

Does the World Need Additional Uniform Legislation on Arbitration?*

by Gerold HERRMANN**

A. Introductory remarks

What an honour to be invited to the Holy Grail of Freshfields Arbitration Lecturers, and this as one of the few invitees not born on the island where the Knights of the Round Table assemble. Upon receipt of the honouring invitation, I asked some English friends for suggestions as to a suitable and interesting topic. None of them made a positive proposal; but they all agreed in the negative by telling me unanimously: “Please, not another talk on the new English Arbitration Act! and certainly not by a civil lawyer!”

What a pity, since it prevents me from presenting with relish the following quotation from one of the commentaries: “When, over 15 years ago, the United Nations Commission on International Trade Law (UNCITRAL) decided to prepare a draft uniform law on arbitration procedure, its members could hardly have imagined that their proposal would lead to a revolution in the practice of arbitration in England. Yet such a revolution is the likely consequence of the Arbitration Act 1996.”¹

The conclusion is obvious: England would not have that Act today without the earlier advent of the UNCITRAL Model Law. We clearly have come a long way since the mid-eighties where an extremely influential judge warned against the theoretical or abstract French concepts sweeping over the Channel and saw the Model Law for quite some time (at least until Scotland adopted it) as being potentially useful exclusively for underdeveloped countries where arbitration was not practiced anyway. As far as England is concerned, he predicted at the 1982 Annual Conference of the Chartered Institute of Arbitrators as the consequence of the Law coming into being that “the whole of our arbitration law would have to change and that, in turn, would lead to a revolution.”²

I fondly remember the raging debates about the Model Law in London, with the Financial Times quoting me calling Professor Francis Mann a “sloppy reader”, in response to him inexplicably calling us “sloppy draftsmen” - or with the Master of the Rolls John Donaldson calling me the father of the Model Law which I had to ask him to downgrade to the status of midwife (in view of the expert input from fathers from all regions and different types of countries).

Actually there were so many discussions in England on the Model Law that a sentiment, similar to the above 1996-saturation, developed: “Please, not another talk about the Model Law.” This Model-Law saturation or fatigue may well have been one of the

¹ B. Harris, R. Planterose and J. Tecks, The Arbitration Act 1996 - A Commentary (1996) at p. 1.

² As reported by Shilston, ‘A View from the 1982 Annual Conference of the Chartered Institute of Arbitrators’, in (1983) 49 Arbitration 291 at pp. 291-292.

psychological reasons for England not to follow Jan Paulsson's advice: Take the Model Law, add a dash or two of London bitter and the English cocktail will be loved by the many jurisdictions traditionally guided by English law; otherwise your legal children will run away and take the Model Law as is.

As we all know today, this is exactly what happened. These "runaway children" of common law tradition were the first to embrace the Model Law - with, fortunately, many civil law jurisdictions following suit. We have Model Law countries in all continents, of all sizes and all stages of economic development, covering altogether more than one quarter of the world's territory. And more are likely to join in soon, such as Croatia, Greece, Honduras, Korea, Kyrgyzstan, Macau, Mauritania, Moldova, Mongolia, Mozambique, the Philippines, South Africa and Thailand.

As I have described elsewhere³, the model-law technique, as compared to the convention approach, has proven to be very successful not only in terms of numbers of jurisdictions and in terms of speed of implementation, but also in terms of the level of harmonisation: Deviations from the Model Law text have, as a rule, very rarely been made, except for three countries (i.e. Bulgaria, Egypt and India), in two of which most of the deviations in fact reiterate proposals which had been advanced unsuccessfully by the representatives of those countries to the Model Law sessions of UNCITRAL. Remembering the main argument in favour of the model-law technique, namely its flexibility which allows adjustment to local requirements, I must say that I am still waiting for the first deviation which bears a substantive connection with local conditions. Unfortunately, we do not have to wait for the first cases of real trouble caused by deviations: These have already occurred, in India with its prohibition of an even number of arbitrators and in Egypt with additional grounds for setting aside.

While deviations have been rare, most national enactments have added provisions on issues not addressed by the Model Law. Many of those issues had been discussed during the preparation of the Model Law but, for one reason or another, were not included in the final text. The disparity between national answers to those and other issues has led to suggestions to consider the preparation of uniform answers, taking into account, of course, also any answers provided by other modern arbitration laws not classified as Model Law enactments (e.g. Dutch, English, French and Swiss laws). Related suggestions have been made at the 1998 ICCA Congress in Paris⁴ and UNCITRAL's New York Convention Day on 10 June 1998⁵ concerning matters governed by the 1958 New York Convention and the 1961 European Convention, as well as other points possibly to be addressed in a future convention or model law.

What I intend to do here is to survey those suggestions, various others made at yet other

³ Herrmann, 'The UNCITRAL Arbitration Law: a Good Model of a Model Law', in (1998) Uniform Law Review at p. 483.

⁴ Since the proceedings of that Congress (to be Congress series no. 9) have not yet been published, no precise citations are given hereinafter for the many references to relevant contributions.

⁵ Since the proceedings of New York Convention Day have not yet been published (by the United Nations) no precise citations are given hereinafter for the various references to relevant contributions.

occasions, and add some of my own. My primary focus will be on the substance of the proposals for legislation; I will not focus on the most adequate form of legislation, i.e. a new convention or, as my current tentative hunch would indicate, a Model Law Supplement. Yet, a major question will be whether legislative treatment of any, some or all of the suggested issues is desirable and feasible. In examining this question, regard should be had to the actual impact of a problem, to the state of the current discussion and the maturity of the suggested answers and, above all, to the question whether the expected benefits of harmonisation outweigh the possible disadvantage of ossifying matters and thus impeding future development. This latter, very important concern is somewhat less strong for a model law than a convention and could be softened, as is UNCITRAL's tradition, by focussing in legislative texts on fundamental rules of principle, providing an enabling statutory framework, and leaving the detail of ever-changing practices to sets of rules at the contractual level.

Many issues need to be addressed, and I can only scratch the surface. The views expressed here are my personal ones which, moreover, are rather tentative. Also, I am presenting more questions than answers. After all, that is what the title promised, and that question will be with us for many years. By the way, after having committed myself to the topic, I remembered the title of Lord Mustill's 1996 Goff Lecture "Too many laws"; my goose-pimples only disappeared when reading his concluding remark in favour of harmonisation of national arbitration laws - even though, as he rightly says, it can never be complete - and about the UNCITRAL Model Law as a great step forward in this respect.⁶

Indeed, the success of the Model Law provides a good basis and encouragement for future uniform legislation. This lecture should help to solicit the views of as many experts as possible, triggering a worldwide discussion that would assist UNCITRAL in its deliberations in June 1999 and any future elaboration of a uniform law text. Such text could constitute yet another contribution of the United Nations to the global development of international commercial arbitration, in addition to the 1958 New York Convention, the UNCITRAL Arbitration Rules, the UNCITRAL Model Law and the UNCITRAL Notes on Organising Arbitral Proceedings.

Let us now look at the first batch of issues which all relate to the basis of arbitration: the arbitration agreement.

A. The basis of arbitration

I. "In writing"

The proposal most often made is to adopt a more flexible or liberal definition of written form than that contained in Article II(2) of the New York Convention. The Model Law contains a more embracing formula. Yet, certain situations are arguably not covered, certainly not beyond doubt, and have led to modified formulations in enacting States.

The problem under the Model Law does not concern technical advances such as the use of electronic data messages; these are covered by the forward-looking term "means of

⁶ Lord Mustill, 'THE GOFF LECTURE, HONG KONG 1996 - Too Many Laws', in (1997) 63 Arbitration 248 at p.257.

communication that provide a record of the agreement". In so far as it is a problem under the New York Convention, States are offered a remedy in the form of another UNCITRAL Model Law, namely that on Electronic Commerce concluded in 1996.⁷

Rather, the problem arises from the combination of the true question of form and the way the agreement comes about (*i.e.* its formation), expressed by the unfortunate term "exchange" (of letters etc.). This term, inherited by the Model Law drafters from the New York Convention, is unfortunate in lending itself to an overly literal interpretation in the sense of mutual exchange (although at the cotton exchange the commodity tends to move only in one direction).

