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# SIR KENNETH BAILEY MEMORIAL LECTURE: DISPUTE RESOLUTION IN A COMPLEX INTERNATIONAL SOCIETY

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*[Today's complex international society calls for a fresh approach to transnational dispute resolution. The first part of the article focuses on the changing nature of disputes around the world and the lessons to be learned from other countries' approaches to litigation. Specifically, this part discusses the need to address collective or group interests in private litigation. It also explores the consequent need to find ways of representing the public interest in private and especially arbitral disputes, perhaps through the means of an amicus curiae system. The second part of the article addresses the necessity for cross-border cooperation. In a globalised world, there is a strong need to develop new principles and rules to govern cross-border judicial assistance. This article looks at examples of such cooperation which already exist, and discusses the prospects for improving cooperation through networks of government authorities and judges, cooperation between judges and the arbitral process, and court-to-court cooperation in such areas as the grant of provisional measures, the taking of evidence, and the administration of bankruptcy proceedings.]*

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## I INTRODUCTION

Thirty years ago, at least in French universities, international law classes dealt with only a few procedural mechanisms: the International Court of Justice in classes on public international law, and jurisdiction and judgments in classes on private international law. Law professors were not interested in dispute resolu-

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tion and devoted most of their lectures to substantive issues. International commercial arbitration was not taught as such. The International Criminal Court did not exist, and, although its establishment had been foreseen by the founders of the *Charter of the United Nations*, it was unlikely to be instituted soon. The International Centre for Settlement of Investment Disputes ('ICSID') was still a very young, dormant institution.<sup>1</sup> In this procedural 'quasi-desert', the only well-functioning judicial institutions for private disputes were the European Court of Human Rights ('ECHR') and the European Court of Justice ('ECJ').<sup>2</sup>

Change came with the advent of globalisation and the increased movement of persons, entities and activities after the fall of the Berlin Wall. Today, disputes have a new character: not only do they involve more people than ever before, but they also involve people residing in, or entities established in, many different countries. In addition, instead of the large multinational corporations which, thirty years ago, made up the bulk of international disputes, nowadays small corporations and even individuals take part in international activities or are affected by such events, and hence become interested in transnational lawsuits.

At the same time, access to justice has become a fundamental right. The role of the legal norm is changing slowly. First, there is what is called the 'contractualisation' of the law. This is not an easy concept to grasp. In one of its senses, it means that the legal norm is less created by the nation-state than by private actors through party autonomy (again a controversial concept), by which actors have the right to regulate their own activities to an ever-increasing extent. Hence, states have less power to regulate activities a priori, in a preventive way. Regulation is more often left to the judge who acts a posteriori, after the activity has been performed and when a dispute has already arisen. Second, in civil or commercial tort actions, as well as in criminal prosecutions, victims play a growing role. Penal justice is no longer simply a bilateral battle between a prosecutor and a defendant. Victims have begun to act and claim financial reparation and civil damages. Sometimes, victims consider it more important to receive financial compensation than to gain the moral satisfaction of seeing the tortfeasor sanctioned penally. It is no coincidence that the *Alien Tort Claims Act*<sup>3</sup> was reborn in the United States in the early 1980s, giving rise to a large amount of litigation in the early 1990s.<sup>4</sup>

However, the increase in the need for justice by citizens has not translated into a proportional increase in the resources given to judicial systems in most

<sup>1</sup> It had only been established in 1966 under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*'). For information about ICSID, see generally <<http://www.worldbank.org/icsid>>.

<sup>2</sup> It should be noted that even these institutions were not fully empowered since many countries (for example, France) had not accepted the right of direct recourse by their citizens.

<sup>3</sup> 28 USC § 1350 (1948).

<sup>4</sup> The literature on the *Alien Tort Claims Act* 28 USC § 1350 (1948) is considerable. In an earlier article, the author has examined the private international law issues stemming from civil actions for human rights violations: see Catherine Kessedjian, 'Les Actions Civiles pour Violation des Droits de l'Homme: Aspects de Droit International Privé' in Comité Français de Droit International Privé (ed), *Travaux du Comité Français de Droit International Privé: Années 2002–2004* (2005) 151.

countries. Hence, there is a growing disparity between, on the one hand, the right to access justice and the expansion in the number of disputes which judges have to resolve, and, on the other, the allocation of money to national judicial systems. One result of this is a phenomenon known as the 'privatisation of justice': states increasingly rely on alternative modes of dispute resolution, particularly arbitration, which is a true alternative to litigation.<sup>5</sup> However, given that arbitration is a private process, usually confidential, it is neither well known nor understood by the general public. It may also be questioned whether the rules created in the 20<sup>th</sup> century for purely commercial disputes are adequate to meet the evolving needs of the 21<sup>st</sup> century transnational society.

The 'privatisation' of justice is also one of the consequences of the 'contractualisation' of law. By that expression I mean that parties to a dispute now have more choices than they ever had before. Not only does party autonomy play an ever-increasing role in the substantive law which is applied to the dispute, but parties are also able to choose procedural rules. Traditionally, the privatisation process has materialised in the choice granted to parties between several different types of dispute resolution mechanisms. Arbitration (or similar mechanisms such as trade fairs in the Middle Ages) was first created as an alternative to court proceedings. Then, as arbitration became more procedurally technical, less rigid means were offered, such as conciliation or mediation,<sup>6</sup> or a combination of both resulting in the Med-Arb system or the mini-trial model.

Even more significant is the development of procedural rules specifically created for transnational disputes, which parties to those disputes may craft for themselves, or which apply by default in the absence of a specific choice made by the parties. This trend has also occurred in arbitration. In the last two decades or so, arbitration practice has created a set of procedural rules which are considered to be truly transnational, as they apply in many types of arbitration proceedings, whatever the nationality of the parties or of the arbitrators, and whatever the institution under the auspices of which the proceedings take place.<sup>7</sup> Moreover, a proposal for a code of procedural principles has been jointly adopted by the American Law Institute ('ALI') and the International Institute for the Unification of Private Law ('UNIDROIT').<sup>8</sup> Although this is quite a controversial endeavour,<sup>9</sup> it does illustrate that the privatisation of justice also has its foot in the door of the court.

<sup>5</sup> The expression 'alternative dispute resolution' is not understood in the same sense everywhere. In some countries it includes arbitration, while in others arbitration is excluded. In the following discussion, 'alternative dispute resolution' will refer to all means of dispute resolution other than litigation in state domestic courts.

<sup>6</sup> See, eg, Eileen Carroll and Karl Mackie, *International Mediation — The Art of Business Diplomacy* (2000). For recent trends with respect to mediation throughout the world, see Nadja Alexander (ed), *Global Trends in Mediation* (2003).

<sup>7</sup> See, eg, Dominique Hascher, 'Principes et Pratique de Procédure dans l'Arbitrage Commercial International' (1999) 270 *Recueil des Cours* 52.

<sup>8</sup> See ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure* (2004) ('ALI/UNIDROIT Principles and Rules'). See below Part II(C) for further analysis of the project. Only the principles were adopted by both institutions; the rules remain the product of the ALI.

<sup>9</sup> For a discussion of the French experience, see Philippe Fouchard, *Vers un Procès Civil Universel? Les Règles Transnationales de Procédure Civile de l'American Law Institute* (2001). For a discussion of the German and Swiss experiences, see Gerhard Walter and Samuel

Simultaneously, arbitration has become more aggressive and less consensual. It is very frequent nowadays that parties who have initially accepted an arbitration clause in an agreement will try to evade their obligation when an actual dispute arises, by trying to challenge the validity of the clause, or by claiming in court related issues which could be dealt with by the arbitration tribunal. Consequently, there are growing difficulties in arbitration, such as simultaneous proceedings before an arbitral tribunal and state courts. In addition, further jurisdictional challenges arise where courts with multiple tribunals in different countries are asked to resolve the same or related disputes.

Part II of this article will focus on the changing nature of disputes around the world and the lessons to be learned from other countries' approaches to litigation.<sup>10</sup> For example, the class/group/collective action models will be further studied. This part also discusses the possible development of a new role for judges. In common law countries, there is room for judges to take a more active role in the management of cases and, in civil law countries, they could be less timid in crafting solutions for a changing society. Furthermore, the representation of interests other than those of the parties to the dispute themselves may have an increased importance as judicial solutions tend to replace a priori legal norms. The ever-diminishing vertical role of states, whose role as norm creator is increasingly challenged by other transnational actors, increases the importance of judges, since there must be a point at which the conflicting interests at stake are resolved. If the solution is not a priori, by preventive law-making, it has to be a posteriori, through dispute resolution mechanisms. Hence, there is an ever-increasing role for dispute resolution mechanisms in a rapidly changing and complex transnational society.

Part III will then discuss the need to develop a new approach to transnational dispute resolution. The solutions which sufficed 30 years ago are now totally inadequate to resolve the current issues and intricacies of international disputes, highlighting the strong need to develop new principles and rules to govern cross-border judicial cooperation. It is argued in this part that greater focus must in fact be placed on cross-border judicial cooperation than on assistance, in order to develop a more effective approach to transnational dispute resolution.<sup>11</sup>

Baumgartner, 'Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project' (1998) 33 *Texas International Law Journal* 463.

<sup>10</sup> Baumgartner argues that the major importance of a comparative approach to transnational litigation is that it provides a means to develop better rules: Samuel Baumgartner, 'Is Transnational Litigation Different?' (2004) 25 *University of Pennsylvania Journal of International Law* 1297, 1385–90. Comparative analysis has been the major tool for the harmonisation of European law; whether it creates better rules is arguable. For a sceptical view, see Barbara Dohmann and Adrian Briggs, 'Learning to Learn from Others in Europe in Commercial Litigation' in Birgit Bachmann et al (eds), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtbarkeit — Festschrift für Peter Schlosser zum 70 Geburtstag* (2005) 161.

<sup>11</sup> The concept of cooperation is very often misunderstood and sometimes taken only to be a synonym for 'assistance': see, eg, Baumgartner, above n 10, 1312, who argues that '[j]udicial cooperation is the performance of a judicial act by one court on its territory upon the request and for the benefit of another' (citing as an example Bruno Ristau, *International Judicial Assistance* (1984) vol 1).

## II COLLECTIVE INTERESTS IN PRIVATE LITIGATION

There are two sets of developments which make it necessary to seek other means of rendering justice. First, the number of persons (be they individuals or companies) involved in cross-border disputes has grown tremendously. For example, one can reflect on the number of people affected by the 1990 invasion of Kuwait by Iraq; the number of people who may have a claim in what are known as 'the dormant accounts' in Swiss banks; or the number of civil suits for damages stemming out of the sale of a defective product. Second, a single action between two parties may affect many more people than those two parties themselves. Investment disputes are a typical example of this second trend.<sup>12</sup>

Beyond ad hoc mechanisms, which will be described briefly below, the main question is how domestic systems should adapt to cope with these new developments. In the first category of cases, the procedural answer may be to create something like a class action (aggregate litigation)<sup>13</sup> or a group action. In the second category, one of the possible answers would be to allow intervention by third parties, particularly via the *amicus curiae* system.<sup>14</sup>

<sup>12</sup> Investment disputes are now more often than not resolved through arbitration, either via bilateral investment treaties, multilateral agreements (such as the *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (entered into force 1 January 1994) ('*NAFTA*')) or direct ICSID arbitration. There are many concerns that arbitration — as developed in the last century for purely commercial disputes — may not be the most appropriate mechanism to decide investment disputes. Although this article is not the place to explore this issue fully, it is worth mentioning that a constitutional challenge was brought before the Ontario Superior Court of Justice in *Council of Canadians v A-G (Canada)* (Unreported, Ontario Superior Court of Justice, Pepall J, 8 July 2005). In that case, a Canadian anti-trade non-government organisation ('NGO') and the Canadian Union of Postal Workers challenged the constitutionality of the *NAFTA*'s authority under ch 11 of the *NAFTA*, arguing that the *NAFTA*'s grant of authority to an arbitral tribunal represented a constitutional breach. Pepall J explained, however, that the case was premature, and not based on a specific set of facts that would permit an assessment of potential harm, and therefore the record was 'inadequate to render the determination requested by the Applicants': at [64]. Nevertheless, the ruling suggests that it might be appropriate to challenge ch 11 by arguing that a tribunal should be required to consider the *Canadian Charter of Rights and Freedoms (Constitution Act 1982, being sch B to the Canada Act 1982 (UK) c 11, pt 1 ('Charter'))* in a particular case, or that an administrative or legislative action taken by the government in response to the findings of a *NAFTA* panel ruling should be subject to the *Charter*. Pepall J further explained that arbitral tribunals have no authority to change Canadian domestic laws or practices, and their jurisdiction is limited to international law issues put before them and to the remedies provided under the *NAFTA*. Specifically, Pepall J wrote (at [65]) that

[n]othing in the *NAFTA* compels the Canadian government to amend its laws and practices. The arbitration of claims that Canada has failed to honor its treaty obligations does not affect or determine the rights of Canadians. As such, there can be no breach of the *Charter* that arises simply as a result of the establishment of these tribunals.

