
Stockholm International Arbitration Review



2008:2

ARBITRATION INSTITUTE

OF THE STOCKHOLM CHAMBER OF COMMERCE

JURISNET, LLC.
A SUBSIDIARY OF JURIS PUBLISHING, INC.

INTERNATIONAL ARBITRATION IS NOT ARBITRATION*

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What are you to make of the title of this lecture? It may well take me the better part of an hour to try to convince you I'm right – and you may still disagree.

But it will take me less than one minute to explain why the title is not at all preposterous – and you will be instantly persuaded.

You don't think that international arbitration is arbitration because it has "arbitration" in its name, do you? Do you think a sea elephant is an elephant?

International arbitration is no more a "type" of arbitration than a sea elephant is a type of elephant. True, one reminds us of the other. Yet the essential difference of their nature is so great that their similarities are largely illusory.

Sea elephants have no legs. They exist in an environment radically different from that of elephants. International arbitration is no less singular. This needs to be understood. The concept is as stark as the dichotomy between animals with legs and those without. Here is the difference: arbitration is an alternative to courts, but international arbitration is a monopoly – and that makes it a different creature.

Not so long ago, conference organisers were so enamoured of the topic "arbitration vs. litigation" that they seemed to treat it as a handy default solution. They seemed to say: "If we cannot think of anything original, let's just trot out the question 'Is arbitration better than litigation?' and we'll fill the hall." Amazingly, sometimes they did. But whatever the interest in the question in a purely national setting, it is nonsense as soon as one considers the most basic of *international* contexts; that is, a single table where two parties of different nationalities are facing each other. That is all you need to see to realise that the question is puerile because each party hearing 'arbitration or courts?' thinks "*this* arbitration as opposed to what – *my* court or *their* court?" We can be certain that lawyers' cupboards across the globe are filled to bursting with myriad contracts referring to international arbitration *even though each side actually preferred courts*. You all see why

* This article is adapted from a presentation made by Jan Paulsson for the John E.C. Brierley Memorial Lecture at McGill University in Montreal, Canada on May 28, 2008.

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international arbitration finishes first even though it was perhaps never better than second best in anyone's mind. The problem was that the most preferred alternative of each side was the least acceptable to the other.

That is why the debate about the supposed advantages of arbitration, whether they are accepted or denied, must stop at the border if it is to remain at all coherent. Is it quicker? Is it less expensive? Is it less disruptive because it is confidential and informal? Does one get better decisions from persons selected for their relevant expertise? All of these questions may be debated endlessly. Depending on the country you're in, and the industry you're concerned with, the alternative is endlessly variable – from the admirable to the intolerable.

In international arbitration, all of these elements of evaluation fade into relative insignificance when contrasted with a criterion that is dominant here although it is, by definition, irrelevant in the national context. This alone tells you that international arbitration is not arbitration. That unique criterion is *neutrality*. And so even a negotiator who has no time for arbitration in national transactions – “we already pay the judges with our tax money, why not use them?” – is likely to insist on it when dealing with foreigners.¹

In the transnational environment, international arbitration is the only game. It is a de facto monopoly. The parties can also achieve neutrality by adopting a forum clause that refers to the courts of a third country which has no connection with the parties or their transaction. It does happen, typically in particular categories of contracts, but it really is not very prevalent. In fact, how can two foreigners be sure that country X will put its public service at their disposal? In London, we know the judges are available to all comers, and London is doubtless the most frequently selected judicial forum that is foreign to both parties. Still, I wonder if that is not more a relic of Commonwealth traditions than the product of successful marketing of “invisible exports”.

The fact that international arbitration is, practically speaking, a monopoly is no reason to celebrate. It is simply a fact. It is unlikely, in our lifetimes, that we will see the emergence of Global Commercial Courts having compulsory jurisdiction. Indeed, the unique example of the European Union is scarcely encouraging. Due to the fiction that each national court system is infinitely respectable, the European regime – now in the shape of

¹ Professor Fabien Gélinas, who did me the honor of introducing the lecture, has said that this is an exaggeration. He is quite right (my only defence being that lecturers, like poets, must be given some license). It is true that in some national contexts the neutrality factor is highly relevant. It is also true that, in some formally international contexts, there are no true national oppositions. And last but not least, it is my view that citizens of even the smallest social unit should be free to bargain for, and be held to, a reliable arbitral mechanism.

the Brussels Regulation² – has the effect that as soon as a matter is before any court whatever, no one can do anything until that country’s legal system has had its final say. This simplistic approach to *lis pendens* – now enshrined in Article 27 of the Brussels Regulation – has opened the door to something known as the “Italian Torpedo.”³ It works like this. Assume two parties have signed a contract including a forum clause referring to the courts of Austria. Assume, moreover, that this is a perfectly valid forum clause. Assume finally that any national legal system in Europe would reach the same conclusion. It is, nonetheless, a disastrous situation because all a clever and resourceful defendant needs to do is to file a suit in, for example, Italy, and it can be fairly certain nothing will happen for a decade. Of course, the other party can rush into court and point to the valid Austrian forum clause. And I have already said that every country – including Italy – will recognise this clause as valid. It is a foregone conclusion that the case will, in the end, go to the right place, Austria, is it not? Well yes, but the key words are “in the end.” And the expression “foregone conclusion” sounds all wrong; can we say “*aftergone* conclusion”? For, by the time we get to Vienna, life has gone on. Perhaps the parties – especially the true claimant – are tired of war. Perhaps the true defendant has used the time to make itself judgment-proof. The “system” reveals itself to be surrealistic.

