

CI Arb Talk – Hong Kong 20 March 2015

Closing Remarks

Salim Moollan, Essex Court Chambers

My Lords,

Distinguished Delegates,

Ladies and Gentlemen,

It falls to me to bring this commemorative conference to a close. I am most grateful to Neil Kaplan QC and to the Chartered Institute for giving me this opportunity to address you, and to the HKIAC for their flawless organisation of this event. This is of course a momentous year for HKIAC, upon its 35th anniversary, and I very much look forward to coming back here in May for the ICCA Hong Kong Summit and Judges' Forum. I was also interested to hear the reassuring words of the Secretary for Justice for Hong Kong yesterday – a timely reminder that the rule of law is alive and well in Hong Kong. Indeed the presence of Lord Neuberger, of Sir Bernard Rix or of Chief Justice French here today is ample testimony to that fact.

I would like to take you back to where this conference started, with the inspiring addresses of Chief Justice Ma and of Lord Neuberger. To the place of the rule of law in arbitration.

Lord Neuberger's conclusion yesterday was that "*arbitration is not simply compatible with the key features of the rule of law (understood in its wide sense)_ but ... has an increasingly important role to play in upholding those key features, both nationally and internationally*". He reminded us that, while "*over the past forty years national legislation and international conventions have famously given arbitrators ever increasing freedom and power by restricting interference by the courts with arbitrators' procedures and awards*", "*any increase in freedom or power carries a concomitant increase in responsibility, and an*

increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights”.

Chief Justice Ma – it seems to me – expressed very much the same view, concluding that “*arbitrators and the arbitral process are ... part of the administration of justice*” and asking how, in the absence of transparent processes, the public at large – “*the community*” as he put it – can be satisfied that arbitration is discharging the obligations thus placed upon it.

These questions, expressed yesterday by way of kind reminders and interrogations, are no different from that asked in more stark terms by Chief Justice Menon three years ago at the opening of the ICCA Congress in Singapore: is arbitration able to regulate itself and discharge its obligations as an integral part of the global system of administration of justice, or do States need to intervene to put a check to the way it operates? Do we deserve the increased freedom that has been granted to us?

These are important questions, which deserve more than the complacent answers usually served up at arbitral conferences. My remarks today will be structured as follows:

- I will first consider the issue from a theoretical point of view, using the framework posited by Prof. Gaillard in his seminal work *Aspects Philosophiques de l'Arbitrage International*, translated into English as *Theory of International Arbitration*;
- I will then look at a practical example, which also comes from France, not because there is anything wrong with that jurisdiction or with its arbitration regime, but precisely because it is such an advanced arbitral jurisdiction, the home for over 60 years of leading academics such as Prof. Jean Robert, Prof. Goldman or Prof. Fouchard.
- I will then consider the question from the perspective of UNCITRAL’s recent work and of ICCA’s continued work, before concluding with the special role which the Chartered Institute can play in this area.

(1) *Theory*

First, a little bit of theory, always the best way to wake everyone up for a 5 pm closing address on a Saturday. Most of you will be familiar with Prof. Gaillard's 2007 Hague Lecture, which has since been published as a book in French and in English, and has been referred to *inter alia* by the House of Lords in *Dallah*. Prof. Gaillard posits three alternative models, or conceptual frameworks, for international arbitration:

- (a) The territorial model;
- (b) The multilocalised, or Westphalian, model;
- (c) The delocalised, or transnational, model.

These three conceptions of arbitration provide a telling picture of the use which we may in fact be making of the increased freedom which States have been granting us over the past forty years.

(a) The territorial conception:

Starting with the territorial conception, this is by far the most traditional of the three – that which one can expect every State, certainly every State judge, to have prior to embarking upon the forty year journey of liberalisation.

