STATES AND THE UNDERTAKING TO ARBITRATE

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I. INTRODUCTION

THE institution of arbitration, on one view, derives its force from the agreement of the parties; on another view, from the State as supervisor and enforcer of the legal process. The contractual obligation of both parties enables the settlement process to override national differences in law and procedural obstacles which exist in local courts. On the other hand, a State's jurisdiction over its territory and nationals provides an independent supervision of the settlement process and effective enforcement of decisions made according to law: usually this exercise of jurisdiction is direct through the State's own courts, but in arbitration it is carried out through the alternative process of reference to an arbitrator and recognition and execution of the arbitral award.[1]

These two bases, the autonomy of the parties and the judicial supervision of the State as sources of the authority of arbitration are given varying weight in national legal systems in relation to domestic arbitrations.[2] The great expansion of international commercial arbitration

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1. René David, *Arbitrage dans le commerce international* (1982, Eng. translation 1985), pp.78, 81. "Arbitration and the justice of the courts should not be regarded as competitors doomed to be enemies, but rather as two institutions whose purpose is to co-operate for the sake of better justice: a satisfactory regime for arbitration cannot be imagined without some degree of co-operation with the courts, which are called to give assistance to, and also to exercise control over arbitration . . . It is not clear in the case of international disputes as to which national courts will be called to settle any dispute which may arise. This factor may well justify the desire to be free from the particular constraints of national laws and lead us to analyse the award as being a product of the free will of the parties."

For inter-State arbitration, J. H. Ralston, *Law and Procedure of International Tribunals* (1926); K. S. Carlston, *The Process of International Arbitration* (1946); J. L. Simpson and H. Fox, *International Arbitration, Law and Practice* (1959). For international commercial arbitration, A. Jan van den Berg, *The New York Arbitration Convention of 1958* (1981); Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (1984); Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (1986). See also Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (1982).

2. The Italian *arbitrato irrituale* is an extreme example of the autonomy of the parties; it is a contractual institution not subject to any of the formalities of the Italian Code of Civil Procedure and enforcement cannot be effected by an award but only on the basis of an action on the contract to arbitrate: A. Kiss, *Problèmes de Base de l'Arbitrage*, Vol.I,

in the last ten years[3] is attributabie to the successful harnessing of these two bases in the relatively simple machinery provided in the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.[4] By this Convention the agreement of the parties to arbitrate is given effect and the resulting award executed in an increasing number of countries by the legal systems of the States parties to that Convention. The two bases, however, continue to create uncertainty as to the ultimate foundation and source of authority and have produced tensions which are still in process of being resolved.

The theoretical dispute as to the legal possibility of a floating supranational arbitral award, in no way dependent on any local forum or law,[5] is one area of tension; another arises from conflicts between local courts and the arbitral tribunal as to jurisdiction and the applicable law to determine the capacity of the parties to agree to arbitrate and the validity of the arbitration agreement.[6] Further conflicts arise in relation to powers of revision, annulment or appeal exercised by local courts over the arbitral award.[7] The extent to which the assistance of local courts is available, prior to the making of the award, to preserve assets for the subsequent performance of the award, is a further reflection of these tensions; in this situation, on the one hand, autonomy of the parties is asserted by prohibiting any application to a local court by either party to

Arbitrage juridictionnel et arbitrage contractuel (1987). The statutory arbitration which is conducted before a tribunal whose jurisdiction derives not from the consent of the parties but the statute under which the dispute has arisen is an extreme example of the process totally subject to the judicial supervision of the State: Mustill and Boyd, *idem*, p.2.

3. From its foundation in 1919 to April 1987, of the 5,930 requests for arbitration filed with the International Chamber of Commerce, half were filed in the last 11 years. The current annual rate is about 300 cases a year with 659 pending as at January 1987. The London Court of Arbitration currently has about 60 cases a year, all being of an international character with at least one party being a non-UK national.

4. (1959) U.N.T.S. No.4739, p.38. As of 31 Dec. 1986 71 States are signatories to the New York Convention.

5. F. A. Mann, "Lex Facit Arbitrum in International Arbitration", in *Liber Amicorum for Martin Domke* (1967), p.157; W. W. Park (1983) 32 I.C.L.Q. 21; P. Lalive (1976) Rev. de l'Arbitrage 155; J. Paulsson (1981) 30 I.C.L.Q. 358, (1983) 32 I.C.L.Q. 53; W. L. Craig (1985) 1 Arbitration Int. 49; K. H. Bockstiegel (1984) 1 Jo. of Int. Arb. 223. See Donaldson MR in *Deutsche Schachtbau und Tiefbohrgesellschaft mbH* v. *Ras al Khaimah National Oil Co.* [1987] 2 All E.R. 769 upholding the arbitrators' choice of "internationally accepted principles of law governing contractual relations" as the proper law.

6. H. M. Holtzmann, "Arbitration in the Courts. Partners in a System of International Justice" (1978) Rev. de l'Arbitrage 253; B. Goldmann in *ICC Court of Arbitration 60th Anniversary: A Look at the Future* (1984), p.257. The power of the arbitrator to rectify the arbitration agreement is also a controversial area, *Ashville Investments Ltd.* v *Elmer Contractors* (1987) *The Times*, 29 May 1987, distinguishing *Crane* v. *Hegemann Harris Co. Inc.* [1939] 4 All E.R. 68

7. Recent legislation in the UK, France and Belgium has restricted recourse to local courts from international commercial arbitrations held in those countries Schlosser, "L'Arbitrage et les voies de recours" (1980) Rev. de L'Arbitrage 286; Stein and Wolman, "International Commercial Arbitration in the 1980s. A Comparison of the Major Arbitral Systems" (1983) 38 Int. Lawyer 1685.

the arbitration for pre-award attachment measures (as is the case in an arbitration conducted under the ICSID Convention rules),[8] on the other, the enforcement powers of the State are made available through its courts to back up the effectiveness of the arbitration process (as the English court did in the *Rena K*).[9]

I propose to look at the working of these two sources of authority for arbitration as they apply to a State as party to inter-State arbitration and to international commercial arbitration with a private party. These problems are frequently addressed by a definition of the State so as to exclude State-trading entities and render the latter subject to the full rigours of private law. Another method is to distinguish activities of the State in the exercise of sovereign power, *de jure imperii*, from those of a commercial nature, performed in the market place, *de jure gestionis*. I propose, however, to address the problem in a broader, different way. I want to examine what obligations are invoked in the undertaking to arbitrate and to see if the content of these obligations is the same for the State as party to international arbitration (whether inter-State or commercial) as for the private party to commercial arbitration. For the purposes of the discussion the term State is limited to the State as a direct party and excludes separately incorporated State-trading entities. Even without them the position is complicated by the fact that today the State may itself or through its departments of State be a party to commercial arbitration and that a private party may, by means of mixed claims commissions—and the Iran–US Claims Tribunal is the latest version—have its private claims taken up by the State and presented through an inter-State arbitration.

To illustrate the difference in a State's undertaking to arbitrate from that of a private party, two specific areas of law will be examined: first, the State's attitude to enforcement of the award and the relationship of its consent to arbitration to its consent to proceedings in local courts. Second, the extent to which a State's consent to arbitrate has binding effect on claims of its nationals submitted by the State to inter-State arbitration.

First, however, it is useful to consider in a general way the expectations of States concerning arbitration based on their use of the process over the last 50 years.

8. Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (ICSID Convention) 575 U.N.T.S. 160, Art.26; *Guinea* v. *Maritime International Nominees (MINE)* (1985) 24 I.L.M. 1639 (Belgian court held no jurisdiction, because ICSID's jurisdiction was exclusive and lifted attachment order on Guinea's assets); also (1987) 26 I.L.M. 382 (Geneva Surveillance Authority on appeal similarly lifted attachment order against Guinea's assets); but cf. *Guinea and Soguipeche* v. *Atlantic Tritan Co.* (1987) 26 I.L.M. 373 where French Court of Cassation reversed Court of Appeal of Rennes and allowed provisional measures in the form of attachment.

9. [1979] Q.B. 377.

It is not possible in the space available to support the argument by examination of the various types of arbitration to which a State is party. One area relates to arbitration cases with a private party concerning settlement of oil and other concessions and investment disputes such as the *ARAMCO*, *BP*, *TOPCO* and *LLIAMCo* cases against Libya, *Kuwait* v. *Aminoil*, *Framatome* and *Elf Aquitaine*[10] and arbitrations held under the ICSID Convention.[11] Another relates to *ad hoc* inter-State arbitrations on boundary disputes in cases like *The Rann of Kutch*,[12] the *Argentine–Chile Frontier Award*,[13] or under dispute settlement clauses relating to the interpretation of treaties as the *French US Air Services Arbitrations*[14] or the *Young Loans Arbitration* in respect of German external debts after the Second World War.[15] However important and distinct in legal character these arbitrations may be, they do not contradict the general point to be made. They are relatively few, always of an optional consensual character and dependent on the continuing co-operation of the State in the arbitration proceedings if an effective award is to be achieved. There are also, of course, institutionalised methods of State arbitration for specific types of disputes, as for example human rights under the European Convention. In so far as these institutionalised methods involve automatic participation of the State, they constitute an exception and thereby a contrast to the general position now to be considered.

