IMPERIALISM AND CHAUVINISM IN INTERNATIONAL ARBITRATION: LAWYERS, STATUTES AND SCOUNDRELS

by Adam Samuel

I: INTRODUCTION

In the late 1990s, the English Court of Appeal unwittingly shook the international arbitration fraternity by declaring a provision of the Consumer Arbitration Acts to contravene the Maastricht Treaty and, therefore, European Law. The effective annulment of such a minor statute would not have been regarded as such a major thing if it had not been for the reasons given by the Court. Leggatt LJ concluded that since German consumers would not have the benefit of the same protections as their British counterparts, the law discriminated unlawfully against foreigner in not applying to international arbitration. It was, therefore, invalid.[1]

The effect of this was to force the Department of Trade and Industry in London to bring the new Arbitration Act 1996 into force without the provisions laying down a specific regime for domestic arbitration. More importantly, for the purposes of this paper, a Court recognised that an arbitration statute of its own country could unlawfully discriminate against foreigners. This may not be a first - but it is extremely unusual.

Writing about prejudice in comparative law is always a dangerous matter. Readers may identify, in the selection of incidents described, biases on the part of the author sufficient to render his analysis fundamentally flawed. Attempts at balance will likely lead the writer to talk about incidents of lesser importance or of which he knows far less. This paper, then will inevitably concentrate mainly on the Abig four" of international arbitration: England, France, Switzerland and the USA.[2] However, there are spectacular features of other countries= laws that are just too good to be missed.

To begin with, we need to draw a distinction between unusual and discriminatory statutes. There is a sense in which different rules in municipal laws discriminate against foreign lawyers and their clients. Disorientation with a law with which they are not familiar can be very serious. However, total unification of arbitration law would take the creativity out of the subject. It is appropriate for countries to preserve features of their statutes which have been wrongly abandoned elsewhere. In that sense, a degree of chauvinism should be encouraged.[3] The history of the 20th Century tells of the appalling effects of everyone following a consensus.

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[1] Philip Alexander Securities & Futures Ltd v. Bamberger [1996] C.L.C. 1757.

[2] These four countries have had easily more ICC arbitrations in their country over at least the last two decades. The USA has vastly more domestic arbitrations than any other country in the world. For England, ICC work represents a tiny proportion of the overall arbitration workload with its predominance in the shipping and commodity areas not typically subject to ICC arbitration.

[3] F. Mann, APrivate Arbitration and Public Policy", 4 C.J.Q. 257 at pp. 265-267 (1985). As a refugee from Nazi Germany, Dr Mann knew more than most about the dangers of uniformity.

Nevertheless, where a country does have an unusual rule, it does need to state it clearly. That enables foreigners to practice their skills and resolve their disputes without reference to obscure caselaw. One of the more positive features of arbitration law in the 20th century has been the trend towards drafting more comprehensive statutes as countries present their product to the rest of the world.

On a slightly sour note, anyone looking here for tales of the great xenophobic scoundrels of the international arbitration scene will be disappointed. The apocalyptic book title, AYou=ll never eat lunch in this town again" sadly applies to spilling the beans on the better known practitioners in this area.[4] It seems unfair in the circumstances to pick on the less renowned. After all, we all have unguarded moments.

Legal chauvinism in the international arbitration field can have ghastly consequences. It is noticeable, though, that the local arbitration industry almost never benefits from it. At its most extreme, prejudice can chase away some of a countries= most able practitioners and persuade potential litigants to go elsewhere. Countries with big international arbitration businesses tend to be economically and logistically substantial. They also tend to be more politically stable with ethical, if not always efficient, legal systems.

II: ENGLAND - JUDICIAL REVIEW ON THE MERITS AND THE STATUE TO THE UNKNOWN FOREIGN LITIGANT

(i) Case Stated, Appeals on questions of law

This is a tale of unwitting chauvinism over two centuries. Much has been written, particularly in the USA, of the threat to their livelihoods that English judges perceived was posed by arbitration during the 18th and 19th centuries.[5] The research foundation for many of the comments is at best suspect. The truth is probably far more mundane. Some courts felt that arbitrators were taking litigation out of their hands and threatening in this way the sanctity of law in the business community. Others deeply encouraged this development.

To stick with the facts, in 1802, the decision of Kent v. Elstob[6] began a process by which the English judiciary used arbitration to develop their common law of contracts. In that case, the court ruled that an award could be reviewed on the public law ground of error on the face of the record. Now if the award carried reasons, it could be attacked for incoherence and errors of law. Arbitrators reacted by taking the reasons for awards off the face of the award. The unreasoned award became part of

[4] J Phillips, You'll never eat lunch in this town again, Random House, New York 1990. The sad thing is that having spilt the beans on Hollywood, she never did...

[5] D. Roebuck, "The Myth of Judicial Jealousy", 10 Arbitration International 395 (1994).

[6] See K. Diplock, "The Alexander Lecture", 44 Arb. 107 1978)

arbitration culture on both sides of the Atlantic. It reached its height with the unreasoned reasoned awards of the 1980s![7]

The more pernicious development in 1854 was the arrival of the case stated procedure.[8] Either party could ask the arbitrator to state a question for the decision of the court. This provided an excellent flow of top cases on contract law. Many flowed from shipping where force majeure (or frustration to use the English term) and various types of serious breaches of contract gave England a reputation for having one of the most developed systems of commercial law.

This was curious since many of the participants in English international arbitration are not practising lawyers. The case stated procedure with its arcane formalities stopped foreign practitioners from entering the market.

When one of the trade bodies tried to outlaw the case stated through its rules, they were declared to have acted contrary to public policy.[9] The same thing happened when an equity clause was slotted into a contract, for a similar reason.[10] Such clauses were eventually allowed on the basis that they did not exclude the strict rules of law, they merely adjusted the approach to the construction of the contract.[11] England had a significant share of the maritime arbitration market by the 1920s due to its prominence in maritime brokerage activities. It now spread that near-monopoly to its legal profession.

The rise of hyper-inflation in the 1970s made delaying arbitrations of vital importance. The interest that could be awarded usually did not compensate for the loss of the use of the money. This led an arbitrator to decline to state a case on request on the basis that the statute used the word “may” not “shall”. The Court of Appeal’s decision in the Lysland[12] made it virtually compulsory for an arbitrator to raise any question in the form of a special case. The abusive use of this procedure in the prevailing economic climate led to pressure for reform.[13]

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[7] Mutual Shipping Corporation v. Bayshore Shipping Co Ltd (AThe Montan”) [1985] 1 W.L.R. 625.

[8] S. 5 Common Law Procedure Act 1854.

[9] Czarnikow v. Roth Schmidt & Co. [1922] 2 K.B. 478.

[10] Orion Compania Espanola de Seguros v. Belfort Maatschappij voor Algemene Verzekgringen [1962] 2 Lloyd’s Rep. 257.

