Article IV, Paragraph 2 of the New York Convention on Arbitration

Confirming Switzerland's reputation as an arbitration-friendly forum, the Swiss Supreme Court has recently opted for a flexible and pragmatic interpretation of the New York Convention, admitting that in certain circumstances, a party seeking enforcement in Switzerland of an award issued in English may be exempt from producing a certified comprehensive translation of the entire arbitral award into one of the Swiss national languages.

Facts

A party initiated recognition and enforcement proceedings for an International Chamber of Commerce commercial arbitral award before the cantonal court in Switzerland. The party filed a certified German translation of the dispositive part of the award, together with a non-certified German translation of the cost section, but filed no comprehensive German translation of the award.

The cantonal court held that it had sufficient knowledge of English not to request a full translation of the award, especially since a German translation of the decision on costs, which constituted the subject matter of the dispute, had been produced. It thus dismissed any objection to enforcement. The cantonal court granted recognition and enforcement of the award.

The cantonal court's decision was challenged before the Supreme Court on the ground of infringement of the mandatory requirements of Article IV, Paragraph 2. The challenging party further contended that the examination of its public policy-based objection to enforcement (Article V, Paragraph 2(b)) required careful consideration of the entire award, which implied a full translation thereof.

Decision

The Supreme Court dismissed the challenge and considered that the partial translation produced by the requesting party was sufficient to comply with the formal requirements of Article IV, Paragraph 2.

The Supreme Court noted the lack of uniform judicial practice in Europe, as well

as the absence of a clear converging scholarly view in favour of either a strict application of Article IV, Paragraph 2, or a more pragmatic approach to the issue.

Considering that the purpose of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards, the Supreme Court held that it ought to be applied and construed in an enforcement-friendly manner, following a pragmatic, flexible and non-formalistic approach, including with respect to the formalistic requirements set forth in Article IV, Paragraph 2.

Source: http://www.internationallawoffice.com

Bermann on the Gateway Problem in International Commercial Arbitration

George A. Bermann, who is the Gellhorn Professor of Law & Jean Monnet Professor of European Union Law at Columbia University School of Law, has published The "Gateway" Problem in International Commercial Arbitration in the last issue of the *Yale Journal of International Law*.

> *Participants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive alternative to litigation, while still ensuring that its use is predicated on the consent of the parties and that the resulting awards command respect. A priori, at least, all participants—parties, counsel, arbitrators, arbitral institutions—have an interest in ensuring that arbitration delivers the various advantages associated with it, notably speed, economy, informality, technical expertise, and avoidance of national fora, while producing awards that withstand judicial challenge and otherwise enjoy legitimacy.*

National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process. Among the ways courts do so is by ensuring that arbitral proceedings are initiated and pursued in a timely and effective manner. But those same courts are commonly asked by a party resisting arbitration to intervene at the very outset to declare that a prospective arbitration lacks an adequate basis in party consent. No legal system that permits the arbitration of at least some disputes (and most do) is immune to the possibility that its courts will become engaged in an inquiry of that sort at the very threshold of arbitration. Each must decide how, at this early stage, to promote arbitration as an effective alternative to litigation, while at the same time ensuring that any order issued by a court compelling arbitration is supported by a valid and enforceable agreement to arbitrate. The challenge consists of identifying those issues that courts—in the interest of striking the proper balance between these two objectives—properly address at what is increasingly known, in common U.S. parlance, as the "gateway" of arbitration. This "gateway" problem is the focus of the present Article.

For purposes of this Article, I consider an arbitral regime to be effective to the extent that it operates to promote the procedural advantages I posited earlier—speed, economy, informality, technical expertise, and avoidance of national fora. While legitimacy might be defined in many different ways, I consider an arbitral regime to be legitimate (or to enjoy legitimacy) to the extent that the parties who were compelled to arbitrate rather than litigate, and will be bound by the resulting arbitral award, consented to step outside the ordinary court system in favor of an arbitral tribunal as their dispute resolution forum.

Legal systems differ in their responses to the challenge of reconciling efficacy and legitimacy in arbitration, and even in the extent to which they acknowledge that the challenge exists and try to articulate a framework of analysis for addressing it. This Article proceeds on the premise that legal systems have a serious enough interest in properly reconciling the values of efficacy and legitimacy to warrant their developing an adequate framework of analysis, as well as articulating that framework in a clear, coherent, and workable fashion.

