FORUM NON CONVENIENS IN ARBITRATION

by Andrew Rogers*

Has the concept of forum non conveniens a role to play in arbitration? Does a court have power to order that an arbitral hearing be held at a forum other than the one designated by the parties in a contract freely agreed upon? If the answer is in the affirmative, in what circumstances will the power be exercised? Let it be assumed that a company in country A contracts with a State instrumentality in another country B. The contract provides that any dispute should be determined by arbitration in the capital of country B. Subsequently to the date of the contract, there is a dramatic change of circumstances in country B and what was an acceptable and appropriate forum for decision making at the time of making of the contract, has become unsuitable and unacceptable. What can be done by the company in country A? There are other, less obvious situations which throw up for consideration the applicability of forum non conveniens to arbitral

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proceedings. Somewhat surprisingly, the topic has not undergone any extensive examination by the courts outside the United States and, to a much lesser extent, in India.

It is, of course, clear that what is involved is much more than the personal comfort of the arbitrator and the lawyers relaxing in luxury instead of coping with the spartan surroundings of the selected forum.

In Compagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation SA (1971) AC 572, Lord Diplock commented (p 604):

> "An express choice of forum by the parties to a contract necessarily implies an intention that their disputes shall be settled in accordance with the procedural law of the selected forum and operates as if it were also an express choice of the curial law of the contract."

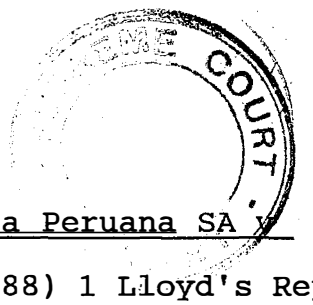
This is, of course, one of the very reasons for the parties selecting a forum for arbitration at the time of entering into the contract. Not, unnaturally, parties to international contracts, with possibly completely different legal systems require the assurance of a known, neutral forum with a system of procedure that the parties are acquainted with at the time of selection.

Where the parties fail to choose the law governing the arbitration proceedings, prima facie, the law of the place of arbitration will govern (James Miller & Partners Ltd v Whitworth Estates [Manchester] Ltd [1970] AC 583; ~~ICC Rule~~

~~16~~. Thus the importance of the law of the forum can hardly be overstated. First, the rules of procedure governing the conduct of the arbitration will be the curial law. Second, rules of admissibility of evidence will be the curial law. Third, it is the courts of the place of arbitration which will provide assistance or judicial supervision (cf Rhidian Thomas "The Curial Law of Arbitration Proceedings" [1985] LMCLQ 491). This, again, was made clear in Whitworth Estates (supra). What I have just said, of course, involves rejection of the concept of a "de-localised" arbitration. Whilst I appreciate the argument of its supporters, English law, at least at present, has set its face against it (Bank Mellat v Hellinniki Techniki SA [1984] QB 291). In this respect, I should think the law in Australia is the same.

Bearing in mind then that forum selection has this important effect, may a court ever displace the parties' choice of curial law, by the back door, so to speak, by holding that the forum is not appropriate?

It remains an open question whether if the place of arbitration may be transferred to another judicial system by a finding of forum non conveniens, it could be made a condition of any order that the curial law remain that of the forum initially selected. Although much discussed in the literature, the possibility of a split between the curial law of an arbitration or the one hand and the law of the seat of the arbitration had



not arisen for decision until Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru (1988) 1 Lloyd's Rep 116. Kerr LJ, in whose judgment the other members of the court agreed, was of the view that (p 120):

> "There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve."

Whilst the difficulty is clearly recognisable any court would presumably strive to preserve for the parties as much of the advantage of forum selection as may be salvageable in a finding of forum non conveniens. A further difficulty will arise where the procedural law also has undergone fundamental change between the date of contract and the dispute; Carvalho v Hull Blyth (Angola) Ltd (infra). With this background, I return to the questions posed.

