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### DOES AD HOC ARBITRATION REQUIRE MORE SUPPORT?

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Our fellow panellists have addressed the far more intellectually demanding topics of public policy and reviewability of awards in international arbitration. It falls to us to consider an entirely practical matter, namely the extent to which it might be useful or indeed necessary to enhance the support available to buttress ad hoc arbitration.

Although this subject will lead us to deal with (inter alia) certain rather mundane aspects of the arbitral process, these may be of very great interest to the parties. Indeed, there are some matters which appear to be ones of pure routine, but in reality put into question the very legitimacy of the process. Hence the concept of “support” that is relevant for our purposes today covers both of the two principal etymological definitions of the term:<sup>1</sup> *assistance* and *backing* to the ad hoc arbitral process; and *upholding* or *sustaining* ad hoc arbitration as *an institution*, to ensure its continuing vitality.

Before turning to those matters, a few words are in order by way of introduction.

#### I. “You Never Had It Better”

Writing in 1967, less than a year after the creation of UNCITRAL, René David penned a contribution to the *Liber Amicorum for Martin Domke* entitled “*L’avenir de l’arbitrage*”.<sup>2</sup> Critically taking stock of developments, Professor David noted that much progress had been made since the 1923 and 1927 Geneva instruments,<sup>3</sup> but fundamental questions remained – notably, as to the requirements for the validity of an arbitration agreement, the question of the law to be applied by arbitrators (including in particular *lex mercatoria*), the law governing the arbitration (the *lex arbitri*),<sup>4</sup> and the legal nature of an arbitral award (contractual or judicial?). Today we recognize that many of those questions have been conceptually

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<sup>1</sup> According to the *Shorter Oxford English Dictionary* (5th edn, 2002).

<sup>2</sup> See Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (1967) 57.

<sup>3</sup> The 1923 Geneva Protocol is at 27 LNTS 157; and the 1927 Geneva Convention at 92 LNTS 301.

<sup>4</sup> A matter dealt with in the same *Liber Amicorum* by FA Mann, in his seminal paper “*Lex Facit Arbitrum*”: *ibid*, 157.

explored, and there is a substantial amount of uniformity in the way that they have been resolved in practice, in international conventions, arbitration statutes, and arbitration rules. Much of this progress is doubtless due to the work of UNCITRAL, whose 40th annual session we honour today.

In the paper cited above, Professor David went on to say that there was a “*différence de grande portée*” between ad hoc and institutional arbitration: only institutional arbitration could be subject to some measure of supervision. If that difference were recognized, international arbitration could be “improved”. States should be prepared to vouch for (“*se porter garant*”) the quality of select arbitral institutions, and publish official lists of such institutions. A measure of “international control”, or at least the creation of some international norms, should be further considered.<sup>5</sup> Professor David could not envisage that what we call today “control assurance” would ever be feasible in ad hoc arbitration. He perceived ad hoc arbitration as a diffuse, unsupervised, and casuistic process, and harboured no hope that it could foster the development of international arbitration as a discipline. As he put it, in ad hoc arbitration “*tant vaut l’arbitre, tant vaut l’arbitrage*”.

Professor David had a point, of course. Resorting to ad hoc arbitration in a satisfactory way required the expenditure of considerable resources to set out the charter of the arbitral process. It was appropriate for very large matters, typically between states and large foreign investors<sup>6</sup> or between states only<sup>7</sup> (or for very small matters, to be resolved informally, without much attention to procedural arrangements). For the vast majority of cases in between, parties had to rely on the provisions on arbitration to be found in statutes or procedural codes, which were much too often antiquated. As the ICC put it in 1974:

“The difficulties to which ad hoc arbitration gives rise at the international level [are due to] the inadaptability of national rules of civil procedure that are applicable in the absence of, or in opposition to, special stipulations by the parties ...”<sup>8</sup>