The *locus classicus* for this point of view remains Francis Mann's article of 1967 in a *Liber Amicorum* for Martin Domke, *Lex Facit Arbitrum*. In the raging debate which he was then having with Professors Goldman and Fouchard as to the alleged existence of an autonomous 'arbitral legal order', Dr Mann identified the issue as going to the very roots of arbitration: is arbitration an autonomous process created by the parties' will, or is it a limited

process existing solely through a State's derogation from its sovereign power to render justice?
His answer was unambiguous:

“ ... it would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as a result of freedoms granted by himself.”

In other words, arbitration can only exist within the legal framework of a given State, that of its seat. It is fundamentally territorial in nature and is anchored in the national legal order of the seat.

It is clear that this territorial conception of international arbitration remains prevalent in a number of legal systems today. England remains a prime example, as do most Commonwealth jurisdictions as – I suspect – Hong Kong.

(b) The multi-localised or Westphalian conception

Prof. Gaillard's second model is referred to as “multi-localised or Westphalian”. This conception is based on a simple idea: one of the main reasons for the very existence of international arbitration as we know it today is the fact that the vast majority of countries are prepared to give effect to an award under the New York Convention.

On a pragmatic level, it is argued, the Courts of the countries where the losing party has assets, and where the award will be enforced, have more legitimacy to scrutinise the award than the Courts of the country where the arbitration happens to have taken place. In particular, they may have to assist the enforcing party with their powers of coercion.

On a theoretical level, this leads one to minimise, if not altogether discard, the role of the country where the arbitration has its seat in favour of an increased role for all those countries where the award may be enforced. The arbitration is no longer localised at the seat, it is multi-localised at all possible places of enforcement. It exists not because the sovereign

of the place of arbitration consents to its existence but because the sovereigns of the places of enforcement are willing to recognise the binding force of its result, the award.

One can first note that this conception has the merit of dealing with one of the main criticisms usually levelled at ‘de-localised’ theories: that the agreement of the parties to arbitrate cannot exist in a vacuum, and that it must derive its binding force from a given legal system. In the multi-localised conception, the binding force of the agreement to arbitrate does exist through one or more legal systems, but is checked *ex post* at the time of enforcement by reference (usually) to Article V of the New York Convention, not *ex ante* by reference to the rules applicable at the seat.

Secondly, one must also note that this conception does find support in the New York Convention itself. In particular, whereas the 1927 Geneva Convention made recognition and enforcement of an award dependent on “*the award [having] become final in the country in which it has been made*”, the New York Convention was expressly meant to get rid of this so-called requirement of ‘double exequatur’.

The main problem however with the multi-localised theory, as noted by Prof. Gaillard, is that it is unstable from the point of view of the tribunal in that it does not give the tribunal answers to a number of crucial problems.

For instance, if one looks at the question of mandatory rules which may potentially apply to an arbitration irrespective of the parties’ substantive choice of law. If the arbitration is in England and one applies a purely territorial approach, there is a simple answer. One refers to the *lex arbitri* – English law – to identify which other systems of law might have a bearing on the proceedings.

Under the multi-localised conception on the other hand, which mandatory rules is the tribunal supposed to apply? It cannot possibly be expected to apply all the mandatory rules of all possible States of enforcement. Apart from practical difficulties, this would lead it to the lowest common denominator, the more interference prone, of all these systems.

For that reason, Prof. Gaillard argues that the arbitrator must move to a more radical conception, the so-called transnational conception.

(c) The transnational approach

In a nutshell, the transnational approach consists in wholly ignoring the parties' choice of seat as being irrelevant. What matters is the parties' choice of international arbitration, and that carries with it a choice of a completely separate, autonomous regime, with its own substantive rules. These rules are said to exist within their own autonomous legal order, an arbitral legal order disconnected from any national legal order.

Some, but not Prof. Gaillard, seek to defend that conception on the basis of a 'natural law' approach. Such an approach would give an autonomous legal effect to the parties' agreement to arbitrate irrespective of any national law.

Prof Gaillard on the other hand places emphasis on the asserted premise that most States are now agreed as to the fundamental notions which underlie international arbitration.

