

ON THE TRANSFER OF SEAT IN INTERNATIONAL ARBITRATION

by Pierre Lalive*

Following a remarkable and stimulating Report on "Arbitration between States and Foreign Enterprises", presented in September 1989 at the 64th Session of the Institut de Droit International, Professor Arthur von Mehren proposed a Draft Resolution containing, among various important provisions, the following clause:

"If a State renders it unduly difficult to carry on an arbitration on its territory, the [arbitration] tribunal is entitled to remove the arbitration to such place as it may decide."

Eventually, after a debate the details of which need not be analysed in the present context, that proposal was accepted by the Institut de Droit International by an overwhelming majority¹ (as article 3 (d), in the following form:

"Should it become unduly difficult to carry on an arbitration at the agreed place, the tribunal is entitled, after consultation with the parties, to remove the arbitration to such place as it may decide."

It is submitted that the principle advocated by Arthur von Mehren (together with his Co-Reporter, the late Judge Eduardo Jiménez de

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¹ *Annuaire (Yearbook) de l'Institut de Droit International*, vol. 63, I, 31–204 (1989) and vol. 63, II, 121–221, at pp. 220–221.

Arechaga) is fully justified, in keeping with the modern conditions and practical needs of international commerce and, moreover, that it should have attracted more attention and praise than seems to have been the case.

Recent arbitral practice on this topic, however, appears to verify, not only the wisdom of the Rapporteurs, but also suggests a certain timidity or lack of vision of a number of arbitrators and arbitration institutions. A few observations on the transfer of seat (in particular in international arbitrations involving a State and/or a State enterprise) thus appear justified in a volume of contributions in honour of the great American internationalist and comparatist.

A *caveat* appears called for at the outset: no attempt will be made here either to describe the various situations in which, under the "general principle" proposed, with success, by Arthur von Mehren to the Institut de Droit International, a transfer of the place of arbitration is advisable or necessary, or to comment, in general or theoretical terms, on this particular application of the concept of "changed circumstances" or "*rebus sic stantibus*".²

The following, limited enquiry will be focused on the case, either in *ad hoc* or institutional arbitrations, when the "place of an arbitration" had been agreed upon by the parties (a State or State enterprise and a foreign private company) and when an unforeseen or "exceptional"

² Among a vast literature, see e.g. Ph. Kahn, in "Le Contrat International", Brussels 1975, p. 195; F. Dasser, *Internationale Schiedsgerichte und Lex Mercatoria*, Zurich 1989, p. 111 and *passim*; R. Köbler, *Die Clausula Rebus sic stantibus als allgemeiner Rechtsgrundsatz*; Tübingen 1991; H. VAN HOUTTE, *Changed Circumstances and Pacta Sunt servanda*, in ICC/Dossier of the Institute, 1993, 105–114.

change of circumstances (including a change of attitude of the State party, or of its political regime) made "unduly difficult" the conduct of normal arbitral proceedings in that venue.

A number of examples easily come to mind, particularly of cases when a private investor felt obliged to accept a place situated in the territory of the State contracting party. Teheran, Abu Dhabi, Dacca, Djakarta, Kabul and Belgrade, all have given or may give rise to difficulties³.

In at least a few of these examples, an arbitration clause containing a choice of "place" or "seat" in case of future disputes submitted to arbitration had been agreed before a new political regime came to power (i.e. before the Islamic Revolution, or before S. Milosevic established his dictatorial regime). Among the questions to be considered by any arbitrator, arbitral institution or State judge seized with a request to order a change of seat, the following two must be mentioned: (a) was the change of circumstances unforeseen or unforeseeable, and (b) are the new circumstances so exceptional as to actually prevent the normal and orderly course of the proceedings, in keeping with the fundamental principles of arbitration ?

Underlying such questions, obviously, another interrogation must be made, as in the case of any other contractual clause: what was (or must have been) the common and real intention of the Parties when they agreed upon or "chose" the place of arbitration?

³ In contrast to the first formula proposed by A. von Mehren to the Institute, Article 3 (d) is not limited to those examples of "undue difficulty" caused by a State; it includes events for which a State cannot be blamed, such as natural disasters (cf. comments by F. Rigaux and B. Goldman, Yearbook of the Institute, loc. cit., at p. 188).

Whoever, like the Arbitration Tribunal, according to the "von Mehren principle", or an institution or judge in other systems) has to answer a request for a change, will proceed from the same starting-point, *pacta sunt servanda*; once agreed upon by the parties, the venue should not be changed except by the parties, i.e., except by agreement. However, like any agreement, such a clause should be interpreted, and implemented in accordance with the common intention of the parties at the time when the original agreement was executed.