The *Société Européenne d’Etudes et Entreprises v Yugoslavia* saga illustrates the ICC’s observation well. The facts are recounted elsewhere.<sup>9</sup> For present purposes, the point to note is that the parties’ arbitration agreement called for an umpire procedure.<sup>10</sup> Yugoslavia defaulted, and the courts of the Canton of Vaud (the place of the arbitration) made the necessary appointment. The two-arbitrator formation, as constituted, was able to reach consensus, and rendered an award.<sup>11</sup> Litigation in three countries (Switzerland, the Netherlands, and France) then ensued. Thirty years, and much judicial time and learned argument, were spent in that litigation; much of which was devoted to the question whether the parties’ ad hoc agreement, calling for an umpire process, was valid under the law of the Canton of Vaud (if that law was relevant at all, which was in dispute).<sup>12</sup>

Not only was ad hoc arbitration cumbersome to design, it was also bereft of practical support on the international plane. If the parties failed to constitute the tribunal (say, because the respondent defaulted in the arbitration and refused to co-operate), the only reliably available *autorité d’appui* was a

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<sup>5</sup> David in *Liber Amicorum Sanders* (note 2 above) 63.

<sup>6</sup> See, eg, the *compromis* in *Saudi Arabia v Aramco*, which is quoted by Hambro, (1962-I) 105 RdC 1, 43. (Award: 27 ILR 117 (1958).)

<sup>7</sup> See, eg, the Agreement concerning the International Arbitral Tribunal on the Gut Dam Claims (US-Canada, 1965), 607 UNTS 141; and the Agreement between Great Britain and Greece concerning the *Ambatielos* claim: UK Treaty Series No 20, Cmd. 9425. Alternatively, states could draw up a *compromis* setting out the basic parameters of the arbitration (principally, the composition of the tribunal and the number and sequence of submissions) and leave more detailed procedural matters to the tribunal, and organizational and logistical matters to the Permanent Court of Arbitration; see, eg, the agreement between Great Britain and France regarding the *Muscat Dhows* case (1904), Scott, *The Hague Arbitration Cases* (1915) 65. (Award: *ibid*, 69 (1905).)

<sup>8</sup> Observations to the preliminary draft UNCITRAL Arbitration Rules, Annex II to UN Doc A/CN.9/97/Add.1 (1975), (1975) 6 UNCITRAL YB 181.

<sup>9</sup> See Paulsson in Lew (ed), *Contemporary Problems in International Arbitration* (1987) 141, 142-143.

<sup>10</sup> The arbitration clause is at (1958) 37 RCDIP 359. For a contemporaneous similar clause involving Yugoslavia see *Losinger & Cie*, PCIJ, Series C, No 78, 52-53.

<sup>11</sup> See (1959) 86 JDI 1074 (1956).

<sup>12</sup> See Petrochilos, *Procedural Law in International Arbitration* (2004) paras 8.90-8.97 and the references.

national judiciary.<sup>13</sup> Clauses calling for appointments to be made by the President of the International Court had no statutory foothold in the Statute of the Court, and were not always effective in practice.<sup>14</sup>

The adoption of the UNCITRAL Rules by the UN General Assembly in 1976<sup>15</sup> must be seen in light of the void in which ad hoc arbitration existed – or, rather, floated – until that time. (A similar attempt had been made in respect of state-to-state ad hoc arbitration in the 1950s, by the UN International Law Commission – with very limited success in practice.<sup>16</sup>) Professor Sanders, who was UNCITRAL’s consultant in the preparation of the Rules, initially proposed a set of rules that, in some respects (such as the constitution of the tribunal), contained separate rules for ad hoc and “administered” arbitration.<sup>17</sup> It was noted that the ad hoc “procedures are necessarily more complex than they would be under administered arbitration”.

But there was considerable opprobrium against the idea that *some* sort of institutional arbitration – until that time (and now) a service offered by national/official Chambers of Commerce, specialized institutions, and the ICC – would be regulated by a UN instrument.<sup>18</sup> UNCITRAL decided to focus on ad hoc arbitration, and a revised draft of the UNCITRAL Rules was prepared on that basis.<sup>19</sup> A year later the UNCITRAL Rules were endorsed by the UN General Assembly. They purported to set forth a comprehensive code of the arbitral process. Parties that had a preference for ad hoc arbitration (say, to avoid the confines of rosters of arbitrators maintained by national Chambers of Commerce, or fees calculated on an *ad valorem* basis) no longer had to reinvent the wheel or experiment: there was a reliable text with a UN *imprimatur*, which they could adopt by reference in their contract.