In The Bremen v Zapata Off-Shore Co (1971) 407 US 1 the Supreme Court of the United States foreshadowed a qualified affirmative answer to the first question. The respondent, an American corporation, contracted with the petitioner, a German corporation, to tow a drilling rig from Louisiana to the Adriatic Sea. The contract provided that any dispute must be treated before the "London Court of Justice". The drilling rig was damaged during towage in the Gulf of Mexico. The respondent, ignoring its contractual promise, commenced a suit

in Admiralty in the United State District Court at Tampa. The petitioner moved to dismiss on forum non conveniens grounds or for a stay pending submission to an English court. The District Court, which was affirmed by the Court of Appeals, refused the motion. Reliance was placed on the fact that the casualty to the rig occurred within waters close to the area of the District Court, a considerable number of potential witnesses, including Zapata crewmen resided in the Gulf coast area, preparation for the voyage, inspection and repair work had been performed in the Gulf area, the testimony of the Bremen crew was available by way of deposition and that England had no interest in or contact with the controversy other than the forum selection clause. The Supreme Court upheld an appeal taking the view that far too little weight and effect had been given to the forum clause by the Courts below (p 8). The Court recognised that traditionally forum clauses had been frowned upon by the American courts. However, the Supreme Court took the view that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances (p 10). The Court recognised that this approach was substantially that followed in other common law countries including England. Recognition was paid to the fact that such policy accorded with "ancient concepts of freedom of contract". In the case before the Court "the choice of that forum (England) was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some

compelling and countervailing reason it should be honoured by the parties and enforced by the courts ... There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or over-weening bargaining power such as that involved here, should be given full effect." (p 12) The Court concluded that a forum clause should control absent a strong showing that it should be set aside. It was upon the party contesting the forum clause to show that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or over-reaching" (p 14). Relevantly for present purposes, what the Court said a little later is of crucial importance (p 16):

> "Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be 'unreasonable' and unenforceable if the chosen forum is seriously inconvenient for the trial of the action. Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable. We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. ...[Then reverting to international contracts] In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain."

was thus authoritatively established as were the limits to escape from the obligation. The requirement to arbitrate in accordance with a forum selection clause was then confronted by the United States Supreme Court in Scherk v Alberto-Culver Co (1974) 417 US 506. The contract of sale for certain trademarks in Germany and Switzerland required the parties, an American corporation and a German citizen to submit any disputes for arbitration to the International Chamber of Commerce in Paris. The American corporation brought suit in the Federal District Court in Illinois. The majority in the Supreme Court expressed the view that "an agreement to arbitrate before a specified tribunal is in effect, a specialised kind of forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute" (p 519). In the result, the majority of the Court took the same view in relation to a forum selection clause calling for arbitration as it did in relation to curial proceedings in the Bremen. The problem of forum non conveniens did not directly arise.

The question now under discussion then arose directly for consideration in Sam Reisfeld & Son Import v S.A.Eleco (1976) 530 F 2d 679. The decision threw up an answer in the negative to the question first posed. The appellant was the exclusive U.S. sales representative of the respondent, a Belgian

manufacturer. The agency agreement incorporated an arbitration clause which required all disputes to be settled by arbitration in Coutrai in Belgium. The appellant commenced an action in the U.S. The appellant contended that the forum chosen was so unreasonable that it either vitiated the arbitration clause altogether or required transfer to a more neutral situs. As the judgment of the Fifth Circuit Court of Appeals describes it, Reisfeld's argument, applying the standard in The Bremen, (supra), classified the Belgian situs as an unreasonable forum pointing to the defendant's economic dominance in the area and the inconvenience and expense the appellant would encounter if forced to arbitrate in that forum, which was both remote and foreign in language. The court said (p 680):

> "In this court, Reisfeld reurges its contention that the forum chosen for arbitration is so unreasonable that it either vitiates the arbitration clause altogether or requires transfer to a more neutral situs. While conceding that "unreasonableness of situs" has not been traditionally recognised as cause to cancel or modify an arbitration clause, Reisfeld attempts to extend the rules relating to forum-selection clauses to the arbitration area. Principal reliance is placed on the Supreme Court's decision in M/S Bremen v Zapata Offshore Co., 407 U.S.1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), an admiralty case which held that forum-selection clauses in international agreements should be enforced unless found to be unreasonable under the circumstances. Applying the Bremen standard, Reisfeld classifies Coutrai as an unreasonable forum, pointing to defendants' economic dominance in the area and the inconvenience and expense Reisfeld would encounter if forced to arbitrate in this forum which is both remote and foreign in language.