Now, no particularly elaborate analysis is required to show what are the main objects, or the *essentialia*, of such a common intention: the parties intend to have a possible dispute settled not by a State Court, but by independent arbitrators of their own choice (acting under the rules of some arbitration institution, like the ICC, or under rules like those of UNCITRAL or, perhaps less frequently, under some State procedural rules or *ad hoc* rules).

A common feature of all such rules is that, subject to the relevant public policy, the parties are free to exercise their "autonomy of the will" on a number of questions of varying degrees of importance, questions which they can choose to regulate (or not to regulate) as they think best, or to leave to the future decision of arbitrators. An example is the number of arbitrators, another is the law applicable to the merits, still others are the choice of language or that of the place, or "seat", of arbitration.

In the hierarchy of importance of the various components or elements constituting an arbitration agreement, the rank of the contractual provision fixing the place of arbitration will, in most cases

(but not in all), be a secondary or subordinate one, as compared, for instance, to the basic requirement of an impartial decision by independent arbitrators and to the finality of the award rendered in accordance with due process, and other fundamental requirements (like respect of equality of the parties). That subordinate character of the choice of place is also evidenced by the fact that an arbitration clause is perfectly valid and operative, as a rule, even when no precise place of arbitration has been specified by the parties. In other words, a provision, contained in the arbitration clause, localising the place, appears *prima facie* as a mere modality, based generally on reasons of practice and convenience as they have been perceived at the time when the arbitration clause was agreed upon.

It is only in special or exceptional circumstances (e.g., in some important "State contracts") that the choice of a particular place may have been for one of the parties (and recognised as such by the other) a condition *sine qua non* of the agreement to arbitrate.

Be that as it may, the choice of place must undoubtedly have been made upon the implied condition or on the common understanding that such a choice would not jeopardise or render impossible the effectiveness or the very "raison d'être" of the arbitration agreement itself. Manifestly, the agreement must be interpreted *magis ut valeat quam pereat*, so that in all cases the integrity and fairness of the arbitration process would be fully preserved, in accordance with the common expectations of the parties.

This means, in particular, the common intention and understanding that the local courts will not interfere, directly or indirectly (on their own motion or upon instruction of the State party to, or

interested in the contract) with the merits of the dispute. A striking illustration of such situation, which should be mentioned in passing, is the Himpurna case, where the Courts of Djakarta attempted to obstruct the normal course of the arbitration; following the failure of that attempt, the Indonesian Government felt that it had no other alternative but to organise the kidnapping of the Indonesian arbitrator on Dutch territory!⁴

Another, less spectacular but nevertheless telling, illustration is provided by two recent ICC cases⁵ in a dispute involving an American corporation on the one hand and, on the other, the Republic of Serbia and a State enterprise of that country. In that case, the parties had chosen Belgrade as the place of arbitration in a Contract entered into in 1990. Some nine years later, disputes arose between the parties, leading to claims and counterclaims, and the American corporation requested first the Arbitral Tribunal, and then the ICC "Court" of International Arbitration to consider its application to change the place of arbitration and designate Geneva instead of Belgrade.

It is interesting to summarise here – with the "von Mehren general principle" mentioned above in the background – first the grounds invoked by the American applicant, and then the reasoning adopted by the Arbitral Tribunal to reject the application on the basis that the original choice of Belgrade was still binding, notwithstanding the change of the political and legal environment.

⁴ See ASA Bulletin 1999, 583; 2000 (15.1); Mealey's International Arbitration Report A-I and B-I; and V.V. Veeder, Natural Limits to the Truncated Tribunal..., in Liber Amicorum K.H. Böckstiegel, Carl Heymanns Verlag, 2001, pp. 794, 802–804.

⁵ Nos 10373 and 10439 (unpublished).

A controversial procedural question arose, which should be mentioned in passing: who had authority to decide on the requested change of place? The Arbitration Tribunal or the arbitration institution, here the so-called ICC "Court" (in the absence of any specific provision in the ICC Rules)? It was argued, on the Serbian side, surprisingly and hardly convincingly, that in cases where the place of arbitration has been agreed by the parties, no one has any authority to modify such a choice, even in the most extreme circumstances, since the ICC Court has merely "administrative" and not "judicial" functions ! That theory was obviously contrary to the needs of practice and to common sense as well as, it is submitted, any reasonable interpretation of the ICC Arbitration Rules. It was not adopted in the case under scrutiny, the ICC Court choosing to ask first the Arbitral Tribunal to render an interim award on the binding character, or not, of the original agreement selecting Belgrade.