In the United States, Congress has largely ignored the challenge of reconciling efficacy and legitimacy in arbitration, as have the states even when establishing

statutory regimes to govern arbitration conducted in their territory. The matter has accordingly fallen to the courts. In this Article, I reexamine the jurisprudence that American courts have developed, increasingly under the leadership of the U.S. Supreme Court, to address the fundamental tension between arbitration's efficacy and legitimacy interests that exists at the very threshold of arbitration. The exercise has come to consist largely of demarcating "gateway" issues (i.e., issues that a court entertains at the threshold to ensure that the entire process has a foundation in party consent) from "non-gateway" issues (i.e., issues that arbitral tribunals, not courts, must be allowed to address initially, if arbitration is to be an effective mode of dispute resolution).

This Article proceeds as follows. Part II briefly sketches the settings in which courts may be asked to conduct the early policing with which this Article is concerned. Part III identifies the terminological confusion that has hampered clear thinking on the subject, and proposes a coherent vocabulary for overcoming it. Part IV then explores critically the conceptual devices that courts and commentators have traditionally employed in sorting through the issues. In so doing, it demonstrates that the two notions most widely relied upon for this purpose—Kompetenz-Kompetenz and separability—are unequal to the task, and explains why. A critical understanding of U.S. law in this regard is aided by comparing it to models—the French and German—that claim to have devised simple and workable formulae for reconciling efficacy and legitimacy interests at the outset of the arbitral process. That discussion will show how the often proclaimed universality of Kompetenz-Kompetenz and separability is in fact misleading.

Against this background, Part V traces how recent U.S. case law has progressively pursued a more nuanced balance between efficacy and legitimacy than the traditional conceptual tools tended to yield. The courts have achieved this result, not by erecting a single comprehensive framework of analysis, but rather through a series of pragmatic adjustments to the received wisdom associated with Kompetenz-Kompetenz and separability. I conclude that they have developed a suitably complex body of case law that ordinarily reaches sound results. But I am equally certain that, in doing so, they have failed adequately to rationalize the case law. The disparate strands of analysis—each of which is basically sound—have combined to produce a needlessly confusing

case law to the detriment of clarity, coherence, and workability. I suggest that the case law can and should be recast, and that the central feature of that recasting must be a serious and frank confrontation of the underlying tradeoff between arbitration's efficacy and legitimacy interests. This Article is thus both descriptive and normative in outlook.

Katia Fach on Arbitration

Dr. Katia Fach (Universidad of Zaragoza) is author of "Rethinking the Role of Amicus Curiae in International Investment Arbitration", to be found in 35 *Fordham International Law Journal 510,* and also here (SSRN)

> The intervention of amicus curiae in investment arbitration is a matter of great interest and it will continue generate a legal debate in the future. In the wake of multiple courts and some tribunals, several rules on investment arbitration have increasingly recognized the possibility that the general interest is protected through amicus submissions. The fact that a party of the investment arbitration is a state and problems transcend the interests of the specific parties involved in the arbitration justify the progressive implementation of the principle of transparency, which has been traditionally rejected in commercial arbitration, in the field of investment arbitration.The acceptance of the institution of amicus curiae in BITs and arbitration rules has resulted recently in various NGOs submitting amicus briefs in relevant international arbitrations. Additionally, UNCITRAL and ICC are currently developing two projects in the field of investment arbitration that are going to address the issue of amicus briefs. Taking all of this data as reference, this Note reflects on the most appropriate regulation of the institution of amicus curiae. This means taking into account a multiplicity of factors, both internal -concerning the content and the submission process- and external -referring to the relationship of these non-parties with other participants in investment arbitration-. The approach taken regarding this regulation is multiple, since the institution of amicus curiae is controversial. Against the multiple benefits

> preached mainly by NGOs, investors believe that the acceptance of amicus curiae brings various injustices. The proposal advocated by this Note is twofold. On the one hand, the acceptance of unsolicited amicus briefs should be governed by a set of criteria able to block any submission that do not benefit the outcome of arbitration and are excessively detrimental to the parties and arbitrators of the investment dispute. On the other hand, institutions managing investment arbitrations could establish a new institution exclusively and permanently dedicated to defending the collective interest. This proposal, although suggestive, would imply a major change in the system and therefore their perspectives of success would possibly materialize in the medium to long term.

