John E.C. Brierley Memorial Lecture

Conférence commémorative John E.C. Brierley

International Arbitration Is Not Arbitration

delivered by Jan Paulsson

28 May 2008

McGill University

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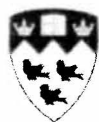

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This third John E.C. Brierley Memorial Lecture was organised in collaboration with the Canadian Bar Association (Québec Branch) and with the support of the law firm Woods and of McGill's Private Justice and the Rule of Law research team (FQRSC).

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Cette troisième Conférence commémorative John E.C. Brierley fut organisée en collaboration avec l'Association du barreau canadien (Division Québec) et avec l'appui du cabinet Woods et du groupe de recherche Justice privée et État de droit de l'Université McGill (FQRSC).

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A Word on John E.C. Brierley

Professor John E.C. Brierley held a B.A. from Bishop's University, a B.C.L. from McGill University, and a doctorate in law from the Université de Paris. He was appointed teaching fellow at the McGill University Faculty of Law in 1960. He later became assistant professor (1964), associate professor (1968) and full professor (1973). He taught Canadian and Quebec private law, focusing on civil law property, comparative law, and foundations of Canadian law. He also served as dean of the Faculty of Law from 1974 until 1984 and as the acting director of the Institute of Comparative Law, McGill University, in 1994. He was named the Sir William Macdonald Professor of Law in 1979 and was the Wainwright Professor of Civil Law from 1994 until 1999.

Professor Brierley was frequently invited as a speaker or a visiting professor to other law faculties, including the Université de Montréal, University of Toronto, Dalhousie University, and the Institut de droit comparé of the Université de Paris II. Following his retirement from McGill University in 2000, he was named Emeritus Wainwright Professor of Civil Law. He passed away in 2001.

Professor Brierley wrote and co-authored numerous articles and books in both English and French, destined for publication in Canada as well as internationally. Noteworthy co-authored publications include *Quebec Civil Law: An Introduction to Quebec Private Law* with Professor R.A. Macdonald *et al.* (1993), *Civil Code 1866-1980—An Historical and Critical Edition* with Professor P.-A. Crépeau (1981), *Private Law Dictionary and Bilingual Lexicons* with Professor R.P. Kouri *et al.* (1991), *Dictionnaire de droit privé et lexiques bilingues* with Professor P.-A. Crépeau *et al.* (1991) and *Major Legal Systems in the World Today. A Comparative Study of Law* with Professor René David, contributing to the first (1968), second (1978), and third editions (1985). He was a prominent figure in the discipline of comparative law internationally and the leading Canadian expert on arbitration.

Professor Brierley received many awards for his accomplishments. In 1965, he obtained the Prix Robert Dennery from the Faculté de droit, Université de Paris, and one of his articles won first prize in the Concours de la Revue du Notariat in 1992. He was named trustee for the Fondation Jean-Charles Bonenfant by the Quebec National Assembly (1981-1988). He was also elected for a number of positions, namely as a member of the Board of Editors for the American Journal of Comparative Law (1989), associate member of the International Academy of Comparative Law (1991), member of the International Academy of Estates and Trusts Law, San Francisco (1992), and later member of its executive committee (1994-1999). He was elected a Fellow of the Royal Society of Canada (Academy I) in 1995.

This public lecture on international arbitration has been established to commemorate his life and work.

Un mot sur John E.C. Brierley

Le professeur John E.C. Brierley détenait un baccalauréat ès arts de Bishop's University, une licence en droit de l'Université McGill et un doctorat en droit de l'Université de Paris. En 1960, il fut nommé *teaching fellow* à la Faculté de droit de l'Université McGill. Il deviendra plus tard professeur adjoint (1964), professeur agrégé (1968) et professeur titulaire (1973). Il a enseigné le droit privé canadien et québécois, particulièrement le droit des biens, le droit comparé et les fondements du droit canadien. Il a aussi été doyen de la Faculté de droit de 1974 à 1984 et directeur intérimaire de l'Institut de droit comparé de l'Université McGill en 1994. Il fut nommé Sir William Macdonald Professor of Law en 1979; puis, de 1994 à 1999, il a été titulaire de la chaire Wainwright en droit civil.

Le professeur Brierley a souvent été invité à prononcer des conférences et à visiter des facultés comme professeur invité, notamment l'Université de Montréal, la University of Toronto, la Dalhousie University, et l'Institut de droit comparé de l'Université Paris II. Suite à sa retraite de l'Université McGill en 2000, il fut nommé titulaire émérite de la chaire Wainwright en droit civil. Il est décédé en 2001.

Le professeur Brierley est l'auteur ou le co-auteur d'un grand nombre d'ouvrages et d'articles, tant en anglais qu'en français, destinés au public canadien et au public international. On remarquera, parmi les publications avec d'autres auteurs, *Quebec Civil Law: An Introduction to Quebec Private Law* avec le professeur R.A. Macdonald *et al.* (1993), *Code Civil 1866-1980 – Une édition historique et critique* avec le professeur P.-A. Crépeau (1981), *Private Law Dictionary and Bilingual Lexicons* avec le professeur R.P. Kouri *et al.* (1991), *Dictionnaire de droit privé et lexiques bilingues* avec le professeur P.-A. Crépeau *et al.* (1991), ainsi que *Les grands systèmes de droit contemporains. Une approche comparative* avec le professeur René David, en contribuant à la première (1968), la deuxième (1978), et la troisième édition (1985). Il fut une figure marquante de la discipline du droit comparé à travers le monde et l'expert incontesté de l'arbitrage au Canada.

De nombreuses institutions ont publiquement reconnu la contribution du professeur Brierley. En 1965, il a obtenu le Prix Robert Dennery de la Faculté de droit de l'Université de Paris, et l'un de ses articles lui a valu le premier prix du Concours de la Revue du Notariat en 1992. L'Assemblée nationale du Québec l'a nommé fiduciaire de la Fondation Jean-Charles Bonenfant (1981-1988). Il a été élu à plusieurs postes, notamment comme membre du conseil de rédaction de l'American Journal of Comparative Law (1989), membre associé de l'Académie internationale de droit comparé (1991), membre de l'International Academy of Estates and Trusts Law, San Francisco (1992) et plus tard membre de son exécutif (1994-1999). Il a été élu *fellow* de la Société Royale du Canada (Académie I) en 1995.

Cette prestigieuse conférence sur l'arbitrage international fut instaurée pour commémorer sa vie et son œuvre.

Introductory Note

This third John E.C. Brierley Memorial Lecture, entitled "International Arbitration is Not Arbitration", was delivered at the Faculty of Law of McGill University on May 28, 2008 by Jan Paulsson.

