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Editorial	211
In the News / Actualité	
MONICA FERIA-TINTA and GUGLIELMO VERDIRAME / The Entry into Force of the Human Rights Act, 1998	213
CATHERINE CISSE / Nations Unies: le rapport Brahimi	218
Recurring Themes / Thèmes récurrents	
<i>Globalisation / Mondialisation</i>	
ELLEN HEY / Introduction: Globalization and International Organizations	220
HERBERT KRONKE / UNIDROIT: Current Work Programme and Future Challenges	224
WALTER SCHWIMMER / The Effects of Globalisation on Law: the Impact on the Council of Europe	227
HANS VAN LOON / Globalisation and The Hague Conference on Private International Law	230
TJACO T. VAN DEN HOUT / The Permanent Court of Arbitration: Responding to a Century of Globalization	235
GILBERT GUILLAUME / La mondialisation et la Cour internationale de Justice	242
Work in Progress / Travaux en cours	
NINA HALL / The Prospects for International Adjudication	245
Conference Scene / Le tour des conférences	
LOUKAS MISTELIS / Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards	248
SAMUEL P. BAUMGARTNER / Debates over Group Litigation in Comparative Perspective	254

*The opinions expressed herein are those of the authors and
do not necessarily reflect the views of the
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Editorial

Vol. 2, No. 4

This issue of the FORUM is more than ever about change, about how States, courts and, especially, international organisations, are grappling with the transformation of the environment in which they operate and re-examining their roles within it. No-one who reads this issue will be left in any doubt about the sweeping nature of that transformation.

For 'In the News', we have chosen to cover the enactment into national law in the United Kingdom of the European Convention on Human Rights, and also the recent report of the UN working group which unflinchingly highlights grave deficiencies in the handling of peacekeeping operations, and presents the UN with a series of challenging recommendations. In 'Work in Progress', we follow the evolution of the Project on International Courts and Tribunals. 'Conference Scene' looks at two events held in July of this year: the first is the workshop on public policy and the enforcement of international arbitral awards, which formed part of the ILA 2000 conference, and the second a conference held in Geneva to examine different techniques of group or class litigation under various legal systems.

Our 'Recurring Theme' is an ambitious one: globalisation. Its impact on international organisations is the subject of the Introduction to the section by Ellen Hey. Globalisation was, not surprisingly, a theme which featured prominently in the plenary sessions at the London conference of the ILA. The increasing stress placed on international organisations in regulating and countering the negative effects of the phenomenon was a concern which strongly underlay the statements made by a number of the distinguished multidisciplinary experts who gathered to debate the future of the international monetary system, the World Trade Organisation, and the relationship between development and human rights.

It was acknowledged at ILA 2000 that, if globalisation is not to be allowed to result in the reinforcement and even exacerbation of the gulf between rich nations and poor, in other words the institutionalisation of a two-speed world economy, organisations such as the WTO need urgently to be strengthened by the inclusion of the needs of developing countries in a new world trade agenda. Democracy and human rights should be advocated as values on their own merits, and not simply presented – implausibly – as by-products of increased global prosperity. And that, while the rule of law will ultimately prove more vital than ever in upholding those values and balancing different interests, some of the most tangible and consistent

advances to date have taken the form of 'soft law': standards, guidelines, best practices and consultative mechanisms.

The whole theme is one to which the FORUM will be returning. We hope you will find this issue rich in content as well as broad in scope, and, as always, we encourage you to add your contribution to the unfolding debate.

In the News / Actualité

The Entry into Force of the Human Rights Act, 1998 in the UK

MONICA FERIA-TINTA and GUGLIELMO VERDIRAME*

Introduction

The Human Rights Act, 1998, officially entered into force in the UK on 2 October 2000. In Scotland and Wales, however, as a result of the legislation on devolution, the regional executives and assemblies have been bound to observe the rights guaranteed by the Act since 1998.

The rights that 'are to have effect' under the Act are those enshrined in the European Convention on Human Rights (ECHR) – subject to designated derogations and reservations – and are indeed referred to as 'the Convention rights' throughout the Act. The only Convention right that is excluded from the Act is the right to an effective remedy (Art. 13, ECHR). The Act does not incorporate the full spectrum of human rights obligations incumbent upon the UK under international law. Not only does it leave out economic, social and cultural rights, the scope of civil and political rights which are accorded protection is also rather narrow. In particular, the Human Rights Act does not incorporate, as such, a self-standing right of non-discrimination, which can be found in the International Covenant of Civil and Political Rights. Hence, under the Act, as is the case under the ECHR, individuals are only protected from discrimination when this occurs in respect of the enjoyment of one of the Convention rights.

The decision to reproduce the rights protected under the ECHR without new drafting certainly sped up the process of adopting the Act, sparing inexorably lengthy discussions on the substantive rights to be included. The price to pay, however, was to leave the Act exposed to criticism for not being the result of a truly open and engaging debate, arguably necessary to bring about the wide-reaching changes in societal attitudes that should underpin legislation of this kind.

The long title of the Act specifies that it is meant 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. As the use of the word 'further' implies, courts were taking the ECHR into account prior to the entry into force of the Act, although they could not apply its provisions directly. In particular, whenever faced with ambiguity or uncertainty in the

* Monica Feria-Tinta is a doctoral candidate teaching public international law and human rights law at the London School of Economics; Guglielmo Verdirame is a Fellow of Merton College, Oxford.

interpretation of a statutory provision or in the common law, courts have striven to uphold the principles of the ECHR. Although the Human Rights Act has been viewed by some as a belated incorporation of the ECHR into UK law,¹ the parliamentary debates reveal that this was not the scheme of the Act especially because of the limits on the justiciability of the Convention rights.² In spite of this, the Act should still succeed in putting an end to the 'informal attitude towards the European Convention' within the judiciary³ by creating a clear, albeit perhaps not ideal, legal framework for courts to give due consideration to the Convention rights.

Principles of interpretation

Courts are required to take into account the European case-law, but they are not bound by Strasbourg precedents. Only time can tell whether this will result in the development of a more restrictive approach to Convention rights by UK courts or not.

Under Section 3, legislation must as far as possible be read and given effect in a way which is compatible with the Convention rights. This Section adds that the validity, continuing operation or enforcement of any primary and, in some cases, of subordinate legislation which is incompatible with the Convention rights is not affected.

Declaration of incompatibility

Section 4 introduces a significant innovation from the point of view of constitutional law. This provision establishes a 'soft' form of judicial review of legislation. Courts are not given the power to strike down Westminster legislation if this is found to violate one of the Convention rights, but they *may* issue a non-binding declaration of incompatibility.⁴ The declaration is not a mandatory act, but a discretionary remedy, and does not 'affect the validity, continuing operation or enforcement' of the incompatible provision.⁵ Quite importantly, the merits of the case, in which

¹ See the 'Introduction' in L. Betten (ed.) *The Human Rights Act 1998: What it means* (1999).

² See the passages from Report of the Lord Chancellor to the House of Lords quoted in P. Chandran, *A Guide to the Human Rights Act 1998* (1999) at 10.

³ Betten, *supra* note 1, at 2.

⁴ Only the higher courts (the House of Lords; the Judicial Committee of the Privy Council; the Courts-Martial Appeal Court; the High Court and the Court of Appeal in England and Wales; and the High Court of the Judiciary in Scotland) have jurisdiction to make a declaration of incompatibility.

⁵ But, under the Scotland Act 1998 and the Wales Act 1998, courts in Scotland and Wales have the power to strike down legislation of the respective regional assemblies, the Scottish Parliament and of the Welsh Assembly, if incompatible with a Convention right.

the question under the Act arose, will still be decided by applying the incompatible provision. As a result, judges in Britain may have to learn to live with some measure of 'cognitive dissonance': they will have to apply legislation which they have found to be contrary to human rights. The declaration of incompatibility amounts simply to a signal to the government and to Parliament that a certain provision does not conform to the standards of the Convention. Parliament is under no obligation to review or modify the affected provision.

For future legislation, the Act establishes a political rather than judicial control of compatibility. Before Second Reading of a Bill in Parliament, under Section 19 the government has to make a statement declaring that the proposed legislation is compatible with the Convention rights. However, even if the government admits that it cannot make a statement of compatibility, it can still proceed with the Bill, for which no qualified majority is required. Courts play no role at this stage, as would be the case, for example, in France where the *Conseil constitutionnel* has the power to review proposed legislation and strike it down if it is found to be unconstitutional.

Acts of public authorities and remedies

The Human Rights Act introduces a 'victim requirement' test: only persons who claim to have been, or to be, the victims of an unlawful act of a public authority can bring an action under the Act, or rely on the Convention rights in the course of other legal proceedings.

Section 9 provides that a court or tribunal may grant relief or remedy or make such order within its jurisdiction as it considers appropriate where it finds that an authority has acted unlawfully. It also specifies the circumstances in which an award of damages may be made. However, the Act does not require courts to award damages, it only allows a court 'to grant relief or remedy, or make such order ... as it considers just and appropriate'.

While public authorities in principle have to observe a Convention right, two important exceptions are made. Firstly, public authorities can act contrary to a Convention right if their act is based on primary legislation which does not allow for a different course of action. Secondly, public authorities can continue to give effect or enforce incompatible provisions of primary legislation. In these cases, it is the legislation underlying the conduct of the public authorities that has to be challenged.

As mentioned above, the right to an effective remedy has been excluded from the Human Rights Act, presumably because it was assumed that the Act itself constituted an effective remedy. However, the Act may not always offer an effective remedy to victims. To give a topical example, an asylum-seeker who alleges a violation

of his/her rights under Art. 3 (Prohibition of torture and cruel, inhuman and/or degrading treatment or punishment) or under Article 5 (right to liberty and security) of the ECHR can only request a non-binding declaration of incompatibility, if the public authority contends that its conduct was based on primary legislation. Courts may find that the asylum-seeker's Convention rights have actually been violated, but will not be able to put an end to the violation. From the point of view of the victim, it could thus be argued that this 'soft' declaration does not constitute an effective remedy, especially since he/she will still suffer from the continued application of the incompatible provision and will not be awarded compensation. Cases could thus be brought before the Strasbourg Court under Art. 13 (right to effective remedy) on the grounds that the very remedies offered by the Human Rights Act are not satisfactory.

Conclusion

The Human Rights Act would not constitute a Bill of Rights in the eyes of constitutional lawyers from most other legal systems. It is not entrenched legislation; it leaves parliamentary sovereignty intact, on the one hand, by preventing courts from striking down primary legislation, and, on the other, by ensuring that Parliament can enact new legislation that contravenes the Act without recourse to a qualified majority.

Whether the impact of the Act will be significant or not will depend on what the courts, and the public, will make of it. It could turn out to be an example of the way of bringing about momentous changes that Pareto considered quintessentially British: saving appearances while changing the substance. Indeed, while the Act leaves Parliament's sovereignty absolute, the 'soft' system of enforcement through a non-binding declaration of incompatibility could still yield enough pressure to prompt Parliament to modify legislation incompatible with a Convention right. When presenting bills in Parliament, government may also be compelled to make a truthful assessment of the compatibility of the proposed legislation with the Convention rights, since the political cost of declaring a Bill compatible, only to be later contradicted by the courts, could be too high. The passing of legislation declaredly inconsistent with fundamental rights, on the other hand, could also prove politically risky.