You will not be surprised to hear that there is still a lot of intra-European arbitration. The fact is that it is a standard feature of significant intra-European contracts.

But as a matter of social policy, the monopoly of international arbitration is not necessarily, as I just said, a cause for celebration. It is a phenomenon to be evaluated continuously and critically. Moreover, as a matter of professional pride and self-preservation on the part of those who work in the field of international arbitration, the monopoly status should be a cause for constant concern. If we do not deliver decent justice, if we do not close the door to abuse, we should understand that sharp reactions are likely – sharp reactions which may harm a very valuable tool.

So the reason, I insist that international arbitration is not arbitration is that we can live without arbitration. Countries A, B, and C may take different views – encourage, discourage, or even outlaw arbitration – but if *international* arbitration goes, international economic exchanges will suffer immensely. Nothing will take its place. Despite the appearance of having created a multinational legal space, Europe is hardly a success story, as you just heard. As for the US, it does not have a single treaty for the reciprocal

² 44/2001, OJ 2001, L 12/1.

³ See Marios Franzoi, ‘Worldwide Patent Litigation and the Italian Torpedo,’ [1997] *EIP Rev.* 382; Trevor Hartley, ‘The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws,’ 54 *ICLQ* 813 at 815 (2005).

enforcement of court judgments, which, I should say, seems to have less to do with unwillingness to dance than with an inability to find partners.

There is great danger, I believe, in not recognising the uniqueness of international arbitration. I have changed my mind in the last twenty years, since the days when I thought it would be fine if one ring could bind us all – if one coherent regime were to govern international arbitration and arbitration *tout court*. Now I doubt it. Today my hosts have given me a chance to tell you why.

First, something surprising. Let me read to you a statement from Sir Lyndon Macassey at the Grotius Society remarking that, in recent years, the development of commercial arbitration, both national and international, has been “phenomenal.” How strange – I do not see any great reaction out there! Have you heard such comments before? Sorry, I forgot to mention: this one appeared in the Grotius Society Transactions of 1938, and the “recent years” in question were the 1930s.

Are the times we are living in not so very different from four generations ago? What was happening then?

In the wake of the savagery of World War I, people of good will sought urgently for ways to avert its recurrence. Peace, it was reasonably thought, would be buttressed if peoples and their governments had mutually reinforcing stakes in systems of cooperation. Trade was an obvious thing to be promoted; it would not make sense to attack a golden goose. Of course, commercial transactions lead to disputes in some inevitable proportion of cases, as reality intrudes on expectations and as parties then take different views of imperfect contractual provisions. It is, therefore, essential that such disputes be resolved fairly and efficiently lest the unreliability of bargains become an impediment to trade. Thus, the idea of international arbitration as a tool of peace emerged. Of course, the idea of international arbitration was not new. Just a generation earlier, the first Peace Conference in The Hague had been convened in 1899 and established the Permanent Court of Arbitration. The remarkable US Secretary of State Elihu Root won the Nobel Peace Prize principally because of his promotion of international arbitration. But this was international arbitration between States. The new idea was international arbitration in the commercial field.

This really was something novel. Previously, commercial arbitration was inherently national. A foreigner who accepted arbitration was entering into a foreign national system. Enforcement of a foreign arbitral award in commercial matters before the 20th Century – as I can only imagine, for I have never come across a reported case – was even more difficult than the enforcement of foreign judgments, because at least the latter was rendered by public officials perhaps entitled to full faith and credit, whereas foreign

arbitrators, although doubtless operating under a contractual mandate susceptible to acknowledgement elsewhere, had no status under local law.

This is what was to change. When the International Chamber of Commerce got its start, months after the signing of the Treaty of Versailles that formally established the terms of peace, arbitration was, from the very outset, one of its key purposes.

Many of you know that the mechanism of ICC arbitration was launched at the seminal ICC Congress held in London in 1921, shortly after the founding of the ICC itself. Some of you have heard the name Owen Young. He was the Chairman of the Commercial Arbitration Committee of the US Chamber of Commerce. Mr. Young was a well-known US businessman – I'll have the occasion to say something about him a bit later – and he made some remarkable recommendations to that Congress in London. Here is what he said:

The field of international commercial arbitration is one in which the International Chamber of Commerce may well play an important and influential part. Its success, however, will depend on the recognition by the Chamber and by its individual members of the inherent difficulties and complexities of the situation. The most important of these difficulties lies in the fact that, generally speaking, the business men of continental Europe rely upon a legal sanction for the carrying out of arbitral decisions, whereas in the United States, as well as in England and the South American countries, a moral sanction has been shown to be, certainly for the present, more effective than a legal sanction. To ensure the cooperation of these countries, therefore, some system of arbitration *outside the law* must be provided.

Mr. Young went on to imagine that some arbitral awards would not be enforced by legal processes:

... but upon a moral sanction, such as can be exercised by the International Chamber of Commerce itself, and by member National Committees, with all the force that business men of a country can bring to bear upon a recalcitrant neighbour.

Before agreeing to conduct an arbitration outside the law, even when both parties should join in a request, the International Chamber should be convinced that the business men of both countries concerned are sufficiently well organized and that the business organizations are willing to exert moral pressure, if need be, in favor of carrying out the arbitration decision outside the law, and are sufficiently influential to make such pressure effective.

Some of you may possibly recognise the name George Ridgeway. He was a professor of history and the author of what, to my knowledge, was the first book about the ICC; a densely footnoted volume of 392 pages published in 1938 under the title *Merchants of Peace: 20 Years of Business Diplomacy Through the International Chamber of Commerce*.

