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ARBITRATION LAW REFORM IN EUROPE

Arbitration Law Reform in Europe

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Arbitration and trade

England, a country of seafarers and traders (unkindly described by Emperor Napoleon as 'a country of shop-keepers') has a long history of using arbitration as an adjunct to trade. We have, for several centuries, taken the view that disputes get in the way of trade and that the swift resolution of disputes benefits trade. As long ago as the 15th Century the Chancellor in our famous Star Chamber of 1475 said:[1]

> *This dispute is brought by an alien merchant... who has come to conduct his case here, and he ought not to be held to await trial by twelve men and other solemnities of the law of the land but ought to be able to sue here from hour to hour and day to day for the benefit of merchants.*

In recognition of the importance of arbitration in the conduct of trade, our first Arbitration Act of 1698 was specifically enacted for the benefit of trade. Its preamble reads:[2]

> *Now for promoting trade and rendering the award of arbitrators more effectual in all cases, for the final determination of controversies referred to them, by merchants and traders, or others, concerning matters of account or trade, or other matters...*

These three objectives of 'promoting trade' 'rendering the awards of arbitrators to be more effectual in all cases' and 'the final determination of controversies referred to them' have remained from that day to this as the central objectives of our arbitration law. Moreover the essential rational behind the proposals of the United Nations Commission on International Trade Law ('UNCITRAL') for the adoption of the UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law of 1985 was to facilitate the conduct of international trade.[3] In the words of the Resolution of the United Nations, adopting the UNCITRAL Arbitration Rules:[4]

> *The General Assembly*
> *... Being convinced that the establishment of rules for... arbitration, that are acceptable in countries with different legal, social and economic systems, would significantly contribute to the development of harmonious international economic relations...*

The development of arbitration law and the Civil Code

Until this century, and particularly until the second half of this century, arbitration as a means of dispute resolution was less developed in those European countries whose law rests upon the Civil (or, as sometimes described, the Napoleonic) Code. Not only has law in the Civil Code developed more from the centre, and the seat of power, and in its development been less evolutionary (and certainly less haphazard!) than the development of law in the common law countries, but in some European Civil Code countries (as I believe in some South American countries), the use of arbitration was forbidden.

This has all now changed. The outstanding fact is that, in the last 20 years, every major European country (including the United Kingdom) has introduced new arbitration laws which have radically reformed the conduct of arbitration in and from that country. Such has been the activity in arbitration law reform in Europe that the process has been accelerating and many of the new arbitration laws have been enacted in the last five years. It started with England in its Arbitration Act of 1979 which abolished two outmoded and unpopular forms of judicial review. In 1981 France introduced

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1 YB13 Edward IV p. 96: see also Potter *Historic Introduction to English Law and its Institution, 2nd Edition (1943) p. 160.*

2 Chaper XV Anno 9° & 10° WILL III.

3 For a fuller analysis of the relationship in England between arbitration and trade see the author's article 'Arbitration Law Reform: The Impact of the UNCITRAL Model Law on the English Arbitration Act 1996' The Journal of the Chartered Institute of Arbitrators Vol. 63 No 4 Nov 1997.

4 Resolution 31/98 adopted by the General Assembly, on 15 December 1976.

a new Arbitration Code, making specific reference to international arbitration, in its Code of Civil Procedure. Austria followed in 1983 with new arbitration laws in its Civil Code of Procedure. Then came Holland in 1986 with its new Arbitration Act and Spain in 1988 with its new Law of Arbitration. After a thorough review of its arbitration law Switzerland came forward with its new arbitration provisions in its Private International Law Act of 1987 which came into effect on 1 January 1989. The first country through the gate of arbitration law reform in Europe in the 1990s was Scotland which adopted, into its domestic law, the UNCITRAL Model Law in 1990. Romania came in with new Arbitration Laws in 1992 and 1993 as did Italy, Hungary and Ukraine in 1994. England, after nearly 20 years of study and debate, produced its major arbitration reform in its Arbitration Act 1996 (effective 31 January 1997) and Germany and Belgium followed in 1998 as did Ireland. Sweden is the latest entrant into arbitration law reform in Europe. Effective on 1 April 1999 the Swedish Parliament has enacted a new Arbitration Act and, at the same time, the Stockholm Chamber of Commerce, which has dealt with arbitration matters since 1917, has revised its Arbitration Rules. You will find in the notes for my paper (attached as an Addendum to this article) the precise identification of each of these European arbitral law reforms.

