ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

Arbitration — The Next Fifty Years

50th Anniversary Conference, Geneva 2011

ICCA Congress Series No. 16

GENERAL EDITOR
ALBERT JAN VAN DEN BERG

with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague

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FOR COM[illegible]RATION

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Preface

ICCA Congress Series no. 16 comprises the proceedings of the ICCA 50 Geneva Conference 2011 hosted by the ICCA 50 Organizing Committee on 19-20 May 2011. The Conference marked a major milestone: the Golden Anniversary of ICCA. A warm word of thanks goes to the Committee for arranging this splendid celebration in the beautiful city of Geneva, the birthplace of ICCA.

Milestones provide a wonderful opportunity to take stock of the past and present, and to look ahead to the future. The Conference Programme was designed to do just that. Johnny Veeder's speech and a screening of video interviews with ICCA's godfathers Professor Pieter Sanders and Professor Pierre Lalive at the Gala Dinner on the eve of the Conference, placed ICCA in its historical context. The video interviews can be viewed on the ICCA website <www.arbitration-icca.org>. The first two sessions of the Conference then focused on the present with Reports and Comments on developments in commercial arbitration and investment arbitration, respectively. The third session was a Round Table discussion on the future. Eminent arbitration practitioners and scholars were invited to share their views on what the future holds for arbitration and for ICCA. I would like to extend my thanks to Session Chairs Donald Francis Donovan and Gabrielle Kaufmann-Kohler, as well as the speakers and Round Table participants.

Information on future ICCA Congresses can be found on the ICCA website <www.arbitration-icca.org>. The next ICCA Congress will be held in Singapore on 10-13 June 2012. See the ICCA website and the Singapore 2012 Organizing Committee website <www.iccasingapore2012.org> for further details. Miami will host ICCA in 2014; information on this event will be available on the ICCA website and the website of the ICCA Miami 2014 Organizing Committee <www.miamiicca2014.com>.

On behalf of ICCA I would once again like to thank the Permanent Court of Arbitration and both the former Secretary General, Mr. Christiaan Kröner, as well as Acting Secretary General, Brooks Daly, for hosting the staff of ICCA Publications at the Headquarters of its International Bureau at the Peace Palace in The Hague. The continued administrative and technical support of the entire PCA staff is greatly appreciated as well.

I would further like to thank the editorial staff of ICCA Publications for preparing this volume for publication. In addition I would like to thank Ms. Christine Passerat of Lévy Kaufman-Kohler for her cheerful assistance in collecting materials for this volume.

Albert Jan van den Berg
March 2012

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Introductory Remarks

Geneva occupies a near mythical place in the lore of ICCA. It was on the banks of the Lac Leman that a few friends, all pioneers of international arbitration, gathered as negotiators of the European Convention on International Commercial Arbitration and fell into the habit of getting together outside the formal technical deliberations to evoke broader perspectives. Some details of these initial conclaves are recounted elsewhere in this volume (see "The First Fifty Years", pp. 219-226). They were the origins of ICCA.

From the beginning, ICCA conceived itself as the forum for a dialogue of big ideas. The very first session of its very first Congress, held in Paris in 1961, was chaired by the president of the French Court of Cassation and devoted to the innovative idea of the autonomy of arbitration clauses. Perhaps it is no coincidence that the leading French judgments on that very concept followed in the wake of that debate. Other sessions dealt with such topics as the functioning and cooperation of international arbitral institutions and the notion of an "international bureau" for the selection of arbitrators and the certification of awards for enforcement. The latter was surely over-ambitious at the practical level, but nevertheless at the very least a worthwhile mental exercise to focus all minds on the art of the possible.

The success of these early Congresses – including for example the 1975 edition in New Delhi, devoted to the concept (unusual at the time) of the filling of gaps in long-term contracts – gave impetus to the ICCA publications which have become such a prominent feature in the arbitral environment.

Perhaps the principal reason why it is appropriate that ICCA's 50th anniversary be celebrated in Geneva is not so much to remember the past as to project ourselves successfully into the future. Geneva's experience with international arbitration has been long and glorious, but this has never impeded Swiss innovation – the product, as far an outsider can tell, of a healthy dialogue among practitioners, academics, lawmakers and judges. The Swiss have never rested on their laurels, but have constantly sought to refine their analysis of the law of arbitration and to improve their practical management of the arbitral process. This example is precisely the one ICCA must follow as it embarks on its second half-century, and seeks to develop effective methods of dispute resolution for the benefit of the international community, to ameliorate its programmes, to reflect the diversity of the modem world in its membership; and as it seeks to ensure – notably by encouraging the newly formed Young ICCA – that new ambitious entrants are welcomed, and are given opportunities to contribute and to thrive.

