award in Mauritius was governed by the Mauritian *Code de Procedure Civile* ("CPC"). This was a rather old-fashioned regime based on French law without modern refinements.

In 1996, Mauritius ratified the New York Convention (the "NY Convention"). The ratification was subject to the reservation of reciprocity, so that Mauritius would be only bound to enforce awards made in other States which had ratified the NY Convention. This is not an unusual reservation to adopt, but it can create issues over the adequacy of another State's adherence to the NY Convention. It can also be used to place additional formal requirements on enforcement[1].

In 2001, Mauritius passed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (the "2001 Act"). The 2001 Act had, *inter alia*, the following effects:

- Section 3(1) gave the force of law to the original text of the New York Convention, which was reproduced in a Schedule to the 2001 Act;

- Section 3(2) provided that regard would be had to the Recommendation regarding the interpretation of Article Il(2) and Article VII(1) of the NY Convention adopted by UNCITRAL at its thirty-ninth session on 7 July 2006[2];

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[1] For example in India, where the reciprocity reservation is used to justify declining to enforce the NY Convention over awards unless the country where the award was made has been officially recognised in the Gazette (Arbitration and Conciliation Act 1996, section 44).

[2] This interpretation provides that the list of documents in Article II(2) of the NY Convention, in which an arbitration agreement might appear is not exhaustive, and that Article VII(1) should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is

- Section 2 and section 4 provided that the Supreme Court of Mauritius would hear any application under the 2001 Act – this ensured that it would always be a senior court which would consider these matters;

- Section 4(3) provided that an appeal would lie, as of right, to the Judicial Committee of the Privy Council against any decision of the Supreme Court under the 2001 Act – this ensured that one stage of appeal would be available, and that the expertise of the English judges would be available to support the development of Mauritian law.

In 2008, Mauritius passed the International Arbitration Act 2008 (the "2008 Act"), which revolutionised international arbitration law in Mauritius. The 2008 Act is primarily focused on arbitrations seated in Mauritius, and other matters relevant to all international arbitrations. But the 2008 Act,[3] also brought one change to the law regarding enforcement of foreign arbitral awards, which was that the Supreme Court should be constituted to hear applications for enforcement in the form of a three-judge panel of the Supreme Court, in line with all matters heard under the 2008 Act.

Notably, the 2008 Act also provided that any arbitration held under the 2008 Act[4] would be subject to the same enforcement regime as for foreign awards.

In addition, it is right to note that, the provisions of the 2008 Act, which provide that: (i) regard should be had to the general principles on which the UNCITRAL Model Law is based, and to international materials relating to the UNCITRAL Model Law, and (ii) that no regard should be had to domestic law on arbitration, evidence and procedure, also apply to proceedings relating to enforcement under the NY Convention.

In 2013 the International Arbitration (Miscellaneous Provisions) Act 2013 was passed. This made some important refinements to the law on enforcement of foreign arbitral awards in Mauritius:

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sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

3 Section 42 of the 2008 Act and section 2 of the 2001 Act.

4 This would mean an international arbitration seated in Mauritius, or an arbitration seated in Mauritius which the parties had expressly agreed to hold under the 2008 Act, regardless of whether it was international or not.

- The reciprocity reservation was removed from Mauritius' ratification of the NY Convention, so that thenceforth, any foreign arbitral award would be enforced under the NY Convention (new section 3A of the 2001 Act);

- English and French were designated as official languages of Mauritius for the purposes of Article IV of the NY Convention, so that awards written in either language could be submitted to the Supreme Court of Mauritius for enforcement, without having to be translated (new section 4A of the 2001 Act);

- It was clarified that no prescription or limitation period would apply in Mauritius to the enforcement of arbitral awards under the NY Convention (new section 4B of the 2001 Act).

Certain changes were also made by the International Arbitration (Miscellaneous Provisions) Act 2013 to the law generally applicable to international arbitration matters which impact upon enforcement proceedings under the NY Convention, in particular:

- The three-judge panel of the Supreme Court would be drawn from a pool of six Designated Judges, who would be selected to hear all international arbitration matters – this would allow particular training for these judges, and would promote consistency in the development of the case law;

- New provisions[5] on confidentiality of Court proceedings, which allow the Court to hold hearings in private and to prevent disclosure of information about cases, apply equally to enforcement of foreign arbitral awards.

Also in 2013, a new dedicated procedural regime was introduced[6], covering any matters before the Supreme Court of Mauritius under the 2008 Act or the 2001 Act. The regime is designed to be streamlined compared to standard Mauritian court procedure, and to include measures which make it more accessible for international parties, for example:

5 Sections 42(1B) and 42(1C) of the 2008 Act.

6 In the Supreme Court (International Arbitration Claims) Rules 2013.

- Witness statements may be used to give written evidence, and no less weight should be given to them just because they are not sworn – this avoids tricky problems with the international swearing of affidavits;

- Hearings are listed on consecutive days where possible, and with regard for parties' time estimates – to avoid, so far as possible, adjournments and the need for multiple visits to Mauritius;

- There is a presumption against oral evidence – to ensure that a decision is made proactively on whether oral evidence is needed to resolve the issues;

- A tight timetable is provided for the exchange of evidence and submissions, which can be adjusted to suit the case in hand;

- Costs may be awarded, at the discretion of the court, according to the general principle that the losing party pays the winning party's costs, in an amount according to the costs incurred, subject to tests of reasonableness and proportionality.

The Supreme Court (International Arbitration Claims) Rules 2013 include a specific procedure for applications for enforcement under the NY Convention, under which the application is made without notice, and a provisional enforcement order is made (assuming the application complies with the requirements set out) before service on the respondent, who then has a short time to apply for the provisional order to be set aside before it becomes final.

II. DISCUSSION: SOME PARTICULAR ASPECTS OF THE MAURITIAN LAW EXAMINED WITH A VIEW TO PROPOSING SOME WAYS FORWARD

It is important first to note two things:

(i) Mauritian law under the NY Convention is still fairly immature. There have not been many contested cases for enforcement in Mauritius.

(ii) However, because the 2008 Act makes it clear that courts in Mauritius can rely on international materials and cases, the law is

> nevertheless quite predictable because the Mauritian Supreme Court can rely on foreign cases and writings to motivate decision-making. Since Mauritian law combines elements of English and French law, Mauritian judges are very familiar with doing this anyway.

With 150 countries having adopted the New York Convention, it is now the exception rather than the rule for the law of any country to be other than that laid down in the NY Convention.

However, this does not mean that they can all be considered the same – due to the way the courts interpret and apply the NY Convention, and the local court procedures in place. There is also the simple fact of delay inherent in the court system: in India it can take three years to get an application for enforcement before the court, after it is filed. By comparison, in *Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor*[7] ("*Cruz City*") in Mauritius, it took just under one year from application to judgment.

Three aspects of the law on enforcement of foreign awards in Mauritius deserve specific mention because they have been clarified in recent case law:

(a) The public policy ground for declining to enforce an award (Article V(2)(b));

(b) The jurisdictional issue-estoppel effect on enforcement proceedings of challenge decisions of the courts of the seat of issues not taken before the courts of seat;

(c) The constitutional issue.

The case of *Cruz City* is the first judgment which addresses a number of issues relating to the enforcement of a foreign arbitral award under the 2008 Act and under the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards Act of 2001. The seat of the arbitration was in England.

7 [2014] SCJ 100.

The brief facts are as follows:

Cruz City, a special purpose vehicle ("SPV") incorporated in Mauritius, and Unitech Limited an Indian public listed company, together with its subsidiaries, Burley (a Mauritian incorporated company) and Arsanovia Limited (a Cyprus company), entered into a joint venture arrangement for the development of slum areas in Mumbai, India.

For this purpose, Kerrush Investment Limited ("Kerrush") was incorporated in Mauritius with Cruz City and Arsanovia as shareholders. Kerrush, Cruz City and Arsanovia entered into a shareholders' agreement ("SHA") with Burley subscribing to certain obligations in the SHA. Cruz City, Burley and Unitech entered into a keepwell agreement ("KWA"). Both the KWA and the SHA were governed by Indian law and the seat for arbitration was England under the LCIA Rules.

Disputes arose between the parties and Cruz City started separate arbitration proceedings against Burley and Arsanovia under the SHA (1st Award) and against Arsanovia together with Burley and Unitech under KWA (2nd Award). Arsanovia together with Burley and Unitech started arbitration proceedings under the SHA against Cruz City (3rd Award).

The three arbitrations were heard simultaneously but were not consolidated. Cruz City was successful in all three arbitrations. The respondent challenged all three awards before the English High Court (the "Supervisory Court").

The Supervisory Court set aside the 1st Award and upheld the 2nd Award and the 3rd Award.

Cruz City started enforcement proceedings to enforce the 2nd Award and the 3rd Award in Mauritius.

The respondents attempted to resist the application for the enforcement by Cruz City on three grounds: firstly, that the arbitral awards were contrary to public policy; secondly, that the arbitrators had exceeded their jurisdiction; and thirdly, that the 2008 Act has limited the role of the Supreme Court to such an extent that it has effectively undermined the institutional integrity of the Supreme Court.

A. Public Policy Issue

The respondents contended that, because there had been a patent breach of Indian law (the governing law of the contract in dispute), the award should not be enforced as it was against public policy in India. The Court rejected this argument and held that it was only the public policy of Mauritius that applied and went to say that:

> "it is the public policy in the international context that applies, but not the public policy that would apply when challenging a domestic award".

The Court cited with approval the definition given by the International Law Association's Committee on International Commercial Arbitration on international public policy. The Committee defined international public policy as:

> "that part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award".

The finding of the Supreme Court regarding the applicability of international public policy instead of domestic public policy is consistent with the legislators' intent of aligning international arbitration in Mauritius with international standards (Sections 3(9) and 3(10) of the 2008 Act and paragraphs 35 and 36 of the *Travaux Préparatoires* to the 2008 Act).

However, as Mauritius is a relatively new jurisdiction in the field of international arbitration, of interest perhaps is the wider question of what matters fall within "public policy" and how the standards are set.

1. The meaning of public policy

Public policy has been described as an "unruly horse"[8], "a nebulous concept that changes from State to State"[9].

While it is recognised that international public policy includes mandatory laws of a state, it is also agreed that not all violations of domestic mandatory law will be in breach of international public policy.

To the extent that international public policy can be defined, it has been defined as:

> "the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought."[10]

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8 Richardson v. Mellish (1824) 2 Bing 229, 252 (Burrough J.).

9 Andrew I. Okekeifere, 'Public policy and arbitrability under the UNCITRAL Model Law' (1999) 2(2) International Arbitration Law Review 70, 70.

10 Krombach v. Bamberski (C-7/98) [2000] ECR I-1935.

> "International public policy generally is seen as being the fundamental notions of morality and justice determined by a national government (either a legislature or court) to apply to disputes that have an international element, either from the underlying transaction's nature or from the nationality of the parties, though those disputes still are within that State's jurisdiction."[11]

> "…it refers to a particular country's subjective concept of what all civilised nations conceived international policy to be."[12]

This begs the question of how to decide which are the "civilised nations", and what the courts of a particular country should include or exclude from the "fundamental notions of morality and justice" that should apply to international disputes.

As I have said above, not all breaches of domestic mandatory laws amount to a breach of international public policy. What would it take for a domestic mandatory law to become so fundamental to the enforcing country and its morality as to become international public policy?

That this question is still very much up for discussion is shown by certain decisions in Africa. In *Zimbabwe Electricity Supply Authority v. Maposa*[13], Gubbay C.J., said:

> "Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably

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11 James D. Fry, 'Désordre Public International under the New York Convention: Wither Truly International Public Policy' (2009), Chinese Journal of International Law.

12 Professor Albert Jan van den Berg.

13 1999 (2) ZLR 452 (SC) at p. 466 [E-G].

> hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

Difficult questions may arise taking account of the widely different views on the part of nations in different parts of the world as to what is acceptable conduct. Should decisions in different countries on international public policy differ according to the locally-held views? Is that consistent with the ideal of consistency across nations? It certainly does not encourage international trade in the way the NY Convention was intended.

Difficult questions like this require difficult cases to illustrate them. So, with apologies for the sensitivity of the subjects, we could consider controversial areas which might be pursued for profit such as sampling of stem cells from foetuses, commercial euthanasia or prostitution. How would courts around the world react to applications to enforce arbitration awards arising from contracts for these activities?

The Supreme Court of Mauritius in *Cruz City,* most probably being aware of the difficulty in applying the concept of international public policy, has tried to stem the proliferation of objections under Article V(2)(b) of the NY Convention and has held that:

> "In our view, a respondent should not raise an objection to the recognition of a foreign award under Article V (2) (b) of the New York Convention injudiciously. Essentially, the respondent has to show with precision and clarity in what way and to what extent enforcement of the award would have an adverse bearing on a particular international public policy of this country. Not only must the nature of the flaw in the arbitration proceedings be unambiguously described but a specific public policy must be identified and established by the party relying on it".[14]

[14] *Cruz City*, p. 27 [emphasis added].

Whether, by laying down such requirements, the Supreme Court will manage to stem the tide of spurious objections on the ground of international public policy remains to be seen.

B. Jurisdictional Issue and Estoppel

The respondents' second objection was in two limbs.

The first limb was that the arbitration tribunal had exceeded its jurisdiction by adjudicating a dispute which was beyond the arbitration clause embodied in the contract in dispute.

This issue had been unsuccessfully raised in the arbitration proceedings as well as at the level of the Supervisory Court in England.

The Court held that the role of the enforcement court is not to look into the merits of the dispute between the parties. The Court held that:

> "[i]ts task is not to sit on appeal and review the decision of the Tribunal on the merits or to substitute its own decision for that of the Tribunal but to consider whether it will refuse recognition and enforcement under any of the grounds that are relied upon and proved by a respondent under Article V of the New York Convention. In that respect, this Court has the power under the ground provided in Article V (1) (c) to undertake a full review of the Tribunal's findings on jurisdiction. It will indeed do so where it considers it appropriate and necessary, bearing in mind the overriding principle that the process of enforcement should be smooth and expedient. In the present cases it is clear that the jurisdictional objection has already been verified by the Supervisory Court of the seat of arbitration chosen by the parties themselves. We do not hold that we would never re-verify the issue of jurisdiction where it has been considered and rejected by the Supervisory Court, but that we would normally not do so unless in presence of exceptional circumstances".

The second limb of the objection was that the global assessment of the costs by the arbitration tribunal, in so far as the respondents had been victorious in one of the awards, was contrary to LCIA Rules and that, therefore, the tribunal had dealt with "*a dispute not contemplated by or falling within the*

terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

The Court, after reviewing the facts – it only did so because *Cruz City* was the first case of its kind under the 2008 Act – found that the objection was *"devoid of merits"*.
However, it is interesting to note that the Court further observed that the respondents had not raised this issue in their challenge before the Supervisory Court. In my view, had the Court not rejected the argument on facts, it would have held that the respondents, by not raising this issue before the Supervisory Court, would have been estopped from raising such an issue at the enforcement level. The Court said:

> "This is yet another reason that would have militated against this Court exercising its discretion to refuse to enforce the award under the NY Convention".

In a situation where a losing party does not appeal to the seat court, but attempts to raise certain issues attacking the correctness of the award at the enforcement level, the Mauritian court would probably not exercise its discretion to refuse the enforcement of the award, based on the decision in *Cruz City*.

I am also comforted in this view because the Mauritian court in *Cruz City* seems to have approved the dictum of Colman J. in *Minmetal Germany GmbH v. Ferco Steel Ltd*:

> "In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an

English court considering enforcement of a foreign award."[15]

1. *Is applying issue estoppel desirable? Is it consistent with a supra-national view of international arbitration? Should all State courts follow closely the decisions of other courts?*

In France, the view would be 'No'. French legislation (*Code de Procédure Civile,* Article 1520) does not include annulment at the seat of arbitration as a ground for declining to enforce an award. Therefore, the French courts would not consider themselves to be bound in any way by a foreign decision.

Also we can look to the decision in *Putrabali*[16] to see that the French approach excludes reliance on the decisions of other national courts in determining enforcement applications. In that case, the court said that the arbitral award was a decision of "international" justice, whose validity should be assessed pursuant to the rules applicable in the country where its recognition and enforcement are sought. The court added that, pursuant to Article VII of the New York Convention, the defendant was entitled to request the enforcement of the First Award in France, in accordance with the arbitration clause and the IGPA Rules. The defendant further had the right, it was held, to invoke the French law of international arbitration (Article 1504 of the French New Code of Civil Procedure), which does not provide at any time, as the claimant had argued, that the setting aside of an award in its country of origin prevented the enforcement of this award in France.[17]

Mauritius, being a mixed Civil Code and common law jurisdiction, has not taken the French approach, but has followed the more conventional approach that, if an award is set aside at the seat of arbitration, the Mauritian courts will refuse enforcement of the award under Art V1(e) of the NY Convention.

