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FOR COMMERCIAL ARBITRATION

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IMPORTANT CONTEMPORARY QUESTIONS

GENERAL EDITOR: ALBERT JAN VAN DEN BERG

with the assistance of the
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Preface

ICCA Congress Series No. 11 comprises the proceedings of the ICCA London Congress 2002 hosted by the Chartered Institute of Arbitrators on 12-15 May 2002. A warm word of thanks and congratulations goes to the Chartered Institute for the outstanding organization of this well-attended Congress, in particular, for opening to the participants the magnificent London venues of the Great Hall of the Royal Court of Justice, the Inner Temple, the British Museum and the Guildhall.

The Congress departed from the earlier format of simultaneous Working Groups and assembled more than 500 participants to hear about and discuss important contemporary questions in international commercial arbitration. The Congress opened with an innovation, a Debate on the proposition: "The parties, not the arbitrators, control the arbitration" chaired by Henri Alvarez. For the motion were Professors Hans Smit and Gabrielle Kaufmann-Kohler and against the motion were Lord Mustill and Sally Fitzgerald. A brief account of the debate can be found in the wonderfully humorous summary of the proceedings in Johnny Veeder's "Postscript" at the end of this volume (pp. 471-480). The remainder of the program focused on Contemporary Questions, following a more traditional panel format. The first topic was the current work of UNCITRAL on three timely issues, the requirement of a written form for an arbitration agreement, interim measures of protection and the model law on conciliation, all three sessions chaired by Jernej Sekolec, Secretary of UNCITRAL. The third issue was framed in terms of a question: "Do we need a model law of conciliation?" and it has been answered affirmatively by UNCITRAL which, shortly after the Congress, on 28 June 2002, approved the Model Law on International Commercial Conciliation. The text of the Model Law is appended to the article by Dr. Shavit Matias on this subject (pp. 288-299). This was followed by panels on "aspects of illegality in the formation and performance of contracts and in the conduct of arbitration" and "the detection of forgery and fraud". These panels were chaired by Jan Paulsson, and Julian Lew led the discussion. The Congress then moved on to "the psychological aspects of dispute resolution", chaired by Cecil Abraham, followed by "arbitration under investment treaties", chaired by Nigel Blackaby.

Another new aspect of this Congress was the call for papers and we would like to thank Cecil O.D. Branson, Q.C., Christopher R. Drahozal and Christoph Liebscher for their contributions which we have included in this volume (pp. 163-178, pp. 179-189 and pp. 300-313, respectively).

Looking ahead, the next ICCA Conference will be held in Beijing, China, on 16-18 May 2004, organized by the China International Economic Trade Arbitration Commission (CIETAC). Updated information on the Conference, as it becomes available, will be posted on the ICCA website at www.icca-arbitration.com with a link to CIETAC.

I would also like to express my continuing appreciation to the International Bureau of the Permanent Court of Arbitration in providing invaluable assistance to the ICCA publications and to thank the Secretary-General, Mr. Tjaco T. van den Hout, not only for making the facilities of the PCA available to ICCA, but also for agreeing to address us at this ICCA Congress (pp. 11-15).

The compilation and editing of this volume have been carried out by Dssa. Silvia

Borelli, Ms. Heather Kurzbauer, Ms. Alice Siegel and Mr. Theodore Mercredi, all under the able supervision of Ms. Judy Freedberg as managing editor. I would like to thank them all, as without each of their unique contributions, the editing of this volume would not be possible.

Prof. Albert Jan van den Berg
General Editor

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Welcome Address: Karen Gough
President, Chartered Institute of Arbitrators

My Lords, distinguished guests, ladies and gentlemen. On behalf of the Chartered Institute of Arbitrators it is my very great pleasure and a privilege to welcome you to London for the XVIth biannual ICCA Congress. I have spent many hours thinking about what it is I wanted to say to you this evening. I have looked at many quotations and books of wit and wisdom concerning dispute resolution, law and justice and wondered why I should find it so difficult to decide on a suitable address.

By way of example of my difficulty, and for your amusement, I found a quotation that was attributed to John Adams (the second President of the United States), who is said to have commented, "I have come to the conclusion that one useless man is called a disgrace, two such men are called a law firm, and three or more become a Congress!" In the context of what I was seeking to achieve here this evening, by way of a welcome to such an eminent gathering, that quote was, as we would say here in London, not "helpful"– and of course, as a lawyer, I could not help but note that even 200 and more years ago, there was even then, a strong desire to shoot the lawyers! However, in the last day or two the real reason for my difficulty has come to me. It is not necessary for me to search for authoritative words of divine wisdom or understanding to underpin my greeting to you all.

My message this evening is very, very simple and very clear. It is with great pride that the Chartered Institute of Arbitrators accepted the task of hosting this XVIth ICCA Congress in 2002. ICCA more than any other international non-governmental organization has led the intellectual debate concerning the development of modern techniques for the resolution of international commercial disputes. The Chartered Institute of Arbitrators, while based in London, is also an international non-governmental organization – which has led the world in the promotion of dispute resolution through its education and training programmes. What we have therefore, here in London in 2002, is a unique collaboration between two remarkable organizations dedicated to the same strategic objectives.