Fact situations that have posed serious problems under the New York Convention and require at least very extensive, teleological construction of the Model Law, provided that neither estoppel or good faith nor later submission to arbitration can help, include the following: tacit or oral acceptance of written purchase order or of written sales confirmation, orally concluded contract referring to written general conditions or, *e.g.*, Lloyd's form of salvage; certain brokers' notes, bills of lading and other instruments or contracts granting rights to non-signing third parties.

Courts have reached rather disparate decisions in those situations, often reflective of their general attitude towards arbitration as such. In the great majority of cases, they have been able to hold the parties to their agreement, sometimes using highly creative construction.⁸ Some commentators have argued that there is thus no need for a cure at the legislative level since courts are usually able to find a way by modern, updating interpretation. However, I side in this matter with Neil Kaplan Q.C. who has probably the richest judicial experience on this point. In his 1995 Goff Lecture he forcefully advocated a legislative solution (reminiscent of an abortive Secretariat-proposal during the preparation of the Model Law).⁹

As he had suggested at an earlier Arbitration Conference in Beijing: "A case can be made out for amending Article 7(2) by permitting an agreement to arbitrate being created by trade custom or usage or a course of dealing or conduct. If an arbitration clause is contained within an otherwise binding agreement why should it be necessary to be able to point to a signature or to a written record of the agreement. Contracts involving millions of dollars are created in this way and it is permissible to ask what is so special about the arbitration clause

⁷ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, available - like any other UNCITRAL text - in brochure form as a United Nations publication and on the UNCITRAL website: <http://www.un.or.at/uncitral>.

⁸ *E.g.* U.S. Court of Appeals, Fifth Circuit, 23 March 1994, No. 93-3200 (excerpted in (1995) *Yearbook Commercial Arbitration* XX p. 937) at p. 941, interpreting the conditions of 'signed by the parties or contained in an exchange of letters or telegrams' as relating only to an arbitration agreement (submission) but not to an arbitral clause.

⁹ Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?' in (1996) 12 *Arbitration International* p. 27 at pp. 44-45.

to require it to comply with Article 7(2)".¹⁰ Rusty Park has suggested in response that "there is no reason why a business manager should not be able to accept some provisions of a contract but not others, particularly a stipulation as important as a waiver of the right to go to court".¹¹ My personal riposte would be: Yes, but then he or she should say so. After all, in an international setting the thrust of an arbitration agreement is not the negative idea of excluding court jurisdiction (which courts, by the way, are you excluding by one arbitration clause in a contract network between a multi-national consortium, with engineering and financing involving yet other countries, and a company ordering construction of a plant in yet another country?); rather, it is the positive idea of creating for an individual case something that does not currently exist, namely an international commercial court. As Yves Fortier Q.C. once put it, international arbitration here is not an alternative, it has become, to a great extent, "the only game in town".

It was precisely for that reason - coupled with the realization that innumerable contracts often of high value are every day concluded over the phone or otherwise orally - that I took the liberty at the 1993 ICCA Conference in Bahrain to recommend full freedom of form (thus replacing for international commercial arbitration agreements the statute of fraud by a statute of liberty).¹²

I know that Mr. Kaplan sympathizes with the argument that allowing oral agreements would lead to uncertainty and litigation.¹³ However, I doubt whether there would indeed be more litigation in an era of full freedom than either in the current situation of considerable uncertainty or in a possible future one with a more flexible writing requirement worldwide. After all, not to require a certain form for validity's sake does not mean that it is not advisable to use that form, and diligent business people are likely to safeguard their interests by securing and keeping a record in some form or another.

In fact, what is probably sufficient and may be recommended as a somewhat less radical solution is to allow an oral arbitration clause if the applicable law does not impose any form requirement on the main contract. Such a non-discrimination rule could operate as an exception to a future universal definition of written form which should take care of the instances of half form and third-party effects.

¹⁰ Kaplan, 'The Model Law in Hong Kong', in CIETAC/ICCA Papers on International Commercial Arbitration, Arbitration Research Institute China Chamber of International Commerce (1997) p. 495 at p. 510.

¹¹ W.W. Park in his draft contribution on the New York Convention (§37.03 (d)) to the upcoming third edition of W. L. Craig, W.W. Park and J. Paulsson, International Chamber of Commerce Arbitration.

¹² Herrmann, 'The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts', in ICCA Congress Series No. 6 (ICCA Bahrain Conference 1993) p. 41 at pp. 45-46.

¹³ Kaplan, supra n. 9 at p. 29.

In order to find the ideal universal rule (short of a “statute of liberty”), more discussion and study is needed of proposals made during the preparation of the Model Law and especially of the various formulations developed in modern national laws. For short versions one may look at the Dutch and Swiss laws, and for longer versions at the German and English laws. The English (or Hong Kong) formula, while somewhat enigmatic to foreign readers, should be high on the hit-list if Toby Landau is right in saying that it defines writing as including oral agreements¹⁴ - a truly diplomatic act of a statute of liberty wrapped in formal attire (a lawyer’s delight of a fiction: For the purposes of this law, Easter Bunny means Santa Claus).

To make the study more useful (and complicated), it should extend to situations of non-signing parties beyond the bill-of-lading context and cover instances of transfer to third parties who were not party to the original agreement. Examples mentioned by Jean-Louis Delvolvé at UNCITRAL’s New York Convention Day on 10 June 1998 were the following: Universal transfer of assets (successions, mergers, demergers and acquisitions of companies) or specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party); or, in the case of multiple parties, or groups of contracts or groups of companies, implicit extension of the application of the arbitration agreement to persons who were not expressly parties thereto.¹⁵

There remains one important question: How to overcome the overly rigid form requirement in the New York Convention without amending or revising it? (Conventional wisdom justifiedly views tampering with that Convention as inadvisable.) A first method could be to rely on a retrospective spilling-over effect on the interpretation by courts, as advocated for provisions of the Model Law and indeed accepted by courts in Switzerland and elsewhere.¹⁶ However, more conservative courts are less likely to do so and even others could hardly do so if the new rule would allow oral agreements. Another concern -which I do not share- could be that Article II(2) establishes a uniform rule not only for the maximum form required but also for the minimum, and thus prohibits a more liberal interpretation. Albert Jan van den Berg, who promulgated this widely held view in the first edition of his seminal treatise on the New York Convention,¹⁷ has recently questioned that view without, however, reversing himself (yet).¹⁸

A second method could be to rely on the more-favourable-law provision of Article VII

¹⁴ Quoted as a “somewhat sardonic” comment by Chiasson, ‘A Precipice Avoided: Judicial Stays and Party Autonomy in International Arbitration’, in (1996) 54 The Advocate p. 63 at p. 70 (n. 35).

¹⁵ Delvolvé, ‘The arbitration agreement and third parties’, supra n. 5.

¹⁶ E.g. Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A., 16 January 1995, 1st civil division of Swiss Tribunal Fédéral, publ. in ATF 121 II 38, relevant excerpts in (1995) 13 ASA Bulletin p. 503 at p. 508.

¹⁷ A. J. Van den Berg, The New York Arbitration Convention of 1958 (Kluwer 1981) at pp. 178-180.

¹⁸ Van den Berg, ‘The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas,’ in (1996) ASA Special Series No. 9, p. 25 at pp. 44-45.

of the New York Convention. I am aware that Prof. van den Berg continues to see this avenue as promising only if the national law provides a full enforcement mechanism, since the Convention becomes inapplicable in toto.¹⁹ I do not share this view and rather perceive the Article as an emanation of “favor executionis” in any relevant aspect, i.e. “pro-enforcement bias”, without getting too biased. Contemporary rules concerning formal validity tend to be liberal in providing optional references to various applicable laws. I would suggest adding the laws referenced in Article V(1)(a) for substantive validity (why should the solution for formal validity be more onerous than that for substantive validity?). Thus, effect would be given to an arbitration agreement which meets the form requirement of the law to which the parties have subjected it; if (as usual) no such choice has been made, the agreement needs to meet the form required by the law of either the place of arbitration or the place of enforcement.