In *Cruz City*, the Supreme Court has deferred to the decision of the English Court which was the seat court in *Cruz City*.

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15 [1999] CLC 647 at p. 661.

16 Cour de Cassation, 1st Civil Chamber, 29 June, 2007, 2 decisions, *Société PT Putrabali Adyamulia c/ SA Rena Holding et autre*s, No. 05–18.053 and No. 06–13.293, Dalloz, 2007, note X Delpech.

17 Michael Polkinghorne, 'Enforcement of Annulled Awards in France: The Sting in the Tail', International Construction Law Review, January 2008.

C. Constitutional Issue

The respondent contended that the role of the Supreme Court under the 2008 Act is so limited that it has effectively become a 'rubber stamp' in enforcing arbitral award which, therefore, undermines the court's institutional integrity and is, therefore, against the Constitution of Mauritius. The Supreme Court accepted the reasoning of the Australian High Court in the case of *TCL Air Conditioner (Zhangshan) Co. Ltd v. The Judges of the Federal Court of Australia*[18] and rejected the argument.

The Supreme Court held that it is inherent in the agreement to arbitrate that the parties have agreed to accept the arbitrator's decision, whether right or wrong. Once the arbitrator's decision has been made, the rights of the parties that were in dispute comes to an end and are replaced by the arbitrator's decision.

The Supreme Court further said:

> "Therefore, a losing party in an arbitration award cannot, just because the award was not in his favour, be allowed, at the stage when this Court is called upon to adjudicate whether to enforce or refuse enforcement in accordance with the criteria laid down in the law, to ask the Court to interfere with the decision of the arbitral tribunal on grounds not laid down in the law. Such a request is not acceptable not only because it will be tantamount to asking this Court to act against the law, to step outside the jurisdiction conferred on it by law as provided by the Constitution, but it will also be unfair, unjust and inequitable as it will deprive the winning party of the benefit of the award, to which the losing party voluntarily agreed to be bound, by delaying and protracting matters."

III. CONCLUSION

The *Cruz City* decision (by three out of the six Designated Judges) shows that the approach of the Mauritian courts is, so far, in accordance with international best practice, but there may be several more difficult matters to deal with in future.

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18 [2013] HCA 5

Looking ahead, Mauritius can expect large numbers of applications to enforce arbitral awards under the 2008 Act to come before the courts. Mauritian companies are incorporated by investors from around the world to conduct business in an equally wide range of jurisdictions, under the Mauritian Global Business Company regime. The potential for assets to be held in Mauritius, against which a successful party seeks to enforce an arbitral award, is therefore high.

Many of these Global Business Companies have arbitration clauses in their company constitutions. All arbitrations arising out of these constitutions will be automatically classed as international arbitrations under the 2008 Act.[19] Even if the arbitration arises, not out of the constitution as such, but out of some related agreement like a shareholders' agreement, it is likely that any arbitration would be international, and therefore, enforcement would be under the NY Convention.

Mauritius is also a major centre for the administration of investment funds and holding companies holding investments in Africa and for headquarter companies doing business in Africa. This means that there will be interplay between arbitrations seated in Mauritius, which may well be enforced in Africa, and arbitrations seated in other African jurisdictions, which may well be enforced in Mauritius.

[19] Section 2(1) of the 2008 Act.

Report to the Conference: A French Law Perspective

Prof. Pierre Mayer[*]

La France est un Etat partie à la Convention de New York ; néanmoins celle-ci n'est pratiquement pas appliquée par les tribunaux français.

Elle n'est pas pour autant méconnue. La Convention de New York n'est pas une convention de droit uniforme, qui imposerait à chaque Etat partie l'application de ses règles. C'est une convention dont l'objet principal est de favoriser la reconnaissance des sentences arbitrales étrangères. Dans son article V elle n'énonce pas les conditions de reconnaissance que chaque Etat devrait adopter : elle énumère les seules causes de refus que les Etats pourront opposer aux sentences étrangères ; ils ne pourront pas en opposer d'autres, mais ils ne sont pas obligés de les adopter toutes. D'ailleurs, l'article VII autorise expressément les Etats à adopter dans leur législation des règles plus favorables à la reconnaissance.

Or telle est précisément la situation du droit français : les règles françaises sont plus libérales que celles de la Convention de New York. Ces règles figurent dans le Code de procédure civile (« CPC »), au Livre IV, Titre III, Chapitre III. Elles ont été quelque peu modifiées par la réforme de 2011 du droit de l'arbitrage interne et international.

Un avantage d'avoir intégré la liste des obstacles à la reconnaissance dans le Code de procédure civile est que cela permet d'avoir la même liste pour la non-reconnaissance des sentences étrangères, et pour l'annulation des sentences rendues en France en matière internationale. C'est ainsi que l'article 1525 CPC, relatif à la reconnaissance des sentences arbitrales étrangères, renvoie à l'article 1520, qui énumère les causes d'annulation des sentences rendues en France en matière internationale.

J'ai prévu de diviser cette présentation en deux parties :

I. Aspects procéduraux
II. Examen des obstacles à la reconnaissance

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I. ASPECTS PROCEDURAUX

Je passerai très vite sur ces aspects. La procédure de reconnaissance comporte trois stades :

(i) Premier stade : une demande d'exequatur est portée devant le tribunal de grande instance. A ce stade, la procédure est non contentieuse, et le seul motif de refus d'exequatur est la contrariété manifeste à l'ordre public international. Un tel refus doit être motivé. En pratique, il est rarissime.

(ii) Dans un deuxième stade, qu'il y ait eu octroi ou refus d'exequatur, un appel est possible dans le mois de la signification de la décision. L'appel n'est pas suspensif d'exécution. Devant la cour d'appel, la partie qui s'oppose à l'exequatur peut invoquer dans les griefs énumérés à l'article 1520 du Code de procédure civile. La procédure, à ce stade, est contradictoire.

(iii) Enfin un pourvoi en cassation est possible contre l'arrêt de la cour d'appel. La Cour de cassation contrôle, non la sentence, mais la façon dont la cour d'appel a appliqué l'article 1520 CPC.

II. LES MOTIFS DE REFUS D'EXEQUATUR

C'est une cour d'appel qui va les apprécier. Il s'agit le plus souvent de la Cour d'appel de Paris. Le rôle de celle-ci est si important que l'on parle couramment d'une « jurisprudence de la Cour d'appel de Paris », chaque fois que la Cour de cassation n'a pas encore adopté une solution.

Une remarque préliminaire doit être faite, avant d'aborder l'examen point par point des griefs énumérés à l'article 1520 CPC : le droit français a adopté une conception délocalisatrice de l'arbitrage international, sous l'influence de théories doctrinales développées dans les années 60 du 20ème siècle. Ces théories soutiennent que l'arbitrage international n'appartient à aucun ordre juridique étatique, pas même à celui du siège. Selon plusieurs arrêts de la Cour de cassation, notamment l'arrêt *Putrabali* de 2007, dont je reparlerai, *« La sentence international n'est rattachée à aucun ordre juridique étatique » ; « c'est une décision de justice internationale ».*

La formule est ambiguë : la Cour de cassation veut-elle dire que la sentence internationale appartient à un véritable ordre juridique non-étatique, que l'on pourrait appeler droit transnational, *lex mercatoria* ou

ordre juridique arbitral ? Ou simplement, et de façon purement négative, qu'elle n'est intégrée dans aucun ordre juridique ? Quoi qu'il en soit, cette conception entraîne deux conséquences quant au contrôle exercé sur les sentences étrangères : d'une part, aucune place n'est laissée aux règles étrangères, et notamment à celles du siège ; d'autre part, aucun compte n'est tenu des décisions que les tribunaux du siège ont pu prononcer à l'égard de la sentence invoquée en France.

On va le vérifier en examinant d'abord les motifs de refus d'exequatur des sentences étrangères admis en France, puis les motifs non admis en France.

A. Motifs de refus d'exequatur des sentences étrangères admis en France

L'article 1520 CPC énumère cinq griefs.

1. « *Le tribunal arbitral s'est déclaré à tort compétent ou incompétent* »

Cette formulation a été introduite par le décret de 2011. La formulation antérieure visait seulement les cas où un tribunal arbitral s'est déclaré à tort compétent. Il faut dire que les cas où le tribunal arbitral s'est déclaré à tort incompétent sont plus rares, et ne concernent en pratique la France que dans le cadre d'un recours en annulation contre une sentence rendue en France, car on ne voit guère de raison d'invoquer devant les tribunaux français une sentence étrangère par laquelle le tribunal arbitral s'est déclaré incompétent.

En revanche il est assez fréquent que l'on oppose à une sentence étrangère qu'elle a été rendue par un tribunal incompétent : soit qu'elle l'ait été en l'absence de convention d'arbitrage, soit que la convention d'arbitrage ait été inapplicable, soit encore que la convention soit nulle.

(a) Dans la grande majorité des pays autres que la France, la première question qui se pose, lorsque la nullité de la convention d'arbitrage est invoquée, ou qu'un problème d'interprétation se pose, est celle de la loi applicable. Telle n'est pas la solution du droit français. Le raisonnement conflictualiste est banni, on recourt à la méthode dite des règles matérielles. Ainsi dans une affaire *Dalico*, qui a donné lieu à un arrêt de la Cour de cassation de 1993, le problème qui se posait était celui de la validité en la forme de la convention d'arbitrage, à laquelle se référait un contrat soumit à la loi libyenne. Aux termes de l'arrêt rendu le 20 décembre 1993 : « En

> vertu d'une règle matérielle du droit international de l'arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient […], et son existence et son efficacité s'apprécient, sous réserve de l'ordre public international et des règles impératives du droit français, d'après la commune volonté des parties, sans qu'il soit nécessaire de se référer à une loi étatique ».[1]

Est ainsi consacrée une double autonomie de la clause compromissoire : autonomie, d'abord, par rapport au contrat qui la contient (la solution est ancienne en droit français, elle remonte à un arrêt *Gosset* de 1963)[2], autonomie, ensuite, par rapport à tout droit étatique. Il s'agit moins là, en fait, sous le deuxième aspect, d'une véritable règle matérielle, que d'un pur principe de validité : dès lors que les parties ont consenti à se lier par une clause compromissoire, celle-ci est valable.

Par la suite des arrêts *Zanzi* (1999)[3], *Unikod* (2004)[4] et *Jules Verne* (2006)[5] on infléchi cette jurisprudence. On ne parle plus de « droit international de l'arbitrage », mais de « règles matérielles du droit français de l'arbitrage ». On ne parle plus non plus d'un principe de validité, mais d'un principe de licéité, dont la portée est moins grande. Mais il n'est toujours pas question de faire application d'un droit étranger, qui régirait la clause ou le contrat qui la contient, à moins que les parties n'aient choisi spécifiquement la loi régissant la clause, ce qui est rarissime.

(b) Par ailleurs, la jurisprudence précise que le contrôle s'effectue « en fait et en droit ». Par exemple, la cour d'appel peut retenir une interprétation de la clause compromissoire différente de celle retenue par le tribunal arbitral. Inversement, la cour d'appel donnera effet à une sentence étrangère par laquelle le tribunal arbitral a retenu sa compétence à l'égard d'une partie non signataire, en relevant, conformément à la jurisprudence française, que cette partie a été impliquée dans l'exécution et/ou la

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1 Civ. 1re, 20 déc. 1993, *Dalico*, *JDI* 1994.432, note E. Gaillard, *Rev.crit.DIP* 1994.663, note P. Mayer.

2 Civ. 1re, 7 mai 1963, *Gosset*, *JCP* 1963.II.13405, note B. Goldman, *Rev.crit.DIP* 1963.615, note H. Motulsky.

3 Civ. 1re, 5 janv. 1999, *Zanzi*, *Rev.arb*. 1999.260, note Ph. Fouchard, *Rev.crit.DIP* 1999.546, note D. Bureau.

4 Civ. 1re, 30 mars 2004, *Unikod*, *Rev.arb*. 2005.961, note Seraglini, *JDI* 2006.127, note S. Bollée.

5 Civ. 1re, 7 juin 2006, *Jules Verne*, *Rev.arb*. 2006.945, note E. Gaillard, *JDI* 2006.1384, note A. Mourre.

négociation du contrat, même si le droit du siège et celui qui régit le contrat ignorent un tel principe d'extension de la clause.

2. « Le tribunal arbitral a été irrégulièrement constitué »

L'application la plus fréquente de cet élément du contrôle concerne les cas où un arbitre ne serait pas indépendant et impartial, et n'aurait pas révélé les circonstances qui auraient permis à une partie de s'opposer à sa nomination ou à le récuser. La jurisprudence juge maintenant que le défaut de la révélation d'une circonstance de nature à susciter chez les parties un doute sur l'indépendance et l'impartialité de l'arbitre ne suffit pas à justifier un refus d'exequatur. La cour d'appel vérifie que, pour elle, la circonstance non révélée crée une présomption de manque de partialité et/ou d'indépendance. Ce n'est pas le défaut de révélation, en soi, qui est la cause du refus d'exequatur, mais le fait non révélé.

Il a été précisé récemment par un arrêt *Tecnimont*[6], en matière d'arbitrage institutionnel, que le délai imposé par le règlement de l'institution pour s'opposer à la nomination d'un arbitre, ou pour le récuser, devait être pris en compte par la cour d'appel : dès lors que l'institution aurait estimé l'objection ou la récusation forclose, le délai étant écoulé, le grief n'est plus recevable devant la cour.

3. « Le tribunal arbitral ne s'est pas conformé à la mission qui lui a été confiée »

C'est un élément original par rapport au droit comparé ou à la Convention de New York. On pourrait même soutenir que sur ce point le droit français ne respecte pas la Convention de New York. Mais une interprétation raisonnable de celle-ci permettrait probablement de rendre compte de la plupart des solutions concrètes que la jurisprudence française a consacrées au visa de l'article 1520, 3° CPC. Il sera ainsi opposé à la sentence étrangère :

- d'avoir statué *ultra petita* ;
- d'avoir statué *infra petita* alors qu'il n'est plus temps de compléter la sentence ;

[6] Civ. 1er, 25 juin 2014, *Tecnimont*, D. 2014.1967, obs. S. Bollée, *Paris Journ.internat.Arb.* 2014.742, obs. Th. Clay.

- d'avoir statué en équité alors que les parties n'en étaient pas convenues ;

- de ne pas avoir mentionné que les arbitres ont statué en équité, alors que les parties sont convenues d'un arbitrage en équité ;

- l'absence de motivation (l'exigence de celle-ci est présumée) ;

- l'application d'une loi différente de la loi étatique choisie dans l'acte de mission.

4. « Le principe de la contradiction n'a pas été respecté »

Chaque partie doit avoir eu la possibilité de faire valoir ses arguments et moyens de preuve, et de connaître et discuter les arguments et moyens de preuve de l'autre partie. De plus, le tribunal arbitral ne peut s'appuyer sur des moyens de droit qu'il relève d'office, sans le soumettre à la discussion des parties.

5. « La reconnaissance ou l'exécution de la sentence serait contraire à l'ordre public international »

Trois particularités sont à noter.

(a) L'expression « ordre public international » est souvent mal comprise dans les pays de *common law* : ce n'est pas un ordre public réellement international, ni au sens du droit international public, ni au sens d'un ordre public commun aux notions civilisées, ni encore au sens d'un ordre public de la *lex mercatoria*. C'est le noyau dur, seul retenu, de l'ordre public *national* de l'Etat auquel on demande la reconnaissance.

(b) Il ne s'agit pas seulement de principes touchant aux valeurs fondamentales de l'ordre juridique français. L'ordre public international couvre, par exemple, le droit français et européen de la concurrence, contrairement à la position suisse, qui le limite aux valeurs fondamentales de l'ordre juridique suisse. En France, la condition de non-contrariété de la reconnaissance de la sentence à l'ordre public international englobe en fait le respect des lois de police françaises, dans le domaine territorial impératif qu'elles revendiquent.

(c) Un grand débat oppose les partisans d'un contrôle plutôt restreint, minimaliste, et ceux d'un contrôle dit maximaliste. Les minimalistes mettent en avant trois arguments principaux. Tout d'abord il conviendrait de faire confiance à l'arbitre, dont il n'y a pas de raison de penser qu'il est moins capable qu'un juge étatique de faire application d'une loi de police. Ensuite, un contrôle sur la bonne application d'une loi de police se heurterait à la prohibition de la révision et au caractère final des sentences. Enfin, puisque la jurisprudence française a, tardivement, ouvert l'arbitrage aux matières dans lesquelles l'ordre public joue un rôle, il ne serait pas logique de reprendre d'une main, par un contrôle étroit, ce que l'on a donné de l'autre aux arbitres.