> Reisfeld's attack falters on its initial premise that the Bremen unreasonableness test is applicable to arbitration clauses. Rather, we agree with the district court that the enforceability of the arbitration clause at issue is governed exclusively by the explicit provisions of the Federal Arbitration Act 9 U.S.C. ss 1-14. Under the Act, a party seeking to avoid arbitration must allege and prove that the arbitration clause itself was a product of fraud, coercion, or "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. s 2; Prima Paint Corp. v Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). This stringent standard has not been modified by the Supreme Court's recent decision in Scherk v Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). The Court in Scherk upheld a stay pending arbitration even though the plaintiffs asserted a claim under the federal securities law. The references to Bremen in that case were made to emphasize the Court's rejection of a provincial approach in favor of the policy of giving effect to the agreement of the parties in international transactions, not to incorporate the Bremen standards wholesale to situs selections in arbitration clauses. If anything, Scherk strengthens defendant's position by insisting upon liberal enforcement of arbitration clauses in multi-national contexts. Since Bremen is inapplicable, the district court did not need to reach the question of whether the selection of Coutrai was unreasonable under the circumstances here presented."

The decision in Reisfeld was cited with approval by the Court of Appeals for the First Circuit in USM Corporation v GKN Fastener Ltd (1978) 574 2d 17. The agreement between the parties called for arbitration in England. USM contended that the inconvenience of arbitration in England was a hardship sufficient to justify departure from the contractual obligation. The court responded (p 20) by pointing out that such an argument:

> "...is precisely the type of contention which would have been resolved prior to signing the arbitration agreement.

> Indeed, if every party who signed an arbitration clause could later come into court and attempt to defeat the clause on the basis of its unfairness or unreasonableness, the advantages attendant on arbitration rather than litigation would be largely lost. A party's right to defeat an arbitration clause for specifically recognized reasons is explicitly protected in the statute. If the clause was the product of fraud, coercion, or such legal or equitable grounds which would give rise to revocation of a contract, the clause can be repudiated."

The unqualified rejection of the applicability of the principle of forum non conveniens by the Reisfeld court was considerably softened by the Supreme Court in Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc. (1985) 473 US 614. The automobile distributorship agreement there in question called for arbitration in Japan under the rules of the Japan Commercial Arbitration Association.

The majority opinion repeated the commitment of U.S. courts to the enforcement of freely negotiated choice of forum clauses. The majority pointed out that "the mere appearance of an anti-trust dispute does not alone warrant invalidation of the selected forum". On the other hand it accepted that "the party may attempt to make a showing that would warrant setting aside the forum-selection clause" on the the basis set out in the Bremen. Thus the central conclusion in Reisfeld was overruled. According to Mitsubishi, absent a showing of fraud, undue influence or overweening bargaining power it is necessary to prove that enforcement would be unreasonable and unjust or the proceedings in the contractual forum will be so "gravely difficult and inconvenient that the resisting party

will for all practical purposes be deprived of his day in court." In other words, the test in The Bremen.

The question next to be addressed is how real is the opportunity to avoid the forum specified by contract by the application of this test? The answer returned by the Court of Appeals for the Fifth Circuit in National Iranian Oil Co v Ashland Oil Inc (1987) 817 F 2d 326; Cert denied 108S.Ct.329) is not very. To add point to the lesson, Goldberg J put the admonition in poetical form. As the names of the parties indicate, the genesis of the problem lay in the Islamic Revolution in Iran and the rupture of US-Iranian relations following the seizure of hostages at the US Embassy. The US companies received Iranian oil already in transit at the time of the takeover of the US Embassy. No payment was made for the oil. The Iranian company appointed an arbitrator. The US companies refused to participate in arbitral proceedings in Teheran, as required by the forum selection clause, because of perceived dangers to Americans. They further refused to participate in an arbitration elsewhere. The Iranian company commenced proceedings in the Federal District Court for an order to compel arbitration in Mississipi. The US defendants filed a counter claim alleging tortious interference with and breach of contract by the plaintiff.