<sup>13</sup> The expression 'aggregate litigation' is used instead of the term 'class action' to show that the issue of collective/group actions is wider and more diverse than just the class action model. It is also the title chosen by the ALI for its new project, *Principles of the Law of Aggregate Litigation*. The ALI defines aggregate litigation as follows:

An aggregate lawsuit is one in which a final judicial order on the merits resolves a claim involving multiple claimants or multiple respondents, or in which the joinder of parties allows for the common disposition of overlapping issues. ... Examples of aggregate lawsuits include mass tort actions, class actions, RICO actions naming multiple defendants as conspirators, and multi-district consolidations.

ALI, *Principles of the Law of Aggregate Litigation* (Preliminary Draft No 2, 2005) 1.

<sup>14</sup> For this part of the article, I am indebted to Séverine Menétreay, a student at the Université Panthéon-Assas (Paris II) who is preparing, under our supervision, a doctoral dissertation on the subject 'L'Amicus Curiae — Vers un Principe de Procédure Internationale?'

### A Aggregate Litigation

The class action phenomenon started in common law countries, particularly in the United States.<sup>15</sup> It is not entirely clear why such an action became so popular and has been used so systematically in that particular country. It may have to do with the more litigious character of United States society; every citizen having in mind that it is a fundamental right to seek redress in court. Judges also play a more prominent role in defining social values in the United States than in many countries. Finally, the search for efficiency in the judicial process may also have been relevant.

In any case, it is now a given that 21<sup>st</sup> century society needs to organise mass claims in a different way than it did before, as such claims have become more and more frequent. Mass claims are not all similar, but they often stem from historical events such as the Second World War and the Holocaust, the first Gulf War and the invasion of Kuwait by Iraqi forces in 1990, the genocide in Rwanda in 1994, or the Yugoslav wars in the early 1990s. Some of these mass claims stem from international settlements, such as the property claims processed by the German foundation, Remembrance, Responsibility and the Future, which was established after a settlement was entered by an executive agreement between the United States and Germany<sup>16</sup> as a consequence of the court proceedings commenced in the United States against German companies by Holocaust victims or their heirs.<sup>17</sup> Some mass claims take the form of ad hoc arbitration tribunals such as the Iran–United States Claims Tribunal, created by the Algiers Accords in 1981<sup>18</sup> and having its seat at The Hague.<sup>19</sup> Other mass claims have taken the form of administrative tribunals, such as the United Nations Compensation Commission, created in the aftermath of the first Gulf War.<sup>20</sup>

Although these forms of dispute resolution are interesting, my aim is not to study them, but rather to analyse whether and how a form of collective action could be incorporated into national legal systems, so as to accommodate international mass claims which stem from either human rights violations or more traditional activities such as environmental harm, product liability, and the like.<sup>21</sup>

<sup>15</sup> In the United Kingdom, it was only in 1999 that multi-party actions were introduced after Lord Woolf's report on access to justice: Department for Constitutional Affairs, United Kingdom, *Access to Justice (Final Report)* (1996) ('*Woolf Report*'). This type of action relies on the management skills of the new proactive judge, and on the full cooperation of lawyers.

<sup>16</sup> *Agreement concerning the Foundation 'Remembrance, Responsibility and the Future'*, United States–Germany, 39 ILM 1298 (entered into force 17 July 2000).

<sup>17</sup> These cases were initiated by, amongst others, a prominent New York lawyer and professor, Burt Neuborne: see Burt Neuborne, 'Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts' (2002) 80 *Washington University Law Quarterly* 795. See also Pierre A Karrer, 'Mass Claims to Provide Rough Justice — The Work of the Property Claims Commission of the German Foundation "Remembrance, Responsibility and the Future"' in Birgit Bachmann et al (eds), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtbarkeit — Festschrift für Peter Schlosser zum 70 Geburtstag* (2005) 329.

<sup>18</sup> *Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, 20 ILM 230 (entered into force 19 January 1981).

<sup>19</sup> See Iran–United States Claims Tribunal <<http://www.iusct.org/index-english.html>>.

<sup>20</sup> See The United Nations Compensation Commission <<http://www2.unog.ch/uncc/>>.

<sup>21</sup> See also the creation of 'compulsory arbitration' in insurance and banking consumer claims in the United Kingdom and Ireland: Financial Services Authority, *FSA Guide to Making a*

In order to do so, this article will briefly explain which kinds of collective actions are known in civil law countries and the European Union ('EU'). It then looks at the issues which may have to be resolved in order to accommodate such transnational mass claims in domestic courts without having to resort to the formation of additional ad hoc tribunals.

Mass claims have not been frequent in civil law countries because, in civil law, standing to sue has always been interpreted very strictly. Hence, any third party not represented in a trial would not be affected by the outcome of the case. This is not to say that group actions have been completely unknown in civil law countries.<sup>22</sup> First, it must be noted that in Portugal a 'civil public action' may be instituted by the *Ministério Público* (not by an individual or a group) in order to prosecute collective interests.<sup>23</sup> Recourse to such a public action is indeed a fundamental right. In order for such an action to be commenced there must be a social interest at stake. The judge must find that there is an 'active legitimacy'.<sup>24</sup> That is, the judge must find that individually, claimants would not reach the same result or the action could not be instituted; that the trial would be just and fair; and that the effects of the decision would be the same for all persons who carry the same rights.<sup>25</sup> In Brazil, the Portuguese influence has imported a similar action. There, the civil public action will only dispose of the defendant's liability,<sup>26</sup> and an individual decision for each plaintiff will be made on the

*Complaint about Financial Services* (2005) 14–17, 20, 24–5 <<http://www.fsa.gov.uk/consumer/pdfs/complaint.pdf>>; cf *Consumer Arbitration Agreements Act 1988* (UK) c 21. Obviously, there is a contradiction in terms when one speaks of 'compulsory' arbitration, as the very nature of arbitration relies upon the parties' voluntary engagement in the process. However, once this conceptual problem is resolved, the question is whether this model could develop into some kind of transnational arbitration. So far, it seems difficult to do so because of conceptual obstacles particularly associated with the arbitration model. However, that does not mean that this is not an avenue for future exploration.

- <sup>22</sup> Several civil law countries have either introduced a group action in their system, or are about to do so. In Sweden, the reform entered into force on 1 January 2003 and four group actions were filed in the first year of existence of the law: see *Lagen om Grupprättegång 2002* (Sweden) (an English translation is available at <<http://www.sweden.gov.se/content/1/c6/02/77/67/bcbe1f4f.pdf>>). The Netherlands adopted a new law in July 2005 (see *Wet Collectieve Afwikkeling Mas-saschade* 29.414 (2005) (Netherlands)), while Italy and Finland are still in the process of discussing possible reform (see, eg, Disegno di legge C 3838 e C 3839, 14<sup>a</sup> Legislatura, Disposizioni per l'introduzione dell'azione di gruppo a tutela dei diritti dei consumatori e degli utenti (Italy); Finnish Consumer Agency, 'There Is an Obvious Need to Allow Class Actions in Finland' (Press Release, 1 April 2005) <[http://www.kuluttajavirasto.fi/user\\_nf/default.asp?id=16574&site=36&tmf=7420&root\\_id=7420&mode=readdoc](http://www.kuluttajavirasto.fi/user_nf/default.asp?id=16574&site=36&tmf=7420&root_id=7420&mode=readdoc)>). However, most of these laws are very different to the United States class action.
- <sup>23</sup> Lei No 83/95, de 31 de agosto, *Direito de Participação Procedimental Procedimental e Acção Popular*, arts 12, 16 (Portugal).
- <sup>24</sup> Lei No 83/95, de 31 de agosto, *Direito de Participação Procedimental Procedimental e Acção Popular*, art 3 (Portugal). 'Legitimidade activa' might also be translated as 'standing to sue'.
- <sup>25</sup> Lei No 83/95, de 31 de agosto, *Direito de Participação Procedimental Procedimental e Acção Popular*, capitulo III ('Do exercício da acção popular') (Portugal).
- <sup>26</sup> Lei No 8078, de 11 de setembro de 1990, *Código de Proteção e Defesa do Consumidor*, art 103 (Brazil).



quantum of damages.<sup>27</sup> Nowadays, there is a proposal for this type of action to be extended to a number of Latin American countries.<sup>28</sup>

Then, in countries such as France there is an action called '*en représentation conjointe*' (joint representation), whereby each person who wishes to take part in a court action can sign a mandate so that they are represented before the tribunal. Nobody can enforce the issuing judgment against a person who has not signed such a mandate and hence has not been represented. Mutatis mutandis, it is the equivalent of a class action with an 'opt in' mechanism. The plaintiff in this kind of action is not a person but an association, duly accredited, which does not act in its own name but in the name of the victims themselves. Hence, the real parties to the proceedings are the victims and the judgment will bind them, not the association which is just acting as their representative. The action may commence as soon as at least two victims give the association the power to act, although in practice, an association will probably wait until a sufficient number of plaintiffs have signed a mandate before commencing an action. This type of action must be specifically authorised by law. Currently, such actions exist for consumer law,<sup>29</sup> for investors in financial markets and securities,<sup>30</sup> and for environmental protection.<sup>31</sup> These provisions demonstrate a strong public policy against encouraging the formation of mandates, so as to limit court proceedings. In environmental matters, it is even prohibited to advertise for such proceedings, while advertisement is only allowed in printed media for consumer and investment disputes.

This very timid attitude towards group actions in France may be explained by the fact that public interests are traditionally represented by the *Ministère public*, who is a representative of the state. Obviously, his role is much more prominent in criminal cases than in civil cases, but even in the latter context the *Ministère public* has a role in cases relating to *état civil* (civil status), the protection of children and other family matters. Additionally, he has standing to challenge the validity of a number of public acts such as marriages or patents, or to request the dissolution of associations.<sup>32</sup> In economic matters, such as competition, he plays an important role and may act to obtain provisional measures or order the cessation of an illicit activity.<sup>33</sup> It is doubtful, however, whether he may act to request damages for the victims of such illicit acts. In bankruptcy, he may

<sup>27</sup> Lei No 8078, de 11 de setembro de 1990, *Código de Proteção e Defesa do Consumidor*, art 95 (Brazil). This is also the case in a number of recent reforms such as in the Netherlands, Slovenia and Hungary: see, eg, *Wet Collectieve Afwikkeling Massaschade* 29.414 (2005) (Netherlands).

<sup>28</sup> See, eg, Antonio Gidi, 'Class Actions in Brazil — A Model for Civil Law Countries' (2003) 51 *American Journal of Comparative Law* 311, 327 fn 30.

<sup>29</sup> *Code de la Consommation*, arts L422-1–L422-3 (France).

<sup>30</sup> *Loi No 94-679 du 8 août 1994 portant diverses dispositions d'ordre économique et financier* (1) (France).

<sup>31</sup> *Loi No 95-101 du février 1995 relative au renforcement de la protection de l'environnement* (1) (France).

<sup>32</sup> *Code Civil*, arts 175-1, 184, 191 (France) (marriage); *Code de la Propriété Intellectuelle*, art L-613-26 (France) (patents); *Loi du 1 juillet 1901 relative au contrat d'association*, art 7 (France) (associations).

<sup>33</sup> *Code de Commerce*, art L 442-6 (France).

request that a corporation be wound up, and is also involved in the verification of *mandataires* (the special profession in charge of the management of bankrupt companies).<sup>34</sup>

Apart from the *Ministère public*, a number of institutions are granted the power to act to protect collective interests. Trade unions are allowed to act before any relevant court to protect the collective interests of the profession they represent, and may claim damages.<sup>35</sup> No other law grants a similar power to associations to protect the collective interests for which they have been formed. As some authors have noted, some civil courts have nevertheless granted associations the power to act on the basis that a collective right exists when one takes in the sum of the individual rights of the members.<sup>36</sup> However, this practice may be considered against the law.

Finally, French positive law grants the protection of collective interests to administrative authorities (*autorités de régulation*) such as the *Conseil des Marchés Financiers* ('CMF', formerly the *Conseil des Opérations de Bourse*) or the *Conseil de la Concurrence* — the equivalent of the Securities and Exchange Commission or the Competition Council.<sup>37</sup>

*De lege ferenda*, in early 2005, the French Ministry of Justice launched a working group to study the feasibility of a true class action, but '*à la française*'! The chances of success are difficult to assess since a number of lobby groups, mainly coming from industry, have argued against such a development, even though President Chirac has mentioned group actions as one of his 2005 wishes for the French people! A report should be ready by the end of 2005, after which a proposed bill may be drafted.<sup>38</sup>

In my opinion, the following issue must be resolved before a class action can be introduced into any legal or judicial system, namely the respective advantages and inconveniences of deciding together a number of similar claims for the claimants, the defendants, the judicial system and the law itself. Given the nature and costs of an individual claim, it may not otherwise be feasible for claimants to bring an action before a court or tribunal without recourse to a class action. Hence, the fundamental right of access to justice would not be respected if the claims could not be aggregated. As far as the defendants are concerned, a well-managed class action may be a considerable advantage in time, effort and resources of all sorts. Facing a class action does have a deterrent effect: it can be a strong incentive for defendants to comply with better quality control of their products, or better adherence to their ethical charters. Nevertheless, abuses must be avoided and prevented, and the balance between the claimants' and defendants' rights must be carefully weighed.