The expectations of States differ very considerably from those of private parties who resort to commercial arbitration. Here it may be as well to remember that, unlike the situation of the private party who chooses flexibility of the arbitral process as an escape from the strict requirements of litigation, arbitration in any form is for the State a loss of liberty, an acceptance of constraints from which it is otherwise free. All

10. *Saudi Arabia* v. *Aramco* (1963) 27 I.L.R. 117; *BP Exploration Company (Libya) Ltd* v. *The Government of the Libyan Arab Republic* (1973) 53 I.L.R. 297; *Texaco Overseas Petroleum Co (TOPCO) and Californian Asiatic Oil Co.* v. *The Government of the Libyan Arab Republic* (1977) 53 I.L.R. 389; *Libyan American Oil Company (Liamco)* v. *The Government of the Libyan Arab Republic* (1977) 62 I.L.R. 146; *Government of Kuwait* v. *Aminoil* 66 I.L.R. 519; *Framatome et al.* v. *Atomic Energy Organisation of Iran* published in French in Clunet. (1984) Jo. du D.I. 58 and in English under the title *Company Z and others (Republic of Zanadu)* v. *State Organisation ABC (Republic of Utopia)* (1983) VIII Y.B. Comm. Arb. 94; *Elf Acquitaine* v. *National Iranian Oil Co.* (1986) XI Y.B. Comm. Arb. 97.

11. For up-to-date account see (1987) 4 ICSID News.

12. The *Rann of Kutch Arbitration* (India and Pakistan) (1976) 50 I.L.R. 1.

13. Award of HM Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile 24 Nov. 1966, HMSO 59–162 (1969); 16 U.N.R.I.A.A. 109.

14. Case concerning the interpretation of the Air Transport Services Agreement between USA and France (1969) 16 U.N.R.I.A.A. 5; Case concerning the Air Service Agreement of 27 March 1946 (*US* v *France*) (1979) 54 I.L.R. 304.

15. *Young Loans Arbitration* (1980) 59 I.L.R. 494. See generally A. M. Stuyt, *Survey of International Arbitrations 1794–1970.*

international proceedings are instituted by some form of arbitration clause. There is not today and never has been any general method of compulsory adjudication at the international level. The absence of a court with international competence over States was remedied by the establishment of the Permanent Court in 1921 after the First World War, now replaced by the International Court of Justice set up after the Second World War. But as is well known the jurisdiction of that Court was and still is dependent on the consent of the parties. (The complaint of the United States in the recent judgment on the merits in the case of the *Military and Paramilitary activities against Nicaragua* brought by Nicaragua against the United States was precisely on the ground that no consent by the parties to the Court's jurisdiction had been proved to exist; Nicaragua had never completed the process of ratification necessary to its acceptance of the compulsory jurisdiction of the ICJ, it forgot to send the necessary telegram and in any event the United States had expressly revoked its acceptance of the Court's jurisdiction as it was (or so it maintained) free to do three days before the Nicaraguan application was filed. The International Court found against the United States on both grounds; it held that there was sufficient evidence of Nicaragua's consent and the purported revocation of US consent was ineffective.)[16]

The Optional clause, Article 36(2) of the Statute of the Court, introduced a form of compromissory clause; unilaterally a State might in advance confer by declaration some general or limited jurisdiction on the International Court which, if matched with a similar undertaking of another State, generated jurisdiction. The practice of attaching reservations to a State's acceptance of the Court's jurisdiction and the requirement of reciprocity of commitment have considerably reduced the effectiveness of the Optional clause as a basis for compulsory adjudication. The construction of the terms of States' acceptance of the Court's jurisdiction has led to a great increase in preliminary objections relating to the jurisdiction of the Court. Of the 71 cases before the Court from 22 May 1947 to 31 July 1985, 46 judgments and 18 advisory opinions have been given. In 27 of those preliminary objections were taken as to jurisdiction or admissibility. Nor has the number of States willing to accept in advance the Court's jurisdiction increased. As at 31 July 1985 only 46 States out of a possible 160 or so had accepted the compulsory jurisdiction of the ICJ and many of these attached reservations as to subject matter and duration. The United States has since withdrawn its acceptance.[17]

16. *Nicaragua/US Military and Paramilitary Activities* (Jurisdiction and Admissibility) [1984] I.C.J. Rep. 392.
17. (1985–6) I.C.J.Y.B. 60.

In many respects, therefore, the Permanent Court was—and its successor, the International Court, even more so, remains—an institutionalised arbitration tribunal rather than a court. It has the attributes of a court in that it is a permanent institution staffed by judges drawn from countries other than those of the parties and has a statute and rules of procedure which the parties take no part in drafting. But it resembles an arbitration in that the parties initiate the proceedings by consent, are entitled each to have a judge of their own nationality, and in the absence of international machinery—the recourse to the Security Council under Article 94 of the UN Charter is too political a measure to be of much legal assistance—the execution of the judgment very much depends on the parties' good faith. A recent revision of the rules appears to increase the control of the parties; it is now possible for a dispute to be heard in a chamber of the Court, the members of which are appointed by the Court after the President has ascertained the views of the parties as to its "composition".[18]

II. OBLIGATIONS CONTAINED IN THE UNDERTAKING TO ARBITRATE

So much then for States' general attitude towards arbitration of inter-State disputes: let us now examine more closely the content of the undertaking to arbitrate and the extent to which it depends on the two sources of authority, the autonomy of the parties and judicial supervision of the State. The undertaking to arbitrate in arbitrations between private parties involves three major commitments:

1. an immediate irrevocable obligation to refer the dispute to arbitration;
2. an obligation to settle the dispute by means of arbitration in preference and prior to resort to any other type of legal proceedings;
3. an obligation to honour the award of the arbitrator.[19]

A. Between Private Parties

In arbitration between private parties their good faith and voluntary commitment supports these obligations but, should one party disregard them, domestic courts provide procedures of varying effectiveness to enforce these obligations. A party who cannot get the other side willingly to arbitrate may when sued on the dispute seek the court's aid to direct the parties back to the arbitration. So far as English law is concerned, where the English court is satisfied that the agreement to arbi-

18. 1978 Rules of the ICJ, Art.17(2).
19. David, *op. cit. supra* n.1, at p.209; Mustill and Boyd, *op. cit. supra* n.1, at p.73.

trate is valid according to its proper law it will give effect by staying local proceedings. Such a stay is mandatory where the agreement is not a domestic arbitration agreement within the meaning of section 1 of the Arbitration Act 1975. The same remedy is available to enforce the second undertaking where a party in disregard of the arbitration agreement seeks to commence legal proceedings in relation to the arbitrable issues and the court, by declarations as to the status of the agreement to arbitrate or as to the jurisdiction of the arbitrator and by supervision of the appointment and conduct of the arbitrator, will support the arbitrator in the carrying out of the arbitration. Finally, when the award is made a limited right of appeal is available and the court will by summary procedure or by action on the third undertaking, the promise to honour the award, convert the arbitral award into a judgment so that a party may obtain its recognition and proceed to enforce it by all measures available for execution of judgments of the English court.[20]

B. Between States

The position with regard to the three commitments in the undertaking to arbitrate is rather different in international arbitrations between States. As has been seen there is not today and never has been any general method of compulsory adjudication at the international level. A State which makes the undertaking to enter into an arbitration knows that nothing but good faith and the general principle, *pacta sunt servanda*, holds it to the arbitration. There is generally no external authority which can make an order compelling the State to submit to the arbitration. Even where a jurisdiction clause is construed by the International Court to confer jurisdiction upon it, a State which disagrees may flout the order of the Court, as the United States has done in the *Nicaragua* case. No legal sanction follows under international or municipal law. The sole deterrent is the disapproval of world opinion.[21] Similarly, there is no method by which a State can be restrained from resorting to legal methods of settling a dispute other than the agreed arbitration. Indeed the second commitment to settle the dispute exclus-

20. Mustill and Boyd, *idem*, as to remedies for the first undertaking p.9 and Chap.30, for second undertaking p.21 and Chap.32 and for the third undertaking p.30 and Chap.28.