In response, the plaintiff sought a stay of proceedings on the counter claim and, again, the appointment of an arbitrator. For the plaintiff it was argued, that because compliance with the forum selection clause had become impossible, the forum selection provision should be severed and the defendants should be ordered to perform the essential part of their bargain to arbitrate. The decision lost some of the impact it would otherwise have had on the point in issue because it was conceded that the court had no power to order arbitration in Teheran. The power to make such an order was confined by US legislation to ordering arbitration in countries that were signatories to the New York Convention. Iran was not a signatory. However, relevantly to the present discussion and somewhat ironically, the plaintiff submitted that the impossibility or commercial impracticability of the defendants participating in an arbitration in Iran made the forum selection clause inoperative. The court distinguished The Bremen (supra) on the basis that there the forum selection clause did not relate to the site of an arbitration. The court took the view that the applicable principle was laid down in Reisfeld (supra) "that the forum selection clause contained in an arbitration provision must be enforced, even if unreasonable". (ib p 332). The Ashland court recognised that even under the principles laid down in Reisfeld, the argument that the political atmosphere rendered arbitration in Iran impossible or impracticable might call for unenforceability of the clause. However, anything short of

impracticability was insufficient and the plaintiff did not pitch its claim that high. In the court's view, there were two requirements to be satisfied to make out a case of impossibility or commercial impracticability. First, "the affected party must have no reason to know at the time the contract was made of the facts on which he relies". In the court's view, it was unimaginable that the plaintiff could not have foreseen at the time the contract was made that (p 333) "Teheran would become a forum in which it is undisputably impossible for Americans to participate in proceedings". Second, a party may not rely on the doctrine of impossibility or impracticability if the event is due to the fault of the party himself. The court concluded that "as part of the revolutionary government" the plaintiff bore responsibility for the chain of events. More importantly than the debatable conclusions of the court as to the factual situation it was said that the plaintiff would have to show that the agreement to arbitrate was of the essence while the situs was merely "a minor consideration". The court concluded (p 334):

> "Notwithstanding considerations of "convenience", one cannot reasonably argue that the parties' contract contemplates arbitration in Mississippi. The contract's provision that arbitration was to be in Tehran "unless otherwise agreed" suggests that, were Iran to become inconvenient or unacceptable to one or both parties, no other forum was to be available unless mutually agreed upon. Because arbitration is a creature of contract, we cannot rewrite the agreement of the parties and order the proceeding to be held in Mississippi."

Although the court referred to Mitsubishi (supra) it did not address the question pinpointed by the majority opinion and earlier quoted. Reading the polemical passage in the Ashland judgment intituled "Conclusion", it is difficult to escape the apprehension that the court was unduly impressed by the identity of the plaintiff. Nonetheless, certiorari was denied by the Supreme Court.

It is submitted that, at least in the United States, the test of forum non conveniens in face of a forum selection clause, in an international agreement, calling for arbitration should be taken from the majority in Mitsubishi. For success an applicant is required to show that the difficulties confronting it will result in an absence of a proper opportunity to have its case heard. The gloss added by Ashland should not be accepted. The true path has been correctly stated by Hakan Berglin, "The Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal", 4 J.Int.Arb.46 at 48, "it is a well established practice of municipal and international tribunals to deny enforcement of choice of forum clauses, when radical changes have fundamentally altered the circumstances relied upon when the clauses were negotiated". The article relies on the opinions of Judge Holtzman in "With respect to Interlocutory Awards on Jurisdiction in Nine Cases containing various forum selection clauses" (1 Iran - US Claims Trib Rep 283 esp p 289 et seq). If I may say so, with great respect, the exposition by Judge Holtzman seriously challenges the accuracy of the conclusions in Ashland.

It is perhaps instructive to contrast Ashland with the decision of the English Court of Appeal in Carvalho v Hull Blyth (Angola) Ltd (1979) 3 AER 280. The forum selection clause in the contract there in question provided that "In the case of litigation arising the District Court of Luanda should be considered the sole court competent to adjudicate to the exclusion of all others." At the time of the contract, the District Court of Luanda was governed by Portugese law with a right of appeal to the Supreme Court in Lisbon. Two years after the contract was made, Angola became independent under a revolutionary government. A civil war broke out. Although there continued to be a District Court at Luanda the system of appointment of judges was completely different. The English Court held that the Luánda court was no longer that contemplated by the contract and accordingly the plaintiff was not bound by the agreement to litigate only in Angola. If I may say so, the approach of the English Court, whilst it pays full regard to the demands of the principle of pacta sunt servanda, makes a much more realistic attempt at dealing with revolutionary changes than the Ashland court did. It more appropriately charts the way to go.