The success of this post-WWI wave of trade and arbitration seems to have been astounding.

By the early 1940s, the situation was such that the New York court reports for the year 1943 – quoting from a study – “disclose the comparative scarcity of sales contract cases despite the tens of thousands of sale transactions taking place daily in New York.” Courts were apparently fast becoming irrelevant. In Europe as well. A UNIDROIT conference convened by European governments in Rome in 1928 to unify sales law was met by the observation that unification was already in place by private groups – no participation by governments or legislatures was necessary.

It is amazing to think that arbitration had made such inroads in so little time. All of this was in the days before the New York Convention; how could arbitration have been so successful? Moreover, in 1921, the Geneva treaties on arbitration agreements and awards had not yet been concluded. Astonishing!

Now keep that in mind as a mental time capsule, and I will tell you about something that’s happening today which Mr. Young would surely have applauded.

What I am about to give you is an illustration of a kind of framework within which international arbitration can operate in such a way as to give it remarkable efficiency. The illustration comes from the world of sports which, of course, today is the focus of quite astonishing passion – some of it very unattractive – and in any event a very big international industry. This industry has generated an interesting arbitral mechanism which operates in a context which gives it great efficacy. Although it has been in existence for little more than two decades, the Court of Arbitration for Sport, located in Lausanne, is extremely active and the awards of arbitrators operating under its rules are given full and immediate effect. It is easy to see why this is so in disciplinary cases; an athlete who is suspended for a doping offence will simply not be given the credentials to compete because the federations that organise competitions adhere to regulations which accept CAS awards as ultimate appellate decisions. It is more interesting to consider how CAS also achieves finality and efficacy with respect to *contractual* disputes. I will illustrate with an example.

In early 2002, a Brazilian football player signed a four year contract to play for a Mexican club called Sinengia Deportiva, or more commonly

Tigres. He was first paid a transfer fee of (US) \$1 million, and was thereafter entitled to receive a monthly salary until the end of the fourth season.

The player stayed with the team for one year only, and then went home to Brazil. He did not report for pre-season training the second year. The international football federation, FIFA, promptly suspended him from playing worldwide. Within a few months, a Brazilian labour court ruled that he was entitled to pursue his career. He accordingly signed with a Brazilian team known as Atlético Mineiro.

As you can imagine, *Tigres* felt hard done by. They had paid one million dollars in order to procure the services of the player for four seasons, not just one. But how were they to be made whole? Lawyers familiar with international transactions would hardly paint a rosy picture if they were to advise *Tigres*. True, the club had an employment contract with the player. True, they might get a judgment in their favour from a Mexican court. But then what? Even without any complicating factor, one cannot expect that a Mexican judgment would readily be declared enforceable in Brazil. Even if, by vastly good fortune it were homologated – to use the term favoured in Brazil – how could it be enforced against the player? What reason would there be to suspect that he had saved his money in a single convenient, transparent account to accommodate the Mexican judgment creditor? And, of course, there is that complicating factor: a Brazilian court had declared that the player was entitled to pursue his career with a local team. This entitlement, to be sure, is shrouded in stirring language about every individual's right to work. It would be hard to mobilise much sympathy in Brazil for conclusions to the contrary.

Grim prospects indeed.

But that was before consideration of the modern context of the globalised football industry and the role of CAS within that context. The fact is that *Tigres* had no difficulty in enforcing their claim. Here is how it works.

First, proceedings were held before the FIFA Players' Committee. The player was found to have breached his contract and ordered to pay damages in the amount of the US\$1,000,000 transfer fee. If he failed to pay, Atlético Mineiro would be jointly liable. This decision was challenged by the player and by Atlético Mineiro before CAS and three arbitrators were duly appointed.

An arbitration was duly conducted, and full arguments were heard – notably as to the interpretation of the employment contract and as to the principle of joint liability. As to the former, applying Swiss law and the FIFA Regulations, the arbitrators concluded that the damages should be reduced to US\$750,000 on account of the one year the player did perform. As to the latter, the position was crystal clear: the FIFA Rules explicitly hold teams jointly liable for the breach of a prior contract committed by any

player they chose to employ. Accordingly, if the player were to fail to pay the US\$750,000 within thirty days of the award, Atlético Mineiro would be required to make the payment.

Atlético Mineiro could be counted upon to make the payment because it would otherwise face a disciplinary action by the Brazilian federation in the form of a relegation from the premier division. For the club not to do what was necessary to avoid that sanction – i.e., to satisfy *Tigres* – was really quite inconceivable.

The Brazilian federation could be counted on to discipline its member, Atlético Mineiro, because otherwise it would face disciplinary action by FIFA in the form of exclusion from international competition. What? Brazil out of the World Cup? “Inconceivable” is not an adequate word!

What about the Brazilian judgment that declared the player free to pursue his career with Atlético Mineiro? To the extent that it is in contradiction with the CAS award (or, more likely, vice versa: a Brazilian judge declaring that the CAS award infringed on the players’ rights as perceived in Brazil) there is undoubtedly a possible tension between international federations and national authorities. This possible conflict has materialised in many sports, for example in cycling, where Spanish competitors competing in an international championship event in Spain are subjected to the rules of the *Union Cycliste Internationale* with reference to CAS as the ultimate authority. There is also a Spanish Royal Decree on Sports which gives exclusive final jurisdiction to the courts in matters of doping, apparently on the theory that sports organizations may be too tolerant. On the CAS website, you can contemplate *UCI v. Aitor Gonzalez & Real Federación Española de Ciclismo* (20 December 2006), an award which, in sum, reasoned that Spain can certainly regulate whatever happens on Spanish territory, but if no accommodation is made for the primacy of international regulations, the consequence would inevitably be that international competitions (which by necessity must be ruled by perfectly homogenous rules) would simply have to avoid the country. There have been some tense momentary standoffs (not, as it happens, involving Spain) but so far national and international regulators have respected an intelligent division of domains. Here too – need I say it? – it turns out that international arbitration is not arbitration.