And what makes this occasion even more special is each of you. You the participants, who have gone to the time, trouble and expense, to journey to London from sixty different countries throughout the world to participate in this Congress. The topics for debate in 2002 reflect the concerns of the business community which we serve – through the provision of our diverse services in connection with the resolution of their disputes – either through international commercial arbitration, or other forms of dispute resolution

It was Plato who said, "no law or ordinance is mightier than understanding". At this Congress, we propose to consider important contemporary questions affecting international commercial arbitration and to ask ourselves whether indeed, as currently proposed by the working group constituted by UNCITRAL, the world needs a Model Law on Conciliation. Our task is to show the users of our services that we have not congregated here to engage in a festival of self-congratulation which has neither impact nor relevance to their businesses or the disputes which they need us to work with them to resolve.

While the questions may be contemporary, the issues for the business community are not new. How do we, in the twenty-first century, afford the business community processes for the resolution of their disputes that are at the same time, fair, expeditious, simple and cost effective? If, over the course of the next three days, we can improve our overall understanding of these issues and we can come to some conclusions that assist in the achievement of this overriding objective, we will have had a successful congress.

The challenge is to ensure that international commercial arbitration and ADR do not become like the Killy-Loo bird. The Killy-Loo bird is a creature which insisted on flying backwards because it did not care where it was going but it was mightily interested in where it had been!

So with this simple message, I welcome each and every one of you to this great debate. My hope is that you enjoy the stimulus of the challenging speeches and arguments and that you will, as ever, meet new and interesting people, make new friends and renew old friendships in the course of your stay here in London. And finally, since all work and no play is known to make Jack and Jill incredibly dull people – don't forget to enjoy yourselves! On behalf of the Chartered Institute of Arbitrators, I welcome you all.

Welcome Address Opening Ceremony: Fali S. Nariman President, International Council for Commercial Arbitration

My Lords, Excellencies, ladies and gentlemen, I am happy to welcome you all to the 16th ICCA Congress held in the great metropolis of the commercial world. The only reason British commercial law continues to enjoy regard and respect in countries abroad is because of the quality of its judges, their sensitivity to legitimate commercial needs and their receptiveness to new legal instruments and concepts fashioned to serve those needs. As an American professor once told Lord Wilberforce, "The elegance, the style, and analytical powers of the British Judges have survived the decline of the British Empire." And we are privileged to have heard this evening two of the most outstanding judges of our time. By their presence and their words they have not only honoured ICCA, they have done more: They have given international commercial arbitration the recognition it richly deserves.

Commercial arbitration has moved significantly in the direction of becoming an aspect of public law. Private dispute resolution is no longer a private matter, it is one that affects the public good. International commercial arbitration exists not because it is cheap, nor because it is always necessarily quicker than court procedures, but often simply because there is no other choice.

Nearly ten years ago at the centenary celebration of the LCIA in London, Judge Howard Holtzmann and Judge Stephen Schwebel (who are with us here at this Congress) had suggested the creation of a new international court that would take the place of municipal courts in resolving disparities concerning the enforceability of international arbitral awards. But, these learned friends were tilting at windmills and like Don Quixote in "The Man of La Mancha", they were dreaming "the impossible dream"!

Ten years on we are still a distant dream away from an International Arbitration Court. In an imperfect international world then, where there is no universally applicable law, and no international forum for enforcement of foreign awards, arbitrators have to do their best. And England is fortunate in having judges who help along arbitrators who do their best.

I have often wondered about the utility of a President of an organization like ICCA: it only meets once in two years in what we call a "Conference", and then every four years in what we call a "Congress". There is of course legal justification for the office of President of ICCA, a body cannot be seen to function without a head. So, once in four years when we hold a congress, we change the head. I have been more fortunate than some of my predecessors because after the ICCA Congress in Vienna, when I first assumed this office, they just forgot to change the head at the Congress in Paris four years later. Thus, I have had two terms as President.

To have gone on for a third term is just not given to ordinary mortals. There is that delightful story about the swearing-in of an extraordinary personality, Franklin Roosevelt, as President of the United States for the third time. Chief Justice Charles Hughes who administered the oath of office later confided in a friend that he had an impish desire to break the solemnity of the occasion by telling the President, "Frank, don't you think this is getting a trifle monotonous?"

I will spare you a recitation of what I did during my two terms as President – not so much out of fear as to what someone else might complain I did not do, but more because of what a former Chief Justice of the New York State Court of Appeals told his audience some years ago when inaugurating a function of the International Bar Association in New York. He told us when he was first appointed Chief Justice of that hallowed Court he proudly showed his wife the room of Justice Benjamin Cardozo, his most illustrious predecessor in office. And he said to his wife in reverent tones, "See, this is Cardozo's room, this is where, I will sit." And his wife replied, not very reverently: "Yes, and after fifty years and five more Chief Justices it will still be Cardozo's room!"