The influence of the Act is going to be greatly felt in the sphere of public law since all organs and authorities exercising public functions are now under a duty to observe the Convention rights. This could produce a change of institutional culture and underlying attitudes towards rights. As noted by Michael Beloff, 'at present our domestic courts have, in the public law sphere, to answer the question whether the public authority has exceeded its powers (or failed to fulfil its duties), not as

such whether it has sufficiently respected an individual's right... [As a result of the Act] there will then be a change of emphasis from the negative to the positive. But even the positive will change in character. The protected interests will be transformed from liberties to entitlements'.⁶

⁶ Beloff, 'What Does it All Mean', in Betten (ed.), *supra* note 1, at 12.

Nations Unies: le rapport Brahimi

Suite aux deux rapports constatant l'échec de l'ONU à Srebrenica en 1995 et au Rwanda en 1994, le Secrétaire général a mis sur pied un groupe d'étude des opérations de paix de l'ONU. Le groupe, présidé par M. Lakhdar Brahimi, a remis au Secrétaire général en août un rapport approfondi¹ sans concession sur les déficiences des opérations de paix proposant des recommandations concrètes en vue de faire de l'ONU une force de paix crédible et efficace. Le rapport Brahimi sera analysé de manière plus détaillée dans un prochain numéro de FORUM sur les opérations des Nations Unies.

Le rapport dénonce l'inadéquation existante entre le mandat de maintien de la paix des forces de l'ONU et la réalité complexe existant sur le terrain lorsqu'une partie à un accord de paix en viole les clauses. Une telle situation peut, dans certaines circonstances, rendre l'ONU "complice du crime" en raison notamment de sa neutralité. Le groupe recommande que des règles d'engagement fermes soient adoptées pour permettre aux soldats de la paix de se défendre eux-mêmes, et de défendre le mandat de la mission. Cela implique que non seulement le recours à la force devrait être prévu dans les mandats mais aussi que des moyens adéquats soient mis à la disposition de ces forces, y compris ceux relevant de la sphère du renseignement.

Le succès de l'établissement d'une mission de maintien de la paix présuppose que le Secrétaire général recommande au Conseil de Sécurité des effectifs et des moyens calculés sur la base de scénarios réels et que le Conseil de Sécurité diffère l'adoption d'un projet de résolution jusqu'à ce que le Secrétaire général ait obtenu, de la part des Etats membres, des promesses de fournir des moyens suffisants. Par ailleurs, le groupe recommande que l'ONU déploie pleinement des opérations de maintien de la paix de type classique dans un délai de 30 jours à compter de l'adoption de la résolution du Conseil de Sécurité ou dans un délai de 90 jours dans le cas d'une opération complexe. Une liste d'une centaine d'officiers expérimentés sous astreinte, dressée dans le cadre du système de forces et de moyens en attente, permettrait de constituer des équipes disponibles dans les sept jours, chargées de préparer des plans d'opérations concrets et tactiques avant le déploiement des contingents. Un système similaire devrait être mis en place pour le personnel de police civile et les experts en matière de droit pénal et des droits de l'homme. Parmi les autres recommandations importantes du groupe d'étude figurent: – la création d'une unité de gestion de l'information et d'analyse stratégique (SIAS)

¹ A/55/305 S/2000/809: Rapport remis au Secrétaire général le 17 août 2000.

chargée de créer des bases de données intégrées, de formuler des stratégies; – la mise en place par le Secrétaire général d'un groupe de juristes internationaux étudiant la possibilité et l'utilité d'élaborer un code pénal international lorsque les opérations de l'ONU exercent un pouvoir exécutif; – la création d'équipes spéciales intégrées pour la planification des missions et des services d'appui.

Le groupe d'étude recommande également une série de mesures de type opérationnel et administratif visant à renforcer les capacités des Nations Unies dans le domaine de la paix et de la sécurité.

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Recurring Themes / Thèmes récurrents

Introduction: Globalization and International Organizations

ELLEN HEY

The manifestations of globalization or mondialisation, in French, are many and varied. Its most salient manifestation probably is the increased ease with which individuals engage in transnational contacts – whether by way of the internet or phone, physical travel or the products that we buy in the corner-store. These contacts also have their ‘flip side’ – employees increasingly suffer from stress as a result of the around the clock economy, most forms of physical travel result in greenhouse gas emissions and the corner-store is fast disappearing. Most of us participate in the process of globalization – at least as consumers – and all of us may experience its effects – think of, for example, global climate change.

The question that occupied the members of the editorial board of the FORUM is how international organizations are accommodating to the process of globalization and what problems they may be encountering en route. We have purposely asked five ‘insiders’ to comment on the topic. We realize that, given the vastness of the topic, such a small number of contributions can only present an impression of the issues at stake. This is also why we have decided to return to the topic in the next volume of the FORUM. On that occasion we hope to be able to include your views and comments in the discussion. This introduction focuses on questions that are implicitly raised by the five contributions included in this issue.

If ‘globalization’ is defined as “the process enabling financial and investment markets to operate internationally, largely as a result of deregulation and improved communications”¹ then only some international organizations are agents of globalization, while most deal with its effects. A further point that arises with respect to this definition is whether the term ‘deregulation’ suffices. Might ‘national deregulation’ be a more appropriate term for inclusion in the definition? In that case, another role appears for international organizations and international law: the regulation of globalization. In this perspective most international organizations can thus be regarded as forums through which globalization and its effects may be regulated, with international courts and tribunals applying the resulting regulations. Given the fact that globalization blurs the boundary between the local, national, regional and international, we assume that this task places significant stress on

¹ *Collins Concise Dictionary*, 3rd edition, Harper Collins Publishers, 1995.

international organizations, which were originally designed for purposes of coordinating cooperation between states at the international or regional level.

A question that also arises is whether globalization, as defined above, truly is a world wide phenomenon or whether it is its effects that have a world wide character. If we take the contribution by Herbert Kronke on UNIDROIT the relevance of that question becomes apparent. It is noteworthy that UNIDROIT, with its focus on the unification of especially commercial and related laws, might be classified as an agent and regulator of globalization. However, it has only 58 member states, with the small number of developing states parties being particularly noteworthy. Should this be taken to mean that the absentees do not participate in the process of globalization, and its regulation through UNIDROIT?

The contribution by Walter Schwimmer on the Council of Europe points towards a seemingly contrasting development where the effects of globalization are concerned. Schwimmer remarks that the Council of Europe is extending its pan-European focus to include states from other regions of the world with regard to topics such as corruption. Corruption undoubtedly is a phenomenon that as a result of the process of globalization has taken on transnational dimensions of a world wide character. However, the question remains why, in addition to the United Nations, the Council of Europe, as a regional organization, is taking on this task at the global level?

A similar development is noted by Hans van Loon, who writes about The Hague Conference on Private International Law, and mentions that that organization has also expanded its geographical focus from being Euro-centric to being world-wide. This step was first taken with respect to an issue in which the Conference can be regarded as an agent of globalization, contracts for the international sale of goods. More recently, however, a similar broadening of geographical scope also has taken place with respect to issues that concern the effects of globalization, most notably the protection of children. Interestingly, van Loon notes that in the latter case as well as more in general, in order to be effective, the Conference has had to expand its scope of activities beyond the traditional means of attaining the unification of legal systems to include, for example, the opening of channels of communication and cooperation between legal systems. Might this be the case because such procedures leave more room for the divergent social and cultural values that exist at the national and local level?

The developments at the Permanent Court of Arbitration, discussed by Tjaco van den Hout, also are noteworthy. The adoption of procedures that are open to actors other than states and the establishment of the financial assistance fund undoubtedly will contribute to making the system more inclusive. However, these developments also can be regarded as a necessity in view of the process of

globalization. That is to say, disputes will arise as a result of the process of globalization and those involved have an interest in having the option to settle those disputes through law based procedures. However, having the option is not the same as being required to settle such disputes through law based procedures. While equal partners to a global transaction may be likely to both benefit from such an option, it is less clear that those who may experience detrimental effects of globalization will be able to equally profit from such an option.

Might it thus be that globalization, as defined above, is not a global phenomenon in the sense that large portions of the world population do not have access to the world's financial and other markets. But, that the effects of globalization are felt everywhere, even if often in terms of marginalization. If regarded in this perspective, the most significant challenge that international organizations face as a result of globalization might well be how to regulate and counter the negative effects of globalization, both at national and international levels.

How are we in this perspective to regard the caution expressed by Gilbert Guillaume against the proliferation of international law based forums for dispute settlement and his call for a redefinition of the role of the International Court of Justice in terms of a constitutional court or court of referral for other international courts and tribunals? Such a step undoubtedly would contribute towards preventing fragmentation in the international legal system.

However if the process of globalization is to develop subject to the rule of law, another consideration may also be relevant. It is to be expected that national courts will increasingly be required to interpret and apply rules of international law. Such a development also risks contributing to the fragmentation problem. In addition, it may be taken to imply that a forum should be established to which national courts can direct their questions regarding the interpretation of international law. Not only would such a system counter fragmentation of international law, it would also leave the application of the law close to the individuals and groups concerned. Obviously such a development, among other things, would require a major revision of the relationship between international and national law, in most national legal systems.

It is interesting to note that van Loon mentions that The Hague Conference on Private International Law might have to consider establishing a facility along the lines referred to in the previous paragraph. What he contemplates is the establishment of expert panels that could be called upon by courts and parties to a dispute to give legally non-binding interpretations of the instruments that would result from the Conference's project on jurisdiction and recognition and enforcement of judgements in civil and commercial matters. A step that would contribute to the uniform interpretation of these instruments and that, due to the legally

non-binding character of the interpretations, would probably not require a major revision of the relationship between international and national law in most national legal systems.

From the above perspective the real challenge presented by the process of globalization might well be how to find a balance between 'le modèle économique et social que nous fournissons les Etats-Unis d'Amérique' qui 'tend à se généraliser', referred to by Guillaume, and the diverse social and cultural values that are a reality at the local level. International organizations undoubtedly will have to redefine their roles in this process. With this recurring theme column, we open a discussion on how international organizations are, can and should accommodate to the process of globalization.

UNIDROIT: Current Work Programme and Future Challenges

HERBERT KRONKE*

I. Introduction

Next to the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT¹) is the oldest intergovernmental Organisation working in the area of harmonisation and modernisation of private and commercial law. Set up in 1926 as an auxiliary organ of the League of Nations, UNIDROIT today is an independent intergovernmental organisation funded by annual contributions from its currently 58 member States which are drawn from the five continents and represent a variety of different legal, economic and political systems. The General Assembly, made up of one representative from each member Government, approves the work programme every three years, elects the Governing Council (the supervisory and policy-shaping body) every five years and votes the Institute's budget each year.