It may be noted that the rules of arbitral institutions (including the ICC Rules) and the UNCITRAL arbitration rules provide no answer, or no clear answers, as to who has the authority, in certain circumstances, to change a place of arbitration agreed by the parties. For instance, Article 14 of the ICC Rules is silent on the subject, and the power, recognised by Article 14 para 2, granted to the Arbitral Tribunal, to "conduct hearings and meetings at any location it considers appropriate" (after consultation with the parties), elsewhere than at the seat, is obviously no answer: "Such a change of physical venue does not alter the legal significance of the chosen place of the arbitration"⁶.

This silence has led a minority of commentators to contend that the ICC Court would have no authority to refuse to "confirm" an agreed seat of arbitration and/or to transfer the seat in circumstances like those, mentioned above, prevailing in Belgrade during the Milosevic regime⁷.

As already indicated, the contention that, whatever the new circumstances may be, no authority can decide to change the (agreed) seat is contrary to elementary principles of interpretation and to common sense. Furthermore, no reliable inference in favour of that contention can be drawn from the fact that, for a variety of reasons (mainly of convenience), when the ICC Rules of Arbitration were revised in 1998, a proposal to introduce a provision explicitly granting the Court the authority to change the (agreed) seat was not adopted. In particular, a doctrinal or *a priori* refusal to recognise such an authority, in absence of an explicit rule to that effect, cannot be based on the alleged "purely administrative" and non-judicial role of the ICC Court. Whatever is or may be the precise legal nature of that Court's functions, it cannot be asserted that a decision to change the (agreed) seat in exceptional circumstances is of a totally different nature or of a vastly greater importance than, for instance, that of appointing or removing the chairman of the arbitral tribunal (under Rule 12)⁸.

⁶ Marc J. Goldstein, in "The International Lawyer", Summer 2000, vol. 34, No 2 at II, who points out, quite rightly, that this question "is closely related to the question of enforcement of annulled awards".

⁷ See Y. Derains – E. Schwartz, *A Guide to the New ICC Rules of Arbitration*, Kluwer 1998, p. 202, *Contra*, e.g., G. Born, *International Commercial Arbitration in the United States*, 1994, p. 77; Craig–Park–Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules*, 1998, p. 104, who maintain, rightly, that in exceptional circumstances which threaten to frustrate the arbitral process, the ICC Court has power [and indeed the duty, it is submitted] to deal with the situation, under Rule 35.

⁸ As has been aptly remarked by Jan Paulsson "the objective fact is that the ICC Court is frequently called upon to make immensely important decisions which in some

In the ICC case just mentioned, the request for transfer of seat was based on two grounds, one legal – (an interpretation of the contractual clause choosing Belgrade), the other factual, i.e., the situation allegedly prevailing in Belgrade 2000 under the Milosevic regime.

On the first point, it could safely be asserted that the initial choice of place had been, or must have been based on the common understanding or assumption that "Belgrade was, and would remain, a legal environment conducive to fair and effective international arbitration, in accordance with the ICC Rules". In other words, the arbitration agreement as a whole, and in particular its provision on the place or "seat" was based upon, and implied the continuing trust of the parties in a Belgrade legal environment in accord with the fundamental principles of international arbitration, i.e., regarding the equal treatment of the parties, and the fairness, independence and impartiality of the proceedings and of the arbitrators⁹.

Trust in and respect for such fundamental principles (which would seem to be part and parcel of "transnational public policy", as well as a traditional component of the "national" international public policy of most States) are obviously a precondition of any arbitration agreement, so much so that their mention appears superfluous and indeed futile in all "normal" cases.

instances determine, for all practical impacts and purposes, the outcome of the dispute".

⁹ Cf. P. Lalive: "On the Neutrality of the Arbitrator and of the Place of Arbitration", in Swiss Essays on International Arbitration, Schulthess, Zurich, 1984, pp. 23-33, at 28 ss.

But it was contended that arbitration in "Belgrade 2000" (allegedly the very antithesis of the place chosen in 1990 by the parties) was not, and could not be "normal", given the fact that "the Milosevic Government had degraded, intimidated, manipulated and purged the Yugoslav judiciary and [had] placed the Courts in the service of the Government's iron-fisted crackdown on political expression by citizens and its xenophobic hatred of the United States" – with the result, among others, that any future award in favour of the claimant¹⁰ would inevitably be annulled in Belgrade.