If, however, one were to follow the traditional (van-den-Berg) view, the only effective solution would be to provide expressly for recognition and enforcement of arbitral awards based on agreements meeting the more liberal form requirement - a solution which would have to be dealt with in the wider context of a possible Model Law Supplement containing a chapter on enforcement (see below, E.I.c).

II. Field of application of Article II(3) New York Convention

Another candidate for uniform treatment is the field of application of Article II(3) of the New York Convention. Here, the question of Article VII or of any retrospective impact of a new rule does not arise. The issue is not addressed in the Convention, due to the last-minute inclusion of Article II. It has therefore been answered in implementing legislations and case law, and quite disparately so for agreements providing for arbitration within the State in which they are invoked and for those not specifying the place of arbitration.²⁰ If a uniform answer should be suggested, it could be included in model provisions of an implementing act. Such provisions could be of practical use for any newly joining member of the New York Convention family and any other member considering revision of its implementing legislation. Moreover, they could guide the courts of those States that have not addressed the issue either in legislation or in case law.

III. Subjective and objective arbitrability

In the realm of validity of the arbitration agreement we meet two more candidates for uniform treatment: subjective and objective arbitrability.

(a) Subjective arbitrability or capacity

The first issue deals with the legal ability of a person or entity to conclude an arbitration agreement. It is of particular concern in the case of a State or a State enterprise. That practically crucial aspect was not addressed in the New York Convention - as it was in the European Convention concluded three years later. Article II accords the right to conclude valid arbitration agreements to legal persons considered by the law applicable to them as

¹⁹ Van den Berg, supra n. 17 at p. 180, and “Enforcement of Annulled Awards?” in (1998) 9 ICC International Court of Arbitration Bulletin p. 15 at p. 18.

²⁰ Van den Berg, supra n. 18 at pp. 33-36.

“legal persons of public law”, with the possibility for States to declare limits to that faculty. The same provision has been included in some national laws (e.g. Algerian, Bulgarian, Egyptian and Lebanese law). The Swiss Law of 1987 provides as follows: “If a party to the arbitration is a state or an enterprise or organisation controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.”

It is submitted that a uniform rule along those lines could enhance legal certainty in the many arbitration cases where States are involved in one way or another. Such a rule could be proposed and characterized, in line with modern thinking, as a material rule of public policy of the law of international arbitration.²¹

An ancillary question possibly to be addressed in this connection is whether a State party to an arbitration agreement is prevented from invoking State immunity only as regards the arbitral proceedings or also in respect of court proceedings assisting or controlling those proceedings (while the issue of immunity from execution is clearly separate, to be dealt with later; see below, E. III. b).

(b) Objective arbitrability or domain of arbitration

Objective arbitrability is next. Commercial subject matters reserved to the courts are in some countries determined by case law only and in others by various statutes, for instance, those dealing with anti-trust or unfair competition, securities, intellectual property, labour or company law. Various States include in their arbitration law a general formula, in modern times going beyond the traditional formula of “what parties may compromise on or dispose of” to cover, for example, “any dispute involving property” or “any claim involving an economic interest” (“vermögensrechtlicher Anspruch”, Switzerland and Germany).

An ambitious effort, as suggested by some commentators,²² would be to elaborate a detailed list of non-arbitrable issues. However, I expect considerable difficulties in reaching a worldwide consensus on an exhaustive list; perhaps one could agree on three or four issues and then “compel” States to list immediately thereafter any other issues deemed necessary by that State. Such an approach of channelled information, as used in Article 5 of the Model Law, would at least ensure certainty and easy access to information about those restrictions. Moreover, it would initially “compel” a State to identify the non-arbitral matters and examine them as to their continuing justification.

In searching for the best approach, one faces a dilemma: the more general the formula, the greater the potential risk of divergent interpretation by courts of different States; and the more detailed the list, the greater the risk of non-acceptance by States and, to the extent accepted, the risk of ossifying matters and thus impeding further development towards limiting the realm of non-arbitrability. Nevertheless, a considered attempt should be made since the result of worldwide discussion would in itself be revealing and useful.

²¹ Thus Hanotiau, ‘The Law Applicable to the Issue of Arbitrability’, supra n. 4 (sub II b).

²² Altaro and Guiamarey, ‘Who Should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment,’ in (1996) 12 Arbitration International p. 415 at p. 427.

(c) Law applicable to arbitrability

The related question of the law or laws applicable to arbitrability is of equal importance, at least as long as we do not have worldwide uniformity in substance. This complex matter was discussed in some depth at the 1998 ICCA Congress in Paris where Bernard Hanotiau, in particular, surveyed the application of the law governing the arbitration agreement, the impact of the law of the seat of arbitration, foreign policy laws (“lois de police”) of the place of performance of the agreement or of the place of enforcement of the award as well as the special situation of the referral judge under Article II(3) of the New York Convention. He concluded that, while the role that public policy plays has been considerably narrowed, material rules specific to international arbitration are emerging in national legal systems. His true conclusion comes as a question: “Should we go as far as to consider that the arbitrability of disputes is a transnational principle directly applicable without reference to any national law? This was already many years ago the conclusion reached on this issue by the late Professor Berthold Goldmann.”²³

A somewhat less futuristic but no less thought-provoking and potentially objection-provoking conclusion was presented at the recent 75th anniversary symposium of the ICC by Jan Paulsson. He recommends the following principles to direct national courts when they examine the issue in the context of the New York Convention:

“1. For the purposes of Articles II and V(1)(a), an arbitration agreement shall be considered effective *in casu* unless the party resisting arbitration, or opposing recognition and enforcement of the award, proves to the satisfaction of the court that the agreement is invalid under *both*:

- (a) the law chosen by the parties to govern their agreement, *and*
- (b) the law of the country where the place of arbitration is located,

it being understood that reference will be made only to such provisions of these laws as are applicable to arbitration of an international character.

If no place of arbitration has been selected, reference shall be to the country in which is situated the authority charged with the appointment of the presiding arbitrator in the absence of party agreement thereto.

2. Subparagraph V(2)(a) shall not prevent recognition and enforcement unless the non-arbitrability of the subject matter is a matter of such fundamental importance that recognition and enforcement would also violate subparagraph V(2)(b).”²⁴

The second proposal should, in my view, not face insurmountable difficulties. Various

²³ Hanotiau, supra n. 21 (sub IV).

²⁴ Paulsson, ‘Arbitrability, Still Through a Glass Darkly’, Remarks at 75th Anniversary of the ICC International Court of Arbitration, Geneva, 25 September 1998 (to be published).

commentators have for a long time denied the independent relevance of subparagraph (a) since it is viewed as absorbed or covered by subparagraph (b).

The first proposal, however, promises interesting and difficult discussions. Some might object to having the law of the place of arbitration play a role here since, as Mr. Paulsson put it, that law “often has no reason to apply to issues of arbitrability with respect to an international contract having no connection with the country.” Yet, I agree with him that “in the interest of predictability it is useful to make it a law of reference” (as done by the Model Law, articles 1(5) and 34(2)(a)).

Others might object to giving the parties full freedom to agree on a law (possibly the only one in the world that accords arbitrability to the dispute in question) without having any connection to the contract. Probably the stiffest resistance will be encountered on a point that one might overlook when first reading the proposal, namely that a judge to whom a substantive claim is brought shall disregard its own law when deciding under the referral provision of Article II(3) whether the arbitration agreement is void (for reasons of non-arbitrability). According to Mr. Paulsson, “a court faced with an Article II problem has no business applying its domestic notions of non-arbitrability; fundamental societal interests, such as the proscription of *fraude à la loi*, may be ensured at the stage of enforcement by virtue of Article V(2)(b).”²⁴ I am not sure whether this will persuade many referral judges to disregard even those national exclusive-jurisdiction norms designed for international transactions; after all, a substantive claim tends to be brought in a jurisdiction whose courts would be competent but for the arbitration agreement. At least one conclusion is clear: exciting and possibly frustrating discussions and negotiations lie ahead.

IV. Restricting or enlarging the scope of the arbitration agreement

The next batch of issues relating to the basis of arbitration concerns the restriction or enlargement of the scope of the arbitration agreement. I am thinking of consolidation and related issues as well as set-off.