Turning to the judicial organisation of a country, it is clear that the budgets of the ministries of justice around the world have not matched the exponential

<sup>34</sup> *Code de Commerce*, art L 814-10 (France).

<sup>35</sup> *Code du Travail*, art 411-11 (France).

<sup>36</sup> Serge Guinchard et al, *Droit Processuel: Droit Commun et Droit Comparé du Procès* (2<sup>nd</sup> ed, 2003) 1068.

<sup>37</sup> *Code de Commerce*, art 442-6 (France).

<sup>38</sup> Daniel Mainguy, 'A Propos de l'Introduction de la *Class Action*' [2005] *Recueil Dalloz* 1282.

increase in the needs created by the new right of access to justice granted to citizens. Hence, class actions may well represent one of the most efficient ways to spend scarce public money. Finally, there is a strong advantage for the law itself. Indeed, instead of facing a multitude of decisions, with the possibility that some of them may be inconsistent, a class action decision has the merit of being unique and having a preclusive effect on many additional potential claims. One may hope that such a decision has the power to settle the law for some time. Ideally though, class actions should be an innovation made at the level of European law.

In the EU, the only action which may have an indirect similarity to a class action is the claim for an injunction for the protection of consumers' interests.<sup>39</sup> However, this is different from a 'real' class action, as the *Directive on Injunctions* allows associations accredited in one member state to sue in another member state under numerous directives protecting consumers.<sup>40</sup> Member states must therefore file with the European Commission a list of accredited bodies, which is published in the Official Journal.<sup>41</sup> All of these bodies enjoy a right of access to courts in any member state, so long as the cause of action originated in that state, irrespective of the location of the consumers.<sup>42</sup> In other words, the *Directive on Injunctions* requires any court or administrative body in the member states to accept the published list as proof of the legal capacity of the qualified entity. Nonetheless, the court or administrative body seized may still examine whether the purpose of the qualified entity justifies its taking action in a specific case.<sup>43</sup> This brief description shows that the purpose of the *Directive on Injunctions* is quite limited.

This state of affairs in European law raises the question of whether it would be beneficial to litigants in Europe, within the framework of the internal market, to create a true class action. In order to answer that question, one has to first examine the competence of the European Community to do so. Without such competence, even if one would think it to be in the best interest of European citizens, such a development would be impossible. One has to turn to art 65 of the treaty establishing the European Community<sup>44</sup> to find out whether the

<sup>39</sup> *Directive 98/27/EC of the European Parliament and of the European Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests* [1998] OJ L 166/51 ('*Directive on Injunctions*').

<sup>40</sup> By 'collective interests', the *Directive on Injunctions* [1998] OJ L 166/51 refers to interests which do not include the cumulation of the interests of individuals who have been harmed by an infringement. The action provided for by the Directive is without prejudice to individual actions brought by persons who have been harmed by an infringement: recital 2.

<sup>41</sup> 'Accredited bodies' are what the *Directive on Injunctions* [1998] OJ L 166/51 calls 'qualified entities' under art 3. They may be independent public bodies or private organisations whose purpose is to protect the interests of consumers. Member states are free to accept either or both of the categories, as their national law allows.

<sup>42</sup> *Directive on Injunctions* [1998] OJ L 166/51, art 4.1.

<sup>43</sup> *Directive on Injunctions* [1998] OJ L 166/51, art 4.1.

<sup>44</sup> *Consolidated Version of the Treaty Establishing the European Community*, opened for signature 26 February 2001, [2002] OJ C 325/33 (entered into force 1 February 2003) ('*Consolidated EC Treaty*'). The present form of art 65 (as embodied in the *Consolidated EC Treaty*) was added by the *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/145 (entered into force 1 May 1999) ('*Amsterdam Treaty*'), amending the *Treaty on Euro-*

European Community has the competence. The first condition for a Community act is that it must be necessary for the functioning of the internal market. This condition is met when one considers that the ECJ has stated that court proceedings should not be used in member states to increase unfair competition among companies.<sup>45</sup> One may indeed wonder whether the fact that a class action exists in one member state and not in another may trigger unfair competition consequences in the internal market. The second condition is that the matters in which the Community wants to act must 'have cross-border implications'. This is a more difficult condition to meet. Indeed, it may be argued that, with the increase in cross-border economic activity, many foreseeable class actions will involve either one or several defendants established in different member states or claimants scattered across more than one member state. However, the usefulness of creating a class action is clearly not only for purely European cases but also for domestic ones. Considering this difficulty and the fact that some member states have become very timid in their proposals for new Community acts, it is unlikely that a European class action will be instituted in the foreseeable future. This is particularly so when one considers the Hague Programme,<sup>46</sup> which makes no reference to such a possibility. Consequently, there is room for improvement on this front.

### B *Amicus Curiae*

The use of the *amicus curiae* mechanism is a fascinating development in recent years in judicial processes around the world. It is unnecessary to review all the existing domestic systems as they are too numerous. Rather, this article will discuss two contrasting domestic systems, namely the United States and France; the proposed *ALI/UNIDROIT Principles and Rules*;<sup>47</sup> and a potential rule before arbitration tribunals.

In addition, one must note that an *amicus curiae* system already exists before the ECHR and the ECJ. In competition matters, the system has also been introduced in proceedings before the European Commission.<sup>48</sup> *Council Regulation (EC) No 1/2003*, which has reformed the procedural aspects of competition control and sanction under arts 81 and 82 of the *Consolidated EC Treaty*, includes an article which provides:

*pean Union*, opened for signature 7 February 1992, [1992] OJ C 191/01 (entered into force 1 November 1993) ('*Maastricht Treaty*').

<sup>45</sup> See, eg, *Mund and Fester v Hatrex Internationaal Transport* (C-398/92) [1994] ECR I-467.

<sup>46</sup> The Hague Programme is a continuation of the Tempere Programme: see below Part III(A). It details the actions that the Council of the European Union requested the European Commission to take in proposing Community acts. It is followed by an action plan which was adopted in early June 2005: see Council of the European Union, *Council and Commission Action Plan Implementing the Hague Programme on Strengthening Freedom, Security and Justice in the European Union*, Doc No 9778/2/05 REV 2 (2005).

<sup>47</sup> See ALI/UNIDROIT, above n 8.

<sup>48</sup> The European Commission is both a legislative authority (under the supervision of the Council of the European Union, the European Parliament, and the supremacy of primary law) and a judge at first instance for cases under the *Consolidated EC Treaty*, opened for signature 26 February 2001, [2002] OJ C 325/33, arts 81–2 (entered into force 1 February 2003).

If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted. The competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.<sup>49</sup>

The provision is quite succinct, but it proves the importance for the European competition authorities of hearing all relevant interests before deciding a case, as the decision to be rendered will have an impact on the market and thus affect its many actors. Although the intervention must be approved by the European Commission, the precondition of 'sufficient interest' is fairly weak. In addition, this precondition does not apply when the request for intervention comes from member states.<sup>50</sup> Conversely, the European Commission enjoys a right to be heard as *amicus curiae* in proceedings before the courts of the member states.<sup>51</sup>

One could also note a general provision of a similar effect in the new free trade agreement between the United States, Central America and the Dominican Republic,<sup>52</sup> which provides:

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties, shall be entitled to attend all hearings, to make written and oral submissions to the panel, and to receive written submissions of the disputing Parties in accordance with the Model Rules of Procedure. Those submissions shall be reflected in the final report of the panel.<sup>53</sup>

As will be apparent, in comparison with other rules studied below, this provision is the broadest in scope, allows the fullest participation possible in the proceedings, and is the strictest in nature.

Finally, it is worth examining the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.<sup>54</sup> On 17 February 2005, the Council of the European Union made the decision to approve the *Aarhus Convention* on behalf of the Community, thereby starting the process for it to become European law on this matter.<sup>55</sup> The *Aarhus Convention* defines the public as 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations

<sup>49</sup> Council Regulation (EC) No 1/2003 on the Implementation of the Rules of Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 27-3.

<sup>50</sup> Council Regulation (EC) No 1/2003 on the Implementation of the Rules of Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 27-3

<sup>51</sup> This is due to the decentralisation process in competition matters: see *Commission Notice on Cooperation within the Network of Competition Authorities* [2004] OJ C 101/43.

<sup>52</sup> *Central America–Dominican Republic–United States Free Trade Agreement*, opened for signature 5 August 2004 (not yet in force) ('CAFTA') <[http://www.ustr.gov/Trade\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html)>. The United States House of Representatives voted in favour of ratification on 27 July 2005 with a vote of 227 to 201: *Resolution Providing for Consideration of the Bill (H R 3045) to Implement the Dominican Republic–Central America–United States Free Trade Agreement*, H R Res 386, 109<sup>th</sup> Cong (2005). Parties to the treaty are Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States.

<sup>53</sup> CAFTA, opened for signature 5 August 2004, art 20(11) (not yet in force).

<sup>54</sup> Opened for signature 25 June 1998, 2161 UNTS 450 (entered into force 30 October 2001) ('Aarhus Convention').

<sup>55</sup> *Council Decision (EC) No 2005/370 of 17 February 2005 on the Conclusion, on Behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* [2005] OJ L 124/1.

or groups'.<sup>56</sup> As defined, the public shall have access to justice without discrimination as to citizenship, nationality or domicile; and in the case of a corporation or association, without discrimination as to where it has its registered seat or effective centre of its activities.<sup>57</sup> In addition, the public needs to show an interest as defined in the *Aarhus Convention* itself.<sup>58</sup> Although the *Aarhus Convention* provides that disputes may be solved by means of arbitration,<sup>59</sup> it is unclear whether the requirement of public participation also applies in this case. Nonetheless, these provisions are of considerable interest regarding the trend I am seeking to clarify here.

### 1 *United States*

The amicus curiae mechanism was first developed in common law countries; although whether the common law concept is an offshoot of an early Roman law concept is still unclear.<sup>60</sup> In the United States, the amicus curiae system has been popular from the first case,<sup>61</sup> especially in suits before the United States Supreme Court. The numbers are telling. Comparing the period of 1946–55 to that of 1986–95, the number of amicus briefs filed in the Supreme Court has risen from 531 to 4907, and the percentage of cases in which at least one such brief was filed has increased from 23 per cent to 85 per cent.<sup>62</sup> Thirty-four cases have triggered 20 briefs or more — one case triggered 78 briefs — for subject matter ranging from abortion and affirmative action, to punitive damages, the First Amendment, copyright, federalism, tax powers and the environment.<sup>63</sup>

The *Rules of the Supreme Court of the United States 2005* ('*US Supreme Court Rules*') provide a set of provisions concerning amicus curiae briefs.<sup>64</sup> The first provision provides:

An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to

<sup>56</sup> *Aarhus Convention*, opened for signature 25 June 1998, 2161 UNTS 450, art 2(4) (entered into force 30 October 2001).

<sup>57</sup> *Aarhus Convention*, opened for signature 25 June 1998, 2161 UNTS 450, art 3(9) (entered into force 30 October 2001).

<sup>58</sup> *Aarhus Convention*, opened for signature 25 June 1998, 2161 UNTS 450, art 9(2) (entered into force 30 October 2001).

<sup>59</sup> *Aarhus Convention*, opened for signature 25 June 1998, 2161 UNTS 450, art 16(2)(b), annex II (entered into force 30 October 2001). Annex II establishes an ad hoc arbitration system.

<sup>60</sup> Frank M Covey Jr, 'Amicus Curiae: Friend of the Court' (1959) 9 *DePaul Law Review* 30, 33–9. See also Michael Humbert, 'L'Assistance Judiciaire dans le Monde Romain' in Laurent Waelkens (ed), *L'Assistance dans la Résolution des Conflits* (1998) 47, who suggests that although the expression 'amicus curiae' was unknown in the judicial system of the Roman world, the entire system was organised with strong collective and public participation in the process.

<sup>61</sup> Most authors believe the first such case was *Green v Biddle*, 21 US (8 Wheat) 1 (1823): see, eg, Samuel Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72 *Yale Law Journal* 694, 700. However, Stuart Banner dates the first case back to 1790, *Vasse v Spicer*, 2 US (2 Dall) 111 (1790): Stuart Banner, 'The Myth of the Neutral Amicus: American Courts and Their Friends 1790–1890' (2003) 20 *Constitutional Commentary* 111, 116.

<sup>62</sup> Joseph Kearney and Thomas Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148 *University of Pennsylvania Law Review* 743, 752.

<sup>63</sup> *Ibid* 755.

<sup>64</sup> Rule 37 remained unchanged from previous versions. A similar rule exists for the appellate level within the federal system and in the law of a number of states. For the purpose of this article, only the *US Supreme Court Rules* will be analysed.

the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.<sup>65</sup>

One must note immediately that the provision refers to a 'matter', a very broad, general term, which could cover both factual circumstances and elements of law. The issue should be relevant — in other words, it must stay within the subject matter of the dispute — but should show, beyond the parties' arguments, the other issues with which the Court should be concerned and should add something to the general content of the case. The operation of this principle illustrates one of the difficulties faced by the *amicus curiae* mechanism, because although it suggests that many *amicus* briefs could have been dismissed for failing to meet this standard, this does not appear to be the case in practice, as the statistics mentioned above show.