The gathering momentum of European arbitral reform

What has been the reason for this massive wave of European arbitration law reform? There has been the collapse of communism and the movement of the countries of Eastern Europe from command economies of the communist era to demand economies of the capitalist era. Such countries have had to create a vast range of new laws which did not exist, or had become moribund, under communism. Undoubtedly the publication of the Model Law in 1985 also had its influence. However I believe the major reason for arbitration law reform in Europe has been in the increasing realisation that efficient, fair (and dare I say swift!) dispute resolution is an essential component of good trading. European arbitration law reform has also created its own momentum with one country after another country entering into competition to provide the most attractive location for international arbitrations.

It is quite plain, from the excellent papers we have heard this morning, that the same movement of arbitral law reform is gathering pace in Central and South America. I am in no doubt that the use of commercial arbitration will much increase, as it has in Europe during the last two decades, during the next decade in this region of the world. This conference is, therefore, exceedingly well timed.

In a recent article, which I much commend to you, Matthieu de Boisséson and Thomas Clay, of the Paris Bar, describe this evolution of arbitration in Civil Law countries with these words:[5]

> *The evolution in civil law countries is continuous, and converges towards the same goal: the ever more assured affirmation of arbitration. There are many examples from over the last three years which would illustrate the maturing of international arbitration in civil law countries and the place that it holds, not as an alternative to the state judicial system, but rather as a more suitable dispute settlement mechanism. The arbitrator fulfils this mission not as a substitute for the national judge, a role to which we have wanted to confine him for too long, but as the true natural judge of international trade such as has been progressively fashioned by case law.*

The main trends of European arbitration law reform

What, therefore, have been the main trends?

(i) The enlargement of commercial and social activities which can be made subject to arbitration

The increased use of arbitration can be found in a variety of circumstances. The starting point is that, under many Civil Law countries, arbitration is only permitted when the law permits it. Although there has been talk of taking Article 2061 out of the French Civil Code, it is still there:

> *An arbitration Clause shall be null unless the law provides otherwise.*

The increase in arbitrability in the civil law countries of Europe has enabled public or state bodies to enter into arbitration agreements and for public works also to be arbitrable. Two recent Awards in Italy in April 1996 firmly held that public works concessions were arbitrable.[6] Under the 1998 Belgian Arbitration Reform Act public authorities may expressly enter into arbitration agreements if the subject matter of the agreement relates to the resolution of disputes concerning the construction or performance of the agreement.[7] Similar extensions in arbitrability are to be found in the Civil Law countries in competition law and consumer law. In France the decisions of the Cour de Cassation in the two Jaguar cases of May 1997, ruled in favour of the arbitrability of consumer disputes.[8] Two recent decisions in the Madrid Courts are to the same effect.[9]

There has been a particularly interesting, in the Civil

[5] 'Arbitration in the Civil Law Countries': IBA Newsletter of SBL Committee D 'Arbitration and ADR' Vol 3 No 2 October 1998.
[6] Arbitral awards: Naples 1 April 1996: *Revista dell' arbitratro 1996.581.*
[7] New Article 1676 of Belgian Code of Civil Procedure amended 19 May 1998 and effective 17 August 1998.
[8] Cour de Cassation 1st Civil Law Chamber: 21 May 1997.
[9] Sentencia de la Andencia Provincial Madrid: 18th and 21st Sections 13 July 1993.

Law countries of Europe, extension of the use of the arbitration clause relating to third parties. This was most eloquently stated in the Paris Appeal Court in March of 1995:[10]

> *... the arbitration clause inserted in an international contract has self standing validity and effectiveness which require that its application be extended to parties which are directly implicated in the performance of the contract and in the disputes that may arise therefrom as long as it is established that their situation and their activities give rise to the presumption that they were aware of the existence and the scope of the arbitration clause, even though they were not signatories of the contract which provides for it.*