(a) Consolidation and other multi-party issues

Consolidation, understood as a court measure forcing parties having signed separate arbitration agreements together into one arbitration, in my view has been a rather fashionable topic in the eighties, out of a burning desire to avoid inconsistent results. The world of arbitral decisions is, however, full of inconsistencies (and so are the interests of multiple parties involved). As experienced in Hong Kong and elsewhere, this has given way to a realisation that the disadvantages and procedural difficulties often outweigh the expected gain. The current legislative picture worldwide is telling and unlikely to change dramatically in the near future: To my knowledge, compulsory powers in international cases are given to the courts only in the United States and the Netherlands (where the power has been introduced into the law to suit the needs of the local construction industry and has in fact hitherto been used exclusively in domestic cases).

As pointed out by Pieter Sanders, who recommends uniform legislative treatment,²⁵

²⁵ Informal proposal to ICCA-Council (1998) and to be published in his upcoming magnum opus “Quo vadis arbitration?”

various other countries also have legislative provisions concerning consolidation. Yet there is a crucial difference: These provisions operate as optional rules, requiring a previous consent by all parties. Their purpose is to assist in the implementation of that general agreement of all parties. Such procedural court assistance is of practical value for arbitrations that are either ad hoc or administered by an institution which does not provide that assistance (as, however, increasingly foreseen in recently revised sets of rules). Consideration might thus be given to devising a uniform rule on court assistance if a need therefor is widely felt.

More important would be to consider a number of consolidation-related issues, drawn to our attention by Sir Michael Kerr in his seminal Keating Lecture²⁶. Problems worthy of research include those raised before some United States courts due to the so-called “intertwining doctrine” which operates where court proceedings are pending concurrently with arbitral proceedings and a party asserts among several causes of action one that falls within the exclusive jurisdiction of the courts. Equally worthy of study are a variant of that doctrine applied in Canada and especially the unfortunate vestiges in some common law jurisdictions of a 1912 decision of the English Court of Appeal. The potential of what Sir Michael calls a “ploy of pre-empting the institution or continuation of arbitration proceedings by an application to a local court” is a good reason for a worldwide search for similar abuse-prone devices and for elaborating an appropriate uniform answer, obviously aligned with the answer to the earlier referenced suggestion by Jan Paulsson.

In order to complicate matters or make them more fascinating for the drafters of any additional uniform legislation, I recommend to include in the research study a number of other multi-party issues which have never received the attention they deserve. I am thinking of a variety of situations where a third party is somehow involved in the arbitral proceedings, either upon its own request or upon the two other parties’ request. It may be actively participating or it may be silently attending. Its participation may entail the risk of losing like any other respondent or it may lead to certain negative inferences concerning the proof of facts or even preclusions from invoking points of law. While aware of the foggy nature of the terms of reference for the suggested study, I refrain from naming any label used in procedural law since the terminology and the scope of the situations differs from country to country to a mind-boggling extent.

(b) Set-off

Another interesting issue concerning the basis of arbitration arises from the frequent situation that a respondent invokes a certain claim not as a counter-claim, about which the arbitral tribunal would have to decide irrespective of the outcome of the claimant’s demand, but as a defence by way of set-off. Let us assume that the arbitral tribunal regards the claimant’s demand not as obviously unfounded and the set-off as admissible (in itself a complex issue mixing contractual and procedural law). The question then may arise whether the arbitral tribunal is competent to examine the merits of the disputed claim invoked by set-off if that claim is not covered by the arbitration agreement at hand but by either another arbitration agreement between the same parties (e.g. an arbitration clause in another contract) or a forum-selection clause. The question is extremely complex and could easily constitute the topic of a separate lecture, as shown by Klaus Peter Berger’s recent survey of the current

²⁶ Kerr, ‘Concord and Conflict in International Arbitration,’ in (1997) 13 Arbitration International p. 121 at pp. 135-136.

state of the discussion in the light of extreme dearth of legislative treatment.²⁷

In short, the traditional and probably still prevailing view is that the scope of the first arbitration agreement cannot be presumed to cover any outside claim invoked by the respondent by way of set-off since the second arbitration agreement (or forum-selection clause) needs to be given equal weight. A more modern and apparently ground-gaining view is the pragmatic presumption of the arbitral tribunal's competence also for any defences ("le juge de l'action est le juge de l'exception") for the sake of procedural efficiency and peace-creating finality. Here - as in respect of earlier mentioned multi-party issues - the desired in-depth study should include the question whether an appropriate uniform rule should be elaborated for the legislative level or whether the issue can appropriately be addressed in arbitration rules (as, e.g., article 27 of the 1989 International Arbitration Rules of the Zurich Chamber of Commerce).

(c) "Terminal" issues

To terminate the "basis of arbitration", let me merely mention three terminal issues addressed in some national laws and possibly warranting uniform treatment: the effect of death of a party on the arbitration agreement and on the proceedings; the effect of insolvency of a party on the agreement and on the proceedings; and the effect of a judicial setting-aside decision on the arbitration agreement.

A. Powers and duties of arbitrators, and other procedural issues

Constraints of time and space compel me to shift gears and take you rapidly, in what may be the first fast track approach to a Freshfields Lecture, through the next part addressing procedural issues, especially concerning the powers and duties of arbitrators.

- I. First step: filling of gaps, not to be confused with adaptation of contracts due to changed circumstances. The UNCITRAL view of the eighties probably still stands: no need for legislative treatment. Other procedures akin to arbitration tend to be available.
- II. Second step: determination of law applicable to substance of dispute failing party agreement. Model Law Article 28(2) guides via the indirect route (i.e. conflict-of-law rules deemed applicable in the sense of appropriate) to a law, not rules of law, while parties themselves may agree on rules of law. UNCITRAL was divided on whether to take the next step, i.e., the direct route towards appropriate law or rules of law. Uniformity was not ensured since not all States were expected to accept the more liberal solution. Has that changed? Does it make much difference in practice?

²⁷ Berger, 'Die Aufrechnung im Internationalen Schiedsverfahren', in 1998 Recht der Internationalen Wirtschaft p. 426.

III. Third stop: truncated tribunal. Power of remaining two arbitrators to ensure integrity of arbitral process in face of obstructionistic tactics or sabotage was favoured at the 1998 ICCA Congress by Judge Schwebel²⁸ and Serge Lazareff.²⁹ Contra Tadeusz Szurski³⁰: Party cannot “legally” be held responsible for misbehaviour of arbitrator, and party agreement usually provides for replacement. While proponents see a majority of developed arbitration laws granting that power, I can see only two clearly granting that power: Bermuda and Germany (both enactments of the Model Law). Case law is not generally supportive; negative decisions have been rendered even in highly developed arbitration countries (Switzerland and France). A favourable trend has emerged in respect of arbitration rules. Recent revisions of AAA, LCIA and ICC Rules envisage continuation based on reasonable exercise of discretion. Under other arbitration rules, e.g. UNCITRAL Rules, the same result has been distilled from other provisions: duty of arbitrator to carry out the mandate, majority of signatures suffices, and resignation needs to be accepted by the other two arbitrators.

Thus, should we aim for a uniform treatment in legislation, granting the power irrespective of previous party agreement therefor? Is such a rule acceptable in all parts of the world? I have my doubts, despite the reported informal sounding out of developing country representatives at The Hague who had no objection to such power in new PCA Rules³¹ (which, after all, are contractual rules, not legislation). Perhaps we will have to settle for a legislative sanction or recognition of any party agreement granting such power to the rump-panel, probably with certain conditions and indicating the time-period of effectiveness.

IV. Fourth stop: interest. During preparation of the Model Law, we saw no need for expressing the arbitrator’s power to award interest. Why should he or she, authorised to award high amounts of damages, not be naturally authorised to add interest? Yet, thereafter uncertainty, stemming from an apparently obscure English law, spread in the common law world and led to added provisions in most enactments of the Model Law.

A recommended uniform rule should not merely grant the power to award interest from the time of birth of the debt (hopefully overcoming the judgement-dichotomy between pre-and post-decision stage) but also specify any relevant details, e.g., whether compound interest may be awarded. An additional rule on the rate of interest would seem extremely useful, if consensus could be reached. In order to avoid the vagaries of private international law with its unsettled state of affairs on this point, one should search for an acceptable substantive rule, subject to party agreement, and choose a general formula (e.g. “reasonable commercial rate”) or a more elaborate one (e.g. Article 7.4.9 UPICC: UNIDROIT Principles of International Commercial Contracts): ... “the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment...”.