21. Schwarzenberger, *International law as applied by International Courts and Tribunals*, Vol.IV, *International Judicial Law* (1986), pp.724–726. Rosenne, *The International Court of Justice* (1957), p.82. The unilateral withdrawal of a State from continued participation in arbitration after consenting to the setting up of the arbitration tribunal, as in the *Hungarian Optants* case and the *Buraimi Oasis* arbitration terminates the arbitration and the arbitrator's powers; these truncated arbitrations present a serious challenge to the immutability of the arbitration and have led to a distinction between use of arbitration as a method of diplomacy and as a judicial process: 1955 U.N.Y.B. 339–340, (1953) 1 I.L.C.Y.B. 51–52; Schwebel, *International Arbitration: Three Salient Problems* (1987), Chap.3.

ively by arbitration may not be one recognised in international arbitration. The International Court of Justice, anxious to encourage parties to settle their disputes by whatever means they choose, has held parties to be free, whilst engaging in proceedings before the Court, at the same time to refer the dispute to the Security Council (*US Diplomatic and Consular Staff in Tehran* case),[22] to a regional process of settlement (the Contadora process in the *Nicaragua–US Military and Paramilitary* case)[23] and to bilateral discussion (*Aegean Sea Continental Shelf* case).[24] These are bilateral solutions pursued as an alternative to arbitration. But international law also countenances unilateral acts, however unfriendly, to persuade another State to yield in a dispute, always provided they do not amount to threat or use of force or illegal reprisals.[25]

Finally, the content of the third commitment to honour the award appears to differ from that in the private party's undertaking. Whenever the latter is required to comply with the award in good faith by his own efforts, a passive role is also envisaged, should he default, of subjection to local courts' powers so far as necessary to enforce the award. In an arbitration between two States there is no question of submission to a third authority; each State undertakes to exercise its own powers to execute the award and should it lose to accept the exercise of the other party's State powers for the performance of the award. Whilst the Covenant of the League of Nations imposed a general obligation "to carry out in full good faith any award that may be rendered"[26] it is usual for most arbitration agreements to contain a specific article under which the contracting States agree to accept the award as final and binding and also undertake "to take such measures as may be requisite to carry out the arbitral award".[27] In mixed claims commissions it is usual to set out detailed provisions for the time, date and manner of payment of money claims. The Mexican–US Claims Commission of 1923, for instance, requires the Commissioners to determine the value of any property for

22. [1980] I.C.J. Rep. 3, 21–24.
23. See also *Merits* [1986] I.C.J. Rep. 14.
24. [1978] I.C.J. Rep. 3, 12.
25. *US French Air Services Arbitration* (1979) 54 I.L.R. 304; Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984).
26. Art.13(4).
27. *Aguilar Amory and Royal Bank of Canada* claims, Convention between Great Britain and Costa Rica 12 Jan. 1922, 1 U.N.R.I.A.A 371; *Trail Smelter* case (Canada/US), Convention for Settlement of Difficulties of 15 Apr. 1935, Art.XII: "The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal" 162 L.N.T.S. 73. Indo–Pakistan Location Boundary Case (Rann of Kutch) Arbitration Agreement of 30 June 1965, Art.3(iv): "Both Governments undertake to implement the findings of the Tribunal in full as quickly as possible" 548 U.N.T.S. 277. See Witenberg, *L'Organisation judiciaire; la procédure et la sentence internationale* (1937).

which a restitution order is made and gives the respondent State an option, to be exercised within 30 days of the award, to pay the value rather than restore the property.[28] On occasions States seek a declaration of the legal position in the first instance from the arbitrator, leaving the parties themselves to agree the method of carrying out the award. For instance, in boundary arbitrations it is usual for the parties to provide for a technical commission to carry out the demarcation of the boundary in accordance with the award.[29] Whilst a State is possibly under obligation to give effect through its national laws and courts to an award to which it is party, the cases to date have revealed obstacles of incorporation into national law and of political allocation of resources.[30] The practice has been to leave to the government of the State itself as a matter of discretion the decision as to the means of performing the award.[31]

In this connection the security account established at a third State's central bank under the Algiers Accords in January 1981 between Iran and the United States which effected the release of the US Iran hostages in Tehran provides possibly a unique precedent. In that case the security account was initially funded in advance of the arbitration of claims between the States by $1 billion of Iranian assets frozen in the United States: awards have been paid out of that security account which, in accordance with the provisions of the claims settlement agreement between the two States, Iran has replenished on two or three occasions

28. In the General Claims Commission between Mexico and USA set up by Convention signed at Washington, 8 Sept. 1923, the contracting States undertook "to give full effect" to the decisions of the Commission, that the result of the proceedings of the Commission were to be a "full, perfect and final settlement of any such claim upon either government", and as regards their nationals every such claim to be treated "as fully settled, barred and henceforth inadmissible, provided the claim filed has been heard and decided" (Art.VIII). Article IX provided that a balance between the total amounts awarded to the nationals of each State having been struck, a lump sum in gold coin or its equivalent was to be paid at Washington or the City of Mexico to the government of the country in favour of whose citizens the greater amount might be awarded: A. H. Feller, *The Mexican Claims Commission 1923–1934* (1935).

29. In the Agreement for Arbitration of 22 July 1971 between Argentina and Chile for the Beagle Channel dispute Art.XII(1) provided that when the proceedings before the Court of Arbitration have been completed, it should transmit its decision to Her Britannic Majesty's Government which should include the drawing of the boundary line on a chart, and Art.XV provided "The Court of Arbitration shall not be *functus officio* until it has notified Her Britannic Majesty's Government that in the opinion of the Court of Arbitration the Award has been materially and fully executed": Cmnd. 4781 Misc.23 (1971).

30. Simpson and Fox, *op. cit. supra* n.1, at p.259; *Socobelge* v. *The Hellenic State* (Belgium, Tribunal Civil de Bruxelles, 1951) 18 I.L.R. 3; *Société Européenne d'Etudes et d'Enterprises* v. *World Bank, Republic of Yugoslavia and Republic of France* (1982) J.D.I. 931; *Waltham Press* v. *Union of Soviet Socialist Republics* (1982) 20 Can. Y.I.L. 282.

31. In the debate on the State Immunity Bill Elwyn Jones LC said "it is generally accepted that States do not take coercive action against each other or their property" 388 *Hansard*, H.L. Debs, 17 Jan. 1978, col.76.

when the account has fallen below $0.5 billion: to date that replenishment has been out of actual interest.[32]

It is, therefore, plain that an undertaking to arbitrate may have different connotations for a State when engaging in inter-State arbitration than for a private party to commercial arbitration. Which of these connotations applies when the State itself becomes a party to international commercial arbitration? This question is particularly relevant when the scope of the undertaking is considered as regards proceedings in local courts.

III. EXTENSION OF UNDERTAKING TO ARBITRATE TO COVER LOCAL COURT PROCEEDINGS

A private party's undertaking to arbitrate is an exception to the general compulsory jurisdiction which some local court is entitled to exercise over him. As demonstrated, this is not the position for the State. A State's undertaking to arbitrate is a restriction on freedom. Is the State's undertaking when given as a party to commercial arbitration confined, therefore, to consent to comply with the arbitration process or does it extend to acceptance of the jurisdiction of local courts to support the arbitration? Once again the basis of arbitration is exposed. Clearly if the undertaking to arbitrate rests solely on consent of the parties and that consent is interpreted in the same way as a State's undertaking to arbitrate in inter-State arbitrations, it deprives the proceedings, the arbitrator and the award of the support and enforcement procedures of local courts.

A. State Immunity

Do these supervisory and enforcement powers of the local court apply when a State is party to a commercial arbitration? The obstacle to an immediate answer is the doctrine of State immunity. Until recently there was widespread observance of a rule of absolute immunity.[33] There could be no local proceedings or enforcement measures against a State without its consent and that consent had to be expressed and given

32. Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 Jan. 1981 (General Declaration), paras.6–7, reprinted in (1981) 20 I.L.M. 223; Lillich (Ed.), *The Iran–US Claims Tribunal 1981–83* (1984), p.5. In January 1986 the balance in the security account fell below US$500 million due to the payment of awards in favour of US claimants. It was replenished (and again in October 1986) by transfer of interest earned by the security account and held in a separate account by the Depositary Bank (1987) XII Y.B. Com.Arb. 230.

33. *The Christina* [1938] A.C. 485; *Berizzi Bros.* v. *S.S. Pesaro* 271 U.S. 562 (1926); Lauterpacht (1951) 28 B.Y.B.I.L. 220.

before and after judgment. For the adjudication stage English law required express consent by an authorised agent of the State to be given direct to the court after proceedings had begun—in other words an express submission.[34] After judgment a further express consent to execution was required.[35] Under such an absolute rule the consent to refer a dispute to commercial arbitration, even though made in writing and confined to an existing dispute, was insufficient to constitute consent to the local court's jurisdiction or waiver of the State's immunity.