Thirty-one years after the adoption of the UNCITRAL Rules, it is useful to bear in mind that the basic architecture of ad hoc arbitration was codified in those Rules. That was the most significant support that ad hoc international commercial arbitration had ever received.

Today we start with the UNCITRAL Rules as an *acquis*. We are able to focus on matters subordinate, of refinement and adaptation. But those matters merit our attention. It is still the case – and in the nature of things it will always be the case – that the lack of institutional support in ad hoc arbitration poses special challenges. Ad hoc arbitration is still perceived as a mechanism best left to experienced users.<sup>20</sup> Only 25% of the known investment-treaty cases are resolved under the UNCITRAL

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<sup>13</sup> The European Convention on International Commercial Arbitration (Geneva, 21 April 1961), 484 UNTS 349, provided for support in the constitution of the tribunal to be given by national Chambers of Commerce (officially notified by the contracting states) or a three-member Special Committee to be constituted by nominees of such Chambers; see Articles IV, X(6), and the Annex to the Convention. The European Convention attracted few ratifications.

<sup>14</sup> For the difficulties encountered by the eponymous claimant in the *Anglo-Iranian* case see Johnson, (1953) 30 BYIL 152. And for a clause that, failing agreement of the parties, called for the appointment of the presiding arbitrator by the Secretary-General of the UN see *Peace Treaties* (Advisory Opinion), *ICJ Reports 1950*, 221: no such appointment could be made if one of the parties had failed to appoint an arbitrator. For happier outcomes see the appointments reported at [1968-1969] ICJ YB at 112-113 and [1969-1970] ICJ YB 117-118, in disputes relating to Algerian hydrocarbons and claims brought by French parties.

<sup>15</sup> GA Res 31/98 (15 December 1976), UN Doc A/RES/31/98 (1976).

<sup>16</sup> A Memorandum submitted by the UN Secretary-General in 1949 charting out possible areas for codification work by the International Law Commission (UN Doc A/CN.4/1/Rev.1) noted that arbitral practice “raised the question of an authoritative formulation of some of the principles of arbitral procedure”, in particular excess of jurisdiction, the doctrine of “essential error”, and the revision and interpretation of arbitral awards: *ibid*, 58. Professor Scelle, who was appointed Special Rapporteur, prepared a report in 1950 (UN Doc A/CN.4/18, [1950-II] ILC YB 114) focusing on the “technical framework” of the arbitral process: *ibid*, 117. A draft convention on arbitral procedure was proposed, and the Secretariat prepared a detailed study in support (UN Doc A/CN.4/92 (1955)), but ultimately there was little support for such a convention and the text that resulted from the process took the form of “Model Rules on Arbitral Procedure”: [1958-II] ILC YB 83.

<sup>17</sup> See UN Doc A/CN.9/97 (1974), (1975) 6 UNCITRAL YB 163.

<sup>18</sup> See the ICC’s observations, cited at note 8 above.

<sup>19</sup> See UN Doc A/CN.9/112 (1975), (1976) 7 UNCITRAL YB 157.

<sup>20</sup> A recent research by the University of London School of International Arbitration showed that only 24% of the corporations interviewed opt for ad hoc arbitration, which is perceived as appropriate for “primarily larger corporations with more experience of international arbitration”: *International Arbitration: Corporate Attitudes and Practices* (2006) 12.

Rules<sup>21</sup> – and investment-treaty cases typically attract more resources and more experienced counsel than ordinary commercial cases. The importance of having a codification that is adapted to the broad range of contemporary needs cannot be overstated. *Tant valent les règles, tant vaut l'arbitrage*.

It is clear that the most important measures of support in ad hoc arbitration relate to the constitution of the tribunal.<sup>22</sup> In this paper, we propose not to deal with that matter, focusing instead on more discrete aspects of the arbitral process. Here we confine ourselves to two observations only.