V. Fifth stop: cost and fees. A considerable number of Model Law enactments have added provisions on the arbitral tribunal’s power to fix and allocate cost and fees. Those provisions

²⁸ Schwebel, ‘The Authority of a Truncated Tribunal’, supra n. 4.

²⁹ Lazareff, ‘Comments on Judge Stephen M. Schwebel’s Communication’, supra n. 4.

³⁰ Szurski, ‘The Constitution of the Arbitral Tribunal - Comments’, supra n. 4.

³¹ Jonkman, ‘Comments’, supra n. 4.

often differ in substance and especially as to relevant ancillary issues, e.g. request for deposits, accounting, placing a ceiling, form of decision. It would thus seem desirable to elaborate a model uniform provision for future enactments.

VI. Sixth stop: confidentiality, another stop at which we could easily spend days of interesting discussions, and there are certainly months and years of these ahead (the topic of the late nineties). As Gavan Griffith saw it at UNCITRAL's New York Convention Day: "There is now an appreciation that the parties' requirements for confidentiality of the proceedings are not adequately protected. This issue is not touched upon, and is as ripe for coverage in the Model Law as it is in most State laws."³² My own feeling is that confidentiality was regarded as natural and taken for granted, even though we were not aware of its precise scope. But four years ago an Australian decision in a case of public interest fuelled our realization that the paradise was lost and we were all naked. We had to realize that in our cosy arbitration world of informal, confidential private hotel-room justice a more lawyered type of proceedings, often in mega cases, had developed: "Arbitigation", close to litigation, but in an ad hoc court created for the case, for lack of an international commercial court. The equation with litigation led to the still startling view that confidentiality may not be presumed as an essential feature, as an implied term of the arbitration agreement; if parties want it, they should so stipulate.

To stipulate such a clause (or a uniform legislative rule) is far from easy, as we realised as the "Gang of Four" draftsmen of the WIPO Arbitration Rules. The more one tries to delimit confidentiality, the more it becomes enigmatic. Nevertheless, an effort should be made, looking at all possible situations where confidentiality would be justified and where it would hinder commercial activity (e.g. disclosure to shareholders). At least, it would be wrong to change a deeply-rooted principle merely for the reason that its scope cannot be determined with precision. As Hayek thought that "money matters", I strongly believe that "confidentiality matters".

³² Griffith, 'Possible issues for an annex to the UNCITRAL Model Law', supra n. 5.

VII. Seventh stop: liability and immunity. National laws differ considerably on this point, as shown in a collection of comparative law essays edited by Julian Lew 1990³³ and in a comparative analysis by Christian Hausmaninger of the same year.³⁴ Common law courts tend to equate arbitrators to judges while civil law courts traditionally focus on their contractual function as experts, with considerable disparity even within the same legal family. Partly due to the dearth of legislative treatment at the time, the Model Law drafters abstained from touching the issue (so as not to wake up sleeping dogs). However, the dogs are quite awake today. As Gavan Griffith put it in New York: “Particularly by aggressive litigators within the North-American hemisphere, there is an emerging tactic of recalcitrant parties engaging in personal attacks on the independence of the arbitration process. It is not uncommon for arbitrators now to be threatened with proceedings and claims against them personally if they do not act in a particular manner”.³⁵ In order to safeguard against what I would call the “See you later, litigator”-syndrome, Gavan Griffith suggested that “when arbitrators are honestly discharging their duties, even if one party believes imperfectly, there should be immunity from personal liability in the same manner as is usual for a judge.”

In fact, a number of Model Law enactments already contain a provision along those lines, yet with considerable variations and far from uniform with other laws (e.g. Peru: “acceptance of appointment by the arbitrators... entitles the parties to compel them to discharge their responsibilities within the fixed period of time, under penalty of being liable for the damages caused by delay or failure to comply with their obligations”, sect.16 of 1992 Law).

The desirable search for a universally acceptable formula may start with the various formulations already adopted in national laws and should include proposals made by organisations or commentators, like the following one contained in the introductory note to the IBA’s 1987 Rules of Ethics for International Arbitrators: “International arbitrators should, in principle, be granted immunity from suit under national laws, except in extreme cases of wilful or reckless disregard of their legal obligations”, or the refinement of that proposal by Christian Hausmaninger which will certainly stimulate lively discussion in the future search: “International arbitrators should be granted immunity from civil liability suits under national laws, except in cases of intentional or grossly negligent violations of their contractual duties, if such violations have led to either the premature termination of the arbitral proceedings or the vacation of the final award. In no case shall the arbitrator be held liable for an error in the making of the award, except if such error consists in a manifest disregard of the applicable law.”³⁶ Any objections, your Honours or Arbitrators? Should immunity from professional liability also be legislated for witnesses, experts, arbitral institutions?

VIII. Eighth stop: foreign counsel. As brought home some years ago by the Turner-case in Singapore excluding foreign counsel (of a certain famous firm which organises prestigious lectures once a year in London and Hong Kong), such a prohibition spells disaster for the local arbitration centre; and Singapore was fairly rapid in curing the defect in its enactment of the

³³ J. D. M. Lew (ed.), *The Immunity of Arbitrators* (Lloyd’s of London Press, 1990).

³⁴ Hausmaninger, ‘Civil Liability of Arbitrators - Comparative Analysis and Proposals for Reform’, in (1990) 7 *Journal of International Arbitration* p. 7.

VII. ³⁵Griffith, *supra* n. 32.

³⁶ Hausmaninger, *supra* n. 34 at p. 48.

UNCITRAL Model Law. When advising legislators I have often encountered great sympathies for such prohibition, motivated, of course, by the desire to protect the interest of the local bar. What a superficial reasoning, apart from its being anathema to true international arbitration! The prohibition simply leads foreign users to take their arbitrations elsewhere unless commercial necessity requires otherwise. A rule permitting foreign representation, at least in cases involving foreign law, attracts international arbitrations and may well lead to retaining at least one local counsel; it thus serves local bar interests clearly better than a prohibition.

IX. Ninth stop: conciliation, for which Prof. Sanders proposes the preparation of a model law.²⁵ I can see transcendental glows in the eyes of converts of the ADR movement raging primarily in the common law world as understandable reaction to “Arbitigation”. Unfortunately, the “dawning of international commercial conciliation”, which I predicted at the 1982 ICCA-Congress in Hamburg,³⁷ shows three less desirable features which may cause disillusion in the not so distant future.

First, when listening to presentations on the many nicely distinguished ADR techniques and the roles of different participants, one gets the impression of a dangerously increasing formalisation of the process. Secondly, when law societies or other professional associations market a multitude of conciliation methods, one suspects them of recommending an “escalation or ladder clause”, as if ADR stands for “Accumulated dispute resolution techniques”: Take A; if that doesn’t work, take B; if that fails, try C, but don’t forget to pay for all of them before depositing an advance for the final step - your arbitration. Thirdly, the obsession with novelty and uniqueness in marketing leads to overemphasizing particular aspects or phases of what is one and the same natural process and to drawing artificial distinctions (e.g. between conciliation and mediation) usually crowned by acronyms that are catchy, fancy and at times misleading (like “Mini-trial”). To name only a few other such “alternatives”: Structured CEO Negotiation, Early Neutral Evaluation, Partnering, Dispute Review Board, Lawyerless Mediation, Rent-a-Judge, Med/Arb, Medaloo, Arb/Med, Shadow Mediation and Co-Med-Arb. How could I resist the temptation of adding some new techniques the names of which I have already copyrighted:

The pacifying effect of good food is exploited by “GOURMEDIATION[®]”, a five-course meal in a five-star restaurant: Soup - to identify liquid proof, a fish-course for discovery and other fishing expeditions, a meat-course to see whether respondent meets claimant’s demand, dessert to sweeten the suggested settlement terms, and cheese for the shake-hand picture taking. A fast-track version is called “TARMAC[®]” (not to indicate the taste of the ground beef at the ordinary locale but the speed of taking off and landing).