The rule of absolute immunity has been modified in the last ten years, extensively as to the adjudication stage, less dramatically for the enforcement stage.[36] The broad justification for the modification has been that a State expresses its consent to local jurisdiction by engaging in trade, entering into transactions with close connections with a particular country, and that it is artificially narrow to require the consent to be express, in the face of the court and only to be given at a time after proceedings have been commenced in respect of the particular dispute. On the basis of this philosophy legislation of the United States, Great Britain, Canada, South Africa, Singapore, Pakistan and Australia has restricted the immunity before national courts in two ways. These laws have redefined the conditions of waiver and submission sufficient to constitute consent of the foreign State in the eyes of the local courts. Second, they have identified a number of transactions in respect of which the plea of immunity may not be raised. The commercial transaction is the best known non-immune exception, but for present purposes the exception which makes commercial arbitration non-immune and subject to proceedings in local courts in respect of the arbitration is the most relevant.

B. Section 9 of the State Immunity Act 1978

Provisions relating to waiver of immunity are to be found in all of the national legislation and the extent to which they render non-immune proceedings relating to arbitration agreements depends on their word-

34. *Kahan* v. *Federation of Pakistan* [1951] 2 K.B. 1003.

35. *Duff Development Co.* v. *Kelantan Government* [1924] A.C. 797.

36. European Convention on State Immunity 16 May 1972, U.K.T.S. (1979) No.74 (Cmnd.7742), (1972) 11 I.L.M. 470. US Foreign Sovereign Immunities Act 1976, UK State Immunity Act 1978, Singapore State Immunity Act 1979, Pakistan State Immunity Ordinance 1981, South Africa Foreign States Immunity Act 1981, Australian Foreign States Immunities Act 1985. Draft articles on Jurisdictional Immunities of States and their Properties (1987) 26 I.L.M. 625; State practice is collected in Materials on Jurisdictional Immunities of States and their Property UN St.Leg.Ser B/20 as updated in the Special Rapporteur's Reports, 4th Report (1982) Y.B.I.L.C. Vol.II, pt.1, p.199; 5th Report (1983) Y.B.I.L.C. Vol.II, pt.1, p.25; 6th Report (1984) Y.B.I.L.C., Vol.II, pt.1, p.5 and 7th Report U.N.G.A. doc. A/CN4/388. See also Sinclair (1980–II) 167 Hag. Rec. 121; Badr, *State Immunity, An Analytical and Prognostic view* (1984).

ing which differs.[37] Section 9 of the United Kingdom State Immunity Act 1978, however, specifically deals with the effect a State's agreement to arbitrate may have on immunity.[38] By that section, "where a State has agreed in writing to submit a dispute which has arisen or which may arise in arbitration the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration".

This section appears to effect a massive imputed extension of a State's consent to local proceedings. On the widest construction of the section, the agreement to arbitrate removes State immunity from proceedings in respect not only of commercial but of non-commercial matters, in respect of foreign awards as well as English and from proceedings to enforce the award. Such a construction produces the paradoxical result that a State by express consent to arbitration renders itself more subject to the adjudicative and enforcement powers of the local courts than when it expressly submits by written agreement under section 2 of the 1978 Act to the jurisdiction of the English court itself. It would further appear to defeat the function of the arbitral process as a different and alternative method of dispute settlement to litigation and to disregard the intention of the State which consents to arbitration precisely on the basis that it is not itself and does not wish the dispute in which it is involved to be subject to local courts' jurisdiction.

Such a wide construction highlights sharply the tension in the two bases of arbitration which I have been discussing. On one view, a State as party to an arbitration consents solely to the first base, the consensual obligation to comply with the award. The widely observed immunity of the State from enforcement proceedings in the local courts prevents the second base, the judicial supervision of the arbitration process, having any operation in an arbitration to which a State is a party. A State carries over into private law arbitration the characteristics of inter-State arbitration and its status as a litigant in local courts—that is, no enforcement except by the State itself or, at least, with its consent.[39]

On a second view, however, commercial arbitration is seen as the modern novel process; it provides a process of worldwide enforcement of commercial obligations. Just as foreign courts enforce against a pri-

37. FSIA 1976, s.1605(a)(1) and s.1610(a)(1); UK State Immunity Act 1978, s.2; Canadian State Immunity Act 1982, s.4; Australian Foreign States Immunities Act 1985, s.10.

38. The Singapore State Immunity Act 1979, s.11, the South Africa Foreign States Immunities Act 1981, s.10, and the Pakistan State Immunity Ordinance 1981, s.10, have a similar provision to that in the UK Act but it is omitted in the Canadian Act; for Australia see text at *infra* n.51.

39. This view accepts that State immunity is a relevant plea only in respect of proceedings in local courts and that it is a well-established principle that State immunity cannot be raised as a plea to jurisdiction or a defence to the merits in an arbitration to which a State is party: J. Gillis Wetter (1985) 2 Jo of Int. Arb. 7 and cases there cited. Where however the assistance of the local courts is required for the arbitration or to enforce the arbitral award, under the rule of absolute immunity a plea of State immunity may be raised.

vate party an arbitral award more readily than a judgment obtained in his home court, so by the State's consent to arbitration foreign courts are enabled to enforce awards in circumstances where they would by reason of immunity refuse or be unable to enforce judgments obtained in their courts.[40] In the light of the tension between these two approaches it is now necessary to examine more closely the detailed arguments for and against a wide construction of section 9 of the UK Act.

First, the section contains no express limitation to proceedings relating to arbitration of commercial matters. Had section 9 followed Article 12 of the European Convention on State Immunity 1972—and one of its purposes was to enable HMG to ratify that Convention[41]—it would have restricted the proceedings to those relating to "commercial or civil matters". By omitting to do so, it theoretically covers all arbitration, domestic and international, relating to non-commercial matters.[42] For States the distinction has great importance; many disputes with private parties arise by reason of the exercise of governmental power, or involve mixed issues of commercial law and public law. It is in this sensitive area that a State may consent to settlement by arbitration where it would adamantly oppose reference to a local court. To impute automatically submission to the local court by reason of the consent to the agreement to arbitrate is to endanger States' willingness to consent to any third party process of settlement. The 1958 New York Convention on Reciprocal Enforcement of Arbitral Awards recognises the significance of the distinction between commercial and non-commercial matters by allowing States to limit the obligation of their courts to give effect to foreign awards "only to differences . . . which are considered as commercial under the national law of the State making the declaration".[43]

40. This approach is supported by Delaume (1983) 38 Arb. Jo. 34, (1981) 75 A.J.I.L. 786; and Lord Denning in a case decided prior to the State Immunity Act 1978, *Thai Europe Tapioca Services Ltd* v. *Government of Pakistan* [1975] 1 W.L.R. 1485.

41. 388 *Hansard*, H.L. Debs, cols. 52–55, 17 Jan. 1978. Article 12 of the European Convention on State Immunity provides:

> (1) Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of proceedings relating to
>
> (a) the validity or interpretation of the arbitration agreement;
>
> (b) the arbitration procedure;
>
> (c) the setting aside of the award,
>
> unless the arbitration agreement otherwise provides
>
> (2) Paragraph 1 shall not apply to an arbitration agreement between States.

42. The section does not apply to arbitration agreements between States, s.9(2).

43. Art.1(3).

Despite the application of section 9 to non-commercial matters, are there other inherent limitations which reduce its scope? The second omission appears to be any limitation of the section to English arbitration. Is an undertaking by a State to refer a future dispute to arbitration outside the United Kingdom, and for which the proper law is a foreign law, within the section so as to constitute consent to proceedings in the English court? Dr Mann considers the section extends to foreign awards.[44] Although, as far as I know, the point has not appeared in any English reported case, this disregards the additional requirement that the English court will require a jurisdictional connection between itself and the arbitration agreement, such as England being the place of arbitration, which would rule out such extreme situations.[45] Certainly in the United States, where, under the FSIA 1976, section 1605(a)(1) permits waiver "either expressly or by implication", the case law after some hesitation has emphasised the need for territorial links with the US courts and refused to construe a waiver of immunity in respect of one jurisdiction as waiver to all jurisdictions.[46] On this analogy consent to arbitration in England may constitute consent to proceedings in English courts but consent to arbitration elsewhere will not. Section 9 of the UK Act should, therefore, be interpreted as removing immunity only in respect of agreements to arbitrate in England. Even if restricted to English arbitrations, it is necessary to know for what type of proceedings relating to the arbitration immunity of the State party to the arbitration agreement is removed. Does the section permit proceedings in the English court to enforce the award without the consent of the State? Had section 9 once again followed the wording of Article 12 of the European Convention there would have been no ambiguity. Article 12 expressly limits the local court proceedings to those relating to the validity or interpretation of the arbitration agreement, arbitration procedure and the setting aside of the award. When the Bill was first presented to the House of Lords the relevant clause contained an additional sentence stating that the section did not apply to proceedings for the enforcement of the award. Such a limitation would seem to have been in conformity with the general approach which was to separate off enforcement measures and to require a separate express consent by the State to their application. The section in its final version, however, omitted the additional sentence.[47] Does this mean that section 9 removes immunity