Alas I could not show my wife any room when I was first elected ICCA President, simply because ICCA has no office; in fact it has no place of abode. It is an amorphous organization that materializes from out of nowhere at each conference and at each congress and so it has been for nearly fifty long years.

This morning's London Times carried in one of its supplements, a fascinating article about the great Picasso-Matisse Exhibition at the Tate Modern. The writer said of Matisse that he had "the ability to do nothing much, slowly". It is an unflattering but not accurate description of the work of ICCA. As someone said at our Council meeting this morning we are not "missionaries of arbitration" but a body that has from the beginning set itself the task of "disseminating the culture of arbitration". I do like to think that the culture of arbitration has gone forward a little during my two terms of office.

But I must frankly say that just as some countries get along *because* of what their governments do, and a few pull through *despite* what their governments do, so it has been with ICCA for these eight long years. ICCA, you see, is a self-propelled organization and gets along quite splendidly without much effort on the part of its President. This is of course because of ICCA's flagships, its publications: the *Yearbook* and the *Handbook*. They are our badge of fame. They were the indefatigable brain child of Pieter Sanders, our Honorary President, the father of the New York Convention who is here with us and whom I am delighted to welcome. The *Yearbook* has been carried to new heights by its General Editor Albert Jan van den Berg and the *Handbook* likewise by Jan Paulsson. For some years now the fact that the publications continue to be compiled is due to the single-minded devotion of Judy Freedberg, Managing Editor. She and her colleagues have kept the good ships afloat and they all continue to bring great credit to ICCA.

If it is known at all, ICCA then is known because of its *Yearbook* and *Handbook*. It is also known because of the glittering tycoons of arbitration that we manage to assemble at our gathering every two years in different parts of the world aided and advised almost always by sponsors. The sponsor of this, the 16th London Congress, is the prestigious Chartered Institute of Arbitrators much older than ICCA, of First World War vintage and still growing from strength to strength.

I said that ICCA works on the self-perpetuating principle, but this is somewhat of an exaggeration. It only appears to do so principally because of its unobtrusive but extraordinarily efficient, Secretary-General, my dear friend and comrade in arms, Ulf Franke, who is the factotum in charge of its entire administration.

Some of our colleagues here and abroad have questioned the utility of ICCA conferences of the type that we keep staging. "What does one learn from such a

conference?" the more studious are accustomed to ask. The not-so-studious look for detailed information on free tickets and free social events! About the first, there is that touching story of a Master of Zen Buddhism who invited one of his students over to his house for afternoon tea. They talked for a while and then the time came for tea. The teacher poured the tea into the student's cup. Even after the cup was full, he continued to pour. The cup overflowed and the tea spilled out onto the floor. Finally, the student said, "Master you must stop pouring, the tea is overflowing from the cup." And the teacher wisely replied, "That's very observant of you. And the same is true with you. If you are to receive any of my teachings, *you must first empty out what you have in your mental cup.*"

I like to think that each one of us attends every ICCA conference and congress with our respective mental cups full to the brim. Some of us leave such conferences with the chastening thought that what we knew was not *all* there is to know. Some others leave these conferences having acquired the ability to unlearn what they thought they knew. "Emptying, and then filling the mental cup", that in the end is why we hold Conferences and Congresses.

There is another organization – a truly international one – that functions out of this great city. Recently it also celebrated its fortieth birthday as ICCA did not long ago. It is called Amnesty International (Amnesty). The story of the forty years of Amnesty has been compiled in a book, *Like Water on Stone*. I read a review of this book in The Economist. It said that Amnesty had made mistakes, some terrible mistakes in the past, but, and I quote, "Like water dripping on the stone, it is slowly changing the world." I like to think of ICCA in the same way – except that we cannot be accused of making mistakes, since we don't do too much. Perhaps we can be faulted for not doing more. But all in all, ICCA too is like water dripping on the stone, the edifice in stone of international arbitration and slowly but hopefully changing the arbitral world. With these few words, I once again welcome you all to this XVIth ICCA Congress.

Opening Address: Fali S. Nariman
President, International Council for Commercial Arbitration

Last month in an international newspaper there was a cartoon showing the Dove of Peace at a job centre, the bird looking disheveled and out of sorts. The Dove of Peace tells the man in charge at the job centre, "I need a career change. I'm getting nowhere in my current job." And the man in charge says, "Why not try *arbitration?*" And that is precisely what we are all going to explore today and tomorrow and till lunch on Wednesday.

The arbitral world is changing – at hell-neck speed as Lord Woolf reminded us last evening. For those of you who are as old as I am, my advice is *think young*. Don't behave like that old man, who had lived a long time. He was asked on his ninetieth birthday, "Have you seen many changes in your life?" and his response was,"Yes, and I was against every one of them!"