I should add that, on more than one occasion, *Brazilian* athletes and teams have benefited from the international regime in circumstances where it is doubtful that national proceedings could have been effective, for example the award by which the Ittihad Club of Saudi Arabia was ordered to pay nearly US\$2.8 million to the Brazilian Vitória de Bahia (7 August 2007; appeal rejected, with costs, by the Swiss Federal Tribunal, 13 May 2008). Of course the international system would break down if it were not supported by a strong structure of reciprocal benefits.

Isn't all this marvellous?

Well, not everyone thinks so – and not everyone thought so back in the days I was talking about a while ago when I asked you to keep a mental time capsule.

Not everyone thought arbitration was wonderful then. Not everyone thinks arbitration is wonderful now. This is where it becomes so very important to keep in mind the difference between international arbitration and arbitration *tout court*. Those of us who like sea elephants should insist that our beast not be lumped in with the elephants. We like the elephants well enough, but if powers that be want to get rid of *them*, or shunt them off to a tiny part of the zoo, let's never forget that the sea elephant is a different creature with fundamentally different qualities.

You can probably see what is coming. I'm going to tell you about the enemies of *arbitration*. And just so you see the parallel, just so you can really perceive how much some things stay the same, let me first tell you about resistance to *arbitration's* success three generations ago.

Not long ago, I came across a remarkable article in the 1944 volume of the *Yale Law Journal*. Don't look at me like that – *à Paris, l'on s'amuse comme on peut*. It was written by Professor Heinrich Kronstein of the Georgetown Law School, under the title "Business Arbitration – Instrument of Private Government."⁴

It was in fact Professor Kronstein who conducted the study I mentioned of the New York State court reports, and concluded that arbitration seemed to be displacing the courts.

And he was appalled!

Let me say that his article was both lengthy and richly encrusted with citations from US, English, French and German sources. But make no mistake: he wanted to destroy arbitration before, in his view, it would destroy our grandparents. The way he saw it, the development of arbitration was promoted and advanced by powerful wicked conspirators who, like villains in a Bond movie, were intent on establishing dominion over the world for nefarious purposes, placing private gain over public interest, seeking to "pervert ... the balance imposed by law." The "arbitration system," he wrote, is surrounded by a secrecy which could be penetrated only by "official investigation." He was not talking about a sociological inquiry, of course, but police raids and jail sentences. "Organized arbitration," he continued, "serves no social justice and has become an

⁴ 54 *Yale L.J.* 36 (1944).

element of dissolution.” It is “an instrument of cartels and monopolistic trade associations.”

His premise was that the true and acceptable purpose of arbitration had been to resolve disputes that were (i) simple and (ii) involved ordinary individuals. It had no legitimate role in the complex world of corporate business. Indeed to understand how far Kronstein’s critique went, we can begin with the very idea of corporate law. It was unacceptable, he argued, for the Supreme Court of New York to hold that disputes under a shareholders agreement should be subject to arbitration under the Rules of the American Arbitration Association. It did not matter that the case involved a family corporation having only three shareholders (all named Martocci):

the court seems to have passed over a self-evident fact: that arbitrators, representing the public, have an interest in any transaction governing the conduct of a corporation.

You heard me right: “any transaction governing the conduct of a corporation.”

Kronstein thought it was even more intolerable to imagine that corporate “articles of association” could be subject to arbitration because they are an obvious tool for evil conspirators, a way for cartels to “usurp judicial control” over public instruments. Apart from corporate governance, he also mentioned trademarks and patents as obvious areas for manipulation by cartels – all in the service of price fixing and restraints of trade.

Indeed his article contains the word “cartel,” it seems, in every other line. Truth be told, he was able to cite some eye-popping examples of arbitration arrangements under which businesses – including spectacularly General Electric⁵ – gave effect to price fixing schemes by ensuring the appointment

⁵ It is simplest to reproduce this passage from Kronstein’s article, at pp. 40-41: Carboly Company, a subsidiary of General Electric, having obtained an exclusive license under certain patents, relating to hard metal composition, from the German firm, Krupp, granted a license for manufacture to Firth-Sterling Steel Company on the express condition that its prices, terms and conditions of sale for all tools and dies made of hard metal composition should be no more favourable to the customer than those to be established from time to time by Carboly. The agreement between Carboly and Firth-Sterling provided for arbitration of controversies which the parties were unable to adjust between themselves, and through a supplementary instrument the form of arbitration procedure was agreed upon: ‘For the period of one year from March 1, 1931, the parties hereby appoint Harold Norberg ... as the sole arbitrator over controversies which may arise between the parties or either of them concerning violations of their respective obligations to maintain the prices, terms and conditions of sale established from time to time by Carboly. ... The arbitrator in performing his functions shall act impartially between the parties.’ Since the Mr. Norberg in question was at the time of his appointment and subsequently an employee of Carboly, there seems hardly any doubt that arbitration was used here by Carboly both to control prices at the expense of its licensee and to prevent such a scheme of price fixing from coming into court.”

of safe “arbitrators” and imposing heavy sanctions for trying to escape an oppressive arbitral mechanism.