It was recognised by the applicant that the fact that a State is a party to an arbitration is not sufficient, as such and in itself, to justify or compel the transfer of the (agreed) place away from its own territory. But it was stressed that the dispute involved a *de facto* expropriation or confiscation of property by the direct action of the local judiciary (and not only with its apparent complicity.) How then could the local courts act in an independent and objective "judicial" manner ?

And how could Arbitrators meeting in "Belgrade 2000" (and called upon to decide a "Serbian–American dispute" of some importance be, or feel, really free, in an oppressive environment, from (direct or indirect) psychological pressures if not from actual personal intimidation?

It should be remembered in this context that the standard of independence is an objective one. It suffices that, from an objective

¹⁰ The Claimant was an American pharmaceutical company owned or controlled by a well-known political opponent of S. Milosevic, of Yugoslav origin.

point of view, there could arise in the view of a reasonable man "justifiable doubts" as to the independence of the Arbitrators. The latter, when exposed to (the risk of) interference by a totalitarian State (known to have eliminated its political opponents by murder and other violent means) runs clearly the risk of losing, *volens nolens*, at least the appearance of independence, and thus the trust of the parties as well as the respect of international opinion.

Reference may be made here to another element of the von Mehren Resolution, as adopted by the Institut de Droit International¹¹, which states in Article 1 that: "An Arbitrator...shall exercise its functions impartially and independently"¹². Similarly, Article 7.1 of the ICC Arbitration Rules States that "Every Arbitrator must be and remain independent of the parties involved in the arbitration" (emphasis supplied).

It is hardly necessary or useful to stress the fundamental importance of that duty, but one may be excused for emphasising that it includes the Arbitrator's duty to perform his mission in a manner which is manifestly and publicly seen and recognised as totally independent¹³. That principle is all the more fundamental when one of the parties happens to be, formally or indirectly, substantially (e.g., through a State-controlled enterprise) the very State in which the arbitration's "seat" has been located.

¹¹ Yearbook of the Institut, vol. 63, II, 1989, pp. 325–330.

¹² On these two concepts and their distinction, cf. P. Lalive in *La procédure arbitrale et l'indépendance des arbitres*, Bulletin de la Cour d'Arbitrage CCI, 1991, pp. 119–135.

¹³ See, inter alia, the English case *R. v. Sussex, Ex parte Mc Carthy* [1924] IKB 256.259, quoted again in the recent High Court decision of 20 April 1999 in *Laker Airways Inc. v. FLS Aerospace* (ASA Bulletin 1999, 384).

Such a circumstance is not sufficient as such and in itself to question the validity of that location, especially since it had been foreseen and indeed agreed upon by the parties. But the prevailing political and legal conditions may have changed radically since the time of the arbitration agreement. Can such a radical change be ignored by an arbitral tribunal (or by an arbitral institution) or should it be taken into account, either *proprio motu* or upon a request for a transfer of seat to some "neutral" country?

First, it should be repeated that a mere transfer of the place of hearings or the choice of another location for the tribunal's deliberations (e.g., ICC Rules, Article 14, para 2 and 3) would obviously fail to answer the preoccupations of the party requesting a change of the "seat", having regard to the possible role of that notion in respect of the applicable procedural law, or of the role of its courts concerning the enforceability and finality of awards.

Belgrade, again, is an appropriate illustration. In recent times it was public knowledge that a totalitarian regime led by a Stalinist clique controlled in particular the judiciary, the army and the police, and would have no compunction in causing the courts to set aside any unfavourable award which might be rendered against the State itself or a State enterprise. In such an environment, the position of a foreign party involved in a (contractual) dispute with the State or one of its agencies is undisputably not equal to that of the "State party". The equilibrium between the parties is clearly jeopardised, already during the proceedings themselves (even if the State is cautious enough not to appear to interfere directly, as in the Himpurna case cited above). This equilibrium is imperilled because of the likelihood that local Courts will

be able to set aside any award considered unsatisfactory by the State party to the arbitration.

The totalitarianism prevailing in recent times in Serbia (including the taking over of the judiciary by the Government) did not only endanger, and indeed destroy the equality of the parties in arbitration. It also affected the very independence of an arbitral tribunal sitting in Serbia and called upon to decide, as said above, a "Serbian–American dispute" of some importance (moreover involving a personal political opponent of S. Milosevic). Quite apart from the likelihood or threat of an annulment of a future award favourable to the foreign party, the mere knowledge of the violent methods used locally to silence opponents of the regime¹⁴, and the prevailing oppressive environment, could not fail to exercise a psychological pressure upon the minds of many, if not all, Arbitrators. This fact should suffice, it is submitted, short of actual personal intimidation, to cast a doubt in the minds of the foreign party and in the general public's mind upon the "remaining" or lasting independence of the Arbitrators. How, in such circumstances, could the Arbitrators continue to enjoy the full confidence of all parties and be seen to exercise their functions completely, impartially and independently¹⁵? How could the integrity and fairness of the whole arbitration process be preserved and in particular, be seen manifestly to be preserved?