I have been often asked the question, "How do I become a good arbitrator?" There are two answers to this: first a serious one, and then the not-so-serious. The serious one goes back in time. Long, long ago, it was the Buddha who prescribed, with prescient wisdom, five principles that must be observed by a wise ruler when resolving disputes amongst his subjects. This is how they have been recorded in a book on the *Teaching of Buddhish*.[1]

> "First, examine the truthfulness of the facts presented; second, ascertain that they fall within his jurisdiction; third, enter into the mind of the parties to the disputes so that the judgment to be rendered be a just one; fourth, pronounce the verdict with kindness, not harshness; and fifth, judge with sympathy."

The modern-day international arbitrator, whether he hails from the East or the West, whether his cultural background be from the First World or the Third World, cannot go wrong if he follows these five principles laid down more than 2,000 years ago. And now, the not-so-serious, almost flippant answer. When God made the world he heard cries of protest. First came the moon with her complaint, "You have made the sun shine brighter than me and reduced me to second fiddle in the firmament." And the good Lord said, "O.K., I will make the tides flow to your command and lovers to sing praises of you and poets to write poetry about you." Exit moon satisfied.

Then came Switzerland, with a strong protest, "You have given us snow and mountains but no sea. You have surrounded us by land masses all round. We have no identity, no status." And the good Lord said, "O.K., I will make you a tourist paradise. In your country you will make watches and have peace conferences and you will never be at war." Exit Switzerland satisfied.

Then there entered groups of quarrelsome guys, most of them in black coats. They complained to God that they had no fixed place of abode, "We have no status, we have

1. Published by the Buddhist Promotions Foundations (Bukhyo Dendo Kyokai) 3-14 Shiba, 4 Chome Minato-ku, Tokyo, Japan.

no identity", they complained. And God said, "I will give you status, I will give you identity – I will make each one of you international arbitrators!"

One piece of advice to speakers who are not listed in the programme. If you feel compelled to make a comment or ask a question, always recall what the President of the Spanish Association of Arbitrators told a gathering such as this at the ICCA Congress in Hamburg in 1982: "If what is good is brief – it is twice as good."

And now a last bit of advice, to chairpersons at our sessions. We keep learning from other cultures. For instance, a question that has perplexed us for generations has been resolved by an ancient culture emanating from the African continent. How to pry long-worded speakers away from the podium without breaking their fingers? The answer is simple and effective. Speakers can speak as long as they like so long as they do so standing *on one foot*; when doing this, if the other foot falls, so does the curtain and the bell must ring. My other foot is about to fall and it is time to close.

Tribute to Sir Michael Kerr

*Fali S. Nariman**

This is, I believe, the first conference held about International Commercial Arbitration anywhere in the world, since Sir Michael Kerr died. And it is but appropriate that we commence today's proceedings by paying tribute to a fine judge, a great arbitrator and a noble human being. He was, as you all know, a father figure of international arbitration, the founder and first President of the London Court of International Arbitration. My wife and I have had the privilege to know Michael and Diana Kerr for many years.

Just a month before he passed away, a Japanese corporation consulted me through their attorneys in New Delhi as to whether an international arbitral award rendered by Sir Michael Kerr as an umpire in a dispute between a Japanese corporation and an Indian corporation under our old arbitration law was a valid award. The award had been set aside by two judges of the Bombay High Court for an error of law. I opined, it was and advised an appeal to the Supreme Court. Strangely, the very day I got the news of Michael's death, the appeal came up on board for admission in the highest Court and it did not take much argument to convince the judges that the Bombay High Court was wrong and Michael Kerr was right. The admission of this appeal gave me great personal solace and satisfaction: it was difficult to fault Michael Kerr on an interpretation of law or on appreciation of facts. But even when he occasionally erred, he was noble, upright and gracious.

In the millennium issue of the London Times, 1 January 2000, William Rees-Mogg, a regular contributor, gave his memories of the century that went before. He described a visit to Hong Kong and dinner with the Pattens at Government House. Rees-Mogg took a taxi back to his hotel and the Chinese taxi driver made the following comment about the last representative of the Queen in Hong Kong:

> "He was a *good* governor even when he was wrong."

This is an appropriate epitaph for any international figure – including Sir Michael Kerr whose death we mourn. A great old oak has fallen and the forest of international arbitration will not be the same, not for a very long time. May his soul rest in peace.

I would ask you all to rise and pay tribute for a couple of minutes to the memory of Sir Michael Kerr.

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* President, International Council for Commercial Arbitration.

Luncheon Address: The Influence of International Commercial Arbitration on the Permanent Court of Arbitration

*Tjaco T. van den Hout**

I am honored to have the opportunity to address you as the final speaker at this enriching event.

When you represent an old institution, as I do, an historical aside seems an appropriate beginning to a speech and passing in front of Christie's auction house the other day supplied me with one. Seeing Christie's reminded me of a recent auction of a Fabergé egg. I believe it was called the "Winter Egg". It appeared to be covered in frost and glistening with ice crystals.

Sadly for me, the bidding went a few thousand times beyond what I had budgeted for my daughter's Easter present, but I could not help but notice the numerous parallels between the egg and my institution: the Permanent Court of Arbitration (PCA). Both are a century old, both have elegant outward appearances (one encrusted in diamonds, one housed in the Peace Palace), and both are subjects of interest in international commerce: one as a luxury commodity and one as a service provider in dispute resolution.