Also from Katia Fach, see "Ecuator's Atteinment of the Sumak Kawsay and the Role Assigned to International Arbitration", the *Yearbook of International Investment Law and Policy*, 2010-2011, pp. 451-487:

> Article 422 of the 2008 Ecuadorian Constitution prevents the Ecuadorian State from ceding its sovereign jurisdiction to international arbitration entities through entering into Treaties or international instruments. This provision is a clear manifestation of the rejection generated in Ecuador by an *ex ante* and general submission to international tribunals. This chapter discusses in detail the wording of Article 422, highlighting the doubts and difficulties of interpretation posed by this constitutional provision. It also reflects on two events derived from the approval of Article 422: the denunciation of the ICSID Convention and the denunciation of a number of Bilateral Treaties on the Promotion and Guarantee of Investments signed by Ecuador. The chapter also studies some recent judgments of the Ecuadorian Constitutional Court, which have declared many BITs as unconstitutional. A detailed review of these decisions will lead us to make a critical assessment. Finally, it analyzes the most recent manifestations of the Ecuadorian government regarding international investments. These latest contractual and legislative developments force us to reconsider the real impact that Article 422 of the Constitution is having on Ecuadorian economic life.

International Arbitration Law Review, Vol. 14, Issue 5

The latest issue of the International Arbitration Law Review (Vol. 14, no. 5, 2011) is out.

Contents include several topics of interest to the intersection of private international law with commercial and investor state arbitration, including:

Hong-Lin Yu, How far can party autonomy be stretched in setting the grounds for the refusal of arbitral awards?
Charles Kotuby Jr, 'Other international obligations' as the applicable law in investment arbitration
Sanja Djajic, Contractual claims in treaty-based arbitration – with or without umbrella and forum selection clauses

Also in this edition are:

Thierry Berger & Mark Roberts, The new ICC Rules of Arbitration: a brief overview of the main changes
Judy Zhu, China's CIETAC Arbitration – New Rules under review
Richard Smith, Angeline Welsh & Manish Aggarwal, Jivraj v Hashwani – the UK Supreme Court overturns a controversial Court of Appeal ruling on arbitration
Luis Fernando Bermejo, Mandatory ICC provision in Guatemala's Arbitration Law is declared unconstitutional by the Constitutional Court of Guatemala

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New Book on Public Contracts and

International Arbitration

A new book exploring issues raised by arbitrations involving states and states entities was published earlier this fall. The book, which was edited by professor Mathias Audit (Université Paris Ouest Nanterre la Défense), offers a variety of contibutions in French and in English.

INTERNATIONAL AND REGIONAL PERSPECTIVES

- ICC arbitration & public contracts : the ICC Court's experience of arbitratons involving states and stage entities
- L'arbitrage CIRDI et les contrats de nature publique passés avec un Etat ou une entité étatique
- International arbitration and Public Contracts in Latin America

NATIONAL PERSPECTIVES

- Arbitrage international et contrats publics en France
- Arbitrage international et contrats publics en Belgique
- Arbitrage international et contrats publics au Canada

The full table of contents is available here.

The book can be ordered here.

3rd International Moot Competition on Maritime Arbitration

The Center for International Law and Justice (Odessa, Ukraine) is pleased to invite law schools to compete in the 3rd International Moot Competition on Maritime Arbitration.

This year the moot case concerns number of issues at the forefront of economy affairs. Prominent Ukrainian Law Firm “International Law Offices” have kindly provided the Center with Moot Case which was developed as close to the real dispute as it is possible. The teams are challenged to present positions of Owners and Charterers according to the LMAA rules. The core problem lays in refusal to pay demurrage charges, arguing that the existing situation has been an exclusion from the GENCON charter uniform. Participants should analyze factual background, legal reasoning of both sides, documents (Notice of Readiness, Ukrainian Chamber of Commerce and Industry references, Charter, Arbitral Clause), correspondence, actual Rules of procedure, etc.

Deadline for registration is 31 of December. Participation fee is 200 euro per team and includes meals and lodging (from March 16 to 18, 2012), at the Ukrainian style wooden hotel “Kolyba”.

For further information concerning the event please look at the web-site:

www.cilj.org.ua

French Conference on Arbitration and EU Law

A conference on Arbitration and European Union Law (*Arbitrage et droit de l’Union europeenne*) will be held in Paris on November 4th, 2011.

