

ICCA 50th ANNIVERSARY

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It is a pleasant privilege for me to be invited to address you tonight at this anniversary dinner. Yet, I am uniquely un-qualified to speak about the historical origins of the “International Arbitration Congress”, later known as the “International *Committee* for Commercial Arbitration” and, since 1975, called the “International *Council* for Commercial Arbitration – or “ICCA”.

I was not there at ICCA’s foundation in 1961; and, strangely, the United Kingdom was not an active supporter of ICCA in its earliest days, at least not compared to specialists from France, the Netherlands, Italy and Switzerland, soon joined by India and the USSR.

The history of ICCA is also not the usual history of an arbitral institution because ICCA was not created as an institution. It is now an organisation with a legal personality under international law and ICCA’s Foundation, as separate body in Holland, has a legal personality under Dutch law; but ICCA was born as a concept; and so it remains with no formal constitution and no large building or home of its own. Moreover, ICCA is entirely independent of anything and everyone; and it does not work under the umbrella of any other body with different or even conflicting interests.

From its first beginnings, ICCA has been truly international; and it does not serve nationalistic, sectorial or regional self-interests. ICCA’s unique status and origins as regards international arbitration requires an explanation by analogy.

In the world of chemistry, positive catalysts play a relatively small but highly significant part. These re-agents speed up a chemical reaction without being consumed by the reaction itself. In the world of international arbitration, those catalysts are ideas, both theoretical and practical, for which ICCA has provided a highly significant forum as an ideas-factory, now for half a century.

It began with meetings over lunch and dinner in 1961 a few kilometres from here, at the Relais de Chambésy on the road to Lausanne. Professor Sanders from Holland was there, as were Me Jean Robert from France, Professor Bülow and Dr Dr Glossner both from the Federal Republic of Germany and Professor Minoli from Italy. This group of like-minded friends, joined by others, became known as the “Club de Chambésy”.

These founders of ICCA began with a simple proposal: to hold one or more international congresses, open to all, to consider and debate good ideas for the better conduct of international arbitration, without fear or favour – good ideas which have now, 50 years later, become indispensable to arbitration, world trade and even the rule of law.

Now, an idea can be fleeting and ephemeral – born of present circumstance and quickly forgotten. For example, at a time when the Beys of Tunis were the undisputed rulers of Tunisia, it is said that one Bey, during the early part of the 19th century, wished to teach the haughty ambassadors of the Western powers a lesson in humility.

He requested all three diplomats in full ambassadorial uniform to prostrate themselves on the floor of his throne room at the outset of their regular audiences. All three politely declined, on the basis that it was not a useful precedent to subject the representatives of the

United States of America, France and the British Empire to such unnatural indignities. And so, at the next royal audience, they bowed their heads; but they did *not* prostrate themselves on the palace floor. The Bey's request was nonetheless repeated for the next audience; and for that audience, these proud representatives encountered an apparently insuperable diplomatic problem.

The wily Bey had built a new entrance to his throne room, a doorway less than two foot high, the better to require the ambassadors to prostrate themselves as they squeezed themselves through the new doorway – on the palace floor. But the British ambassador had an idea which was to preserve the dignity of the Empire and which he was prepared to share with his two esteemed diplomatic colleagues from France and the United States. And thus it was that the Bey of Tunis, instead of seeing the three ambassadors prostrate themselves saw, first, the feet and then the rotund behinds of the three ambassadors as they successively wiggled themselves *backwards* through the new doorway into the royal presence.

That British idea, the backward ambassadorial wiggle, however excellent at the time, is not now to be found in any book of diplomatic etiquette.

That is manifestly not so with ICCA, as the forum for ideas planned 50 years ago by the Club de Chambésy for arbitration specialists, then straddling both the massive political divisions during the Cold War and the divide between academic, professional and state practitioners, both 'privatistes' and 'publicistes'; and both lawyers and non-lawyers.

You will recall that in April 1961, the United States and Cuba nearly went to war over the incident at the Bay of Pigs; that in June 1961 Kennedy and Khrushchev held a most unsatisfactory summit in

Vienna; and that in August 1961, the USSR and the GDR began building the Berlin Wall. Apart from ICCA's foundation, 1961 was not a good year.

ICCA's story begins, however, before 1961. The Club de Chambésy had its origins first at the United Nations Convention of 1958 in New York, attended by Professor Sanders and other members, including Professor Bülow and Dr Dr Glossner. The same group of friends was already working on the long-drawn out negotiations for the European Convention on International Commercial Arbitration; and they were present when this Convention was eventually signed on 21 April 1961 in Geneva. This 1961 Geneva Convention included an Annex and Special Committee intended to provide a new framework for trade between free market economies and socialist economies in the Soviet bloc. Hence the Club's meetings at the Relais de Chambésy, with a special interest in dispute resolution for East-West Trade. If Napoleon really said: "C'est la soupe qui fait le soldat", then we can say that that the menu of this Swiss restaurant had much to do with the making of ICCA.