The closest parallel, however, is that each owes its existence to a Russian Czar. We all know that Czar Nicholas II commissioned Easter eggs from the French jeweler Fabergé, but fewer of you may know that it was in fact the same Czar who called the First Hague Peace Conference of 1899 where the convention founding the PCA was signed. At the time, the hope was that this first global mechanism for dispute resolution would put an end to military conflict between States.

In view of twentieth-century history, I can only say that the Czar failed miserably in this respect.

But arbitration, the main mechanism proposed to States by the PCA, is a tool for pragmatists. The twentieth century was to a large extent, however, a time of ideologues and nationalists. The PCA was therefore ahead of its time: it proposed an efficient mechanism for dispute resolution in an era when the governments of too many countries still subscribed to the "might makes right" school of international relations.

In contrast, international business leaders have often been the most pragmatic players on the international scene, seeking efficient resolution of their disputes without indulging in national chauvinism. This would explain why the international business community has, since the early days of the PCA, called upon the institution to step beyond its original treaty mandate in inter-State disputes and begin providing services in international commercial disputes.

The PCA declined to venture beyond inter-State disputes until 1935. In that year, the PCA was requested to put its services at the disposal of an arbitral tribunal constituted to resolve a contract dispute between the Chinese government and an American

* Secretary-General, Permanent Court of Arbitration, The Hague.

company, Radio Corporation of America. In order to do so, the Secretary-General sought and received the approval of the PCA's Administrative Council, composed of representatives of all of the parties to the PCA's founding conventions.

Based on this precedent and the increasing interaction between States and non-State parties, the PCA promulgated its Rules for Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State in 1962. Although 1935 and 1962 were critical moments in the history of the PCA, it was UNCITRAL's adoption of Arbitration Rules in 1976 that brought the greatest demand for PCA services from the commercial arbitration world.

These ad hoc rules were meant to allow proceedings to be conducted without the involvement of an arbitration institution, but some mechanism was needed to safeguard the constitution of the arbitral tribunal. The drafters of the UNCITRAL Rules solved this problem by means of a designated "appointing authority" which may appoint arbitrators when parties fail to act or decide challenges against arbitrators. If the parties do not agree, or have not previously agreed, on the designation of an appointing authority, the Rules provide that either of the parties may request the Secretary-General of the PCA to select the appointing authority. This small role under the UNCITRAL Rules has resulted in consistent involvement of the PCA in international commercial arbitration between non-State parties.

Ironically, the first request to the Secretary-General for the designation of an appointing authority emanated not from a commercial arbitration tribunal, but from the Iran-US Claims Tribunal, established by the 1981 Algiers Accords with the assistance of the International Bureau of the PCA. In the ensuing years, the PCA witnessed the expansion of global commerce through the increase in the number of requests submitted to the Secretary-General under the UNCITRAL Rules. In recent years this number amounted to an average of one every two weeks, which is double the number of requests received ten years ago. The parties to these arbitrations originate in all regions of the world, as do the institutions that 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 appointing authority.

These UNCITRAL matters also appear to be increasing in terms of the complexity of the cases and the contentiousness of the parties. In recent months, the International Bureau has dealt with multi-party cases, objections to PCA authority to act, challenges, and consolidations. We have also felt the growth in investment treaty arbitration that was discussed earlier today. Last year, the PCA became registrar in an UNCITRAL matter under the Czech-Netherlands bilateral investment treaty. NAFTA too has presented the International Bureau with an interesting case that I cannot say more about at present, and PCA arbitration under Art. 27 of the Energy Charter Treaty may be drawing near. I predict that the complex and cumbersome nature of the proceedings in many of these investment treaty matters will cause more ad hoc tribunals to seek the administrative support of the PCA in coming years.

As the President of ICCA, Fali Nariman, stated in his message of welcome at this Congress, that the main challenge in the continuous evolution of commercial arbitration is "keeping up". One way the PCA has kept up with changes and increasing outside demands is through an increase in the staff of its International Bureau to twenty people,

made up of thirteen lawyers from various jurisdictions and seven paralegal, administrative, and editorial staff. Among other sources, the Bureau stays abreast of developments in arbitration through ICCA itself, which, pursuant to our 1989 cooperation agreement, provides the PCA with information concerning arbitration institutions, experts, procedures and activities in various parts of the world; this cooperation was expanded in 1996 to include the editorial functions of the ICCA publications. Perhaps until today, for some of you, the ICCA *Yearbook* and its managing editor, Judy Freedberg, acting under the guidance of the General Editor Albert Jan van den Berg, have been your only contact with the PCA. The PCA also has editorial responsibility for the arbitration database disseminated on CD-ROM by Kluwer Law International and for Kluwer periodicals such as Journal of International Arbitration and World Trade and Arbitration Materials. The most exciting development in this area is the Kluwer web portal, which should be coming online virtually as I speak. This portal will offer a subscription service containing Kluwer and ICCA materials as well as a reporting service providing regular updates on court decisions, new legislation, new rules and other arbitration events. The PCA has provided both editorial and technical support in this venture and will have a continuing responsibility in advising on the development of this service.