On a practical level, such an approach would enable an arbitrator to ignore a mandatory rule of the seat which is "out of step" with what the arbitrator considers to be established and accepted arbitral practice. One example given in the Lecture is that if Ethiopia requires its arbitrators to draft their awards on yellow paper, an international arbitrator sitting in Ethiopia is free to draft his award on pink paper, because the majority of nations would allow him to do so.

Our – arbitral – community readily understands this. But what about the wider community?

Start with the Ethiopian judge. There can be little doubt that there will be utter bewilderment on his part as to how a tribunal seated in his home jurisdiction can somehow ignore the rules designed by his State to govern arbitrations seated there. And other judges from developing countries who are exposed to such theories and methods are bound to share that disbelief, and to question a dispute resolution process which can lead to such results. So that a method crafted to assist the arbitral process in specific cases may in fact end up undermining the long term acceptability and legitimacy of international arbitration as a form of dispute resolution overall.

But one need not go to Ethiopia to find incomprehension. Let's stay in France, and I now turn to my practical example.

(2) A practical example

We heard this morning about the Tapie case. For those of you who are not familiar with the case, Mr Tapie is a prominent and controversial French businessman. Many years ago he purchased Adidas, the sports brand, with the help of loans from Crédit Lyonnais, the French Bank. He could not repay the loans, the Crédit Lyonnais caused the asset to be sold at – it was alleged – a gross undervalue, and it was resold a short time later at a much inflated price. Mr Tapie sued before the French courts. This part of the Crédit Lyonnais's business was bailed out by the French State, so that Mr Tapie's law suit was effectively against the State.

The case was bogged down in the French courts for many years, much in the way frequently associated with Courts from the developing world. Mr Tapie and the French State then agreed to arbitrate the dispute, much in the way in which developing States are frequently asked to arbitrate their disputes by parties from the developed world.

There have since been very serious allegations, recently upheld by the Cour d'Appel de Paris, that the agreement to arbitrate and the arbitration itself were marred by fraud. But what is interesting, and the reason I refer to this example today, is the reaction of the ordinary

French public when it first learned that this dispute had been arbitrated, prior to any evidence of fraud coming to light. The questions asked in the mainstream press at the time were along the following lines:

- What is this illegitimate form of dispute resolution which takes place behind closed doors?
- How can the fate of millions of Euros worth of public funds be left to three private judges?

So that this sort of reaction is not limited to developing jurisdictions still at the beginning of the forty year journey. They extend to the general public in developed countries in a way which shows – in my respectful submission – that there is a very real disconnect between us, arbitral practitioners, and our wider communities. And this not only in the field of investment arbitration – which as we heard from Chief Justice French this morning is coming under ever increased scrutiny.

What is the answer? How can we convince our communities, and those who have granted us our freedom and who may yet take it back through more regulation, that we are faithful servants of the rule of law?

Here, I would – with great diffidence and with the utmost respect – venture to depart somewhat from the thoughts expressed by Lord Neuberger and Chief Justice Ma yesterday. Transparency is certainly not a panacea, but it seems to me that transparency does have a significant “disinfecting” role to play in our field, to use Lord Neuberger’s term.

- It can do much to rebuild public confidence in arbitration as part of the global system of administration of justice.
- It can also – and importantly – ensure that all of us act and are seen to act in furtherance of, and in conformity with, the rule of law.

And this leads me to the third and final strand of these closing remarks, the recent work of UNCITRAL and ICCA in this area.

(3) The work of UNCITRAL and ICCA

I have come to this Conference straight from Mauritius where we celebrated – on Tuesday of this week – the signature of the UNCITRAL Convention on Transparency in treaty-based investor-State arbitration, in short the Mauritius Convention on Transparency.

As you will be aware, UNCITRAL adopted new rules on transparency in investor-State arbitration last year. The transparency regime under those rules include:

- The publication on a registry to be maintained by UNCITRAL of basic information as soon as arbitral proceedings are started;
- The publication – subject to the protection of commercial confidentiality and of state secrets – of memorials, witness statements and experts as of right, and of further documents under the control of the tribunal;
- Rights of intervention by interested third parties by way of amicus curiae briefs, and by the State of the investor with respect to the interpretation of the relevant treaty;
- Public hearings, again subject to the protection of commercial confidentiality and of state secrets;
- Public awards.