Within a month of the Geneva Convention, the first ICCA Congress took place in Paris over three days in May 1961, with Jean Robert as the rapporteur-general. There were 162 delegates from 14 countries, of which 74 came from France. There were, however, only three countries from outside Western Europe: the United States of America, Turkey and Yugoslavia.

This first congress was attended by, amongst others, Professor Pieter Sanders, Professor Berthold Goldman and senior French judges. One of the papers presented to the first of its four working groups was by a young Professor Frédéric-Edouard Klein from Basel University on the separability of the arbitration clause (to which we shall return).

The second ICCA Congress took place in Rotterdam in 1966, with 130 delegates from 14 countries. Again, these countries were largely from Western Europe, with the addition of the United States of America, Romania and Yugoslavia. The theme of this Congress was “Arbitration and the European Common Market”. Its president was Professor Sanders. It was also attended, amongst others, by Professor Pierre Lalive.

For the United Kingdom, as with the first congress, this second congress was attended by few arbitration specialists; and, of these, only two names stand out today as representatives of the ICC’s National Committee for the United Kingdom. Perhaps the European theme of the Congress put others off: the United Kingdom was not then a member of the Common Market; but, in any event, there were no Wilberforces, Diplocks, Kerrs, Mustills, Littmanns or Manns. The first well-known English name was Lord Tangle, who was a mountaineer and solicitor who later became the President of the ICC Court of Arbitration. The second was Niel Pearson, a Solicitor from Manchester, who attended all these early congresses.

Neil Pearson soon became better known as the chairman of the first ICC tribunal to be ordered by the English High Court, in 1972, to state its award in the form of a Special Case for the decision of the High Court, a form of *lèse-majesté* against the ICC in Paris. That was later purged by two successive English Arbitration Acts 1979 and 1986 abolishing the Special Case; but it left England in French eyes on permanent probation as still capable of refusing to enforce a valid French ICC award under the New York Convention. In fact, of course, that is today an unthinkable impossibility. (I stress the word “valid”). It seems surprisingly hard for the French to forget Clemenceau’s

famous judgment, for arbitration as for much else, that England 'is a French colony which failed'.

The third ICCA Congress took place in Venice in 1969, with delegates from 26 countries and chaired by Professor Minoli (then of Modena University and the President of the Italian Arbitration Association). These 26 countries now included India, Poland and the USSR, together with representatives from the United Nations and the World Bank, the latter represented by Dr Broches, as the General Counsel of the World Bank and ICSID's first Secretary-General. It was also attended from the USSR by Professor S.N. Bratus and Professor Lebedev. (We shall return to several of these names).

The fourth ICCA Congress was held in Moscow in 1972, with delegates from 36 countries, now covering East and West, North and South. By this time, ICCA had achieved what no other arbitral body had ever achieved: it was world-wide, inclusive, non-national, non-political, free-thinking and truly international; and it was attracting arbitration specialists from all walks of life, from both the developed and developing world: academics, practitioners, administrators, officers of state and, of course, arbitrators, both lawyers and non-lawyers, including (from London) the doyen of English commercial arbitrators, Cedric Barclay.

The fifth ICCA Congress took place in New Delhi in 1975, organised by Dr. M.N. Krishnamurthi, with delegates from 43 countries. Here, ICCA's status and name were formalised with its Statements of Purposes and Procedures. This non-constitution, for a non-organisation, was the product of negotiations first begun in Moscow conducted by Judge Holtzmann (of the USA) and Professor Lebedev, designed to square the political circle between an international 'organisation' (which specialists from the USSR and other countries

could not join without further awkward formalities) and a 'network' or council (in which representatives from those countries could take part). With only minor amendments, that Statement of Purposes and Procedures still governs the workings of ICCA in its three complimentary roles:

As to ICCA Congresses, since 1975, there have been a further 21 ICCA Congresses, Conferences and Meetings, including tomorrow's, held in North and South America, Europe, the Middle East and Asia, but not Africa - at least not yet.

As to ICCA publications, ICCA has published a mass of specialist legal materials, collections and research. The records of its early Congresses were published in the *Revue de l'arbitrage* and also by host organisations; but since 1976, its materials have been published by Kluwer. These extend to the multi-volumed *International Handbook on Commercial Arbitration* and the *ICCA Yearbooks and Special Series*, to which we must now add the increasingly indispensable ICCA web-site.

ICCA's educational third role is now no less important than its other two roles, both for senior judges confronting the 1958 New York Convention and UNCITRAL Model Law and young arbitration practitioners, more skilled and more numerous than ever before.

But I come back to ICCA's function as a forum of ideas, or catalyst, working as a laboratory and not as a museum. I can take only one example tonight, an idea so simple but so necessary to international arbitration: the severability or separability or autonomy of the arbitration clause from the substantive contract in which it is physically embedded, whereby the non-existence or invalidity of the latter does not necessarily infect the existence or validity of the former.