The human desire for travel and vacation is catered for by “CRUISATION[®]” (or, if one insists on the use of ADR, “CRUISADR[®]”): Proceedings take place on board of a cruise-ship that calls on a port only after settlement, usually a former warship with no space for spouses, kids or any recreational facilities. For particularly confidential cases we use submarines. Other protected names are: “CIA[®]” = Conciliation integrated into Arbitration, “INTERMEDIATION[®]” and, for personal injury cases, “Doctor Med.[®]”.

³⁷ Herrmann, ‘Conciliation as a new method of dispute settlement’, in ICCA Congress Series No. 1 (VIIIth International Arbitration Congress, Hamburg 1982) p. 145 at p. 165.

And why not use the same marketing tools for the field of arbitration? New methods could be “TSP” for two-stage-proceedings (e.g. liability-quantum), “BOA contractor” as “Best-Offer-Arbitration” for cement and other construction cases, “BBTA” as a 24-hour-service in the form of “Bed and Breakfast-track-arbitration[©]”, “ALOHA”, the “American Last Offer and Hope Arbitration[©]”, “ORBITRATION[©]” administered by “GAC”, the “Galactic Arbitration Center”, already advertised above, and influenced, as regards evidence-taking, by that blimp or space shuttle revealingly called “US Discovery”.

Finally, the old dream of cheap arbitration is satisfied by three new techniques: “Bud light” (for Budget Arbitration), “CAP” (for Cost Avoidance Programme) and “DON'T[©]” (Documents Only, No Travel[©]). Unfortunately none of that will ever end up in future legislative provisions.

But what then? National enactments of the UNCITRAL Model Law, which have spurred Pieter Sanders’ proposal, may provide some ideas, except where they simply reproduce the UNCITRAL Conciliation Rules. My tentative collection of studyworthy points is as follows:

First, a set of rules encouraging or permitting conciliation and addressing the issue of a conciliator turning arbitrator and vice-versa. Particularly in common law jurisdictions, a rule would be useful that overcomes any objection based on assertions of prejudice or even violation of natural justice (e.g. Hong Kong SAR: “Where an arbitration agreement provides for the appointment of a conciliator, and further provides that the same person shall act as an arbitrator, then in the event of the conciliation proceedings failing, no objection can be taken to the appointment of such person solely on the ground that he has previously acted as conciliator”).

However, as regards the referenced party agreement, the normal and more prudent rule, as recognized by Fali Nariman at ICC’s birthday party,³⁸ is to provide from the outset that the conciliator will not act as an arbitrator or as counsel of a party in subsequent arbitral or judicial proceedings in respect of the same subject matter (see Article 19 of the UNCITRAL Conciliation Rules); of course, parties may later change their original position and regard the conciliator’s familiarity with the dispute as an asset rather than a disadvantage. In essence, what counts is party autonomy relating even to touchy points such as caucusing next to phases of arbitration, and the law should give effect to the parties’ agreement.

Secondly, regard should be had to particular concerns of keeping conciliation efforts confidential, including protection of privileged information against disclosure to the other party.

Thirdly, a useful provision, to my knowledge not found in any national law, would be to let a limitation or prescription period be interrupted by the initiation of conciliation proceedings (so as to end their discrimination if compared with arbitration or litigation). The possible alternative of starting conciliation with an agreement not to invoke expiry of such period is not always practicable, and a legislative provision would at least have the psychological effect of expressing non-discrimination.

³⁸ Nariman, ‘May the same persons consecutively act as Mediators/Arbitrators in respect of the Same Dispute? Pros & Cons’ and ‘How broad should the power of an Arbitrator to refer the parties to mediation be?’ Remarks at 75th Anniversary of the ICC International Court of Arbitration, Geneva, 25 September 1998 (to be published).

Fourthly, settlement agreements should be accorded enforceability, either directly (as done, e.g., by Hong Kong SAR) or indirectly, by “allowing” the parties to the settlement to commence arbitration, despite the disappearance of the dispute, and to obtain an award on agreed terms.

D. Court assistance or control (excluding enforcement)

With this we have elegantly reached the crucial area of court involvement. On a first loop, we will see some instances of court assistance during arbitral proceedings and of court control, and on a second and final loop we will explore possible improvements in the field of recognition and enforcement of awards.

- I. First stop: assistance in getting the ball rolling. Where the agreed process of appointing arbitrators runs into difficulties, the Model Law already envisages court assistance (in Article 11, also covering later instances of, e.g., challenges, Article 13). Yet, it does so only for arbitrations anchored in the country where the court is situated; the drafters did not accept a Secretariat proposal to help also in instances where the place of arbitration had not yet been determined. Germany in its enactment of the Model Law offers that assistance, provided that either the respondent or the claimant has its place of business or residence in Germany (Sect. 1025(3)). A uniform rule along those lines seems recommendable.

Another field of initial assistance, as advocated by Werner Melis at New York Convention Day,³⁹ are certain pathological clauses. As provided for in Article IV of the 1961 European Convention, help could be rendered where parties have not specified the mode of arbitration (institutional or ad hoc), or where they have agreed to institutional arbitration without precisely identifying the entrusted institution, or where the parties have not stipulated the rules of the game. While the last contingency is cured by the Model Law which provides a mini-set of arbitration rules (as a first-aid kit to get the arbitration started and proceed to an award), other possible deadlocks could be prevented by appropriate assistance. If deemed desirable, one should look for appropriate helpers: Presidents of Chambers of Commerce or a Special Committee as under the 1961 European Convention? Designated national arbitral institutions might be better. Or should we entrust international bodies, either at the universal level like the Permanent Court of Arbitration, or designated regional bodies like the Common Court of Justice and Arbitration of OHADA (Organisation pour l’harmonisation en Afrique du droit des affaires) in Abidjan?

- II. Second stop: court assistance in taking evidence. The Model Law already provides for such assistance, yet again only for arbitrations whose seat is in the Model Law country. The drafters did not extend that assistance to foreign arbitrations; it was felt that an effective system could be established only by means of a convention, and that the availability of such assistance might induce parties to dilatory or obstructionist requests for evidence. Both concerns are no longer regarded as very forceful; besides, the Model Law itself contains a device for preventing dilatory tactics, namely the requirement of the arbitral tribunal’s

³⁹ Melis, ‘Considering the advisability of preparing an additional Convention, complementary to the New York Convention’, supra n. 5.

consent to any such request to a court (Article 27). Some recently promulgated national laws contain the extension to foreign arbitrations and not-yet-empanelled arbitrations, such as the German Model Law enactment (sect. 1025(2) and 1050) and the English Act of 1996 (Sect. 2(3)(a) and 43, for witnesses). A uniform rule along those lines seems recommendable.

III. Next stop: court assistance in giving executory force to interim measures of protection ordered by the arbitral tribunal. This is a prime candidate for uniform treatment, as advocated at New York Convention Day especially by Johnny Veeder Q.C.⁴⁰ and Sergei Lebedev⁴¹ (who also proposed wider court assistance by judicial interim measures of protection). The Model Law itself (in Article 17) authorizes the arbitral tribunal to order certain interim measures of protection, while some other laws do not even recognize any party agreement to that effect (e.g. Austria, Greece, Italy, Sweden). The Model Law, however, does not address the issue of enforceability of such measures. National enactments, as expected by the Model Law drafters, have often answered the question. They provide either directly for enforceability or indirectly by envisaging the interim order to be made in the form of an award, triggering the applicability of the general provisions on recognition and enforcement of arbitral awards.

One should, however, recognise that the latter approach, sometimes used also in arbitration rules, faces problems where the New York Convention comes into play. It is, to say the least, far from certain whether the Convention covers interim orders which are not “final” in the strict sense. However, in my view an interim measure is not only “binding” (on the parties) but also “final” in the sense of “definite” according to its terms which typically include a time limitation or a revision possibility.