Jan Paulsson
President of ICCA

Welcome Message from the Swiss Federal Government

On behalf of the Swiss Federal Government, I am pleased to welcome you to Geneva. I wish to congratulate ICCA on its 50th anniversary and am proud that ICCA has chosen Switzerland as the venue for its celebration.

ICCA's anniversary marks half a century of commitment to advancing arbitration as a means of settling disputes in international commercial relations. Through first-rank publications and congresses, through its educational endeavors and its cooperation with UNCITRAL, ICCA has been a leading actor in the promotion of international arbitration over the last decades. Thanks to the diversity of its membership, representing all the regions of the world, ICCA has contributed to the growing acceptance and use of international arbitration both at the global level and domestically.

Switzerland boasts a long tradition in the peaceful settlement of disputes generally and in international arbitration in particular. Landmark proceedings such as the *Alabama* case, decided by an arbitral tribunal sitting in Geneva in a dispute between the governments of the United States and Great Britain in 1872, shaped – and were shaped by – this tradition. Today, Switzerland hosts international organizations active in dispute settlement such as the World Trade Organization and the World Intellectual Property Organization, the UN Compensation Commission and the Court of Arbitration for Sport, just to name a few. Each year, countless commercial parties choose Switzerland as seat of arbitration, trusting its legal environment, its modern arbitration laws and the excellence of its judiciary.

Personally, I view this heritage both as a grant of trust and as a responsibility. Switzerland remains committed to the values which international arbitration has found to be a fostering environment in the past. Also, my administration encourages developments to maintain a wise and fruitful balance between the legitimate expectations of traditional stakeholders on the one hand and new demands international arbitration will need to accommodate in the future on the other hand. In that sense, I look forward to many years of successful dialogue and shared interests between Switzerland and ICCA.

Simonetta Sommaruga
Federal Councilor
Federal Department of Justice and Police

Gala Dinner Address
Memories from ICCA's First Fifty Years

*V.V. Veeder**

It is a pleasant privilege for me to be invited to address you tonight at this anniversary dinner. Yet, I am uniquely unqualified to speak about the historical origins of the "International Arbitration Congress", later known as the "International *Committee* for Commercial Arbitration" and, since 1975, called the "International *Council* for Commercial Arbitration – or "ICCA".

I was not there at ICCA's foundation in 1961; and, strangely, the United Kingdom was not an active supporter of ICCA in its earliest days, at least not compared to specialists from France, the Netherlands, Italy and Switzerland, soon joined by India and the USSR.

The history of ICCA is also not the usual history of an arbitral institution because ICCA was not created as an institution. It is now an organization with a legal personality under international law and ICCA's Foundation, as separate body in Holland, has a legal personality under Dutch law; but ICCA was born as a concept; and so it remains with no formal constitution and no large building or home of its own. Moreover, ICCA is entirely independent of anything and everyone; and it does not work under the umbrella of any other body with different or even conflicting interests.

From its first beginnings, ICCA has been truly international; and it does not serve nationalistic, sectorial or regional self-interests. ICCA's unique status and origins as regards international arbitration requires an explanation by analogy.

In the world of chemistry, positive catalysts play a relatively small but highly significant part. These re-agents speed up a chemical reaction without being consumed by the reaction itself. In the world of international arbitration, those catalysts are ideas, both theoretical and practical, for which ICCA has provided a highly significant forum as an ideas-factory, now for half a century.

It began with meetings over lunch and dinner in 1961 a few kilometres from here, at the Relais de Chambésy on the road to Lausanne. Professor Pieter Sanders from Holland was there, as were M[e] Jean Robert from France, Professor Arthur Bülow and Dr.Dr.

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* Essex Court Chambers, London; Member of ICCA.

This historical account is drawn from several sources: Piet SANDERS, *Herinneringen*, pp. 56-59; Heinz STROHBACH, "*Vom Club de Chambésy zum* International Council for Commercial Arbitration" in A. PLANTEY, K.-H. BÖCKSTIEGEL and J. BREDOW, *Festschrift für Ottoarndt Glossner zum 70. Geburtstag*, p. 417; "The I ICCA Congress 1961 (Paris)", Rev.arb (1961, no. 2); "The II ICCA Congress 1966 (Rotterdam)", Rev.arb (1966, no. 3, special); "The III ICCA Congress 1969 (Venice)", Rev.arb (1969, no. 4) pp. 133, 226, 338 et seq; "The IV ICCA Congress 1972 (Moscow), Rev.arb (1972, no. 4) pp. 426, 463 et seq; and "The V ICCA Congress 1975 (New Delhi)", Rev.arb (1975, no. 1) pp. 3, 131 et seq; and private communications from Jan Paulsson, Sergei Lebedev, Howard Holtzmann, Brigitte Stern, Alan Redfern, Jernej Sekolec, Martin Hunter, Jason Fry, Annette Magnusson and Sebastién Besson – to all of whom I express my profound recognition and gratitude (albeit that any errors here are mine alone).