This doctrine of separability is, of course, a legal fiction; the product of arbitral logic which bears no foundation in fact because no commercial person considers making two quite separate, independent agreements in one contract; but, without this simple idea, there could be no effective system of arbitration for international trade but, rather, a multiplicity of proceedings in a Legal Tower of Babel with non-stop (not one-stop) adjudications. It is an idea which shows how ICCA's forum for ideas works, both in theory and practice; and why only ICCA could have worked in this way.

Let me explain. At ICCA's first congress in Paris in 1961, as recited above, one topic was the autonomy of the arbitration clause; and the report and discussion were published by ICCA. At the third congress in Venice in 1969 and the fourth in Moscow in 1972, Professor Bratus attended as one of the foremost Soviet lawyers and arbitrators. It is inconceivable that Professor Bratus and his colleagues were not exposed through ICCA to the legal developments in France, Germany, Switzerland (and elsewhere) on the separability of an arbitration clause, including the French decision in *Gosset* (1962), the US Supreme Court decision in *Prima Paint* (1967) and the Bundesgerichtshof decision of 27 February 1970.

Much later, in 1984, Professor Bratus, as an arbitrator in a Soviet arbitration in Moscow, issued an award recognising and applying under Russian law the doctrine of separability in a case where the substantive agreement was legally invalid ab initio, thereby assuming jurisdiction over the merits of the parties' non-contractual dispute. That had never been done before by any Russian arbitrator or judge; and it was achieved as a matter of legal logic, independently from any express provision in the Russian Civil Code or Code of Civil Procedure.

In 1989, that award was then enforced under the 1958 New York Convention by the Bermuda Court of Appeal in proceedings where legal experts had testified as to the comparative laws and practices on the separability of an arbitration clause. These experts were Professor Goldman and Dr Broches, both, of course, well-known participants in ICCA Congresses. Dr Broches was also assisted by the former legal secretary to Professor Sanders, who was by now the General Editor of the ICCA Yearbook, as he is still: Professor Albert Jan van den Berg.

But this story does not end here. The successful Counsel in this Bermudian case was a well-known advocate in England, originally from South Africa, Sir Sydney Kentridge QC. In a subsequent English case argued in 1993, before the English Court of Appeal, Sydney Kentridge cited this Bermudian judgment in support of his argument on separability under English law. The Court of Appeal decided to adopt the same approach, based on the Soviet award and the expert evidence and materials cited in the Bermudian legal proceedings. That was done in England at common law, likewise as a matter of legal logic, without benefit of any statute; and the principle is now codified in Section 7 of the English Arbitration Act 1996.

So, an idea which was propagated in Paris at the first ICCA Congress in 1961 led to statutory recognition by the British Parliament in 1996, 35 years later, which is a relatively short period for arbitral history. Some might say 'better late than never' (although it took France almost 50 years to codify *Gosset*); but let us rather thank ICCA and its early supporters for pursuing an idea as a cause with a manifestly good effect in very different legal systems.

So much for history. As to the future, what good ideas may come from ICCA over the next 50 years, which several of you here tonight will surely celebrate in 2061? There are certain catalytic reactions which are already taking place. Let me list four:

First, there were no women at Chambésy; and there were, apparently, no women speakers at ICCA's first five congresses. Yet, in many countries now, over 50% of law students are women. That change is not reflected in the composition of arbitration tribunals and senior practitioners. We do not know the identity of the first woman arbitrator in modern times; but it was certainly not before 1961. It may have been Margaret Rutherford QC in England, or Professor Bastid in France, or Madame Simone Rozés as an ICC arbitrator or possibly Judge Birgitta Blom as an arbitrator at the SCC. Fifty years later, changes are taking place; and we shall see further changes.

Second, ICCA in 1961 was inevitably Euro-centric. Its founders made determined efforts to break the European mould, with increasing success. We shall certainly see further changes in the practice of international arbitration, particularly in Asia and Africa; and, as you will know, the next ICCA Congress in 2012 will take place in Singapore.

Third, there were few young practitioners in ICCA's early days. That has now changed with the emergence of a new young arbitral élite, with specialist education, training and experience in all forms of international arbitration, with multiple skills, multiple languages and evermore glittering résumés. These young specialists will influence significantly the future practice of international arbitration.

Fourth, there were no computers, electronic aids or emails for arbitrators and arbitration practitioners in 1961. Now we have not

only personal computers but also I-Phones, I-Pads, Skype and Apps (as with the SIAC App). Soon, we shall each have an “EAB”, an Electronic Arbitral Bag with ready access to all electronic tools and materials in an electronic super-cloud, including ICCA publications and much, much more. Our system of work is about to undergo a massive technological change.

So the future is bright both for ICCA and international arbitration, as the attendance at this anniversary event demonstrates. ICCA’s positive catalyst still works. I shall stop here, because, tomorrow morning, so must we.