[11] Eagle Star Insurance Co Ltd v.Yuval Insurance Co Ltd [1978] 1 Lloyd’s Rep. 357.

[12] Halfdan, Greig & Co. A/S v. Sterling Coal & Navigation Co. [1973] Q.B. 843. For references on the 1979 Act and the lead up to it, see the author’s “The1979 Arbitration Act - Judicial Review of Arbitration Awards on the Merits in England”, 2 J.Int. Arb. 4 53 (1985). This piece was completed as part of the work done thanks to a van Calker scholarship, one of the most unchauvinistic of academic awards.

[13] Granvias Oceanicas Armadora S.A. v. Jibsen Trading Co (The AKavo Peiratis”) [1977] 2 Lloyd’s Rep. 344 at pp. 349-350.

At the same time, there was a clear view that England was missing out on international construction arbitration of the type typically handled by the International Chamber of Commerce.[14] That organization had no love for England with its un-continental approach in this area. So, it tended not to select London as a place of arbitration.

The 1979 Arbitration Act was one of the more cynical smokescreens dropped onto the international arbitration market. Essentially, the parties could not agree to waive their right to appeal on a question of English law until after the commencement of the arbitration in shipping, commodities and insurance cases. Since this was the area where English arbitrators had particular expertise, exclusion agreements were largely ineffective. The only area where they worked was outside these areas or in relation to existing disputes. There agreement to ICC arbitration excluded the right of appeal.[15] Since England had never had huge numbers of these cases anyway, by allowing them to bypass the courts, it was not stopping the process of using international arbitration to develop English law.

Very few parties could ever agree to exclude the right of appeal after the dispute had arisen although in many cases, the parties agreed not to ask for reasons which might found the basis of an appeal.[16] They could have used the “Bermuda gap”. Since Bermuda commercial law was identical to English law and foreign law is a matter of fact, the choice of this country’s law could be used to avoid the effects of the 1979 Act. This was rarely tried since lawyers did not want to take the risk of something unforeseen turning up in Bermuda law.

As a further cost, the UK legislature was unable to define coherently which questions of law they wanted the courts to deal with. So, the statute left it to the Court’s discretion. There then followed five years of litigation on what that meant. Now, we knew broadly speaking that if the case was a one-off, the award had to be obviously wrong. If it was not, it had to be probably wrong.[17]

One can identify a legal job creation exercise when a country replaces judicial discretion with an adverb. Now, lawyers faced with an award decided on a point of law that a judge might regard as wrong have to guess the levels of likely judicial indignation to judge whether the latter would regard the matter as a one-off and the award as right, wrong, or obviously wrong. A lawyers’ paradise and plenty of failed applications that could just as easily succeeded have followed.

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[14] Commercial Court Committee Report on Arbitration (1978) Cmnd. 7284 , para 18.

[15] Marine Contractors Inc. v. Shell Petroleum Development Co. of Nigeria Ltd. [1984] 2 Lloyd's Rep. 77.

[16] Mutual Shipping Corporation v. Bayshore Shipping Co Ltd (“The Montan”) [1985] 1 W.L.R. 625.

[17] Pioneer Shipping v. B.T.P. Tioxide ("The Nema") [1982] A.C. 724; Antaios Compania Naviera S.A. v. Salen Rederierna A.B. ("The Antaios") [1985] A.C. 193.

The people that paid for this juridical party were, of course, the arbitration participants. This is to be a little cynical. There were actually advantages to the English system for users. Whereas in much international arbitration, the parties feel foreign to the location and the local legal set-up, this is not true in the English shipping and commodities environment. Big players have to have London bases and lawyers to trade and litigate effectively. They know their trading partners, the arbitrators who were regularly appointed and a fair amount of the law applicable to their disputes. After all, their trading partners had often helped to establish that law through the case stated and, in the 1980s and after, through appeals under the 1979 Act.

However, this enthusiasm should not be exaggerated. The 1979 Act followed the US caselaw example[18] in allowing parties to contract into an appeal.[19] In that way, they could avoid the uncertainty of the judge's decision as to whether to grant leave. I am not aware of any appeal resulting from such a clause which may say something about its popularity.[20]

A decade ago, a distinguished Swiss arbitrator suggested the erection of a statue in the Temple an area where the English commercial bar has historically predominated, in honour of a great local hero: the unknown foreign litigant. (Since the names of appellate parties are public, perhaps this should be the "known" foreign litigant.) His diligent efforts have happily developed English commercial law into one of the most developed systems in the World.

The 1996 Act abolishes the special category cases. So, the parties to an arbitration can effectively contract out of the appeal system. If the legislature thought that people liked the appeal system, they would presumably have followed the US example and allowed people to contract into it if they wanted it. The truth is that those responsible for English arbitration law are happy to allow inertia to help with the development of the English legal system and its practitioners.

(ii) A little postscript - Arbitration legislation and making fun of foreigners

The English are famed for their sense of humour. So, they like to play small tricks on the rest of the world. The UK Parliament retains power to legislate on arbitration throughout Great Britain. Nevertheless, historically, there has been different legislation for England (which confusingly incorporates Wales), Scotland and Northern Ireland. Part I of the much-admired Arbitration Act 1996 does not apply to Scotland. The 1979 Act never applied to Scotland. It has its own legislation based on the UNCITRAL Model Law.

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[18] Gateway Technologies Inc. v. MCI Telecommunications Corp, 64 F. 3d 993 (5th Cir. 1995) for a more modern example.

[19] S. 1(3)(a).

[20] For the opposite view, see Joint Contract Tribunal Standard Form of Building Contract 1980 Ed., Cl. 41.6; S. Boyd, "The role of national law and the national courts in England" in Contemporary problems in international arbitration, ed. J. Lew, Center for Commercial Law Studies, Queen Mary College, London 1986, 149 at p. 158. See also I. Duncan Wallace,"Control by the Courts: A Plea for More, Not Less", 6 Arb. Int. 253 (1990).

There are elegant arguments about the Act of Union 1707 to explain this situation. However, a much more likely phenomenon is that the English like to be able to look down at foreigners when they heard them discussing “la loi britannique sur l’arbitrage”. At least, one piece of foreign legislation was passed (which will be discussed later) by reference to a UK Arbitration Act 1979 that never legally existed.

III: FRANCE: FROM GÖTAVERKEN TO PABALK - FROM SELF-SACRIFICE TO INDULGENCE

It is not only because of the historically curious relationship between England and France that a discussion of French law naturally follows that of England. It is just that France’s finest piece of legal imperialism in this field also relates to setting aside proceedings. This then creates a curious link back to the English judicial review of awards on the merits.