A quoi les maximalistes rétorquent : premièrement, que l'arbitre, personne privée choisi par des personnes privées pour statuer sur leurs seuls intérêts privés, ne peut être érigé en gardien de l'ordre public ; deuxièmement, que les sentences ne sont finales que sous réserve du contrôle prévu par la loi, et que la révision prohibée est celle qui s'exerce en dehors des points de contrôle prévus par la loi ; et troisièmement, que l'ouverture de l'arbitrage à l'ordre public n'a jamais signifié l'abdication au profit des arbitres, mais seulement la possibilité pour ceux-ci de se prononcer en premier, sous réserve du contrôle étatique, pour éviter des manouvres dilatoires.

La Cour d'appel de Paris, puis la Cour de cassation, ont posé en principe que l'ordre public international ne faisait obstacle à la reconnaissance que si sa violation était à la fois « concrète », « effective » mais aussi « flagrante ».

Des arrêts en ce sens ont été rendus en matière de droit de la concurrence : arrêts *Thales*[7], et *Cytec*[8].

L'opinion doctrinale s'est orientée vers une critique du caractère de « flagrance », très laxiste. Ce laxisme constitue un danger pour la crédibilité de l'arbitrage. On peut craindre notamment les réactions de l'Union européenne si elle constate que des juges français condamnent des parties à exécuter une sentence, et par là un contrat, sans avoir vérifié s'il ne méconnaissait pas le droit de la concurrence de l'Union européenne, alors que cette thèse avait été soutenue par l'une des parties.

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7 Paris 18 nov. 2004, *Thales*, *JDI* 2005.357, note A. Mourre, *Rev.arb.* 2005.529, note L.G. Radicati di Brozolo.

8 Civ. 1re, 4 juin 2008, *Cytec* D. 2008.2560, obs. S. Bollée, *Rev.arb.* 2008.473, note I. Fadlallah, *JDI* 2008.1107, note A. Mourre.

Il semble y avoir une évolution de la jurisprudence : plusieurs arrêts de la Cour d'appel de Paris, sur des allégations de corruption (notamment en septembre, octobre et novembre 2014), ont seulement invoqué l'exigence de violation effective et concrète.

Reste la question de l'étendue du contrôle. Il s'effectue « en droit et en fait » ; mais selon quels moyens y procède-t-on ? Il n'est pas question en tout cas de rouvrir l'instruction. Mais peut-on remettre en cause l'appréciation des faits en se reportant aux éléments du dossier ? Un arrêt récent de la Cour de cassation (Civ. 12 févr. 2014)[9] insiste sur ce que le juge du contrôle est « le juge de la sentence et non de l'affaire » : il faut donc toujours que la méconnaissance de l'ordre public international puisse se constater à la seule lecture de la sentence, même s'il n'est plus exigé que cette méconnaissance « saute aux yeux ».

B. Motifs de refus d'exequatur des sentences étrangères non admis en France

1. Erreurs même grossières dans la motivation

Par exemple, ne sont pas des motifs de refus d'exequatur : une erreur, même grave, sur le contenu du droit français ; une contradiction de motifs ; une dénaturation du contrat.

2. Annulation de la sentence dans le pays du siège

Il résulte d'une série d'arrêts de la Cour de cassation (en particulier *Hilmarton*[10], et *Putrabali*[11]) que la demande d'exequatur d'une sentence internationale – décision de justice internationale, non intégrée dans l'ordre juridique du siège du tribunal arbitral, comme on l'a vu – doit s'effectuer exclusivement selon les vues de l'ordre juridique du juge saisi, qui ne coïncident pas nécessairement avec celles du pays du siège. Le fait que la sentence ait été annulée dans son pays d'origine ne figurant pas dans la liste des conditions de régularité retenue par le Code de procédure civile, la sentence annulée pourra être reconnue si elle satisfait à ces conditions. Certes l'article V.1.e de la Convention de New York mentionne, parmi les

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9 Civ. 1re, 12 févr. 2014, *Schneider*, *Rev.arb.* 2014.389, note D. Vidal, *JCP* éd.G 2014 n° 474, concl. P. Chevalier.

10 Civ. 1er, 23 mars 1994, *Hilmarton*, *Rev.arb.* 1994.327, note Ch. Jarrosson, *JDI* 1994.701, note E. Gaillard, *Rev.crit.DIP* 1995.356, note B. Oppetit.

11 Civ. 1re, 29 juin 2007, *Putrabali*, *Rev.arb.* 2007.499, rapp. J.-P. Ancel et note E. Gaillard, *JDI* 2007.1236, obs. Th. Clay, *Rev.crit.DIP* 2008.109, note S. Bollée.

griefs invocables, l'annulation de la sentence dans son pays d'origine. Mais il résulte de l'article VII de la Convention qu'une solution plus libérale est possible. Le droit français ne viole donc pas la Convention de New York.

La solution ne fait pas pour autant l'objet d'une approbation unanime.

Certains ont objecté : est-il concevable de reconnaître une sentence qui n'existe plus ?

A cela la réponse est qu'elle n'est inexistante que dans l'ordre juridique qui l'a annulée. La solution est banale en dehors du domaine de l'arbitrage : si un contrat international est annulé par un juge du pays où il a été conclu, mais que le jugement d'annulation n'est pas reconnu dans un autre pays, le contrat pourra y être jugé valable et son exécution ordonnée.

Chacun pourra se former son idée sur les mérites de la solution en prenant connaissance de la solution donnée dans l'affaire *Putrabali*, qui a donné lieu à l'arrêt le plus emblématique.

La société indonésienne Putrabali avait vendu à une société française, nommée depuis Rena Holding, du poivre blanc ; la marchandise fut perdue lors d'un naufrage. Rena ayant refusé de payer le prix, Putrabali saisit, conformément à la clause compromissoire, un tribunal arbitral siégeant à Londres. Celui-ci considéra que Rena n'était pas tenue de payer la marchandise non livrée. Mais la *High Court* de Londres, saisie d'un « recours sur un point de droit », annula partiellement la sentence pour violation du droit anglais choisi par les parties. Une nouvelle sentence condamna Rena à payer. Peu avant la reddition de la deuxième sentence, Rena avait saisi le tribunal de grande instance d'une demande d'exequatur de la sentence annulée. L'exequatur fut accordé, et confirmé à tous les degrés de juridiction, en vertu de la conception, plus haut évoquée, de l'absence d'intégration de la sentence dans le pays du siège. Il en résulte que, tandis que la deuxième sentence est celle qui a autorité de chose jugée en Angleterre, et est probablement reconnue dans le reste du monde, en France c'est la première sentence, celle que les juges anglais du siège ont déclarée avoir méconnu le droit anglais applicable au contrat, qui est reconnue.

La doctrine française approuve très majoritairement cette solution, que le décret de 2011 réformant le droit français de l'arbitrage n'a pas remise en cause.

PANEL V

RECOGNITION AND ENFORCEMENT OF AWARDS: A PRACTICAL APPLICATION

Introductory Remarks

Prof. Dr. Albert Jan van den Berg[*]

I. L'APPLICATION DE LA CONVENTION DE NEW YORK

On va traiter d'un scénario actuel mais fictif, pour vous démontrer comment fonctionnent dans la pratique les problèmes juridiques de l'annulation ou de l'exécution de la sentence.

En ce qui concerne le cadre juridique pour l'annulation et l'exécution de la sentence dans l'ordre international, il y a un problème causé par la Convention de New York. Plus précisément, par le champ d'application de la Convention.

L'article 1 de la Convention de New York stipule que *« La présente Convention s'applique à la reconnaissance et à l'exécution des sentences arbitrales rendues sur le territoire d'un État autre que celui où la reconnaissance et l'exécution des sentences sont demandées... »*.

Le champ d'application de la définition est territorialiste. Qu'est-ce que cela a comme effets? Je vous le démontre en trois points.

A. Deux Actions Possibles

Là, il faut vraiment faire la distinction entre les deux actions. On a un pays d'origine et de l'étranger, et on a deux actions : exécution et annulation.

En ce qui concerne l'exécution, la Convention de New York s'applique qu'à l'étranger et non dans le pays d'origine. Là, on a un régime pour l'exécution dans le pays d'origine qui est régi par la loi nationale sur l'arbitrage de ce pays, sauf qu'il y a une exception : si la sentence n'est pas considérée comme nationale, mais c'est une exception assez exceptionnelle.

À l'étranger, la même sentence est soumise au régime de la Convention de New York.

Voyons maintenant ce qui se passe pour l'annulation de la sentence. Dans le pays d'origine, les tribunaux étatiques sont exclusivement compétents pour juger sur l'annulation de la sentence. Les pays étrangers n'ont pas cette compétence. Il est très important aussi de

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voir cette distinction. Gardez cela en tête et voyons-en maintenant les effets.

B. Les Effets

Je rappelle qu'on a deux actions : exécution et annulation.

Il y a deux cas de figure pour l'exécution, soit le refus, soit l'exécution, et aussi deux cas de figure pour l'annulation : le refus ou l'acceptation et cela se produit dans le pays d'origine.

Le refus d'exécution signifie qu'on ne peut pas exécuter la sentence dans le pays d'origine.

À l'étranger, ces deux divisions, en principe, n'ont pas d'effet. Il y a des exceptions mais n'entrons pas maintenant dedans. En principe, elles n'ont pas d'effet à l'étranger.

Par contre, s'agissant de l'annulation de la sentence, si la sentence a été annulée dans le pays d'origine, cela produit un refus d'exécution aux termes de la Convention de New York.

L'article V(1) de la Convention de New York dispose que *« La reconnaissance et l'exécution de la sentence ne seront refusées »* que si la preuve est fournie, et la preuve est que la sentence a été annulée dans le pays dans lequel elle a été rendue.

Le problème très controversée dans notre cas fictif est de savoir si on peut ou non refuser, selon la Convention de New York, une sentence qui a été annulée dans le pays d'origine.

C. L'Arbitrage d'Investissement

Cela fait une différence énorme pour le cadre juridique si on choisit un arbitrage selon le Règlement de l'arbitrage de la CNUDCI ou de la CCI d'un côté ou un arbitrage CIRDI d'un autre côté.

Par exemple, l'arbitrage d'investissement selon le Règlement de l'arbitrage de la CNUDCI ou de la CCI obéit au même cadre juridique que celui que je viens d'expliquer avec la Convention de New York, avec la possibilité d'annulation dans le pays d'origine et avec l'exécution dans les autres pays, à l'étranger.

Par contre, on a un double contrôle.

La Convention de New York, qui joue pour l'arbitrage d'investissement selon le Règlement de l'arbitrage de la CNUDCI ou de la CCI, ne s'applique pas à l'arbitrage CIRDI parce que celui-ci est l'exception car c'est un arbitrage régi par la Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants

d'autres États (ci-après « Convention du CIRDI »). Là, puisqu'il n'y a pas de pays d'origine, il y a exécution automatique selon l'article 54 de la Convention du CIRDI. Il n'y a pas de motif de refus d'exécution.

Deuxième chose, en ce qui concerne le contrôle de la sentence, il y a un seul contrôle et non pas un double contrôle comme dans la Convention de New York. Un seul contrôle, cela veut dire qu'il n'y a à nouveau pas de pays d'origine, mais il y a un comité *ad hoc* qui juge sur l'annulation de la sentence.

Je montre cela parce qu'il y a une grande confusion dans le monde de l'investissement lorsqu'on parle du cadre juridique de l'arbitrage d'investissement. C'est clairement la différence. Il faut savoir quel système il nous faut choisir parce qu'un grand nombre de traités d'investissement bilatéraux offrent le choix entre CIRDI ou, par exemple, la CNUDCI ou la CCI. Ce troisième point est lié à la conséquence du choix faite.

Presentation of the Practical Problem: *Friendly Mining Company DRC Ltd. v. Management and Control Company Ltd.*

Jessica Naga[*]

Avocat de la partie demanderesse : Carole Malinvaud[**]
Avocat de la partie défenderesse : Christian Camboulive[***]

Tribunal : Juge Raymond Ranjeva[****]
Karel Daele[*****]
Iqbal Rajahbalee[******]

I. LE CAS PRATIQUE

Ce scenario traite deux pays fictifs, la République démocratique de Conya (« RDConya »), et la République de Cirné. Le droit de Cirné est identique au droit de l'île Maurice.

La Friendly Mining Company DRC SA (ci-après « Friendly Mining ») est la plus grande société minière de la République démocratique du Conya, celle-ci étant une adhérente au Traité OHADA et par conséquent membre de l'OHADA. Les actionnaires de Friendly Mining sont le gouvernement de la RDConya à hauteur de 40% du capital, et un groupe de riches investisseurs européens à 60%.

En 2010, la société Friendly Mining découvrit un nouveau gisement de bauxite en RDConya sur un site appelé « Solong ». Ce site avait le potentiel de receler des quantités massives de bauxite, une source d'aluminium. Étant donné le caractère très onéreux de l'extraction et du transport de la bauxite du site de Solong, Friendly Mining décida de solliciter un financement auprès d'une société connue, établie en

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République de Cirné, la Management and Control Company Limited (ci-après « Management and Control »).

Les deux parties conclurent un contrat aux fins duquel Management and Control fournirait les ressources financières à l'exploitation minière du site de Solong. En échange elle se verrait rembourser une partie du capital et verser une partie des bénéfices réalisés par l'exploitation. Les termes du contrat de financement étaient onéreux et requéraient ainsi un remboursement rapide ; en outre il attribuait à Management and Control une part significative des bénéfices du projet Solong.

Une clause figurant au contrat stipulait que :

> « Tout différend découlant du présent contrat ou en relation avec celui-ci sera résolu par trois arbitres suivant le Règlement d'arbitrage de la LCIA-MIAC Arbitration Centre. Le siège de l'arbitrage sera la République démocratique de Conya. La langue de l'arbitrage sera le français. »

Management and Control fournit les fonds nécessaires et Friendly Mining amorça l'exploitation du projet. Ce fut un désastre : les gisements de bauxite s'avérèrent bien moins importants que prévu, en sus de présenter une contamination importante. La meilleure solution pour Friendly Mining aurait été d'extraire tous les dépôts disponibles puis de les traiter avec d'importantes dépenses additionnelles, afin d'enlever les impuretés. Les revenus bruts de ce processus, même avant de prendre en compte le coût d'extraction, auraient à peine suffi à rembourser les fonds avancés par Management and Control. Il n'y aurait par conséquent pas eu de bénéfices et au contraire de larges pertes nettes. Friendly Mining n'aurait pas eu les ressources nécessaires à gérer le fonctionnement de la mine et à transférer entièrement les revenus de l'activité. Par conséquent, Friendly Mining décida de mettre fin au projet.

Sans les revenus découlant de l'exploitation de la mine de Solong, Friendly Mining n'était pas en position de pouvoir rembourser les fonds avancés par Management and Control.

La société Management and Control amorça donc une procédure d'arbitrage contre Friendly Mining à la fin de l'année 2012. La société réclamait le montant intégral des fonds avancés, assorti d'importants intérêts. Friendly Mining se défendit contre les demandes de Management and Control en s'appuyant sur l'Acte sur la protection de l'exploitation minière (*Conyan Mining Protection Act)* de 2007 (« la Loi »), ce dernier

excluant que tout différend portant sur le forage ou l'extraction de ressources minérales au Conya puisse être soumis à l'arbitrage : ces différends ne pourraient être sujets qu'à un jugement obligatoire devant la High Court de Conya.

A. Le tribunal arbitral énonça que La loi ne pouvait s'appliquer, aux motifs que :

(i) le contrat en question portait sur un accord de financement et le remboursement des fonds avancés, et non pas sur le forage ou l'extraction de ressources minérales au Conya ; et

(ii) la Loi était contraire à la constitution de Conya, qui prévoyait la promotion des modes alternatifs de règlement des différends tels que la conciliation, la médiation et l'arbitrage.

Le tribunal arbitral accorda donc à Management and Control l'intégralité de la somme réclamée, soit USD 457 750 431, assortis d'intérêts annuels d'USD 45 775 043.

En tout état de cause, l'exécution de cette sentence signifierait la mise en faillite de Friendly Mining. Friendly Mining demanda donc à la High Court de Conya d'annuler la sentence en s'appuyant sur l'article 26 de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA.

B. La Cour suprême de RDConya accorda cette requête, et annula la sentence, aux motifs que :

(i) l'effet de la sentence, qui aurait fait disparaître une importante société en République démocratique de Conya, causerait par conséquent un chômage massif au sein des villes où Friendly Mining opérait à titre principal. Par conséquent, le gouvernement de RDConya se verrait privé d'un atout national d'importance régionale stratégique, ce qui serait contraire à l'ordre public international du pays ;

(ii) le *Conya Mining Protection Act* de 2007 n'était pas contraire à la constitution. La Cour suprême peut promouvoir les modes alternatifs de règlement des différends sans pour autant ignorer une loi qui, pour la protection de l'intérêt national, excluait les différends portant sur certaines activités de l'arbitrage ; et

(iii) le contrat en cause était clairement un contrat de forage et d'extraction de ressources minérales au Conya, puisqu'une partie des bénéfices auxquels Management and Control avait droit en vertu du contrat était constituée d'une part des bénéfices de cette activité.