Some support for a positive decision to transfer the seat in such circumstances can be derived from the general principles of Public

¹⁴ The international press had reported a number of high–profile assassinations in public places (e.g. Arcan, Bulatovic) or attempts (e.g. V. Draskovic).

¹⁵ See Article 1, cited above, of the Resolution of the Institut de Droit international, Yearbook, vol. 63 II, 1989, pp. 325–330.

International Law, on the one hand and, on the other, from general Private International Law in the matter of forum selection clauses.

On the first point, it may suffice here to refer to the recognised principle of International Law, endorsed, for example, by Article 62 of the Vienna Convention on the Law of Treaties, relating to the effect of a "fundamental change of circumstances".

The International Court of Justice has recalled that such a change can also modify the effect or scope of a jurisdictional obligation which has been agreed upon by the parties (such as an agreement to arbitrate disputes). In the Fisheries Jurisdiction case¹⁶, the Court confirmed that it was a principle of customary international law that a fundamental change of the circumstances which induced parties to accept a treaty may be grounds for termination of the treaty if the change radically transforms the extent of the obligations undertaken (but it held that there was no such change in Iceland's case).

The issue of the impact of changed circumstances on forum selection clauses was addressed, though not decided (in the case of Teheran as an agreed forum) in several cases of the Iran–US Claims Tribunal in The Hague, for instance in the case of Re Halliburton Co¹⁷. Under the Claims settlement Declaration, it was held that the Tribunal had the authority to decide whether in a given case, a forum selection clause in favour of Iranian Courts was, in the light of changed circumstances, enforceable, but gave a negative answer (presumably

¹⁶ UK v. Ireland, Judgement, ICJ Reports 1973, pp. 3, 18–20, cf. Fisheries Jurisdiction Germany v. Iceland, Judgement, ICJ Reports 1973, pp. 49, 62–65).

¹⁷ 1 Iran–US, CTR, 242.

because of the specific and sensitive political context – Judges Holtzmann and Mosk dissenting¹⁸.

The underlying *ratio* of the application of the changed circumstances principle to forum selection, which is the need to prevent a denial or miscarriage of justice – is to be found also in the many Private International Law statutes which provide for a *forum necessitatis*; in other words, a subsidiary and exceptional jurisdiction is created and made available whenever it would be impossible, impracticable or "unduly difficult" to resort to the courts normally competent. Thus Article 3 of the Swiss Act on Private International Law (of 1987) provides that:

"When...proceedings in a foreign country are impossible or cannot reasonably be required, the Swiss judicial or administrative authorities at the place with which the case has a sufficient connection have jurisdiction" (emphasis supplied).

This provision affords a court "of last resort" to claimants to whom access to meaningful justice is refused or barred because of a serious malfunction of the judiciary of the competent State or because a risk of a denial of justice, for instance because of war, notorious corruption, political persecution, etc.¹⁹

¹⁸ 1 Iran–US, CTR, 284 (Holtzmann), 305 (Mosk). But the general validity of their observations, and the case law on which they relied – regarding the application to jurisdictional clauses of the concept of "changed circumstances" – was not disputed. – "International tribunals and courts of many countries have repeatedly held that forum selection clauses are no longer binding when revolutionary changes have fundamentally altered the court system which existed when the forum was chosen..." (Holtzmann, at 289; cf. also Mosk, at 308).

¹⁹ Cf. Stephen V. BERTI, Honsell–Vogt–Schnyder, in Basler Kommentar IPR, p. 23, no 9; Anton K. Schnyder, Das neue IPRGesetz, 1988, p. 24.

An echo of the same ethical and social requirement may be found in the rule of Public International Law requiring the "exhaustion of local remedies". The ineffectiveness of such remedies, and thus the likelihood of a denial of justice, must be presumed, for instance, when there is evidence that the local courts are subservient to the other branches of government, especially the Executive²⁰. As aptly put by Judge Charles De Visscher: "a claimant cannot be required to exhaust justice in a State where there is no justice to exhaust"²¹.

Returning to the Serbian example just mentioned, two specific circumstances (in addition to the general totalitarian context created by the Milosevic regime) were invoked which appeared to give some force to the request for a transfer of seat by either the arbitral tribunal or by the ICC Court of Arbitration.