II. Current Work Programme

1. *Contracts*

Following the overwhelming success of the UNIDROIT Principles of International Commercial Contracts in both contract drafting and commercial arbitration practice as well as their frequent use as a model by legislators in the Americas, Asia and Europe, a new working group is currently busy drafting Part II of the Principles, dealing with agency, assignment, third parties' rights, set-off, limitation of actions and waiver. Furthermore, the group is looking into issues raised by the advent of e-commerce. At the end of this process (so far, three working sessions have been held in Rome, Bolzano and Cairo) we shall have an almost complete general part of rules regarding contractual obligations.

A model law on disclosure and the consequences of insufficient disclosure in franchising will pass from a study group to the governmental consultation process later this year.

2. *Credit, Finance, Capital Markets*

The two 1988 UNIDROIT Conventions on Financial Leasing and Factoring are in force and have been ratified by major trading countries. They have recently attracted

* Secretary General, International Institute for the Unification of Private Law (UNIDROIT), Rome (Italy). Professor of Law and Director, Institute of Foreign and International Private and Commercial Law, University of Heidelberg (Germany) (on leave).

¹ <http://www.unidroit.org>

considerable attention in Latin America, Eastern Europe and Asia. In particular, more ratifications of the Leasing Convention as well as its use as a model for domestic law reform are expected for the near future.

Currently, the most ambitious and time-consuming project is the draft Convention on International Interests in Mobile Equipment (in commercial circles dubbed the asset-backed finance convention), providing for a new international regime of secured transactions geared at reducing credit costs for high-value mobile infrastructure such as aircraft, space objects (in particular, telecommunications and meteorological satellites) and railway rolling stock. Some observers in both the practitioners' and the academic communities envisage extension of the new regime to other categories of high-value mobile equipment such as oilrigs or even ships at a later stage.

The draft Convention, together with a draft Protocol on Matters Specific to Aircraft Equipment, has been approved by the UNIDROIT Governing Council and will be submitted to a Diplomatic Conference in 2001 to be held in South Africa. Protocols on Matters specific to Railway Rolling Stock and to Space Property are under preparation. The former will be submitted to a Governmental Experts Committee later this year. While the intergovernmental process on the texts as related to aircraft equipment is co-sponsored by UNIDROIT and the International Civil Aviation Organization (ICAO) the texts regarding railway rolling stock will be reviewed by intergovernmental bodies co-sponsored by UNIDROIT and the International Rail Transport Organisation (OTIF).

As soon as this centre piece of a broader effort to modernise the law of asset-based finance, which was given priority by governments, will be in place, work on a model law on secured transactions will resume.

In the medium and long-term perspective the law of transactions on transnational capital markets will be the centre of gravity of our activities. The problem areas have been identified and range from cross-border take-overs to issues raised by ECNs and other reasons for the increasing delocalisation and disintermediation of markets to clearing and settlement rules, manipulation of share prices and the privatisation of retirement pension systems. Currently, consultations with stock exchanges, regulating agencies, the financial intermediaries as well as the bar are being held.

3. Protection of Cultural Heritage

The 1995 UNIDROIT Convention on the Restitution of Stolen and Illegally Exported Cultural Objects is experiencing considerable success in some countries and encounters bitter opposition from certain quarters, in particular advocates of unlimited freedom for art commerce. Further promotion efforts and a stronger

commitment on the part of governments in major art trading countries will be crucial.

4. Civil Procedure

UNIDROIT and the American Law Institute (ALI) have joined forces in elaborating Principles and Rules of Transnational Civil Procedure. These rules are designed to cater for the atypical but increasingly frequent situation of litigation involving parties from jurisdictions other than the forum. The Working Group, made up of eminent judges, members of the bar and academics from around the world, has just concluded its first session.

III. Objectives and Tools

While the UNIDROIT Statute provides that “The purposes ... are to examine ways of harmonising and co-ordinating the private law of States and groups of States and to prepare gradually for the adoption by various States of uniform rules of private law” and that the Institute “shall... prepare drafts of laws and Conventions with a view to facilitating international relations in the field of private law...” the emphasis has recently shifted. On the one hand modernisation, i.e. the development of new world-wide solutions for new problems, appears to be more important than unification. On the other hand the classic form of a convention, i.e. a binding treaty which states then have to transform into domestic law, is not the only tool. “Principles”, be they restatements, *ratio scripta*, or pre-statements (i.e. best solutions which have yet to find wider acceptance) as well as model laws, best-practice guides etc. contribute equally to achieving the overarching goals.

The relationship between regional economic integration of varying degree and world-wide harmonisation of commercial law will be the subject of more in-depth analysis.

IV. Subsidiary Activities

UNIDROIT maintains a world-renowned library, publishes the “Uniform Law Review” and is committed to setting up a uniform law database. Its scholarship programme provides for study sojourns for young government officials and academics from developing countries and economies in transition.

The Effects of Globalisation on Law: the Impact on the Council of Europe

WALTER SCHWIMMER*

Never in the history of humankind has so much information been so widely available, so many places so easily accessible or markets so readily open. This new openness is the result of technical achievements coupled with economic development as well as the emergence of new mentalities. Globalisation has obvious positive effects but also carries concomitant risks such as the inevitably homogenising effect upon cultural diversity or the unchecked spread of criminal behaviour. It has also affected the way governments design their policies since the lines between domestic and international issues are becoming increasingly blurred. Moreover, the impact that national or regional interests have at global level has grown steadily.

While the concept of superpowers is still a valid one, the influence that countries exert is not measured in military terms alone, but in economic ones, thus transforming at the same time the very concept of security.

Globalisation has a direct impact on the law, the way it is conceived, its content and its application at national, international and supranational level.

Indeed, it imposes the definition of universal standards affecting the very basis of the organisation of our society. This is particularly so in the case of human rights, where beyond their obvious objective and practical implications, different policies exist regarding compliance and there is a pressing need to ensure greater protection of fundamental values. Therefore, globalisation affects also the definition of legal rules at international level rendering some of the notions of international law.

The Council of Europe, the pioneer among pan-European organisations, which is committed to increased intergovernmental co-operation in Europe and is fundamentally devoted to the promotion and protection of human rights, provides various examples of how the globalisation phenomenon has affected the law as well as the Organisation's very existence and structures and the way it operates.

For instance, in the field of basic rights, the Council of Europe set up, as early as 1950, a most comprehensive and sophisticated system for the protection of human rights which has proven successful and is taken as a model in other parts of the world, such as Latin America. Human rights are enshrined in the European Convention on Human Rights adopted in 1950 and breaches thereof are assessed by an independent body, the European Court of Human Rights placed under the

* Secretary General of the Council of Europe.

aegis of the Organisation. The position that this Court has upheld in respect of reservations to the European Convention – termed the *Strasbourg approach* – has had a profound impact at a universal level. While the Vienna Convention on the Law of Treaties of 1969 provides that States are free to accept or object to reservations made by other parties to a treaty, the Court established that some reservations made by two member States party to the European Convention on Human Rights were inadmissible as they were contrary to the very essence, i.e. the object and purpose of the Convention. Although initially reticent, the member States of the Council of Europe finally accepted this approach, which some endorsed further at international level.

At a global level, the United Nations Human Rights Committee tried to take a similar stand, drawing on the Strasbourg precedent, but it did not succeed. Yet, the effects of the *Strasbourg approach* upon the international community's understanding of human rights and its effective protection have been considerable.

Also in this connection, it is worth noting that in the Dayton Agreements the international community agreed to refer to the European Convention on Human Rights as a basic premise of the rule of law although Bosnia and Herzegovina is not yet a member State of the Council of Europe and this convention applies only to member States, all of which have signed and ratified it as a *sine qua non* for accession to the Organisation.

The effects of globalisation on law have very soon become evident in the work and activities of our Organisation. The Council of Europe has responded speedily to new behavioural and societal challenges by regulating phenomena such as bio-ethics, corruption, organised crime and cyber-crime, through the preparation of international treaties in these complex fields, providing an international legal basis for fighting undesirable behaviour. Some of these treaties are unique and serve as a basis for harmonisation of positions far beyond the pan-European context. For instance, the *Group of States against Corruption (GRECO)*, an enlarged and partial agreement of the Council of Europe, is open to member and non-member States on an equal footing, regardless of their geographical position. This is also the case with the Council of Europe conventions in the criminal and civil fields aimed at fighting corruption. Some Council of Europe instruments have been acceded to by countries such as South Africa, the Kingdom of Tonga, Panama, the United States, Canada, Australia, New Zealand, Costa Rica, Burkina Faso and Tunisia.

Globalisation has also affected the very infrastructure of the Council of Europe. Following the events of 1989, this Organisation saw its membership explode to its present membership of 41 members encompassing states from the Mediterranean to the Barents Sea and from the Caspian Sea to the Atlantic Ocean, thus covering almost the entire European continent. Moreover, a number of countries including

Armenia, Azerbaijan, Belarus, Federal Republic of Yugoslavia, Bosnia and Herzegovina and Monaco have requested admission to the Council of Europe. Thus, we can expect the membership of the Organisation to increase further provided that candidate States meet the necessary criteria for accession.

In addition, a number of non-European States, including Canada, Japan, Mexico and the United States, have requested and obtained the observer status with the Organisation. This fact illustrates a growing interest in the pan-European scene.

The Council of Europe has also seen the membership of its committees expand steadily far beyond the reach of the European continent. The case of the Committee of Legal Advisers on Public International Law (CAHDI) serves to illustrate this. This committee, originally set up as an informal framework for the Legal Advisers of the Council of Europe's member States to exchange views on issues of public international law, and possibly bring their positions closer (particularly with a view to their participation in other international fora, namely the UN), has witnessed an unprecedented succession of requests for observer status from governments and non-governmental organisations. As a result, the CAHDI currently brings together, in addition to the Legal Advisers of Council of Europe member States, equivalent observers from Armenia, Australia, Azerbaijan, Belarus, Bosnia and Herzegovina, the Holy See, Israel, Mexico, New Zealand, the United States, NATO and the OECD. The European Union also takes part in CAHDI meetings.

On the one hand, the Council of Europe is therefore under increasing pressure to take into account developments at universal level and not to focus exclusively upon pan-European specificities.

On the other hand, our Organisation, like other regional international organisations, is called upon to play an increasingly important role on the world stage. Ultimately, this raises the question of the overall UN role as addressed by the UN Secretary General's Millennium Report.

Globalisation and The Hague Conference on Private International Law

HANS VAN LOON*

Globalisation, the growing interconnectedness, worldwide, of individuals, societies, economies and legal systems is, as far as the Hague Conference is concerned, reflected in the increasing frequency with which the Organisation is solicited, both with regard to its “products” – the multilateral treaties that are the Hague Conventions – and its “services” – advice and assistance concerning their practical operation – and, more and more, in an intentionally global approach to new Conventions. This very clearly poses many new challenges to the Conference. Globalisation, reinforced by regional work now also being undertaken on private international law, therefore requires an active strategy on the part of the Organisation.