Nonobstant le fait que la sentence avait été annulée en RDConya, Management and Control demanda à la Cour suprême de Cirné l'exécution de la sentence.

C. Devant la Cour suprême de Cirné, Management and Control affirmait ainsi que la sentence pourrait, et devrait, être exécutée à Cirné selon la Convention de New York, aux motifs que :

(i) Le refus d'exécuter une sentence annulée au lieu du siège de l'arbitrage est discrétionnaire selon la Convention de New York. Cette dernière a fait l'objet d'une interprétation correcte des cours de Cirné et a été incorporée dans le droit cirnéen ;

(ii) Le cas échéant, ce pouvoir discrétionnaire devrait être exercé en faveur de l'exécution de la sentence car :

(a) La décision d'annuler la sentence n'était pas conforme aux standards internationaux, puisque l'interprétation et l'application de l'exception d'ordre public international figurant à l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA étaient clairement erronées ;

(b) Le tribunal arbitral était habilité à se prononcer sur l'inconstitutionnalité du *Conya Mining Protection Act* de 2007 et de l'écarter. Cette décision ne pouvait être contrecarrée par la High Court de Conya simplement parce qu'elle se trouvait en désaccord avec celle-ci ; et

(c) Même si le *Conya Mining Protection Act* de 2007 était bien conforme à la constitution, l'annulation d'une sentence pour un motif de non-arbitrabilité devrait être écartée par les cours de Cirné au nom de son pouvoir discrétionnaire attribué par la Convention de New York. En effet, la Loi de 2007 exclut à tort un secteur industriel

majeur de la résolution de différends par l'arbitrage. Cirné devrait dans ce cas favoriser sa politique pro-arbitrage, en ne reconnaissant que des annulations pour motif de non-arbitrabilité concernant des domaines que le droit cirnéen reconnaît lui-même comme non arbitrables.

II. LA PROBLEMATIQUE

Albert Jan van den Berg : La question est : que faut-il faire de la sentence annulée? Pour trouver la réponse à cette question et aussi entendre les arguments pour et contre, je laisse la parole au tribunal que nous avons ici et aux deux grands avocats très versés dans cette matière.

III. LES ARGUMENTS DES PARTIES

A. Les Arguments de la Partie Demanderesse

1. *La décision d'annulation de la Cour de RDConya à raison d'une prétendue violation de l'ordre public international n'est pas conforme aux standards internationaux*

Carole Malinvaud : Nous sommes effectivement dans un cas totalement typique où une juridiction nationale s'est arrogé le droit en fait d'instrumentaliser la procédure de recours en annulation pour effectuer une révision au fond de cette sentence.

Évidemment, ils ont habillé leur décision. Ils l'ont habillée en ayant recours à ce fameux ordre public international qui, en l'espèce, n'est qu'une question d'opportunité. Est-ce qu'ils avaient intérêt ou pas à arrêter ce contrat?

Ils l'ont habillée en ayant recours à une loi interne sur l'arbitrabilité qui n'avait jamais été évoquée pendant toute l'année de négociation que nous avions eue avec l'État parce qu'en réalité, on vous dit que 40 % de la société est détenu par le gouvernement adverse, mais c'est l'intégralité de la société qui était sous le contrôle effectif du gouvernement, lequel pour autant n'a jamais invoqué son droit interne quand on a négocié cette fameuse clause compromissoire.

C'est en réalité pour des raisons purement économiques que la juridiction interne de la République démocratique de Conya a décidé d'annuler cette sentence, en fait de la réviser au fond pour annuler une

année et demie de procédure et laisser comme cela la République de Conya repartir avec mes 450 millions de dollars.

Je dis mes 450 millions de dollars parce que dans l'exposé factuel, qui était très complet, on a omis de vous dire que mon client a prêté 450 millions de dollars pour réaliser l'extraction et tous les travaux d'exploration en réalité qui étaient nécessaires avant de donner un premier coup de pioche qui, malheureusement, s'est avéré inutile parce qu'il n'y avait pas un gramme de bauxite dans cette mine. Il n'empêche que mes 450 millions de dollars sont bien allés chez le gouvernement de la République de Conya.

C'est un simulacre de justice qui a eu lieu devant la République démocratique de Conya et je demanderai à votre Cour d'exercer son pouvoir discrétionnaire, le pouvoir discrétionnaire qu'elle détient à juste titre, et de reconnaître dans la République de Cirné cette sentence et de m'en octroyer le bénéfice.

La raison pour laquelle je dis cela est parce qu' il ne faut pas se leurrer : si jamais vous ne faisiez pas droit à ma demande, je serais donc sans sentence, je serais obligée de retourner devant les juridictions de Conya, c'est-à-dire que je serais obligée d'aller plaider devant les juridictions locales contre l'État pour obtenir 450 millions de dollars. Autrement dit, on aboutirait à un déni de justice, exactement ce que l'on a voulu éviter lorsqu'on a négocié, avec difficulté je dois dire, cette clause compromissoire LCIA-MIAC, règlement qui fonctionne merveilleusement bien. La seule erreur qu'on ait faite à l'époque, c'est de mettre son siège dans la République démocratique de Conya. Sinon, le règlement a parfaitement fonctionné.

Pourquoi devez-vous utiliser votre pouvoir discrétionnaire, et ce pouvoir discrétionnaire existe-t-il? Ce sera ma première partie.

Ma deuxième partie reviendra sur certaines particularités de cette décision locale que j'appellerai la décision scélérate, si vous voulez bien.

2. *La Cour suprême de Cirné a le pouvoir de vérifier l'arbitrabilité d'un litige et ce à double titre : selon l'article V(1)(a) et l'article V(2)(a)*

Carole Malinvaud : La Cour suprême de Cirné, vous avez l'avantage d'avoir dans votre droit applicable, la Convention de New York qui a été incorporée dans votre droit, or il s'avère que la Convention de New York, en particulier son article V(1), vous permet d'avoir un pouvoir discrétionnaire. Il est écrit la chose suivante : « La reconnaissance et

l'exécution de la décision peut être refusée, à la requête d'une partie contre qui il est invoqué un certain nombre de cas »,

Christian Camboulive : Je prendrai le texte français de la Convention qui dit la chose suivante : « La reconnaissance et l'exécution de la sentence ne seront refusées » - pas « ne sauront être refusées » – « ne seront refusées, sur requête de la partie contre laquelle elle est invoquée, que si cette partie fournit à l'autorité compétente du pays où la reconnaissance et l'exécution sont demandées la preuve… », et ensuite suivent les cas de figure.

Carole Malinvaud **:** Ce texte dit donc : *« may be refused »* ce qui montre donc, malgré ces différences de traduction, qu'il y a une possibilité, qu'il y a un pouvoir d'appréciation de votre Cour. Nous ne sommes pas là devant vous sans que vous ayez le moindre pouvoir d'appréciation. Il aurait été inutile sinon de vous réunir. Vous avez donc ce pouvoir d'appréciation pour vérifier si oui ou non un certain nombre de ces cas doivent être pris en considération par votre Cour. Il y a des auteurs de grand calibre et reconnus dans le monde de l'arbitrage international qui ont soutenu exactement la même position. Je citerai Professeur Jan Paulsson, qui a, de manière je dirai continue, soutenu qu'il fallait apprécier cet article-là avec un pouvoir d'appréciation, un pouvoir discrétionnaire de votre Cour.

Je dois dire que je suis ravie de voir que votre Cour elle-même a reconnu ce pouvoir d'appréciation puisque dans un arrêt de la Cour suprême de Cirné, qui a été commenté précédemment par mon confrère Moorari Gujadhur dans la décision de la Cour suprême, l'arrêt *Cruz City*[1]. Dans cet arrêt il était écrit : « Il est clair qu'en application de l'article V(1), la Cour a la discrétion de refuser la reconnaissance et l'exécution... ».

Donc votre Cour a déjà pris position sur le pouvoir d'appréciation dont elle dispose en application de l'article V(1) de la Convention de New York, sans préciser si c'était le V(1)(a), (b), (c), (d), (e) ou le V(1)(2). Donc, j'en déduis que l'article V(1)(e), qui est un des cas de l'article (V)(1) de la Convention de New York, vous permet de disposer de ce pouvoir discrétionnaire.

Je vous rassure, si tant est que ce soit nécessaire : vous ne seriez pas les seules juridictions à agir de la sorte. Je pense que parfois il est intéressant de donner quelques éléments de droit comparé, or les Américains ont décidé en ce sens-là. Je parle notamment de l'arrêt

[1] *Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor* [2014] SCJ 100 (ci-après « *Cruz City* »).

Chromalloy[2], dont vous avez connaissance, qui certes, après avoir donné lieu à un petit hic de la jurisprudence américaine avec une décision, *TermoRio*[3], mais qui a fini par une décision beaucoup mieux fondée, sur laquelle je veux m'arrêter une seconde, qui est la décision *Pemex* de 2013[4], la plus récente à ma connaissance de la District Court de New York.

Cette décision est assez intéressante parce qu'en réalité, c'est exactement le même type de situation que nous avions. On est en face d'une société étatique. On est dans le domaine des ressources naturelles et, comme par hasard, la sentence qui donnait raison à l'investisseur est annulée à Mexico, siège de l'arbitrage, sous prétexte d'une loi qui rendrait inarbitrable le litige entre la société investisseur et l'État du Mexique.

Eh bien, les tribunaux américains ne se sont pas trompés. Ils ont considéré qu'en appliquant l'article V(1)(e) de la Convention du Panama, qui est exactement identique à la Convention de New York sur ce point, ils avaient un pouvoir d'appréciation, un pouvoir discrétionnaire, et ils l'ont appliqué. Et ils n'ont pas tenu compte de cette décision scélérate mexicaine.

Les Hollandais, n'en déplaise à certaines autorités, ont récemment pris exactement la même position dans la fameuse affaire *Yukos*[5], et nous avons eu le privilège, grâce à Lord Mance tout à l'heure, d'en avoir quelques bribes. Effectivement, dans l'affaire *Yukos*, qui a eu plein de ramifications mais qui est notamment allée demander l'exécution en Hollande après que quatre sentences aient été annulées par les tribunaux russes, et, très sagement, la Cour d'appel d'Amsterdam a décidé que la Convention de New York n'obligeait en aucun cas à la reconnaissance des décisions d'annulation rendues au siège. Et ils l'ont fait pourquoi? Parce qu'il y avait une absence d'indépendance et d'impartialité absolument manifeste des tribunaux russes, un peu à l'instar de ce qui s'est passé devant les juridictions de la République démocratique de Conya.

Je voudrais finir avec nos amis anglais, puisque la tradition du pays de Cirné est d'avoir aussi bien du *common law* que du *civil law*. Dans une affaire *Yukos* - décidément, cette affaire a donné lieu à beaucoup de décisions, une affaire récente puisqu'elle est du 3 juillet 2014, il était posé la

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2 *Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt*, United States District Court, District of Columbia, Civil, 1 July 1996, 939 F. Supp. 907 (ci-après « *Chromalloy* »)

3 T*ermoRio S.A. E.S.P. et al. v. Electranta S.P. et al.,* US Court of Appeal, District of Columbia, 25 May 2007, 487 F3d 928 (DC Cir. 2007) (ci-après « *TermoRio* »)

4 *Corporación Mexicana de Mantenimiento Integral (Comisa), S. de R.L. de C.V. v. PEMEX Exploracion y Produccion*, United States District Court, Southern District of New York, 27 August 2013, 10 Civ. 206-AKH (ci-après « *Pemex* »)

5 *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation)*, Gerechtshof, Amsterdam, Court of Appeal, 200,005,269, 28 April 2009 (ci-après « *Yukos* »)

question préliminaire suivante parce que c'est un des arguments qui a été notamment développé par le Professeur van den Berg : *« rien ne peut venir du néant »*. Donc, à partir du moment où la sentence a été annulée au siège, ce néant ne peut pas donner lieu à une exécution où que ce soit. Ceci découle du principe latin, *ex nihilo nihil fit*.

Séduisant comme cela peut sembler, les anglais n'ont pas du tout été séduits et ils ont décidé exactement le contraire : quelque chose peut jaillir du néant. D'ailleurs, n'en sommes-nous pas tous la preuve? Mais sans rentrer dans des considérations philosophiques ou autres, cela me paraît suffisamment concret. Les tribunaux anglais ont donc considéré que ce principe-là n'empêchait pas de reconnaître une sentence qui aurait été annulée dans son pays d'origine s'il était prouvé que la procédure d'annulation offensait les principes basiques du droit, ce qui est le cas, encore une fois, en l'espèce.

J'en viens à mon dernier point : la mise en oeuvre de ce pouvoir discrétionnaire.

(a) La mise en œuvre du pouvoir discrétionnaire

Carole Malinvaud : Ce pouvoir me paraît particulièrement opportun parce qu'il faut l'exercer avec délicatesse, et je suis sûre que votre Cour saura le faire. On ne peut l'exercer brutalement. Mais là, il est bienvenu que vous l'exerciez parce que cette allégation de violation de l'ordre public international OHADA par la République démocratique du Conya n'a strictement aucun fondement. En réalité, si on reprend la décision de Conya, voilà l'ordre public international de Conya, je cite : *« Risque de disparition d'une importante société de la République démocratique de Conya », « risque de chômage local », « privation d'un atout national d'importance régionale »*. On est loin de l'ordre public international OHADA qui était applicable devant la République démocratique de Conya puisque c'est en application de l'article 26 de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA que cette décision avait été annulée au siège.

(b) Les arbitres pouvaient constater la contradiction existant entre le Conyan Mining Protection Act *de 2007 (en ce qu'il prohibite l'arbitrage dans quelques matières) et la constitution de RDConya*

Carole Malinvaud : Deuxième raison pour laquelle je pense que vous devez exercer ce pouvoir d'appréciation, c'est la question, un peu plus complexe mais qui me paraît bien vue de la part des arbitres, du pouvoir des arbitres

d'apprécier la constitutionnalité ou pas d'une loi interne puisqu'en l'espèce, il était invoqué que la Loi rendait inarbitrable ce litige, or la constitution de la République de Conya a un principe fondamental en faveur des modes alternatifs de règlement des litiges, et les arbitres ont justement considéré que cette Loi de 2007, qui déclare inarbitrable une partie des litiges en matière minière, était inconstitutionnelle parce que c'est contraire à la Constitution de Conya. Ils avaient ce pouvoir-là parce qu'un arbitre prend l'intégralité du système juridique. Il ne s'érige pas en juge constitutionnel pour autant, mais son devoir est de vérifier la constitutionnalité aussi de certaines lois.[6]

Pour conclure là-dessus, vous avez ce pouvoir discrétionnaire, vous avez ce pouvoir d'appréciation, et il serait dans la logique de votre jurisprudence de l'appliquer. Ce serait logique et je dirais ce serait peut-être même un peu timoré. Et aujourd'hui je vous demanderai d'être audacieux, d'être modernes, d'être français… et d'aller un cran plus loin, et d'adopter ce qui a été élégamment rappelé par le Professeur Pierre Mayer : une décision arbitrale internationale est une décision de justice internationale. Il n'y a aucune raison d'accorder plus d'importance au lieu du siège *versus* le lieu de l'exécution. Elle a son existence propre. Elle a été annulée au siège? Très bien. À vous, Cour suprême de Cirné, de vérifier qu'elle doit rentrer - je parle de la sentence arbitrale - dans votre ordre juridictionnel et pouvoir d'être exécutée.

B. Les Arguments de la Partie Défenderesse

Christian Camboulive : J'admire le lyrisme de ma consoeur! Cela conduit parfois à quelques approximations. Les premières sont simplement factuelles, je commencerai très brièvement par cela avant d'en venir au fond du dossier.

Il a été plaidé que la Cour suprême de Conya, dans sa décision d'annulation, aurait révisé la décision des arbitres, la sentence arbitrale.

Ma consoeur s'est reprise, elle a admis qu'il ne s'agissait qu'une décision d'annulation. En aucun cas les cours de Conya ne se sont prononcées sur le fond du litige qui a été tranché par le tribunal arbitral, mais elles ont rendu une décision en droit qui, en effet, annule la sentence rendue. C'est un fait juridique. Il doit y être donné des conséquences.

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[6] Jan Paulsson, *L'exécution des sentences arbitrales en dépit d'une annulation en fonction du critère local* (ALC) Bull. CCI vol. 9/No. 1, mai 1998. Le Conya Mining Protection Act de 2007 pouvait être écarté car il appartient au tribunal en vertu de sa mission de statuer en dernier ressort sur la conformité d'une norme inferieure a la norme supérieure.