A second fundamental change alleged by the foreign claimant was the unilateral assignment by the State of its contractual obligations, against the will of the foreign party, to another (state-controlled) contractual partner. And a third, even more, fundamental change of circumstances, in the Claimant's view, was the fact that the Serbian State, acting directly or through its own judiciary (and with its active assistance) had caused a *de facto* expropriation or confiscation of the foreign-owned enterprise. In other words, the State, or rather its State-controlled assignee (and allegedly new contracting party) had caused the disturbances and difficulties at the core of the dispute submitted to arbitration, thereby effectively frustrating or destroying the legitimate

²⁰ Cf. Barcelona Traction Co. case (Belgium v. Spain, in 1970 ICJ Reports, 145–147 (Sep. Opinion by Judge Tanaka).

²¹ Le Déni de Justice en droit international, 52 Recueil des Cours de l'Académie de Droit international, 1935 II p, 424, cited by Judge Tanaka, supra note 18.

expectations of the parties (and in particular those of the non-Serbian, i.e., foreign contracting party) regarding the neutrality of the place of arbitration and the normal and correct functioning of the arbitral process.

In a penultimate part of this survey, a rapid mention should be made of some of the (few) known arbitral precedents, where a transfer of seat would appear to be, at least to the detached observer, quite justified on the basis of the *rebus sic stantibus* principle. But such "precedents" as are known seem contradictory and not decisive.

In general, arbitrators may be said to be and to have been very cautious, and understandably reluctant to weaken the rule *pacta sunt servanda* and to excuse non-performance or adaptation by resorting to *rebus sic stantibus*²².

But it is doubtful whether the same solutions can be "transposed", so to speak mechanically, from the general field of non-performance or "adaptation" of (substantive) contractual obligations to the particular, procedural domain of the "choice of seat" clause (which, as said above, is in general little more than an ancillary modality, based on practical considerations of convenience).

In one of the cases where Teheran had been agreed upon (before 1979) as the place of arbitration, an international arbitral tribunal had no alternative, having regard to the troubled circumstances of the time in that city, but to transfer the seat to another country. In another

case²³, the ICC Court unilaterally changed the place it (and not the parties) had previously fixed in Bangkok. What is remarkable is that the *ratio decidendi* was not any existing local threats to the security and independence of the Arbitrators or the parties, but the fact that (in the absence of legislation) the award would not have been enforceable.

In still another case, where the defending party was obstructing the arbitration in the Courts of Abu Dhabi, the contractual seat, the arbitrators proposed in their draft terms of reference a transfer to another country, but the ICC Court, with excessive but perhaps characteristic timidity, refused the proposal²⁴.

In a recent ICC Award²⁵, an American company had requested that the (originally agreed) seat of arbitration of Belgrade be transferred to a neutral place, such as Geneva – in the circumstances described above, i.e. because of the totalitarian Serbian regime. The Arbitral Tribunal did not have the courage (if this is the proper denomination in such a case) to accept the request – which would of course have implied expressing a view on the nature of the Milosevic regime and its consequences on the "Rule of Law".

What is of interest, and would deserve a more detailed criticism than available space permits, are the reasons adduced by the arbitrators to try to justify their negative conclusion, contrary to the

²² See, inter alia, among a vast literature, H. VAN HOUTTE, *Changed Circumstances and Pacta sunt servanda* in "Transnational Rules in International Commercial Arbitration, Dossier of the ICC Institute, 1993.

²³ Cited by S. JARVIN in 7 Bulletin of the ICC Court 2/1996, cf. also Derains–Schwartz, *A Guide to the New ICC Rules of Arbitration 1998*, p. 204).

²⁴ See ASA Bulletin 4/1987, pp. 293–297.

²⁵ Interim Award of October 11, 2000 in ICC Case No 10439.

solution adopted by the Institute of International Law under the proposal of Arthur von Mehren.

One reason retained by the Tribunal was that the risk of annulment by the Courts of the seat (in case of an award unfavourable to the Serbian party) did exist even at the time of execution of the arbitration agreement (although the award concedes that such a risk may have become a certainty in 1996 when Milosevic and his party took control). Furthermore, the Tribunal relies on Hilmarton and Chromalloy (notwithstanding cases like Baker Marine and Martin I. Spier) to reject the argument that an award hypothetically rendered in favour of the American claimant and annulled in Belgrade would not be enforced outside Serbia.