I am not underestimating the inherent difficulties of grasping the true nature of interim measures, distinguishing between the very different types of such measures and their conditions and other procedural issues involved, as discussed, for example, by Marc Blessing at the 1997 International Arbitration Day in New York.⁴² Yet, we should regard those difficulties as fascinating challenges on our way to the rewarding achievement of universally acceptable provisions. As regards a non-award approach, I recommend as a starting point the elaborate provision of the new German Law (Sect. 1041), with possible provisions to be added in a Model Law Supplement to ensure enforceability of such measures also in countries other than where the seat of the arbitration is located.

IV. Final assistance stop: judicial review on the merits: Before moving into the wonderland of recognition and enforcement of awards, let us take a brief stop at “judicial review”. I am not referring to the English system of appeal on a point of law which parties may avoid by an exclusion agreement if they are aware thereof (that is why I had years ago recommended an inclusion, opting-in system for England, so as to avoid a trap to the unwary).⁴³ Rather, I am referring to the situation where parties agree on judicial review for arbitrations conducted

⁴⁰ Veeder, ‘Provisional and conservative measures’, supra n. 5.

⁴¹ Lebedev, ‘Court assistance with interim measures’, supra n. 5.

⁴² Blessing, ‘The Trouble With Interim Relief in International Arbitration’, AAA/ABCNY/IBA International Arbitration Day: Global Perspectives, New York, 25 September 1997.

⁴³ Herrmann, ‘For an UNCITRAL Model Restatement of Arbitration Law in the United Kingdom’, in (1988) 4 Arbitration International p. 62 at p. 66.

under laws that do not provide for judicial review. Courts have given different answers to such party-desired “non-finality”. One U. S. court has given effect to the clause relying on the principle of “ensuring enforcement of private agreements to arbitrate”.⁴⁴ Another U. S. court felt that “parties cannot contract for judicial review and impose on the courts burdens and functions Congress has withheld”.⁴⁵ A French court, also regarding the parties’ appeal provision as invalid, went even further and held that the entire arbitration agreement therefore was flawed and invalid.⁴⁶

The diversity of views is symptomatic of the eternal question of the limits of party autonomy and the extent to which finality is essential in international commercial arbitration. While the disparity is not particularly reassuring, the issue probably defies uniform legislative treatment, at least for the time being.

E. Reinforcing recognition and enforcement of awards

The views on our final loop are of a particularly tentative nature. The debate has not yet reached the stage of maturity that would allow easy consensus-building conclusions. Individual views are at times extremist and drastically changed within a few months.

Not only the substantive side of the reinforcement effort is very tentative but also the question of form or means: Do we need a convention supplementing the New York Convention? Is the appropriate vehicle a Model Law Supplement? And should that expressly interpret and complement the New York Convention, in part as a Model Implementing Act? Or should it indirectly remedy shortcomings of the Convention by providing a modern enforcement system (either “New York inclusive” or as an “add-on”) which for States members of the New York Convention would become operative via Article VII? Or is what we need (or can finally agree on) a set of UNCITRAL Guidelines, as suggested by Sir Michael Kerr?⁴⁷ Should we establish an advisory Uniform Interpretation Board whose persuasive force might be strengthened by linking it to UNCITRAL? Or should we refrain from any formal approach and leave the questions to learned judges and commentators? To make things even more interesting, the choice need not necessarily be a general one but may well vary from issue to issue.

Thus, let us turn to the issues, lumped into three groups: The Concept of award; Enforcement conditions and procedure; and Grounds for refusal.

I. Widening/clarifying the definition of “award”

⁴⁴ La Pine Technology Corporation v. Kyocera Corporation, 130 F. 3d 884 (9th Cir. 1997); appeal decision on case in note 45.

⁴⁵ La Pine Technology Corporation v. Kyocera Corporation, 909 F. Supp. 697, 705 (N.D. Cal. 1995); similarly Chicago Typographical Union v. Chicago Sun-Times, 935 F. 2d 1501 (7th Cir. 1991).

⁴⁶ Société Diseno c/ société Mendes, Cour d’Appel de Paris (October 27, 1994), in 1995 Rev. arb. p. 263.

⁴⁷ Kerr, supra n. 26 at pp. 142-143.

There are at least six candidates for enforceability whose coverage by the New York Convention is controversial and quite often denied or at least doubtful:

(a) Interim measures of protection: As mentioned earlier, for conservatory and other interim measures the executory force of a court may be desired. Yet, even if the measure is ordered by the arbitral tribunal in the form of an award or is by arbitration rules or the law of the place of arbitration accorded the status of an award, enforcement in another country is far from ensured. A uniform rule, with appropriate procedures and conditions, should grant enforceability to a measure which, even if limited in time or revisable under its terms, is definitive and binding on a party. In that context, it might be advisable to specify the various types of interim measures that would be made enforceable.

(b) “Settlement agreements”, as discussed earlier, might be made enforceable even if not incorporated into an award on agreed terms; an alternative (to avoid the difficult task of precisely defining an eligible settlement agreement) could be to give effect to a clause in such agreement whereby a party subjects its assets to enforcement.

(c) Certain awards not based on signed or written arbitration agreements, as discussed earlier, need to be made enforceable, too.

(d) “Treaty awards”: Various bilateral treaties (for instance, on investment) and some multilateral treaties (e.g. NAFTA and Energy Charter Treaty) suggest enforcement of awards that may not be based on a traditional arbitration agreement between the parties but, for example, on the State’s offer by joining the treaty and the investor’s consent by initiating arbitration. Enforcement under the New York Convention (or the Model Law) may then be a question and should be made answerable in the affirmative (with adjustments needed for the requirement to present the arbitration agreement to the enforcement judge).

(e) “Unseated” awards, including stateless or a-national awards: While a-national (or “free-floating”) awards are more common in the imaginative world of radical de-localisers than in the real world, we may wish to anticipate future space awards, rendered in cyberspace (virtual “CYBITRATION[©]” awards by seatless on-line arbitration centers) or in outer space (“ORBITRATION[©]” by the “Galactic Arbitration Centre”, remember). As regards the probable absence of a setting-aside facility, the situation is similar to that of a country where the law or the parties have set aside that facility.

(f) “Award-like decisions” (in proceedings akin to arbitration): Consideration might be given to ending the disparity between Italian and other courts on the qualification of the “laudo irrituale” as well as possibly similar proceedings (e.g. “bindend advies”, “Schiedsgutachten”).

II. Enforcement conditions and procedure. A number of issues may be mentioned here; a number of others are likely to be added as a result of the IBA/UNCITRAL Joint Project Monitoring the Implementation of the New York Convention (about which I have reported elsewhere⁴⁸).

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Herrmann, ‘Implementing Legislation - The IBA/UNCITRAL Project’, in (1996) ASA Special Series No. 9 p. 135.

(a) First, there are two issues of time: a retroactive effect of the New York Convention could be recommended to newly joining States; and a uniform time period for requests for enforcement may be commended generally, if a time-limit is regarded as justified at all (currently legislated time periods range from 6 months to 30 years).

(b) Secondly, refinements to the conditions of Article IV of the New York Convention might be considered: arbitration agreement in certain cases (e.g. submission; oral agreement; treaty award) to be proven otherwise than by original or copy in writing; details of authentication or certification could be clarified (e.g. signatures on award necessary to be authenticated and, if so, how; does authentication of chairman's signature suffice); requirement of translation a matter of discretion for the court; proof of fact that a certain State is a member of the New York Convention to be established by reference to homepage of United Nations Treaty Section, thereby abolishing the current requirement in some States to have reference to a published list of the Ministry of Foreign Affairs or, much more restrictive and against the thrust of the Convention, for certification by the diplomatic or consular representative of the enforcement state in the country whose membership is to be proven; clear rule to eradicate last remnants of "double exequatur", e.g. requirements of deposit, registration or confirmation of award to be irrelevant for foreign countries.

(c) Thirdly, practically important questions of procedure could be examined, e.g. fees, possibly imposing a cap, in addition to the requirement of non-discrimination contained in Article III of the Convention; leave for enforcement to be granted within fixed time-limit, possibly ex parte; appeal possible against leave or against its refusal; which is the competent court.

The last field to be covered is particularly difficult, controversial and crucial.