However, this piece of arbitration drama had a double twist to it. The tale has to begin with a bad mistake from an imperialist point of view, the Gotaverken case.[21] There in an arbitration taking place in Paris between a Libyan and a Swedish party, the Cour d’appel de Paris concluded that since the arbitration had nothing to do with France, the French courts could not consider an application by Libya to set aside the award. This curious development mirrored a similar one in Switzerland in the 1950s in the notorious SEEE v. Yugoslavia affair.[22] Both cases did absolutely no good for local arbitration business. Parties would not agree to arbitrate in these locations if they could not access local courts in the event of jurisdictional or procedural problems. The Swiss realized this and in 1969, the Concordat reversed the rule.[23] The French legislature did the same in 1981.[24] All arbitrations with a seat in France could be subject to setting aside proceedings there. The setting aside grounds in the new legislation[25] were (and remain) if anything rather better drafted than their Swiss equivalents.

French legal imperialism turned the Götaverken problem into a triumph with a caselaw development based on the pre-1981 law but which was clearly reflected in the new legislation. It began with the Cour de cassation’s decision in Pabalk v.

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[21] General National Maritime Transport Company c/ Gotaverken Arendal A.B., Cour d'appel de Paris, 21 February 1980, [1980] Rev. Arb. 524.

[22] Société européenne d'études et d'entreprises S.A. c/ République populaire fédérative de Yougoslavie, JT 1958 III 107. That this was not an isolated case can be seen from S.N. Repal c/ Soc. des Raffineries du Rhône S.A., 59 Rev. Crit. 107 (1969).

[23] Art. 1(1). This did not come into force until 1972 and only for those who ratified it.

[24] Art. 1504

[25] Article 1502 which applies as a result of Art. 1504.

Norsolor.[26] This decided that, since the statutory grounds for refusing to enforce a foreign award in France did not include annulment in the place of origin, that ground could not be used as a defence to such proceedings. The logic was unimpeachable. The New York Convention was designed to facilitate not restrict the enforcement of arbitration awards and agreements. It contained no limits on enforcement and a provision, Article VII, which expressly entitled people to rely on municipal laws and international treaties if it provided for recognition of an award that did not meet the New York Convention minimum standards. The Court found that nothing in French law made annulment a ground for refusing enforcement.

The 1981 legislation is crystal clear - more so than its predecessor. Article 1504 makes the grounds for setting aside and resisting enforcement identical. For reasons of logic, this had to mean that foreign annulments could have no impact on enforcement and recognition of awards in France. They are not listed in Article 1502 as grounds for resisting enforcement. The French legislature rejected notions of res judicata in favour of their courts being the only judge of whether an award was fit to be enforced.

This meant that a party with significant assets in France might be well-advised to agree to arbitrate there if it was interested in effective procedural protection from the courts. Clearly any appellate procedure in England on a question of law could be ignored if enforcement was to be sought in France. In such cases, France effectively wiped out the effects of judicial review on the merits in England.[27]

The courts of some Common Law countries, notably England (at least at the time) and the USA, are prepared to use injunctions to stop arbitrators continuing towards awards when they do not have jurisdiction or have acted in a fundamentally unfair way (on which more later).[28] Otherwise, though, the French approach made any unsatisfactory award in circulation potentially enforceable in France. While the French courts might decline recognition, the litigation would have to take place on its territory using its lawyers. In other words, an award set aside in its place of origin was generally reckoned to be unenforceable anywhere except France. That was, of course, until the Chromalloy affair.

IV: CHROMALLOY - FRANCE AND THE USA

In the Chromalloy case, the parties chose Egypt as the place of arbitration. The

[26] Pabalk Ticaret Ltd. Sirketi c/ Soc. annon. Norsolor, Cour de cassation, 9 October 1984, [1985] Dalloz 101.

[27] Michael Warde c/ Société Feedex International Inc., Tribunal de grande instance de Paris, 13 April 1984, [1985] Rev. Arb. 155**.** Leave to appeal had been granted in England although the appeal was subsequently dismissed on the merits.

[28] Tracomin v. Sudan Oil Seeds (No. 2) [1983] 1 W.L.R. 1026; Oil & Natural Gas Commission v. Western Company of North America [1987] All India Reports SC 674.

Egyptian courts set aside the award. As one would expect, the French courts enforced the award.[29] To rather more surprise, the District Court of Columbia in the USA did the same.[30]

Legally, if not practically, there was a respectable way for the US court to reach this decision. The English version of the New York Convention says that the court "may" decline to enforce an award if one of the grounds listed in Article V(1) are present. There is no compulsion (nor is there under the French version which is better translated as "will only refuse... if"). At the very least, an English-speaking court in the absence of any different enacting legislation would be entitled to enforce an award on this basis even though it had been set aside in its place of origin.[31] As we have seen so far, local discretion and the possibility of enforcing an annulled award in the country concerned is a good way to bring legal business to your country. Where an award has been set aside, your state can give the party who won the arbitration what other countries will not give him.

Unfortunately, the judge in Chromalloy did not take the suggested approach. She somehow referred herself back for the grounds for resisting enforcement to Chapter 1 of the FAA relying on the catch-all provisions of §208 which apply that chapter where it is not in conflict with the Convention. §9 says that awards can be confirmed unless they are vacated in accordance with the next section. From this court deduced that an award set aside on a ground that is not listed in §10 cannot be refused enforcement on that basis. It is neat and it makes complete nonsense of the wording and context of the Act. §9-10 do not relate to setting aside abroad. There is no conflict between the New York Convention which chapter 2 applies to the enforcement of foreign and international awards and Chapter 1 which does not deal with that subject. To howls of juridical derision, enforcement was ordered.

The Second Circuit appeared to repair some of the damage in Baker Marine v. Chevron.[32] In that case, the court applied Article V(1)(e) to decline enforcement of a Nigerian award that the Nigerian courts had set aside. The court seems to say that where an arbitration agreement provides for arbitration abroad under the local law, there is no place for applying §9-10 of the Federal Arbitration Act. That would straighten out the first problem in Chromalloy. It then quite rationally rejects the

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[29] Chromalloy Aeroservices v. Arab Republic of Egypt, Cour d'appel de Paris, 14 January 1997 [1997] Rev. Arb. 395; 939.

[30] F. Supp. 907 (D.D.C 1996).

[31] A. Samuel, Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law, Schulthess, Zurich 1989 at pp. 271-272; Dicey & Morris, Conflict of Laws 13th ed. L. Collins, Sweet & Maxwell, London 2000 at p. 636; D. Rhidian Thomas, "International commercial arbitration agreements and the enforcement of foreign arbitral awards - a commentary on the Arbitration Act 1975", [1981] L.M.C.L.Q. 17 at p.33: on the travaux preparatoires of the Convention, see E/Conf. 26/L 34, 28 May 1958. This can be found in International Commercial Arbitration: New York Convention, ed. G. Gaja, Oceana, New York (looseleaf) at II.B.25-26.

[32] Baker Marine Ltd. v. Chevron Ltd 191 F.3d 194 (2nd Cir 1999).

argument based on the fact that the Convention gives the enforcing a court a discretion as to whether to permit enforcement of an award coming within one of the article V(1) defenses. The judge remarks that he cannot see any particular reason not to recognise the decision of the Nigerian court.