More clearly controversial is the following reason:

"Unlike the judge of a selected forum whose decision may not be impartial due to the political environment of that forum, the members of this Tribunal are totally independent from any Serbian authority, be it a governmental one or a judicial one. Indeed, the three arbitrators have been confirmed in their function by the ICC Court after having signed a declaration of independence and their removal or replacement remains within the sole competence of that Court. Furthermore, the three arbitrators are nationals of third countries and do not reside in Serbia; therefore, any possible threat from whatever Serbian or Yugoslav authority would have no impact on their decision, whatever it may be and whichever party it may favour. Under these circumstances, the award to be rendered shall be free from any governmental influence, intimidation etc. and that consideration is sufficient to find that the parties legitimate

expectancies when signing the arbitration clause shall be totally implemented.

That the Arbitral Tribunal should find it convenient or necessary to reaffirm its own independence from Serbian influence is hardly surprising but is it sufficient? A negative answer could be based, it is submitted, on several reasons.

First, the belief of the arbitrators that they (because they are foreign nationals and "do not reside in Serbia") are not, and cannot possibly be impressed or intimidated by Serbian authorities, governmental or judicial – a factor to which should be added the pressure of local conditions in general – is not more than a subjective feeling which, notwithstanding its total good faith, cannot in and by itself, decide the matter. Similarly, a challenge of arbitrator is nowhere left to be decided by the challenged arbitrator alone, since *nemo iudex in causa sua...*

From this point of view, one may well doubt the correctness of the method chosen by the arbitral institution, *in casu* the ICC Court of International Arbitration, i.e. to abstain from deciding itself, directly, on the request for the transfer of seat (from Belgrade to a neutral seat like Geneva) and to "pass the baby" so to speak, to the arbitrators, under the guise of a "purely" legal question: "Is the clause fixing the seat in Belgrade still binding?". It must be conceded, however, that an arbitral institution has also to think in "marketing terms" and is legitimately reluctant to pass political judgements on the conditions prevailing in certain countries at a given time. But the arbitrators themselves are likely to feel the same reluctance and to do their best, as shown by the Interim Award just quoted, to escape such an embarrassing mission.

Be that as it may, and although the arbitrators could perhaps invoke their "competence–competence" and the relation between "seat" and jurisdiction, they cannot be considered as the final judges of their own "independence" with regard to the Serbian governmental or judicial authorities. Moreover, as suggested earlier, "subjective" independence of the arbitrators is only one side of the coin or, rather, one of the several elements of the problem. Other elements have to be taken into consideration, such as the position and security of the non–Serbian party and of witnesses, including the degree of trust they may feel ("subjectively" but of course reasonably) in the integrity of the arbitral process, in the new circumstances prevailing under the Milosevic regime.

The ICC Interim Award of October 11, 2000 cited above, is characterised not only by an understandable "diplomatic" caution and the desire not to offend Serbia, but also by its failure to take due account of a number of important factors, or by a deliberate attempt to minimise their relevance. Some of them are factual, e.g., the climate of insecurity, the active participation of Serbian Courts in the spoliation complained of by the Claimant Company, the ultra–nationalism and xenophobia prevailing in "Belgrade 2000", the violent attacks directed by the Government against the Claimant's CEO and employees, publicly denounced as "terrorists", etc. Could it seriously be asserted then that such facts or circumstances were "normal" and/or have no effect whatever on the arbitration process, or that these circumstances could and should have been foreseen in 1990, when the arbitration clause containing the choice of seat was agreed upon? The conclusion, invoked by the Award, that a confiscation of assets "cannot be qualified as an unforeseeable circumstance – which is undisputable – or was an

eventuality actually covered" by contractual provisions, is hardly relevant. What was not foreseen were the methods used by the Milosevic regime to confiscate the Claimant's assets and the general climate resulting therefrom.

In such a situation, there is a remarkable lack of candor in the Award's statement that the Arbitrators reassertion of their total independence from Serbia "is sufficient to find that the parties' legitimate expectancies when signing the arbitration clause shall be totally implemented"! (sic).

Other neglected factors are juridical: an example is the understandable fear of the Claimant that its own security would be at risk in Milosevic's Belgrade, where it would be impossible for a foreign (and American party) to receive protection and a fair procedural treatment in the circumstances. In other words, there were reasonable grounds for the foreign (American) claimant to believe that, in Belgrade, it would now be impossible for justice (whether judicial or arbitral) to be done and, more precisely, to be "seen manifestly to be done".

Conclusion

Opinions may and will doubtless vary as to the wisdom, realism or naïveté of arbitrators who refuse to apply the exception of "changed circumstances" or *rebus sic stantibus* to a set of facts like the Serbian one just described, notwithstanding the notorious excesses committed in Belgrade since 1996 and before Milosevic, the leader of the new regime was indicted for war crimes and crimes against humanity.