First, it is difficult to overstate the importance of Article 6(4) of the UNCITRAL Rules, which requires the appointing authority to “have regard [inter alia] to ... the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties”. That provision must be seen against the background of arbitration rules of national Chambers of Commerce which, at the time of the adoption of the UNCITRAL Rules, called for the appointment of nationals of the state of the Chamber concerned.<sup>23</sup>

Secondly, there is today some discussion about the idea of a universal body or institution assuming the functions of a default appointing authority under the UNCITRAL Rules. A similar idea was mooted in 1975, in the revised draft UNCITRAL Rules.<sup>24</sup> Article 7(b) of that draft suggested that “an appropriate organ or body to be established under United Nations auspices” should be the designating authority (as an alternative to the PCA). Something different is being discussed today in the context of the revision of the UNCITRAL Rules. The idea is that the PCA could be the default appointing authority (rather than the designating authority, as is now the case), subject to (a) the parties’ right to ask the PCA to designate another appointing authority and (b) the PCA’s discretion to designate another appointing authority. The suggestion has met with initial scepticism: it is asked whether a single body (rather than several regional bodies) would be an appropriate appointing authority in all cases; and, if there is to be a universal appointing authority, whether the PCA should be that body.<sup>25</sup> We would in principle answer both questions in the affirmative.

## II. *Quis Custodiet the Tribunal in Fixing its Fees?*

We started by noting that mundane matters can be of cardinal importance. The fixing of fees is the paramount example of such a fundamental issue. Everyone knows that arbitration is generally different from court litigation in the sense that arbitrators must be remunerated for their one-time service in a given case. No one gets a salary for being *willing* to be an arbitrator; an arbitrator without a case is not in fact an arbitrator at all. So it is perfectly routine that arbitration rules establish a mechanism for the establishment of arbitrators’ fees. But this routine matter looks very different when one compares ad hoc arbitrations with those conducted under the rules of an institution. When the ICC or the LCIA fixes the fees of a tribunal, it does so in a purely objective manner. When ad hoc arbitrators fix their own fees, they are in effect acting as judges in their own cause. The UNCITRAL Rules say in Article 39(1) that “[t]he fees of the arbitral tribunal shall be reasonable in amount” taking all relevant circumstances into account. That is fine so far as it goes, but there must be some way to control excessive demands.

Otherwise parties are at the mercy of arbitrators. They may be hesitant to challenge the arbitrators on this subject. After all, the arbitrators’ fees are but a small fraction of the amount in dispute. But when parties have the sense that arbitrators have abused their position of authority, it leaves them with a bad taste, and in fact diminishes their confidence in the process as a whole.

That this is not a theoretical problem may be proved by reference to a simple fact: arbitrators often complain when the ICC or the LCIA restricts their fees. So if they were unchecked, they would be

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<sup>21</sup> UNCTAD, “Latest Developments in Investor-State Dispute Settlement”, *IIA Monitor* No 4 (2006) 3 (figures as of November 2006).

<sup>22</sup> See notes 13-14 above and the accompanying text.

<sup>23</sup> See Professor David’s criticism and suggestions (note 2 above) 63. Today, those arbitral institutions that maintain a roster of arbitrators take care to include foreign nationals.

<sup>24</sup> Note 19 above.

<sup>25</sup> See UN Doc A/CN.9/619 (2007) paras 71-74. For the PCA’s track record see the document cited at note 33 below.

in a position to impose their own ideas of what they deserve. This is not in the interest of good and well-accepted governance.

Most experienced arbitrators who have a steady flow of cases, and good reputations to protect, act responsibly. There is no problem. But there are still cases where this is not true, and they create ripples of discontent and mistrust. When the ad hoc system is not combined with a good system of controls, applied effectively and at an early stage of the process, huge embarrassments may ensue as parties go to court to remove arbitrators or to challenge their awards,<sup>26</sup> indeed demanding that they appear as defendants in court to justify their conduct. This is harmful for the system.

The UNCITRAL Rules have no system of controls. Article 39(2) provides that if an appointing authority has been agreed upon by the parties or designated by the PCA *and* “if that authority has issued a schedule of fees for arbitrators in international cases which it administers”, the arbitral tribunal “shall” take that schedule into account “to the extent it considers [it] appropriate in the circumstances of the case”.<sup>27</sup> That, we submit, is little comfort; for two reasons.