Jan Paulsson is among the world's foremost experts in international arbitration. He is head of the international arbitration and public international law practice at Freshfields Bruckhaus Deringer, Professor of Law at the University of Miami and Centennial Professor at the London School of Economics. He is the author of *International Chamber of Commerce Arbitration* (2000), *The Freshfields Guide to ICSID Arbitration* (2004), and *Denial of Justice in International Law* (2005). He is President of the London Court of International Arbitration (LCIA), President of the World Bank Administrative Tribunal and a Vice President of the ICC International Court of Arbitration.

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Note introductive

Cette troisième Conférence commémorative John E.C. Brierley, intitulée « International Arbitration is Not Arbitration », fut prononcée à la Faculté de droit de l'Université McGill le 28 mai 2008 par Jan Paulsson.

Jan Paulsson est parmi les leaders de l'arbitrage international. Il dirige le groupe arbitrage international et droit international public au cabinet Freshfields Bruckhaus Deringer et est par ailleurs professeur de droit à l'université de Miami, ainsi que Centennial Professor à la London School of Economics. Il est l'auteur de *International Chamber of Commerce Arbitration* (2000), *The Freshfields Guide to ICSID Arbitration* (2004), et *Denial of Justice in International Law* (2005). Il est président de la Cour d'arbitrage international de Londres (LCIA) et du Tribunal administratif de la Banque mondiale, et est un des vice-présidents de la Cour international d'arbitrage de la CCI.

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Introduction

What are you to make of the title of this lecture? It will take me the better part of an hour to try to convince you I am right—and you may still disagree.

But it will take me less than one minute to explain why the title is not at all preposterous—and you will be instantly persuaded.

You do not think that international arbitration is arbitration because it has "arbitration" in its name, do you? Do you think a sea elephant is an elephant?

International arbitration is no more a "type" of arbitration than a sea elephant is a type of elephant. True, one reminds us of the other. Yet the essential difference of their natures is so great that their similarities are largely illusory.

Sea elephants have no legs. They exist in an environment radically different from that of elephants. International arbitration is no less singular. This needs to be understood. The concept is as stark as the dichotomy between animals with legs and those without. Here is the difference: arbitration is an alternative to courts, but international arbitration is a monopoly—and that makes it a different creature.

Not so long ago, conference organizers were so enamoured of the topic "arbitration vs. litigation" that they treated it as a handy default solution. They seemed to say, "If we cannot think of anything original, let's just trot out the question: 'Is arbitration better than litigation?' and we'll fill the hall." Amazingly, sometimes they did. But whatever the interest of the question in a national setting, it is nonsense as soon as one considers the most basic of *international* contexts—a single table at which two parties of different nationalities face each other. In this setting, each party, hearing the words "arbitration or courts?" thinks "*this* arbitration as opposed to what—*my* court or *their* court?" We can be certain that lawyers' cupboards across the globe are filled to bursting with myriad contracts referring to international arbitration *even though each side actually preferred courts*. You all see why international arbitration finishes first although it was perhaps never better than second-best in anyone's mind. The problem is that the preferred alternative of each side is often the least acceptable to the other.

That is why the debate about the supposed advantages of arbitration, whether they are accepted or denied, must stop at the border if it is to remain at all coherent. Is arbitration quicker? Is it less expensive? Is it less disruptive because it is confidential and informal? Do persons selected for their relevant expertise render better decisions? All these questions may be debated endlessly. Depending on the country and industry one is concerned with, the alternative to arbitration is endlessly variable—from the admirable to the intolerable.

In international arbitration, all these evaluative elements fade into relative insignificance when contrasted with a criterion dominant here, although by definition irrelevant in the national context. This alone tells you international arbitration is not arbitration. That unique criterion is *neutrality*. And so, even a negotiator who avoids arbitration in national transactions—"we already pay the judges with our tax money, why not use them?" may be the only reason needed—is likely to insist on it when dealing with foreigners.

I. No Alternatives to International Arbitration

Not to put too fine a point on it: in the transnational environment, international arbitration is the only game. It is a de facto monopoly. Naturally, the parties can also achieve neutrality by adopting a forum clause referring to the courts of a third country that has no connection with the parties or their transaction. Forum clauses do exist, typically in particular categories of contract, but they are uncommon, because foreigners can rarely be sure that the stipulated country will put its public service at their disposal. True, we know the judges in London are available to all comers, and London is doubtless the most frequently selected judicial forum that is foreign to both parties. Still, I wonder if this is not more a relic of Commonwealth traditions than the product of successful marketing of "invisible exports".

That international arbitration is practically speaking a monopoly is no reason to celebrate. It is simply a fact. We are unlikely in our lifetimes to see the emergence of global commercial courts with compulsory jurisdiction. Indeed, the unique example of the European Union is scarcely encouraging. Due to the fiction that each national court system is infinitely respectable, the European regime, now embodied in the *Brussels I Regulation*, has the effect that once a matter is before any national court whatever, no one can do anything until that country's legal system has had its final say.[1] The result has been called the "Italian torpedo". It works like this. Assume two parties have signed a contract including a forum clause referring to the courts of Austria. Assume, moreover, this forum clause is valid. Assume, finally, that any national legal system in Europe would reach this same conclusion. Still it is a disastrous situation. All a clever and resourceful defendant needs to do is file a suit in, say, Italy, and it is fairly certain nothing will happen for a decade. Of course, the other party can rush into court and point to the valid Austrian forum clause. And I have already said that every country, thus including Italy, will recognize this clause as valid. So it is a foregone conclusion the case will in the end go to the right place, is it not? Well yes, but the key words are "in the end". And the expression "foregone conclusion" sounds all wrong; can we say "*after*gone conclusion"? For by the time the dispute reaches Vienna, life will have gone on. Perhaps the parties, especially the

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[1] EC, *Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] O.J.L 12/1 [*Brussels I Regulation*].

true claimant, will be tired of war. Perhaps the true defendant will have used the time to become judgment proof. The European "system" reveals itself to be surrealistic.

You will not be surprised to hear there is still much intra-European arbitration. It is in fact a standard feature of significant intra-European contracts.

But again, as a matter of social policy, the monopoly of international arbitration is not necessarily cause for celebration. It is a phenomenon to be evaluated continuously and critically. Moreover, as a matter of self-preservation and professional pride on the part of those of us who work in the field of international arbitration, the monopoly status should be a cause for constant concern. If we do not deliver decent justice and close the door to abuse, we should understand that sharp reactions are likely—sharp reactions that may harm a valuable tool.

Hence my insistence that international arbitration is not arbitration. We can live without arbitration, but not without *international* arbitration. Countries A, B and C may take different views—encourage, discourage, or even outlaw arbitration—but if international arbitration goes, international economic exchanges will suffer immensely. Nothing will take its place. Despite the appearance of having created a multinational legal space, the European regime is hardly a success story, as you just heard. As for the United States, it does not have a single treaty for the reciprocal enforcement of court judgments—not one.