1 Effects of Globalisation on the Conference

(a) Organisation and Conventions

The last few years have seen a sharp increase in countries linked to the Organisation, whether as Member States or as States Parties to one or more Conventions. Ten years ago they numbered 57. Today they are 107, from all continents. Over the past year or so, five new countries have been admitted as Member States, Ukraine, Peru, South Africa, Jordan and Belarus. Once these States accept the Statute, they will raise the total number of Member States from 47 to 52. Meanwhile, Lithuania and Georgia have also applied for membership. While the pace of ratifications of and accessions to the 34 Hague Conventions adopted since the Second World War varies considerably, the Conventions on judicial and administrative co-operation have seen remarkable growth in recent years. Two of them, the *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961)*, and the *Convention on the Civil Aspects of International Child Abduction (1980)* now have more than 60 States Parties; in the case of the latter, half of the accessions have occurred within the last five years. Considering that these include jurisdictions as far apart as South Africa, Turkmenistan, Brazil and Hong Kong, the global character of the Convention becomes apparent. Other examples: the *Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993)* is now

* Secretary General, Hague Conference on Private International Law. The author gratefully acknowledges permission given by the publishers for using some materials included in I.F. Fletcher, M. Cremon and L.A. Mistelis, *Foundations and Perspectives of International Trade Law*, London (Sweet and Maxwell).

supported by 41 Contracting States within 7 years of its coming into being, certainly a record for Hague Conventions. The *Hague Convention on the Service of Judicial and Extra-Judicial Documents Abroad in Civil or Commercial Matters (1965)* has recently found its way to China, Mexico, South Africa and Sri Lanka.

The effects of globalisation are also reflected in the steady rise seen in the number of visits to the Hague Conference website (<http://www.hcch.net>), which is now in its second year: it currently receives more than 5000 hits per day. The Conference's secretariat also receives increasing numbers of requests for assistance and information, again from all parts of the world.

(b) Global approach in negotiations

The Hague Conference started, in 1893, as an initiative of continental European States. They still dominated the scene after the Second World War, when the Organisation took on its present structure. In the course of the 1960's, the United States, Canada, Australia and other common law countries acceded. Much of the work over the past three decades has been invested in bridging the gap between the civil law and common law traditions. A typical example is the *Convention on the Law Applicable to Trusts and on their Recognition (1985)* which facilitates the operation of the common law institution of the trust, increasingly used as a vehicle for global estate planning, in civil law countries where this institution is generally not known.

In 1980, the Conference decided to open its doors to non-Member States "where the subject matter (...) lends itself thereto". This decision was taken with international trade law in mind, and, for the negotiations on the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, all States were invited and 60 participated. This experiment also brought to the forefront the need to do more in-depth comparative research and to prepare the ground for negotiations by making contacts in non-Member States. This became particularly necessary when the Conference embarked on the drafting of its Convention on intercountry adoption, to which it invited a large number of non-Member States, mostly countries of origin of adopted children. The current negotiations on a Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters are explicitly aimed at achieving a world-wide instrument. The question as to what extent solutions on the European regional scale (Brussels and Lugano Conventions on jurisdiction and enforcement of judgments) can also function at a global level is, at this moment, the subject of an animated debate.

2 Challenges of Globalisation

Increasing participation of new countries with little experience in private international law poses new challenges to the Organisation. More preparation and more, very basic, “after sale” activity with regard to the “products” and “services” of the Conference will be necessary in respect of these countries. One of the aims of “The Hague Project for International Co-operation and Protection of Children”,¹ under the patronage of Mary Robinson, UN Commissioner for Human Rights, is the development of training programmes for the personnel of the authorities appointed to carry out responsibilities under the Hague Conventions on Child Protection.

Increasingly, the Conference is faced with the paradox that while the number of legal conflicts involving cross-border elements is growing exponentially as a result of the impact of globalisation, at the same time the capacity to deal adequately with these conflicts by legislators, administrations and court systems, in particular in many developing countries, remains limited and will continue to be so in the foreseeable future. What, then, may we expect?

- (a) It is likely that, as a general rule, efforts to seek harmonisation by establishing channels of communication and co-operation *between* legal systems will have a greater chance of success than attempts aimed at unification requiring major modifications of those legal systems themselves. Such Conventions can in many instances be ratified without major reforms of the existing legal systems of the ratifying States. They are clearly potentially applicable world-wide. The implementation and monitoring of these Conventions and their review and revision (see *infra*, (c)) will remain high on the Agenda of the Conference.
- (b) The current project on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, to be completed late 2001 or early 2002, will need to be supplemented sooner rather than later by some sort of system of uniform interpretation. For the time being, the most realistic option would seem to be the creation of a system allowing for panels of experts in international litigation which would be at the disposal of courts or parties to provide non-binding advisory options on questions of interpretation. This would be an innovation and require considerable thought.² At the same time, alternative dispute resolution (ADR) in the context of e-commerce will require our full attention.
- (c) More generally speaking, the exponential growth of electronic data interchange, the Internet and electronic commerce, which know no boundaries,

¹ See www.hcch.net/e/conventions/projet.html.

² See www.hcch.net/e/workprog/jdgm, Preliminary Documents Nos 11 and 7.

requires world-wide work in the field of private international law. Existing Hague Conventions such as those on service abroad, taking of evidence abroad, and on the abolition of legalisation, are all witnessing the effects of electronic communication.

To a large extent, it would seem, an approach based on functional equivalence may provide the answer: the rationale underlying the legal requirements, associated with the more traditional forms of communication, for the serving of process or the taking of evidence, also generally applies in an electronic environment, but some adaptations may be necessary. The Conference will be studying these questions in the near future, and this may well lead to further work on a review of some Conventions. Moreover, it seems probable that, as a parallel instrument to the popular 1961 Convention on the Abolition of Legalisation, there may be a need for a new instrument providing for an electronic “certificate” for electronic public “documents”.

Further ahead lie questions of applicable law in the field of on-line contracts and torts. (Should the victim have a choice between the law of the country where the injurious act took place and the law of the country where the injury was sustained? How do you locate those countries?) The question of the law applicable to data protection also requires further study. Party autonomy in this, as in other fields, is likely to feature strongly.

3 Globalisation, regional integration and a strategy for the future.

While globalisation has its own dynamics, another factor which accelerates the Conference’s evolution towards universalism, is the effect of regional integration. This is not a phenomenon limited to Europe; we also see it in MERCOSUR, for example. However, its effect is undoubtedly greatest in Europe and, since the Hague Conference traditionally comprises the EU countries as a core, “communitarisation” is increasingly bound to have a profound effect on the Hague Conference and its work.

- (a) Obviously, in an Organisation of forty-seven Member States, of which all fifteen current EU States and all the candidate EU States are Members, a strict co-ordination of positions among the EU Countries could make or break the negotiations. Depending on the degree and effect of this co-ordination the traditional working methods of the Conference may need to be reviewed. This should, however, be done in such a way as to have no detrimental effect on the product – texts which are precise and clear and which provide predictability, certainty and fairness.
- (b) The exact effect of the external competence of the European Community, which follows from the internal competence attributed to it by the

Amsterdam Treaty, is still rather unclear. Since the Community as such is not yet a Member of the Hague Conference, it must express its views through the EU Member States, and this is bound to have an impact on negotiations. It is likely that the future Conventions on jurisdiction and recognition and enforcement of judgments in civil and commercial matters and on collateral securities³ will contain a clause allowing the European Community to sign and ratify the Conventions. Such a clause may well have a multiplying effect on the scale of the adherence to the Conventions.

- (c) A further logical development would be the accession by the Community to the Hague Conference. There is certainly a role for the Community as a new motor for world-wide activities within the Hague Conference. One could imagine here, for example, a future EU initiative for a world-wide Convention on the law applicable to contractual obligations. Indeed, in the long run it would not be satisfactory to have in place in the EU a set of choice of law rules on contracts (and torts) which would apply irrespective of any connection between that contract (or tort) and the EU. It would be preferable to aim at a set of rules applicable world-wide so as to avoid conflicts of choice of law regimes.

The harmonious simultaneous development of private international law at the regional and at the global level will require concerted action on the part of all organisations concerned. At the Hague Conference a start has been made with a plan for strategic action through the adoption by the Governments of a set of recommendations proposed by an informal group of Ambassadors of 18 Member States. These recommendations seek to accelerate significantly the growth of the circle of Member States of the Conference in order to permit the Organisation to affirm, and respond to, its global mission. Other recommendations include wider publication of the Conventions and documents of the Conference and the organisation of regional seminars in co-operation with other organisations, the development of training programmes for authorities and judges applying the Conventions and further support for the staff of the secretariat. Consultations are underway with the European Community with a view to formulating principles and procedures for close co-operation. This may well be followed by similar arrangements with other organisations. Private international law has become an integral part of the global citizen's legal environment. The need and potential for international co-operation in this field are enormous. The Hague Conference is reaching out to fulfil this need and develop this potential.

³ See ftp://hcch.net/doc/concl_e.doc and ftp://hcch.net/doc/concl_ann6.doc.

The Permanent Court of Arbitration: Responding to a Century of Globalization

TJACO T. VAN DEN HOUT*

Introduction

The history of the 100-year-old Permanent Court of Arbitration (PCA) is a microcosm of a century of globalization, and its evolution during that period testifies to its ability to meet the changing needs of an increasingly globalized international community. Particularly in the past decades, the PCA has evidenced great flexibility in meeting the dispute resolution needs of the international community in such emerging and expanding fields as telecommunications, air traffic control, mass claims settlement, international organizations and the environment. It has also become involved in global dialogue and the dissemination of information, by electronic as well as traditional means, on a variety of current topics in international law and relations.

Non-State Parties

The PCA was born at the first Hague Peace Conference of 1899, itself a watershed in the globalization of international relations.¹ For the first two decades of its existence, the PCA remained faithful to its original mandate, administering exclusively inter-State arbitrations.² In the mid-1930s, it was given its first opportunity to demonstrate its ability to respond to the changing needs of the international community, by agreeing to administer a “mixed” arbitration, in which one of the parties was a foreign corporation, rather than a State.³ In 1960, the Administrative Council, relying on this precedent, responded to the increasing

* The author is Secretary-General of the Permanent Court of Arbitration at The Hague.

¹ Robin Sharwood, *The Hague Peace Conference of 1899: A Historical Introduction*, in *International Alternative Dispute Resolution: Past, Present and Future – The Permanent Court of Arbitration Centennial Papers* 163 (The International Bureau of the Permanent Court of Arbitration, ed., 2000) [hereinafter *Centennial Papers*].

² See Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1799 [hereinafter 1899 Convention], reproduced in *Permanent Court of Arbitration – Basic Documents: Conventions, Rules, Model Clauses and Guidelines* 1 (1998) [hereinafter *Basic Documents*]; see also, Convention for the Pacific Settlement of International Disputes, October 18, 1907, 36 Stat. 2199 [hereinafter 1907 Convention], *id.* at 17.