Kronstein’s second group of villains were trade associations like the Liverpool Cotton Association. He cited the following passage from an English Chancery Division judgment upholding an agreement to arbitrate under the Liverpool Rules, describing it as:

the result of attempts to bring Continental associations formed in the interests and for the protection of the cotton trade into line with the association, and to inaugurate between the members of the association and of the Continental associations a code of dealing and conduct similar to that already obtaining between the members of the association *inter se*. The importance of Liverpool, as the controlling centre of the cotton trade in Europe, necessarily results in members of the association being in constant contractual relationship with traders on the Continent, and, experience having demonstrated the difficulties not infrequently arising in enforcing judgments and awards out of the jurisdiction, the association determined to take steps to remove these difficulties and to facilitate the settlement of disputes with foreigners and the obtaining of prompt settlement of claims for payment and damages, and, by making the advantages reciprocal, to secure and retain the confidence of Continental buyers. This policy ... falls ... within the powers of the ... memorandum of association.

This Kronstein found outrageous: “the emergence of a self-enforcement policy” which represents “the final breach between arbitration and the law.” These associations are “utilizing the arbitration device for their own purposes” and transform it into something occult and all-powerful: *making* their own laws, *enforcing* those laws, and *punishing* anyone who does not obey the private arrangement – for example, by ruinous exclusion from the trade association.

This diatribe resonated in my mind as I thought back on a memorable experience in my early years of practice.

In the first race of the 1982 Formula One Grand Prix season, held in Kyalami, South Africa, 27 out of 28 drivers refused to drive due to their rejection of an amendment to the regulations which they considered related to business rather than sport. An epidemic of stubbornness broke out, and one of the qualifying sessions was actually run with a single competitor trundling around by his lonesome self (Keke Rosberg of Finland). Those who had tickets only for that session were not amused. The 27 non-participants were disciplined by the so-called *Federation Internationale du Sport Automobile* (FISA), which had that function under the Formula One Rules.

These drivers formed a steering group headed by Didier Pironi and Nicki Lauda, and asked me to challenge FISA's decision.

Under the F1 Rules, an internal body called the *Tribunal d'appel international* (TAI) was competent to hear such challenges. That was our first problem. FISA was a committee of the International Automobile Federation. TAI was created and financed by the self-same International Automobile Federation. Indeed, it turned out to be a peculiar form of arbitration – if anyone claimed that such was the nature of the proceedings – in which your opponent selects seven arbitrators, you select none, and no one sits in the middle. Moreover, although those eligible to serve included persons knowing something about motor sports, the true specialists were for obvious reasons the ones from major motor sports countries like Italy, France, and England – and they could not be selected because the parties to the disputes were invariably connected with these countries. The decision-makers tended to be persons from odd little countries which happened to be members of the International Automobile Federation, and who very much enjoyed coming to Paris and spending a few days in luxury at the Hotel de Crillon, next door to the historic building on the *place de la Concorde* where FIA/FISA/TAI are housed. You may forgive my clients and me if I say that we had a feeling that these gentlemen were keen not to displease those who invited them.

The outcome was unsurprisingly negative. So off we went to the *Tribunal de grande instance* of Paris. Here we had a second problem. Under the F1 Rules, anyone who challenged the internal decisions in an ordinary court was susceptible to the discipline of *lifetime* exclusion from the sport! This did not worry me because I considered this a clear-cut affront to public policy which would instantly be rejected by any court – but then I was not earning, or hoping to earn, fabulous riches as an automobile racer. Still, Formula One racers are by nature risk-takers, and this group was reasonably comforted by the thought that all of them could not realistically be banned for life. (The twenty-seven racers included Gilles Villeneuve, Nelson Piquet, Carlos Reuteran, Jacques Lafitte, Michel Alboreto, Nigel Mansell, and many more.) Sure enough, the French judges decreed that the penalty for going to court was unenforceable. That was all well and good for our case. But ours was an extraordinary situation with almost every athlete in the sport involved. How many claimants lacking that strength-in-numbers had been frustrated and for how many years by the fear of a lifetime ban? Even a ban ultimately declared ineffective might have irretrievably disrupted a career while the law suit ran its course.

So do not think for a moment that I cannot relate to Kronstein's complaint about abusive associations. Where I differ radically with him is with respect to his apparent belief that arbitration in the hands of

associations is inevitably crooked and cannot be controlled. I find it disappointing that critics of arbitration, as they appear through the generations, ignore the history of law and the wealth of evidence of the persistent impulse to resolve disputes outside the processes of warlords and bureaucrats. Weber, after all, expressed the view, in his *Sociology of Law*, that arbitration was at the origin of all legal proceedings. This postulate may go too far, and is, indeed, controversial among historians, but no one can deny the vast role in medieval times of the original Roman *arbitrium ex compromisso* as it was institutionalised, a counterweight to the law of potentates, functioning as a reliable mechanism for the enforcement of rights and obligations within the trades and the nascent bourgeoisie. For Kronstein to treat the Liverpoolian cotton merchants as the inventors of a racket was quite simply grotesque.

Kronstein at last pointed his finger at a third category of miscreants – the International Chamber of Commerce. He too mentioned Mr. Owen Young, on the very first page of his article, and hardly in a flattering light.