All of this "keeping up" with the commercial arbitration world has not led the PCA to abandon its original mission as an intergovernmental institution and a forum for State-State disputes, or prevented it from considering new initiatives in such areas as environmental arbitration, or the arbitration of mass claims.

First, maintaining its role in dispute resolution between States remains the primary focus of the PCA, and the ever-increasing prominence of the United Nations (UN) does not make the task easy.

As you know, the PCA is not an organ of the UN, but rather an independent international organization with its own State membership, currently totaling ninety-seven States. Pursuant to Art. 4 of the Statute of the International Court of Justice (ICJ), however, the ICJ judges are elected by the UN General Assembly and Security Council from a list of candidates nominated by the national groups of the Permanent Court of Arbitration. This direct reference to the PCA in the ICJ Statute, which is part of the UN Charter, makes the PCA the only existing institution, other than the UN itself, mentioned by name in the Charter.

This special relationship was further strengthened when, in 1993, the General Assembly of the United Nations granted permanent observer status to the PCA, allowing it to participate in its work and thus facilitating collaboration between the two institutions. The PCA will be represented at the UNCITRAL meeting to be held in New York next month where one of yesterday's topics "Do we need a model law on conciliation?" will be further debated.

Although States have access to other such dispute resolution fora as the ICJ, several of the PCA's recent or current arbitrations have involved State parties exclusively, including the Eritrea/Yemen arbitration, the Eritrea/Ethiopia Boundary Commission, the France/Netherlands Rhine Pollution arbitration, as well as the Ireland/UK arbitrations regarding the marine environment of the northeast Atlantic. The procedural flexibility of the PCA and the ability of States to participate in the selection of arbitrators have been cited as reasons for the continuing appeal of arbitration in disputes between

States. The PCA has also sought to improve State access to arbitration through its Financial Assistance Fund created in 1994. The Fund is designed to help qualifying States meet the costs of international arbitration and has made four grants of assistance in recent years.

Environmental arbitration is one of the PCA's new initiatives. In June of last year, the PCA Administrative Council adopted Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.[1] The establishment of a separate panel of arbitrators specialized in this field and of a panel of scientific experts as foreseen in these Rules is currently underway. Environmental dispute resolution is an area where I firmly believe the PCA has a role to play. Presently there is no unified forum to which States, intergovernmental organizations, non-governmental organizations, corporations or private parties have recourse when seeking resolution of controversies concerning environmental protection, and conservation of natural resources. More than half of the instances where the International Bureau provided information to States concerning arbitration last year displayed a need for consideration of issues in these fields.

The example of a cyanide spill in Romania, which poisoned a river flowing through other countries in the Carpathian Basin, underscores the point that lack of adequate recourse can only lead to both increased frustration for those who have suffered damages and strained relations between polluter States and polluted States. The International Bureau expects the Rules will be included primarily in the dispute resolution clauses of international conventions and treaties relating to environmental protection and conservation because they provide structure and guidelines currently unavailable elsewhere. Already, these Rules are being considered as a dispute resolution mechanism for an emissions trading scheme being developed in connection with the Climate Control Convention and the Kyoto Protocol.

Another PCA initiative is in the area of mass claims. Recent years have seen the establishment of a number of tribunals and systems for settling large numbers of claims from historic events and diplomatic crises. These have included systems created to resolve claims resulting from events related to the Islamic Revolution in Iran, from damages suffered as a result of the Gulf War, from property losses in Bosnia-Herzegovina, claims by victims of Nazi persecution related to dormant bank accounts in Switzerland, insurance, slave labor and looted assets. The PCA has established a Steering Committee on Mass Claims, chaired by Judge Howard Holtzmann and composed of individuals who have been active in two or more of the mass claims processes currently operational.

The Steering Committee is producing comprehensive guidelines for setting up new systems to settle mass claims and expects to publish its work later this year. The expertise of the Committee has already been put to use in the constitution of the Eritrea-Ethiopia Claims Commission which is mandated to decide claims between the two governments or by nationals of one country against the government of the other arising out of the recent war between the two countries. The deadline for the submission of claims was December 2000 and the Commission expects to finish its work

1. Available online at www.pca-cpa.org.

within three years.

To sum up, while working to maintain its traditional role in disputes between States and making forays into other areas of international arbitration such as mass claims and the environment, the PCA has been inexorably drawn into the international commercial arbitration universe. This experience has enriched our institution, and I believe that our unique history has also provided something special to commercial arbitration. This symbiotic relationship shall continue and be intensified by the technological changes that are bringing the services and expertise of arbitrators, lawyers and institutions even closer together and more accessible to one another. The PCA is caught up in and adapting to a changing environment; we are studying how digital communication is becoming the foundation of a new "state-of-the-art" in dispute resolution. This allows us to overcome limitations of physical growth and continue to evolve in ways not always externally visible.