³ See *Radio Corporation of America v. China*, summarized in *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution. Summaries of Awards, Settlement Agreements and Reports* 196, 202 (P. Hamilton, H.C. Requena, L. van Scheltinga, B. Shifman, eds., 1999) [hereinafter *PCA Summaries*].

interaction between States and non-State parties, such as multinational corporations, by authorizing the International Bureau to elaborate procedural rules for the resolution of these types of disputes. The PCA “Rules of Arbitration and Conciliation for settlement of international disputes between two parties of which only one is a State” were completed in February 1962.

Decolonization and Emergence of New States

In the period following the Second World War, the PCA fell into relative disuse, probably for a variety of reasons, including disillusionment resulting from the failure of international law and institutions to prevent two World Wars, and waning confidence in third-party settlement mechanisms in general. Another significant factor was the political climate created by the emergence of a large number of “new” States, which had not participated in the 1899 and 1907 Hague Conferences or in the making of international law generally. In 1960, in response to this globalization of the world order, the PCA invited all Member States of the United Nations to accede to the Hague Conventions. Since then, similar invitations have been extended on a regular basis to all States that are not yet parties to either Convention. There are, at present, ninety-one State parties.

International Commercial Arbitration and the UNCITRAL Arbitration Rules

In 1976, the PCA was launched directly into the field of international commercial arbitration, with the adoption of a set of arbitration rules by the United Nations Commission for International Trade Law (UNCITRAL).⁴ These Rules authorize the Secretary-General of the PCA, upon request of a party to the arbitration, to designate an “appointing authority,” who is responsible for appointing arbitrators and ruling on challenges to arbitrators.⁵

The increase, in recent years, in the number of such requests to the Secretary-General (an average of one every two weeks in 1999)⁶ is evidence of the expansion of global commerce. The parties to these arbitrations originate in all parts of the world, as do the institutions and persons who are ultimately designated as appointing authorities. The Secretary-General’s visibility in performing this function has also led, with increasing frequency, to his being directly designated by parties as the

⁴ UNCITRAL Arbitration Rules, adopted April 28, 1976. *Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session*, 31 U.N. GAOR Supp. (No. 17) at paras. 56-57, U.N. Doc. A/31/17 (1976), reprinted in 15 I.L.M. 701 (1976).; *Basic Documents*, supra note 2, at 237.

⁵ See UNCITRAL Arbitration Rules, supra note 4, arts. 7-9.

⁶ *PCA Annual Report 1999* at 16.

appointing authority. Provisions to this effect have been included, not only in commercial contracts, but also in treaties, agreements and codes of conduct in such areas as telecommunications, air traffic control, international finance and environmental protection.⁷

Modernization of Procedural Rules

This link with the UNCITRAL Arbitration Rules, coupled with the universality of those rules, has led the PCA to model its most recent sets of procedural rules upon the UNCITRAL Rules. The Optional Rules for Arbitrating Disputes between Two States, adopted in 1992, Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, adopted in 1993, the 1996 Optional Rules for Arbitration Involving International Organizations and States and the 1996 Optional Rules for Arbitration between International Organizations and Private Parties all closely follow the UNCITRAL Rules. The Optional Conciliation Rules, also adopted in 1996, are patterned after the 1980 UNCITRAL Conciliation Rules.⁸ Work is currently underway on the adoption of specific arbitration rules for disputes involving natural resources and/or the environment, an area of undoubtedly global scope and concern, and a steering committee has been set up to explore issues relating to the settlement of mass claims, and to make specific recommendations.

In addition to its own sets of rules, the PCA has adopted guidelines for administering commercial arbitrations under the UNCITRAL Rules.⁹ The PCA has further strengthened its ties to commercial arbitration through its research and publication activities, which include the publications of the International Council for Commercial Arbitration,¹⁰ the arbitration database disseminated on CD-ROM by Kluwer Law International, and editorial responsibility for the Kluwer periodicals "World Trade and Arbitration Materials" and "Journal of International Arbitration."

⁷ See, e.g., Memorandum of Understanding on Dispute Resolution in Telecommunications, 1998; Revised EUROCONTROL Convention, signed June 1997, art. 34; Convention on the Conservation of Migratory Species of Wild Animals (1979), art. XIII; Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980.

⁸ Only the 1997 PCA Optional Rules of Procedure for Fact-finding Commissions of Inquiry do not have an UNCITRAL counterpart.

⁹ Permanent Court of Arbitration Procedures for Cases under the UNCITRAL Arbitration Rules, *Basic Documents*, *supra* note 2, at 267.

¹⁰ *Yearbook Commercial Arbitration, International Handbook on Commercial Arbitration, and ICCA Congress Series*.

Recent Cases

This flexibility in types of proceedings and parties does not mean that the PCA is no longer perceived as an appropriate forum for arbitration of disputes between States. Although States have access to other fora, two of the PCA's most recent arbitrations have involved State parties exclusively, including the *Eritrea/Yemen* Arbitration, which took place from 1997-1999.¹¹ Other arbitrations in the 1990s involved disputes between a State and a commercial entity, and the PCA is currently acting as Registry in a dispute between two European governments.

Ties to Other Organizations

One of the effects of globalization on international organizations is that no institution or entity can exist in a vacuum. The prominence of the United Nations on the intergovernmental scene has certainly influenced the PCA, albeit not an organ of the United Nations, but rather an independent international organization. Pursuant to Article 4 of the Statute of the International Court of Justice (ICJ), the members of that Court are elected by the General Assembly and the Security Council from a list of candidates nominated by the national groups of the Permanent Court of Arbitration.¹² This direct reference to the PCA in the Statute of the ICJ, which forms an integral part of the UN Charter, makes the PCA the only institution, other than the organs of the then-existing League of Nations and of the United Nations itself, mentioned by name in the Charter. These ties were formalized when, on October 13, 1993, the General Assembly of the United Nations granted permanent observer status to the PCA.¹³

In addition to the United Nations, the PCA has formal cooperation agreements with the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA). The International Bureau is also an active member of the International Federation of Commercial Arbitration Institutions (IFCAI).

In 1999, the International Bureau of the PCA entered into an agreement with the Organization for the Prohibition of Chemical Weapons (OPCW) in The Hague to serve as Registry for dispute resolution proceedings concerning the OPCW's Confidentiality Commission.

¹¹ See *PCA Summaries*, *supra* note 3, at 196, 202.

¹² A country's "national group" consists of the Members of the Court appointed by it; see note 14, *infra*.

¹³ Resolution No. A/RES/48/3.

The PCA as a Forum for an International Exchange of Views

In September 1993, the International Bureau convened a conference of the “Members of the PCA” at the Peace Palace in The Hague. The “Members” are a pool of some 250 distinguished international jurists, from all parts of the globe. The parties to a dispute may, but are not obligated to, select from this list members of the tribunal or commission that will carry out whatever form of dispute resolution the parties have agreed upon.¹⁴ Until the 1993 conference, however, the Members of the Court had never had the opportunity to meet and exchange views. The Members convened in The Hague again, in May 1999, on the occasion of the 100th anniversary of the PCA.¹⁵ Members’ recommendations included the continuation of the PCA’s publication and research efforts, as well as the organization of symposia, conferences and seminars.

Combining these recommendations, the International Bureau inaugurated, in December 1999, a semi-annual series of “International Law Seminars” (ILS), the proceedings of which are published under the name “The Permanent Court of Arbitration/Peace Palace Papers.” The ILS concentrates on issues of timely and topical interest to international lawyers. The first of these topics was “Institutional Aspects of Mass Claims Settlement Systems”.¹⁶ Responding to the interest generated by the seminar and publication, as well as a growing number of requests for procedural assistance in this rapidly-expanding area, the International Bureau has decided to establish a Mass Claims Steering Committee. The second ILS took place on May 17, 2000 and covered “International Investments and Protection of

¹⁴ According to the 1899 and 1907 Conventions, each Contracting Power may designate a maximum of four persons of “known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators.” The persons thus designated are referred to as “Members of the Court,” and are listed in Annex 7 of the Annual Report of the PCA, which is widely distributed among government offices, libraries and universities, and is also available on the PCA’s website: Art. 24 of the 1899 Convention, and art. 45 of the 1907 Convention, require the arbitrators to be “chosen from the general list of Members of the Court.” This requirement does not apply if the tribunal is characterized as a “special tribunal” organized pursuant to Art. 26 or Art. 47. This has now been expressly laid out in the various PCA Optional Rules, see, e.g., Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, art. 8(3), Basic Documents, *supra* note 2, at 69.

¹⁵ *Centennial Papers*, *supra* note 1, at 93.

¹⁶ *Institutional and Procedural Aspects of Mass Claims Settlement Systems*, The Permanent Court of Arbitration/Peace Palace Papers, PCA International Law Seminar, December 9, 1999 (2000).

the Environment: the Role of Dispute Resolution Mechanisms”.¹⁷ The third ILS is scheduled to take place in early 2001, the topic of which will be “Arbitration in Air and Space Law including Telecommunications Activities: Enforcing Regulatory Measures.”

Financial Assistance Fund

Recognizing that the cost of dispute resolution might be prohibitive for developing countries, and wishing to encourage them to nevertheless agree to arbitration and other such methods in their relations with other States, non-State entities, and intergovernmental organizations, the PCA has established a fund from which qualified States may draw in order to offset the costs incurred in connection with the submission of disputes for settlement under the aegis of the PCA.¹⁸ A State may apply for financial assistance if a) it is a State Party to the Convention of 1899 or 1907, b) it has concluded an agreement for the purpose of submitting one or more disputes, whether existing or future, for settlement by any of the means administered by the Permanent Court of Arbitration, and c) at the time of requesting financial assistance from the Fund, it is listed on the “DAC List of Aid Recipients”, prepared by the Organization for Economic Cooperation and Development (OECD). Decisions are made by a Board of Trustees established for this purpose. Three States have received support from the Fund since it became operational in 1995.

Dissemination of Information

We live in what is frequently labeled the “Information Age”, emphasizing the importance of global availability and exchange of information. As indicated above, the PCA is actively involved in research and publication, and the latter covers both paper and electronic formats. The PCA also has an extensive internet site, featuring, *inter alia*, the annual report and all of its basic documents, including rules and model clauses.

¹⁷ *International Investments and Protection of the Environment: The Role of Dispute Resolution Mechanisms*, The Permanent Court of Arbitration/Peace Palace Papers, PCA International Law Seminar, May 17, 2000 (2000).

¹⁸ *Permanent Court of Arbitration: Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines*, approved by the Administrative Council on October 3, 1994, para. 5, reprinted in *Basic Documents*, *supra* note 2, at 231. A similar fund is the U.N. Secretary-General’s Trust Fund, established in 1986 to provide financial assistance to qualifying countries that are involved in proceedings before the International Court of Justice, see *Terms of Reference, Guidelines and Rules of the Secretary General’s Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice* (1989).