This is a nettle which has not been grasped in English arbitration law.[10a] Under Section 35 of the English Arbitration Act 1996[11] the arbitral tribunal can order the consolidation of arbitral proceedings with other arbitral proceedings or order concurrent hearings but only when the parties expressly give them the power to do so. Also under Rule 3 of our new Construction Industry Model Arbitration Rules[12] of March 1998 the arbitrators have certain powers of joinder and consolidation but only relating to different disputes under the same arbitration agreement or when the same arbitrator has been appointed in different arbitral proceedings which involve common issues. There are, however, no procedures in England for parties outside an arbitration to intervene and participate in it or generally for parties in an arbitration to bring in other parties who were not signatories to the arbitration agreement.[12a] Such powers can only be exercised with the express agreement of all the involved parties. This is not so under several European Civil Law countries. As cited, France has established, relating to international contracts, the right to bring third parties into an arbitration. Under Swiss Law this principle has also been established. The Swiss Federal Court in January 1996 ruled that where an arbitration clause bound a subsidiary company it also bound, because of its dominant position, the parent company.[13] Under the recent Belgian Arbitration Reform Act a party to an arbitration may invite a third party to join the arbitration proceedings. Similarly third parties in Belgium may now request to join arbitration proceedings. This has to be with the unanimous consent of the arbitral tribunal and, as part of the process, all of the parties involved have to sign an arbitration agreement.[14]

(ii) Severability of the arbitration clause

Another important trend in the development of arbitration law in Europe has established the severability of the arbitration clause. The UNCITRAL Model Law recommends, in Article 16 (1), that the arbitration clause should be independent from the other terms of the agreement. It is good that it does so. In practical terms it is very important not to lose the arbitration, as the agreed means of resolving the disputes between the contractual parties, when the contract containing the arbitration clause could be held to be null and void. The new Swiss Federal Arbitration Law of 1989,[15] the Italian Arbitration Reform Law of 1994,[16] the English Arbitration Act 1996[17] and, as the latest example, the German Arbitration Law of 1998[18] all give statutory force to the severability of the arbitration clause. So does Spain in its new Arbitration Law of 1988 although it deals with this provision in a more discretionary way '*The voidness of a contract will not necessarily imply that of the accessory arbitration agreement*'.[19] France, who started the journey towards the autonomy of the arbitration clause over 30 years ago, in the *Gosset* case[20] remains ahead of the field. In the *Dalico* case of 1993[21] the French Cour de Cassation not only separated the arbitration clause from the principal contract and the applicable law of the principal contract but from any substantive law which governed the contract or its execution. Hence if under any substantive law, which is binding on the parties, the arbitration clause can not be severed from the contract, the French Courts under the *Dalico* case can nonetheless rule (for arbitrations taking place in France) that the arbitration clause is outside any system of the state law and is severable from the main contract.

[10] Paris Court of Appeal 22 March 1995: quoted in the article of Boisséson and Clay: above note 5.

[10a] All references to English or England include Welsh and Wales—the jurisdiction of England and Wales being, at law, one jurisdiction.

[11] Chapter 23 of the General Public Acts of 1996 of England and Wales.

[12] Published in London by the Society of Construction Arbitrators.

[12a] In the Contracts (Rights of Third Parties) Bill currently before the English Parliament there is a provision which will permit a third party to opt into the arbitration clause in the contract between the promisor and promisee (of which he is a beneficiary) but there is no proposal for the contractual parties to be able to compel the third party to join into an arbitration even though the third party had full notice of the arbitration clause.

[13] Swiss Federal Court; 1st Civil Law Court: 29 January 1996.

[14] New article 1676 of Belgian Civil Code: see note 7.

[15] The Swiss Federal Private International Law Act (effective 1 Jan 1989) Chap 12 Article 178.3.

[16] Enacted by Law No 25 on 5 January 1994 (published in the Official Gazette on 17 January 1994) and effective on 17 April 1994 amending Title VIII of Book IV of the Italian Code of Civil Procedure. The right of the arbitral tribunal to decide the issue of its jurisdiction is also contained in Article 4.4 of the Rules for International Arbitration of the Italian Association for Arbitration (approved 15 April 1994 and effective 30 September 1994) and in Article 1.2 of the International Arbitration Rules of the Milan Chamber of National and International Arbitration (effective 1 May 1996).

[17] Section 7: Chapter 2 General Public Acts of 1996 of England and Wales.

[18] Article 1, No 7 of the Arbitral Proceedings Reform Act of 1997 (effective 1 Jan 1998) adopting a new Tenth Book of the German Code of Civil Procedure: See Section 1040(1).

[19] Article 8 Title II Spanish Private Law 36/1988.

[20] Cour de Cassation 1st Civil Law Chamber, 7 May 1963.

[21] Cour de Cassation 1st Civil Law Chamber, 20 December 1993. There is also mention of this case in the excellent article by de Boisséson and Clay in the IBA Newsletter: above Note 5.