Unfortunately, in an attack of judicial politeness, the court distinguishes Chromalloy on the basis that the Egyptian court there failed to apply its own law and the agreement expressly provided for no appeals. This is simply not good enough.

Either way, one is left with US courts happily exercising their discretion as to whether to enforce awards set aside in their place of origin. The original rejection of the mandatory "shall" during the travaux preparatoires of the New York Convention is finally coming back to haunt people.[33]

The mess created by any refusal of the enforcing court to recognise the setting aside decision of the court of the seat is well documented. The losing side in the arbitration has to fight enforcement proceedings wherever he has assets. If his claim has been wrongly rejected in the arbitration, he has to find a forum to generate an enforceable judgement outside France and possibly the USA.

There is something slightly obnoxious about the French and US courts sitting in effective judgement on the Egyptian decision here. After all, the parties agreed to arbitrate in Egypt. So, they accepted the risk that the local courts might intervene.

The French approach is slightly preferable on two related counts. First, the statute applies equally to all awards wherever rendered. Consequently, the court is not having to make a ruling on the merits of the foreign court's ruling, at least where the ground for setting aside is not found in French law. Under the NCPC, the annulment is irrelevant in that case. Secondly, by giving the court a discretion, the 2nd Circuit increases the risk that the US court will essentially be disparaging those countries' legal systems by enforcing awards set aside by them.

Having said that, the Baker Marine method has one big advantage. It creates a strong presumption against enforcing annulled awards. In other words, if its approach prevails in future, applications to seek enforcement in these cases are likely to be rejected unless they disclose some particularly unattractive feature of the host legal system or its judges.

The USA and France are not the only countries to enforce awards annulled elsewhere. Belgium did this to a Tunisian award which was not covered by the New York Convention because of lack of reciprocity. The Belgians followed the French approach and found that the domestic law did not provide for the refusal of enforcement on the grounds of a foreign annulment.[34]

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[33] E/Conf. 26/L 34, 28 May 1958.

[34] Sonatrach (Algérie) c/ Ford, Bacon & Davis Incorporated, Tribunal de 1ère Instance de Bruxelles, 6 December 1988, 7 ASA Bulletin 213 (1989)

V: BELGIUM - THE LATE UNLAMENTED ARTICLE 1717(4) OF THE CODE JUDICIAIRE

Belgians take not unjustifiable pride in doing things differently. Just as France and Holland had followed the Swiss lead in ensuring that its courts would be able to deal with setting aside applications against awards rendered on its territory, Belgium did the opposite. In 1985, on the basis of a quite inaccurate presentation to the Belgian Parliament including the infamous reference to “la loi britannique”,[35] it stopped foreigners in non-Belgian cases from applying to set aside awards rendered there.

It said rather strangely that this would keep unnecessary cases out of its courts. Actually, it was trying to carve a niche in the international arbitration world. By being different, it hoped to attract customers who wanted to avoid court at all costs.[36] Unfortunately, it never found many of these customers to justify the exercise.

It was nationally chauvinistic in a few minor ways. First, there were extravagant claims made for the innovation of blocking all setting aside proceedings that might be brought by foreigners. Belgians of course retained the protection of the statute (as did those in dispute with Belgians). The problem was that parties were not given a choice in the matter. In other terms, the Belgians went looking for new colonies without first ensuring that they retained their existing territory. While arbitration statistics are notoriously elusive, it does not appear that the Belgian initiative succeeded. In the ten years from 1989 to 1999, they were chosen to host only 54 ICC arbitrations. This number was boosted by 14 chosen by the ICC itself. The ratios for Switzerland are close to 1 in 10 and for the UK, 1 in 7, France 1 in 5 and Belgium 1 in less than 4.

The effect of all this was that in 1998, Article 1717(4) quietly disappeared. It was replaced by a more conventional arrangement whereby parties could expressly exclude setting aside proceedings if they wanted to. Since Switzerland and Sweden had similar rules, the attempt to promote Belgium as a paradise for international arbitration was over.

VI: ENGLAND, SWITZERLAND, THE TRACOMIN AFFAIR AND ANTISUIT INJUNCTIONS

Switzerland has never officially fallen under the yoke of British imperialism. It is true that surreally some British travel enthusiasts played a large part in developing the Swiss ski industry. Nevertheless, in the 1980s, the English legal system demonstrated the full majesty of its imperial power by straightening out a horrid mistake by the Tribunal fédéral in the Tracomin affair.[37]

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[35] M. Storme, "Proposition de loi relative à l'annulation des sentences arbitrales", [1985] Rev. Arb. 461.

[36] M. Storme, "Belgium: A Paradise for International Commercial Arbitration" 14 I.B.L. 294 (1986)

[37] Tracomin S.A. v. Sudan Oil Seeds Co. Ltd., [1983] 1 W.L.R; 1026 ATF 11 Ib 253 (1985). The original Swiss proceedings were not reported.

Tracomin and Sudan Oil entered into a contract for the sale of Sudanese ground nuts by reference to a standard form FOSFA contract which provided for arbitration in London. Tracomin commenced legal proceedings in Switzerland, the Sudanese party claimed that they should be dismissed because of the agreement to arbitrate and lost. They then applied to the English courts for an injunction to stop Tracomin continuing the Swiss court proceedings. They won there and obtained an award in their favour in London. This, after a certain amount of litigation received enforcement in Switzerland.

Essentially, the initial Swiss court proceedings rejected the notion that the arbitral agreement could be incorporated by general reference. Actually, the Swiss judgements up to the Tribunal fédéral were so incoherent that one cannot say that for sure. It was argued more convincingly in the literature that, since there was no signed document or exchange of letters or telegrams referring to the arbitration clause, there was no agreement conforming to Article II(3) of the New York Convention. Since Switzerland had no domestic rule of its own on this subject, the Convention applied. There were, therefore, no grounds for the Swiss court to dismiss the court proceedings.

The English took a rather different approach. Although somewhat late in doing so, the UK had ratified both the New York Convention and the Geneva Protocol and Convention of the 1920s. However, the spirit in which this ratification took place was rather different from Switzerland's. The UK approach was almost that the existing common law was merely being largely adopted by the rest of the world.[38] The English court correctly construed the New York Convention (if it ever seriously gave the Convention much thought) as laying down minimum pro-enforcement standards to which all contracting states must adhere. There was nothing to stop the English court from going further and insisting that parties comply with the higher standards expected of those appearing before the English courts.

The English court's understanding of the Convention was correct. It allowed stricter enforcement of arbitral agreements. It had to be conceded that a contract providing for arbitration in London under the rules of a trade association there must all be governed by English law. Anyway, all that mattered was the arbitration agreement. Why, the English court seemed to ask, should an arbitration clause be treated any differently from the rest of the agreement? The parties had with a few exceptions referred for the key terms of their contract to the standard form agreement.