Mr. Young, he noted, had been Chairman of the Board of RCA – the Radio Corporation of America – and it stood to reason that his recommendations to the ICC London Congress “were influenced by his experience [on behalf of RCA] in connection with the South American radio consortium, which proved to be the basis of the international radio cartel.” This ominous comment is left unexplained, perhaps because the author felt that the facts spoke for themselves when one considered the ICC. He quoted the passage from Young’s report that I read to you before, but with disparagement bordering on contempt. He figuratively leaped at the words “arbitration outside the law” which Young as a layman had obviously used as shorthand to refer to what a verbose lawyer (like myself) would describe as “arbitration based on voluntary participation and compliance without the need to refer to formal and complex court procedures in cross-border trade.” In Kronstein’s view, Young had somehow admitted – in this public document, mind you, endlessly disseminated over the years by the ICC – that the goal was to flout the law. At any rate, the expression “arbitration outside the law” recurs many times in Kronstein’s piece as though it were the ICC’s admission of guilt beyond redemption. Now look at the ICC, he went on:

The unique feature of the Chamber is the appointment of arbitrators by national committees of countries specifically designated by the central committee. A nation such as Switzerland, for example, liberal in its treatment of cartels, may be entrusted with the task of appointing arbitrators. Subsequently the central committee may send these ‘liberal’ arbitrators to a foreign country to render their decision – even to the domicile of the party

against whom the award is to be made. The reason for this mobility of arbitrators becomes apparent in the light of the rule that an arbitrator is free to choose whether his decision is to be bound by municipal law. ...

Like the operations of exchange institutions, a loose procedure of this kind seems only too easily to lend itself to the exercise of cartelized power. On behalf of the commercial interest which it undertakes to protect the central committee may at its discretion utilize the municipal law which proves to be the most advantageous and the most expedient.

As his putative proof of this last sentence, the author referred in a footnote to the ICC's own brochure published on the occasion of the 1921 London Congress – a rather counterintuitive source which does not, in fact, support the author's suggestion of an intent to circumvent law.⁶

The only mercy Professor Kronstein showed to the ICC was to suggest that in fact it would not be able to do so much harm as it intended – because the trade associations and cartels and their accomplices had already shown that they could subjugate the courts and the law without the ICC!

'What should be done?', Kronstein asked. For one thing, he wrote, arbitration agreements should go back to what he believed was its traditional status – they should be *revocable*. Advocates of arbitration have misled the courts into thinking that agreements to arbitrate *future* disputes have something to do with the sanctity of "freedom of contract" – three words he put within quotation marks – courts were being mesmerised by the "hypnotic power" of the notion of "independent arbitration" – again, quotation marks around "independent arbitration." He thundered about the perils of "indiscriminate enforcement."

We must restore arbitration *within* rather than *outside* the law, he urged; this is a big job. *Temporarily*, lawmakers should establish an absolute right to appeal

⁶ In this respect, Kronstein the militant seems to have overcome any scruples of Kronstein the scholar. Anyone who goes to the source (as opposed to relying on Kronstein's quotations) will find that the founders of ICC arbitration wished to create something which would "reconcile" the conception of "moral" and "legal" sanctions. True, Owen Young referred to the former as a "system of arbitration outside the law" but it seems abusive to take this expression of a non-lawyer to describe the thrust of what the ICC was doing, especially since Young himself urged that "a code for arbitration within the law is equally necessary" (and moreover made perfectly clear that "outside the law" meant no more than "a moral sanction" which did not need formal judicial assistance, and had nothing whatsoever to do with evasion or subversion of the law); Ridgeway, pp. 320-322. Kronstein's speculations about conspiracy do not fit well with the fact that the London congress expressed a consensus to the effect that it was "undesirable for ICC officials themselves to accept the function of arbitrator." *Proceedings of the First Congress* (ICC Brochure No. 18, 1921).

to courts from all arbitration cases “provided the public interest is involved.” Corporate parties contemplating participation in cross-border arbitrations should be required to obtain a prior license from US courts. Arbitrations abroad should not be binding if they did not comply with US law or if one of the parties did not appear. And arbitrators should never, never be allowed to decide on the validity of a contract; the separability notion was to be rejected out of hand. And oh – government agencies should be “immune” from arbitration, even if they had the bad idea of agreeing to it.

Since I am speaking here in Canada, the abode of the high priests of transparency in international arbitration, I should not forget that Kronstein also proposed that the files in arbitral proceedings – pleadings in evidence – should be made available to government officials, who should also have free access to all hearings.

I told you Kronstein was Professor of Law at Georgetown Law School, but did I forget to mention that he was also, at the time he wrote, a staff lawyer at the US Department of Justice? Well he was; naturally his first footnote revealed that the opinions expressed in his article were not “necessarily” those of the Department.

It’s time to leave Professor Kronstein. Let me only explain why I dwelled so long on this *Yale Law Journal* article. It is because Kronstein’s arguments are still alive. And it is because his denunciation of arbitration, dogmatic though it may be from beginning to end, is a sustained and documented criticism, by a well-known scholar⁷ in a very serious publication, which not only deserves consideration, but *demand*s consideration if arbitration is not to fall into disrepute.

In retrospect we can see that Kronstein’s fulminations were not persuasive, and his proposals made no headway. His proposals were not only left to wither on the vine, but the tendencies he excoriated maintained their momentum. Broadly speaking they have moved so much further in the direction of party autonomy – all over the world, notably with the impetus of the UNCITRAL Model Law – that students today may have difficulty imagining that anyone in 1944 would already have observed something called “independent arbitration.” Students today may well conceive that arbitration has only *become* unbound since the 1970s. And, it seems, they are taught that it is a good and useful thing.