La seconde approximation – mais j'avoue que même le président de cette Cour l'a faite - a été de dire que je défendais l'État de la République de Conya. Ce n'est pas le cas. Je défends la société Friendly Mining Company dans laquelle l'État de Conya n'est que minoritaire.

J'en viens maintenant à un bref propos sur la sentence, puisque c'est d'elle qu'il s'agit aujourd'hui, cette sentence qui a été annulée et la procédure qui a conduit à cette annulation. J'examinerai dans un deuxième temps l'existence prétendue d'un pouvoir discrétionnaire d'appréciation dans le cadre de la Convention de New York avant de conclure mes observations sur les deux motifs de mise en oeuvre de ce pouvoir discrétionnaire qui ont été avancés au nom de Management and Control.

1. L'annulation de la sentence par le juge du siège est conforme au droit choisi par les parties

Christian Camboulive : Qu'en est-il de cette annulation? Selon la clause compromissoire, il est stipulé la chose suivante : « *Tout différend découlant du présent contrat ou en relation avec celui-ci sera résolu par trois arbitres suivant le Règlement d'arbitrage de la LCIA-MIAC Arbitration Centre. Le siège de l'arbitrage sera la République démocratique de Conya. La langue sera le français.* »

(a) Le droit applicable

Christian Camboulive : Quel est le droit choisi par les parties pour régir l'arbitrage? La République de Conya est un État membre de l'OHADA.

Selon l'article 10 de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA, « le fait pour les parties de s'en remettre à un organisme d'arbitrage les engage à appliquer le règlement d'arbitrage de cet organisme, sauf pour les parties à écarter expressément certaines de ses dispositions. »

Il n'y a pas, dans la clause compromissoire, de dispositions dérogatoires, c'est donc le Règlement d'arbitrage de la LCIA-MIAC Arbitration Centre qui s'applique intégralement. Selon l'article 16 de ce Règlement, le droit du siège régit la convention d'arbitrage. Le siège a été fixé à Conya, le droit de Conya s'applique à la Convention d'arbitrage.

(b) La matière était inarbitrable selon le droit applicable

Christian Camboulive : Or, selon le droit de ce pays, le contrat (la matière) était inarbitrable. On vous l'a rappelé tout à l'heure, cela vient d'un texte de Loi de 2007 qui rend inarbitrables les opérations de forage et d'extraction.

Management and Control aurait pu soutenir que l'invocation de ce texte était inappropriée au regard de l'article 2 du Traité relatif à l'harmonisation du droit des affaires en Afrique (ci-après « Traité de l'OHADA ») qui interdit à un État ou à une émanation de l'État d'invoquer un droit interne pour plaider l'inarbitrabilité. Précisément, ils ne l'ont pas fait. Cet article 2 du Traite de l'OHADA n'a pas été invoqué. Je ne suis pas l'État de Conya ; je ne représente qu'une société privée.

Management and Control n'aurait pas pu non plus et ne peut pas faire valoir que le contrat ne serait qu'un accord de financement. Management and Control a négocié, tout à la fin de la période de négociation qui était évoquée plus haut, et alors qu'en effet, les parties avaient à un moment donné acté le principe d'un arbitrage. Tout à la fin, Management and Control a voulu avoir plus qu'un simple remboursement de son prêt. Elle a voulu obtenir que sa rémunération soit constituée des fruits de l'exploitation de la mine en question, de sorte que l'opération économique, qui n'était qu'une opération de prêt, s'est transformée en une opération qui intègre l'opération de forage et d'extraction. Par voie de conséquence, le contrat est tombé dans le champ de ce texte de Loi que Management and Control soutient aujourd'hui ne pas avoir connu. Elle était pourtant tout à fait assistée.

Carole Malinvaud : Je profite de cette interruption pour dire que je ne vois pas bien comment j'aurais pu être remboursée par quoi que ce soit d'autre que les produits de la mine puisque, par hypothèse, il n'y avait qu'une coquille vide dans cette société à part le gouvernement.

Christian Camboulive : C'était, Madame, une partie des profits qui auraient été réalisés par cette mine, ce qui va très au-delà du simple remboursement des frais ou des sommes qui ont été avancés.

Le litige était donc inarbitrable. Or, selon le Traité de l'OHADA, la sanction d'inarbitrabilité est la nullité de la sentence. L'article 26 de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA le pose clairement.

Dans ces conditions, l'annulation de la sentence par le juge de Conya était prévisible. Il n'y a rien de scélérat dans cette décision.

C'est une conséquence de droit du droit qui s'applique, en l'espèce le droit tiré de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA.

J'ajouterai un dernier point sur cette question. Selon l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA, Management and Control avait la possibilité de faire un pourvoi en cassation contre la décision d'annulation. L'article 25 de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA permet aux parties de saisir la Cour commune de justice et d'arbitrage (« CCJA ») d'un pourvoi en cassation si jamais il est estimé que la décision rendue par le tribunal d'annulation était anormale et donne à la CCJA un rôle d'harmonisation du droit. Or précisément, s'il était pensé à l'époque que l'utilisation ou l'invocation d'une violation de l'ordre public international au sens du Traité de l'OHADA était anormale dans la décision des juridictions de Conya, Management and Control pouvait faire ce pourvoi en cassation. Elle s'est abstenue, elle n'a pas exercé cette voie de recours. Donc, la décision de la Cour suprême de Conya d'annuler la sentence est ainsi devenue définitive. C'est un fait juridique.

2. Pas de reconnaissance possible à Cirné d'une sentence arbitrale annulée au siège

(a) Application de l'article V(1)(e) de la Convention de New York

Christian Camboulive : J'en viens à l'interprétation de la Convention de New York. En effet, c'est le texte qu'il vous revient d'appliquer pour décider de donner ou pas effet à cette sentence annulée.

Selon l'article V(1)(e) de la Convention de New York, il est prévu dans le texte français - qui en effet a vocation à s'appliquer puisque le français comme l'anglais sont des langues officielles du CIRDI pour les besoins de cette demande de reconnaissance - que : *« La reconnaissance et l'exécution de la sentence ne seront refusées que s'il est rapporté la preuve que la sentence n'est pas encore devenue obligatoire ou a été annulée par une autorité compétente du pays dans lequel ou d'après la loi duquel la sentence a été rendue. »*

Il y a trois conditions dans l'article V(1)(e) susmentionné: une sentence annulée, par une autorité compétente, selon la loi du siège. Ces trois conditions sont remplies en l'espèce. L'existence de l'annulation ne fait pas débat. La compétence de la Cour suprême de Conya n'est pas contestée et Conya, comme je vous l'ai expliqué tout à l'heure, était le siège de la procédure d'arbitrage et le droit de Conya s'appliquait.

Dans ces conditions et pour cette première raison, la reconnaissance doit être refusée.

(b) L'absence d'un pouvoir discrétionnaire dans la Convention de New York

Christian Camboulive : La seconde question juridique qui se pose est de savoir s'il existerait un pouvoir discrétionnaire du juge d'accueil de la sentence qui pourrait être tiré de la Convention de New York.

Tout le propos et toute la difficulté vient du fait que, comme vous l'avez compris, il y a des différences de rédaction entre les différentes langues de la Convention de New York.

Si je prends la version française, *« La reconnaissance ou l'exécution ne sera refusée que si... »*. En français, c'est une double négation. Cela pourrait se lire : *« Dans ces conditions, la reconnaissance ou l'exécution sera refusée si... »*. Elle sera refusée si la sentence a été annulée par une autorité compétente selon le droit du siège.

Donc selon la version française de la Convention de New York, ma soumission est que vous devez refuser d'accepter la reconnaissance de cette sentence annulée.

Si l'on évoque rapidement la question de la version anglaise qui a été plaidée longuement par ma consoeur, tout repose sur l'utilisation du verbe *may*. Mais les conditions restent les mêmes : annulation de la sentence, par une autorité compétente, selon la loi du pays dans lequel elle a été rendue. En l'espèce, les conditions continuent d'être remplies et, en effet, la conséquence de cette annulation est de supprimer l'existence de la sentence. Par voie de conséquence et en application de l'article IV(1) de la Convention de New York, cette fois-ci, il n'y a plus de sentence que vous devez reconnaître.

Alors on vous a ensuite dit : oui, mais il existe des décisions qui ont accepté l'existence d'un tel pouvoir discrétionnaire. Comme ma consoeur l'a rappelé, il y a eu des décisions postérieures américaines qui sont revenues en arrière par rapport à *Chromalloy*, une des plus récentes d'entre elles étant la décision *TermoRio*, dans laquelle il est indiqué : *« La règle concernant les sentences annulées est maintenant claire. La Cour secondaire… »* - c'est-à-dire la cour à laquelle il est demandé de reconnaître une sentence annulée - *« should defer to the decision of the court that annulled or set aside the award. » « La cour secondaire devrait donner effet à la décision de la cour, du tribunal qui a annulé la sentence. »*

On a également évoqué rapidement deux décisions de *Yukos*, une anglaise, l'autre néerlandaise. Aucune de ces décisions n'est rendue au visa de l'article V(1)(e) de la Convention de New York.

Il a enfin été évoqué l'arrêt *Pemex* présentée comme un retour de la jurisprudence américaine à une solution favorable à la reconnaissance d'une sentence annulée. Outre le fait que la sentence a été rendue sur le fondement de la Convention de Panama, les faits sont assez différents puisque, à la différence du cas qui nous occupe aujourd'hui, la loi qui avait rendu inarbitrable le litige dans l'affaire *Pemex* avait été prise alors que l'arbitrage était en cours et que la sentence était rendue. Donc, en effet, c'était une loi de circonstance. Tel n'est pas le cas de la Loi de 2007 qui rend inarbitrable mais qui existait avant que le contrat soit signé.

(c) L'inapplicabilité de l'article VII de la Convention de New York

Christian Camboulive : Le Professeur Pierre Mayer a très rapidement évoqué, brillamment et clairement, les choses. Nous ne sommes pas dans la situation française. Vous n'êtes pas dans la situation française. Votre droit intègre l'intégralité de la Convention de New York. Il n'y a donc pas de régime plus favorable que vous ayez la faculté d'appliquer.

J'en termine enfin avec les deux raisons, les deux motifs avancés par Management and Control pour justifier la mise en oeuvre du prétendu pouvoir discrétionnaire que vous auriez.

(i) La Cour suprême de Cirné n'est pas le forum d'appréciation de l'application par les cours de la RDC de l'exception d'ordre public international

Le premier point qui a été fait est de dire : vous avez la possibilité d'apprécier la façon dont les juridictions de Conya ont appliqué l'ordre public international et d'apprécier la conformité de la sentence à son ordre public international. Ce n'est pas votre rôle. Votre rôle comme Cour Suprême d'accueil, est en effet d'exercer un contrôle sur la conformité à l'ordre public international, mais il s'agit de votre ordre public international. En aucune manière vous n'êtes une sorte de juridiction d'appel de l'appréciation par la Cour de Conya de son ordre public international, et c'est ce qu'a dit en effet très clairement votre Cour en page 25 dans l'affaire *Cruz City.*

(ii) La Cour suprême de Cirné n'a pas à rejuger la question de l'arbitrabilité du litige ou à se substituer au juge constitutionnel de RDC

Le second point est la question de savoir si le tribunal arbitral avait la possibilité de se prononcer sur la constitutionnalité ou l'inconstitutionnalité de cette Loi de 2007.

En l'espèce, cela pose une question intéressante en droit : est-ce qu'un arbitre a l'obligation ou la faculté d'analyser la conformité d'une règle, d'une loi, à une norme supérieure?

Il y a eu quelques voix, parfois éloquentes, notamment celle du Professeur Jan Paulsson cité par ma consoeur, pour soutenir que les tribunaux arbitraux internationaux auraient une autorité pleine et entière pour apprécier la conformité de ce qu'ils appellent une règle au droit d'un pays. Pourtant, dans son article, il admet très vite que ce qui est en jeu, c'est les valeurs fondamentales comme la démocratie ou les droits des individus.

En revanche, comme l'ont dit d'autres voix non moins éloquentes, notamment celle du Professeur Pierre Mayer, la mission de l'arbitre *« n'est pas de faire respecter la hiérarchie des normes en vigueur dans le pays dont le droit est applicable. »* Il n'est pas dans son rôle de se livrer à l'appréciation *« nécessairement subjective »* que requerrait la résolution d'une apparente confrontation entre une norme généralement exprimée de façon très générale, une norme constitutionnelle, et une règle inférieure.

Je note à cet égard et pour terminer le commentaire fait par votre Cour dans l'affaire *Cruz City* à propos de la question de la constitutionnalité et de l'appréciation de la constitutionnalité, notamment*: « The Constitution enforces protection of those fundamental rights in freedom subject to limitations designed to ensure that the enjoyment of those rights does not prejudice the public interest ».*

Or le débat qu'il y a ici est de dire : votre loi qui cantonne l'arbitrabilité des litiges pour exclure ceux afférents aux opérations de forage et d'extraction serait une atteinte au principe constitutionnel de Conya selon lequel il faut favoriser les modes alternatifs de règlement des litiges. On le voit bien, on est dans deux niveaux de choses très différentes, et même votre Cour accepte qu'il puisse y avoir, pour les besoins de l'intérêt public, des restrictions aux principes constitutionnels existants.

Voilà, Monsieur le président, Messieurs les assesseurs, les observations que je souhaitais faire.

IV. LA DELIBERATION DU TRIBUNAL

Juge Raymond Ranjeva : Le tribunal va maintenant délibérer et je demanderai d'abord à Me. Rajahbalee de faire part de ses observations. Après, Me. Daele prendra la parole et je dégagerai éventuellement des conclusions s'il y a lieu.

Iqbal Rajahbalee : Merci Monsieur le Président. Peut-être qu'avant de commencer les délibérations, Monsieur le Président, si vous me le permettez, j'aurai quelques questions aux deux avocats, des deux parties, d'abord à Me. Camboulive qui représente les intérêts d'une société de la République de Conya qui fait partie de l'espace OHADA.

Je note que sous l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA, il est question de l'application de l'ordre public reconnu par les États parties au Traité de l'OHADA. Est-ce que le facteur économique qui est mentionné dans notre dossier fait partie de cet ordre public de l'espace OHADA?

Christian Camboulive : Deux remarques sur ce sujet.

La première est que c'est une question qui ressort du droit OHADA et s'il y avait un débat, la lecture faite par les cours de Conya du périmètre de l'ordre public international est critiquée. C'est l'objet de la critique. S'il y avait véritablement une critique sérieuse, alors cette question aurait dû être renvoyée à la CCJA qui a ce rôle d'harmonisation en application de l'article 25 de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA.

Deuxièmement, je crois que cela sort de votre mission, de rejuger sous l'angle du droit OHADA. La seule préoccupation qui peut être la vôtre dans le cadre de la Convention de New York est votre ordre public international.

Carole Malinvaud : Vous aurez noté l'inconfort dans lequel mon confrère s'est trouvé pour répondre à cette question parfaitement pertinente sur la notion d'ordre public international OHADA puisque c'est, bien entendu, la catégorie fourre-tout où les parties essaient d'obtenir l'annulation pour des prétextes de fond de sentences arbitrales. Or pour être sérieux, bien entendu l'ordre public international selon les États signataires du Traité de l'OHADA s'entend des principes fondamentaux des États parties. Cela a été écrit sur les commentaires de l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA. En l'espèce, des considérations d'ordre purement

économique sont à l'évidence et non pas des principes fondamentaux des États parties de l'OHADA.

En ce qui concerne le recours à la CCJA, il est clair qu'on aurait pu aller devant la CCJA. Mais la République de Cirné ne fait pas partie de l'espace OHADA et il nous est paru plus important de venir devant vous, Cour suprême, pour que dans le cadre de votre appréciation de l'ordre public international, vous puissiez exercer non pas votre discrétion - parce que discrétion, cela a un côté un peu ingérant - mais votre pouvoir d'appréciation.

Juge Raymond Ranjeva : Je tiens à préciser à l'intention de l'assistance que la Cour internationale de Justice, dans l'affaire des activités militaires dans la province orientale du Congo, a rappelé que pour les États du continent africain, parties à l'OHADA, le pillage des ressources naturelles représente une atteinte aux droits de l'homme. En d'autres termes, il s'agit d'une question qui relève des questions de droit constitutionnel autre que l'exploitation des ressources naturelles.

Iqbal Rajahbalee : Ma deuxième question, aussi adressée à Me. Camboulive, porte sur l'impact de la Loi sur l'exploitation et le forage de 2007, qui limite la possibilité aux parties d'entrer dans des conventions d'arbitrage.