There is great danger, I believe, in not recognizing the uniqueness of international arbitration. I have changed my mind in the last twenty years, since the days when I thought it would be fine if one ring could bind us all—if one coherent regime were to govern international arbitration and arbitration tout court. Now I doubt it. Today, my hosts have given me a chance to explain why.

II. Some History

To begin, something surprising. Let me bring to your attention Sir Lynden Macassey's remark that in recent years the development of commercial arbitration, both national and international, has been "phenomenal". How strange—I do not see any great reaction out there! Have you heard such comments before? Apologies, I omitted to mention: this one was made to the Grotius Society in 1938, and the "recent years" in question were the 1930s.[2]

Are our times so like four generations ago? What was happening then?

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[2] Lynden Macassey, "International Commercial Arbitration: Its Origin, Development and Importance" (1938) 24 Transactions of the Grotius Society 179 at 191-92.

In the wake of the savagery of World War I, people of good will sought urgently for ways to avert its recurrence. Peace, it was reasonably thought, would be buttressed if peoples and their governments had mutually reinforcing stakes in systems of cooperation. Trade was an obvious good to be promoted; it would not make sense to attack a golden goose. Of course, commercial transactions lead to disputes in some inevitable proportion of instances, as reality intrudes on expectations, and as parties then take different views of imperfect contractual provisions. And it is essential that such disputes be resolved fairly and efficiently lest the unreliability of bargains become an impediment to trade. So the idea of international arbitration as a tool of peace emerged. This idea was not new. Just a generation earlier, in 1899, the first Peace Conference at The Hague was convened, and established the Permanent Court of Arbitration.[3] The remarkable U.S. Secretary of State Elihu Root won the Nobel Peace Prize in 1912 principally because of his promotion of international arbitration. But this was international arbitration between states. The novel idea was international arbitration in the commercial field.

Previously, commercial arbitration was inherently national. A foreigner who accepted arbitration entered into a foreign national system. Enforcement of foreign arbitral awards in commercial matters before the twentieth century—as I can only imagine, for I have never come across a reported case—was even more difficult than the enforcement of foreign judgments, because at least the latter were rendered by public officials perhaps entitled to full faith and credit, whereas the former were made by foreign arbitrators, doubtless operating under a contractual mandate susceptible to acknowledgement elsewhere, but with no status under local law.

This is what was to change. Arbitration was one of the key purposes of the International Chamber of Commerce ("ICC") from the moment it was founded, months after the signing of the Treaty of Versailles, which formally established the terms of peace.

Many of you know that the mechanism of ICC arbitration was launched at the seminal ICC Congress held in London in 1921, shortly after the founding of the ICC itself. Some of you have heard the name Owen Young. He was the Chairman of the Commercial Arbitration Committee of the U.S. Chamber of Commerce and a well-known U.S. businessman. He made some remarkable recommendations to that Congress in London:

> The field of international commercial arbitration is one in which the International Chamber of Commerce may well play an important and influential part. Its success, however, will depend on the recognition by the Chamber and by its individual members of the inherent difficulties

[3] *Convention for the Pacific Settlement of International Disputes (Hague I)*, 29 July 1899, (1968) 1 T.I. Agree. 230, (entered into force 4 September 1900), online: Yale Law School <http://avalon.law.yale.edu/19th_century/hague01.asp>.

> and complexities of the situation. The most important of these difficulties lies in the fact that, generally speaking, the business men of continental Europe rely upon a legal sanction for the carrying out of arbitral decisions, whereas in the United States, as well as in England and the South American countries, a moral sanction has been shown to be, certainly for the present, more effective than a legal sanction. To ensure the co-operation of these countries, therefore, some system of arbitration *outside the law* must be provided.[4]

Mr. Young went on to imagine that some arbitral awards would not be enforced by legal processes,

> ... but upon a moral sanction, such as can be exercised by the International Chamber of Commerce itself, and by member National Committees, with all the force that business men of a country can bring to bear upon a recalcitrant neighbour.
>
> Before agreeing to conduct an arbitration outside the law, even when both parties should join in a request, the International Chamber should be convinced that the business men of both countries concerned are sufficiently well organized and that the business organizations are willing to exert moral pressure, if need be, in favor of carrying out the arbitration decision outside the law, and are sufficiently influential to make such pressure effective.[5]

Some of you may recognize the name George Ridgeway; he was a professor of history and the author of what to my knowledge was the first book about the ICC, a densely footnoted volume of 392 pages published in 1938 under the title *Merchants of Peace: 20 Years of Business Diplomacy Through the International Chamber of Commerce, 1919-1938.*[6]

And the success of this post-World War I wave of trade and arbitration seems to have been astounding. Courts were apparently fast becoming irrelevant. According to a commentator of the time, the New York court reports for the year 1943 "disclose[d] the comparative scarcity of sales contract cases despite the tens of thousands of sale transactions taking place daily within the jurisdiction of New York

[4] Owen Young, "International Commercial Arbitration" (1921) 3 Int'l Comm. Dig. 3 at 1-2 [Young].
[5] *Ibid.* at 1.
[6] George Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy Through the International Chamber of Commerce, 1919-1938* (New York: Columbia University Press, 1938) [Ridgeway].

courts."[7] A UNIDROIT conference convened by European governments in Rome in 1928 to unify sales law was met by the observation that unification was already in place by private groups—no participation by governments or legislatures was necessary.

It is amazing to think that arbitration had made such inroads in so little time. All this was in the days before the New York Convention;[8] how could arbitration have been so successful? What is more, in 1921, the Geneva treaties on arbitration agreements and awards had not yet been concluded.[9] Astonishing!

Now remember that as a mental time capsule, and I will tell you about something that is happening today which Mr. Young would surely have applauded.

III. Sporting Examples

Let me give you an example of a framework within which international arbitration operates with remarkable efficiency. The example comes from the world of sports, which is, today, the focus of quite astonishing passion—some of it very unattractive—and in any event a vast international industry. This industry has generated an interesting arbitral mechanism.

Although it has been in existence for little more than two decades, the Court of Arbitration for Sport ("CAS"), located in Lausanne, is extremely active, and the awards of arbitrators operating under its rules are given full and immediate effect. It is apparent why this is so in disciplinary cases: an athlete who is suspended for a doping offence will simply not be given the credentials to compete, because the federations who organize competitions adhere to regulations that accept CAS awards as ultimate appellate decisions. But it is more interesting to consider how the CAS also achieves finality and efficacy with respect to *contractual* disputes. I can illustrate this best with an example.

In early 2002, a Brazilian football player signed a four year contract to play for a Mexican club called Sinergía Deportiva, or more commonly Tigres. He was first paid a transfer fee of US$1 million, and was thereafter entitled to receive a monthly salary until the end of the fourth season.