Conceptually speaking, Kronstein appears to have been wrong in two ways. First of all, he failed to perceive that the law could embrace arbitration and yet protect the public interest. Arbitration is not the struggle

⁷ Kronstein was to become the first Director of Georgetown’s International Law Institute in 1955. A modern view of Kronstein’s attack appears in Christopher R. Drahozal, “Is Arbitration Lawless?”, 40 *Loyola of Los Angeles Law Review* 2007.

against *law*, but a tool in the development of its delivery system in response to globalization. Hundreds of lectures,⁸ thousands of learned disquisitions by judges and scholars have made us see how public policy can accommodate arbitration, all the while limiting the excesses of those who would be tempted to manipulate the “arbitral device.”

Secondly, Kronstein saw only the evil intent behind deviant behaviour and, therefore, ignored the possibility that we all perceive – namely the positive contribution of arbitration to the rule of law in ways indispensable to exchanges that benefit the international community. And yes, *international* arbitration is not arbitration. Kronstein did not see this.

Divorced from the ideal of social justice and designed to avoid the law, modern arbitration – so Kronstein concluded – would seem to rest basically upon Kelsen’s theory of law ... persons in a position to exert political or legislative power would seem to be justified in creating the kind of law most suited to their needs ... a neutered instrument of groups in a position to exercise power ... colorless and without aim ... a ready tool of those who would make use of it.

No, Kronstein did not see our noble sea elephant. For him there was only one kind of arbitration: bad arbitration.

Now, you may have your doubts about the need for arbitration, or indeed the value of it, if you live in a country where the courts give justice quickly and surely at no cost to those whose rights have been violated. But in the international system such courts – good or bad – simply do not exist. It would be a grave error, for those who would curtail arbitration because they believe that, in their national systems, the public interest is better served by a greater, irreducible role for the courts, not to see that international arbitration is something quite different, and that there is no trade-off. Trimming the sails of international arbitration is not a way to favour another mode of transport; it is the *only* one we have. Allow me to repeat that the emergence of a World Commercial Court is not something we are likely to see in our lifetime.

We are surely on very solid ground when we stake out the claim for the specific advantages of international arbitration. Consider the stated purposes of the unimaginably successful New York Convention which is, after all, a treaty conceived and promoted under the aegis of the UN. Consider the preamble of the widely used 1976 Arbitration Rules of the UNCITRAL, which stresses the international community’s interest,

⁸ Including the Brierley Memorial Lecture given at this very podium by Professor Andreas Lowenfeld in March 2005 under the title *Public Policy and Private Arbitrators: Who Elected Us and What Are We Supposed to Do?*

expressed in the form of a recommendation of the General Assembly, in ensuring the development of the arbitral device. Consider the UNCITRAL Secretary's report in 1984, explaining the objectives of the Model Law which has had such enormous influence and which contains everything Kronstein wanted to proscribe – and much more which he did not even imagine. Consider finally Koffi Annan's speech in 1998 on the occasion of the 40th anniversary of the New York Convention, when he congratulated the international community on the propagation of that treaty, and on its impact in contributing to the increased security of economic relations.

I have long lived in France, where arbitration and international arbitration are treated in separate laws. The differences are substantial. For example, it has long been established that agreements to arbitrate *future* disputes are valid only if both parties have the status of merchants. And even if both are merchants, an appeal lies to the courts, if either side rejects the award, unless there is an explicit agreement to the contrary. In international arbitration, by contrast, there is no requirement of merchant status to validate arbitration clauses; even employment agreements may be subject to international arbitration – as long as they are international in nature. And with international arbitration the rule about appeals is radically different: there is no such thing; parties cannot even “opt in” for appeals, whether on fact or law.

Another factor comes into play here – let us call it sociological – which merits careful observation. In France, people not involved in international trade seem to harbour considerable doubts about arbitration.⁹ Lawyers involved predominantly in domestic matters often have a rather cynical view of arbitration. So do businesspeople engaged in specific industries or trades which have set up sectorial arbitration institutions. The relevant community often seems too small to avoid suspicions of partisanship, influence-peddling, and excessive deference to ill-defined practices – all the things, if you will, that Kronstein worried about. Yet *international* arbitration is held in great esteem, as I have observed in my three decades of acquaintanceship with French trade and industry. Major French corporations may complain about costs and delays, but they do not perceive a moral hazard in international arbitration, and are content to entrust major contractual relationships to the ultimate control of the international

⁹ In 1943, the renowned jurist Raymond-Théodore Troplong, then a *conseiller* at the *Cour de cassation*, nine years before his elevation to its presidency, wrote this in his treatise *Du contrat social civil et commercial*, t II, n° 520:

L'arbitrage est une manière de juger si défectueuse, si dépourvue de garanties ... quant à moi qui ai été arbitre quelquefois, je déclare, par expérience, que dans un procès de quelque gravité, je ne conseillerais à personne de se faire juger par des arbitres; un tribunal qui se croit le droit d'être plus équitable que les lois les plus équitables du monde me paraît ne pouvoir s'adapter qu'à un petit nombre de questions de fait et à des intérêts médiocres.

process. (They are, by contrast, unenthusiastic about litigating in other national courts in Europe; they seem to see through the myths of European judicial integration.) Legislators, judges, and scholars follow suit and have tolerated, acknowledged, and ultimately supported a system of international arbitration which is a world apart from domestic processes.