Admittedly, caution must be exercised, either by an arbitration tribunal, an institution or, as the case may be by a Court, before deciding to change an (agreed) place of arbitration from one country to another. Parties may easily be tempted to claim that changed circumstances justify such a transfer, particularly when a State is concerned and when the private party had assumed the risk of signing an arbitration clause locating the seat of the arbitration in a city of that State²⁶.

A transfer of an (agreed) seat of arbitration should not be decided without consideration being given, *inter alia*, to possible procedural consequences, in particular with regard to the risk of setting aside and to the possibility of enforcing the future awards (in one or more countries). Admittedly also, the agreement concerning the seat may have been, in a particular case, at least for one of the parties, an essential element, a condition *sine qua non*, to be respected – at least if known and accepted by the other party.

In the situation which has been examined in the present study, it seems to have been alleged by the Serbian party that the choice of Belgrade had actually been such an important and essential element. Assuming such an allegation to be true, the question would have to be asked whether the fact had been mentioned during the negotiations or was at least understood by the private, foreign party. And in the

²⁶ As the Himpurna case, cited above, and the "Serbian–American" case under scrutiny should suffice to indicate, the location of the "seat" in the contracting State always implies an additional risk for the private party. But a State should think twice before insisting, for reasons of prestige, on such a location, at the time of negotiating the contract. Experience shows that most private parties, in practice, would only accept that additional risk against an "additional price" or benefit (often without the contracting State realising it).

affirmative, the further question would arise whether that common intention of the parties referred not only to "Belgrade 1990", as it was at the time when the contract was executed, or whether it foresaw also a place like "Belgrade 2000", as it became under the totalitarian regime of S. Milosevic.

The ICC Interim Award referred to above does not discuss this question, preferring to assume or assert an affirmative answer. This must be regretted: a serious analysis was justified, and would have made the decision more persuasive. For instance, it would have been interesting to examine whether one of the parties, or both, at the time of the negotiations, had foreseen or could reasonably be expected to foresee that, ten years later, a Stalinist dictatorship or its equivalent would have taken *de facto* control of the government and of the judiciary. When the contract was being negotiated, did the State representatives foresee such important changes? Did they foresee that future arbitration proceedings could thus be controlled, indirectly or otherwise, by Serbian authorities? It is of course rather unlikely. And one should exclude, in accordance with the presumption of good faith, the hypothesis of State negotiators keeping that possibility in the back of their minds (e.g., through an intervention of the local Courts, as in Himpurna). This would amount to a kind of "mental reservation", an empty promise to arbitrate a future dispute subject to retaining complete control of the arbitration. In such a case, the arbitration undertaking would be null and void, being affected by what French legal writing would call a "purely potestative condition".

The following conclusions may thus be drawn from the present survey and, in particular, from its analysis of a Serbian – American arbitration:

(a) there is no reason why a choice of place of arbitration contained in an arbitration clause should not, as a general rule, be interpreted *rebus sic stantibus* like any other contractual clause, and according to the common intention of the parties at the time when the contract was executed.

(b) when requested to decide a transfer of the (agreed) place of arbitration, the competent authority (arbitral tribunal, institution or judge) should pay due regard to all relevant circumstances and in particular to the fact that the choice of place is normally a modality of the arbitration agreement, secondary to the common intention of the parties to submit a future dispute to an effective arbitral process.

(c) the integrity of that process, and respect for fundamental principles of arbitration (e.g. due process, equality of the parties, independence of the arbitrators) clearly require priority in case a substantial and unforeseen²⁷ change of circumstances would make it "unduly difficult" to carry on the arbitration at the agreed place.

To sum up, it is this writer's considered opinion that arbitral practice should now fully support and implement – also in "ordinary" international arbitrations (between private parties²⁸) – the ideas advocated by Professor Arthur von Mehren in 1989–1990, before the "Institut de Droit International" in the case of arbitrations between States and foreign enterprises, not only when proceedings at the seat originally agreed upon would become, because of new circumstances,

²⁷ There is not a decisive reason to accept here the condition of "unforeseeability".

²⁸ Cf. F. A. Mann, in Yearbook of the Institute of International Law, vol. 63 I, 1989, p. 69: "In my view, such arbitrations [between States and foreign enterprises] are in no way different from arbitrations between private persons".

"impossible" or dangerous, but already, as rightly expressed in the Resolution of Santiago de Compostela in 1990, when it would become "unduly difficult" to carry on the arbitration proceedings at the place indicated by the parties in the arbitration clause.