Who may file an *amicus* brief? Any and everyone, as the *US Supreme Court Rules* do not specify any special requirements. However, there are two categories of amici: the first comprises only 'public entities'; the second category includes all other entities or persons. The persons who fall within the first category include: the United States, represented by the Solicitor-General; any agency of the United States allowed by law to appear before the Supreme Court; a state, commonwealth, territory or possession represented by its Attorney-General; and a city, county, town or similar entity when submitted by its authorised law officer.<sup>66</sup> The list is exhaustive and cannot be enlarged even by a decision of the Supreme Court. These public entities are allowed to file an *amicus* brief without permission from the parties or the Court. This mechanism corresponds *mutatis mutandis* to that known in civil law countries as the *Ministère public*. Such a provision is consistent with traditional understandings of representative democracy, whereby public entities are supposed to represent the collective interests of the society they administer.

By contrast, the second category is not defined. This is understandable for several reasons. The first is procedural in nature. The entities and persons who belong to the second category of amici are not allowed to file an *amicus* brief unless they get permission from all the parties at stake in the case, or unless permission is granted by the court itself.<sup>67</sup> Hence, the Court will be able to verify the value of the amici petitioning to file a brief and may screen them according to a number of criteria (not specified in the *US Supreme Court Rules*) which could include the representativeness of the *amicus* concerned.<sup>68</sup> Conversely,

<sup>65</sup> *US Supreme Court Rules*, r 37.1.

<sup>66</sup> *US Supreme Court Rules*, r 37.4.

<sup>67</sup> *US Supreme Court Rules*, r 37.2.

<sup>68</sup> The representativeness of the *amicus* has also been the main issue before the ECJ: see, eg, *Pharos v Commission of the European Communities* (C-151/98) [1998] ECR I-5441. One of the criteria examined by the Court in assessing representativeness is to look at the object and goals of the NGO that requests the permission to act as *amicus*, and to see whether the matters at stake in the pending case will affect the members of that association: see *Poste Italiane SpA v Commission of the European Communities* (T-53/01) [2001] ECR II-1479. The system of *amicus curiae* is unique before the ECJ because of the special status of the European Commission, the European Parliament, the Council of the European Union, and the member states. One may argue that all these actors do indeed represent collective interests and, therefore, there is no need for another mechanism to represent collective interests. However, this is not entirely accu-

because of the common law adversarial system, there is no reason for the *amicus curiae* accepted by all parties to be further scrutinised by the Court.

The second reason is more substantive. The amici who belong to the non-public entity category represent what is now understood as ‘civil society’. They are emblematic of the renewed interest in ‘direct democracy’ or ‘participative democracy’, representing collective interests which are otherwise not represented.<sup>69</sup>

The *US Supreme Court Rules* neither require an interest (in the legal sense) to be demonstrated by the amicus, nor do they provide for neutrality or independence. On the contrary, it is implicit in the rules that the amicus could be filing in favour of a party. Under r 37.6, a brief must indicate whether counsel for a party authored part or all of the brief, and it must also indicate who made a monetary contribution to its preparation or submission. In addition, r 37.3 provides that the brief must indicate the party for which it is filed, or, if it is not filed in favour of any party, whether it indicates affirmation or reversal.

One may argue that the admission of amici in a common law system is a substitute for third-party intervention, which does not fit well with the adversarial system paradigm. However, this argument is not convincing, as the mechanism of third-party intervention in civil law countries (the inquisitorial system) does not have the same function as the amicus intervention under common law. Contrary to the broad interests represented by amici curiae, third parties in a civil law system represent their own narrow interests. This is probably the reason why it is currently envisaged that civil law countries will provide for some form of amicus.<sup>70</sup>

The concern to ensure that amici curiae have legitimacy to intervene is illustrated by r 37.2, according to which the amicus must be either accepted by all parties to the case or be allowed by the court. Whether the amicus’ legitimacy should derive from the notion of ‘interest’<sup>71</sup> or from that of ‘representativeness’ remains unsettled, due to the way in which the *US Supreme Court Rules* have

rate since the interests represented by the European institutions and the member states may be quite different and may not coincide with those of the civil society at large.

<sup>69</sup> This is not intended to be a passing of judgement, but a mere description what most observers may witness in the functioning of our contemporary society. This new trend in democracy is, however, controversial.

<sup>70</sup> See below Part II(B)(2). It is noteworthy that, in March 2003, the *Conseil des Barreaux Européens* (Council of Bars and Law Societies of Europe) intervened before the Convention preparing the draft Constitution to call for a more general acceptance of *amicus curiae* in all proceedings before judicial institutions of the European Union: see *The Future of the European Union — Debate* (2004) EUROPA: Gateway to the European Union <[http://europa.eu.int/constitution/futurum/index\\_en.htm](http://europa.eu.int/constitution/futurum/index_en.htm)>. Presently, the intervener before the ECJ is limited to filing a brief in support of one of the parties’ positions: *Protocol on the Statute of the European Court of Justice* [2002] OJ C 325/167, art 40; *Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991* [1991] OJ L 176/7, art 93, amended by *Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991* [1995] OJ L 44/61.

<sup>71</sup> The conception of what constitutes a ‘public interest’ — whether it is merely the aggregation of private interests, or a truly separate form of collective interest — differs greatly from country to country: see, eg, Anton Garapon and Ionannis Papadopoulos, *Juger en Amérique et en France* (2003).



been applied by the Court. This issue does not need to be resolved here, as it is sufficient to stress the crucial importance of the legitimacy of any intervening amicus.

However, it must be recognised that the influence of amicus briefs has not been as great as might have been expected.<sup>72</sup> Indeed, some argue that the amicus in the United States has become just another form of lobbying.<sup>73</sup> This is understandable considering the significant role that judicial decisions (particularly those of the Supreme Court) play in shaping United States society. However, it may be that amicus briefs are not even read by judges and are allowed as a mere formality in the new functioning of society at the beginning of the 21<sup>st</sup> century, without any real content.

## 2 France

The amicus curiae system has taken a different route in France. Although it was introduced into the French procedural system in the early 1980s, it has been seldom used and, until recently, only upon invitation of the court.<sup>74</sup> Moreover, in order to qualify as an amicus curiae, one has to be recognised as a *personnalité* — that is, a prominent scientist, a high ranked official with extensive experience in the field at stake, or a highly representative organisation whose expertise is uncontested.<sup>75</sup> It is also worthwhile noting that until recently the amicus could only answer specific questions posed by the court and had no right to deviate from those questions to express their own opinions about the issue at stake in the court proceedings.

This restrictive conception of the French form of the amicus curiae could be abandoned in favour of a different approach which better resembles the common law view. For example, a recent decision of the *Cour de cassation*<sup>76</sup> showed that it may be willing to relax the process upon the request of an amicus.<sup>77</sup> That case involved the juridical characterisation of a fairly new financial instrument which borrowed features from a saving instrument, a type of life insurance and a more traditional financial investment. While the case was being reserved before judgment, the *Conseil Supérieur du Notariat* filed *sua sponte* an amicus brief by writing to the First President of the *Cour de cassation*.<sup>78</sup> This note was then

<sup>72</sup> Donald Songer and Reginald Sheehan, 'Interest Group Success in the Courts: Amicus Participation in the Supreme Court' (1993) 46 *Political Research Quarterly* 339, 350.

<sup>73</sup> See, eg, Lee Epstein and Jack Knight, 'Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae' in Cornell Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutional Approaches* (1999) 215.

<sup>74</sup> See *Nouveau Code de Procédure Civile*, arts 27, 181 (France).

<sup>75</sup> See cases cited in Catherine Kessedjian, 'La Nécessité de Généraliser l'Institution de l'Amicus Curiae dans le Contentieux Privé International' in Heinz-Peter Mansel, Thomas Pfeiffer, Herbert Kronke (eds), *Festschrift für Erik Jayme* (2004) 403, 405.

<sup>76</sup> The *Cour de cassation* is the highest court in the French judicial system, and has jurisdiction to review all decisions arising from lower criminal and civil courts.

<sup>77</sup> Identical decisions for four cases were rendered on the same day by the *chambre mixte* of the *Cour de cassation*: Cass ch mixte, 30 novembre 2004, D 2004 inf rap, 3191. For commentary on the decisions, see Pascale Deumier and Rafael Encinas de Munagorri, 'Sources du Droit en Droit Interne — L'Ouverture de la Cour de Cassation aux Amici Curiae' [2005] *Revue Trimestrielle de Droit Civil* 88, 89.

<sup>78</sup> The *Conseil Supérieur du Notariat* is the only organ in France which speaks on behalf of all lawyers in France. It represents lawyers in dealings with government authorities, contributes to

circulated to the *Procureur général*,<sup>79</sup> who, after securing the approval of all parties involved, decided to open a wider consultation. Briefs by the Ministry of Economic and Financial Affairs, Ministry of Justice, and the *Fédération Française des Sociétés d'Assurances* (the French Federation of Insurance Companies) were filed and subsequently sent to the parties in order to respect the '*principe de la contradiction*' (principle by which each party has a right to respond to arguments put against them). However, they were not made public, and the only knowledge of those briefs available to the public were the extracts contained in the report of the *conseiller-rapporteur*<sup>80</sup> and the conclusions of the *avocat général*.<sup>81</sup> This may be considered as a transitional case where the *Cour de cassation*, within the framework of existing procedural means, tried to accommodate general interests potentially affected by the decision and also to protect the reasons it was about to deliver.<sup>82</sup>

### C A Proposal for a Generalised Procedural Principle in Domestic Courts

The *ALI/UNIDROIT Principles and Rules* are the first proposals for a universal set of norms.<sup>83</sup> The project was initiated in 1997 by the ALI, which later sought the partnership of an intergovernmental organisation so that the proposal would have more chance of being widely accepted. The final draft of the principles was adopted in April 2004 by the UNIDROIT Council and by the General Assembly of the ALI in May 2004.<sup>84</sup> However, the rules were not adopted as such, but remain as a study in the *American Law Institute Reporter* with the aim of giving an example of how the principles could be put in more concrete terms.<sup>85</sup> It is true that there is greater difficulty in agreeing on specific and detailed rules at a universal level, whereas principles, normally drafted in more general and abstract terms, are more easily acceptable for many different cultures and societies.<sup>86</sup>

the evolution of the legal profession, and provides collective services to the legal profession: see *The Institution: High Council for the Notarial Profession*, *Notaires de France* <[http://www.notaires.fr/notaires/notaires.nsf/V\\_TC\\_PUB/SMSD-5WFL96](http://www.notaires.fr/notaires/notaires.nsf/V_TC_PUB/SMSD-5WFL96)>.

<sup>79</sup> Known also as a *Ministère public* (public minister), the *Procureur général* is the highest ranked prosecutor in the *Cour de cassation* and is responsible for presenting cases before the *Cour de cassation* in the name of the law.

<sup>80</sup> A presiding judge will give a case to a *conseiller-rapporteur*, who is then responsible for filing a statement of procedure, compiling a note outlining his opinion of the merits of the appeal, and compiling a draft decision rejecting or allowing the appeal (or both in the event of uncertainty).

<sup>81</sup> This very limited transparency is typical of the French manner of conducting an amicus consultation, and does not pose a problem to most commentators: see Deumier and de Muna-gorri, above n 77, who speak of 'discretion and transparency [sic]'.<sup>82</sup>

<sup>82</sup> The best evidence of such a move is the article published by the current First President of the *Cour de cassation*: Guy Canivet, 'L'Amicus Curiae en France et aux Etats-Unis' (2005) 49 *Revue de Jurisprudence Commerciale* 99.

<sup>83</sup> See ALI/UNIDROIT, above n 8.

<sup>84</sup> See 'ALI/UNIDROIT Principles of Transnational Civil Procedure' (2004) 9 *Uniform Law Review* 758.

<sup>85</sup> See Geoffrey C Hazard Jr et al, 'Actions Taken with respect to Drafts Submitted at 2004 Annual Meeting' (2004) 27 *American Law Institute Reporter* 8.

<sup>86</sup> A neat dichotomy between rules and principles is not always easy to establish. It is clear that sometimes rules are written in abstract terms, whereas principles are more detailed. For such a trend, see, eg, *UNIDROIT Principles of International Commercial Contracts* (1995); *UNIDROIT Principles of International Commercial Contracts* (2004).

It should be noted that, as far as *amicus curiae* intervention is concerned, the proposed *ALI/UNIDROIT Principles and Rules* contain only one principle and no accompanying rule. Principle 13 provides as follows:

*Amicus curiae* submission: Whenever appropriate, written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation of the parties. The court may invite such a submission. The parties should have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court.

The comment following Principle 13 shows that its inspiration has been taken, in essence, from the United States approach, as it stresses that an *amicus* brief may be helpful to the court to 'achieve a just and informed disposition of the case'<sup>87</sup> and should provide 'material assistance' to the court.<sup>88</sup> Failing this, the court has full power to reject the submission.<sup>89</sup> It is also stressed that the submission should not interfere with a court's independence.<sup>90</sup>

With respect to the procedural details of the submission, a few comments are required. First, although the principle speaks of a written submission, the comment makes it clear that, if the court so decides at its discretion, the submission may be supported by oral presentation.<sup>91</sup> Second, according to the comment, any person (either an individual or an entity) may be allowed to file an *amicus* brief, whether it is disinterested or partisan and whether or not it has a legal interest sufficient for intervention.<sup>92</sup> In other words, it is clear that the *amicus* does not become a party to the case — it is an 'active commentator'.<sup>93</sup> Consequently, there is no need to identify any specific interest. Finally, parties must always be given the opportunity to reply to the *amicus* brief, although they are not necessarily given an opportunity to oppose its submission.