All the terms of the agreement including the arbitration clause fitted together satisfactorily. Tracomin were members of FOSFA. Indeed, it played a prominent role in the organization. In English common law, there is actually no requirement of an agreement in writing. Even to fit the case within the Arbitration Act, one only has to

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[38] Private International Law Committee, Fifth Report (Recognition and Enforcement of Foreign Arbitral Awards), HMSO, London 1961 Cmnd. 1515, particularly at p. 27.

identify a written document to which the parties have (by whatever means) expressed their agreement. There was no English law argument against the enforceability of the arbitral agreement.

The English court granted an injunction to stop Tracomin from continuing the Swiss proceedings and declared that any judgement resulting from them would be unenforceable. The English saw no reason why Sudan Oil which had agreed to arbitrate all disputes with Tracomin arising out of their contract should be faced with litigation against it in a foreign country. The English court did the needful. Essentially, had Tracomin continued with the Swiss case and its directors had set foot in England, they could have been arrested.

English courts always excuse their attempt to control another legal system by saying that the injunction is personal to the parties and has nothing to do with the foreign court. This is disingenuous. It also may cause a problem where the foreign court is prepared to strike back by issuing an injunction against the continuance of the UK arbitration and court proceedings. [39] However, the only countries that seem to issue these injunctions are common-law states, notably the USA and India. The Swiss simply had no legal ammunition with which to retaliate. The English arbitration took place. Magically, when enforcement was sought, Swiss courts found an exchange of telexes referring to the arbitration provision. This satisfied the New York Convention's requirements by implication.[40]

In the Tracomin case, the English courts acted as imperialist bullies - but in a good cause. It all goes back to the Geneva Protocol.[41] This left countries to assess the validity of arbitral agreements by reference to their applicable law: a conflict of laws approach. The New York Convention tries to eliminate the conflicts approach by stipulating a formal validity rule.[42]

However, the system breaks down where the law of the place of arbitration has a stricter formal validity rule. This was the situation in Switzerland for all cases before 1989 and continues to be for domestic disputes[43] Then the arbitration agreement becomes incapable of being performed.

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[39] Dicey & Morris, Conflict of Laws 13th ed. L. Collins, Sweet & Maxwell, London 2000 at pp. 414-415, in particular the cases cited at fn 28; A. Samuel, "Injonctions anglaises empêchants l'introduction d'actions antitrusts à l'étranger", 81 Schweizerische Juristen-Zeitung 398 (1985).

[40] ATF 11 Ib 253 (1985).

[41] Arts 1 & 4.

[42] Art. II(3).

[43] IAC Art. 6(1); République arabe de Lybie c/ Wetco, Sem jud. 1980, p. 443.

The mandatory application of Article II(3) of the Convention, without more, is also unnecessarily rigid where the place of arbitration has a lower or no formal validity requirement. It can prevent the enforcement of perfectly reasonable arbitration agreements. One can end up in the ludicrous situation where a party sues in court on the basis of a term in a contract which is as formally valid or invalid as the arbitration clause whose application the same party seeks to evade.[44]

Anyway, the English position in Tracomin was that the parties had agreed to arbitration in London. Under English law the agreement was valid. So, anything which obstructed that state of affairs had to be stopped. This approach which represents a throw-back to the Geneva Protocol must be preferred to the stiff approach represented but not mandated by the New York Convention.

Tracomin does represent chauvinism and imperialism on the part of the English. However, the scoundrels here were the Swiss Tribunal fédéral and a party who should have known better. The latter at least was punished by FOSFA for its misdemeanours. The Tribunal fédéral just slipped away.

Antisuit injunctions are threatened by the Brussells and Lugano Conventions for cases involving contracting states.[45] The difficulty is caused by the fact that arbitration is excluded from both of these Conventions. The UK's attempt to deal with this matter seems to have been overlooked during the Brussells negotiations. In concrete terms, the problem begins with the Lis pendens rule in Article 21 (using the Lugano references). When a court in a contracting state begins to consider a case, all other courts must stop and decline to deal with the case unless and until the first court declines jurisdiction. This presumably outlaws the use of an antisuit injunction granted by England after somebody starts proceedings in a foreign state. If the English court is seised first, there is presumably no problem.

The best answer otherwise is for litigants to seek jurisdiction over the defendant in a non-European Common Law country, notably the USA. The relevant minimum contacts with the US, though, must still exist for that.

If the use of antisuit injunctions is severely restricted where a Convention court in another country is seised first, the resulting judgement on the merits of the dispute may be entitled to recognition and enforcement in a 3rd location or even England. While Article 27(1) allows a Convention country to block enforcement on the grounds of public policy, Article 28 (3) prevents this defence being applied "to the rules relating to jurisdiction". One argument is that these rules relate to the ones laid down

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[44] Britannia c/ Jezequel et Maury, Cour de cassation, 15 July 1987, Bull. Civ. 1987 IV NE 179, p. 133. Later the court changed its view about formal validity concluding that, in international cases, French law contains no rule on the subject.

[45] The Heidberg [1994] 2 Lloyd's Rep. 287; Dicey & Morris, Conflict of Laws 13th ed. L. Collins, Sweet & Maxwell, London 2000 at pp. 545-546

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in the Convention and not supplementary ones relating to arbitration. With the doubts and hesitations in this area, a reference to the European Court of Justice cannot come a moment too soon.[46]

One thing that seems reasonably clear is that where an antisuit injunction has already been obtained, Article 27(3) will protect the country concerned (in practice England or Ireland) from having to recognise a judgement which will contradict an earlier ruling.

In summary, where the imperialist Common Law countries are engaged in using their injunctive powers to stop litigation proceeding in breach of arbitration agreements, this needs encouragement. It does not deserve the threat posed to it by ill-considered multilateral treaties put together by parties who seem to find it distasteful to discuss the overlap between litigation and arbitration. In other words, which do you prefer, the English or the initial Swiss approach to the Tracomin case? The public policy of requiring parties to honour their contracts, to which the Tribunal fédéral repeatedly refers, surely produces only one answer.

VII: LEGISLATIVE VAGUENESS, OMISSIONS AND MISLEADING COMMENTS

Cicero was probably not being very original when he accused lawyers of inventing mysterious formulas to stop non-lawyers from taking their work away.[47] There are two ways of keeping foreigners from bypassing the local legal profession. First, you make the law so obscure that domestic expertise becomes vital. Secondly, you just exclude them from local practice before your courts and in the extreme case before arbitration tribunals located in your country. Each of the countries under discussion has a "distinguished" record under at least the first heading.

(i) Subject-matter arbitrability

None of the countries has a clear list of types of disputes which cannot be submitted to arbitration. So, local knowledge is required. The English could be excused on the feeble grounds that they have never discovered a non-arbitrable subject-matter that they have not subsequently abolished by statute.[48]

The French have something splendidly pernicious in this area: a misleading statute.[49] Read normally, the Code Civil indicates that matters relating to public policy cannot be submitted to arbitration. They then developed a caselaw rule that this did not

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[46] Dicey & Morris, Conflict of Laws 13th ed. L. Collins, Sweet & Maxwell, London 2000 at p. 547.