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[7] Kronstein, "Business Arbitration—Instrument of Private Government" (1944) 54 Yale L.J. 36 at 40 [Kronstein].

[8] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38 (entered into force 7 June 1959) [New York Convention]

[9] *Geneva Protocol on Arbitration Clauses*, 24 September 1923, 27 L.N.T.S. 157; *Geneva Convention on the Execution of Arbitral Awards*, 6 September 1927, 92 L.N.T.S. 301.

The player stayed with the team for one year only, and then went home to Brazil. He did not report for pre-season training the second year. The International Football Federation ("FIFA") promptly suspended him from playing worldwide, but within a few months, a Brazilian labour court ruled that he was entitled to pursue his career. He accordingly signed with a Brazilian team known as Atlético Mineiro.

As you can imagine, Tigres felt hard done by. They had paid US$1 million in order to procure the services of the player for four seasons, not just one. But how could they be made whole? Lawyers familiar with international transactions would hardly have painted a rosy picture if they had had to advise Tigres. True, the club had an employment contract with the player. True, they might have got a judgment in their favour from a Mexican court. But then what? Even without any complicating factor, one cannot expect that the Mexican judgment would have readily been declared enforceable in Brazil. And even if by vastly good fortune it had been homologated—to use the term favoured in Brazil—how could it have been enforced against the player? It is unlikely that he would have saved his money in a single, convenient, transparent account to accommodate his judgment creditor. And, of course, there *was* a complicating factor: a Brazilian court had declared that the player was entitled to pursue his career with a local team. This entitlement, to be sure, was shrouded in stirring language about every individual's right to work. It would have been hard to mobilize much sympathy in Brazil for conclusions to the contrary.

Grim prospects indeed.

But that was without consideration of the modern context of the globalized football industry and the role of the CAS within that context. In fact, Tigres had no difficulty in enforcing their claim. Here is how it works.

Proceedings were held before the FIFA Players' Status Committee. The player was found to have breached his contract, and ordered to pay damages in the amount of the US$1 million transfer fee. If he failed to pay, Atlético Mineiro would be jointly liable. The player and Atlético Mineiro challenged this decision before CAS, and three arbitrators were duly appointed.

The arbitral panel heard full arguments, notably as to the employment contract's interpretation and as to the principle of joint liability. As to the former, applying Swiss law and the FIFA Regulations, the arbitrators concluded that the damages should be reduced to US$750,000 on account of the one year the player did perform. As to the latter, the arbitrators' position was crystal clear: the FIFA Regulations explicitly hold teams jointly liable for the breach of a prior contract committed by any player they choose to employ. Accordingly, if the player were not to pay the US$750,000 within 30 days of the award, Atlético Mineiro would be required to make the payment.

Atlético Mineiro could be counted on to make the payment, because otherwise it would face a disciplinary action by the Brazilian football federation in the form of relegation from the premier division. For the club not to do what was necessary to avoid the sanction was inconceivable.

The Brazilian football federation could be counted on to discipline its member, Atlético Mineiro, because otherwise it would face disciplinary action by FIFA in the form of exclusion from international competition. What? Brazil out of the World Cup? "Inconceivable" is not an adequate word!

What about the Brazilian judgment, which declared the player free to pursue his career with Atlético Mineiro? To the extent that it contradicts the CAS award, there is undoubtedly a possible tension between international federations and national authorities. This possible conflict has materialized in many sports, for example in cycling, where Spanish competitors in an international championship event in Spain are subject to the rules of the *Union Cycliste Internationale*, with reference to the CAS as the ultimate authority, but where there is also a Spanish royal decree on sports which gives exclusive final jurisdiction to the courts in matters of doping, apparently on the theory that sports bodies may be too tolerant. On the CAS website, you can find the *Landaluce* award, in which the arbitral tribunal reasons, in essence, that Spain can certainly regulate whatever happens on Spanish territory, but that if no accommodation is made for the primacy of international regulations, the consequence may be that international competitions (which by necessity must be ruled by perfectly homogenous rules) will avoid the country.[10] There have been some tense momentary standoffs (not, as it happens, involving Spain), but so far national and international regulators have respected an intelligent division of domains. Here too—need I say it?—it turns out that international arbitration is not arbitration.

I should add that on more than one occasion *Brazilian* athletes and teams have benefited from the international regime, in circumstances where it is doubtful that national proceedings could have been effective, for example through the award by which the Ittihad Club of Saudi Arabia was ordered to pay nearly US$2.8 million to the Brazilian team Vitória de Bahia.[11] Of course, the international system would break down if it were not supported by a strong structure of reciprocal benefits.

Isn't all this marvellous?

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[10] *Union Cycliste Internatonale c. L. & Real Federación Española de Ciclismo* (2006), (Court of Arbitration for Sport), (Arbitrators: Jan Paulsson, Olivier Carrard, José Juan Pintó), online: Court of Arbitration for Sport <http://jurisprudence.tas-cas.org> at para. 2.
[11] (2007), (Court of Arbitration for Sportt), aff'd by the Swiss Federal Tribunal (2008).

Well, not everyone thinks so—and not everyone thought so back in the days I was talking about when I asked you to keep a mental time capsule.

IV. The Case Against Arbitration

Not everyone thought arbitration was wonderful then. Not everyone thinks arbitration is wonderful now. This is where it becomes so important to keep in mind the difference between international arbitration and arbitration tout court. Those of us who like sea elephants should insist that our beast not be lumped in with the elephants. We like the elephants well enough, but if the powers that be want to get rid of them, or shunt them off to a tiny part of the zoo, let us never forget that the sea elephant is another creature with fundamentally different qualities.

You can probably see what is coming. I am going to tell you about the enemies of *arbitration*. And to ensure you see the parallel and perceive how much some things stay the same, let me first describe the resistance to arbitration's success three generations ago.

Not long ago, I came across a remarkable article in the 1944 volume of the Yale Law Journal. Don't look at me like that—*à Paris, l'on s'amuse comme on peut*. It was written by Professor Heinrich Kronstein of the Georgetown Law School, under the title "Business Arbitration—Instrument of Private Government."[12]

It was in fact Kronstein who conducted the study of the New York court reports I mentioned previously, and saw that arbitration seemed to be displacing the courts.

And he was appalled!