#### D Before Arbitration Tribunals

The situation is a little different before arbitration tribunals. First, one must emphasise the fact that many arbitral tribunals derive their powers only from the parties' will.<sup>94</sup> Hence, the parties control the arbitral proceedings, which are tailored, both in substance and procedure, to their own needs and dispute. By the same token, the eventual decision should have no impact beyond the parties. However, the recent evolution of arbitration to encompass disputes which cover interests larger than just the parties involved — such as what is known as 'investment arbitration' or arbitration in competition matters — obliges us to

<sup>87</sup> 'ALI/UNIDROIT Principles of Transnational Civil Procedure', above n 84, cmt P-13A.

<sup>88</sup> *Ibid* cmt P-13B.

<sup>89</sup> *Ibid*.

<sup>90</sup> Principle 1.1 of the *ALI/UNIDROIT Principles and Rules*, above n 8, specifies: 'The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence.'

<sup>91</sup> 'ALI/UNIDROIT Principles of Transnational Civil Procedure', above n 84, cmt P-13A.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid* cmt P-13B.

<sup>94</sup> This is, however, less true in investment arbitration, where the parties take advantage of an 'offer to arbitrate' contained in bilateral treaties. Consent arises within a pre-existing framework.

reconsider the limited character of the arbitration process. In fact, 'arbitration' is often used to refer to the dispute resolution mechanism in those areas, when it would be clearer and less misleading to invent another concept to distinguish it from typical international commercial disputes between private parties.<sup>95</sup>

Second, the arbitral process is said to be confidential. This was (and to some extent, still is) always taught as one of the major advantages of arbitration over court proceedings. Confidentiality allows parties to keep the nature and the extent of the dispute private, and makes it possible for them to go on with business 'as usual' so that the market does not suffer from the dispute. Although this argument may initially appear to be insurmountable, it can be overcome fairly easily. The objective of confidentiality is more to protect the substance of the information exchanged during the arbitral process than the existence of a dispute, which is probably well known in the market and, in many cases, has to be disclosed in annual reports (particularly if the company is publicly listed). Under most national arbitration laws, confidentiality may be protected by imposing on those participating in the arbitral process a duty not to disclose further what is learnt.<sup>96</sup> The *NAFTA* guidelines, which will be analysed later in this section,<sup>97</sup> show that it is possible to protect confidentiality while allowing non-disputing parties to intervene in the process.

Third, one argument against the participation of non-disputing parties in an arbitral process is linked with the supposed neutrality of the arbitral process which is due, among other features, to a 'delocalisation' or 'denationalisation' of the arbitral proceedings. Some commentators fear that the intervention of non-disputing actors may disrupt this neutrality. It is not entirely certain, however, that neutrality is the proper concept to be used in this context. The law is never neutral. It is a technique (among others) to impose values which are shared by the members of the community for which the legal norms are being created. Furthermore, even if neutrality is accepted as a legitimate goal, it is hard to see why an amicus intervention would disrupt it. On the contrary, an amicus would be able to shed light on the values underlying the measures taken and the norms which are at stake in the dispute. It seems that such a process could only clarify the issues and add to its general neutrality.

Some recent amendments to arbitration rules, such as the *Swiss Rules of International Arbitration* (2004) ('*Swiss Rules*'), which entered into force on 1 January 2004, may pave the way for a better use of non-disputing parties in arbitration proceedings.<sup>98</sup> It is too soon to know how arbitral tribunals acting

<sup>95</sup> The type of public interest at stake is very well stated by ICSID in *Order in Response to a Petition for Transparency and Participation as Amicus Curiae (Aguas Argentinas SA v Argentine Republic)* (2005) ICSID ARB/03/19, [1], [18]–[22] (Salacuse P, Arbitrators Kaufmann-Kohler and Nikken) ('*Aguas Argentinas SA v Argentine Republic*').

<sup>96</sup> Cf *Australia*, where confidentiality in arbitration now requires the insertion of an express term to that effect in the parties' agreement: see *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

<sup>97</sup> See below nn 99–111.

<sup>98</sup> *Swiss Rules*, art 1(3). Article 4(2) provides:

Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party

under the *Swiss Rules* will use the power they have been granted. A concrete example of the acceptance of *amicus curiae* in the arbitration process can be seen in the statement issued by the North American Free Trade Commission ('*NAFTA Commission*') on non-disputing party participation dispute resolution under ch 11 of the *NAFTA*.<sup>99</sup> The statement makes clear that submissions by a non-disputing person or entity are neither prohibited, nor limited, by the provisions of the *NAFTA*. This is an important step, as it is well known that a number of tribunals which had been asked to hear non-disputing parties had refused to do so in the past. The statement goes on to specify that only written submissions are acceptable. The procedural provisions recommended by the *NAFTA Commission* are appropriate since the tribunals are granted the duty to accept or deny the request for submission (hence the tribunal's discretion is complete). The main guiding principle is that the submission should not disrupt the proceedings or unduly burden or unfairly prejudice either of the disputing parties.<sup>100</sup> In terms of the substance of the case, the submission should not raise any matter which is not already part of the dispute. This is a very important safety provision for achieving the goals set forth in art 7. Indeed, if non-disputing parties were allowed to enlarge the scope of matters in dispute, the disputing parties would be burdened and the proceedings could become unmanageable.

The *NAFTA Guidelines* provide a list of considerations which the arbitral tribunal should bear in mind before it makes a decision on the request for an *amicus submission*. The conditions may be summarised as follows:

- 1 the submission should genuinely help the tribunal in its determination of the factual and legal issues;<sup>101</sup>
- 2 the non-disputing party must have a significant interest in the arbitration;<sup>102</sup> and
- 3 there should be a public interest in the subject matter of the arbitration.<sup>103</sup>

It is noteworthy that while all disputing parties must be notified of a request for a submission, their consent is not required. Obviously, it will be easier for the tribunal to accept the submission if all the parties agree. Conversely, even if the parties do not give their consent, the tribunal may still decide to accept the submission if it considers that the public interest at stake is of such importance that an *amicus curiae* should be allowed. Yet one could imagine cases in which, even if they agree, the tribunal considers that the submission will add nothing to the dispute or not assist the tribunal in its decision.

to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

<sup>99</sup> See *NAFTA Commission, Statement of the Free Trade Commission on Non-Disputing Party Participation* (2003) International Trade Canada: The North American Free Trade Agreement <<http://www.dfait-maeci.gc.ca/NAFTA-alena/Nondisputing-en.pdf>> ('*NAFTA Guidelines*'). These guidelines were adopted on 7 October 2003. See also Kessedjian, 'La Nécessité de Généraliser l'Institution de l'*Amicus Curiae*', above n 75.

<sup>100</sup> *NAFTA Guidelines*, above n 99, [B(7)]

<sup>101</sup> *Ibid* [B(6)(a)].

<sup>102</sup> *Ibid* [B(6)(c)].

<sup>103</sup> *Ibid* [B(6)(d)].

Canada has made a declaration to encourage arbitration proceedings to be 'open to the public' upon obtaining the consent of disputing investors.<sup>104</sup> The only limitation is the protection of confidential information, including business information.<sup>105</sup> Canada suggests that tribunals may make the appropriate logistical arrangements for open hearings in consultation with disputing parties.<sup>106</sup> These arrangements may include use of closed-circuit television systems, internet webcasting or other forms of off-site access.<sup>107</sup> These suggestions go one step further than the *NAFTA* Commission's statement analysed above, since it agrees to submissions which are not necessarily written. It appears that while the United States has not made a similar declaration, its practice, both before domestic and international tribunals, has always been in favour of a broad participation by the public. By contrast, Mexico has always been opposed to such a course of action.<sup>108</sup>

Two cases have shown how the public could be admitted to participate in arbitral hearings and contribute to a better understanding of the interests at stake: *Re an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules: Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae (Methanex Corporation v United States of America)*<sup>109</sup> and *UPS Inc v Canada*.<sup>110</sup> Both cases were conducted under the *Arbitration Rules of the United Nations Commission on International Trade Law* (1976) ('*UNCITRAL Arbitration Rules*').<sup>111</sup> In both cases, all parties had agreed to open the hearings to non-disputing parties.

Outside the *NAFTA*, the recent ICSID case of *Aguas Argentinas SA v Argentine Republic*<sup>112</sup> is worth mentioning in some detail to illustrate the difficulties an arbitral tribunal may face when requested to enlarge the hearings to accommodate third parties. Before stating the facts, it is worth mentioning that the ICSID's *Rules of Procedure for Arbitration (Arbitration Rules)* ('*ICSID Arbitration Rules*')<sup>113</sup> are not particularly detailed in this respect. They simply state that: 'The Tribunal shall decide, with the consent of the parties, which other persons

<sup>104</sup> International Trade Canada, *Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations* (2003) International Trade Canada: The North American Free Trade Agreement <<http://www.dfait-maeci.gc.ca/NAFTA-alena/open-hearing-en.asp>>.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> See, eg, *An Arbitration under Chapter 11 of the North American Free Trade Agreement: Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (United Parcel Service of America Inc v Canada)* (2001) ('*UPS Inc v Canada*') <<http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf>>, where Mexico protested against the request of Canadian Union of Postal Workers and the Council of Canadians for intervention and participation as amici curiae.

<sup>109</sup> (2001) ('*Methanex Corp v United States of America*') <<http://www.international-economic-law.org/Methanex/Methanex%20%20Amicus%20Decision.pdf>>. See also Andrew Newcombe and Axelle Lemaire, 'Should Amici Curiae Participate in Investment Treaty Arbitrations?' (2001) 5 *Vindobona Journal of International Commercial Law and Arbitration* 22.

<sup>110</sup> (2001) *NAFTA Claims* <<http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf>>.

<sup>111</sup> GA Res 31/98, UN GAOR, 31<sup>st</sup> sess, 99<sup>th</sup> plen mtg, UN Doc A/31/98 (1976).

<sup>112</sup> (2005) ICSID ARB/03/19.

<sup>113</sup> ICSID Doc ICSID/15/Rev 1 (2003).

besides the parties ... may attend the hearings.<sup>114</sup> Five NGOs<sup>115</sup> filed a *Petition for Transparency and Participation as Amicus Curiae* with the ICSID secretariat, requesting the arbitral tribunal organised under ICSID auspices to allow petitioners to: (a) have access to the hearings; (b) present legal arguments as amicus curiae; and (c) access all documents in the case in a timely, sufficient and unrestricted manner.<sup>116</sup> The parties were given the opportunity to comment on the requests for intervention, with the respondent approving the petition, while the claimants asked the tribunal to reject it. The tribunal interpreted r 32(2) of the *ICSID Arbitration Rules* literally and rejected the petition as far as the hearings were concerned.

However, the tribunal took a more liberal approach towards the submission of amicus briefs. It first noted that '[n]either the ICSID Convention nor the Arbitration Rules specifically authorize or specifically prohibit the submission by non parties of amicus curiae briefs or other documents.'<sup>117</sup> Although this statement is formally accurate, one may note that the drafters of the *ICSID Convention* and *ICSID Arbitration Rules* may not have thought specifically about amicus curiae briefs in 1965, or believed that r 32(2) was broad enough to cover all kinds of participation in the hearings — written or oral — at whatever stages possible. Further, the tribunal noted that art 44 of the *ICSID Convention* grants residual powers to it to decide an issue whenever a procedural question arises which is not covered by the *Convention* or by any additional rules agreed upon by the parties. The tribunal then proceeded to hold that this provision gave it the power to admit an amicus curiae brief even where one of the parties objected. In doing so, the tribunal relied heavily on the two *NAFTA* cases cited above.<sup>118</sup> In my view, the situation is quite different, as the *UNCITRAL Arbitration Rules* are entirely silent on non-disputing parties' intervention, while the *ICSID Arbitration Rules* provide — at least partially, if the tribunal's interpretation is to be accepted — for such a right. The fact that the tribunal states that art 15(1) of the *UNCITRAL Arbitration Rules* is 'substantially similar to art 44 of the ICSID Convention'<sup>119</sup> gives no weight to the fact that art 44 specifically relies on other arbitration rules. For the issue at stake, these other rules lead to art 32(2) of the

<sup>114</sup> *ICSID Arbitration Rules*, r 33(2).

<sup>115</sup> Asociación Civil por la Igualdad y la Justicia (Association for Equality and Justice), Centro de Estudios Legales y Sociales (Centre for Legal and Social Studies), Center for International Environment Law, Consumidores Libres Cooperativa Ltda de Provisión de Servicios de Acción Comunitaria (Cooperative for the Provision of Community Action Services), and Unión de Usuarios y Consumidores (Users' and Consumers' Union).