Est-ce qu'il y a une activité, une décision, un acte juridique que pourrait faire Friendly Mining sans aller à l'encontre de cette interdiction de la prohibition que vous imaginez? Quel genre de différend aurait pu être soumis à l'arbitrage qui serait conforme à la Loi de 2007 ?

Christian Camboulive : C'est, là encore, une question très factuelle mais la Loi de 2007 n'interdit le recours à l'arbitrage que pour les opérations de forage et d'extraction. Par voie de conséquence, sur l'ensemble des opérations qui sont liées intimement avec des opérations de forage ou d'extraction.

En l'espèce, ce qui a fait basculer ce qui aurait pu n'être d'un contrat de prêt dans cette prohibition, c'est le fait que la rémunération du contrat de prêt ne soit pas constituée que d'un droit à remboursement, ce qui est une contrepartie classique dans un contrat de financement, mais que Management and Control ait obtenu des rémunérations sur les profits réalisés par l'exploitation. Elle s'est donc intégrée dans l'opération économique que constituait l'opération d'extraction et de forage.

Si Management and Control avait été moins gourmand et s'était contentée de simplement demander des droits à remboursement, alors l'opération de simple financement ne rentrerait pas dans cette prohibition.

Carole Malinvaud : Je dois dire juste deux choses.

Cette loi sur l'inarbitrabilité n'a jamais été invoquée pendant les longs mois de négociation que nous avons eus, où nous avons fait connaître cette question fondamentale pour nous d'avoir recours à un forum neutre et d'avoir recours à un forum d'arbitrage.

Il me semble que la bonne foi basique aurait été que nos partenaires, s'ils avaient considéré qu'on était dans le cadre d'un contrat de forage et non pas d'un contrat de prêt, attirent notre attention là-dessus, ce qui n'a pas été le cas.

Deuxième point, sur la dénaturation qui a été faite par la République de Conya de la qualification de ce contrat. C'est pour cela que je parlais plus haut d'une révision au fond : c'est qu'en réalité, la Cour de Conya a révisé la qualification du contrat de prêt en qualification de contrat de forage, et c'est là où elle est rentrée dans le fond du dossier et n'est pas resté sur son contrôle de cour d'annulation.

Iqbal Rajahbalee : Ayant écouté non seulement les plaidoiries des avocats très éloquemment évoquer des arguments pour et contre l'intervention de la Cour de Cirné, je reconnais tout d'abord cette école de pensée qui prédomine ces temps-ci en faveur d'un élargissement des pouvoirs discrétionnaires de la Cour en matière de reconnaissance et d'exécution. Celle-ci repose sur une interprétation de la Convention de New York, mais je présume que le débat ne devrait pas se situer sur le pouvoir discrétionnaire parce que tout sujet, tout différend qui est soumis à une cour est sujet à la décision de cette cour, et cette décision s'exerce d'une façon judiciaire et judicieuse.

En ce qui nous concerne, cette théorie de la délocalisation du jugement d'annulation me paraît assez difficile à contenir dans l'ensemble des principes régissant l'arbitrage international, notamment en ce qu'elle enlève à la convention d'arbitrage tout rattachement à un ordre juridique.

Il y a un enchevêtrement d'ordres juridiques qu'on arrive difficilement à réconcilier dans les différents jugements et décisions qui ont été cités au cours de cette audience.

Tout d'abord, l'effectivité de chaque jugement est rapportée à un territoire délimité. Le jugement sur l'annulation de la sentence à Conya était délimité dans ses effets au territoire de Conya. Les effets de la

reconnaissance, si la Cour de Cirné parvenait à cette conclusion, seraient limités au territoire de Cirné.

Par conséquent, je ne conçois pas tellement l'application de cette théorie de la délocalisation. Je trouve que même si la Cour s'inscrit en contradiction à la décision de la Cour suprême de Cirné annulant la sentence, sans pour autant tenir compte de ce jugement et voir si le jugement est conforme à l'ordre public international, un peu à l'instar de la décision hollandaise dans l'affaire *Yukos*. Notamment, c'est par renversement de la situation que l'on conçoit, que l'on interprète l'effet de l'annulation. Notamment, est-ce que dans la forme et dans la substance, la cour de l'annulation a appliqué correctement les principes de l'ordre international ou pas? Si c'est oui, si l'opinion de la cour d'exécution est que l'ordre public international a été bel et bien respecté par le pays de l'annulation, ce jugement pèse lourdement en faveur de la non-exécution de la sentence dans le pays de Cirné.

Par contre, s'il y a eu une entorse au principe de l'ordre international, à ce moment-là, je conçois que ses pouvoirs de décider de la reconnaissance et de l'exécution de la sentence arbitrale soient considérés par la Cour de Cirné.

En l'occurrence, je suis ici concerné par le fait que la Cour de Cirné a effectivement outrepassé ses pouvoirs en décidant sur l'annulation au motif de la constitutionnalité qu'il était parfaitement dans les pouvoirs de l'arbitre de décider, et deuxièmement outrepassé ses pouvoirs en appliquant les facteurs économiques pour l'annulation.

En tant que juge, je ne sais pas quelle serait la décision de la majorité. Personnellement, je pencherais pour accorder la reconnaissance de l'exécution de la sentence à Cirné.

Karel Daele : Il y a quelques mois, je faisais partie d'un autre tribunal, un tribunal arbitral qui devait déterminer un différend entre une partie africaine et un gouvernement africain. Je crois que nous avons été le premier tribunal à avoir tenu ses audiences ici, à l'île Maurice. Donc, avant de poser mes questions, je voudrais dire : si vous cherchez un siège pour tenir vos arbitrages, je peux vous recommander de venir ici, à l'île Maurice, parce que c'était une expérience splendide.

Ceci dit, Me. Malinvaud, en fait je n'ai pas de questions pour vous et je vais vous expliquer pourquoi.

Selon l'article IV de la Convention de New York, à mon avis, la partie demanderesse à deux choses à faire.

En vertu de l'article IV(1), la partie qui demande la reconnaissance et l'exécution doit fournir seulement deux choses : premièrement, l'original

de la sentence, dûment authentifié ; deuxièmement, l'original de la convention d'arbitrage.

En fait, c'est ce que vous avez fait. Donc pour moi, vous avez rempli les deux seules conditions que la Convention de New York vous impose. Ce n'est pas à vous de prouver que vous avez raison. J'estime que c'est à la partie défenderesse de prouver parce que l'article V(1) de la Convention de New York dit que la reconnaissance et l'exécution ne seront refusées que si certaines conditions sont remplies. Donc, ce n'est pas à vous de prouver que les conditions ne sont pas remplies.

Me. Camboulive, je n'ai qu'une question. Elle concerne les difficultés entre les deux textes, le texte français et le texte anglais, de la Convention. Pour vous, quels sont le but et l'objectif de la Convention de New York?

Christian Camboulive **:** La vraie réponse, c'est de se poser la question de savoir si, dans les cinq cas qui sont visés à l'article V(1), le tribunal, votre Cour en l'espèce, doit avoir une approche identique sur les cas (a) à (e) ou s'il faut faire une distinction entre deux cas de figure. Le premier cas de figure concerne les critères de l'article V(1)(a) à V(1)(d). L'autre concerne l'hypothèse particulière de l'article V(1)(e).

C'est une hypothèse particulière parce que dans ce cas-là, la sentence a été annulée par une autre juridiction qui est votre égale. C'est une juridiction d'un État souverain qui applique son droit et au terme d'un raisonnement, elle a abouti à une décision d'annulation.

Ma suggestion est qu'à supposer même qu'il y ait un pouvoir discrétionnaire ou un pouvoir d'appréciation et pas une obligation de donner effet ou de ne pas donner effet à la sentence, vous ne pouvez pas exercer votre pouvoir de façon particulièrement précautionneuse dans l'hypothèse de l'article V(1)(e) où une annulation est intervenue. Vous ne pouvez pas agir comme une sorte d'organe d'appel de la décision d'annulation. Vous êtes confronté à un fait juridique.

Karel Daele : Vous ne répondez pas à ma question. Ma question était : selon vous, quel est l'objet et le but de la Convention de New York? Je vais vous expliquer la raison pour laquelle je pose cette question. Vous êtes d'accord qu'il y a une différence, à mon avis fondamentale, entre la version française et la version anglaise ?

Je vous lis le paragraphe 4 de l'article 33 du Traité de Vienne sur le droit des traités, qui dit que : *« Sauf le cas où un texte déterminé l'emporte conformément au paragraphe 1 »* - on n'est pas dans ce cas-là - *« lorsque la comparaison des textes authentiques fait apparaître une différence de sens que l'application des articles 31 et 32 ne permet pas*

d'éliminer » - et je crois que ce débat a clairement démontré qu'on n'a pas pu éliminer cette différence -, *« on adoptera le sens qui, compte tenu de l'objet et du but du traité, concilie le mieux ces textes. »*

Donc c'est une méthode d'interprétation. Quel est, selon vous, le but et l'objet de la Convention de New York? Est-ce en faveur ou contre l'exécution d'une sentence arbitrale?

Christian Camboulive : Il est évident que l'objet de la Convention de New York est de favoriser la reconnaissance des sentences. Maintenant, cela ne se fait pas à n'importe quelles conditions et vous avez un pouvoir à exercer. À partir du moment où vous êtes confronté à une annulation d'une sentence par le pays d'accueil, l'objectif général de la Convention de New York n'est pas de permettre la reconnaissance de n'importe quelle sentence, surtout si elle a été annulée.

Juge Raymond Ranjeva : Je dois vous dire qu'en tant que président de cette Cour, je me trouve dans une situation très embarrassante parce que nous sommes en face d'une question délicate qui, à la limite, n'a rien à voir avec l'affaire qui est présentée devant la Cour dans la mesure où les versions française et anglaise ne signifient pas très exactement la même chose. N'étant ni anglais ni français, j'aurai du mal à trancher.

Ceci me rappelle un cas très précis devant la Cour internationale de justice à propos du caractère obligatoire des mesures provisoires et des mesures exécutoires où, pour éviter d'avoir à trancher une question de grammaire, la Cour a ajourné sa décision.

En l'espèce, en tant que président de cette Cour, je remercie les parties comme mes collègues qui siègent à cette juridiction de leurs contributions importantes et très intelligentes mais, prenant la responsabilité de veiller à ce que la décision de la Cour soit non seulement le reflet de l'ensemble de nos débats et de nos travaux mais également considérée comme une décision sérieuse, il me paraît préférable de n'avoir pas à trancher sur une question de grammaire alors que nous sommes dans une instance juridique.

Neil Kaplan *Q.C.* nous a exposé l'intérêt d'un réseau virtuel d'arbitres qui a pour vocation d'associer toutes les parties concernées, les professionnels comme les intéressés, à un débat virtuel. Alors pourquoi, dans le cadre de cette affaire où le problème est d'abord une question de grammaire qu'il faudra clarifier, ne pas recourir à cette ressource? C'est pour cela qu'après avoir consulté avec mes deux collègues, et avec leur

assentiment, la décision de la Cour visera d'abord à surseoir à la décision, à consulter le réseau virtuel des arbitres sur la signification à donner à l'alinéa (e) du premier paragraphe de l'article V de la Convention de New York.

PANEL VI

RECOGNITION AND ENFORCEMENT OF AWARDS: PANEL-LED DISCUSSION

Report to the Conference

Jennifer Konfortion[*]

Moderator: H.E. Hugo H. Siblesz[**]

Discussion Leaders: Dr. Mohamed Abdel Raouf[***]
Dr. Philippe Leboulanger[****]

I. INTRODUCTION TO THE PCA

The Permanent Court of Arbitration (the "PCA") is an intergovernmental organisation with 116 Member States including 23 African States. It is dedicated to the peaceful resolution of international disputes through arbitration, conciliation and fact-finding inquiry commissions. It provides registry services in any dispute in which at least one party is a State entity or an intergovernmental organisation.

The PCA case docket includes 95 pending cases including 7 inter-State disputes and 88 mixed arbitrations. Of those pending cases, 2 inter-State arbitrations and 19 mixed arbitrations involve at least one African party. Cases involving African parties account for some 20% of the PCA's total caseload.

The PCA is based in The Hague but it opened its first overseas office in Mauritius under a Host Country Agreement signed in 2009. That Agreement facilitates PCA activities in Mauritius including the first PCA hearings held here earlier in 2014 in a dispute between two African parties.

A. The PCA's perspective on the enforcement process

As an administering institution, the PCA's role is typically limited but it is involved in the post-award stage, for example:

(i) by providing a duly authenticated award or a duly certified copy of the award to a party seeking enforcement under the New York Convention; or

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(ii) by assisting with registration requirements under the law of the seat of the arbitration; or

(iii) by providing, as necessary, an official, or unofficial or courtesy translation of the award; and

(iv) by maintaining an archive of the case.[1]

As a registry, the PCA is also involved under the New York Convention and its grounds for refusal of enforcement, that is, the integrity of the arbitral process as a whole. Under the UNCITRAL Arbitration Rules, the PCA is authorised to designate an appointing authority in certain situations or to act as an appointing authority.

Under the Mauritian International Arbitration Act 2008, the PCA:

(i) is the appointing authority for the appointment of arbitrators;[2]

(ii) decides on challenges;[3] and

(iii) decides on whether or not a tribunal may proceed without one of its members[4].

II. THE VARYING APPROACHES OF DIFFERENT COUNTRIES TO THE RECOGNITION AND ENFORCEMENT OF AWARDS WHICH HAVE BEEN SET ASIDE AT THE SEAT OF ARBITRATION

Four possible approaches will be analysed: the French one, the Nigerian one, the Ghanaian one and the British one. All, except the French, would not enforce for different reasons an Award set aside at the seat.

1 Sometimes, files are misplaced or lost. For instance, in a predictive case, as a result of a change of government, the PCA was asked to provide a copy of the entire file in the context of enforcement proceedings.

2 See section 12(3)(a)(ii) and 12(3)(b) of the International Arbitration Act 2008.

3 See section 14(3) of the International Arbitration Act 2008.

4 See section 16(2) of the International Arbitration Act 2008.

A. The French Approach

The position of French law is based on the fact that French law is more liberal than the New York Convention. So far, the New York Convention is not really applied in France. If a foreign award complies with the French requirements for its recognition or enforcement, a French court cannot refuse such recognition and enforcement on the ground of the New York Convention.

For the *Cour de Cassation*, the solution is the mere expression of the autonomy of international arbitration. It is based on a few very simple ideas.

The arbitrator is an international jurisdiction by itself. The award which is the product of the will of the parties exists by virtue of the parties' intent. For some scholars, this solution is the evidence of the existence of an arbitral order independent of national legal orders.

As a consequence, the fact that an award is being challenged before the court(s) of the seat of the arbitration is not in itself a bar to its recognition in France.

French law is more liberal than the New York Convention and by virtue of Article VII(1) of the New York Convention[5], French law prevails over the Convention. According to Article V(1)(e) of the New York Convention[6]. Pursuant to Article V(1)(e) and as affirmed by French case law, annulment of an award in the country where it has been rendered is not a ground for French courts to refuse exequatur.

French law considers that the award is a private act – though a decision of international justice – which is not anchored in the legal order of the country where it has been annulled and thereafter set aside. This is not a broadly accepted solution. It is a very controversial idea although some countries tend to adopt, more or less, this solution.[7]

B. The African Approach

1. Nigeria

The likelihood is that the Nigerian courts would not enforce an award that is set aside at the seat. Although such situations have not yet been

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5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article VII (1).

6 *Ibid*, Article V(1)(e).

7 *Société PT Putrabali Adyamulia v. SA Rena Holdings*, *Cour de cassation*, 29 June 2007, Y.B. COM. ARB. Vol. XXXII 299 -302 (2007) (France No. 42),

encountered in Nigeria's case law, the Nigerian courts tend to respect the decisions of other courts. The Nigerian courts would also look at the New York Convention.

Nigeria is a common law country and has adopted the English common law, prior to 1900, as part of its law. English case law is therefore persuasive, it and it is probable that the Nigerian courts would look towards what England has done. Therefore, the recent decision in the UK would also be something that the Nigerian courts would take into consideration if it was brought to their attention.

Nigeria would also look at the public policy issue. The matter is still open for discussion but there is a 70% chance that if the award has been set aside at the seat, the Nigerian courts would not enforce it if the matter was brought.

Section 52(2) of the Nigerian Federal Law[8] provides for the circumstances under which the court would refuse the recognition or enforcement of an award. For example, section 52(2)(a)(ii) provides that "[i]f the party against whom it is invoked furnishes proof that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made…"

Therefore, the law in the seat of arbitration is quite critical under the Nigerian Federal Law. If at the seat of the arbitration, the award is set aside, then from section 52(2) of the Nigerian Federal Law, it would seem that the Nigerian courts may not necessarily enforce that award.