First, there is a question mark as to what kind of schedule of fees is appropriate. It is true that institutions like the ICC and the SCC, both of which administer UNCITRAL arbitrations, have schedules of fees.<sup>28</sup> At least one court in Switzerland has adopted the schedule of fees under the Swiss Rules, for cases in which the court is asked to function as an appointing authority.<sup>29</sup> But those schedules are *ad valorem*, linked to the amount in dispute. No such schedule (or any schedule for that matter) was thought appropriate for inclusion in the UNCITRAL Rules in 1976.<sup>30</sup>

Secondly, and most importantly, Article 39(2) is a *lex imperfecta*: it has no teeth. The duty of consultation with the appointing authority (if one is in place and has issued a schedule of fees for international cases), under Article 39(4) of the UNCITRAL Rules, will not deter those determined to abuse the process. (Professor Sanders has recommended doing away with that provision.<sup>31</sup> There is no recorded instance of its use in practice, nor are we aware of any.)

In our Report to the UNCITRAL Secretariat on the Revision of the UNCITRAL Rules,<sup>32</sup> we suggested that Article 39(2) should be prescriptive. If any party disagrees with the tribunal’s determination of its fees, the fees “shall be fixed by the Appointing Authority”. And “[i]f the Appointing Authority is unwilling or unable to do so, the fees shall be fixed by the [PCA] or by another institution or person selected by the [PCA] for that purpose”.<sup>33</sup>

The strength of the proposed provision would lie in its deterrent force. Taking away the tribunal’s power to fix its fees is a powerful incentive for the tribunal to be reasonable. A more elaborate

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<sup>26</sup> For a specific right of recourse against an award in respect of fees, see section 41 of the Swedish Arbitration Act of 1999 (SFS 1999:116).

<sup>27</sup> See also Article 39(4) of the UNCITRAL Rules, which sets forth a duty for the tribunal (if an Article 39(2) request has been made and accepted) to “consult” with the appointing authority before fixing its fees.

<sup>28</sup> The AAA Procedures for Cases under the UNCITRAL Arbitration Rules (1996, revised 2005), provide in Article 5 that “The AAA has no schedule of fees for arbitrators, but it will furnish a statement concerning customary fees based on its experience in administering large numbers of cases.”

<sup>29</sup> This of course raises the question whether that schedule may be said to have been “issued” by the court as the appointing authority in the sense of Article 39(2) of the UNCITRAL Rules.

<sup>30</sup> The legislative history is set out in Caron *et al*, *The UNCITRAL Arbitration Rules* (2006) 942-943. UNCITRAL’s commentary to the revised draft of the UNCITRAL Rules (quoted *ibid*, 943) states that “it was not believed possible to develop a uniform schedule of fees for arbitrators”.

<sup>31</sup> Sanders, (2004) 20 *Arb Int* 243, 258.

<sup>32</sup> The final version of the report, dated September 2006, is available at the website of UNCITRAL.

<sup>33</sup> *Ibid*, 153 (proposed Article 39(2)). Note that, while the PCA does not fix arbitrators fees or establish schedules of fees, it has “assisted parties in reaching agreements with arbitrators with respect to their fees”, including fixed-fee arrangements, differential fee arrangements, and the application of the fee schedule of an arbitral institution; see the PCA Report on its Activities under the UNCITRAL Arbitration Rules, reproduced in UN Doc A/CN.9/634 (2006) paras 18-19.

(and, we respectfully submit, better) provision which would achieve the same result is now under consideration in UNCITRAL's Working Group II.<sup>34</sup>

### III. Administrative Support

There are other ways in which support for ad hoc arbitration is useful and perhaps indispensable to make up for deficiencies in the applicable rules. As rules of arbitration are revised and improved, this need will diminish.