44. F. A. Mann (1979) 50 B.Y.I.L. 43, 58.

45. RSC, Ord.11; 949 *Hansard*, H. C. Debs, col.409.

46. *Verlinden Bv* v. *Central Bank of Nigeria* 488 F. Supp. 1 284 (S.D.N.Y. 1980), affirmed on other grounds 647 F 2d 320 (2d Cir. 1981) reversed 103 S.Ct. 1962 (1983); *Maritime International Nominees Establishment (MINE)* v. *Republic of Guinea* 693 F 2d 1095 (2nd Circ. 1981). See Kahale (1981) 14 N Y.U Jo. of In. & Pol. 29; Sullivan (1983) 18 Tex. Int. L.J. 329; Oparil (1986) 3 Jo. Int. Arb. 61.

47. 389 *Hansard*, H.L. Debs, col.76, 17 Jan. 1978.

for proceedings relating to arbitration not only to matters arising before or during the arbitration but also to the recognition and enforcement of the award? On one view, the omission of the words does not alter the limitation of proceedings relating to the arbitration to the pre-award phase. The Act, it is argued, maintains the distinction between the adjudicative and enforcement stage of proceedings: section 9 and the removal of immunity by agreement to arbitrate relate to the adjudicative stage. Section 13 deals with the enforcement stage and subject to the exceptions in subsections (3) and (4) expressly prohibits the court from giving effect to the award or the property of a State being subject to any process for the enforcement of an arbitral award. Only written consent under subsection (3) is sufficient to waive the immunity from enforcement. Accordingly, on this view the implied consent of section 9 is limited in its effect to proceedings relating to matters before or during the arbitration.

On another view, a more restricted view of section 13(2)(b) is taken, namely that it is concerned with the prohibition of attachment of State property to enforce an arbitration award except by written consent or in respect of property for the time being in use or intended for use for commercial purposes. On this view, section 13 provides no bar to enforcement of arbitration awards, merely a limitation as to the property which may be attached. Certainly Lord Wilberforce, in the committee stage, argued against the inclusion of the bar: a State's entry into an arbitration clause should constitute implied waiver from execution unless express reservation to the contrary was made.[48] The net result on this view is that English courts may recognise arbitral awards and enforce them but only in respect of property of the State in commercial use. This is certainly the view of Dr Mann.[49] Professor Crawford, who advised the Australian government in the preparation of its legislation on State immunity, considered the construction of the UK section not free from doubt. He recommended that the Australian Act should make the matter plain.[50] That Act accordingly contains a wide provision clarifying most of the ambiguities in the English statute—by section 17(1) a State which is party to an arbitration agreement is not immune from the recognition and enforcement of an award made pursuant to the arbitration, wherever the award was made.[51] The Australian Act also limits sec-

48. 389 *Hansard*, H.L. Comm., col.1524.

49. (1979) 50 B.Y.I.L. 43, 58.

50. Australian Law Commission Report No.24 Foreign State Immunity (1984) 62. See also Triggs (1982) 9 Monash Univ. L.R. 104.

51. Section 17 provides:

> (1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not

tion 17 to non-immune matters so presumably it excludes non-commercial matters. Under this provision a State which consents to arbitration consents to proceedings being brought against it to enforce the award in local courts anywhere in the world. The second basis of arbitration is imputed from consent to the first basis, agreement of the parties to arbitrate.

It is important not to lose sight of the principle of the matter in the legislative history and points of statutory construction. Unilateral legislation of single States expanding the meaning of consent and non-immune situations, as the Australian section and the widest construction of section 9 of the 1978 Act purport to effect, cannot alone alter the international rule of immunity.[52] A foreign State may disregard such unilateral provisions if contrary to international law. There is some support for a more limited rule in the draft convention on jurisdictional immunities which the International Law Commission has been preparing for the past seven years and which had its first reading in 1986. The draft article adopted by the Commission contains the three limitations initially set out in Article 12 of the European Convention; immunity is removed only in respect of civil or commercial matters and only in respect of proceedings in local courts which have a sufficient jurisdictional nexus with the arbitration (the arbitration either being held on the territory within the local court's jurisdiction or subject to its law). Finally, consent to arbitration is not construed as removing immunity from the enforcement stage of the arbitral award.[53] This reinstatement

immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration including a proceeding:
(a) by way of a case stated for the opinion of the court;
(b) to determine a question as to the validity and operation of the agreement or as to the arbitration procedure; or
(c) to set aside the award.
(2) Where—
(a) apart from the operation of subpara.11(2)(a)(ii), subsec.12(4) or subsec.16(2) a foreign State would not be immune in a proceeding concerning a transaction or event; and
(b) the foreign State is a party to an agreement to submit to arbitration about the transaction or event, then subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose or for the enforcement of an award made pursuant to the arbitration, wherever the award was made.

52. "If one State chooses to lay down by enactment certain limits, that is by itself no evidence that those limits are generally accepted by States" *I Congreso del Partido* [1983] A.C. 244, 260, *per* Lord Wilberforce.

53. Art.19 of the draft articles provides:

Effect of an arbitration agreement. If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke

by the International Law Commission of a treaty rule adopted in 1972 provides fairly strong evidence that the international law in this area is more restricted than the provisions contained in the UK and Australian legislation.

In the absence of a clear statement at international law of the rule, it will only be when a majority of States comply with national legislation such as the Australian and UK provisions that one can say with certainty that there is sufficient State practice to show that the international rule is accurately expressed in the terms of the national legislation. A moderate assumption of the supervisory function over both the adjudicative and enforcement stage of an arbitration with territorial connections with the local jurisdiction is the rule most likely to obtain the approval of States. It gives, after all, some weight to the second basis of arbitration, the judicial supervision of the arbitral process, yet preserves the widely observed immunity of the State from enforcement in local courts. It would be wrong to allow a party to a commercial arbitration, just because it is a State, to disregard that second basis altogether which, as discussed, is part of the inherent nature of the arbitral process and upon which much of the effectiveness of modern arbitration depends. A compromise solution has to be sought by which the first basis of arbitration, autonomy of the parties, is employed to identify and give independent force to a limited and agreed version of the second basis. It is here that jurisdictional links to one particular system of local courts and the commercial nature of the arbitration are all-important. If in the arbitration agreement the State consents to the applicable law as English law, or to the arbitration being held in England and identifies the arbitration as relating to commercial matters, it is a small extension of that express consent to hold it subject to the supervision of the English courts for the purposes of the arbitration proceedings whether before or during the award.

Such moderate assumption should not, in my view, extend to attachment of State assets before or after the award. At the present stage of the development of commercial arbitration and States' growing co-operation I would not extend that judicial supervision beyond recognition of the award. To dismantle State immunity from enforcement in respect of

> immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
> (a) the validity or interpretation of the arbitration agreement,
> (b) the arbitration procedure,
> (c) the setting aside of the award
> unless the arbitration agreement otherwise provides.

U.N.G.A. Official Records, 41st Session, Supp. No.10(A/41/10), Chap.II, pp.5–23, reprinted (1987) 26 I.L.M. 625. See also Art.III(g) of the draft Resolutions on jurisdictional immunities of the Institute of International Law, prepared by Professor I. Brownlie (1987) 62 Inst.I.L.Ann. 98, 101.

arbitral awards whilst preserving it for proceedings in local courts would unduly strain the legal system and forfeit States' co-operation. I would prefer courts to require an express acceptance of such liability to attachment in the arbitration agreement by the State or at any rate an acknowledgement that the arbitration relates to commercial matters. In the meantime, until the position is clarified, private parties in drafting arbitration clauses with States are well advised to include express waiver of immunity by the State both to adjudication and enforcement proceedings in the local court.