[47] Pro Murena Oratio , para 25.

[48] Under section 24(2) Arbitration Act 1950, there was a rule that if accused of fraud, one could object to the application of an agreement to arbitrate. This was abolished in the 1996 Arbitration Act.

[49] Code Civil, Art. 2060

apply to international arbitration.[50] The courts then find a number of areas where public policy forbids arbitrators to resolve cases.[51]

The Swiss courts have proved less guilty than most at creating arbitrability exceptions out of nowhere. However, one has to watch out for the public policy reserve in the LDIP. Foreign lawyers still find it difficult to know what is not "de nature patrimoniale"[52] and, therefore, not cable of being resolved by arbitration.

The US Supreme Court seemed to have carved out a reasonably clear rule. Only where a federal statute clearly excludes arbitration, is there a subject-matter arbitrability question. Nevertheless, they have left the problem of footnote 19 of the Mitsubishi case[53] floating around without ever explaining its application properly. This seemed to stop parties using an applicable law clause to defeat the application of mandatory US legislation in an arbitration abroad. However, the only times on which anyone has tried to use this to block an arbitration, it has failed.[54]

(ii) Law applicable to the arbitration agreement - Switzerland and a little local difficulty

LDIP Article 178(2) provides that an arbitration agreement will be substantively valid if it is so under any of the following: the law governing the contract, the law applicable to the dispute, the law chosen by the parties or Swiss law. An effect of this is to create a pro-arbitration bias for no particularly good reason. Essentially, the arbitrator in Switzerland where the law applicable to the substance is not Swiss can rely on the foreign legal system or Swiss law, whichever points towards him having the power to continue with the case. The need for a formally valid agreement

[50] Société Impex c/ Sociétés P.A.Z., Cour de cassation, 18 May 1971 [1972] Rev. Arb. 2 and the cases which follow it.

[51] Société des Grands Moulins de Strasbourg c/ Compagnie Continentale France, Cour de cassation, 15 March 1988, Bull civ. 1988 I NE 72, p. 48; Société Thinet et Cie c/ Labrély, Cour de cassation, 8 March 1988, Bull. civ. 1988 I NE 65, p. 42 and Société Almira films c/ M. Pierrel, ès qualitès de liquidateur de la société Ema films, Cour de cassation, 5 February 1991, Bull. civ. 1991 I NE 44, p. 29 (where the court held that the arbitrators would have been required to stop proceedings during the "declaration de créance" in a bankruptcy case.)

[52] LDIP, Art. 177(2).

[53] Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 at p. 637 (1985)

[54] In re Hops Antitrust Litigation, 655 F.Supp. 169 (E.D. Mo. 1987), appeal dismissed, 832 F.2d 470 (8th Cir. 1987); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2nd Cir. 1993); W. Park, International Forum Selection, Kluwer, Boston 1995 at pp. 119-120.

between the parties is conveniently evaded by pointing to the documents showing the requisite elements of the agreement under the most favourable law.[55]

The simplest area where this can be exploited relates to groups of company cases. In fact, it is not possible to analyse this complicated subject within the scope of a paper of this nature. In general terms, there are a significant number of techniques, agency, unilateral contracts becoming collateral on performance of an obligation, good faith and waiver style doctrines that may enable apparent non-parties to be joined in arbitrations. Since many of the cases depend heavily on the facts, it is difficult to know whether the results would be different without Article 178(2).

Recently, though, this pro-arbitration bias was thrown back on itself by the Tribunal fédéral's most unfortunate judgement in the Fomento case. This blasted a hole in Article 178(2) by declaring that the question of whether participation in a court case constituted waiver of the agreement to arbitrate was governed by the law in which the court case took place. In the Fomento case, that was not one of the Article 178(2) applicable laws. You would have to have an intimate knowledge of Swiss caselaw to know this.

(iii) Non-statutory applications to court

(a) England

The English used to be the big specialists in this area. There was always the fear of the "inherent jurisdiction of the court". Before 1996, a challenge to the arbitrator's jurisdiction was essentially a common law remedy. The 1950 Arbitration Act was silent on the subject. The grounds for applying to set aside or remit an award were also magically absent in any real sense from that Act. As already indicated, in the 1979 Act, nobody could decide which questions of law would be appealable. So, the English left it up to the judge's discretion and enjoyed six years of case law on the subject.

Under the inspiration of the best provision of the UNCITRAL Model Law, the 1996 Act is a vast improvement in providing for court intervention to be limited to the cases set out in the relevant part of the statute. Sections 32(2) and 69(3), though, do contain small reminders of past glories. The former covers challenges to the arbitrator's jurisdiction which can only be done with the tribunal's agreement. The latter reproduces (badly) the caselaw on the 1979 Act's provisions for appeal on a question of law. Section 32(2) gives the court a discretion that is only marginally fettered. Section 69 (3)(c) uses delightfully vague standards like "obviously wrong", "at least

[55] E c/ Z., ICAZ. et soc. M, 8 ASA Bulletin 270 (1990); Arthur Andersen Business Unit Member Firms c/ Andersen Consulting Business Unit Member Firms, Tribunal fédéral, 8 December 1999, 18 ASA Bulletin 546(2000). P. Lalive, J.-F. Poudret & C. Reymond, Le droit de l'arbitrage interne et international en Suisse, Payot, Lausanne 1989 at p. 322

open to serious doubt" to determine which awards will benefit the English legal system.

Now, all we can say against 1996 Act in terms of its ability to keep foreigners out is a a gap of 34 sections between the provisions on immunity for arbitrators and that for arbitral institutions and some magnificent prolix drafting.

(b) Switzerland

The Swiss LDIP represented a considerable improvement on the Concordat in terms of defining the grounds for setting aside awards. The abandonment of "arbitraire", as a ground for setting aside awards reduced significantly the feeling that Swiss lawyers would always be needed in a local arbitration.

It is the unstated trip-wires that one worries about. Recently, 14 years after it was first discussed in the caselaw, the Tribunal fédéral recently left open the question of whether there could be an application to court for a declaration that the dispute was obviously not subject to a valid arbitral agreement.[56] There is no mention of such an application in the statute. Like its French counterpart, the Tribunal fédéral has already grafted on a application for the "revision" of the award in cases of clerical error.[57]

Where the seat of arbitration is in Switzerland, and court proceedings have been brought on the same subject, the Tribunal fédéral has insisted that it will only decline jurisdiction if the arbitral agreement is obviously invalid or inapplicable. The application of this "obviously" standard is not in the relevant part of the LDIP or the New York Convention.[58]

Both France and Switzerland have, by statute, the same "obviously invalid" standard for refusing to appoint arbitrators. When applied to jurisdictional questions, they create a double opportunity for local lawyers to fight about jurisdiction in court: initially at the start of the case and then following the ruling on the arbitrator's jurisdiction.