8h30 – Accueil et inscription des participants

9h00 – Allocution introductive
M Philippe LEBOULANGER
Président du Comité français de l’arbitrage
Avocat au Barreau de Paris

PREMIERE PARTIE – L'EXCLUSION DE L'ARBITRAGE DU DOMAINE DU REGLEMENT BRUXELLES 1 ET SON EVENTUELLE SUPPRESSION
9H10

Président de séance
M Gérard PLUYETTE
Conseiller Doyen à la première Chambre civile de la Cour de cassation

Les questions liées à l'appréciation et aux effets de la convention d'arbitrage
M Sylvain BOLLEE
Professeur à l'Ecole de droit de la Sorbonne (Paris I)

Les questions liées au déroulement de la procédure arbitrale et à l'efficacité de la sentence
M Cyril NOURISSAT
Recteur de l'Université de Bourgogne

Table ronde et discussion générale
Mme Sandrine CLAVEL
Professeur à l'Université Versailles Saint Quentin,
M Laurent JAEGER
Avocat au Barreau de Paris, Associé, Orrick
Philippe PINSOLLE
Avocat au Barreau de Paris, Associé Shearman & Sterling
François-Xavier TRAIN
Professeur à l'Université Paris-Ouest.

11h15 : Pause-café

DEUXIEME PARTIE – ARBITRAGE ET DROIT MATERIEL EUROPEEN
11H45

Président de séance :
M Guy CANIVET
Président honoraire de la Cour de cassation
Membre à la Cour de cassation

L'application du droit européen de la concurrence par l'arbitre
M Olivier CAPRASSE

Doyen de la Faculté de droit de Liège
Professeur à l'Université de Bruxelles
Avocat au Barreau de Bruxelles, Cabinet Hanotiau & Van Den Berg

Le contrôle judiciaire sur le respect du droit européen de la concurrence par l'arbitre
M Matthieu DE BOISSESON
Avocat au Barreau de Paris, Associé, Darrois Villey Maillot Brochier

12h45 – Déjeuner

DEUXIEME PARTIE (SUITE) – ARBITRAGE ET DROIT MATERIEL EUROPEEN (suite)
14H15

Arbitrage et droit européen de la consommation
M Christophe SERAGLINI,
Professeur à l'Université Jean Monnet (Paris XI)

Table ronde et discussion générale
M Santiago MARTINEZ LAGE
Avocat au Barreau de Madrid, Associé Howrey LLP
M Pierre MAYER
Professeur à l'Ecole de droit de la Sorbonne (Paris I)
Avocat au Barreau de Paris, Associé, Dechert LLP
M Jean-Baptiste RACINE
Professeur à l'Université de Nice-Sophia Antipolis
M Luca RADICATI DI BROZOLO
Professeur à l'Université Catholique de Milan
Avocat associé, Bonelli Erede Pappalardo

15h45 : Pause

TROISIEME PARTIE – L'ARBITRAGE ET LE CONTROLE DES ENGAGEMENTS EN DROIT DE LA CONCURRENCE (PRATIQUES ANTICONCURRENTIELLES ET CONTROLE DES CONCENTRATIONS)
16H00

Président de séance :

Mme Catherine KESSEDJIAN
Professeur à l'Université Panthéon- Assas (Paris II)
Membre du Collège européen de Paris

Description du système, objectifs et bilan
Mme Ana GARCIA CASTILLO
Direction Générale de la Concurrence
Membre de la Commission européenne

Analyse du système
Mme Laurence IDOT
Professeur à l'Université Panthéon-Assas (Paris II)
Membre du Collège européen de Paris

Discussion générale

QUATRIEME PARTIE – LE ROLE DE LA COMMISSION DE L'UNION EUROPEENNE DANS LA NEGOCIATION DES TRAITES COMPORTANT DES CLAUSES RELATIVES A L'ARBITRAGE
17H00

Président de séance :
Mme Catherine KESSEDJIAN
Professeur à l'Université Panthéon- Assas (Paris II)
Membre du Collège européen de Paris

Exposé
M Eric LOQUIN
Professeur à l'Université de Bourgogne
Doyen honoraire de la Faculté de droit
Directeur du CREDIMI
Sébastien MANCIAUX
Maître de Conférences à l'Université de Bourgogne

Discussion générale

18h00 – Clôture du colloque

The conference will be held at the *Maison du Barreau* on the *Ile de la Cite*.

Speeches will be delivered in French without translation.

More information is available here.