Then again talking about public policy, there is also another distinction between the Nigerian Federal Law and the arbitration law of Lagos[9]. While the Federal Law of Nigeria refers to public policy in Nigeria, the Lagos Law refers to public policy in general, so it would appear that these two regimes are quite dissimilar. It is hoped that the courts would pin their search light on this more.

2. Ghana

The issue is not up for debate in Ghana because by the Alternative Dispute Resolution Act[10], Ghana has taken a firm position that despite subsection (1), the court shall not enforce a foreign Award if the Award has been annulled in the country in which it was made. This is not a homogeneous

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8 Arbitration and Conciliation Act 1998, Cap. A18, Laws of the Federation of Nigeria (2004).

9 The Lagos State Arbitration Law No. 10 of 2009.

10 See section 59(3)(a) of the Alternative Dispute Resolution Act 2010.

African position. One should therefore look at the various jurisdictions where the statute does not make express provision and see where there is another formulation that African countries, other than those which have set out the position in statute, may adopt.

C. The English Approach

The traditional approach in England has been incredibly territorial. In his seminal article *Lex Facit Arbitrum*[11], about 50 to 60 years ago, Francis Mann says that it is completely abhorrent to the idea of arbitration, as seen from a territorial perspective, that one could give effect to an annulled decision. That has been the traditional position in common law countries.

III. THE COMPETING THEORIES OF ARBITRATION

About five years ago, Professor Emmanuel Gaillard analysed in his seminal book[12] the various theories of international arbitration which might have a direct impact on the enforcement of a foreign award which has been annulled in the arbitral seat. These theories are the following:

A. The Territorial Approach

The arbitrator only exists because of the sovereign power of a given country which has allowed him to exist. If that country then annuls his decision that is the end of the matter.

B. The Multi-localised Approach

This approach has also been called Westphalian after the Treaty of Westphalia. It is to the effect that the most important point of contact is not the seat but are the countries that may recognise that award.

C. The Denationalised Approach

This model suggests that it is possible that the annulment of the award might not impact what the recognising court would do. The French courts have adopted this approach.

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11 F.A.Mann, *Lex Facit Arbitrum*, in *Liber Amicorum for Martin Domke* 160 (1967).

12 Emmanuel Gaillard, *Legal Theory of International Arbitration* (2010) Martinus Nijhoff.

It is the extreme approach at this stage of the development of international arbitration. It says that nobody has anything to say about the award which exists in its own juridical order.

D. The Impact of the Three Theories on the Recognition and Enforcement of Awards Set Aside at the Seat of Arbitration

The theory that one adopts will have an impact on how one looks at this issue but what we are seeing is a move away from theory to pragmatism. We are faced, and even the English courts are recognising it, with annulled decisions which perhaps ought not to be recognised.

For years and years, French authors in particular have focused and tried to look for jurisdictions which might also recognise annulled awards. The US was their Holy Grail because here was an example of someone else doing it but that is not the right analysis.

One needs to look at the theory which underpins the recognition which can be very different, namely:

(i) You can have the traditional early French approach which is to say, and it is still the best justification for the French approach, Article VII of the New York Convention allows us to do it.

(ii) Another approach is to say Article V(1)(e) of the New York Convention turns on the word "may". It does not give us many answers because what standard does one apply to decide how to exercise the discretion. Professor Jan Paulson has ventured to say that there might be local standards of annulment and therefore that there might be local standards of annulment to the effect that there are international standards of annulment which would be given effect to. If the award has been annulled on that ground, the Court would not recognise it. If it is a local parochial standard, one can recognise it but that has not been accepted either. What are the courts left with?

(iii) Then you have an approach which does now seem to be taking more prominence which was the approach also in the US in the early cases which is focused on the status of the judgment that has been annulled.

In fact, most countries will already have a regime which tells them how to treat a foreign judgment. It becomes a question of what is the impact of the international Convention in this field. Is the annulling judgment to be treated any differently from any other judgment? That is what we were seeing more and more. Was the Russian court's decision right or wrong? Was it taken in denial of justice? That tends to be the focus now.

That seems to be the French paradox where Professor Christophe Seraglini in France has put his finger on, which is: what is the position in France of the annulled award. Why is it that French Courts do not recognise it? It is not properly dealt with in the French jurisprudence.

French law and French courts have adopted the transnational or denationalised approach which in the minds of the courts is the very spirit of truly international arbitration. Therefore, in this perspective the international Award is not embedded or incorporated in any specific national legal order and the only control of the Award should be at the place of execution. In this logic there should not be any recourse for annulment.

IV. PROBLEMS ARISING DUE TO THE VARYING APPROACHES

A. The Overriding Public Policy Question

There is an overriding public policy question as to why a court asked to implement a decision or not to review it only on the basis that it has a suspicion that the court from which this decision emanates may not have the same standards, whatever those standards are, jurisprudential or otherwise?

The reason for that is that the committee of nations rests on the respect that courts give to other courts of sovereign countries. There is a great danger of degenerating into a situation where courts in some countries may then arrogate to themes the jurisdiction to re-open and rehash arguments that were made before and arrive at a different conclusion. It is even worse where the questions that have arisen are about the interpretation of domestic law.

B. The Political Dimension

1. A Practical Case Study

Imagine there is a merchant in Le Havre sending goods from Indonesia to a buyer in France. Do you think that the merchant and the buyer would have agreed to London as the place of arbitration or to the International Court of Justice? No.

Even worse what I understand in that situation what happened is this. The English courts are pretty serious so they have seen this first award and they say: "go back to the arbitrators, I think you are applying the law incorrectly".

Then there comes a second award. What happens in that case? The first Award travelled to France. The French court says we make you alive again so the first award gets enforced although it has been set aside in England.

Now comes the second award which you would think is the good Award because they improved what they did in the first place. The second Award comes to France. They refuse enforcement. The ultimate result is that the bad award remains in force and not the good award.

Apart from this there is also some inconsistency. The French Supreme Court referring to *justice internationale* because this is rendered outside France – everything outside France – for the French the flat earth theory – is *justice internationale*. If one comes inside France, and these paper merchants had their arbitration agreed in Le Havre, which is a place in France where you have a lot of these commodity arbitrations. Imagine that you had that one and suddenly it is a French award. How can the same award because of the place just on the other side of the channel be in England be *justice internationale* – it does not exist in the *Cour de Cassation* in this theory – but if it had been rendered in Le Havre it is a French award and you could set aside that award in France. If that Award has been set aside in France the French courts will refuse enforcement.

This award had been set aside in England and now the French courts say "welcome, we will enforce it." The effect of this is political. The political dimension is that they effectively are insulting their brethren in other countries.

2. The COMMISA v. Pemex Case

An award was made in Mexico and was set aside at the place of arbitration being the Mexico Federal District. The District Court in the Southern District of New York allowed enforcement of the award[13].

Notwithstanding that the award has been set aside and that the enforcement is under the Panama Convention (which is more or less equivalent to the New York Convention), the Court enforced the award because they said that the Mexican judges have deprived the COMMISA of

[13] *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, No. 10 CIV. 206 AKH, 2013 WL 4517225.

its due process rights because they could not reinstate the claim after they had been set aside.

If one looks at what happened in Mexico and if one looks what it is, there is a lot of daylight between what the judge in New York dreamed up in his decision and what actually happened in Mexico. The Mexicans are really upset about it and said: who is this judge who accuses us of applying the law so wrongly in Mexico?

V. PROPOSED SOLUTIONS

A. The Adoption of another International Instrument

Under the OHADA Common Court of Justice and Arbitration rule of arbitration, where the court has set aside a CCJA Award, it cannot be recognised in any other contracting State. This African model can serve as the model for the elaboration of another international instrument to complete the New York Convention.

So far as there is no such instrument, the French position has a justification. Maybe the solution would be to adopt another international instrument.

B. The Adoption of Clear Domestic Statutory Provisions for the Enforcement of Awards Set Aside at the Seat

Should other countries be encouraged to adopt new arbitration laws to have a clear provision regarding the enforcement of awards set aside at the seat?

There are five grounds for refusal of enforcement together with one on public policy under the New York Convention. One should simply follow the text of the New York Convention. If any Award is set aside in the country of origin, so be it. There are not that many awards which are set aside. Of course, the proponents of this theory say you should do this because of the scandals. There may be cases that Awards have been set aside for grounds which are questionable but they are casualties we have to pay the price for a stable regime for international arbitration.

On the other hand, one would not quite pay the price that is demanded.

VI. SHOULD THE COURTS FOCUS ON THE JUDGMENT SETTING ASIDE THE AWARD ITSELF?

A. Focusing on the Judgment

The question as to what "may" means in the New York Convention and the English legislation does fall to be construed in the light of the Vienna Convention. There are doubts whether one would take the view taken in France, namely that the domestic legislation goes further or is more favourable to enforcement because the wording is precisely the same.

Leave aside the word "may" as a matter of the law, there are considerable arguments for disagreeing.

It would seem strange that a French court would enforce the first worse award and ignore the second, and it would seem strange, at least through British eyes, that they did not give credence to the decision of the English Commercial Court to set aside the first award.

One should concentrate on the foreign judgment which sets aside the award. No doubt it will be relevant whether it was in the seat of arbitration or elsewhere, although that may not make a huge difference. In either case, on the face of it English courts would be likely to pay regard to that judgment.

Quite possibly it gives rise to res judicata or issue estoppel but English courts do not always recognise foreign judgments. Of course they do not ignore foreign judgments simply because they disagree on the merits, that would be entirely wrong, but on public policy grounds we do from time to time, very rarely, refuse to follow foreign judgments. This happens even when there is no arbitration element between courts.

The Privy Council in 2011 illustrates this in a case called *Altimo*[14] where we had to decide whether to recognise judgments of the courts of Kazakhstan. If you read the Privy Council advice to Her Majesty, in no uncertain terms we described the judgments as bizarre and refused to follow them. Facts were set out, they speak for themselves.

One can go further? Supposing a Nazi law, would one really follow a judgment which was discriminatory against Jews? It seems to me in a sense it is *a fortiori* where you have an arbitration award because there is a foreign court, even if it is the foreign court of the seat, is setting aside an award which is based on the parties' autonomous agreement.

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[14] *Altimo Holdings and Investment Limited and Others v. Kyrgyz Mobil Tel Limited and Others* [2011] UKPC 7.

It is an award which *prima facie* represents what the parties agreed to be bound by. If you formed the view that that had been set aside on appeal on the grounds that the award was made in favour of a Jew, would you really feel it appropriate to recognise the foreign judgment as effective? If it were shown as a result of a bribe, there is a strong argument that you should not.

Without pre-judging whether the word "may" compels a different result but certainly the attitude of the British courts hitherto seems to have been, that it does not compel a different result and that "may" does leave us some power in residual situations to refuse to follow.

If one focuses on the judgment to set aside, what one does is to preserve the limited grounds within the Convention. What is particularly powerful about focussing on the judgment is that it would be a very rare case that one would set aside the judgment. It forces one to think about what is that rare case rather than insulting the judges.

In the rare cases where one does not enforce a foreign judgment actually what one does is reinforce the judgments because in most cases those judgments involve interference by the executive in the judiciary. It is actually a reaffirmation of what those courts should have done and in that sense is quite strong.

That is exactly what the Amsterdam Court of Appeal did in the Yukos case before it went to the Supreme Court. Everybody talks about the Supreme Court case[15] but that is actually not the most interesting case. The Court of Appeal[16] did look at the Russian setting aside decision and decided that what had happened in that court was dramatically wrong.

That decision did not make this analysis on the basis of the New York Convention. It made this analysis purely on the basis of non-conventional rules of Private International Law which is a very unsatisfactory approach.

If one is bound by a treaty, and the Netherlands is bound by the terms of the New York Convention, what they should have done is they should have looked at "may". They should have said is it "may" or is it "must" and instead they circumvented the entire issue. Possibly the English courts will do the same thing but do it better but it is a very serious thing for one court to say that another court has come up with a decision which outside of the realm of compulsory conventional rules should simply be effectively ignored. This is not the way forward.

There is no reason not to look at the foreign judgment.

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15 OAO Rosneft v Yukos Capital S.A.R.L., Decision of the Dutch Supreme Court, 25 June 2010, case No.09/02566

16 Yukos Capital S.A.R.L. v. OAO Rosneft, Decision of the Amsterdam Court of Appeal, 28 April 2009 in Case No. 200.005.269/0

B. Focusing on the Award instead of the Judgment to Set it Aside

There is no insult, no contempt, no offence to the judge who has annulled the award. The issue is that the French courts do not consider the judgment of annulment. They just consider and take into consideration only that award in itself. There is no appreciation of the decision which has been taken by the foreign judge on the merits of the award or the regularity of the award. This is only the award which is taken into consideration not the judgment so there is no insult of course.

C. Distinguishing Between Foreign Judgments

A distinction may be made between foreign judgments of the court of the seat sitting aside the award and the judgment from another court recognising the award. This distinction feeds a little bit to other questions that are in the paper about *res judicata* and issue estoppel.

One is not sure whether they should be treated as analogous. If one starts having a regime whereby because of the application of Article V(1)(e) of the New York Convention one would normally be following the court of the seat whenever an award has been annulled. If one adds to this issue estoppel which is a newer doctrine, not something which was widely discussed a few years ago, and one then says also when that court has recognised the award I will follow that too, add to this a little layer of abuse of process and say if you went before that court and you did not raise a point you will be bound too. Add to this a little bit more and say you should have gone before that court but you did not, that is also abusive, and you are back into the regime of double exequatur which is exactly that which was abolished by the Article VII(2) of the New York Convention. We need to exercise some caution.

Under the scheme of the New York Convention when it comes to the recognition and enforcement, the court of the seat is one thing but then each country which would recognise and enforce, each foreign country vis-a-vis the seat, would have its own autonomy, its own independence and not be bound by the judgement of another recognising court.

D. Recognition of Foreign Judgments and the New York Convention

The latest theory about the recognition of foreign judgments is another slippery slope in interpreting the New York Convention.

For a grant of refusal of enforcement under Article V(1)(e), one has to furnish proof that (a) there was a competent court, and (b) that the court has set aside the award.

If one introduces the whole system of recognition of foreign judgments, the first question is: which legal basis is there for introducing the requirement of recognition of the foreign judgments and which would do the New York Convention? Does one use the local law for recognition of foreign judgments? This becomes complicated.

The solution for this is far simpler. We have these judgments that can be obtained by corruption. We have all kinds of other very basic issues that may taint it.

If one looks at the introduction of Article V(1) of the New York Convention, it says that a party has to furnish proof of the ground for refusal of enforcement. If one furnishes proof by giving a judgment that has been obtained by corruption, one offers evidence that it is tainted in some way or the other which the court can say one has not proven one's case and would refuse the enforcement in this case under Article V(1)(e) of the New York Convention.

VII. RELATIONSHIP BETWEEN THE NEW YORK CONVENTION AND OTHER CONVENTIONS

It is very particular to North Africa and I would like to know whether this would be always the case under the OHADA system or the COMESA system.

A. OHADA

OHADA arbitration has two pillars:

(i) OHADA Common Court of Justice and Arbitration Regulations

(ii) the Uniform Act on Arbitration.

Some of the OHADA contracting States are also signatories to the New York Convention. In the OHADA countries, that are also a contracting State of the New York Convention, if there is a need of *exequatur,* the claimant will have the choice to rely either on the New York Convention or on the Uniform Act of Arbitration. Generally the Uniform Act is deemed more favourable than the New York Convention.

B. The Riyadh Convention

The Riyadh Convention of 1983, also called Riyadh Convention for Judicial Co-operation comprises certain provisions for the enforcement of Arab Awards in Arab States. It has been ratified by 16 Arab States including seven Arab African States.

1. A Case Study

Imagine that an arbitral Award is rendered in Cairo in favour of an Egyptian private entity against a public entity in Mauritania. Egypt and Mauritania are both parties to the New York Convention. They are also both Arab States, member of the Riyadh Convention of 1983.

The winning party, the Egyptian party, seeks enforcement in Mauritania and the Mauritanian party invokes the Riyadh Convention. He is asking the Mauritanian judge to apply the Riyadh Convention rather than the New York Convention because under the Riyadh Convention it still requires the double *exequatur*. We need the award to establish that the arbitral award is not only final but has always obtained the *exequatur* where it was rendered before seeking enforcement elsewhere. It is not the case, as you know, under the New York Convention.

We have two conflicting conventions governing the enforcement of such foreign arbitral award. Under the Riyadh Convention parties should not and are not allowed to agree to violate the provisions of the Riyadh Convention. What should the Mauritanian judge do? Which provisions shall prevail?

The Riyadh Convention was adopted in 1983 so after the New York Convention. Does the doctrine of maximal efficiency apply? The subsequent prevails also precedes over the former provisions? These are questions that we have in North Africa and which we would like to discuss with you.