All countries have to reserve public policy as a ground for annulling arbitral awards. However, did the Swiss court have to include the existence of a court case in

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[56] Fomento de Construccciones y Contratas S.A. c/ Colon Container Terminal S.A. ATF 127 III 279 at p. 286 (2001). See the commentary on this in J-F Poudret, C Reymond, P Lalive, Le droit de l'arbitrage interne et international en Suisse, Payot, Lausanne 1989 at p. 386. My own similar view can be found in Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law, Schulthess, Zurich 1989, at pp. 189-191.

[57] P c/ S, ATF 118 II 199.

[58] Fomento de Construccciones y Contratas S.A. c/ Colon Container Terminal S.A.ATF 127 III 279 at p. 286 (2001).

Panama as falling within this already crowded category?[59] It could so easily have just dealt with the question of whether an arbitrator continued to have jurisdiction as a simple matter of Swiss arbitration law.

Even when it first emerged, everybody looked at Article 185 of the LDIP and wondered what it meant. It allows the court of the cantonal authority to support the arbitration. However, nobody outside the Swiss legal community knows what support can be given and the grounds on which it will be available.

(c) USA

It is heartening for the US legal profession to note that most of the world's arbitrations probably take place under a statute passed in 1925, the true scope of which is still a matter of disputes. Part of the problem is due to federalism and the founding fathers' inability to clearly delineating the respective responsibilities of the state and federal courts and their laws. The 1925 Arbitration Act does not help greatly by not setting out the intended reach of the statute in relation to those courts and legal systems.

It seems unlikely that there will be many more Supreme Court decisions on this subject at the end of a long string of them going back to the early 1980s. Nevertheless, the recent Circuit City case[60] continues to leave the application of the act in the employment context to the distinction between "a transaction involving commerce" and the employment of workers "engaged in foreign or interstate commerce". One can see from this that a mastery of the scope of the Commerce clause of the US Constitution is a pre-condition to understanding when the Act and federal arbitration law, in general, applies.

The foreign party is also vulnerable to litigation due to the US Supreme Court's refusal to overrule the Volt case.[61] In this, Rehnquist CJ refused to question a Californian State Supreme Court decision finding that the law chosen to govern the main contract applied to arbitration agreement, to the apparent exclusion of the Federal Arbitration Act. The fact that this is inconsistent with the whole thrust of the Court's prior and subsequent decisions,[62] provides a happy hunting ground for lawyers with a taste for Washington. After all, lawyers have to recommend an appeal on the off-chance of catching the court in one of its Volt moods.

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[59] Fomento de Construccciones y Contratas S.A. c/ Colon Container Terminal S.A.ATF 127 III 279 at p. 286 (2001). This has since been reversed by statute.

[60] Circuit City Stores Inc v, Saint Clair Adams , 532 U.S. (2001)

[61] Volt Information Science v. Trustees of Stanford University, 489 U.S. 468 (1989)

[62] Allied-Bruce Terminix Cos. v. Dobson, 513 U. S. 265, 270-271 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 628 (1985)); Mastrobuono v, Shearson Lehman.Hutton, 514 U.S. 52.

Otherwise, the Federal Arbitration Act is one of the better pieces of legislation around. The big problem is the court-invented ground for challenging awards of "manifest disregard of the law". The case which invented it has since been overruled on its main point.[63] Yet, this "obviously wrong" ground from which parties do not appear able to contract out can prolong litigation well beyond satisfactory limits. Like "arbitraire" in the Concordat, few applications actually succeed; but the delaying potential is considerable.

(iv) Clogged-Up Appellate Systems

One of the stranger ways in which national legal systems retain their grip over arbitration participants from abroad is through interminable appeals. The Swiss rightly received praise for creating a single tribunal of appeal against awards. By and large, the system has worked reasonably well.

The Swiss, French and Americans all, though, share one problem, the absence of a recours en reforme and cross-appeals applicable to arbitration. Things have to be referred back to the arbitrators when frankly they could be resolved more efficiently on the spot. This problem is more serious when looking at appeals against court decisions relating to arbitration. Here the yoyo effect can be marked.

For example in the recent Circuit City case,[64] the Supreme Court reversed the Court of Appeals ruling that the Federal Arbitration Act did not apply. It remitted the case to a court of appeals for a ruling on whether the terms of the clause rendered it unconscionable and thus unenforceable. The Court of Appeals[65] then ruled in favour of the party that lost in the Supreme Court. Circuit City appealed a second time to the Supreme Court. Only that court's discretionary power not to hear cases prevented a second decision on the case. It would have been more efficient if the original lower court had expressed its view on the unconscionability. Lower court judges need to rule on all credible arguments to make the system work properly and the respondent to the appeal needs to be able to cross-appeal. Since in modern litigation, even in England, parties present extensive written briefs anyway, this should not involve significant extra work.

(v) Legal Practice Restrictions

None of the big four arbitration countries restrict the right of foreigners to act as counsel or arbitrators in their countries although Italy had such a rule until 1983. In

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[63] Wilko v. Swan, 346 U.S. 427 at p.436 (1953); Merrill Lynch, Pierce, Fenner & Smith v. Botker, 808 F. 2d 930 (1986).

[64] Circuit City Stores Inc v, Saint Clair Adams , 532 U.S. (2001).

[65] 279 F. 3 889 (2002); cert denied 122 S.Ct. 2329 (2002).

this respect, British imperialism had famously failed to penetrate Singapore who tried to ban foreign counsel in the 1980s.[66]

There are restrictions on the rights of foreign lawyers to appear in courts in different countries even in relation to international arbitration. In 1997, the Swiss Tribunal féderal reached an enlightened decision[67] in rejecting a challenge to a written submission filed by a foreign lawyer. It pointed out that foreign lawyers may represent parties in proceedings before it in international arbitration cases, be it on an application to set aside an award or to obtain the revision of it. England permits practitioners of some foreign bars, notably in the Commonwealth, to appear in English courts and has to permit EU and EEA lawyers the same privileges - but not those qualified in the USA.

All the countries discussed here have more subtle legal practice restrictions Essentially, by incorporating significant elements of local civil procedure into their courts' involvement in the arbitral process, they force parties to involve local lawyers whenever such applications are contemplated. Since in some of these countries, there are ongoing controversies on the rules to be applied, lawyers of individual countries stand to benefit financially for this localisation of arbitration court procedure.