IV. MIXED CLAIMS COMMISSIONS AND ARBITRAL CLAIMS TRIBUNALS

THE second illustration of the working of the two bases of arbitration is drawn from one institutional form of international settlement which has a long history and recent developments suggest it may have particular relevance for commercial arbitration. That institution is the mixed claims commissions of the nineteenth century which in time led to the mixed arbitral tribunals set up under the peace treaties of the First World War. The earliest commissions are to be found under the Jay Treaty of 1794 between Great Britain and the United States to settle the boundary and war claims outstanding after the War of Independence. Although the commissions were interrupted by disagreements between the English and American commissioners, their enquiries into the facts and elucidation of principle aided the final settlement, the United States paying £600,000 in three annual instalments for the "confiscated debts" owed to the British, and Great Britain £2,330,000 in respect of 533 separate awards made to US nationals for loss of vessels and cargoes.[54] Further mixed commissions were set up by States, in particular to settle claims of their nationals for loss arising out of war or civil disturbance; this procedure was used against France after the Napoleonic wars, for US and British claims against Mexico (1838 and 1868), Chile (1883 and 1886), Venezuela (1869 and 1903), Peru (1904), in settlements involving Germany after the First World War, and again in claims of the United States against Mexico (1923 and 1924).[55] The most recent example is the Iran–US Claims Tribunal which, in addition to dealing with direct claims between the two States and disputes as to interpretation of the two declarations contained in the 1981 Accords of Algiers, confers juris-

54. 52 Consolidated T.S. 243; Moore, *International Adjudications*, Vols.1–4; A. de la Pradelle and N. Politis, *Recueil des Arbitrages internationaux* (2nd ed.), Vol.1, pp.1–28.

55. Verzijl, *International Law in Historical Perspective Pt.VIII* (1976), Chap.IX; Simpson and Fox, *op. cit. supra* n.1, at Chaps.1–4; Dolzer, "Mixed Claims Commissions" 1 Encyclopaedia of Public Int. L. 146; Ralston, *op. cit. supra* n.1; Feller, *op. cit supra* n.28; Recueil des decisions des Tribunaux arbitraux mixtes institutes par les Traites de Paris, Vols.1–10 (1922–1930).

diction on the Tribunal to decide claims (including counterclaims arising out of the same transaction) of nationals of the United States against Iran and claims of nationals of Iran against the United States.[56] Terminology is not always exact. The institution has developed over the years with the inclusion of neutral members in the composition of the commission either at a second stage or throughout; in this form the institution is usually described as an arbitral claims tribunal. There has also been an extension to individual claimants of some right of participation in the proceedings.[57]

In all these commissions and arbitral claims tribunals some common features are observable. In all proceedings the claim of injured nationals is espoused by the State which enters into a treaty to settle the dispute with another State. The treaty between the States is more in the form of a submission than a compromissory clause—the subject matter, the tribunal, the law applicable are all agreed.

The subject matter of the dispute is broadly identified, though its precise scope often remains a fruitful source of argument in cases coming before the commission. US Secretary of State Pickering complained that the Jay Treaty "in effect made the United States the debtor for all the outstanding debts due to British subjects and contracted before the treaty of peace".[58]

The composition and procedure of the tribunal is agreed, though again some flexibility is left to the tribunal which may by administrative decisions taken early on in the proceedings lay down general guidelines as to the disposition of the claims.[59]

The law applicable is international law supplemented in some instances by special rules on which the parties agreed—as did Great Britain and the USA in the Washington Rules on the duties of neutrality for the Alabama Claims.[60] The origin of the treaty for settlement by a mixed claims commission or arbitral tribunal is the inadequacy of local law to compensate for the loss suffered (no, or inadequate, provision for damage from war, civil disturbance, or act of State is usually to be found in local laws) and the recognition by the contracting States that a standard external to local laws is required to provide compensation. It is a well-established principle that diplomatic protection of aggrieved

56. Claims Settlement Declaration, 19 Jan. 1981, reprinted (1981) 20 I.L.M. 230.

57. Simpson and Fox, *op. cit. supra* n.1, at pp.10–12, 34–41; Burchard (1927) 21 A.J.I.L. 472.

58. Secretary of State Pickering to Minister of US in London, 5 Feb. 1799, Moore, *op. cit. supra* n.54, Vol.3, at p.170.

59. Mixed Claims Commission US and Germany, Administrative Decisions and Opinions to 30 June 1925 (1925); Borchard (1925) 19 A.J.I.L. 133.

60. Treaty of Washington, 8 May 1871, Art.VI, 143 Consolidated T.S. 146, 149; Moore, *op. cit. supra* n.54, Vol.1 (1898), p.550.

nationals is precluded as long as the remedies available under domestic law have not been exhausted by the private party.[61]

The relationship of the jurisdiction of the commission or claims tribunal to that of local courts is a variable one.

Some treaties specifically exclude the role requiring exhaustion of local remedies, others define the circumstances in which it shall be applicable. The Algiers Accords setting up the Iran–US Claims Tribunal contain both types of provision. Claims arising under a binding contract for exclusive sole jurisdiction of the competent Iranian courts are excluded (Article II.1), whilst claims referred to the Arbitral Tribunal are treated as transferred with the consequent effect that they are "to be considered excluded from the courts of Iran or of the United States or of any other court" (Article VII.2).

Other treaties provide a right of appeal to the arbitral tribunal (as in the London Agreement on German External Debts 1953, from the mixed commission to the arbitral tribunal)[62] or a right to obtain a ruling on the interpretation of the treaty rules from the arbitral tribunal (as domestic courts of the contracting States might do under the Austro–German Property Treaty 1957).[63]

A. The Position of the Individual Claimant

A common feature to all these procedures is that the States are the parties. Although in the commissions under the Jay Treaty and subsequent nineteenth-century mixed commissions the individual was permitted to file his claim and the sums awarded were qualified by reference to that claim, ultimate control throughout was retained by the State. Cases were conducted by agents appointed by the two States and it was rare until after the First World War for individuals to present memorials to the commission, participate in oral proceedings, appear as witnesses or be represented by counsel.[64] Claims by individuals were directly presented in the mixed arbitral tribunals set up under the peace treaties after the First World War but only after they had been subjected to a clearing system of national offices of the countries concerned. Although the Franco–German Tribunal dealt with 20,000 cases and the Anglo–German and German–Italian Tribunals with some 10,000 cases each, these represent only a fraction of the claims settled through the national

61. *Panevezys* v. *Saldutiskis Rly.* case P.C.I.J. Ser.A/B No.76 (1939); *Interhandel* case [1959] I.C.J., Rep.6; 18 *Halsbury's Laws* (4th ed.), Foreign Relations Law 909, para.1751.

62. London Agreement on German External Debts, 27 Feb. 1953, Arts.28(4), 31(7), 333 U.N.T.S. 2. Simpson and Fox, *op. cit. supra* n.1, at pp.35–40.

63. German Bundesgesetzblatt 1958 II 129.

64. Simpson and Fox, *op. cit. supra* n.1, at pp.99–102.

clearing system.[65] After the Second World War the London Agreement on German External Debts set up a complicated three-tier system of appeals to which individuals had somewhat limited rights.[66] Claims of less than £250,000 in the Iran–US Claims Tribunal are to be presented by the government of the national concerned; claims in excess may be presented by individual claimants but the agents of the two States are present throughout the hearing with a right of audience.[67]

It is unwise to refer to the Iran–US Claims Tribunal as a modern illustration of claims commissions without at the same time noting its novel features which distinguish it from previous inter-State arbitrations.[68] Reference has already been made to the parties' establishment in advance of a security account out of which private parties' claims could be paid. The General Principles in the first declaration for the Algiers Accords of 17 January 1981 between Iran and the United States (which effected the release of the hostages) also emphasised the intention to achieve a settlement of outstanding private law claims as well as public international law claims against either State. Principle B stated that "it was the purpose of both parties . . . to terminate all litigation as between the government of each party and the nationals of the other and to bring about the settlement and termination of all such claims through binding arbitration". To this end the terms of reference of the Tribunal included claims of US nationals against Iran and of Iranian nationals against the United States for debts, contracts (including transactions which are the subject of letters of credit and bank guarantee), expropriation and other measures affecting property rights. The applicable law provision also does not disregard the private law aspect of the arbitration, the Tribunal being directed in Article V to decide "all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law rules as the Tribunal determines to be applicable".

The settlement of claims through the Iran–US Claims Tribunal provides an example of the fusion of State and private party claims in one procedure. An increase in demand for such a procedure is to be expected if States deliberately use their private law either by suspension of local remedies or change of substantive rules as a response to perceived illegal action on the international plane by another State. Any solution of the international dispute will then necessarily require a settlement of private claims which have been generated in the course of the dispute.

65. Wuhler, "Arbitral Tribunals" 1 Encyclopaedia Public Int. L. 146.
66. See reference at *supra* n.62.
67. Claims Settlement Declaration, *supra*. n.56, Arts.III(3), VI(2).
68. See D. Lloyd-Jones, "The Iran–US Claims Tribunal: Private Rights and State Responsibility", in Lillich (Ed.), *op. cit. supra* n.32, at p.51.