However, the transparency rules only apply to investment treaties concluded after their entry into force on 1 April 2014, thus making them of little practical use with respect to the 3,200 or so investment treaties which were already in existence as of that date. The Mauritius Convention is meant to give those States that wish to extend the transparency regime to their existing treaties the power to do so. Taking the most simple example, that of a bilateral investment treaty, the Convention works in the following way:

- If both State Parties to the BIT have acceded to the Convention, the Convention operates as a “*successive treaty relating to the same subject matter*” as the BIT within the meaning of Article 30 of the VCLT, so that the original offer of non-transparent arbitration under the BIT is modified into an offer of transparent arbitration;
- If only the Respondent State in the arbitral proceedings (the Host State of the investment) has acceded to the Convention, the Convention cannot have that modifying effect, but the Convention still operates in a more limited way to extend an offer of transparent arbitration additional to the original offer of non-transparent arbitration under the BIT. It then falls to the investor to decide which regime (confidentiality or transparency) it wishes to opt for when starting the arbitration.

It has been said that the UNCITRAL transparency rules and the Mauritius Convention have operated a paradigm shift in investor-State arbitration from confidentiality to transparency, and I would respectfully agree. They are also increasingly seen as potentially leading the way on two fronts.

First, with respect to further reforms of the ISDS system, through use of the Article 30 mechanism of “*successive treaties relating to the same subject matter*” for the creation of multilateral regimes designed to modify investment treaties and perhaps even the ICSID Convention itself. It remains to be seen how much weight Article 30 can take, but one proposal has for instance been the use of that mechanism to create a multilateral appeal mechanism. Less ambitiously, it could be used to address the problem of abusive concurrent proceedings in investment-arbitration and that is something which UNCITRAL is looking into.

Secondly and separately, it raises the question – once taboo – of the extent to which confidentiality should remain as a basic tenet of commercial arbitration. When the idea of transparency was first introduced into UNCITRAL’s work by NGOs and by Prof. John Ruggie, the UN Special Representative on business & human rights appointed by the Secretary-General of the United Nations, their demands were for a transparency regime which would apply not only to investment arbitrations, but also to all commercial arbitrations

involving a State or a para-Statal body. The reaction from traditional circles – in that instance from the Milan Club of arbitrators – was predictably fierce. But one may wonder whether the case for confidentiality is not much overstated. Can commercial and state secrets not be protected without a blanket ban on publication and on the disinfecting light of public scrutiny? The UNCITRAL rules on transparency appear to demonstrate that they can. And much would be gained in terms of legitimacy and accountability if our communities could see for themselves that what we profess is true: that we do abide by, uphold, and contribute to the rule of law.

Conclusion

As I noted at the beginning of this talk, these are serious issues which deserve serious consideration. The ICCA Miami Congress began that process, and sought to analyse the extent to which a number of perceived legitimacy concerns in our field were well-founded. We will continue the process at the ICCA Mauritius Congress next May, and will seek to analyse the extent to which international arbitration does conform with, and contribute to, the rule of law.

States like Mauritius that embrace and promote international arbitration do so not to line the pockets of commercial arbitration specialists, but because they are told, and perceive, that international arbitration is an essential component of the global system of administration of justice. It falls to us to ensure that we deliver what they are buying into.

The Chartered Institute with its vast global and diverse membership has much to contribute in this respect. As has frequently been observed within UNCITRAL itself, there is currently a lack of implementation and dissemination of the rules and ideas devised by specialist bodies such as UNCITRAL. As they look to shape the future of arbitration after a century of successful operation, your 13,000 members are ideally placed to ensure that arbitration remains a vibrant and legitimate form of dispute resolution. That beyond our immediate commercial interests we take to heart our central task of upholding and contributing to the rule of law.

I thank you for your attention.