For example, the Swiss LDIP applied the rules for the recours de droit public to applications to set aside awards.[68] This led to much argument about the procedures and pre-conditions for bringing such an appeal in the arbitral context. Like the USA, Switzerland has had serious problems sorting out the decisions against which appeals can be brought outside this context. In Switzerland, the mess related to decisions to appoint arbitrators and partial awards.[69] In the USA, there was a problem defining final judgements for the purposes of appealing against District Court decisions. In spite of a Supreme Court decision and a legislative reform, there is still something of a muddle.[70]

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[66] Builders Federal (Hong Kong) Ltd & Joseph Gartner & Co v. Turner (East Asia) Pte Ltd. XIV Yearbook Commercial Arbitration 224 (1989). This has since been reversed by the Legal Profession Amendment Act 1992.

[67] N. Aluminium Plant c/ l.E., 9 July 1997, 15 ASA Bulletin 506 at p. 508 (1997). It was difficult to explain to the same lawyer that the author while a qualified member of the English and New York Bar could not appear in the English part of this case because of the English rule against barristers who are not members of Chambers or have not been for five years appearing in front of the English courts and the lack of any reciprocity with the New York Bar.

[68] Art. 191(1).

[69] ATF115 II 288 & 294.

[70] Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., A Division of Bill Harbert International, Inc. 529 U.S.193 (2000); Green Tree Financial Corp.-Alabama and Green Tree Financial Corporation, Petitioners v. Larketta Randolph 531 U.S.79 (2000).

One might argue that these problems are inevitable. Each country must be entitled to have its own civil procedure system reflecting its cultural norms. This must mean that local lawyers will be needed. This whole approach has the support of Article III of the New York Convention which makes it clear that the method by which foreign awards is recognised is a matter for the legal systems of the countries in which they are relied upon. Against that, the tangles in which countries discussed here have found themselves in when trying to adapt their appellate systems to arbitration suggest that there needs to be a better alternative.

A look at these awkward attempts to adapt local rules to applications to set aside arbitral awards shows clearly that, for this purpose, an arbitral award does not fit comfortable into the classification of a municipal judgement. If it something different, perhaps it deserves a distinct treatment. At the same time, there has been a clear trend towards developing what one distinguished lawyer has called “un droit commun de l’arbitrage dans les pays habituellement choisis comme siège d’arbitratges commerciaux internationaux” “a common law of arbitration in the countries regularly chosen as seats of international commercial arbitrations”.[71] Are we ready now for a Model Civil Procedure Law to govern court applications relating to international arbitrations. Simple clear application forms indicating the documents to be filed in support of each party’s position could enable foreign lawyers to deal with much if not all of court proceedings relating to arbitration. A sensible relaxation in the rights of audience would enable courts to become more familiar with foreign cases decided often enough on the basis of statutes with common juridical origins. The input of local lawyers could be significantly reduced except where it is likely to add genuine value.

VIII: THE ULTIMATE STORY OF IMPERIALISM AND CHAUVINISM IN INTERNATIONAL ARBITRATION: LAWYERS, STATUTES AND SCOUNDRELS - ATTEMPTED GENOCIDE

To conclude, it is appropriate to step outside the four top arbitration countries to one that should have been in that list: Germany.[72] With one of the three largest economies in the world and a pivotal geographic position in Europe, Germany should be one of the top arbitration nations. It was the origin of much original thinking about arbitration and procedural matters. The original Yearbook of International Commercial Arbitration was produced in Germany in the 1920s and appears to have been the model for the current Dutch-produced version we have today. Yet Germany hosted only 138 ICC cases in the 1989-1999 period: a number not much over a half

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[71] C. Reymond, Preface to A. Samuel, Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law, Schulthess, Zurich 1989 at p. 3. If anything, the trend has become more pronounced with the English Arbitration Act 1996 since this was written.

[72] O Sandrock, “International Arbitration in the Federal Republic of Germany: A Hitherto Missed Opportunity”, 1 American Review of International Arbitration 49 (1990)

of the UK total (the lowest of the top four). This is consistent with its historical performance.

The main reason for this is, I believe: the rise to power of a racist anti-semitic regime in 1933. This is not the place to write the biographies of the generation who left Germany in the 1930s or who never returned there to work permanently. Arthur Nussbaum, the author of the original three yearbooks fled to the USA. So did Martin Domke, the leading light on the international side of the American Arbitration Association. Francis Mann, one of the greatest modern exponents of both private and public international law and a major international arbitration force ended up in London. Michael Kerr, also settled in London, becoming one of the top barristers in the arbitration field and then a Court of Appeal Judge and writer on the subject. Clive Schmitthoff was discussing the lex mercatoria long before it became fashionable in Continental European circles. This list merely scratches the surface.

At a more modest level, the damage may even have been greater. A whole generation of lawyers and their children left Germany, never to return. Businessmen and their advisers from countries that suffered from the attempted genocide vowed not to return to Germany and Austria if they could avoid it. They would trade with these countries but they saw no reason to have their disputes resolved there.

This whole subject dwarfs a paper on arbitration. Perhaps, though, the message is that the rise of racial intolerance is a much greater threat to the progress of international arbitration and so many other far more important things than defective laws and poor civil procedure. It all pails by comparison.

IX: CONCLUSION

In the 1989-1999 period, about 78% of ICC arbitrations took place in four countries. Perhaps, what is notable about this paper are the omissions. These states do not discriminate spectacularly in their arbitration statutes against foreigners. Their Governments do not intervene to sabotage proceedings that might go against them. They aim to provide legal frameworks for arbitration which welcome foreign businessmen and practitioners.

As countries, they reflect their openness in different ways. The cultural frame of reference that each of us has determines the aspect of this that catches the eye. France was the recipient of the great black American jazz musicians and entertainers who had been discriminated against at home. Switzerland, as a country, plays host to an extraordinarily high number of foreign residents and international institutions. The USA was the original melting-pot into which people came seeking their fortunes, fleeing from religious persecution and poverty. Finally, England, where I come from, has one of the most vibrant traditions of multiculturalism and political stability in the world.

Each of these countries, though, has blots on their political and cultural tradiitons too numerous to list here. This ambivalence to multiculturalism, sometimes concealed in

the form of commercial enthusiasm is reflected in some of the legal and practical issues discussed in this paper.

Yet, if there is a message from the fact that many an innocent mistake in an arbitration statute can be construed as chauvinistic, it is this. Obscurantism, attempts to steal a march on other countries by any other means than adopting the very best practice, can damage a country's arbitration industry. Domestic users will not go abroad. So they can be discounted. If countries want the balance of payments advantages of international arbitration, they have to leave themselves open to competition from foreigners. The exposure of their local lawyers to these international influences can only improve standards.

When the Swiss Government with help from private donors set up the Swiss Institute of Comparative Law twenty years ago, it made an inspired decision from which this author, like many others, benefited. It decided to recruit staff and scholars from around the world, rather than fill the Institute with Swiss lawyers who could speak the relevant languages. The same applied to the library staff. The result was not just to increase the technical competence of the institution but to extend the cultural knowledge of all who came into contact with the Institute far beyond anyone's wildest dreams. If you cannot learn to be ethnically and culturally tolerant in the Swiss Institute of Comparative Law's environment, you do not have a chance anywhere else. Thank you.