This increasing fusion of State and private party claims in one procedure before an arbitral claims tribunal leads back to a consideration of the basis of arbitration and the scope of the undertaking to arbitrate.

B. Relationship of Arbitral Claims Tribunals to Local Courts

It will be important to clarify the relationship between such claims tribunals and local courts if private law claims are increasingly to be referred to them. Is the authority of such an arbitral claims tribunal based on consent of the parties or the judicial authority of the State? Is it the agreement of the two States which gives legal force to the decisions of the tribunal or the combination of the judicial powers of two States? So far as the first base is concerned, does the consent of the State bind its national in all circumstances in respect of any claim that it may seek to bring in local courts whether within the State or a third State? As regards the second base, whilst international law permits and third States must recognise the exercise of judicial authority of a State within its territory or over its nationals, does international law require similar recognition by a third State of a settlement by bilateral treaty between two States of the claims of their nationals? If it does, in the absence of a treaty with the third State or implementing legislation, how are the courts of the third State to be satisfied of the validity of the awards and jurisdiction of the arbitral claims tribunal? Even if so satisfied, may those courts still reject the decisions of such tribunals, as they do in respect of foreign judgments, on grounds of fraud or by reason of the award being contrary to public policy or opposed to natural justice?

It may be helpful to illustrate these questions by an example. At the time of the US air strike on Libya the United States government froze Libyan assets in the United States. Suppose a US national tries in England to recover a loan owed to him by a Libyan State-owned bank and suppose, subsequently, the United States and Libya agree to refer all claims to arbitration, must the English court discontinue the action?

Now I appreciate that I am posing the question in such general terms that no answer is possible. The terms of the US freezing order, whether its ambit includes the loan arrangement between the US and Libyan nationals, the proper law of the transaction, whether the US national has exhausted local remedies in Libya, are all issues which require elucidation. But in broad terms you can see the underlying interests involved.[69]

There is first the situation of the individual whose claim is the subject

69. For a recent case involving some of the considerations raised in the hypothetical example in the text, see *Libyan Arab Foreign Bank* v. *Bankers Trust Co.*, 2 Sept. 1987, Staughton J.

https://doi.org/10.1093/iclqaj/37.1.1 Published online by Cambridge University Press

of political settlement between States. If he refers his claim to the arbitral claims tribunal set up by the two States, then arguably he has personally submitted to its jurisdiction and any award will bind him finally.[70] But supposing he does not do so but wishes to continue with his action in the English court? Suppose, indeed, aware of the uneasy relations between their governments, the parties expressly chose to make the contract of loan subject to the jurisdiction and law of England. To what extent is the US national affected by the treaty of settlement between the United States and Libya? Is the arbitration treaty anything more than an agreement *inter alios*? The private party is not a direct party to the treaty and the espousal of his claim by means of the treaty enabling it to be brought before the tribunal is a matter of discretion for the State and not of right on the part of the national claimant. Certainly English law provides no remedy to such a claimant whereby he can force the UK government to take up and present his claim against another State or any remedy to enforce the payment over to him for any sum awarded or recovered by the UK government in respect of his claim under such an arbitration agreement.[71]

Has the US national a right to exhaust local remedies in Libya or to continue with his English suit and to oppose the conversion of his claim to local proceedings into an arbitration claim?

The original claim may either be grounded in private law on the contract or, if the Libyan court can be shown also to have jurisdiction, in international law on a denial of justice from the Libyan courts for failure on Libya's part to observe minimum standards in the treatment of aliens. It is generally the latter type of claim which States refer to arbitral claims tribunals although the root cause of dissatisfaction often arises from some breach of contract due to disruption of normal business relations between the countries. From the point of view of the private litigant either type of claim derives from the laws of one or other of the States parties to the arbitration. States are free to change such laws. Is the reference to arbitration equivalent to such legislative action so as to defeat any continuance or initiation of proceedings in the local court to give effect to the national's claim? This raises a nice question whether either applicant or respondent State is free to dispense with the requirement of exhaustion of local remedies when the private party concerned still wishes to pursue them. It seems probable that provided the claim is between nationals of the States concerned and is wholly grounded in the territory of one or the other, whether based on private law or public

70. As the court found in respect of the plaintiff in *Dallal* v. *Bank Mellat*, see text *infra* n.72; Dicey and Morris, *Conflict of Laws* (11th ed., 1987), p.563.

71. *Civilian War Claimants Association Ltd* v. *R.* [1932] A.C. 14; *Tito* v. *Waddell (No.2)* [1977] Ch. 106; 18 *Halsbury's Laws* (4th ed), Foreign Relations Law 728, paras.1419, 1768; F. A. Mann, *Foreign Affairs in English Courts* (1986), p.77.

international law, it can be terminated by the States' reference of it to arbitration. The constitutional law, however, of a particular State may require enabling legislation to direct its courts to stay or discontinue proceedings. Here, reference to the second basis of arbitration, the judicial authority of the State, seems necessary to extend the arbitration agreement beyond the direct parties to persons outside the agreement. Is this second basis, judicial authority of a State, available and sufficient to extend the jurisdiction of the arbitral claims tribunal to the courts of a third State and over claims that may be grounded on the laws of third States? Will the second basis give primacy to the tribunal's jurisdiction? Will it bring to a halt proceedings in local courts in respect of the same claims, render null any order by such courts to attach assets in respect of the claims and require the local courts of a third State to recognise and give effect to the awards of the tribunal?

Whether such reference by treaty and legislation would effectively defeat causes of action grounded on a third State's laws with sufficient jurisdictional connection to entitle the courts of that third State to take jurisdiction is a more difficult question. It also raises the extent to which a third State and its courts are bound to give effect to a bilateral treaty to which the third State is not a party.

C. Dallal *v.* Bank Mellat

It was precisely these problems which Hobhouse J had to consider in the recent decision of *Dallal* v. *Bank Mellat*.[72] The claimant in that case had personally submitted to the jurisdiction of the Iran–US Claims Tribunal and his claim had no independent basis in English law or jurisdictional links with the English court. But the reasoning of the judgment suggests that the English court has an inherent power to give effect to an arbitration award grounded in international law even though there was no treaty between Great Britain and the States setting up the arbitration tribunal and no implementing English legislation.

A US national in that case had a claim for two cheques dishonoured by an Iranian bank. The Iran–US Claims Tribunal had dismissed the claim by a majority award, with the American arbitrator dissenting, on

72. [1986] 2 W.L.R. 745. The relationship between local courts and the Iran–US Tribunal has also arisen in West German and French courts. The exercise of concurrent jurisdiction by a West German court (Frankfurt am Main District Ct., Feb. 1980) by attachment of Iranian assets to enforce US companies' claims, suspended in US courts, led Iran to file a complaint before the Iran–US Tribunal, Case No.A/5. The French Cour de Cassation has refused to annul an award obtained in an ICC arbitration against the Iranian Air Force which the applicant is seeking to enforce by filing a claim before the Iran–US Claims Tribunal and in proceedings before West German courts: *Commandement des Forces Aeriennes de la République Islamique d'Iran c. Bendone—De Rossi* International, 1st Ch. Civ. Cour de Cassation, Arrêt No.449, 5 May 1987, (July 1987) I.F.L.R. 44.

the ground that the applicant had failed to discharge the burden of proof that the transaction was not illegal as contrary to the Iranian foreign exchange law, and held that the US applicant should not be allowed to amend his claim to a plea of unjust enrichment. The applicant subsequently brought an action on the cheques in the English court and the defendant, relying on the award of the Iran–US Claims Tribunal, applied to strike out the action as an abuse of the process of the court. Hobhouse J, in considering the validity of the arbitration and the award, tested it by reference to the two bases of arbitration, consensual autonomy of the parties and the power of the State to enforce the legal process. He first approached the problem as one of recognition of a valid arbitration agreement either under the New York Convention or by English conflict of laws rules. By reason of the arbitration being held at The Hague it was argued the proper law of the arbitration agreement was Dutch.[73] Here a well-known obstacle, the legal requirement for a formal submission of the parties, is encountered. Article 623 of the Dutch Civil Code required such a formal submission and its absence rendered any agreement a nullity. Consequently there could be no recognition by the English court of the proceedings and award of the Claims Tribunal "from the application of the ordinary principle applicable to consensual arbitration".