(iii) Increased autonomy of arbitrators

The increased autonomy of arbitrators is another very important development in European arbitration law. The right of the arbitral tribunal to decide upon its own jurisdiction and the right of the arbitral tribunal to be in charge of the conduct of the proceedings before it, gives most important autonomy to the arbitral tribunal. The former is contained in Article 16(1) of the UNCITRAL Model Law and is also to be found in Article 186.1 of the Swiss Federal Arbitration Law of 1989, in Article 23.3 of the Spanish Arbitration Law of 1988, in Section 30(1) of the English Arbitration Act of 1996 and in Section 1040 of the new German Arbitration Law of 1998. Similarly under Article 1466 of the French Civil Code for Arbitration it is for the arbitrator to '*rule on the validity or scope of his or her jurisdiction*' but French law goes further than other laws in other European countries by, in effect, in Article 1458 of its Civil Code prohibiting the Court from entertaining any challenge to the arbitrator's jurisdiction until the arbitration has reached its end. This is in marked contrast to the Federal Law of the USA where in a recent decision[22] the US Supreme Court affirmed that the arbitrator's jurisdiction remains a decision to be decided by the Court.

The autonomy of the arbitral tribunal over the conduct of proceedings is to be found in Article 1460 of the French Civil Code where the conduct of arbitration proceedings is left, free from the rules followed by the French Courts, for the determination of the arbitrators unless the parties have otherwise agreed in the arbitration agreement. The same applies under Article 21 of the Spanish Arbitration Law of 1988 and similar powers in the conduct of the arbitration proceedings are given to the arbitrators in Section 34 (1) of the English Arbitration Act 1996 and Article 182.2 of the Swiss Federal Arbitration Law of 1989[23] subject to the parties having the first opportunity to decide upon the procedure for the conduct of the arbitration. Likewise powers are to be found in the new German Civil Code for the conduct of arbitral proceedings[24] where, subject to the parties agreeing otherwise, in Section 1042(4) the arbitral tribunal has the right to '*conduct the arbitration in such manner as it considers appropriate*' and in Section 1047 the arbitral tribunal is left to decide whether to hold oral proceedings or to conduct the arbitration on the documents and other materials submitted to it. Italy has an identical approach. In the new Rules for International Arbitration of the Italian Association for Arbitration[25] it is expressly stated in Article 25:

> *The arbitrator is free to settle the manner in which the proceedings shall be conducted as he best sees fit, provided he respects the determinations of the parties in this regard which have been bought to his attention...*

The right to exclude or limit judicial review of arbitral awards is all part of giving increased autonomy to arbitrators. Under the new Swiss Federal Arbitration Law where none of the parties are domiciled in Switzerland (or are habitually resident or have a business establishment there) an express agreement can be made between the parties under Article 192 (viz. when an award has gone beyond claims submitted to the arbitral tribunal or where it has failed to decide one of the claims before it) to exclude all setting aside proceedings.[26] The right under English Law to appeal to the Court on a question of law can be excluded if the parties agree to exclude it under Section 69 of the Arbitration Act 1996 but Belgium (like Switzerland) has gone further (when the parties so provide in the arbitration clause) to statutorily bar the review of international arbitral awards.[27]

(iv) Increased autonomy of parties

The UNCITRAL Model Law gives a good lead on the autonomy of the parties. Under Articles 10 and 11 of the Model Law, autonomy is given to the parties for setting up the arbitral tribunal. Under Article 13 of the Model Law, the parties are given autonomy for agreeing the procedure under which an arbitrator can be challenged. Under Article 19 parties are given autonomy for determining the procedure under which the arbitration is conducted and under Article 28 for selecting the governing law or, as their sole prerogative, for permitting the arbitral tribunal to make decisions on equitable principles. Although earlier enacted we find under French Civil Code, for the conduct of international arbitrations, in Article 1494 that:

> *The arbitration agreement may, directly or by reference to the Arbitration Rules, determine the procedure to be followed in the arbitral proceeding...*

and under the Swiss Federal Arbitration Law in Article 182:

> *The parties may, directly or by reference to the Arbitration Rules, determine the arbitral procedure...*

Similar powers are given to the parties under Section 34 of the English Arbitration Act and under Section 1042(3) of the new German Arbitration Law of 1998 the provision is that:

> *...the parties agree to determine the procedure themselves or by reference to a set of Arbitration Rules.*

[22] Options of Chicago v Kaplan 115 S 1920 (1995).
[23] Chapter 12 for International Arbitration (effective 1 January 1989).
[24] See note 18 above.
[25] See note 16 ibid.
[26] See note 23 above.
[27] The new Article 1717 in the Belgian Civil Code: see Note 6 above.