Some of the biggest changes are nearly invisible. I read just last week that technology-driven change has brought about the phenomenon of hyperagile thumbs among the youth of Japan. According to this article, "childhoods spent furiously thumbing hand-held computer games", and "young adulthoods spent thumbing e-mail messages on cell phone key pads", have made thumbs bigger and more muscular. I'm not sure what intensive thumb use bodes for arbitration, but I suspect that this Japanese "thumb generation" and its counterparts in India, China and around the world will leave a new imprint on our arbitration world.

Contemporary Questions

The Requirement of a Written Form For an Arbitration Agreement: When "Written" Means "Oral"

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I. INTRODUCTION

In what is a fast expanding corpus of literature on international commercial arbitration, there is already a substantial amount of writing on "writing". Whilst national laws and international conventions have long imposed a written form requirement for arbitration agreements, there is an increasing disparity among different systems as to how "writing" should be defined, and an increasing dislocation between legislative requirements and actual business practices. Just as the 1677 Statute of Frauds in England was designed to combat false claims by imposing a writing requirement, and yet itself became a means to evade genuine transactions,[1] so too the writing requirement for arbitration agreements is in danger of defeating the very process it is designed to secure. As recent cases demonstrate, it is a curious feature of international commercial arbitration that the formal validity of the very cornerstone of the whole process – the arbitration agreement – remains the subject of significant uncertainty.

One obvious aspect of the problem is the advent of technologies beyond the imagination of the drafters of 1958, and indeed those of 1985. In particular, the impact of "e-commerce" has been dramatic, and has put a strain on many legislative conceptions of the written form. Commerce over the Internet is expected to reach as much as € 7.64 trillion[2] in 2004,[3] worldwide, having reached € 214 billion in 2000. According to one study, since 1992 the number of computers with access to the Internet worldwide has increased from an estimated 1.3 million,[4] to 625 million in 2001.[5]

However, the problem with the form requirement runs deeper than evolving technologies. When subjected to scrutiny, the form requirement as currently expressed appears to cut across business practices that were widespread even before 1958. To this end, the requirement of a written form reflects a conception of arbitration and particular policy considerations that are no longer tenable, and that have long since been irreconcilable with many other doctrines in this field.

The debate on this topic has been galvanized by a series of well-known papers,[6] that

1. See Sect. IV below.
2. I.e., a thousand billion.
3. Forecast by Forrester Research, reported in Matthew R. SANDERS, "Global eCommerce Approaches Hypergrowth", 18 April 2000, available at: www.forrester.com/ER/Research/Brief/Excerpt/0,1317,9229,00.html. This estimate includes both business-to-business (B2B) and business-to-consumer (B2C) transactions, although B2B transactions account for more than four-fifths of all transactions conducted online. See OECD *Business-To-Consumer E-commerce Statistics* 14 (March 2001) available at: www.oecd.org. These references have been taken from a note by Avril D. HAINES, entitled "The Impact of the Internet on the Judgments Project: Thoughts for the Future", prepared in connection with The Hague Judgments Convention negotiations.
4. U.S. GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, *Towards Digital eQuality*, 2nd Annual Report, 1999.
5. "Computer Industry Almanac", Press Release of July 2001, at: www.c-i-a.com/200107cu.html, again as cited by Avril D. HAINES, *op. cit.*, fn. 3.
6. See, in particular, HERRMANN, "The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts" in *International Arbitration in a Changing World*, ICCA Congress Series no. 6 (1993) (hereinafter *ICCA Congress Series no. 6*) p. 41; KAPLAN, "Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial

in turn have generated negotiations within UNCITRAL on the possible modification of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (the Model Law) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention). In relation to the Model Law, these negotiations have proceeded relatively happily, with good prospects of a palatable result. So far as the New York Convention is concerned, however, there is no current consensus, and every new proposal for compromise appears to betray a deeper difference in understanding.

It is the New York Convention, therefore, that is the focus of this paper.

II. STRUCTURE OF THIS PAPER

Sect. III of this paper analyzes the problem, focussing on the underlying policies that have given rise to the current form requirement and reciting select war stories.

Sect. IV advances two fundamental but inconsistent propositions:

1. That the requirement of a written form for arbitration agreements is no longer defensible as a matter of logic or policy.
2. That the New York Convention should not be amended.

Sect. V addresses the range of possible solutions, and proposes a means of reconciling the inconsistency.

III. THE CURRENT REQUIREMENT AND THE CURRENT PROBLEM

1. *The Justifications for a Written Form Requirement*

It is difficult to analyze the current form requirement without a thorough scrutiny of its genesis. And yet, it is often simply assumed that the requirement is the product of a coherent policy, common to all legal systems that insist upon "writing". In fact, when examined carefully, a number of quite different policy considerations are discernible. As will be seen in Sect. IV, each particular rationale gives rise to a different form requirement. It is therefore vital to untangle each thread.