Let me say that his article was both lengthy and richly encrusted with citations from U.S., English, French, and German sources. But make no mistake: he wanted to destroy arbitration before, in his view, it would destroy our grandparents. The way he saw it, the development of arbitration was promoted by powerful, wicked conspirators who, like villains in a Bond movie, were intent on establishing dominion over the world for nefarious purposes, placing private gain over public interest, seeking to "pervert [arbitration] ... to upset ... the balance imposed by law."[13] The "arbitration system," he wrote, is surrounded by a secrecy which could be penetrated only by "official investigation."[14] He did not mean a sociological inquiry, of course, but police raids and jail sentences. "Organized arbitration," he

[12] Kronstein, *supra* note 7.
[13] *Ibid.* at 36.
[14] *Ibid.* at 40.

continued, "serv[es] no social justice [and] has become an element of dissolution." It is "an instrument of cartels and monopolistic trade associations."[15]

His premise was that the true and acceptable purpose of arbitration is to resolve disputes that are (i) simple and (ii) involve ordinary individuals. It has no legitimate role in the complex world of corporate business.[16] Indeed to understand how far Kronstein's critique went, we can begin with the very idea of corporate law. It was unacceptable, he argued, for the Supreme Court of New York to hold that disputes under a shareholders' agreement were subject to arbitration under the American Arbitration Association Rules. It did not matter that the case where this happened involved a family corporation with only three shareholders (all named Martocci):

> ... the court seems to have passed over a self-evident fact: that creditors, representing the public, have an inherent interest in any transaction governing the conduct of a corporation.[17]

You heard me right: "*any transaction governing the conduct of a corporation.*"

Kronstein found it even more intolerable that articles of association could be subject to arbitration, because they are an obvious tool for cartels to "usurp judicial power" over public instruments. Apart from corporate governance, he also mentioned trademarks and patents as obvious areas for manipulation by cartels in the service of price fixing and restraints of trade.[18]

Indeed, his article contains the word "cartel", it seems, in every other line. Truth be told, he was able to cite some eye-popping examples of arbitration arrangements under which businesses, including spectacularly General Electric, gave effect to price fixing schemes by ensuring the appointment of safe "arbitrators" and imposing heavy sanctions for attempts to escape an oppressive arbitral mechanism.[19]

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[15] *Ibid.* at 66, 68.
[16] *Ibid.* at 39.
[17] *Ibid.* at 61.
[18] *Ibid.* at 57, 61, 68.
[19] It is simplest to reproduce this passage from Kronstein's article (*ibid.* at 40-41):

> ... Carboloy Company, a subsidiary of General Electric, having obtained an exclusive license under certain patents, relating to hard metal composition, from the German firm, Krupp, granted a license for manufacture to Firth-Sterling Steel Company on the express condition that its prices, terms and conditions of sale for all tools and dies made of hard metal composition should be no more favorable to the customer than those to be established from time to time by Carboloy. The agreement between Carboloy and Firth-Sterling provided for arbitration of controversies which the parties were unable to adjust between

Kronstein's second group of villains were trade associations such as the Liverpool Cotton Association. He cited the following passage from an English Chancery Division judgment upholding an agreement to arbitrate under the rules of the Association:

> [The agreement to arbitrate is] ... the result of attempts to bring Continental associations formed in the interests and for the protection of the cotton trade into line with the association, and to inaugurate between the members of the association and of the Continental associations a code of dealing and conduct similar to that already obtaining between the members of the association *inter se*. The importance of Liverpool, as the controlling centre of the cotton trade in Europe, necessarily results in members of the association being in constant contractual relationship with traders on the Continent, and, experience having demonstrated the difficulties not infrequently arising in enforcing judgments and awards out of the jurisdiction, the association determined to take steps to remove these difficulties and to facilitate the settlement of disputes with foreigners and the obtaining of prompt settlement of claims for payment and damages, and, by making the advantages reciprocal, to secure and retain the confidence of Continental buyers. This policy ... falls entirely within the powers of the ... memorandum [of association].[20]

This Kronstein found outrageous: he considered it "the emergence of a self-enforcement policy," which represents "the final breach between arbitration and the law."[21] To him, these associations were "utiliz[ing] the arbitration device for their own purposes" and transforming it into something occult and all-powerful—*making*

> themselves, and through a supplementary instrument the form of arbitration procedure was agreed upon: "For the period of one year from March 1, 1931, the parties hereby appoint Harold Norberg ... as the sole arbitrator over controversies which may arise between the parties or either of them concerning violations of their respective obligations to maintain the prices, terms and conditions of sale established from time to time by Carboloy. ... The arbitrator in performing his functions shall act impartially between the parties." Since the Mr. Norberg in question was at the time of his appointment and subsequently an employee of Carboloy, there seems hardly any doubt that arbitration was used here by Carboloy both to control prices at the expense of its licensee and to prevent such a scheme of price fixing from coming into court.

[20] *Merrifield, Ziegler & Co. v. Liverpool Cotton Association Limited*, 105 L.T.R. (N.S.) 97 at 104, cited in *ibid.* at 65 [reproduced from the original].
[21] Kronstein, *ibid.* at 64.

their own laws, *enforcing* those laws, and *punishing* anyone who did not obey the private arrangement, for example by ruinous exclusion from the trade association.[22]

This diatribe resonated in my mind as I thought back on a memorable experience in my early years of practice.

In the first race of the 1982 Formula One ("F1") Grand Prix season, held in Kyalami, South Africa, twenty-seven out of twenty-eight drivers refused to drive due to their rejection of an amendment to the regulations, which they considered related to business rather than sport. An epidemic of stubbornness broke out, and one of the qualifying sessions was run with a single competitor trundling around by his lonesome self (Keke Rosberg of Finland). Those who had tickets only for that session were not amused. The twenty-seven non-participants were disciplined by the *Fédération Internationale du Sport Automobile* ("FISA"), which had that function under the F1 Rules. These drivers formed a steering group headed by Didier Pironi and Nicki Lauda, and asked me to challenge the FISA's decision.

Under the F1 Rules, an internal body called the *Tribunal d'appel international* ("TAI") was competent to hear such challenges. This was our first problem. FISA was a committee of the International Automobile Federation ("FIA"). TAI was created and financed by the self-same FIA. Indeed, it turned out to be a peculiar form of arbitration—if anyone claimed that such was the nature of the proceedings—in which your opponent selects seven arbitrators, you select none, and no one sits in the middle. Moreover, although those eligible to serve included persons knowing something about motor sports, the true specialists were for obvious reasons the ones from major motor sports countries like Italy, France, and England, and they could not be selected because the parties to the disputes were invariably connected with these countries. So the decision makers tended to be persons from odd little countries, chance members of the FIA. They much enjoyed coming to Paris and spending a few days in luxury at the Hôtel de Crillon, next door to the historic building on the Place de la Concorde where FIA/FISA/TAI are housed. You may forgive my clients and me if I say that we had a feeling that these gentlemen were above all keen not to displease those who invited them.