III. Grounds for refusal of recognition or enforcement

(a) In general

Before looking at individual grounds, we need to look at a general matter which lies at the heart of the controversy: the relationship between the setting-aside court in the country of origin and the enforcement judge, the famous problem of "double control", made conspicuous (but not at all created) by the Model Law with its parallel lists of grounds in Articles 34 and 36. The criticism has been especially strong in respect of domestic situations, i.e. both courts are in the same country. Albert Jan van den Berg called it the major defect of the Model Law.⁴⁹ However, one should realize that the Model Law does not prevent any State from adding a rule concerning that relationship, including a possible preclusion effect to reduce double control, in line with its existing system of such preclusion rules. Germany, for example, addressed the issue in its enactment, Sect. 1060 (2).

Another misconception is what Lord Mustill recently presented as his memory of the UNCITRAL debates and the two philosophies in collision. The first allegedly was "that arbitrations should be left undisturbed by the local law, complaints about procedural unfairness being addressed at the stage of enforcement in a foreign court", and the second, opposite view, which he said led to the inclusion of Article 34, was to tackle "procedural errors and failures of justice at the earliest possible moment, on the spot, through the

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Van den Berg, 'The Freshfields Lecture 1992 - The Efficacy of Award in International Commercial Arbitration', in (1992) 58 Arbitration p. 267 at p. 272.

medium of the national court”⁵⁰ at the place of arbitration. I cannot remember a single delegation having proposed to do away with setting aside (as later legislated by one country, namely Belgium, for cases not involving Belgian interests). In fact, all delegates would probably rally around Lord Mustill’s argument in favour of the second view: If complaints are reserved for the stage of enforcement there is no remedy for the claimant who, through unfairness, has seen his claim wrongfully dismissed; in the opposite case, the loser could “be harassed by enforcement proceedings all round the world, accompanied by the blocking of credit balances and seizure of assets”. When I once expressed during an arbitration conference that same view, preserving for the loser the necessary means to attack the award at the roots rather than having to sit put and wait until enforcement efforts in various countries, I was called “award killer” by a well-known arbitrator (whose recent award had been set aside).

My view has not changed. Thus I am unable to share the view of Philippe Fouchard that setting aside should be done away with⁵¹ or the recent view of Jan Paulsson that setting aside should be given only local effect. His main argument against any more-than-local effect of setting aside is the alleged “international trend to attach less, rather than more, significance to the formal link between an award and the country of the arbitration”, and that “the opposite view reflects an unjustified lack of confidence in courts where enforcement is sought”.⁵² But why should there be less confidence in the judges at the place of arbitration, chosen by the parties often because of its so-called neutrality or lack of connection with the subject-matter?

Thus, my preference continues to be in favour of a global effect of setting aside, with certain reductions of the “second” court control, at the place of enforcement. The reductions should be achieved with respect to the individual grounds for refusal set forth in Article V of the New York Convention, especially subparagraph (e) of paragraph (1). In similar vein, one should provide some kind of preclusion effect for the case where a ground has been unsuccessfully invoked at the place of arbitration - not necessarily as “*res iudicata*”, probably not obtainable world-wide, but as an exhortation to decline reconsideration if the court is satisfied that the respondent already had its day in court (one).

Before looking at the various grounds for refusal, I feel compelled to dispel the almost

⁵⁰ Lord Mustill, *supra* n. 6 at p. 254.

⁵¹ Fouchard, *Rapport de synthèse générale*, *supra* n. 4.

⁵² Paulsson, ‘Towards minimum standards of enforcement: feasibility of a model law’, *supra* n. 4, and similarly ‘Enforcing Arbitral Awards notwithstanding a Local Standard Annulment (LSA)’, in (1998) 9 ICC International Court of Arbitration Bulletin p. 14; contra: Van den Berg in his *replique*, *supra* n. 19.

epidemic misconception that the words “may be refused” in the English version grant discretion to the enforcement judge to enforce an award despite the existence of one of the listed grounds. The text says “may be refused only if...” which is identical with “may not be refused unless” (exactly like the French version); it thus addresses exclusively the situation where none of the grounds exists, in which case the judge must or shall enforce. The Convention is silent on whether, if a ground exists, enforcement shall be refused or whether there remains discretion to enforce the award nevertheless. Based on a recent statement by Pieter Sanders, the author of the so-called Dutch proposal launched at the 1958 Conference, and the fact that even the extremely liberal and internationally minded previous draft said “shall be refused if...”,⁵³ I suspect that the drafters saw no room for discretion. Yet the legislative history is sufficiently unclear to allow us today to use the Convention’s silence on the point.⁵⁴

(b) Individual grounds

Whether or not by injecting discretion or by using the window of Article VII, the following points might help to reduce court control at the enforcement stage.

Subparagraph (a): Lack of arbitration agreement irrelevant if not invoked at the latest with first substantive statement or if not referred to court according to Article 16(3) Model Law. As regards States or State agencies, the earlier considerations concerning capacity could be used to make an effort, as suggested by Hazel Fox,⁵⁵ to forge a consensus on exclusion (or waiver) of State immunity also for execution, taking into account the commercial nature of the underlying transaction. The task would be formidable, yet the effort itself might assist in clarifying matters (and possibly carving out a limited sector from the vast area currently under consideration by the General Assembly and the International Law Commission).

Subparagraphs (b) and (d): Defect in composition of arbitral tribunal or in arbitral procedure needs to be more than a minor technical flaw or oversight (“De minimis non curat praetor”) and was not apparently without influence on the outcome.

⁵³ Preliminary Draft Convention (1953), Article IV, reproduced in (1998) 9 ICC International Court of Arbitration Bulletin p. 35.

⁵⁴ Even Jan Paulsson's well-researched and detailed excursion into the foreign land of linguistics ('May or Must Under the New York Convention: An Exercise in Syntax and Linguistics', in (1998) 14 Arbitration International p. 227) suffers from the potentially misleading imprecision of not distinguishing between the positive granting of discretion and silence on the issue. For example, his finding that the texts in four of the five official languages do not "require refusal if the conditions apply", based on confirmations by native speakers as to the permissive nature of the respective wording (corresponding to "may be refused"), leads him to the conclusion that these four languages "clearly leave room for judicial discretion" (at p. 229). But one consequence of this imprecision is his conclusion (at p. 230) "that it is unnecessary and indeed inappropriate to resort to the Convention's travaux préparatoires". In truth, however, the search for an answer to a legislative ambiguity or, as in our case, gap may not (or is it: shall not?) exclude resort to the legislative history.

⁵⁵ Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property ?' in (1996) 12 Arbitration International p. 89.

Subparagraph (e): “Not yet binding” may be narrowly defined. Suspension counts only if ordered by a court, not if it is an automatic consequence imposed by law (as in France). Setting aside should be given effect within certain limits: Like Article IX European Convention, no effect to setting aside based on public policy of place of origin; the necessary filter of international public policy is provided by paragraph (2)(b) of the New York Convention. No effect to setting aside for other, peculiar and internationally unacceptable grounds, which Jan Paulsson calls “LSA’s: local standard annulments”.⁵⁶ However, the classification as an irrelevant local standard should not be left to be determined by individual Congress participants and commentators; we need more predictable and universally agreed classifications, along the lines of the Model Law, probably confined to certain basic standards set forth therein such as those in Article 18 and some other mandatory provisions.

In conclusion, I would summarize my answer to the topic as follows: Let the world itself decide whether it needs additional uniform legislation. The months and years ahead promise to be interesting.

And in searching for suitable solutions, let us not only look into the future but utilize the treasure trove of ancient laws, going back to the roots of arbitration. For example, we might learn from traditional Irish laws which used “satire, ridicule and invective to enforce the law” or “distrain of livestock as a way of forcing arbitration between a wrongdoer and a victim” (which in today’s world would mean “distrain of car, mobile telephone or computer”). I am less sure, though, whether in the current state of ethics the following very specific rule provides a viable model: “If a person who is of a higher rank than you refuses to repay his debt you may sit at his doorstep and fast until he submits to arbitration. If you die before he submits he shall be blamed for your death and shall suffer lifelong disgrace.”⁵⁷

Notes

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⁵⁶ Paulsson, ‘Awards set aside at the place of arbitration’, supra n. 4., and supra n. 52.

⁵⁷ M. Dowling Daley, Traditional Irish Laws (San Francisco, 1998) at pp. 4 and 23.