Ottoarndt Glossner both from the Federal Republic of Germany and Professor Minoli from Italy. This group of like-minded friends, joined by others, became known as the "Club de Chambésy".

These founders of ICCA began with a simple proposal: to hold one or more international congresses, open to all, to consider and debate good ideas for the better conduct of international arbitration, without fear or favour – good ideas which have now, fifty years later, become indispensable to arbitration, world trade and even the rule of law.

Now, an idea can be fleeting and ephemeral – born of present circumstance and quickly forgotten. For example, at a time when the Beys of Tunis where the undisputed rulers of Tunisia, it is said that one Bey, during the early part of the nineteenth century, wished to teach the haughty ambassadors of the Western powers a lesson in humility.

He requested all three diplomats in full ambassadorial uniform to prostrate themselves on the floor of his throne room at the outset of their regular audiences. All three politely declined, on the basis that it was not a useful precedent to subject the representatives of the United States of America, France and the British Empire to such unnatural indignities. And so, at the next royal audience, they bowed their heads; but they did *not* prostrate themselves on the palace floor. The Bey's request was nonetheless repeated for the next audience; and for that audience, these proud representatives encountered an apparently insuperable diplomatic problem.

The wily Bey had built a new entrance to his throne room, a doorway less than two feet high, the better to require the ambassadors to prostrate themselves as they squeezed themselves through the new doorway – on the palace floor. But the British ambassador had an idea which was to preserve the dignity of the Empire and which he was prepared to share with his two esteemed diplomatic colleagues from France and the United States. And thus it was that the Bey of Tunis, instead of seeing the three ambassadors prostrate themselves saw, first, the feet and then the rotund behinds of the three ambassadors as they successively wiggled themselves *backwards* through the new doorway into the royal presence.

That British idea, the backward ambassadorial wiggle, however excellent at the time, is not now to be found in any book of diplomatic etiquette.

That is manifestly not so with ICCA, as the forum for ideas planned fifty years ago by the Club de Chambésy for arbitration specialists, then straddling both the massive political divisions during the Cold War and the divide between academic, professional and state practitioners, both "*privatistes*" and "*publicistes*"; and both lawyers and non-lawyers.

You will recall that in April 1961, the United States and Cuba nearly went to war over the incident at the Bay of Pigs; that in June 1961 Kennedy and Khrushchev held a most unsatisfactory summit in Vienna; and that in August 1961, the USSR and the GDR began building the Berlin Wall. Apart from ICCA's foundation, 1961 was not a good year.

ICCA's story begins, however, before 1961. The Club de Chambésy had its origins first at the United Nations Convention of 1958 in New York, attended by Professor Sanders and other members, including Professor Bülow and Dr.Dr. Glossner. The same group of friends was already working on the long-drawn-out negotiations for the European Convention on International Commercial Arbitration; and they were present

when this Convention was eventually signed on 21 April 1961 in Geneva. This 1961 Geneva Convention included an Annex and Special Committee intended to provide a new framework for trade between free market economies and socialist economies in the Soviet bloc. Hence the Club's meetings at the Relais de Chambésy, with a special interest in dispute resolution for East-West Trade. If Napoleon really said: "*C'est la soupe qui fait le soldat*", then we can say that the menu of this Swiss restaurant had much to do with the making of ICCA.

Within a month of the Geneva Convention, the first ICCA Congress took place in Paris over three days in May 1961, with Jean Robert as the rapporteur-general. There were 162 delegates from 14 countries, of which 74 came from France. There were, however, only three countries from outside Western Europe: the United States of America, Turkey and Yugoslavia.

This first congress was attended by, amongst others, Professor Sanders, Professor Berthold Goldman and senior French judges. One of the papers presented to the first of its four working groups was by a young Professor Frédéric-Edouard Klein from Basel University on the separabilty of the arbitration clause (to which we shall return).