The various justifications for a written form may be grouped into two key categories, as follows:

Category One: Proving Initial Consent

The right of access to a court is generally considered a fundamental right of every citizen in a civilized state. It features in most constitutions, whether written or unwritten, and

Practice?", The 1995 Goff Lecture,12 Arb Int'l (1996) p. 27; HERRMANN, "Does the World Need Additional Uniform Legislation on Arbitration?", The 1998 Freshfields Lecture, 15 Arb Int'l (1999) (hereinafter "Freshfields Lecture") p. 211.

is embodied in most if not all human rights conventions. Hence, for example, Art. 6 of the European Convention on Human Rights (ECHR).[7] This, of course, is not an absolute right, since, within defined limits, parties are generally free to contract for arbitration and thereby exclude themselves from a court. However, the exclusion of a court is treated as a serious step, and states therefore have an interest, as part of the public administration of justice, to ensure that any such agreement reflects a genuine consent. One way of policing the exclusion of access to a court is to insist that the arbitration agreement be in writing. This is the most commonly cited justification for the form requirement, which has often been seen as all the more important in international, as opposed to domestic, arbitration. As observed by Mann:

> "If the arbitration agreement is signed by only one party and if the other is alleged to have tacitly assented to it great difficulties are likely to arise.... An English party who has not signed anything would be exposed to foreign arbitration proceedings and to the enforcement here of a foreign award. This is a major legislative decision which the New York Convention did not require and which is open to much abuse. The converse case ... is equally serious: let us assume that ... parties entered in [a foreign state] into a contract of sale of goods. This they can do orally. But it does not follow that the foreign party has entered into an arbitration agreement, must arbitrate in London and must allow the award to be enforced in [the foreign state]. These again are grave matters of legal policy. The New York Convention did not require Parliament to take a position on them. Is it likely that it did so voluntarily and, in the absence of reciprocity, went far beyond anything contemplated by the Convention?"[8]

In fact, this justification has several different, but related aspects:

- "Cautionary" Function: The requirement of writing has a "cautionary" function, in that it distinguishes the conclusion of an arbitration agreement from other types of transaction, thereby alerting the parties to the special significance of the agreement. In turn, this is designed to provoke proper consideration before initial consent to the agreement is given.

It is for this reason that many legislatures impose form requirements in respect of other types of transactions which are regarded as especially significant (whether to the contracting parties themselves or to the wider community). Hence the requirement in many systems that contracts for the transfer of interests in land, or that testamentary

7. Art. 6 ECHR (Right to a fair trial) reads:

   "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...."

8. F.A. MANN, "An 'Agreement in Writing' to Arbitrate", 3 Arb Int'l (1987) p. 171, criticizing the English Court of Appeal decision in *Zambia Steel v. Clark and Eaton* [1986] 2 Lloyd's Rep 225.

wills, be concluded in writing or be signed and witnessed.[9]

- "Evidential" Function: Writing has an obvious "evidential" function: it facilitates the resolution of a dispute as to whether or not an arbitration agreement was actually consented to and concluded. Given the significance of the rights that are thereby excluded, there has been a perceived need to be able to prove a party's consent to arbitration with particular certainty.

In this regard, it is interesting to note the growing jurisprudence from the European Court of Human Rights in Strasbourg on the issue of "waiver" of human rights. Arbitration as it is generally practiced in modern international trade is inconsistent with various elements of Art. 6 of the ECH. For example, it normally involves the denial of access to a national court, a private hearing, and a private judgment. This conflict has been resolved by the Strasbourg court by way of a developing doctrine of waiver. It is often said that the existence of a writing requirement significantly assists – and may sometimes be critical – in proving a clear and unequivocal waiver.

- "Channeling" Function: The imposition of a writing requirement has a "channeling" function, in that it allows for certain types of agreement to be singled out as special legal mechanisms with particular attributes. Equally, it requires that particular transactions take a prescribed form, in order to attract specific legal consequences or characteristics. In this way, parties have to take a deliberate decision to invoke the particular legal device, knowing of the consequences of such a choice. For this reason, in many systems, testamentary wills require writing, signatures and witnesses, thereby distinguishing them from other types of transaction, and elevating them into a specific device. In England, the requirement of writing in Sect. 5 of the Arbitration Act 1996 constitutes, in part, a "scope" provision; if an agreement is in writing, the 1996 Act will apply, with all its legal consequences; if an agreement is not in writing, it will still have some limited existence in English law, but outside of the regime of the 1996 Act.

Category Two: Proving the Terms of the Agreement

Aside from considerations concerning initial consent, the written form requirement has also been justified on the basis of overall certainty within the arbitral process itself. In other words, once parties have consented to arbitration, there is an interest in ensuring that the type of arbitration, and the terms of the process, are clear and susceptible of proof. Again, this justification comprises several different elements:

- Certainty within the Arbitral Process: It is generally thought that there is a premium

9. See, e.g., in England: Sects. 52 and 53 of the Law of Property Act 1925 (writing requirement for conveyances, as well as the creation and disposition of interests in land), and Sect. 9 of the Wills Act 1837, as substituted by Sect.17 of the Administration of Justice Act 1982 (writing, signature and witness requirements for testamentary trusts).