In his article Internationalisation of Commercial Arbitration, (1987-88) 13 Can Bus L Jnl 1, Professor Graham accepted that the test enunciated in the Bremen is the best approach to claims of forum non conveniens in the case of international

arbitrations where the parties have chosen a forum in advance. For the position in Canada he referred to Ship M/v Sea Pearl v Seven Seas Dry Cargo Shipping Corporation 139 DLR 3rd 669 where the Federal Court of Appeal in Canada applied principles settled in English courts as well as in the United States. Pratte J, delivered the judgment of the majority, and although Thurlow CJ dissented, he did not take any different view of the law. Pratte J said (p 681):

> "Prima facie an application to stay proceedings commenced in the Federal Court in defiance of an undertaking to submit a dispute to arbitration or to a foreign court must succeed because, as a rule, contractual undertakings must be honoured. In order to depart from that prima facie rule 'strong reasons' are needed, that is to say, reasons that are sufficient to support the conclusion that it would not be reasonable or just, in the circumstances, to keep the plaintiff to his promise and enforce the contract he made with the defendant. This is a principle which is now applied in England ... and in the United States. That is also in my opinion a principle which should be applied in this court."

The expression "strong reasons" in order to overcome a prima facie case for enforcement of the contract was borrowed from Brandon J at first instance in The Adolf Warski (1976) 1 Lloyd's Rep 107 (affirmed 1976 1 Lloyd's Rep 241) and thereafter applied in a long line of decisions both at first instance and in the Court of Appeal (cf The El Amria [1981] 2 Lloyd's Rep 119 @ 122).

In the result, I suggest that whether the requirement be for "strong reasons" or "seriously inconvenient" in the end the test for application of the principle of forum non conveniens

is bottomed, as Pratte J suggests, on what is just. In evaluating that the court will bear in mind the extent to which the facts founding the claim were present or foreseeable at the time of selection of the forum.

With respect to domestic agreements also, the United States courts have maintained, perhaps in a less rigid form, in face of claims of forum non conveniens the obligation to adhere to a forum freely selected in advance. In Domke Commercial Arbitration, the author says (p 240):

> "There will seldom be a situation where the selection by both parties of a specific place for the arbitration will be altered by the courts as unreasonable in the face of the express contractual choice."

As an example, the author cites in support of the proposition Texas San Juan Oil Corp v An-Son Offshore Drilling Co 198 F.Supp 284. The contract expressly called for arbitration in New York and one party sought to have the action and the arbitration transferred from New York to Louisiana for the convenience of the parties and witnesses. The court said (p 286):

> "What the respondent is seeking is a direction to the arbitrators as to the place where they hold their hearings. There appears to be no substantial reason why the respondent should be relieved from its contractual obligations."

On this approach, the party wishing for a change in a domestic forum is required to demonstrate only a "substantial reason". In United States v American Employers' Insurance Co of

Massachusetts 290 F.Supp 139 the contract called for arbitration in Dade County Florida. The court ordered that, "as burdensome as it may be", the arbitration was to be held in Florida. Again, in Spring Hope Rockwool Inc v Industrial Clean Air Inc 504 F.Supp 1385, a sales contract for baghouses provided for arbitration of erection issues at the erection site and for any other issues in Berkeley, California. The plaintiff sought to strike the arbitration clause as unconscionable and unenforceable due to the extreme inconvenience of California. It further argued that even if the arbitration clause was valid the court should apply the doctrine of forum non conveniens and direct the arbitration be held in North Carolina rather than California. The plaintiff submitted that because the exercise of its right to arbitrate would be prohibitively expensive given the choice of forum, the plaintiff's remedy was effectively foreclosed. It was argued that the baghouses themselves and many of the witnesses were in North Carolina. Chief Judge Dupree of the Federal District Court of the Eastern District of North Carolina held that application of the forum non conveniens doctrine was not authorised under the Federal Arbitration Act.

In the article I have previously mentioned Professor Graham went on to deal with difficulties where there is no forum selection clause in specific terms but a claim of forum non conveniens is raised in respect of the site selected by a third party. He wrote (p 29):

> "The question does arise, however, whether it would be appropriate to apply a less stringent test in the case where an arbitral institute, or the arbitrators themselves, have selected the forum because the parties failed to provide for it in their agreement. In my view, the same standards should prevail in this case as well, the parties having deliberately left their choice to a third party with full knowledge of the possibilities that that would entail."