The second ICCA Congress took place in Rotterdam in 1966, with 130 delegates from 14 countries. Again, these countries were largely from Western Europe, with the addition of the United States of America, Romania and Yugoslavia. The theme of this Congress was "Arbitration and the European Common Market". Its president was Professor Sanders. It was also attended, amongst others, by Professor Pierre Lalive.

For the United Kingdom, as with the first congress, this second congress was attended by few arbitration specialists; and, of these, only two names stand out today as representatives of the ICC's National Committee for the United Kingdom. Perhaps the European theme of the Congress put others off: the United Kingdom was not then a member of the Common Market; but, in any event, there were no Wilberforces, Diplocks, Kerrs, Mustills, Littmanns or Manns. The first well-known English name was Lord Tangley, who was a mountaineer and solicitor who later became the President of the ICC Court of Arbitration. The second was Neil Pearson, a solicitor from Manchester, who attended all these early congresses.

Neil Pearson soon became better known as the chairman of the first ICC tribunal to be ordered by the English High Court, in 1972, to state its award in the form of a Special Case for the decision of the High Court, a form of *lèse-majesté* against the ICC in Paris. That was later purged by two successive English Arbitration Acts 1979 and 1986 abolishing the Special Case; but it left England in French eyes on permanent probation as still capable of refusing to enforce a valid French ICC award under the New York Convention. In fact, of course, that is today an unthinkable impossibility. (I stress the word "valid"). It seems surprisingly hard for the French to forget Clemenceau's famous judgment, for arbitration as for much else, that England "is a French colony which failed".

The third ICCA Congress took place in Venice in 1969, with delegates from twenty-six countries and chaired by Professor Eugenio Minoli (then of Modena University and the President of the Italian Arbitration Association). These twenty-six countries now included India, Poland and the USSR, together with representatives from the United Nations and the World Bank, the latter represented by Dr. Aaron Broches, as the General Counsel of the World Bank and ICSID's first Secretary-General. It was also

attended from the USSR by Professor S.N. Bratus and Professor Sergei Lebedev. (We shall return to several of these names).

The fourth ICCA Congress was held in Moscow in 1972, with delegates from thirty-six countries, now covering East and West, North and South. By this time, ICCA had achieved what no other arbitral body had ever achieved: it was worldwide, inclusive, non-national, non-political, free-thinking and truly international; and it was attracting arbitration specialists from all walks of life, from both the developed and developing world: academics, practitioners, administrators, officers of state and, of course, arbitrators, both lawyers and non-lawyers, including (from London) the doyen of English commercial arbitrators, Cedric Barclay.

The fifth ICCA Congress took place in New Delhi in 1975, organized by Dr. M.N. Krishnamurthi, with delegates from forty-three countries. Here, ICCA's status and name were formalized with its Statements of Purposes and Procedures. This non-constitution, for a non-organization, was the product of negotiations first begun in Moscow conducted by Judge Howard Holtzmann (of the United States) and Professor Lebedev, designed to square the political circle between an international "organization" (which specialists from the USSR and other countries could not join without further awkward formalities) and a "network" or council (in which representatives from those countries could take part). With only minor amendments, that Statement of Purposes and Procedures still governs the workings of ICCA in its three complimentary roles:

As to ICCA Congresses, since 1975, there have been a further twenty-one ICCA Congresses, Conferences and Meetings, including tomorrow's, held in North and South America, Europe, the Middle East and Asia, but not Africa – at least not yet.

As to ICCA publications, ICCA has published a mass of specialist legal materials, collections and research. The records of its early Congresses were published in the *Revue de l'arbitrage* and also by host organizations; but since 1976, its materials have been published by Kluwer. These extend to the multi-volumed *International Handbook on Commercial Arbitration* and the ICCA *Yearbooks* and Special Series, to which we must now add the increasingly indispensable ICCA website.

ICCA's educational third role is now no less important than its other two roles, both for senior judges confronting the 1958 New York Convention and UNCITRAL Model Law and young arbitration practitioners, more skilled and more numerous than ever before.

But I come back to ICCA's function as a forum of ideas, or catalyst, working as a laboratory and not as a museum. I can take only one example tonight, an idea so simple but so necessary to international arbitration: the severability or separablity or autonomy of the arbitration clause from the substantive contract in which it is physically embedded, whereby the non-existence or invalidity of the latter does not necessarily infect the existence or validity of the former.

This doctrine of separability is, of course, a legal fiction; the product of arbitral logic which bears no foundation in fact because no commercial person considers making two quite separate, independent agreements in one contract; but, without this simple idea, there could be no effective system of arbitration for international trade but, rather, a multiplicity of proceedings in a Legal Tower of Babel with non-stop (not one-stop) adjudications. It is an idea which shows how ICCA's forum for ideas works, both in theory and practice; and why only ICCA could have worked in this way.