In 1999, on the occasion of its centenary, the PCA published a collection of summaries of all awards and other adjudicatory decisions rendered under its auspices.¹⁹

Conclusion

Despite its conception in the context of a global conference to promote world peace, the PCA might well have ended up being eclipsed by the speed and complexity of subsequent developments in the world order. Few people today would accept the idealistic notion that the sole purpose of international dispute resolution is the preservation of world peace. The PCA could easily have fallen into oblivion in the period following the Second World War. That it did not is testimony to its early manifestations of flexibility, all of which set the stage for the revitalization of the PCA, particularly during the 1990s. In the first year of its second century, the Permanent Court of Arbitration is a modern intergovernmental organization with an international staff, responsive in a variety of ways to the changed, and constantly changing, dispute resolution needs of the international community.

La mondialisation et la Cour internationale de Justice

GILBERT GUILLAUME*

Du fait de la «mondialisation», le modèle économique et social que nous fournissent les Etats-Unis d'Amérique tend à se généraliser. Il en résulte une réduction du rôle des Etats, dont certaines fonctions traditionnelles sont désormais remplies par des entités privées agissant sur une base transnationale. Par voie de conséquence, les tribunaux nationaux ont de plus en plus souvent l'occasion d'appliquer le droit international. En outre, comme dans la société américaine, le droit et le juge jouent un rôle croissant dans nos sociétés.

Il en résulte une multiplication des institutions juridiques internationales et notamment des tribunaux internationaux. Au lendemain de la première guerre mondiale, la Cour permanente de Justice internationale était la seule juridiction internationale chargée de la solution des différends internationaux. Ces différends concernaient exclusivement les relations entre Etats. La compétence de la Cour internationale de Justice est restée de même nature.

Depuis la fin de la seconde guerre mondiale, les juridictions internationales se sont cependant multipliées. Au plan régional, la Cour de Justice des Communautés européenne et la Cour européenne des droits de l'homme jouent aujourd'hui un rôle éminent. Au plan mondial, la justice pénale s'est développée, de Nuremberg et Tokyo au Tribunal pénal international pour l'ex-Yougoslavie et à celui pour le Rwanda. Bien plus, la convention de Rome de 1998 prévoit la création d'une Cour pénale internationale permanente. Par ailleurs, une douzaine de juridictions administratives internationales ont été mises en place. Le Tribunal international pour le droit de la mer s'est installé à Hambourg et le mécanisme de règlement des différends au sein de l'Organisation mondiale du Commerce a commencé à fonctionner. Enfin, l'arbitrage international s'est considérablement développé, tant dans le domaine classique des relations entre Etats qu'en matière commerciale.

S'agit-il là d'une évolution heureuse marquant les progrès du droit et du juge dans la société internationale ? ou assiste-t-on à une cancérisation de la justice internationale ? quel peut être le rôle de la Cour internationale de Justice en pareilles circonstances ?

Il est tout d'abord certain que de nouvelles juridictions sont aujourd'hui devenues compétentes pour traiter d'affaires qui autrefois ne pouvaient être soumises qu'à la seule Cour et qui d'ailleurs peuvent, encore aujourd'hui, lui être soumises. Mais cette situation n'a pas conduit, bien au contraire, à une réduction de l'activité de la

* Président de la Cour internationale de Justice

Cour. Alors que celle-ci n'avait plus aucun dossier à traiter dans les années 1970, elle a aujourd'hui 24 affaires à son Rôle, ce qui constitue un record absolu. La fin de la guerre froide et le recours croissant au juge ont eu à cet égard des résultats bénéfiques sur les activités de la Cour et celle-ci doit relever un nouveau défi, à savoir apporter dans des délais raisonnables une solution aux litiges qui lui sont soumis.

Pour ce faire, la Cour a d'ores et déjà amélioré ses méthodes de travail et ses procédures. Elle a eu recours aux moyens modernes de communication en établissant un site Internet¹ qui, en moyenne, fournit chaque jour 18.000 documents à ses correspondants. Elle a invité les parties à une plus grande modération dans la présentation de leurs mémoires écrits et de leurs plaidoiries orales. Enfin, elle a modifié ses pratiques procédurales et a entamé la révision de son Règlement de procédure.

Mais ce processus ne sera pas suffisant et la Cour devra être rapidement dotée de moyens plus importants en personnel et matériel. Avec un greffe de 61 personnes et un budget annuel d'environ 10 millions de dollars, la Cour dispose de ressources dix fois moins importantes que le Tribunal pénal international pour l'ex-Yougoslavie. Son budget devra être augmenté sensiblement.

Mais, si la mondialisation et la multiplication des juridictions internationales n'ont pas réduit le rôle de la Cour, elles ont conduit à une situation fort dangereuse pour le droit international lui-même. En effet, la multiplication des juridictions risque à l'évidence de conduire à une fragmentation du droit. Aussi bien ce risque a-t-il déjà pris corps puisque, dans l'affaire Tadić, la chambre d'appel du Tribunal international pour l'ex-Yougoslavie a pris volontairement et explicitement une position différente de celle qu'avait adoptée la Cour internationale de Justice en ce qui concerne l'imputation de certains faits à un Etat intervenant dans un conflit armé à l'étranger. On peut se demander dans ces conditions si le «*forum shopping*» bien connu du droit international privé ne risque pas d'apparaître en droit international public et si les tribunaux, dans la course aux plaideurs, ne seront pas tentés de verser dans la démagogie judiciaire.

En vue de répondre à ces préoccupations, on pourrait songer à transposer en droit international les solutions du droit interne et envisager de faire de la Cour internationale de Justice la cour de cassation de l'ensemble des juridictions internationales. Cette solution aurait sa logique, mais elle impliquerait une réforme profonde du Statut de la Cour, de son organisation et de son fonctionnement. Elle supposerait aussi une ferme volonté politique des Etats qui ne semble pas exister à l'heure actuelle.

¹ <http://www.icj-cij.org>

Une formule plus aisée à mettre en oeuvre consisterait à permettre à toutes les juridictions internationales de poser des questions préjudicielles à la Cour internationale de Justice dans des conditions comparables à celles prévues par l'ancien article 177 du traité de Rome. Cette solution serait juridiquement plus aisée à mettre sur pied puisqu'il suffirait d'insérer dans les conventions internationales en cause une disposition en ce sens. Le traité ainsi conclu rentrerait dans les prévisions de l'article 36, paragraphe 1, du Statut qui n'aurait dès lors pas à être révisé. On pourrait dans la même perspective envisager à cet effet le recours à la procédure de l'avis consultatif comme il est encore de droit pour le Tribunal administratif de l'Organisation internationale du Travail.

L'utilisation des questions préjudicielles avait été envisagée lors de la négociation de la convention de Rome créant une juridiction pénale internationale permanente. Mais elle n'a pas suscité un grand intérêt et n'a finalement pas été retenue.

Il reste dans ces conditions à s'en remettre à la sagesse des futurs négociateurs et à celle des juges. Les premiers devraient éviter dans l'avenir de créer de nouvelles juridictions internationales. Les seconds devraient apprendre à mieux se connaître et à mieux s'apprécier. Les contacts entre juridictions sont à cet égard indispensables et la Cour internationale de Justice devrait disposer des crédits nécessaires à cet effet. Par ailleurs, le fait pour certains juges de tribunaux spécialisés de siéger comme juges *ad hoc* au sein de la Cour peut faciliter une meilleure compréhension par ces tribunaux des exigences du droit international général tel que développé par la Cour internationale de Justice. Des exemples récents sont à cet égard encourageants.

Espérons que la mondialisation ne conduira pas à l'anarchie judiciaire et que le droit international ne se scindera pas dans l'avenir en des disciplines autonomes, voire contradictoires. La sécurité et le progrès du droit au sein de la société internationale sont probablement à ce prix.

Work in Progress / Travaux en cours

The Prospects for International Adjudication: a Roundtable Discussion on Legal and Policy Issues Arising from the Emerging “Market” in International Courts and Tribunals

NINA HALL*

The Project on International Courts and Tribunals (PICT)¹ instigated a Roundtable discussion at the latest International Law Association conference in July (ILA 2000, London) on the legal and policy issues arising from the recent proliferation in the number of international courts and tribunals. The discussion was co-organised by Herbert Smith (Dr Campbell McLachlan) and Matrix Chambers (Prof. Phillippe Sands).

The organisers invited participation from attendees of the ILA 2000 conference and in particular from those closely involved in the ECHR, UNCC, ICTY, ECJ, ICJ, the International Tribunal for Law of the Sea and other members who have been involved in various international tribunals including Iran/Iraq and the Dormant Accounts Claims Tribunal, Zurich.

The discussion focussed on three topics, set out in the letter of invitation to the attendees, namely:-

1. The relationship between the various tribunals (including overlap in jurisdiction, *lis pendens* as well as relations between international and national courts).
2. Procedural issues, costs and other financial issues concerning proceedings before international courts and tribunals.
3. Evidentiary issues.

The remainder of this note sets out briefly the nature of the discussion.

1. The relationships between the various courts and tribunals

The discussion² considered whether there was a problem of competing jurisdiction at the international tribunal level. Many of the participants were able to give recent

* Herbert Smith, London, ILA Member (British Branch).

¹ Web site <http://www.pict-pcti.org>. PICT has a founding association with the Foundation of International and Environmental Law and Development (University of London) and the Centre of International Corporation (New York University).

² The discussion proceeded on the Chatham House basis – i.e. non-identified participation.

examples of applicants seeking redress from more than one tribunal, particularly in the area of international criminal law and extradition.

Connected to this issue was the increasing problem of more than one of the tribunals (of differing jurisdiction) each considering disputes concerning the same sets of facts.

Where the application(s) arise out of the same fact pattern, the Roundtable discussion identified a need for guidance. The situation was compared with that of domestic courts where rules of private international law have devised systems to be applied to situations of *lis pendens*, to avoid conflicting decisions between national courts.

In summary, the discussion identified three real concerns:-

- (a) Jurisdiction: *lis pendens* or suspension and priority;
- (b) The principles to apply where an international tribunal applies national law; and
- (c) *Res judicata* at the international forum level: principles and facts.

2. Procedural issues, costs and other financial issues

The possibility to file amicus briefs, particularly relevant with regard to the growing role of non-state actors before international tribunals, the need for intervention generally and the extent to which hearings should be in public, were all identified by participants as procedural issues requiring consistency and clarification at the international forum level. Many of the participants from various tribunals identified the stage that their own internal procedural regulation had reached on combating these problems. However, a need to reach a consensus on issues such as the filing of amicus briefs was mooted and it was apparent to those attending that this was a developing area where a consistent approach by the tribunals may assist.

3. Evidentiary issues

Clearly, the Roundtable discussion recognised that this was not a new issue. However, there were two main reasons why the topic needed to be reconsidered at this moment, namely:-

- a) there had been a recent increase in the number and volume of cases before international tribunals;
- b) there is a growing factual dimension to the nature of the cases requiring evermore factual determination by the tribunals, for example with the growth of specialist criminal tribunals.