That leaves a category of support which is not the product of any particular deficiencies in the rules, but are purely and simply *useful* practical adjuncts to the process. The LCIA, for example, has found over the past decade that there is a steady demand for its services, even in ad hoc cases having no connection with the LCIA or its Rules, with respect to the administration of funds. Ad hoc tribunals are often inexperienced in such matters, or face difficulties in establishing segregated accounts, for example in the name of the presiding arbitrator. An established institution can act as a secure and independent fundholder of sums deposited by the parties, disbursing them as appropriate, and at all times being in a position to render accounts to the parties.<sup>35</sup> The LCIA, for example, has developed an accounting system specifically adapted so as to maintain up-to-date balances immediately available at request without the need for any specific retrieval of information.

The full suite of LCIA's administrative-support services in ad hoc arbitrations is as follows:

- establishing and maintaining a computerised procedural monitor to track proceedings;
- monitoring compliance with the procedural calendar and advising the tribunal and the parties accordingly;
- maintaining a full file of correspondence and written submissions, to facilitate any enquiry arising and to prepare such copies as the parties or the tribunal may from time to time require;
- issuing procedural directions on behalf of the tribunal, most typically directions for advances on costs;
- closely monitoring the costs of the arbitration, in particular ensuring that fee notes are regularly submitted and the level of further costs advances calculated in consultation with the tribunal and by reference to the established procedural timetable;
- ensuring that lines of communication among parties, counsel, and the tribunal are kept open and up-to-date;
- making practical arrangements for any meetings and hearings, together with such support services as interpretation, translation, court reporting, telephone and video conferencing;
- when required, facilitating entry visas for the purposes of hearings;
- arranging accommodation for parties and arbitrators;
- proofreading draft awards for typographical and clerical errors;
- preparing and issuing certified copies of any award, including notarised copies where required.

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<sup>34</sup> See UN Doc A/CN.9/WG.II/WP.145 (2006) para 100.

<sup>35</sup> The PCA Procedures for Cases under the UNCITRAL Arbitration Rules (2000) provide that “[u]pon request, the International Bureau [of the PCA] will hold deposits from the parties and account for the same”. The AAA “[u]pon request ... will make all arrangements concerning the amounts of the arbitrators’ fees, and advance deposits to be made on account of such fees in consultation with the parties and the arbitrators”; see the Procedures cited at note 28 above, Article 6. Other institutions, such as the German Institution for Arbitration (DIS), have on occasion provided such accounting services to tribunals under the UNCITRAL Rules.

Other institutions, including the PCA and the AAA, offer a range of the above services.<sup>36</sup>

Those services are important. They ensure smooth progress of the process, professionalism and decorum that enhance the credibility of the process, and may lead to cost- and time-savings.

#### IV. Interim and Conservatory Measures

Support for ad hoc arbitration need not always come from outside. Empowering the tribunal to maintain the integrity of its process is equally important. Two aspects of the arbitral process may be especially singled out for discussion in this regard: (a) an express provision permitting truncated tribunals to continue with the arbitration and render an award; and (b) express powers to issue interim and conservatory measures.

As to the former matter, we have dealt with it in some detail in our September 2006 Report, where we also propose that the tribunal should have the power to police resignations, so that only authorized resignations would be effective.<sup>37</sup>

As for interim measures, the first point to make of course is that the UNCITRAL Rules do contain an express provision, Article 26. In material part, this is worded as follows:

“(1) At the request of either party, the arbitral tribunal may take any interim measures it deems necessary *in respect of the subject-matter of the dispute*, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.” (Emphasis added.)

Article 26(1) evolved little in the course of the preparation of the UNCITRAL Rules. An almost identically worded provision is to be found in Article 22 of the 1974 preliminary draft.<sup>38</sup> It was derived from the ECAFE and ECE Rules, of 1967 and 1966 respectively.<sup>39</sup>

In 1974, Article 22 was a small revolution. The 1955 ICC Rules in force at that time authorized the parties to have recourse to the *courts* “in cases of urgency, whether prior to or during the proceeding”. It was only in the 1975 version of the ICC Rules that it was felt that “the power of the arbitrators to order such [urgent] relief was more widely accepted” and a provision to that effect was included in the ICC Rules (albeit in terms whose clarity left much to be desired).<sup>40</sup>

On the public international law plane, too, the area of interim and conservatory measures was one in which to tread with caution. Professor Scelle, writing in 1950, asked whether an ad hoc “*tribunal épisodique*” should have a power traditionally associated with standing bodies, such as the ICJ.<sup>41</sup> As to the binding force (if any) of interim orders, that was an open question. As is well known, Article 41(1) of the ICJ Statute was couched – and deliberately so – in terms that lent themselves to ambiguity:

“The Court shall have the power to *indicate*, if it considers that circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights of either party.” (Emphasis added.)<sup>42</sup>

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<sup>36</sup> See the documents cited at notes 28 and 35 above.