It was suggested by the plaintiff that if Dutch law was not the proper law, international law might be. Hobhouse J was emphatic that private parties had no consensual autonomy to choose international law:

> But what I am concerned with here . . . is not an agreement between States but an agreement between private law individuals who are nationals of those States. If private law rights are to exist, they must exist as part of some municipal legal system and public international law is not such a system. If public international law is to play a role in providing the governing law which gives an agreement between private law individuals legal force it has to do so by having been absorbed into some system of municipal law.[74]

Unable to rely on the consensual agreement of the private parties as the source of authority, the judge turned to the second source of authority, the State's exercise of judicial powers. Describing the proceedings at The Hague as akin to a domestic "statutory" arbitration, where the jurisdiction of the arbitral tribunal is defined not by any choice or agree-

73. A Bill was presented to the Netherlands Parliament which provided that awards of the Iran–US Tribunal should be arbitral awards within the meaning of Dutch law, and not subject to challenge in Dutch courts either for jurisdiction or substance except for compliance with rules of natural justice or on grounds of public policy. The Bill was not proceeded with. Bill entitled "Applicability of Dutch Law to the Awards of the Tribunal sitting in the Hague to hear Claims before Iran and the United States", reprinted in Iranian Assets Litigation Rep. 6, 899 (15 July 1983).

74. [1986] 2 W.L.R. 745, 759.

ment of the parties, he set himself to find the relevant "statute" to govern the present international situation.

This he does as follows:

> The jurisdiction and authority of the tribunal at The Hague was created by an international treaty between the United States and the Republic of Iran, and was within the treaty-making powers of the governments of each of those two countries. Each of the parties was respectively within the jurisdiction and subject to the law-making power of one of the parties to the treaty. Further, the *situs* of all the relevant choses in action are within the jurisdiction of one or other of the two States which are parties to the treaties. Again the municipal legal system of each of the relevant States recognises the competence of the tribunal at The Hague to decide the arbitration proceedings. Accordingly the arbitration proceedings at The Hague are recognised as competent not only by competent international agreements between the relevant States, but also by the municipal laws of those States . . . there is no reason in principle why the curial law of a tribunal cannot derive concurrently from more than one system of municipal law . . . in the present case there are two systems of municipal law with the requisite international competence which give validity to the arbitration proceedings. There is no reason in principle why that validity should not be recognised by the English courts.[75]

This is a lengthy excerpt but I have given it in full to show that the focus has shifted away from the arbitration. There is no question now of the validity of the underlying agreement between the private parties which gave rise to the dishonoured cheques, nor to the absence of any direct agreement between them to refer it to the Claims Tribunal, nor to the validity based on consent of the parties to the resulting award. The enquiry, relying as it does on case law relating to the recognition of decisions of consular courts given in respect of private nationals of States which were not in direct treaty relations with Great Britain,[76] has shifted the focus from consensual autonomy to the competence of the tribunal. If under international law a tribunal is competent, Hobhouse J considers its competence ought to be recognised by English courts. Such competence need not be conferred by treaty, but binds the nationals of the States parties to the treaty and any private party who voluntarily resorts to the arbitral claims tribunal to pursue his claim.

These are resounding principles and exciting news for international lawyers. The *Dallal* decision suggests a route not merely for regularising the relationship of the Iran–US Tribunal with local courts of third States but opens up the prospect of general recognition by local courts of inter-State arbitration. Equating international law with foreign municipal law, the case in effect extends the common law action to enforce a

75. *Idem*, p.761.

76. *The Laconia* (1863) 2 Moore P.C. (N.S.) 161, *Messina* v. *Petrococchina* (1872) L.R. 4 P.C. 144.

foreign judgment[77] to the decision of an international tribunal established by international law. If a bilateral agreement between two States is given such recognition, should the English court not also extend it to judgments of the International Court, which is established by a multilateral treaty to which the majority of States are parties? If it be argued that the recognition is limited to awards affecting the rights of private parties, then surely any arbitral tribunal established by treaty qualifies, whether or not Great Britain is a party to the treaty, provided it purports to decide conclusively issues which otherwise would be decided by the local courts of the contracting states.

So far as the facts of *Dallal* v. *Bank Mellat* are concerned, the treaty between the United States and Iran was confirmed by local legislation of both countries. In the first instance, in the United States it was done by Presidential decree.

On the setting up of the Iran–US Claims Tribunal, in a decree of 24 February 1981 the President suspended all claims for equitable or judicial relief in connection with the claims, and provided that "during the period of suspension all such claims should have no legal effect in any action pending or to be commenced in any court of the United States". The constitutionality of this Presidential decree was upheld by the Supreme Court in *Dames & Moore* v. *Regan Sec. of Treasury*; the Supreme Court there held that Congress had implicitly approved the practice of claim settlement by executive agreement and that the suspension of claims was not an ouster of jurisdiction but effected "a change in the substantive law governing the law suit" and the provision of an "alternative forum, the claims tribunal which is capable of providing meaningful relief".[78] In the words of Justice Rehnquist who delivered the judgment of the Court, "The frozen assets ser 'e as a bargaining chip to be used by the President when dealing wi a hostile country." Private law actions by individual claimants could not therefore be allowed to minimise or wholly eliminate this "bargaining chip".

Whilst, in pursuit of the praiseworthy goal of obtaining the release of hostages, criticism of the Presidential decree and suspension of vested rights of action was muted, it is worth pausing to ask how we in the UK would view such action. The government would not have executive power to do so and would have to enact legislation. As Parliament is theoretically capable of doing anything it pleases, presumably by Act of Parliament existing causes of action could be terminated in a manner similar to the American method. It is an interesting speculation whether such interference with vested rights of property and contractual expectations would involve any infringement of the Treaty of Rome in rela-

77. Dicey and Morris, *op. cit supra* n.70, at p.561
78. 453 US 654 (1981) 673.

tion to the Common Market or to human rights, particularly the right of property in the First Protocol under the European Convention of Human Rights.

But these speculations apart, is it sufficient to leave such an important extension of jurisdiction into the international field to a common law action? It appears from the decision in the *Dallal* case that there is sufficient scope in such procedure to ensure the application of the safeguards relating to rules of natural justice and local public policy which currently apply for the enforcement of foreign judgments and awards.[79] But what of the broader view of public policy? Should the recognition of a treaty conferring international competence be left to individual litigants' resort to a common law action? Are all such bilateral treaties removing claims of nationals from local courts to inter-State arbitration likely to be ones which, in the words of the judge in the *Dallal* case, the English court will "not frustrate"? Should not the decision to endorse or frustrate a treaty arrangement made between other States be with Parliament? Such endorsement has certainly been required in the case of foreign judgments, as the recent entry into force of the Civil Jurisdiction and Judgments Act 1982 illustrates, and also the UK legislation for foreign arbitral awards giving effect to the New York Convention 1958 and the ICSID Convention.

The fusion of international law with local law is an admirable goal but if it is to be done so as to avoid international conflict surely it ought to be done by observance of constitutional procedure, opportunity for parliamentary debate and taking due account of all interests involved.

V. CONCLUSION

To summarise:

1. Commercial arbitration, both domestic and international, depends on two sources of authority, the consensual autonomy of the parties and the power of the State to enforce the legal process.
2. Private litigants as a general rule are subject to compulsory adjudication of their disputes by courts. Resort to arbitration arises from the voluntary choice of a more flexible procedure. States are not generally subject to compulsory adjudication; all forms of arbitration are a restriction on their freedom of action.
3. The undertaking to arbitrate comprises three elements: an immediate irrevocable obligation to refer the dispute to arbi-

79. Dicey and Morris, *op. cit. supra* n.70, at p.571; *Dallal* v. *Bank Mellat* [1986] 2 W.L.R. 745, 765.

tration; an obligation to settle the dispute by arbitration in preference and prior to resort to legal proceedings; and an obligation to honour the award of the arbitrator. In inter-State arbitration the State's undertaking to arbitrate probably does not extend to the second obligation and the first and second obligations are given effect solely by operation of the first basis, the consensual autonomy of the parties. The undertaking of the State does not contain a commitment to respect the power of a third State to enforce the award.

4. In international commercial arbitration the undertaking of the State to arbitrate cannot of itself constitute consent to the award being enforced by court proceedings. Such consent may be construed or imputed as consent to enforcement by English courts where the State in the arbitration agreement consents to the applicable law as English law or to the arbitration being held in England, and identifies the arbitration as relating to commercial matters and commercial property. Section 9 of the State Immunity Act 1978 should be so construed.
5. Reference of private party disputes by States to settlement by mixed claims commissions or arbitral claims tribunals involves no consent by the private party to arbitrate unless he subsequently submits his claim to the commission or tribunal. The second basis, the power of the two States to enforce the award of the commission or tribunal should not extend beyond their own courts. If the award of the arbitral claims tribunal is to receive recognition and enforcement in the courts of a third State, that State must be a party to the treaty setting up the claims commission or tribunal and/or enact legislation requiring its courts to give effect as judgments to the awards of such mixed claims commission or arbitral claims tribunal.