<sup>116</sup> Association for Equality and Justice et al, *Petition for Transparency and Participation as Amicus Curiae: In Case No ARB/03/19 before the International Centre for Settlement of Disputes between Aguas Argentinas SA and The Republic of Argentina* (2005) 20 (an unofficial English version is available at <[http://www.ciel.org/Publications/SuezAmicus\\_27Jan05\\_English.pdf](http://www.ciel.org/Publications/SuezAmicus_27Jan05_English.pdf)>).

<sup>117</sup> *Aguas Argentinas SA v Argentine Republic* (2005) ICSID ARB/03/19, [9] (Salacuse P, Arbitrators Kaufmann-Kohler and Nikken).

<sup>118</sup> *Methanex Corp v United States of America* (2001) <<http://www.international-economic-law.org/Methanex/Methanex%20%20Amicus%20Decision.pdf>>; *UPS Inc v Canada* (2001) <<http://naftaclaims.com/Disputes/Canada/UPS/UPSDecisionReParticipationAmiciCuriae.pdf>>. See above nn 109–11 and accompanying text.

<sup>119</sup> *Aguas Argentinas SA v Argentine Republic* (2005) ICSID ARB/03/19 [14] (Salacuse P, Arbitrators Kaufmann-Kohler and Nikken).

*ICSID Arbitration Rules*, which has no equivalent in the *UNCITRAL Arbitration Rules*. Consequently, it is difficult to rely on the *UNCITRAL Arbitration Rules* as a comparable instrument in the ICSID context.

ICSID has undergone extensive consultation about potential reform of a number of features in its arbitration and dispute resolution rules. One of the proposed changes concerned what the secretariat called 'third-party participation'. This issue triggered the most disagreement.<sup>120</sup> The paper comments that:

Concerns were expressed that any provision on access of third parties to proceedings should subject such access to appropriate conditions ensuring, for example, that the third parties do not by their participation unduly burden parties to the proceedings.<sup>121</sup>

The new proposed art 32(2)<sup>122</sup> provides:

After consultation with the Secretary-General and with the parties as far as possible, the Tribunal may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings. The Tribunal shall for such cases establish procedures for the protection of proprietary information and the making of appropriate logistical arrangements.<sup>123</sup>

One may note immediately that this new proposal does not conclusively resolve the question of admission of amicus briefs. It is hard to read into the verbs 'attend or observe' an increase in active participation of non-party persons or entities. The explanatory note to the proposed article does not address this issue.<sup>124</sup>

The final issue posed by amicus intervention is the question of who may be an amicus. Should the amicus be selected and, if so, by whom, and under which criteria? The easiest question will be first considered: by whom should the selection be made? In my view, there is no doubt that it should fall within the powers of any tribunal to accept or reject any amicus. The only exception I would recognise is where the parties both agree that an amicus should be accepted. In that case, I would propose that the tribunal should not have the power to deny admission to that particular amicus. However, even if both parties reject an amicus, I would still grant the tribunal the power to accept its submission.

The second question is whether there *should* be a selection. Here again, it seems quite clear that not every single person or entity who claims to submit an amicus brief should have it accepted, as there must be some degree of control, if only to keep the case to a manageable size. The real difficulty is in deciding by which criteria an amicus brief is to be accepted. The tribunal in *Aguas Argentinas*

<sup>120</sup> ICSID, 'Suggested Changes to the ICSID Rules and Regulations' (Working Paper, ICSID, 2005) 4 <<http://www.worldbank.org/icsid/052405-sgmanual.pdf>>.

<sup>121</sup> *Ibid.*

<sup>122</sup> Similar changes are proposed for art 39(2) of the *Additional Facility Arbitration Rules*, ICSID Doc ICSID/11/Rev 1 (2003). See also ICSID, 'Suggested Changes to the ICSID Rules and Regulations', above n 120, 10.

<sup>123</sup> ICSID, 'Suggested Changes to the ICSID Rules and Regulations', above n 120, 10.

<sup>124</sup> *Ibid.*



nas *SA v Argentine Republic* decided that only 'suitable non-parties' may make amicus submissions.<sup>125</sup> In order to assess suitability, the tribunal explained that submissions should come from 'persons who establish to the tribunal's satisfaction that they have the expertise, experience and independence to be of assistance in the case'.<sup>126</sup> Henceforth, the tribunal set out the information that each amicus should provide when requesting leave to submit a brief, and what considerations will be taken into consideration by the tribunal in granting leave to appear. While the information sought is likely to be clear, precise and cogent, a list of considerations may be too general to be helpful. It is noticeable that the tribunal was clearly influenced in its decision by the *NAFTA Guidelines*, a fact which shows that a truly common transnational approach is slowly taking shape.

Indeed, the most important feature of an acceptable amicus submission is how it deals with the representativeness and legitimacy of the person or entity who claims to act as amicus. This is why the requirements in the *NAFTA Guidelines* — that the potential amicus disclose its membership; legal status; general objectives; the nature of its activities; any parent organisation of which it is a subsidiary; its possible affiliation, direct or indirect, with any disputing party; the existence of any financial assistance or other assistance in preparing the submission; and the nature of the interest that the applicant has in the arbitration<sup>127</sup> — are of such fundamental importance in assessing the amicus' legitimacy.

### III THE NEED FOR CROSS-BORDER COOPERATION

It is nowadays very fashionable to speak of competition between legal systems and legal norms as if they were simply competing products on the market. This new way of approaching international relations stems from the school of law and economics, which emphasises the economic impact of legal norms.<sup>128</sup> When it comes to dispute resolution, this approach to cross-border relations is, in my view, counterproductive for several reasons. First, the value of legal norms cannot be reduced to their economic impact. A legal norm carries all sorts of values which are not taken into consideration in an economic analysis. Second, law and economics scholars start from a common premise in economic analysis: that actors on the market make rational decisions before acting. Common sense and a little experience with the functioning of corporations reveal the falsity of this premise: actors very often make decisions in an irrational manner.<sup>129</sup> Third, a legal norm — as with any other norm which applies to several actors at the same time — creates the 'rules of the game' for all actors in the same market. How can there be competing sets of rules of the game? Imagine if players seated at a

<sup>125</sup> *Agua Argentinas SA v Argentine Republic* (2005) ICSID ARB/03/19 [16] (Salacuse P, Arbitrators Kaufmann-Kohler and Nikken).

<sup>126</sup> *Ibid* [24].

<sup>127</sup> *NAFTA Guidelines*, above n 99, [B(2)(c)], [(d)], [(e)], [(f)].

<sup>128</sup> Richard A Posner, *Economic Analysis of Law* (6<sup>th</sup> ed, 2002); Horatia Muir Watt, 'Aspects Économiques du Droit International Privé: (Réflexions sur l'Impact de la Globalisation Économique sur les Fondements des Conflits de Lois et de Jurisdiction)' (2004) 307 *Recueil des Cours* 25.

<sup>129</sup> See, eg, John Kenneth Galbraith, *The Economics of Innocent Fraud: Truth for Our Time* (2004).

bridge table each have their own rules: as the game goes along, they would have to decide which rule applies for each phase of the game!

The final false premise of the law and economics analysis consists of the proposition that, given market forces, the best rule always wins. This is not quite true, and a few examples will show why. The first is the *forum non conveniens* mechanism, in which the court seized determines that it is not the most convenient forum and refers the parties to a foreign court which it considers to be more convenient. The problem may arise when, as in *Lubbe v Cape plc*,<sup>130</sup> the court seized refuses to decline jurisdiction even though the court in the foreign country has stronger links with the case. The reasons why the English court did not decline jurisdiction — the lack of expertise in the South African court, and the absence of an equivalent right of access to justice as compared with the United Kingdom — are controversial. Since the defendant, a company which operated asbestos mines, mills and factories in South Africa, had already ceased activities in that country, it seems quite clear that there were fundamental principles of human rights at stake which may have influenced the House of Lords' refusal to decline jurisdiction. However, it is not desirable that a court pass judgement on the system of justice or system of law of another country. It would be very different if the decision on jurisdiction were made jointly by the two or more courts which have jurisdiction in a given case, rather than by way of a unilateral decision that one of the courts is not an appropriate forum.<sup>131</sup> It should also be noted that the English court had jurisdiction because it was the forum of the defendant's domicile, one which is considered in the European legal system as conferring general jurisdiction — that is, a court in which all suits against a defendant may be brought, wherever the activity leading to the dispute had taken place. An additional difficulty is that although the plaintiffs were situated outside the European Union, the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*<sup>132</sup> applied, in which there is no room for use of the *forum non conveniens* mechanism as it is unknown in the provisions of the *Brussels Convention*.<sup>133</sup> In a purely orthodox

<sup>130</sup> [2000] 4 All ER 268 ('Lubbe').

<sup>131</sup> Even the Australian self-restraint in using the *forum non conveniens* doctrine is not entirely satisfactory: see Peter Nygh, 'Forum Non Conveniens and Lis Alibi Pendens: The Australian Experience' in Jürgen Basedow (ed), *Private Law in the International Arena — From National Conflict Rules towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000) 511.

<sup>132</sup> Opened for signature 27 September 1968, 8 ILM 229 (entered into force 1 February 1973) ('*Brussels Convention*'). This has now been replaced by *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter* [2001] OJ L 12/1 ('*Council Regulation (EC) No 44/2001*'). The Regulation did not apply to Denmark until the special agreement of 20 September 2005 between the European Community and Denmark: *Council Decision of 20 September 2005 on the Signing, on Behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2005] OJ L 299/61.

<sup>133</sup> See *Owusu v Jackson* (C-281/02) [2005] ECR I-1383; *Group Josi Reinsurance Co SA v Universal General Insurance Co* (C-412/98) [2000] ECR I-5925. It must be remembered that the *Brussels Convention* was negotiated in the 1960s between the six original members of the then European Economic Community, which all belonged to the civil law system. When the *Brussels Convention* came up for revision, the United Kingdom tried, without success, to convince other member states that it would be beneficial to the functioning of the text to incorporate

application of the *Brussels Convention*, the English courts should not have discussed *forum non conveniens* at all.

It is even more problematic to accept the system of anti-suit injunctions. In such a system, when a court is seized in one country, the defendant in that case starts (or is about to start) a proceeding in a different country, hence taking the role of plaintiff in that second suit. The plaintiff in the first case requests the first court to order an injunction to prevent the defendant in that case from starting a case in a foreign country. This system hardly exists in civil law countries, but it has been used quite often in common law countries and particularly in the United States, the United Kingdom, and Australia.<sup>134</sup> This problem arises from the fact that, because there is no transnational unification of international jurisdictional rules, two or more countries may have jurisdiction under their own rules at the same time, between the same parties, in the same or a related case. The injunction is not directed towards the foreign court but towards the party who intends to start (or has started) the suit in the foreign country. In a country like the United States it is not without significance that, at the domestic level, the concomitance of two proceedings is not considered as a problem, since the first judgment reached will be pleaded in the second case; the *lis pendens* doctrine not being part of the United States procedural system.<sup>135</sup> By contrast, when the competition between jurisdictions occurs at the international level, there is a clear distrust of foreign courts in favour of proceedings taking place in the United States. This is beyond criticism when the parties have agreed on a choice of forum clause giving jurisdiction to a United States court and the foreign proceeding takes place in violation of such a clause.<sup>136</sup> However, when no such clause exists, the competing jurisdiction is a given and it would be better for the courts to cooperate. Again, within the EU, the anti-suit injunction has been prohibited in the context of the *Brussels Convention*, and in its replacement, *Council Regulation (EC) No 44/2001*.<sup>137</sup>

The last example deals with jurisdiction over internet activities. Litigation involving Yahoo! Inc and La Ligue contre le Racisme et l'Antisémitisme was one of clear competition between the United States and France, both at the substantive level and for jurisdictional purposes. Briefly, the case involved Yahoo! Inc's auction sites, which offered Nazi and racist memorabilia prohibited

a provision for *forum non conveniens*. Admittedly, this occurred before anyone had envisaged the option of negotiating the *Amsterdam Treaty*.

<sup>134</sup> For the United States, see, eg, *Quaak v Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F 3d 11 (1<sup>st</sup> Cir, 2004); *Stonington Partners Inc v Lernout & Hauspie Speech Products NV*, 310 F 3d 118 (3<sup>rd</sup> Cir, 2002); *Kaepa Inc v Achilles Corp*, 76 F 3d 624 (5<sup>th</sup> Cir, 1996). For the United Kingdom, see, eg, *Airbus Industrie GIE v Patel* [1999] 1 AC 119; *Donohue v Armo Inc* [2002] 1 All ER 749. For Australia, see, eg, *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

<sup>135</sup> However, a recent Bill for the recognition and enforcement of foreign judgments proposed a specific rule for *lis pendens*: *A Bill to Amend Title 28, United States Code, to Clarify that Persons May Bring Private Rights of Actions against Foreign States for Certain Terrorist Acts, and for Other Purposes* (US) S 1257, 109<sup>th</sup> Cong (2005) s 4. If ever adopted by Congress, this would be a first in the history of the United States.

<sup>136</sup> See *Kaepa Inc v Achilles Corp*, 76 F 3d 624 (5<sup>th</sup> Cir, 1996).