The point made by Professor Graham was taken up by the Court of Appeal for the Ninth Circuit in Aerojet-General Corp v American Arbitration Association 478 F 2d 248. The plaintiff was an Ohio corporation with its principal place of business in California. The defendant was an Israeli company with its principal place of business in Israel. The contract was to engage in a joint venture in Israel. The defendant requested arbitration in New York. The plaintiff wanted the arbitration in Los Angeles. The American Arbitration Association designated New York the site for the arbitration. The plaintiff considered the selection arbitrary and capricious. The plaintiff contended that New York bore no relationship to the dispute, to the parties, or its witnesses. The AAA gave reasons why it chose New York. The court accepted that, in the absence of agreement to eliminate all judicial review, some scrutiny of the choice of locale could be appropriate because a selection could cause irreperable harm. This view was taken notwithstanding the language of the AAA's Commercial Arbitration Rules that its determination as to locale is "final and binding". The court said (p 251):

> "Extreme cases can be imagined in which the choice of locale for arbitration is not made in good faith and severe irreperable injury is inflicted. In such case the courts should be free to prevent a manifest injustice."

In the case before it, the court found that the selection had been made in good faith and no irreperable injury would result.

United States courts have considered also a third category of possible situations. What if there is not a forum designated by the contract nor a third party designated to make a choice? In other words, the parties agreed on nothing more than that any dispute between them should be resolved by arbitration. The current view seems to be that the principle of forum non conveniens should be allowed full play in such circumstances.

The decision of the US District Court for the Southern District of New York, Cannella J, in Oil Basins Ltd v BHP (1985) 613 F Supp 483, is dictated by commercial common sense. The plaintiff, a Bermudan company was the assignee, as trustee, of the benefit of a royalty agreement in respect of hydrocarbons produced in the Bass Strait in Australia. A dispute arose as to the calculation of royalties payable by the defendant, an Australian company. The royalty agreement made provision for arbitration, the dispute between the parties was as to the situs of the arbitration. The plaintiff sought arbitration in New York. Subsequently to the commencement of proceedings in

New York, the defendant commenced an action in the Supreme Court of Victoria to compel arbitration to take place there. In the New York proceedings the judge was hampered by two procedural problems. First, the court held it had power to compel arbitration only in its own district or in a place specified in the contract (p 488). The contract did not specify any place for arbitration whether expressly or impliedly. Second, there was no application to dismiss on grounds of forum non conveniens (p 486). In the result, the court granted the plaintiff's motion to compel arbitration in New York but (p 488) "in the light of the fact that Australia appears to be the most logical situs for arbitration, the court will entertain a motion to reconsider its decision to compel arbitration in New York if the arbitrator or arbitrators once selected determine that the proceedings would best be conducted in Australia". Thereafter, the defendant accepted the court's invitation to reopen and sought and obtained an order for dismissal on the ground of forum non conveniens.

Fortuitously, shortly after the initial decision of the District Court, the Court of Appeals for the Second Circuit held in Maria Victoria Naviera SA v Cementos del Valle (1985) 759 F 2d 1027 that district courts have the power to dismiss a petition to compel arbitration on the ground of forum non conveniens (ib p 1031). On reconsideration, the District Court said the balance of interests weighed overwhelmingly in favour of the Australian forum.

The question was adverted to, albeit briefly, when the dispute was litigated in the Supreme Court of Victoria in BHP Petroleum Pty Ltd v Oil Basins Ltd (1985) VR 725 (on appeal 1985 VR 756) and the view tentatively expressed that the law in Australia was the same as in the U.S.