2. Maximum Efficiency or the Vienna Convention?

(a) Maximum Efficiency

The provisions that grant more efficient solution to enforcement and that are more favourable to enforcement would prevail.

The Egyptian Court of Cassation did not have the same problem but a similar one whereby we had conflicts between the Egyptian law on arbitration, which has provisions on enforcement, and certain provisions in

the Egyptian law on civil procedures which are still in force even after adopting the Egyptian law on arbitration. The provisions on civil procedures require reciprocity for enforcement of the foreign judgments including the arbitral Awards.

The New York Convention refers to national laws. Should we apply the special law on arbitration in Egypt which is more arbitration friendly and does not require reciprocity, or rather the provisions of the civil procedure law which are not really in favour of enforcement?

The position was the more favourable to enforcement should prevail. A judge would, if he or she is aware of the particularities and the objectives of the New York Convention, would go into favour of the provisions in favour of enforcement.

It should be assumed that the Riyadh Convention was not meant to replicate the New York Convention. It was meant to enhance the effectiveness, enhance the *exequatur*. There are two different things: one is the Award which has got to be made in a certain particular way, that is one phase; *exequatur* is something very different linked to the award. This one, if the Riyadh Convention has given an opportunity between States to enhance the *exequatur* the second convention should prevail – not prevail, I do not think there is a conflict; it is simply to facilitate the New York Convention.

Whilst the New York Convention may have been passed earlier, one of the problems for which it came into existence was to deal with the issue of double exequatur. Therefore, even though the Riyadh Convention came in much later it has this problem. One would want to look at the objective for these Conventions and therefore ask the judge I will be looking to enforce the New York Convention in this regard.

(b) Article 30 of the Vienna Convention: the last treaty in time should prevail

First of all, the analogy of a clash in domestic law between a code of civil procedure and another law does not seem to me to be apposite. We are at the level of public international law. The premise of your question is that we have a clash between treaties. If there IS not a real clash, for instance if Riyadh Convention has a provision analogous to Article VII(1) of the New York Convention, then is there not a real clash but let us assume there is a real clash.

It seems that the answer is in Article 30 of the Vienna Convention on the Law of Treaties. As laudable as it may be to want to have maximum effect, Article 30 of the Vienna Convention on the Law of Treaties is a

pretty clear rule: the last treaty in time prevails. That is, Article 34 which says that the Riyadh Convention must prevail.

(c) The Specific over the General

To the extent that a country adopts a treaty which makes it more difficult to enforce an Award than it should be if that country were strictly complying with the New York Convention, is there something which will allow a party to ask the courts of that country to disregard the treaty which appears to mean that country is not complying with its New York Convention obligations?

The contrary argument, you take later in time because you assume if you do it later in time the parties intended for the later to overrule the first, but Article 30 refers you to: do the treaties address the same question. That leads you into a separate point of: is one general and is one specific. You actually have to look at the scope of the two treaties. It is more than later in time; it could be general or specific over general.

(i) The judge does not have the possibility to grant exequatur on a basis different from which the claimant has relied on.

The judge must apply the national law. The *exequatur* is not a matter which is left to the will of the parties; it is impossible. The judge controls the conformity of the Award to its international public policy rules.

If one is looking for an *exequatur* and relying on the New York Convention, the judge cannot rely on something else than the New York Convention to grant or refuse *exequatur*. The judge is bound by the New York Convention in so far that the New York Convention is in force in its territory.

In a case where parties in the OHADA contracting States, have the choice to rely either on the New York Convention or on the Uniform Act on Arbitration and a party relies on the New York Convention, could the judge invoke the Uniform Act on Arbitration instead of the New York Convention? There is no conflict between the Uniform Act on Arbitration and the New York Convention because they both apply but they do not apply in the same situations. It is either the UAA provided that the seat of arbitration was within the OHADA territory or if it is an Award which is rendered outside the territory of OHADA then the Convention applies. It is either the UAA by virtue of Article 34 of the Uniform Act in Arbitration which applies. There is no conflict which is a different situation than the proposed case study.

(ii) Possibility of breach of New York Convention obligations to other New York Convention State parties

The State party that has then adopted the Riyadh Convention would not be in breach of its New York Convention obligations to other State parties to the New York Convention. All those that have adopted the Riyadh Convention have agreed to that regime but by not applying the New York Convention regime in a given case it may well be in breach to other New York Convention State parties.

VIII. CONCLUSION

The enforcement of arbitral awards in Africa is a fundamentally important topic and an area for much further discussion. However, it is only a chapter in the larger story which is the story of Africa's development in the wider context of the rule of law.

Two years ago at the 2012 edition of this event, the legal counsel of the United States Patrica O'Brien remarked that:

> "Better legal standards and fair, stable and predictable legal frameworks generate inclusive, sustainable and equitable development. They foster economic growth and employment and facilitate entrepreneurship and development. Hence international arbitration as a peaceful and reliable mechanism of resolving disputes has proved to assist positively in the consolidation of the international rule of law."

The PCA as an administering institution and as a default appointing authority under the Mauritian International Arbitration Act of 2008 looks forward to co-operating further in this story.

CLOSING REMARKS

Closing Remarks

Hon. Keshoe P. Matadeen, G.C.S.K.[*]

Lord Mance, Justice of the Supreme Court of the United Kingdom,
Mr. Justice Bernard Eder, Justice of the High Court of England and Wales,
Your Excellencies,
Visiting Attorneys General and Ministers of Justice,
Honourable visiting Chief Justices,
Judge Presidents and Learned Judges,
Mr. Neil Kaplan, Q.C.,
Distinguished Heads of institutions,
Distinguished Ladies and Gentlemen,

It falls to me to bring this conference to a close by saying a few words.

It is a distinct pleasure, but also a challenge to speak of the two days of thoughtful and eloquent discussions led by our distinguished speakers. This is the third Mauritius International Arbitration Conference (MIAC) and my first as Chief Justice. It has been a fascinating two days and I hope you feel, as I do, that it has been an enriching experience.

MIAC 2014 has, in many ways, been a continuation of the prior two equally successful conferences.

The first MIAC Conference in 2010 was on the theme "Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat". It introduced the Mauritian International Arbitration Act 2008 (the "Act"), then in its infancy, to the world. The first conference offered an opportunity for in-depth discussion of the Act, which highlighted two distinct strengths of our arbitration law: adherence to the fundamental principles of the UNCITRAL Model Law and innovation to ensure that the courts are directed to support and not interfere with the parties' agreement to resolve their dispute by arbitration.

The second MIAC Conference in 2012 entitled "An African Seat for the 21st Century" was a further step in the development of Mauritius as a place and venue for international arbitration. The conference explored in a practical way the placing of Mauritian arbitration law in three important respects: the duty of the court to stay proceedings in favour of arbitration; its role in supporting arbitration during the course of arbitral proceedings; and the negotiation and enforcement of awards in Mauritius.

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[*] Chief Justice, The Supreme Court of Mauritius.

As you know, the Supreme Court plays an important role under the Mauritian legislation as judges of first instance for any matter coming to court under the International Arbitration Act and for the enforcement of foreign awards in Mauritius. As this week's conference, the first two conferences were attended by many of my colleagues of the Supreme Court of Mauritius, and I know that the judges present at the first two conferences drew many lessons and insights from the conference discussions. I am, therefore, delighted that so many of my colleagues from the Supreme Court have been able to attend this conference including the judges designated under the International Arbitration Act to hear all international arbitration cases.

What have we learned from this conference and how will we take it forward? As some of you will continue to argue, and we will continue to hear and rule upon matters brought before the Mauritian courts, this conference has focused on two central aspects of international arbitration law, and I may add, aspects in respect of which the Supreme Court has a role of some significance to play: challenges to awards and enforcement of awards.

Mr. Neil Kaplan Q.C. raised the curtain on our conference with a review of the international arbitration landscape in and surrounding Mauritius. His speech was an encouragement and inspiration for us to move forward in our efforts to establish Mauritius as a major centre for international arbitration. He reminded us of the importance of planning for the future, of taking lessons from the past, and of looking to the East as well as to the West, something which I am sure resonated with the Mauritian lawyers in the audience.

He also rightly emphasised that compliance by States with their obligations under the New York Convention requires that enforcement of awards be carried out not just in theory but in practice – meaning, within a reasonable time. While reviewing courts must give fair consideration to meritorious arguments as to why an award should not be enforced, technicalities, trivialities and stalling tactics do not justify delaying a party's right to have an award paid nor do these strategies merit a substantial amount of the court's time.

The third MIAC Conference was opened by our Solicitor-General, Mr. Dabee. Mr. Dabee highlighted the role governments can play in setting up and maintaining the system of international arbitration, supporting the development of the legal system and putting in place infrastructure, whilst respecting the freedom of parties to choose how and where to resolve their disputes.

The Government has taken a number of important steps, the most visible of which have been to attract the Permanent Court of Arbitration (the "PCA") to open an office in Mauritius, and to support the establishment of the LCIA-MIAC Arbitration Centre in co-operation with the London Court of International Arbitration. As you will have experienced during this conference, the LCIA-MIAC Arbitration Centre has taken the lead on the organisation of the conference, and it is heartening to see the efficiency and professionalism that its staff has displayed in organising the event, in co-operation with the Board of Investment. I also look forward to the opening of the state-of-the-art hearing centre which Mr. Dabee has planned for Mauritius.

The conference itself was divided into three distinct styles of session: one, panels presenting papers on key issues of international arbitration law, drawing on expertise from various jurisdictions in Africa and Europe; two, mock hearings demonstrating how the law is applied in fictional but, in many ways, realistic scenarios; and, three, discussion sessions in which all of us could exchange views led by recognised experts in the field.

During the first session, Mr. Justice Bernard Eder explained the approach of English law to challenges to arbitral awards. He said that challenges represent an outlet for a party who feels dissatisfied with an award. Whilst recognising that the limited supervision by courts must sometimes be exercised, challenges must be carefully controlled and circumscribed to avoid derogating from the principle of non-interference.

Professor Sebastien Besson took us to France and Switzerland comparing the international arbitration laws of those countries with that of Mauritius. He showed that, despite efforts around the world to bring arbitration laws up to contemporary standards, there remain significant differences of approach and in the emphasis, that international practitioners must keep in mind when seeking to challenge awards.

Ms. Olufunke Adekoya, Senior Advocate of Nigeria, reminded us, in the course of a thorough examination of the international arbitration law of Nigeria, of the complexities that arise in Federal political systems when State laws pertaining to international arbitration interact with national laws. Her account of the latest jurisprudential developments in her country demonstrated the importance of courts in this area. It also showed us how a single decision may affect the confidence of users in the arbitral framework of a given jurisdiction.

To present the Mauritian perspective on our law and case law, we heard from Ms. Aruna Narain, the then Parliamentary Counsel of Mauritius. Ms. Aruna Narain stressed the importance of getting the standard review

right in the context of challenge to awards. She argued in particular that challenges on the grounds that the arbitral tribunal did not have jurisdiction are intended to lead to a *de novo* determination by the Supreme Court of Mauritius, as is made clear in the *Travaux Préparatoires* to our International Arbitration Act.

This conference has been particularly memorable for the two mock hearings and I congratulate those who have played the role of advocates on their skilful presentations. I can imagine the hard work in preparing for these sessions which were a real pleasure to follow.

The first mock hearing presided by Mr. John Beechey showed us how creative advocates can make a good case for the annulment of an award even if the grounds for the application are, if I may say so, a little shaky. Mr. Kwadwo Sarkodie and Ms. Rachael O'Grady entertained us with carefully drafted submissions under the thoughtful supervision of Mr. Jeremy Gauntlett, Professor David Caron and my colleague, the Honourable Shaheda Peeroo.

We were reminded of how difficult it is to plead public policy in seeking to set aside an award. As we know, the public policy exception is subject to narrow interpretation so as to conform to the intention of the UNCITRAL Model Law, which is that of protecting only against serious breaches of a State's international public policy. It is not an avenue for States or private parties to avoid the consequence of freely made commercial agreements.

To close the first day, the discussion was moderated by Dr. Jacomijn van Haersolte-van Hof and led by Mr. Peter Leaver Q.C. and Mr. Benoît Le Bars. Dr. van Haersolte recalled the importance of institutional rules and procedures in the international arbitration process. This is demonstrated by the recent adoption of new rules by the London Court of International Arbitration which include provisions intended to help arbitrators to sanction disruptive conduct on the part of counsel.

As judges, we are used to relying on provisions of court procedures and the regulation of lawyers by Bar associations to help us ensure fair play between counsel in the court room. It seems natural that arbitrators should have similar powers to help them do the same in international arbitration where the national systems of regulation of the legal profession do not necessarily apply and where the diversity of backgrounds of the lawyers appearing before the tribunal means that there will not always be an even playing field.

The ensuing discussion forcefully initiated by our discussion leaders and continued by the audience evidenced the wealth of experience

present in the room with delegates active in international arbitration in seats across the spectrum of common law and civil law jurisdictions.

Today's sessions were dedicated to the related issue of enforcement proceedings. In the morning session, a distinguished panel comprising of Lord Mance, Professor Pierre Mayer, Mr. Ance Ankomah from Ghana, and Mr. Moorari Gujadhur from Mauritius, explored the subject of enforcement. Moderated by Ms. Aurelia Antonietti, the panel presented the similarities and differences between the approaches to enforcement under the English and French systems, the Ghanaian and Nigerian systems, and under Mauritian law.

It was particularly interesting to hear the insights of Mr. Gujadhur, one of the advocates in the recent decisions of the Supreme Court of Mauritius, *Cruz City 1 Mauritius Holdings v. Unitec*h Limited & Anor.[1] As he pointed out, the Supreme Court in *Cruz City* was confronted with a range of arguments against enforcement, giving the Supreme Court the opportunity to clarify the interpretation and application of the New York Convention in Mauritius. Whilst of less direct significance to everyday practice, the importance of the Supreme Court's carefully reasoned dismissal of the constitutional challenge brought against our international arbitration legislation, should not be underestimated.

The second mock hearing panel on day two, held in French – the other primary language of Mauritius – concerned an award rendered by a tribunal in a fictional LCIA-MIAC arbitration seated in an OHADA Member State. The award had been set aside by the courts at the seat, but that did not prevent the prevailing party from attempting to enforce the annulled award. This raised the question of whether, under the New York Convention, under the principle of *ex nihilo nihil fit* (roughly translated as "nothing comes of nothing"), the enforcing court is empowered to consider independently whether the award can stand. The issue is a difficult one – one which our courts will no doubt have to grapple with at some stage. They will no doubt have to grapple further with the related but separate question of the application of principles of *res judicata* and issue estoppel in this field, bearing in mind today's debate on that point.

It is a measure of the level of speakers at this conference that this mock hearing was moderated by one of the great theorists on the enforcement of awards, Professor Albert Jan van den Berg, and the arguments trenchantly presented by Ms. Carole Malinvaud and Mr. Christian Camboulive, two French lawyers who turned out to be expert advocates under the New York Convention, notwithstanding the differences

[1] [2014] SCJ 100.

from the French approach to enforcement. Their submissions were considered and judged by three experienced arbitrators in African related cases, Judge Raymond Ranjeva, Mr. Karel Daele and Mr. Iqbal Rajahbalee.

The second conference day closed with a lively discussion with the audience of some critical issues pertaining to enforcement, moderated by Ambassador Hugo Siblesz, and led by Dr. Mohamed Abdel Raouf and Professor Philippe Leboulanger. Ambassador Siblesz introduced the work of the PCA in Africa, much of which is now led from its Mauritius office. It was again enriching to hear the discussion leaders and lawyers from the Americas, Europe, Africa and Asia exchange their views and ideas.

It is on this note that I want to end. Mauritius seeks to be a centre of excellence for international arbitration. To achieve this goal, it is crucial that Mauritian judges and lawyers have opportunities to meet their colleagues from the bench, the Bar and academia, from Africa and around the world. How intellectually enriching this exchange can be, has, I believe, become clear in the past two days.

I know that Mauritius will continue to host arbitration-related gatherings at the highest level, in the hope that, as the Solicitor General said at the start of the conference, within a generation African disputes can be pleaded and decided by a strong pool of African arbitration lawyers. You will not be surprised to hear that the judiciary in Mauritius is ready to play its part in that process. We will continue to listen to and engage with the important questions that this conference has focused on.

Before concluding, I should like to thank the six hosting institutions, in particular, the LCIA-MIAC Arbitration Centre and the Board of Investment; all our speakers; and all those who have made the conference such a success including our interpreters and transcribers. A special note of thanks goes to our friend, Mr. Salim Moollan.

I sincerely hope you have enjoyed the conference, as much as I have, and I wish you a pleasant continuation of your stay in Mauritius and a safe return home. I encourage you to come back soon, perhaps for the 23rd ICCA Congress in May 2016. I look forward to meeting you all again there. Thank you.