Other important jurisdictions – most notably Switzerland, England, and Sweden – have also developed features that result in significant differences between arbitration and international arbitration. Above all, the basic objective of the UNCITRAL Model Law was to provide a specific regime for international commercial arbitration; individual legal systems were encouraged to adopt it irrespective of the way in which they might regulate domestic arbitration. Some countries were so enthusiastic about the Model Law that they adopted it for all types of arbitration. This is fine as long as domestic arbitration does not develop pathologies. If it does, one may well have second thoughts about the fused regime, since corrections of domestic phenomena may unintentionally harm international achievements and harmonisation.

Today, there are ideas floating about which constitute very significant threats to arbitration. I hope these threats can be averted because I favour arbitration as a matter of political policy. But if they cannot, let us at least make the challengers realise that whatever may be their objections to arbitration, international arbitration is something else. And the sea elephants should be preserved.

Let me give you two frightening examples.

In Europe, we are now living under the spectre of a proposal to kidnap all forms of arbitration and subject them to the regime of the Brussels Regulations dealing with judicial arrangements in the EC. When I say “spectre,” I mean the fear, perhaps exaggerated yet fuelled by past experience, of the possible fallout of a study¹⁰ of the extension to arbitration of Regulation 44/2001 – i.e. that the Italian torpedo will be allowed to destroy fundamental advantages of international arbitration. A defendant wishing to sabotage the neutral arbitral process would need to do no more than to bring a law suit in a country known for judicial torpor and infinite appellate complications; arbitrators would simply have to wait until that country’s highest available court finally decided that the matter should go to them after all.¹¹ Perhaps there are those who do not much mind

¹⁰ Report on the Application of Regulation Brussels I in the Member States, Study JLS/C4/2005/03, Final Version September 2007.

¹¹ According to a working group of the ICC’s Arbitration Commission, the Study is a “major conceptual step backward ... reflecting a vision of arbitration in vogue in the 1920s,” unpublished report, quoted in *Les Cahiers de l’arbitrage* N° 2008/2, *GAZ. DU PALAIS*, 29 June 2008, p. 4.

destroying national arbitration, but they should not be allowed to proceed without giving an account of the vast damage done to the singular – and singularly successful – method we have for allowing international economic relations to be pursued on the foundation of the rule of law.

In the US, the danger lurks in Congress and is taking two forms. One is the proposed so-called Arbitration Fairness Act of 2007,¹² whose proponents want to exclude arbitrations with respect to employment, consumer, and franchise disputes. Whatever one may think of this as a matter of domestic policy – and I would be the first to admit that some businesses in the US have abused the tool of arbitration in the context of consumer transactions – one must view with alarm the fact that the proposal would also exclude arbitration arising from relationships with “unequal bargaining power.” This subjective criterion would apparently be available as an obstacle to international arbitration as well, with the prospect of the endless familiar disasters of discovery, depositions, and appeals, solely to determine whether there is “sufficient equality” to allow arbitration.

Kronstein’s intellectual grandchildren also seem to think that just in case decapitation does not work, why not also carve up the body with a thousand little scalpels? And, thus, there are legislators who want to outlaw arbitration with respect to – I’ll give some examples only – homebuilding contracts, motor vehicle sales and leases, livestock or poultry transactions, employment contracts involving former members of the US armed forces, and loans linked to federal tax refunds. Once again, individual national systems may take a hostile view to arbitration on the basis that only their public courts can be trusted. But this analysis is inapposite to international arbitration and, moreover, would dismantle the valuable international system built around the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Do these legislators now disagree with the points made by the President of the United States when he wrote to the US Senate on 24 April 1968 transmitting the New York Convention and recommending accession to it? Or have they simply forgotten his message? It was based on a decade of observation of the Convention’s initial success and included this passage:

Experience under the Convention has established that it contributes in many ways to the promotion of international trade and investment. For example, it provides greater flexibility for the arranging of business transactions abroad; it simplifies the enforcement of foreign arbitral awards and standardizes

¹² S. 1782 (Senate); H.R. 3010 (House).

enforcement procedures; and it strengthens the concept of safeguarding private rights in foreign transactions.¹³

Astonishingly and regrettably, a number of US courts have shown insensitivity to the specificity of international arbitration *precisely when dealing with an international treaty*. I am referring to the unacceptable addition, to the defined and supposedly exclusive exceptions to enforcement of awards under the New York Convention, of the requirement that the enforcing party also demonstrate that peculiar US jurisdictional requirements are met. Professor William Park and Mr. Alexander Yanos have shown, in an important recent article,¹⁴ how dangerous and unjustified this is. I can only add, on a note of frustration, that the New York Convention itself does not contain a jurisdictional clause – and so other signatory States cannot bring actions against the US under that Convention for these breaches of its terms.

The simple conclusion is that those engaged in the international field would be mistaken if they reflexively join the fray on the side of arbitration each time it finds itself under attack. For all we know, in the particular country where the debate arises arbitration has been abused in a way that makes mockery of the consent of individuals, be they consumers, athletes, or members of a community dominated by so-called religions. In such circumstances, international arbitration is the baby, and arbitration *tout court* is the bathwater.

If international arbitration is not arbitration, what should we call it? Let's see – we will, I suppose, go on calling the sea elephant “sea elephant,” and “international arbitration” is not a bad appellation for international arbitration – but let's remember what it is!

¹³ One of the reasons the US hesitated for more than a decade before acceding to the New York Convention was the adamant opposition of the Deputy Legal Adviser at the Department of State: none other than Kronstein, who had moved there from the Department of Justice.

¹⁴ “Treaty Obligations and National Law: Emerging Conflict in Cross-Border Arbitration,” 58 *Hastings Law Journal* (2006).