The outcome was unsurprisingly negative. So off we went to the *Tribunal de grande instance* of Paris. Here we had a second problem. Under the F1 Rules, anyone who challenged the internal decisions in an ordinary court was susceptible to the discipline of *lifetime* exclusion from the sport! This did not worry me because I considered it a clear-cut affront to public policy which would instantly be rejected by any court—but then I was not earning, or hoping to earn, fabulous riches as an automobile racer. Still, F1 racers are by nature risk takers, and this group were reasonably comforted by the thought that all of them could not realistically be banned for life. (The twenty-seven included Gilles Villeneuve, Nelson Piquet, Carlos

[22] *Ibid.* at 44.

Reutemann, Jacques Lafitte, Michele Alboreto, Nigel Mansell, and many more.) Unsurprisingly, the French judges decreed that the penalty for going to court was unenforceable. That was all well and good for our case. But ours was an extraordinary situation, with almost every athlete in the sport involved. How many claimants lacking that strength in numbers had been frustrated, for how many years, by the fear of a lifetime ban? Even a ban ultimately declared ineffective might have irretrievably disrupted a career while the lawsuit ran its course.

So do not think for a moment that I cannot relate to Kronstein's complaint about abusive associations. But I differ, radically, with his apparent belief that arbitration in the hands of associations is inevitably crooked, and cannot be controlled. I am disappointed that critics of arbitration, as they appear through the generations, ignore the history of law and the wealth of evidence of the persistent impulse to resolve disputes outside the processes of warlords and bureaucrats. Max Weber, after all, expressed the view that arbitration was at the origin of all legal proceedings.[23] This postulate may go too far, and is indeed controversial among historians, but no one can deny the vast role played in medieval times by the original Roman *arbitrium ex compromisso* (private arbitration), as it was institutionalized, a counterweight to the law of potentates, and a reliable mechanism for the enforcement of rights and obligations within the trades and nascent bourgeoisie. For Kronstein to treat the Liverpudlian cotton merchants as the inventors of a racket was plainly grotesque.

Kronstein at last pointed his finger at a third category of miscreants: the ICC. He too presented Mr. Owen Young, in fact, on the very first page of his article, and hardly in a flattering light.

Mr. Young, he noted, had been Chairman of the Board of Radio Corporation of America ("RCA"), and it stood to reason that his recommendations to the ICC London Congress "were influenced by his experience [on behalf of RCA] in connection with the South American radio consortium, which proved to be the basis of the international radio cartel."[24] This ominous comment he left unexplained, perhaps because he felt that the facts spoke for themselves when one considered the ICC. He evoked the same passage from Mr. Young's report I quoted earlier, but with disparagement bordering on contempt. He figuratively leaped at the words "arbitration outside the law," which Mr. Young as a layman had obviously used as shorthand to refer to what a verbose lawyer (like myself) would describe as "arbitration based on voluntary participation and compliance without the need to refer to formal and complex court procedures in cross-border trade." In Kronstein's view, Young had somehow admitted—in a public document, mind you, continuously disseminated over the years by the ICC—that the goal of arbitration was to flout the

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[23] Max Weber, *Sociologie du droit*, trans. by Jacques Grosclaude (Paris: Presses Universitaires de France, 1986) at 30.
[24] Kronstein, *supra* note 7 at 36.

law. At any rate, the expression "arbitration outside the law" recurs many times in Kronstein's piece as though it were the ICC's admission of guilt beyond redemption. Turning to the ICC, Kronstein went on:

> The unique feature of the Chamber is the appointment of arbitrators by national committees of countries specifically designated by the central committee. A nation such as Switzerland, for example, liberal in its treatment of cartels, may be entrusted with the task of appointing arbitrators. Subsequently the central committee may send these "liberal" arbitrators to a foreign country to render their decision—even to the domicile of the party against whom the award is to be made. The reason for this mobility of arbitrators becomes apparent in the light of the rule that an arbitrator is free to choose whether his decision is to be bound by municipal law ...
>
> Like the operations of exchange institutions, a loose procedure of this kind seems only too easily to lend itself to the exercise of cartelized power. On behalf of the commercial interest which it undertakes to protect the central committee may at its discretion utilize the municipal law which proves to be the most advantageous and the most expedient."[25]

As his putative proof of this last sentence, the author referred in a footnote to the ICC's own brochure published on the occasion of the 1921 London Congress, a rather counterintuitive source which does not, in fact, support the author's suggestion of an intent to circumvent law.[26]

The only mercy Kronstein showed the ICC was to suggest that in fact it would not be able to do as much harm as it intended—because the trade associations and cartels and their accomplices had already shown that they could subjugate the courts and the law without the ICC!

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[25] *Ibid.* at 45-46.

[26] *Ibid.* at 46, n.45. In this respect, Kronstein the militant seems to have overcome any scruples of Kronstein the scholar. Anyone who consults the source (rather than relying on Kronstein's quotations) will find that the founders of ICC arbitration wished to create something which would "reconcile" the conceptions of "moral" and "legal" sanctions. True, Owen Young referred to the former as a "system of arbitration outside the law," but it seems abusive to take this expression of a non-lawyer to describe the thrust of what the ICC was doing, especially since Young himself urged that "a code for arbitration within the law is equally necessary" (and moreover made perfectly clear that "outside the law" meant no more than "a moral sanction" which did not need formal judicial assistance, and had nothing whatsoever to do with evasion or subversion of the law) (Young, *supra* note 4 at 2). See Ridgeway, *supra* note 6 at 320-322.

What should be done? Kronstein asked. For one thing, he wrote, arbitration agreements should go back to what he believed was their traditional status—*revocability*. He explained that advocates of arbitration had misled the courts into thinking that agreements to arbitrate *future* disputes have something to do with the sanctity of "freedom of contract"—three words he put within quotation marks; and that courts had been mesmerized by the "hypnotic power" of the notion of "independent arbitration"—again, quotation marks around "independent arbitration".[27] He thundered about the perils of "indiscriminate enforcement".[28]

We must restore arbitration *within* rather than *outside* the law, he urged; this is a big job. *Temporarily*, lawmakers should establish an absolute right to appeal to courts from all arbitration cases "provided the public interest is affected."[29] Corporate parties should be required to obtain a prior license from U.S. courts before participating in cross-border arbitration. Arbitration abroad should not be binding if it does not comply with U.S. law or if one of the parties does not appear. And arbitrators should never be allowed to decide on the validity of a contract; the separability notion was to be rejected out of hand. And, let us not forget, government agencies should be "immune" from arbitration, even if they had the bad idea of agreeing to it.[30]

Since I am speaking here in Canada, the abode of the high priests of transparency in international arbitration, I should add that Kronstein also proposed that the files in arbitral proceedings be made available to government officials and free access to all hearings be given them.[31]

I introduced Kronstein as a law professor at Georgetown Law School, but did I mention that he was also, at the time he wrote this article, a staff lawyer at the U.S. Department of Justice? Well, he was; naturally his first footnote revealed that the opinions expressed in his article were not "necessarily" those of the department.