Radicati on Arbitration and the draft Brussels I Review

Luca G. Radicati di Brozolo, who is a professor of law at the Catholic University of Milan and a partner at Bonelli Erede Pappalardo, has posted Arbitration and the Draft Revised Brussels I Regulation on SSRN. The abstract reads:

> *This paper discusses the provisions on arbitration of the European Commission's December 2010 draft review of Reg. (EC) 44/2001 against the backdrop of the earlier proposals on the inclusion of arbitration within the scope of the Regulation. The analysis focuses principally on the functioning and implications of the lis pendens mechanism laid down by Article 29(4) of the draft, pointing out the analogy between the role conferred on the law and forum of the seat of the arbitration and the mechanism of home country control that is at the heart of European Union law. The article also analyzes the reasons and positive consequences of the Commissions' restraint in not extending the scope of the Regulation to other arbitration – related issues, especially the circulation of judgments dealing with the validity of arbitration agreements and awards. The article's conclusion is that the Commission proposal is well balanced. Whilst it does not solve all problems relating to conflicts between court proceedings and arbitration within the EU, it addresses the most pressing one, that of concurrent court and arbitration proceedings. Moreover, it does so in terms which, in contrast to the use of anti-suit injunctions in aid of arbitration, are reconcilable with the basic tenets of European Union law. Its approach is indisputably favorable to the development of arbitration and does not jeopardize the acquis in terms of arbitration law of the more advanced member States.*

Australian article round-up 2011: Arbitration

Continuing the Australian article round-up, readers may be interested in the following two articles raising points about arbitration:

- **Andrew Bell, 'Dispute Resolution and Applicable Law Clauses in International Sports Arbitration' (2010) 84 *Australian Law Journal* 116:**

Choice of law clauses and jurisdiction or arbitration agreements play a critical role in international commerce. They also play an increasingly important role in sporting disputes by reason of the ever-growing internationalisation and commercialisation of sport. The presence of such clauses does not, however, guarantee the elimination of interlocutory or adjectival contests concerning the law which will govern, and the forum or mode of dispute resolution that will apply, to the determination of an international sporting dispute. This article examines standard sports-related choice of law clauses and arbitration agreements, and considers the emerging jurisprudence in this field.

- **Geoffrey Fisher, 'Anti-Suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement' (2010) 22 *Bond Law Review* 1:**

The anti-suit injunction is the remedial device available in common law systems to restrain a party from instituting or continuing with proceedings in a foreign court. … [A] recognised category for the issue of an anti-suit injunction is where a plaintiff has commenced proceedings in a foreign court in breach of a contractual promise, for example, in breach of an exclusive jurisdiction clause or an arbitration agreement. In this type of case there is a tension between the interests of comity on the one hand and the policy of upholding contractual undertakings on the other. The English Court of Appeal in Aggeliki Charis Campania Maritima SpA v Pagnan SpA (The Angelic Grace) can be regarded as

having inaugurated a more liberal approach to the jurisdiction to grant an anti-suit injunction restraining breach of an arbitration agreement. The tension between comity and contractual bargain was largely resolved in favour of the latter. This paper examines the nature and extent of the liberalisation worked by The Angelic Grace and subsequent English decisions.

Foreign arbitration awards in Australia: a 'pro-enforcement bias'

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131 provides a recent example of the 'pro-enforcement bias' of at least some Australian courts when it comes to international arbitration awards. The Federal Court of Australia enforced a Ugandan arbitration award under the *International Arbitration Act 1974* (Cth) (which applies the *New York Convention*), notwithstanding that the Australian corporate respondent did not participate in the arbitration. That Act was amended in 2010 to favour the enforcement of foreign arbitral awards even further than had previously been the case. There are two points of more general interest.

First, the Court considered that the arbitration clause at issue — which provided that 'Any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration' — was not void for uncertainty and nor was the dispute outside its scope or determined otherwise than in accordance with the procedure agreed by the parties. The Court was prepared to read the clause as meaning (at [63]): 'All disputes under or in relation to the Contract must be referred to arbitration'. The Court thus effectively read the words 'under or in relation to the Contract' into the arbitration clause. The arbitral procedure adopted was in accordance with Ugandan arbitration legislation, which supplied any deficiencies in the parties' agreement concerning procedure.

Secondly, the Court rejected the respondent's submission that the award should

not be enforced on grounds of public policy (s 8(7) of the Act). The respondent had sought to invoke this ground on the basis that the arbitrator made errors of law and fact when determining the award of general damages. The Court said (at [126]) that it was not:

> *against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.*

The Court approved United States authorities consistent with this narrow approach to the public policy exception (*Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier*, 508 F 2d 969 (2d Cir 1974); *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 at 306 (2004)) and disapproved previous Australian authorities supporting a broader approach (*Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432; *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; (2004) 183 FLR 317 at [6]-[14], [18]).