<sup>137</sup> *Turner v Grovit* (C-159/02) [2004] ECR I-3565.

in France<sup>138</sup> but not in the United States because of the First Amendment to the *United States Constitution*. The lack of cooperation resulted in several conflicting judgments in both countries, each country refusing to enforce the other's decisions.<sup>139</sup>

Another source of difficulty which gives rise to a lack of cooperation is the fact that jurisdictional rules have always been considered unilateral — that is, taking into consideration only the interests of the courts of the country which define the norm, without due consideration of other countries' interests. This underscores why it is so important to be able to agree on a truly global convention for jurisdiction in the same way that the EU member states were able to adopt the *Brussels Convention*. The unilateral characteristic of jurisdictional rules has caused difficulties in the past, but these have been multiplied exponentially with internet disputes, as shown by the *Anticybersquatting Consumer Protection Act of 1999* (US).<sup>140</sup> This Act creates an in rem jurisdictional basis, whereby courts at the place of registration of a domain name have the power to decide disputes over that particular domain name.<sup>141</sup> Given that Verisign in Virginia is the registry for the top level generic domains, the *Anticybersquatting Consumer Protection Act of 1999* (US) has the effect of conferring global jurisdiction over such domain names on United States courts.

For all the above reasons, cooperation should be encouraged as a replacement for competition between the legal systems of different countries. The use of the word 'cooperation' is important. Thirty years ago, one talked about 'judicial assistance'. The word 'assistance' is still used, but what is really needed is true judicial cooperation.

#### A Networks of Authorities and Judges

The idea of a network of authorities is not completely novel. Indeed, the Hague Conference on Private International Law ('Hague Conference')<sup>142</sup> has been a leader in requesting, in many of its conventions, the creation of what are known as 'central authorities'.<sup>143</sup> Each state acceding to a convention has the duty to create a central authority which will work as a facilitating body within a state and will liaise with the central authorities of other states which are party to the same convention.<sup>144</sup>

From this early example, networks of authorities have developed very strikingly in the last decade or so in a different manner. Such networks exist in many

<sup>138</sup> *Code Penal*, art R645-1 (France).

<sup>139</sup> See, eg, *Yahoo! Inc v La Ligue contre le Racisme et l'Antisémitisme*, 399 F 3d 1010 (9<sup>th</sup> Cir, 2005); TGI, Paris, 11 février 2003, D 2003 inf rap, 603.

<sup>140</sup> 15 USC § 1125(d) (1999). For an analysis of the Act in the context of trademarks, see Richard L Garnett, 'Trademarks and the Internet: Resolution of International IP Disputes by Unilateral Application of US Laws' (2005) 30 *Brooklyn Journal of International Law* 925.

<sup>141</sup> *Anticybersquatting Consumer Protection Act of 1999* (US) 15 USC § 1125(d)(A)(ii) (1999).

<sup>142</sup> See generally, Hague Conference <<http://www.hcch.net>>.

<sup>143</sup> See, eg, *Convention on International Access to Justice*, opened for signature 25 October 1980, 1510 UNTS 375, art 3 (entered into force 1 May 1988).

<sup>144</sup> See, eg, *Convention on International Access to Justice*, opened for signature 25 October 1980, 1510 UNTS 375, arts 3–4 (entered into force 1 May 1988).

different fields, such as accounting, competition, family and financial law, whether in substantive law or for procedural matters only. So vast are the networks that some authors have proposed the idea that this trend is the new paradigm of world governance.<sup>145</sup> These networks take many different forms: they are sometimes independent from international organisations, but may also be formed either within the framework of organisations such as the UN with the aim of helping decision making, or formed upon encouragement from the organisation. Such is the case with the Hague Conference, where networks participate more actively and efficiently in the enforcement of the conventions adopted under the auspices of the organisation. In addition, some very informal networks, of judges or administrative authorities, serve as a think tank for their members to help them grasp the most current international or domestic trends in order for them to do a better job in their professional lives. This article will analyse an example of each type of network.

Competition has been a very fruitful area in which administrative authorities around the world have gathered together, forming what is known as the International Competition Network ('ICN'), complemented within Europe by the European Competition Network ('ECN'). It is not a dispute resolution mechanism but a preventive one, and it is thanks to the work of bodies such as the ICN that conflicts may be avoided. The ICN describes itself as follows:

The International Competition Network (ICN) provides antitrust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern. It facilitates procedural and substantive convergence in antitrust enforcement through a results-oriented agenda and informal, project-driven organization.

The ICN brings international antitrust enforcement into the 21<sup>st</sup> century. By enhancing convergence and cooperation, the ICN promotes more efficient, effective antitrust enforcement worldwide. Consistency in enforcement policy and elimination of unnecessary or duplicative procedural burdens stands to benefit consumers and businesses around the globe.<sup>146</sup>

The ICN was formed in October 2001 by 14 jurisdictions after they realised that globalisation had considerably increased the number and extent of overlapping interests in competition matters, and that an increasing number of countries had created their own bodies of law and enforcement agencies. While these bodies numbered less than 20 in the middle of the 20<sup>th</sup> century, they now number more than 80 around the globe. It is noteworthy that the ICN has no headquarters, nor any secretariat, and most of the work is conducted through more modern means of communication.<sup>147</sup> When physical meetings do happen, they take place in different countries. The ICN does not seek any 'top-down' harmonisation of competition law and policies throughout the world. It considers that any attempt

<sup>145</sup> Anne-Marie Slaughter, *A New World Order* (2004).

<sup>146</sup> ICN <<http://www.internationalcompetitionnetwork.org>>.

<sup>147</sup> These networks are significantly assisted by contemporary communication techniques such as videoconferencing and the internet. For an example of the use of such communication techniques in the taking of evidence, see Martin Davies, 'Taking Evidence by Video-Link in International Litigation' in Talia Einhorn and Kurt Siehr (eds), *Intercontinental Cooperation through Private International Law — Essays in Memory of Peter E Nygh* (2004) 69.

at wholesale harmonisation would do injustice to the great diversity of the economic, institutional, legal and cultural settings prevalent in the home jurisdictions of its member agencies. Hence, whenever the ICN identifies best practices, or the most convincing approach, it is up to individual agencies to consider whether they want to adopt such an approach.<sup>148</sup> In addition, the practices which the ICN recommends are partly based on close inter-agency cooperation, notably in the control of multi-jurisdictional mergers. In another area, that of the fight against cartels, the ICN has recognised the difficulty of finding evidence, since the secrecy of the entities taking part in the cartels prevents successful investigations.<sup>149</sup> This is why the ICN works as a platform between anti-cartel enforcers who meet regularly for workshops where they share experiences and best practices. They also discuss ways of strengthening their cooperation to achieve more successful results.

The ECN has been set up to facilitate close cooperation among national competition authorities and the European Commission. It also ensures an effective and consistent application of arts 81 and 82 of the *Consolidated EC Treaty. Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules of Competition Laid Down in Articles 81 and 82 of the Treaty ('Modernisation Regulation')*<sup>150</sup> and the joint statement of the Council of the European Union and the European Commission set out the main principles for the functioning of the ECN.<sup>151</sup> These must be understood within the framework of the reform of European competition law which has been changed from a centralised system of exemptions to a decentralised system of legal exception.<sup>152</sup> The decentralised nature of the system renders the issuance of contradictory decisions and a less coherent application of the law more likely. The *Commission Notice on Cooperation within the Network of Competition Authorities*<sup>153</sup> was issued in order to ensure that if more than one authority deals with a case in parallel actions, the authorities will endeavour to coordinate their action to the extent that it is possible.<sup>154</sup> At first glance, corporations may not be very enthusiastic about this prospect, and some authors have advised them to try to get the Commission to deal with their cases in a one-stop shop.<sup>155</sup> An additional worry for companies is the leniency programmes which are developed throughout the EU, and the fact that there is an exchange of information between competition

<sup>148</sup> See ICN, *About the ICN* <<http://www.internationalcompetitionnetwork.org/aboutus.html>>.

<sup>149</sup> See ICN Working Group on Cartels, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties* (2005) vol 1, 5.

<sup>150</sup> [2003] OJ L 1/1, 7.

<sup>151</sup> Council of the European Union, *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities*, Doc 15435/02 ADD 1 RC 22 (2002).

<sup>152</sup> The *Modernisation Regulation* came into force on 1 May 2004: [2003] OJ L 1/1, 25. Negative clearance decisions will no longer be issued. Companies have to assess their agreements themselves and can no longer receive legal certainty from an exemption or negative clearance decision.

<sup>153</sup> [2004] OJ C 101/43.

<sup>154</sup> *Commission Notice on Cooperation within the Network of Competition Authorities* [2004] OJ C 101/43, 44.

<sup>155</sup> See, eg, Cornelis Canenbley and Michael Rosenthal, 'Cooperation between Antitrust Authorities in — and outside the EU: What Does It Mean for Multinational Corporations?' (Pt 1) (2005) 26 *European Competition Law Review* 106, 110.

authorities within the network. If these concerns are legitimate at a time when the network is starting its operation and before it is able to develop best practices, hopefully they will disappear over time, considering the benefits actors in the market will enjoy from that kind of cooperation.

In family law, the Hague Conference has pioneered a system in which judges of countries that had ratified the Hague conventions on family law matters<sup>156</sup> are able to gather for seminars, which led to the establishment of an informal network with its own newsletter.<sup>157</sup> The network is designed to allow actual cases to be handled more smoothly than if there was competition among judges. Indeed, when a child is abducted in one country and is taken into another, it is certainly more detrimental to the child that the judges in the two countries ignore each other and make separate decisions regarding the best interests of that child,<sup>158</sup> instead of sharing information and trying to decide together what would be the best solution. The judges' network therefore tries to overcome the ignorance and isolation of judges when they have to decide a transnational case.

In pure dispute resolution or procedural matters, the EU is somewhat of a champion in creating networks. Besides the European Judicial Network in Civil and Commercial Matters ('EJ-Net'),<sup>159</sup> there is the European Consumer Centres Network ('ECC-Net'),<sup>160</sup> SOLVIT,<sup>161</sup> and more.<sup>162</sup> Since the *Treaty of Amsterdam*,<sup>163</sup> civil cooperation has been established as a new competence of the Community.<sup>164</sup> In order to implement this new competence, the Council of the European Union met in Tampere, Finland, in October 1999 to discuss an action plan for the new area of freedom, security and justice (forming the 'Tampere

<sup>156</sup> See, eg, the first of such treaties, the *Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983).

<sup>157</sup> See, eg, Hague Conference on Private International Law, *International Child Protection — The Judges' Newsletter* (2003) <<http://hcch.e-vision.nl/upload/autumn2003.pdf>>.

<sup>158</sup> The best interests of the child is indeed the criterion on which the judge should decide all family law cases.

<sup>159</sup> See *Council Decision (EC) No 2001/470 of 28 May 2001 Establishing a European Judicial Network in Civil and Commercial Matters* [2001] OJ L 174/25, 25.

<sup>160</sup> See *Council Resolution on a Community-Wide Network of National Bodies for the Extra-Judicial Settlement of Consumer Disputes* [2000] OJ C 155/1.

<sup>161</sup> This is a very interesting programme of networks between administrative authorities to solve, at a very early stage, potential disputes related to the functioning of the internal market — that is, the 'four freedoms' (freedom of movement of goods, services, persons and capital). When either a company or an individual faces an obstacle in exercising the right of freedom of circulation granted by the European primary or secondary law, they may address complaints to SOLVIT's representative in their own country. That representative will try to arrange the matter with SOLVIT's representative in the country of destination, thus preventing a dispute from arising: see generally *About SOLVIT* (2004) EUROPA: Gateway to the European Union <[http://europa.eu.int/solvit/site/about/index\\_en.htm](http://europa.eu.int/solvit/site/about/index_en.htm)>.

<sup>162</sup> See, eg, Eurojust, a body established to complement Europol in dealing with the investigation and prosecution of 'serious cross-border and organised crime': Eurojust: The European Union's Judicial Cooperation Unit <<http://www.eurojust.eu.int>>.

<sup>163</sup> [1997] OJ C 340/145 (entered into force 1 May 1999).

<sup>164</sup> This is true for all member states except Denmark, which has the ability to opt out of certain areas of EU policy: see below n 198. Cf the United Kingdom and Ireland, who negotiated a special opt-in provision in the *Amsterdam Treaty* which allows them a choice in participating or abstaining from participation in any Community instrument adopted on the basis of art 65 of the *Consolidated EC Treaty* [2002] OJ C 325/33 (entered into force 1 February 2003). So far, they have opted into each of these instruments.

Programme').<sup>165</sup> During that meeting, the heads of state and governments decided that the European Commission should take various initiatives to facilitate access to justice within Europe for individuals and corporations. One of the initiatives cited was a network of national authorities specifically competent in civil and commercial matters. In response to the Tempere Programme, the Council of the European Union more recently reiterated its commitment to the continued development of judicial cooperation and to the full completion of the programme of mutual recognition adopted in 2000<sup>166</sup> during its Brussels Meeting in November 2004 (forming the 'Hague Programme').<sup>167</sup> The Council of the European Union confirmed that 'borders between countries in Europe [should] no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.'<sup>168</sup> The Council of the European Union, therefore, stressed the importance of enhancing cooperation and, with that objective in mind, decided to require that each member state designate 'liaison judges' or other competent authorities.<sup>169</sup>

In September 2000, the European Commission did propose such a network, and its creation was adopted by the Council of the European Union in May 2001.<sup>170</sup> The EJ-Net is composed of representatives of member states' judicial and administrative authorities. The mandate of the network is to facilitate judicial and administrative cooperation, and the exchange of information and experiences. This will assist individuals and companies (and their legal counsel) who are confronted with trans-border disputes to understand the differences between the systems of the member states, the content of European instruments, and the content of other international instruments which may be applicable such

<sup>165</sup> The Directorate-General of the European Commission responsible for work in these areas recently changed its title from Directorate-General on 'Justice and Internal Affairs' to that on 'Freedom, Security and Justice'.