It is now time to leave Kronstein. Let me only explain that I dwelled so long on his article because his arguments are still alive, and because his denunciation of arbitration, dogmatic though it may be from beginning to end, is a sustained and documented criticism, by a well-known scholar,[32] in a reputed publication, which

[27] Kronstein, *ibid.* at 61-62.
[28] *Ibid.* at 47.
[29] *Ibid.* at 68.
[30] *Ibid.*
[31] *Ibid.*
[32] Kronstein was to become the first director of the Georgetown International Law Institute in 1955. For a recent empirical study of some of Kronstein's arguments see Christopher Drahozal, "Is Arbitration Lawless?" (2007) 40 Loy. L.A.L. Rev. 187.

not only deserves consideration, but *demands* consideration if arbitration is not to fall into disrepute.

In retrospect, we can see that Kronstein's fulminations were not persuasive. Not only were his proposals left to wither on the vine, but the tendencies he excoriated maintained their momentum. Broadly speaking, they have moved so much further in the direction of party autonomy (all over the world, notably with the impetus of the UNCITRAL *Model Law on International Commercial Arbitration*[33]) that students today may have difficulty imagining that anyone in 1944 would already have observed something called "independent arbitration". Students today may well conceive that arbitration has only *become* unbound since the 1970s. And they are taught arbitration is a good and useful thing.

V. In Defence of Arbitration

Conceptually speaking, Kronstein was wrong in two ways. First, he failed to perceive that the law could embrace arbitration and yet protect the public interest. Arbitration is not an instrument in the struggle against law, but a tool in the development of its delivery system in response to globalization. Hundreds of lectures, thousands of learned disquisitions by judges and scholars have since made us see how public policy can accommodate arbitration, all the while limiting the excesses of those who would be tempted to manipulate the "arbitral device".[34]

Second, Kronstein saw only the evil intent behind deviant behaviour, and therefore ignored the possibility that we all perceive, namely the positive contribution of arbitration to the rule of law in ways indispensable to exchanges that benefit the international community.

And yes, international arbitration is not arbitration. Kronstein did not see this. He concluded that

> ... [d]ivorced from an ideal of social justice and designed to avoid the law, modern arbitration would seem to rest basically upon Kelsen's theory of law ... persons in a position to exert political or legislative power would seem to be justified in creating the kind of law most suited to their needs ... [a] neutered instrument of groups in a position to

[33] UNCITRALOR, 18th Sess., Annex I, UN Doc. A/40/17 (1985) as am. by UNCITRALOR, 39th Sess., Annex I, UN Doc. A/61/33 (2006), online: UNCITRAL <http://www.uncitral.org> [UNCITRAL Model Law].

[34] See e.g. the John E.C. Brierley Memorial Lecture given at this very podium 30 March 2005: Andreas Lowenfeld, "Public Policy and Private Arbitrators: Who Elected Us and What Are We Supposed to Do?", online: (2006) 3 T.D.M. 44.

> exercise power ... colorless and without aim ... a ready tool of those who would make use of it.[35]

Thus, Kronstein did not see our noble sea elephant. For him there was only one kind of arbitration: bad arbitration.

One may doubt the need for arbitration, or indeed its value, if one lives in a country where the courts give justice quickly and surely at no cost to those whose rights have been violated. But in the international system, such courts, good or bad, simply do not exist. It would be a grave error, for those who would curtail arbitration because they believe that in their national systems the public interest is better served by giving a greater and irreducible role to courts, not to see that international arbitration is something quite different. Trimming the sails of international arbitration does not favour another mode of transport; it is the only one we have. Allow me to repeat that a world commercial court is unlikely to emerge in our lifetimes.

We are surely on solid ground when we stake out the claim for the specific advantages of international arbitration. Consider the stated purposes of the incredibly successful New York Convention, which is after all a treaty conceived and promoted under the aegis of the UN.[36] Consider the UN General Assembly's recommendation of the widely used *UNCITRAL Arbitration Rules (1976)*, stressing the international community's interest in ensuring the development of the arbitral device.[37] Consider the UNCITRAL Secretary's explanation, in 1984, of the objectives of the UNCITRAL Model Law, which has since had enormous influence while containing everything Kronstein wanted to proscribe, and much more he did not even imagine.[38] Consider finally Kofi Annan's speech, in 1998, on the occasion of the 40th anniversary of the New York Convention, in which he congratulated the international community on the propagation of that treaty, and on its impact in contributing to the increased security of economic relations.[39]

I have long lived in France, where arbitration and international arbitration are treated in separate laws.[40] The differences between the two are substantial. For

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[35] Kronstein, *supra* note 7 at 67-68.
[36] *Supra* note 8.
[37] *Arbitration Rules of the UNCITRAL*, GA Res. 31/98, UN GAOR, 31st Sess., Supp. No. 39, UN Doc. A/31(1976) 182.
[38] See online: UNCITRAL <http://www.uncitral.org>.
[39] Kofi Annan, "The 1958 New York Convention as a Model for Subsequent Legislative Texts on Arbitration" (1999) 15 Arb. Int'l 319.
[40] *Décret n°80-354 du 14 mai 1980*, J.O., 1980, 1238-40 (introducing general arbitration provisions into the Code of Civil Procedure); *Décret n° 81-500 du 12 mai 1981*, J.O., 14 May 1981, 1398-1406 (international arbitration provisions).

example, it has long been established that national agreements to arbitrate *future* disputes are valid only if both parties are merchants. And even when they are, an appeal lies to the courts if either side rejects the award, unless there is an explicit agreement to the contrary. In international arbitration, by contrast, there is no requirement of merchant status to validate arbitration clauses; even employment agreements may be subject to international arbitration if they are international in nature. And for international arbitration the rule about appeals is radically different: in fact, there is no such thing as an appeal. Parties cannot even "opt in" for appeals, whether on fact or law.

And here comes into play another factor, let us call it sociological, which merits careful observation. In France, people not involved in international trade harbour considerable doubts about arbitration.[41] Lawyers involved predominantly in domestic matters often have a rather cynical view of it. So do business people engaged in specific industries or trades that have set up sectorial arbitration institutions. The relevant community is often too small to avoid suspicions of partisanship, influence-peddling, and excessive deference to dubious usages—all the things, if you will, that Kronstein worried about. Yet *international* arbitration, as I have observed in my three decades of acquaintance with French trade and industry, is held in great esteem. Major French corporations may complain about the costs and delays of international arbitration, but they do not perceive in it a moral hazard, and are content to entrust major contractual relationships to the ultimate control of the international process. (They are, by contrast, unenthusiastic about litigating in other national courts in Europe; they seem to see through the myth of European judicial integration.) Legislators, judges and scholars follow suit, and have tolerated, then acknowledged, and ultimately supported, a system of international arbitration that is a world apart from domestic processes.