<sup>37</sup> Note 32 above, at 8 and 57-62 (revised Article 13). For UNCITRAL’s Working Group’s subsequent consideration of the matter see UN Docs A/CN.9/614 (2006) paras 67 *et seq*; A/CN.9/WG.II/WP.145 (2006) at 19-21; and A/CN.9/619 (2007) at 21-22.

<sup>38</sup> See UN Doc A/CN.9/97 (1974), (1975) 6 UNCITRAL YB 163.

<sup>39</sup> *Ibid*, 176.

<sup>40</sup> See Derains & Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, 2005) 295. See further Yesilirmak, *Provisional Measures in International Commercial Arbitration* (2005) Chs 2 and 5.

<sup>41</sup> He answered that question in the affirmative, “without a doubt”; see UN Doc A/CN.4/18, [1950-II] ILC YB 114, 137.

<sup>42</sup> See further Elkind, *Interim Protection* (1981) Ch 6.

In the 1950s, the UN International Law Commission's study, and Professor Scelle's earlier study, noted the precedents supporting the need for an international tribunal to have the power to intervene to preserve the status quo – but were silent as to the binding force of such a power.<sup>43</sup> Today it is admitted in international jurisprudence that interim and conservatory measures are binding as a matter of principle – and the relevant statutory basis is to be interpreted in light of that principle.<sup>44</sup> They are a necessary adjunct of the process, and in that sense they may be said to form part of an international tribunal's necessary ("inherent" or "incidental") jurisdiction.

Those were in fact the terms in which the Iran-US Claims Tribunal pronounced itself in the landmark *E-Systems* case of 1983. Rather than basing itself on Article 26(1) of the UNCITRAL Rules,<sup>45</sup> the Tribunal chose to rely on a wider principle, holding that it had "an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that [its] jurisdiction and authority are made fully effective".<sup>46</sup> The Tribunal left the parties in no doubt as to the binding force of its order. And notwithstanding the Tribunal's desire to proceed on the basis of a wider jurisdictional principle, rather than Article 26(1) of the Rules,<sup>47</sup> one may wonder whether the Tribunal would have felt able to rule in such confident terms in the absence of Article 26(1).

*E-Systems* teaches that Article 26(1) of the UNCITRAL Rules is expressive of a broad rule of the customary law pertaining to international adjudication. Now the question arises whether the express terms of Article 26(1) fully give effect to that rule. A strong argument may be made that they do not.

Article 26(1) was drafted against the basic staple of international arbitrators at the time: trade disputes. Hence the narrow formulation "interim measures ... *in respect of the subject-matter of the dispute*"; and the emphasis on "measures for the conservation of the goods forming the subject-matter in dispute, such as ... the sale of perishable goods". None of the contemporary major sets of arbitration rules is formulated in such a narrow way.<sup>48</sup> Indeed, there is no compelling reason to abide by the narrow compass indicated by the wording of Article 26(1). Thus, the practice of the Iran-US Claims Tribunal suggests that the powers conferred by Article 26(1) cover a broader range of measures than "in respect of the subject-matter of the dispute".<sup>49</sup>

The reason is straightforward. As a practical and conceptual matter, interim and conservatory measures serve three principal functions:<sup>50</sup>

- facilitating the conduct of the arbitral proceedings (eg orders to preserve evidence);
- avoiding loss or damage, or preserving a certain state of affairs until the dispute is resolved (eg orders to continue performing a contract); and
- facilitating enforcement of a final award (eg freezing orders).

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<sup>43</sup> See Scelle (note 41 above); and the ILC 1955 study (note 16 above) 72 *et seq.* The text of the 1958 Model Rules (note 16 above), Article 20, followed closely the formulation of Article 41(1) of the ICJ Statute.