Likewise under Article 15 of the new International Arbitration Rules of the Milan Chamber of National and International Arbitration it is stipulated:

> *The rules applicable to the procedure shall be those established by the parties before the arbitral body is formed, by these Rules, or in the silence of the Rules, by the arbitrator.*

Increased autonomy of arbitral tribunals v increased autonomy of the parties

You may question how, under European arbitration law, it is possible to increase, at the same time, the autonomy of the arbitral tribunals and the autonomy of the parties. You may indeed legitimately ask is there not a conflict between giving greater powers to the tribunal and at the same time, giving greater powers to the parties? In fact, in the very nature of the arbitration process, there is not a conflict between the greater powers of the tribunal and the greater powers of the parties. Basically it operates in this manner. In the first place the parties are given the autonomy to decide how they want the arbitration to be set up and conducted. The arbitrator only takes up his autonomy after the parties have exercised theirs. So when the parties have reached agreement on procedural and evidential issues the arbitrator is under a duty to honour that agreement or to resign. Thus, if the parties have agreed for the arbitrator to conduct an arbitration in a way which puts the arbitrator in conflict with his own duties and responsibilities (for example, in breach of the arbitrator's duty under the English Arbitration Act to act fairly and impartially between the parties) then the arbitrator has the right, if the parties insist on the particular provision, to resign his appointment. In the real world, however, this seldom if ever arises because arbitrators and parties see that it is their ultimate responsibility to work together in the arbitral process. The real significance, therefore, in the development of European arbitration law is the freeing up of the arbitral process as a separate dispute resolution process which has the support, rather than the interference, of the Courts.

Conclusion

In conclusion, therefore, I believe that there is a message of encouragement from the recent development of arbitration law in Europe. There is a great role and great opportunities for the arbitration process. The need is to train and appoint pro-active arbitrators who move forward the arbitration process swiftly and fairly. Gone should be not only the 'solemnity of the law' but those arbitrations which drag on day after day week after week month after month until everybody is asleep. Yes there is a story of an elderly Peer in the House of Lords who dreamt he was making a speech and woke up and found it was true!

How we can take forward the arbitral process so that awards can be made, in the words of the English Chancellor of 1457:

> *...from hour to hour and day to day for the benefit of merchants*

is a debate which the Chairman of the Chartered Institute of Arbitrators, who is presiding over this session, and I can have with you on another day. In the meantime please receive this message of encouragement from Europe and press forward with the arbitral law reform upon which you are actively embarked.

Arbitration Reform in Europe

ADDENDUM

Austria
Austrian Code of Civil Procedure of 2 February 1983 effective 4 May 1983.

Belgium
Arbitration Reform Act 1998: enacted April 1998.

England, Wales and Northern Ireland

First Arbitration Act:	Arbitration Act 1698
Latest Arbitration Act:	Arbitration Act 1996: effective from 31 January 1997

Finland
Arbitration Act 1992 effective 1 December 1992. Follows Model Law.

France
New Code of Civil Procedure 1981 decreed 12 May 1981.

Germany
The Arbitral Proceedings Reform Act 1998: effected 1 January 1998. Follows Model Law.

Holland
Arbitration Act 1986.

Hungary
Act LXXI of 1994 on Arbitration – effective 23 November 1994.

Ireland
International Arbitration Act No. 14 of 1998 effective 20 May 1998.

Italy
Arbitration Reform 1994 Law No. 25 effective 17 April 1994.

Italian Association for Arbitration: Rules for International Arbitration 1994 – effective 30 September 1994.

Milan Chamber of National and International Arbitration: International Arbitration Rules – effective 1 May 1996.

Romania
Law No. 105 of 22 September 1992 on Settlement of Private International Law Relations and Law No. 59 of 23 July 1993 introduced a New Book VI of Code of Civil Procedure to establish a new Arbitration Law in Romania.

Scotland
Adopted UNCITRAL Model Law: Section 66 and Schedule 7 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Spain
Law on Arbitration of 5 December 1988.

Sweden
Arbitration Act, effective 1 April 1999, replacing the 1929 Arbitration Act and Foreign Arbitration Agreements and Awards Act.

Revised Rules of Arbitration, Institute of Stockholm Chamber of Commerce, effective 1 April 1999.

Switzerland
Swiss Private International Law Act of 18 December 1987 effective 1 January 1989.

Ukraine
Law on International Commercial Arbitration of 24 February 1994 effective 20 April 1994.