The legal regimes of other important jurisdictions—most notably Switzerland, but also, for example, England and Sweden—have also developed features that result in significant differences between arbitration and international arbitration. Above all,

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[41] In 1843, the renowned jurist Reymond-Théodore Troplong, then a *conseiller* at the *Cour de cassation*, nine years before his elevation to its presidency, wrote in his treatise *Commentaire du contrat social civile et commercial* (Bruxelles: Meline, Cans et Co., 1843) at 91, n° 520:

> ... l'arbitrage est une manière de juger si défectueuse, si dépourvue de garanties ... Quant à moi, qui ai été arbitre quelquefois, je déclare, par expérience, que, dans un procès de quelque gravité, je ne conseillerais à personne de se faire juger par des arbitres: un tribunal qui se croit le droit d'être plus équitable que les lois les plus équitables du monde, me paraît ne pouvoir s'adapter qu'à un petit nombre de questions de fait et à des intérêts médiocres.

the basic objective of the UNCITRAL Model Law was to provide a specific regime for international commercial arbitration; individual legal systems were encouraged to adopt it irrespective of the way in which they might regulate domestic arbitration. Some countries were so enthusiastic about the UNCITRAL Model Law that they adopted it for all types of arbitration. This is fine as long as domestic arbitration does not develop pathologies. If it does, one may well have second thoughts about the fused regime, since corrections of domestic phenomena may unintentionally harm international achievements and harmonization.

VI. Modern Threats

Today, there are ideas floating about that constitute very significant threats to arbitration. I hope these threats can be averted, because I favour arbitration as a matter of political policy. But if they cannot, let us at least make the challengers realize that whatever their objections to arbitration may be, international arbitration is something else. And the sea elephants should be preserved.

Let me give you two frightening examples.

In Europe, we are now living under the spectre of a proposal to kidnap all forms of arbitration and subject them to the regime of the *Brussels I Regulation* described above. When I say "spectre", I mean the fear, perhaps exaggerated, yet fuelled by past experience, that the extension to arbitration of the *Brussels I Regulation* will allow the Italian torpedo to destroy fundamental advantages of international arbitration. If it were indeed extended, a defendant wishing to sabotage the neutral arbitral process would need to do no more than bring a lawsuit in a country known for judicial torpor and infinite appellate complications. Arbitrators would have no choice but to wait until that country's highest available court finally decided that the matter should go to them after all.[42]

Perhaps there are some who would like to destroy national arbitration, but they should not be allowed to proceed without giving an account of the vast damage done to the singular—and singularly successful—method we have for allowing international economic relations to be pursued on the foundation of the rule of law.

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[42] For an examination of this proposal see EC, *Report on the Application of Regulation Brussels I in the Member States*, 2007, JLS/C4/2005/03, online: European Judicial Network in civil and commercial matters <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>. According to a working group of the ICC's Arbitration Commission, this study is a "major conceptual step backward … reflecting a vision of arbitration in vogue in the 1920s ... " (unpublished report, cited in Alexis Mourre, *Les Cahiers de l'arbitrage*, vol.2 (Paris : Gazette du Palais, 2008) 4).

In the United States, the danger lurks in Congress under the guise of the proposed so-called *Arbitration Fairness Act of 2007*, which would prohibit pre-dispute agreements to arbitrate with respect to employment, consumer, and franchise disputes.[43] Whatever one may think of this as a matter of domestic policy—and I am the first to admit that some businesses in the United States have abused the tool of arbitration in the context of consumer transactions—one must view with alarm the fact that the proposal would also exclude arbitration arising from relationships with "unequal bargaining power".[44] This subjective criterion would apparently be available as an obstacle to international arbitration as well, with the prospect of the endless familiar disasters of discovery, depositions, and appeals, solely to determine whether there is "sufficient equality" to allow arbitration.

Kronstein's intellectual grandchildren also seem to think that just in case decapitation does not work, the body should also be carved up with a thousand little scalpels. Thus, some legislators want to outlaw arbitration with respect to—these are only a few examples—homebuilding contracts, motor vehicle sales and leases, livestock or poultry transactions, employment contracts involving former members of the U.S. armed forces, and loans linked to federal tax refunds.

Once again, individual national systems may take a hostile view to arbitration on the basis that only their public courts can be trusted. But this analysis is inapposite to international arbitration, and moreover would dismantle the valuable international system built around the New York Convention.

Do these legislators now disagree with the points made by the President of the United States when he wrote to the U.S. Senate on April 24, 1968, transmitting the New York Convention and recommending accession to it? Or have they simply forgotten his message? It was based on a decade of observation of the Convention's initial success, and included this passage:

> Experience under the Convention has established that it contributes in many ways to the promotion of international trade and investment. For example, it provides greater flexibility for the arranging of business transactions abroad; it simplifies the enforcement of foreign arbitral awards and standardizes enforcement procedures; and it strengthens the concept of safeguarding private rights in foreign transactions.[45]

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[43] U.S., Bill H.R. 3010, 110th Cong., S. 1782, 110th Cong, online: GovTrack.us <http://www.govtrack.us>.

[44] *Ibid.*, s.2(b)(2).

[45] One of the reasons the United States hesitated for more than a decade before acceding to the New York Convention was the adamant opposition of the Deputy Legal Adviser at the Department of State—none other than Kronstein—who had moved there from the Department of Justice.

Astonishingly and regrettably, a number of U.S. courts have shown insensitivity to the specificity of international arbitration *precisely when dealing with an international treaty*. I am referring to the unacceptable addition to the defined and supposedly exclusive exceptions to enforcement of awards under the New York Convention of the requirement that the enforcing party also demonstrate that peculiar U.S. jurisdictional requirements are met. An important recent article has shown this is dangerous and unjustified.[46] I can only add, on a note of frustration, that the New York Convention itself does not contain a jurisdictional clause—and so other signatory states cannot bring actions against the United States under the convention for this breach of its terms.

The simple conclusion is that those engaged in the international field would be mistaken if they reflexively joined the fray on the side of arbitration each time it found itself under attack. For all we know, in the particular country where the debate arises, arbitration has been abused in a way that makes mockery of the consent of individuals, be they consumers, athletes, or members of a religion-dominated community. In such circumstances, international arbitration is the baby, and arbitration tout court is the bathwater.

If international arbitration is not arbitration, what should we call it? Let me see. We will, I suppose, continue calling the sea elephant "sea elephant", and "international arbitration" is not a bad appellation for international arbitration—but let us remember what it is!

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[46] William Park & Alexander Yanos, "Treaty Obligations and National Law: Emerging Conflicts in International Arbitration" (2006) 58 *Hastings Law Journal* 251.