Against this background, there are further issues concerning procedure. For example, are tribunals well equipped to make the kind of factual decisions that increasingly

they have to? In particular in cases involving enormous amounts of factual enquiry?

It was highlighted in the discussion that the tribunals that do exist are, on the whole, very different with different mandates. Examples were given of recent tribunals applying lower standards of proof. Although, specific purpose tribunals applying varying evidential rules was accepted as necessary in order to meet certain expectations of the international community, the concern raised was of a risk of contradictory jurisprudence as a direct result of the application of significantly different evidentiary rules.

Observations

It is possible to highlight priorities out of the discussion. A personal impression would be that the development of guidance on issues of competing jurisdiction and application of principles of *res judicata* at the international forum level is a priority. It remains to be seen what action the ILA will be urged to take in light of the discussion. Undoubtedly, the existence of a forum to discuss these issues was appreciated. Suggested follow-up by PICT focuses on the establishment of an ILA Committee on International Courts and Tribunals to consider the issues and concerns raised at this most useful and highly informative discussion.

Conference Scene / Le tour des conférences

International Law Association – London Conference (2000) Committee on International Commercial Arbitration “Keeping the Unruly Horse in Control” or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards

DR. LOUKAS MISTELIS*

Public policy is “a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but where other points fail.”¹ Lord Denning insisted reassuringly that “with a good man in the saddle, the unruly horse can be kept in control.”² Indeed public policy in international commercial arbitration is a double-edged sword: helpful as a tool, dangerous as a weapon. This is a paradox. It should operate only as a shield to the enforcement of foreign awards which bear unwanted solutions. However, it can also be a sword in the hands of those who want to limit the mobility or finality of international awards. Accordingly, public policy acquires particular significance in international transactions. In domestic transactions everyone – parties, counsel, arbitrators, and national courts alike – has a common understanding of the given national public policy. In the cross-border context, public policy is used either as an exception to the application of foreign law, or as a bar to the enforcement of foreign award. Where the tribunal decides to apply some law or legal result, other than that of the applicable law, because international public policy mandates or justifies the result, we have a public policy constellation which was not addressed at the ILA meeting. Only the latter public policy as a bar to the enforcement of foreign awards was discussed at the ILA recent meeting in London..

The meeting of the Committee on International Commercial Arbitration, chaired by Professor Catherine Kessedjian, was arguably among the most vibrant and stimulating workshops of the Conference.³ It lasted just over three hours, without

* Clive M Schmitthoff Lecturer in International Commercial Law, School of International Arbitration, CCLS, Queen Mary, University of London. Email: L.Mistelis@qmw.ac.uk

¹ *Richardson v Melish* (1824) Bing. 228; [1824-1834] All ER 258.

² *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] AC 591, at 606 (per Lord Denning MR).

³ The 69th Biennial Conference of the International Law Association was held in London from 25 to 29 July 2000.

a break. ILA members and attendees were presented with the results of the past years' work by the chair of the Committee, Professor Pierre Mayer. The Report⁴ was then delivered by Audley Sheppard, United Kingdom.⁵ Nearly 150 participants, arbitration practitioners and academics, attended the meeting.

The Report thoroughly discusses public policy as a ground for refusing recognition and enforcement of arbitral awards. It forms a useful addition to two major publications on the topic⁶, and builds upon the paper presented to the Committee by Rapporteur Sheppard at the 1998 ILA Conference in Taiwan, and the comments made both in Taiwan and subsequently. The topicality of the issue has been enhanced by a number of recent judgments.⁷

The Report attempts to define public policy⁸ by reference to "violation of basic notions of morality and justice", the notion of international public policy and transnational or truly international public policy. The Report then looks at public policy as referred to in international conventions for the enforcement of arbitral awards⁹ and Model Laws¹⁰ and national legislative texts.

A survey of national laws reveals the following groupings:

⁴ The Report can be found at <<http://www.ila-hq.org/pdf/ComArbitration.pdf>> and the Resolution can be found at <<http://www.ila-hq.org/pdf/RESCarbitration.pdf>>.

⁵ Dr Nagla Nasser was appointed as co-rapporteur too recently for her to fully participate in the work leading to the report.

⁶ ICCA Congress Series no. 3, *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987); Racine, *L'arbitrage commercial international et l'ordre public* (LGDJ 1999).

⁷ See, for example, *Soleimany v Soleimany* [1998] 3 WLR 811; *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [1999] 2 Lloyd's Rep 65; *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 QB 222; *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315; *Hebei Import and Export Corporation v Polytek Engineering Co Ltd* [1999] HKC 205 = XXIV YBCA 652 (1999).

⁸ See Report, *supra* note 3, at 4-7.

⁹ See, for example, 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards Article V(2)(b): "public policy of *that* country"; 1975 (Panama) Inter-American Convention on International Commercial Arbitration Article 5(2)(b): "public policy of that state"; 1987 (Amman) Arab Convention on Commercial Arbitration Article 35: "public policy" of the seized court.

¹⁰ See, for example, UNCITRAL Model Law Articles 34 (setting aside of awards) and 36 (grounds for refusing recognition and enforcement of awards – public policy of the state where enforcement is sought); Organisation for the Harmonisation of Business Law in Africa (OHADA) 1999 Uniform Arbitration Law Article 31: public policy of the member states.

- Some national laws make reference to international public policy,¹¹ while the majority make reference to public policy (and good morals).¹²
- An effort has also been made to distinguish between public policy as applied to domestic transactions and public policy as applied to international transactions.¹³
- Only a few countries make express reference to domestic public policy,¹⁴ while others opt for no express reference to public policy.¹⁵
- Court practice often distinguishes between domestic public policy and the narrower international public policy.¹⁶

It appears that there is one universally accepted definition of public policy. “It is clear that [it] reflects the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community. Naturally public policy differs according to the character and structure of the state or community to which it appertains, and covers those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.”¹⁷ This definition does not address the issue of the distinction between domestic and international public policy. Indeed, it emphasises the relevance of public policy with the values and standards of a given state or community. It is submitted that the following classification should be made:

- National (domestic) public policy. This may have two versions, the broader domestic public policy one, which is applicable to domestic transactions, and the narrow international public policy one, which is applicable to

¹¹ All laws have been influenced by the French Code of Civil Procedure Articles 1498 and 1502. Followers of this model include Portugal, Algeria and Lebanon.

¹² See, for example, 1996 English Arbitration Act sections 81(1)(c) and 103(3); and legislation in Japan, Libya, Oman, Qatar and the United Arab Emirates.

¹³ See, for example, 1993 Tunisian Arbitration Code Articles 78(2)(II) and 81(II); 1992 Romanian Law on Settlement of Private International Law Disputes Articles 168(2) and 174. See also the US Federal Arbitration Act sections 201 (incorporation of New York Convention) and 301 (incorporation of the Panama Convention) and *Sherk v Alberto Curver*, 417 US 506 (1974) which distinguishes between domestic and international public policy.

¹⁴ See, for example, 1996 Brazil Arbitration Act Article 39(II); 1994 Egypt Arbitration Law Articles 53(2) and 58.

¹⁵ See, for example, Austrian Code of Civil Procedure Article 595(1).

¹⁶ See Report, *supra* note 3, at 13-14 with further references.

¹⁷ Lew, *Applicable Law in International Commercial Arbitration* (Oceana 1978), 532.

international transactions.¹⁸ The latter will be even narrower if there are no state interests involved in the recognition and enforcement of the foreign award.

- Regional public policy. Regional public policy can be found in states or extra-national communities. For example, Muslim states have a common understanding of public policy as it is expressed in the Shari'ah. Another example can be seen in the European Union, where some EC public policy has emerged over the years of regional integration.¹⁹
- Transnational public policy.²⁰ Since international arbitrators have no forum, all State "public policies" are foreign. The international arbitrator should first take into account the public policy of the international community of merchants (including, many state or public entities).²¹ We should emphasise that this is not a public policy that may bar the enforcement of an award, as it normally employed by international arbitrators.
- Public international public policy. This aspect of public policy was rightly excluded from the report, as it possesses its own normativity. This normativity stems from the rather parochial Article 38(1) of the Statute of the International Court of Justice and is applied in international arbitration by way of analogy. Examples of such a policy include the prohibition of bribery of foreign officials and basic procedural principles of due process.

The Report also classifies the content of public policy as procedural²² or substantive.²³ It is submitted that this classification, although it has merits, may not be universally accepted as it emerges from case law in a limited number of countries. Further,

¹⁸ It is worth noting that the Hong Kong *Hebei* case, *supra* note 5, expressly denies international public policy in the sense of a "standard common to all civilised nations."

¹⁹ See *Eco Swiss China Time Ltd (Hong Kong) v Benetton International NV (Netherlands)*, Nederlandse Jurisprudentie (1998, no. 207) pp. 1059-1084 with note H.J. Snijders, pp. 1084-1086; *Eco Swiss Time Ltd v Benetton International NV*, C-126/97, 1 June 1999 (ECJ), [1999] 2 All ER (Comm) 44.

²⁰ Lalive, "Transnational (or Truly International) Public Policy and International Arbitration", ICCA Congress series – no. 3 pp. 258-318, 312-317 (1987).

²¹ *Ibid*, at 314-5. Emphasis in the original.

²² See Report, *supra* note 3, at 24-30. According to the report procedural categories include: (a) fraud / corrupt arbitral tribunal; (b) breach of natural justice / breach of due process; (c) lack of impartiality; (d) lack of reasons; (e) manifest disregard of the law; (f) manifest disregard of the facts; (g) res judicata; (h) annulment at place of arbitration.

²³ See *id.*, at 17-24. According to the report substantive categories include: (a) mandatory rules / lois de police; (b) fundamental principles of law; (c) actions contrary to good morals or public order; (d) national interests / foreign relations.

public policy has by its very nature, a dynamic character, so that any classification may crystallise public policy at a certain period of time but not *ad infinitum*.

The vivid discussion focussed on the Report and the arguable need for a resolution of the Committee on the substantive aspects of the issue. The 36-page Report was praised by most discussants for its succinct nature and admirable abstraction along with extensive research and comparative survey. The draft resolution was accompanied by Proposed Recommendations on Substantive Public Policy as a Bar to Enforcing Arbitral Awards presented in London for discussion only.

The proposed recommendations, consisting of four main and one additional article, were not particularly welcome. At that stage of the discussion two groups were formed in the audience:

- One group consisted mainly of participants with practical experience in arbitration, and participants from developed countries (in arbitration terms). This group's main aim was to safeguard the finality of awards. It was argued that the proposed recommendations, which attempt to define substantive public policy along with mandatory rules, might be abused by national courts of countries which are traditionally hostile to arbitration, thus undermining the success of the New York Convention. In any event, it was argued the inclusion of mandatory rules in the work of the committee was exceeding its mandate.
- The second group, significantly smaller, consisted mainly of a few academic participants and participants from developing countries (in arbitration terms). This group argued that for the sake of certainty and predictability, the guidelines set out in the proposed recommendations should in principle be welcome.