<sup>44</sup> See notably *LaGrand (Provisional Measures)*, ICJ Reports 1999, 9; *Pey Casado and ors v Chile (ARB/98/2) (Provisional Measures)* 6 ICSID Rep 375 (2001). See further Rosenne, *Provisional Measures in International Law* (2005) 9-12.

<sup>45</sup> Article 26(1) of the UNCITRAL Rules is retained without modification in the Iran-US Claims Tribunal Rules. See the Final Rules of Procedure (1983), 2 Iran-US CTR 403.

<sup>46</sup> *E-Systems, Inc v Iran*, 2 Iran-US CTR 51, 57 (Interim Award, 1983). See further Murphy in Drahozal & Gibson, *The Iran-US Claims Tribunal at 25* (2007) Ch 3.

<sup>47</sup> Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996) 138 notes that the Tribunal intended to emphasize in this way the integrity of its jurisdiction: the *E-Systems* order was to prevent the respondent, Iran, from continuing with parallel court proceedings in Iran.

<sup>48</sup> See Article 23(1) of the ICC Rules; Article 25.1(c) of the LCIA Rules; Article 32(1) of the SCC Rules; Article 46(a) of the WIPO Rules; Article 26(1)-(2) of the Swiss Rules; and Article 21(1) of the AAA (International Arbitration) Rules.

<sup>49</sup> See Brower & Brueschke, *The Iran-United States Claims Tribunal* (1998) 217 and the references.

<sup>50</sup> See UN Docs A/CN.9/WG.II/WP.108 (2000) para 63; and A/CN.9/WG.II/WP.109 (2002) paras 16-17. And see further the proposed revised Article 17(2) of the UNCITRAL Model Law on International Commercial Arbitration, cited at note 51 below. The European Court of Justice has adopted a broadly similar (though narrower) definition; see Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco Line* [1998] ECR I-7091.

On that basis, much work has been devoted by UNCITRAL to a revised Article 17 of the Model Law on International Commercial Arbitration. (The current formulation of Article 17 follows closely the wording of Article 26(1) of the UNCITRAL Rules.)<sup>51</sup> It is now proposed that the salient parts of that revised Article 17 (which itself consists of eleven detailed articles) be included in the revised UNCITRAL Rules.<sup>52</sup> The consensus in principle with which those proposals were met indicates the significant progress that has been made in this area in the past 30 years.<sup>53</sup>

The cynic would ask, Why is any of this important; what real power of coercion does a tribunal have? Our answer is threefold. First, there is an important psychological factor at play. If the powers of the tribunal are set forth in comprehensive and clear terms in the arbitration rules, those provisions condition the parties' expectations and future conduct. Secondly, orders may (and often do) take the form of interim awards,<sup>54</sup> which may be enforced by the courts.<sup>55</sup> Finally, and at the very least, failure to abide by an order may well have (and in principle should have) costs consequences.

## V. Conclusions

Arbitration is a form of litigation. It is a process. As in litigation, the credibility and efficiency of arbitration as an institution depends in great measure on the soundness of the process. The principal aim of our modest contribution today was to highlight the importance of practical aspects of that process.

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<sup>51</sup> The currently proposed (final) text was settled in late 2005 and is reprinted as an Annex to UN Doc A/61/17 (2006).

<sup>52</sup> See our September 2006 report (note 32 above) 108-112; and UN Doc A/CN.9/WP.145 (2006) 30 *et seq.*, in particular paras 80-81.

<sup>53</sup> See UN Doc A/CN.9/614 (2006) para 105.

<sup>54</sup> See Article 26(2) of the UNCITRAL Rules.

<sup>55</sup> See s 42 of the Arbitration Act 1996 (England & Wales); s 593(4) of the Austrian Code of Civil Procedure (ÖZPO); and Articles 17 H and 17 I of the proposed revised Model Law, cited at note 51 above. In addition, UNCITRAL is currently considering whether such awards should expressly be made enforceable under the New York Convention of 1958; see UN Docs A/CN.9/592 (2006) paras 34-39; and A/CN.9/WG.II/WP.141 (2005).