This dispute is a convenient vehicle for illustrating the point I made earlier as to the importance that the situs of an arbitration may assume. The eventual award was delivered in Victoria, Australia by a panel of arbitrators consisting of an English former Lord of Appeal, a former Solicitor-General and Judge of the Federal Court of Australia and a former United States District Judge. Needless to say, the award did not please both sides and pursuant to the provisions of the Commercial Arbitration Act, the disappointed party sought leave to appeal to the Supreme Court of Victoria. The Act allows for judicial review by leave only. It is still a moot point whether the same guidelines as are applicable in England should govern the exercise of the court's discretion in granting leave to appeal or whether the discretion is more unstructured (cf Finlay An Overview of Commercial Arbitration in Australia, 4 J Int Arb 103). Accordingly, the judge before whom the application came referred it to the Full Court for determination and, bearing in mind both the amount involved and the importance of the issue, it may well go to the High Court of Australia for ultimate resolution. With that may be

contrasted the position of the disappointed party had the arbitration taken place in New York. The ultimate irony is that the party dissatisfied with the award and seeking judicial review is the plaintiff in the US court who had originally sought arbitration in that country.

In England, the decisions which concern choice of forum clauses all involved a competition between jurisdiction of English courts and jurisdiction of foreign courts. In other words, the competition was not between arbitral proceedings in one country as against the other or between proceedings in court in England and arbitral proceedings elsewhere. Thus the problem with which this paper is concerned did not truly arise. Nonetheless, I have no reason to suppose that the applicable test is any different. A party who has promised to submit a claim or dispute to a tribunal, arbitral or judicial, in an agreed place will be held to his promise unless there is strong reason to allow him to depart from it (infra p 16).

In Naviera Amazonica Peruana SA v Compania International de Seguros del Peru (supra), a Peruvian insurance company provided cover to a Peruvian shipowning company under a hull policy. The policy provided in Article 31 that in the event of judicial dispute the insured accepted the jurisdiction and competence of the City of Lima. Paragraph 3 of a subsequent endorsement called for arbitration under the "conditions and laws of London". The shipowners argued that the seat of the

arbitration was London. The insurers contended that any dispute should be settled in Lima by arbitration on the basis of English insurance law and practice. It was not truly a forum non conveniens argument but turned more on the proper construction of the policy. The Court of Appeal considered that prima facie the forum of any arbitration which might take place under the endorsement was London, since the arbitration clause provided, in effect, that the law in force in London was to be the curial or procedural law of any such arbitration. The court emphasised that the legal "seat" of an arbitration was not to be confused with the geographically convenient place or places for holding hearings. It is difficult to envisage an English court interfering with the decision of the arbitrators as to where the hearings should actually take place.

Nonetheless, the decision gives rise to a question. Why should not the selected forum always remain the seat of the arbitration and the applicability of the doctrine of forum non conveniens rejected as having no say on that matter? On the other hand, the doctrine should be permitted full operation in determining the actual place or places of hearing in the very rare case where the decision of the arbitrator could be productive of injustice. This approach could accommodate all the US decisions as well as the Indian decisions I will discuss shortly. It might not meet a situation where the curial law of the selected forum had undergone drastic change.

The approach last indicated would leave one further matter for debate. It should ordinarily be a matter for the arbitrator whether the hearing take place in town A or B or wherever. Should a national court ever interfere in this respect? In this regard, the decision of a New South Wales judge is of some interest. In Bliss Corporation Ltd v Kobe Steel Ltd (unreported Supreme Court of NSW 29 September 1987), the judge was confronted with an application for a stay made pursuant to s 57(2) of the NSW Commercial Arbitration Act, 1984. That provision is in the following terms:

> "(2) Subject to this Part, where -
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> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
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> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement is capable of settlement by arbitration,
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> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case requires, and refer the parties to arbitration in respect of that matter."

The interesting feature of the provision is that whilst it makes the grant of a stay mandatory in respect of agreements to which the New York Convention applies, the section allows for the imposition of conditions. The plaintiff submitted that in staying the proceedings the court should impose conditions requiring the whole of the arbitration to be held in New South Wales for forum conveniens reasons, notwithstanding, the forum

selection clause designating arbitration in Tokyo. The judge held that:

> "Having regard to the substantial practical considerations in favour of holding the arbitration in Tokyo and the contractual provision that it be held there, I would not, as a matter of discretion in granting a stay, impose a condition that the whole of the arbitration be held in New South Wales. This would be an unwarranted interference with the discretion of the arbitrators. The conduct of the arbitration is their province.
>
> Alternatively, Bliss submitted that the court, in granting a stay, should impose a condition that the evidence of the Australian witnesses should be taken in New South Wales. Kobe submitted that this was not the kind of condition which should be imposed. Indeed, it questioned the power of the court to impose it. Such a condition involved the court intruding upon the province of the arbitrators. Kobe submitted that in relation to international agreements containing arbitration clauses, it was the intention of the Legislature that the courts should not intervene. Once s 57(1) had been met, the court was obliged to grant a stay. The kind of condition which could be imposed was one that facilitated the arbitration or ensured that the applicant for the stay proceeded diligently and promptly. Kobe submitted that a condition requiring prompt prosecution was a good illustration of a condition which the court had power to and was proper to impose. The court should not impose conditions which inhibited the arbitrators in their conduct of the arbitration.
>
> The power of the court is to impose such conditions as it thinks fit. These are words of wide import which should be given their ordinary meaning. However, in the exercise of the court's discretion it will clearly be circumspect in the conditions it imposes, recognising that where an agreement of the type referred to in s 57(1) applies, the parties have chosen arbitration and the Legislature has provided that that choice is to be given effect to and that the court should not indirectly by the imposition of conditions to some extent control how the arbitration proceeds."

The judge was perhaps not quite as emphatic in giving full rein to the arbitrator as the Deputy High Court judge in Hong Kong was in a slightly different context. In the second Shui On Construction Case (unreported 31 July 1987) the court said:

> "I would only have considered ordering consolidation, subject to the condition that the hearing not take place before a particular date, later in time than Shui On's timetable. However it is generally undesirable for the Court to reduce the freedom of an arbitrator by imposing conditions which would amount to arbitration directions, or otherwise unnecessarily to usurp the arbitrator's powers."

These judgments recognise that intervention by the court should be an ultimate sanction to be exercised only if the fundamental dictates of justice so require.

India is the only country in which successful applications have been made to secure arbitral hearings away from the agreed forum. The facts in M/s V/O Tractoroexport Moscow v M/s Tarapore and Co (1971) AIRI were commonplace. The Indian firm purchased tractors from the Russian company by a contract which called for arbitration of disputes before the Foreign Trade Arbitration Commission of the USSR Chamber of Commerce in Moscow. When differences arose, the Russian company commenced arbitral proceedings. The Indian firm commenced proceedings in India to enjoin the Russian company from further proceeding with the arbitration in Moscow. The Russian company sought a stay. The principal arguments against the grant of a stay are not relevant to the present discussion but obiter Grover and Shah JJ of the Supreme Court of India said (p 12):

> "The current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian Firm to take its witnesses to Moscow for examination before the Arbitral tribunal and to otherwise properly conduct the proceedings there. Thus, the proceedings before that Tribunal are likely to be in effect ex parte. The High Court was, therefore, right in exercising discretion in the matter of granting an interim injunction in favour of the Indian Firm."

The result in Renugasar Power Co v General Electric Co (1985) 86 AIR 1156 was more in accordance with the generally accepted standard approach. Pendse J of the Bombay High Court refusing the application for stay, said:

> "The mere fact that the evidence which the respondents desire to lead is from this country is no answer to the claim of the petitioners that the arbitration proceedings must continue and the suit instituted by the respondents should be stayed. As regards the difficulty in securing the foreign exchange, the record indicates that the respondents had made an application before the Reserve Bank of India for grant of foreign exchange for defending the proceedings before the arbitrators and have succeeded in securing the foreign exchange. The mere fact that the proceedings before the arbitrators to be conducted outside India might cause some hardship to the respondents is no ground to by-pass the arbitration clause contained in the contract. In case the party is permitted to resile from the arbitration clause on such ground, then the international trade and commerce would come to a standstill. The respondents have entered into the contract with open eyes and it is futile to them to claim that now they find it difficult to participate in the arbitration proceedings."

It will be observed that application of the approach of the Ashland court would have led Grover and Shah JJ in the earlier decision to a different conclusion. They would have had to refuse to apply the forum non conveniens principle on the ground that the Indian firm would have known all about the

problem of foreign exchange when it agreed to arbitration in Moscow. Yet it seems harsh indeed that meeting the test of impossibility should be insufficient to avoid the forum selection clause on the basis of the principle of forum non conveniens.

It is submitted that, strictly confined, as it should be, to instances where proper opportunity for vindicating the rights of the parties demands it, the reserve power of the courts to negate forum selection or transfer the place of hearing should be maintained and exercised.