Let me explain. At ICCA's first congress in Paris in 1961, as recited above, one topic was the autonomy of the arbitration clause; and the report and discussion were published by ICCA. At the third congress in Venice in 1969 and the fourth in Moscow in 1972, Professor Bratus attended as one of the foremost Soviet lawyers and arbitrators. It is inconceivable that Professor Bratus and his colleagues were not exposed through ICCA to the legal developments in France, Germany, Switzerland (and elsewhere) on the separability of an arbitration clause, including the French decision in *Gosset* (1962), the US Supreme Court decision in *Prima Paint* (1967) and the Bundesgerichtshof decision of 27 February 1970.

Much later, in 1984, Professor Bratus, as an arbitrator in a Soviet arbitration in Moscow, issued an award recognizing and applying under Russian law the doctrine of separability in a case where the substantive agreement was legally invalid ab initio, thereby assuming jurisdiction over the merits of the parties' non-contractual dispute. That had never been done before by any Russian arbitrator or judge; and it was achieved as a matter of legal logic, independently from any express provision in the Russian Civil Code or Code of Civil Procedure.

In 1989, that award was then enforced under the 1958 New York Convention by the Bermuda Court of Appeal in proceedings where legal experts had testified as to the comparative laws and practices on the separability of an arbitration clause. These experts were Professor Goldman and Dr. Broches, both, of course, well-known participants in ICCA Congresses. Dr. Broches was also assisted by the former legal secretary to Professor Sanders, who was by now the General Editor of the ICCA *Yearbook*, as he is still: Professor Albert Jan van den Berg.

But this story does not end here. The successful Counsel in this Bermudian case was a well-known advocate in England, originally from South Africa, Sir Sydney Kentridge QC. In a subsequent English case argued in 1993, before the English Court of Appeal, Sydney Kentridge cited this Bermudian judgment in support of his argument on separability under English law. The Court of Appeal decided to adopt the same approach, based on the Soviet award and the expert evidence and materials cited in the Bermudian legal proceedings. That was done in England at common law, likewise as a matter of legal logic, without benefit of any statute; and the principle is now codified in Sect. 7 of the English Arbitration Act 1996.

So, an idea which was propagated in Paris at the first ICCA Congress in 1961 led to statutory recognition by the British Parliament in 1996, thirty-five years later, which is a relatively short period for arbitral history. Some might say "better late than never" (although it took France almost fifty years to codify *Gosset*); but let us rather thank ICCA and its early supporters for pursing an idea as a cause with a manifestly good effect in very different legal systems.

So much for history. As to the future, what good ideas may come from ICCA over the next fifty years, which several of you here tonight will surely celebrate in 2061? There are certain catalytic reactions which are already taking place. Let me list four:

First, there were no women at Chambésy; and there were, apparently, no women speakers at ICCA's first five congresses. Yet, in many countries now, over 50 per cent of law students are women. That change is not reflected in the composition of arbitration tribunals and senior practitioners. We do not know the identity of the first woman arbitrator in modern times; but it was certainly not before 1961. It may have been

Margaret Rutherford QC in England, or Professor Bastid in France, or Madame Simone Rozés as an ICC arbitrator or possibly Judge Birgitta Blom as an arbitrator at the SCC. Fifty years later, changes are taking place; and we shall see further changes.

Second, ICCA in 1961 was inevitably Euro-centric. Its founders made determined efforts to break the European mould, with increasing success. We shall certainly see further changes in the practice of international arbitration, particularly in Asia and Africa; and, as you will know, the next ICCA Congress in 2012 will take place in Singapore.

Third, there were few young practitioners in ICCA's early days. That has now changed with the emergence of a new young arbitral élite, with specialist education, training and experience in all forms of international arbitration, with multiple skills, multiple languages and evermore glittering résumés. These young specialists will influence significantly the future practice of international arbitration.

Fourth, there were no computers, electronic aids or e-mails for arbitrators and arbitration practitioners in 1961. Now we have not only personal computers but also iPhones, iPads, Skype and apps (as with the SIAC App). Soon, we shall each have an "EAB", an Electronic Arbitral Bag with ready access to all electronic tools and materials in an electronic super-cloud, including ICCA publications and much, much more. Our system of work is about to undergo a massive technological change.

So the future is bright both for ICCA and international arbitration, as the attendance at this anniversary event demonstrates. ICCA's positive catalyst still works. I shall stop here, because, tomorrow morning, we too must work.