The divide in the discussion was quite significant. Although their objective, the finality of awards, was shared, the suggested approaches were far apart. It is not merely a philosophical debate between certainty and flexibility. Public policy is, by its very nature, dynamic and hence, certainty and predictability will always be limited. The finality of awards can be threatened at two different stages: the setting aside stage or the enforcement stage. It is submitted that public policy is inevitable at the enforcement stage, but should not be invoked "when courts hear a motion to vacate/annul international awards. Too malleable a concept."²⁴ Even when relevant, at the enforcement stage, public policy should be a narrow concept. The public policy referred to in the New York Convention is the public policy of the enforcing state. However, in applying their own public policy, state courts should

²⁴ Extract of an e-mail (dated 26 July 2000) by Professor William W. Park to the author commenting on the topic of the ILA meeting.

give it an international rather than a domestic dimension.²⁵

Although the proposed recommendations have merit, it was decided that further work by the Committee was needed. One of the intriguing features of the recommendations was the final point of the discussion: foreign public policy rules. There is no reported case that makes express reference to foreign public policy.²⁶ To the extent that the application of foreign law by courts is not without problems, and the application of foreign mandatory rules has been rejected by several jurisdictions, assertion of foreign public policy at the stage of enforcement by state courts will be equally problematic. It follows foreign public policy is normally not considered, notwithstanding the fact that private international lawyers increasingly discuss the issue of application (or taken into account) of foreign public policy in a favourable manner, albeit in a different context.²⁷

In that way the warning of the 1824 judgment was reiterated. We should be careful, when dealing with the unruly horse!

²⁵ See, for example, Supreme Court of India, 7 October 1993, *Renusagar Power Co Ltd (India) v General Electric Co (US)*, XX YBCA 681, 702 (1995); Swiss Camera di Esecuzione e Fallimenti [Execution and Bankruptcy Chamber], Canton Tessin 19 June 1990, *K S AG v CC SA*, XX YBCA 762, 763-4 (1995); German Federal Court (BGH), 15 May 1986, German charterer v Romanian shipowner, XII YBCA 489, 490 (1987).

²⁶ *Fabergé International, Inc. (U.S.) v Felice Di Pino (U.S. citizen)*, Supreme Court of New York County, Appellate Division 2 July 1985, XII YBCA 536-538 (1987). Reference to foreign public policy is made in the keywords of the Yearbook report, not in the text of the judgment.

²⁷ Reference is often made to the public policy of the *lex causae*: Batiffol/Lagarde, *Droit international privé*, 8th edition, 1993, para 366; Kegel/Schurig, *Internationales Privatrecht*, 8th edition, 2000, §16 VII; Brünig, *Die Beachtlichkeit des fremden ordre public*, 1997.

Debates over Group Litigation in Comparative Perspective

SAMUEL P. BAUMGARTNER*

Under this heading, Duke University School of Law and the Faculté de droit de l'Université de Genève cohosted an international conference in Geneva on July 21-22, 2000. The conference convenor, Professor Thomas Rowe of Duke, succeeded in bringing together a respectable number of leading judges, academics, and practitioners from various countries, mostly Europeans and Americans (including a number of practitioners and scholars from South America), to discuss the merits and demerits of group and class-action litigation. The debates were highly profitable not only because of the quality of the speakers, but also because of the conference format: After traditional sessions with speakers and commenters on U.S. class actions; group litigation in other common law countries; traditional civil law approaches; and on class-actions and proposals in Brazil and Scandinavia,¹ participants had a chance to join the discussion in smaller break-out sessions on specific subtopics. Thereafter, Professor Arthur Miller treated the audience to a one-and-a-half-hour Socratic-style dialogue with some 20 panelists from the various break-out groups. This dialogue had the benefit of forcing the panelists to listen and to respond to specific arguments rather than letting them present well rehearsed statements. In the hands of a recognized master of the Socratic method, this approach elicited a veritable fireworks of excellent arguments on various aspects of group litigation, summarizing, and often critically improving on, what had been said previously during the conference.

From a comparative perspective, it was interesting to hear about group and class-action mechanisms recently introduced in England, Australia, Canada, and Brazil and to learn about some of the difficulties that have arisen under those mechanisms. It was also striking to realize, at least for one who has been away from the United States for some time, how polarized the aggregation debate has become in that country. In fact, it was striking to realize that even in the nations in which class actions have recently been introduced or proposed, lawyers tend to have rather strong opinions about the device's usefulness. Ultimately, however, most of the discussion turned on arguments developed in the United States. This is not surprising

* Associate Lecturer and Research Scholar, Institute for Swiss and International Civil Procedure and Private International Law, University of Bern, Switzerland. LL.B., University of Bern; M.L.I., LL.M., University of Wisconsin, Madison.

¹ Conference papers will be published in the spring 2001 issue of the *Duke Journal of Comparative and International Law*.

since the United States has had the most extensive experience with class actions and because many of its leading proceduralists have spent a considerable portion (perhaps too much, given the relative importance of class actions in practice) of their careers studying the device. Moreover, some of the economic arguments developed in the United States seem to be much easier to transfer to the legal and economic orders of other Anglo-Saxon states, where most of the recent introduction of group actions has taken place, than to those of countries with different traditions regarding law and commerce.

Both because of the polarized debate and the superior U.S. expertise with group litigation, I suspect that, although everyone had learned something about other legal systems, the conference left most U.S. participants believing that, while their procedure is in need of improvement, the continental Europeans with their antiquated approach have nothing to teach, and some continental Europeans convinced that, if this was class-action reality, they preferred their clear-cut and cost-effective procedure and others to think that they knew how to introduce class actions without also importing the American mess. This suspicion was borne out by several private conversations I had with conference participants. This is unfortunate, for complex litigation provides superb opportunities to rethink procedural values,² particularly from a comparative perspective. Doing so does, however, require an open mind. Moreover, fruitful analysis of comparative advantages and disadvantages of procedural systems in general and of class actions in particular requires in-depth comparison of procedural mechanisms; the values they are intended to serve; the historical context in which they came about; and the larger legal, economic, and societal culture within which they operate, an enterprise that can hardly be accomplished during a two-day conference.

Some respectable work in this direction has already been undertaken.³ But more research is necessary, particularly in countries that toy with the idea of newly introducing group litigation. To what extent, for example, are class actions related to other aspects of U.S. procedure? In other words, how effective would class actions be in enforcing rights; deterring reprehensible behavior; and in securing dignity and participation for potential litigants, respectively, without notice pleading; discovery; judges allowed to fashion new substantive and procedural approaches to

² See Stephen B. Burbank, *The Costs of Complexity*, 85 *Mich. L. Rev.* 1463, 1464 (1985) (book review).

³ See, e.g., *Die Bündelung gleichgerichteter Interessen im Prozess* (Jürgen Basedow et al., eds. 1999); Isabelle Romy, *Litiges de Masse* 219-320 (1997); Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 *Am. J. Comp. L.* 805 (1997) and sources there cited.

deal with challenging new fact patterns; jury trials; and a fee system that pays for aggressive advocacy? To what extent is efficiency an argument for aggregation in a system lacking these features? On the other hand, to what extent would class actions level the playing field in countries in which comparatively low costs of litigation, fee shifting, and legal aid operate to make the system available to enforce relatively low monetary claims and in which the quality of the attorney is not as important to guide the client through a process based on law as it is in one steeped in equity? Could we deal with some of the difficulties arising in our mass society without introducing class actions or other aspects of U.S. procedure? For example, would it be sufficient for achieving any of the mentioned process values to consolidate the practice of reversing the burden of proof to the litigant who is ordinarily in possession of the evidence to prove particular facts in order to overcome difficulties in establishing causation as has been done to some extent in products liability litigation in Germany? Or would we still need group litigation to enable plaintiffs in appropriate cases to indicate to some of our rather conservative judges that there is a social problem that deserves to be taken seriously? But again, how could lawyers be used as “private attorneys general” in legal systems in which direct solicitation of clients is outlawed and indirect solicitation severely limited by a virtual ban on attorney advertising and strict personal privacy protection laws that render it impossible to use private or public databases to identify potential clients?

Other questions involve the debate between regulation and litigation. To what extent does the analysis change in countries in which administrative agencies are not as seriously understaffed as many U.S. agencies and in which the bureaucratic class consists of the best minds in the nation and is relatively independent from elected officials? How about the existence of a parallel European bureaucracy that vigorously enforces antitrust, consumer and similar regulations? How about legal systems in which private parties may press criminal charges against the will of the public prosecutor and where victims’ protection legislation allows victims of both felonies and misdemeanors to claim compensation from the state, thus forcing the state to prosecute the miscreants?

Finally, in comparing procedural solutions, we need to keep in mind the legal, political, and economic culture in a particular country. We need to know what it is like to think like a lawyer, businessman, or politician there before we can judge which procedural approaches will work. This approach may cast some doubt, for example, on the usefulness of economic analysis in dealing with the regulation of attorneys fees in countries in which lawyers do not primarily see themselves as entrepreneurs motivated by short-term profits. At least some Swiss attorneys attending the conference were deeply offended by suggestions that they need economic incentives to perform good work. Or, to take another example, how

satisfactory is a legislative funds approach to mass torts in countries in which legislators still largely legislate, not shying away from making difficult policy choices? As far as economic culture is concerned, however, how much of a difference does a tradition of corporate pride in producing high quality products and in caring for the welfare of employees and their families still make in a globalizing environment that puts insistent pressure on continental European companies to meet the productivity standards of U.S. firms?

As the conference vividly showed, many of these questions cannot be answered without the help of extensive empirical evidence, lest the discussion degenerate into a debate about beliefs. Even many Americans, to whom this reminder is not new, seemed to have a hard time adjusting some of their notions to the realities of class-action litigation identified by Professor Hensler and her colleagues at the RAND Institute for Civil Justice, whose latest study⁴ should quickly become standard reading for anyone wishing to discuss class actions.

In-depth comparative analysis of group actions and process values, supported by empirical data, thus promises to enhance the reform debate significantly beyond the current preoccupation with reducing expense and delay, whether or not one ultimately chooses to make significant changes to the existing system. To this end, the conference provided welcome impetus. But the suggested comparative approach should also help in answering the difficult question of what effect class actions have or should have on our approaches to transnational litigation. For example, to what extent does the availability of class actions in some jurisdictions, but not in others, affect the jurisdictional analysis, particularly within the framework of an international convention, such as Brussels, Lugano, or the proposed Hague Convention on jurisdiction and enforcement of judgments? Does the device's availability increase the need for some discretionary tool to decline jurisdiction or, conversely, to consolidate related proceedings? How does it affect current modes of judicial cooperation? Finally, do class action judgments and settlements violate the public policy of a country that does not provide such a device and thus stand in the way of enforcement as some German writers have suggested? These questions merely scratch the surface. We can thank the organizers of the Geneva conference to have inspired their emergence as subjects for future research and discussion.

⁴ Deborah R. Hensler *et al.*, *Class Action Dilemmas, Pursuing Public Goals for Private Gain* (2000).

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