<sup>166</sup> See *Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters* [2001] OJ C 12/1.

<sup>167</sup> For the Presidency's conclusions on the Hague Programme, see Council of the European Union, *Brussels European Council 4/5 November 2004: Presidency Conclusions*, Doc No 14292/04 (2004). The Presidency's conclusions were essentially made in response to the terrorist attacks in the United States and Madrid (the London attacks had not yet occurred). This aspect of the conclusions will not be dealt with here notwithstanding the importance of the network of authorities in criminal matters. The Hague Programme was developed against the background of a draft constitutional treaty, and on the assumption that such a treaty would be ratified: at 10. This prospect is now doomed. However, the Hague Programme does not require much amendment as the main thrust of the competencies remain very similar with or without the constitution.

<sup>168</sup> *Ibid* 35.

<sup>169</sup> The liaison judge was invented on a bilateral basis a few years ago by France, Italy, the Netherlands and the United States, initially to deal with criminal matters. The success of the system led to it being extended to civil matters. The system works as follows: a judge of State A goes to reside in State B, while a judge of State B goes to reside in State A. Each has an office in the Ministry of Justice of the host country, although they are also dependent on their embassy. Their role is to assist in all cross-border proceedings by explaining the legal and judicial system of their country of origin to their counterparts in the host country so as to facilitate smooth and successful cooperation. They are also instrumental in enforcing in the host country decisions made in their country of origin. Liaison judges are already part of the EJ-Net: see *Council Decision (EC) No 2001/470 of 28 May 2001 Establishing a European Judicial Network in Civil and Commercial Matters* [2001] OJ L 174/25, art 2(c).

<sup>170</sup> *Ibid*.



as those adopted by the Hague Conference or the Council of the European Union, with the aim of achieving amicable resolution of disputes whenever possible. More precisely, EJ-Net is charged with the task of facilitating 'the smooth operation of procedures having a crossborder impact and the facilitation of requests for judicial cooperation between the Member States, in particular where no Community or international instrument is applicable'.<sup>171</sup> The network's modus operandi is essentially organised around three methods:

- 1 direct contact between authorities (including judges);
- 2 periodic meetings (some of which are closed meetings while others are public); and
- 3 drawing up and updating information on judicial cooperation and the legal systems of the member states.<sup>172</sup>

More importantly, several provisions emphasise the practicalities of cooperation. The aim is clearly to establish a concrete set of enabling rules so that the network functions in all practicable ways.<sup>173</sup>

The next step that will soon be proposed by the European Commission is to open the network to the different legal professions, including practising attorneys, *notaires* (notaries) and *huissiers* (bailiffs). Of course, because the network is funded by public money, it will not be easy to open it to private professionals without a corresponding decision about their proper financial contribution. This is a difficult issue because small firms, individuals and companies that do not have the financial means to participate in the network may be deprived of valuable information which should remain public and free. It is also difficult to conceive of different levels of participation being organised depending on the level of financial contribution. The solution may lie in opening the network to all, with financial contribution remaining purely voluntary. Alternatively, the financial participation could come from the professional organisations (bar associations, *chambre des notaires* etc) instead of individual members. The whole idea behind the opening of the network to the legal profession is to establish best practices.<sup>174</sup>

### B Cooperation of Judges in the Arbitral Process

A very telling expression has been invented by Swiss doctrine: *juge d'appui*.<sup>175</sup> This concept has triggered little international attention so far and has not resulted in a generally-accepted translation into English. For lack of a better expression, it can be described as a 'support judge'. The support judge stems from the idea that there should be no competition between arbitration and state courts, as they are

<sup>171</sup> Ibid art 3.2(a).

<sup>172</sup> Ibid art 4.

<sup>173</sup> See, eg, ibid arts 6 (cooperation between authorities), 7 (cooperation between language facilities), 8 (cooperation between technical facilities).

<sup>174</sup> See Council of the European Union, *Brussels European Council 4/5 November 2004: Presidency Conclusions*, above n 167, 41.

<sup>175</sup> Pierre Lalive, Jean Poudret and Claude Reymond (eds), *Le Droit de l'Arbitrage Interne et International en Suisse* (1989) 327.

complementary and should work together.<sup>176</sup> The support judge is there to ensure assistance in the arbitration process when needed so that it is efficient and the parties' intention to use arbitration as their dispute resolution method is fully respected. Depending upon the arbitration law to be applied, the support judge may help by appointing an arbitrator when the appointment process fails; by prolonging the deadline to render the award; by granting provisional measures when the tribunal is unable to do so; or by enforcing such measures when the tribunal has ordered them. They may also suspend the proceedings to set aside an award in order to give the arbitral tribunal an opportunity to take action to eliminate the grounds for setting it aside.<sup>177</sup> Under French law, the *juge d'appui* is found in the place of arbitration as long as it is situated in France.<sup>178</sup> Article 1493 of the *Nouveau Code de Procédure Civile* provides that, where arbitration proceedings are international in nature — as opposed to being purely domestic<sup>179</sup> — difficulties concerning the formation of the arbitral tribunal shall be resolved by a single judge: the president of the *tribunal de grande instance* ('TGI') of Paris. The rule is easy to justify. First, most international arbitration proceedings take place in the TGI of Paris, where specialised firms are also located. Second, over the years, judges at the TGI of Paris have developed a strong expertise in the field so that the quality of their decisions is high.<sup>180</sup> But, very cogently, art 1493 suggests that the parties to the arbitration agreement may choose another support judge. Hence, if the parties have chosen, for example, a judge in Geneva, that choice will be upheld, at least by the French judge. It remains to be seen whether the court in Geneva would accept such a choice and whether this would be a cogent choice. Nevertheless, art 1493 operates irrespective of whether the court chosen is located within or outside of France. In addition, art 1457 makes it possible for the arbitral tribunal itself — and not only the parties — to apply to the support judge in a defined set of circumstances,<sup>181</sup> provided that the arbitration proceedings take place in France (or that French law is held to be applicable in the case of an international arbitration) unless the

<sup>176</sup> The first French author to develop this idea was Berthold Goldman: Goldman, 'L'Action Complémentaire des Juges et des Arbitres en Vue d'Assurer l'Efficacité de l'Arbitrage Commercial International' in Cour d'Arbitrage de la CCI (ed), *Arbitrage International — 60 Ans Après: Regards sur l'Avenir* (1984) 271.

<sup>177</sup> This is known as the 'remission' rule: see *UNCITRAL Model Law on International Commercial Arbitration 1985*, art 34(4) <<http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf>>; *Arbitration Act 1996* (UK) c 23, s 68(3). Cf art 1059 of the *Zivilprozessordnung* (Germany) which grants to the courts power to remit the case — not the award — to the arbitral tribunal after setting aside the award: see Pieter Sanders, 'UNCITRAL's Remission Reconsidered' in Bernadini Piero et al (eds), *Liber Amicorum Claude Raymond: Autour de l'Arbitrage* (2004) 273.

<sup>178</sup> The rule works as a unilateral rule.

<sup>179</sup> Article 1492 of the *Nouveau Code de Procédure Civile* (France) defines an international arbitral proceeding as one in which 'international commercial interests are involved'.

<sup>180</sup> Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Traité de l'Arbitrage Commercial International* (1996) 526.

<sup>181</sup> It has been decided that each arbitrator individually may refer matters to the support judge: see TGI, Paris, Ref, 29 novembre 1989, *Revue de l'Arbitrage* (1990) 525.

parties have decided otherwise. Many other arbitration laws also provide for some help by a judge.<sup>182</sup>

Hence, I think it is about time to encourage parties to include such a provision in their arbitration agreement, and for legislators to add such a mechanism into their arbitration law. However, before that can occur, a number of factors must first be addressed by legislators:

- 1 What are the matters which could be entrusted to the support judge? Difficulties in the formation of the arbitral tribunal; revocation of an arbitrator; the time limit to render the award; difficulties in obtaining evidence; difficulties in ordering provisional or protective measures.<sup>183</sup>
- 2 Who may seize the support judge? The parties first (either jointly or separately); the arbitral tribunal acting through its chairperson; or, failing an action by the tribunal, each of the arbitrators.
- 3 Which judge should be appointed as a support judge? Is it a good idea to designate one judge per country? The answer will depend upon the size of the country and the frequency of arbitration proceedings in that country. If the arbitration practice is mostly concentrated in one area, then it will certainly be better to concentrate the jurisdiction of the support judge in that area. However, in countries where arbitration proceedings are scattered, or where there is a federal structure, several judges could be appointed. A more centralised jurisdiction could be created where the matter is federalised and a strong interest is shown for the concentration of judicial assistance. In any case, the parties to the dispute should be free to decide upon a specific judge either in their arbitration agreement or later when they organise the procedure with the arbitral tribunal. Failing an agreement to that end, the judge sitting at the place of arbitration could be the support judge.
- 4 What would be the time limit to seize the support judge? It should be short — a few days to a maximum of a few week — and time should run from the day the difficulty is known by the person who seizes the judge. This is where the action of the legislator is most needed. Indeed, the judicial system should be able to accommodate rapid actions either as a *référé* or upon unilateral requests.
- 5 Could the decisions of a support judge be appealed? For the sake of simplification of the procedural aspects, efficiency and time, I would argue against allowing such appeals. The only recourse I would allow against the support judge's decisions would be if they acted *ultra vires*.

<sup>182</sup> See, eg, *Wetboek van Burgerlijke Rechtsvordering*, arts 1026–35 (Netherlands) (inserted by *Arbitragewet van 1986* (Netherlands)); *Loi Fédérale sur le Droit International Privé*, arts 179–80, 185 (Switzerland); *Codice Civile*, art 810 (Italy). For a thorough comparative analysis, see especially Jean-François Poudret and Sébastien Besson, *Droit Comparé de l'Arbitrage International* (2002) 361 ff.

<sup>183</sup> The ordering of provisional or protective measures is more difficult since it is considered as being within the sole power of the arbitral tribunal.

### C Court-to-Court Cooperation

Court-to-court cooperation is needed mostly in traditional matters of conflict of jurisdictions. But here, the old habits and classic thinking are difficult to displace.

#### 1 Jurisdiction

It is quite disturbing to think that the member states of the Hague Conference have been unable to agree on a convention on jurisdiction and foreign judgments covering many aspects of civil and commercial international relations. All the efforts which were deployed between 1992 and 2001 failed and there will be no adoption of a text of a general nature.<sup>184</sup> It is not the foreign judgments part of the project which was the most difficult.<sup>185</sup> Indeed, the major cause of the failure was the chapter in the draft convention which proposed provisions on direct jurisdiction. The reasons for that may not be entirely easy to ascertain. It may be that some negotiators did not want to curtail the right that individuals and companies enjoy to sue in their home jurisdiction and hence there may not have been room to allow a fairly objective allocation of jurisdiction around the world, including through means of cooperative mechanisms such as *forum non conveniens* or provisional measures. Another reason may have been that jurisdiction remains, in many countries, an exercise in sovereignty to which no limit is acceptable unless what is obtained in return is considered as having a higher price. It is not the first time that jurisdictional rules have caused problems in The Hague. It should be remembered that the *Convention on the Choice of Court* never came into force.<sup>186</sup> In 1971, for the *Brussels Convention*, negotiations were required on a separate protocol for the rules of indirect jurisdiction necessary for the functioning of the enforcement rules.<sup>187</sup>

One may still find a sign of this lack of willingness to cooperate in the latest Hague *Convention on Exclusive Choice of Court Agreements*,<sup>188</sup> despite the fact that the word 'cooperation' appears three times in the preamble.<sup>189</sup> What I consider to be a lack of willingness to cooperate may be seen in the following features of the convention. First, it applies only to exclusive choice of court

<sup>184</sup> See, eg, Hague Conference, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (2000) <<http://www.hcch.net/upload/wop/jdgmpl1.pdf>>.

<sup>185</sup> However, it should be acknowledged that one aspect was indeed difficult — that of punitive or exemplary damages. Yet, very early in the negotiations, all delegations agreed that a special provision should allow the judge of the requested state — that in which the foreign judgment must be recognised or enforced — to accept enforcement for only a part of the damages awarded in the state of origin.

<sup>186</sup> *Convention on the Choice of Court*, opened for signature 25 November 1965, 4 ILM 348 (not in force).

<sup>187</sup> *Protocol concerning the Interpretation by the Court of Justice of the European Communities of the Convention of 27 September 1968 concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters*, opened for signature 3 June 1971, 1262 UNTS 259 (entered into force 1 September 1975).

<sup>188</sup> *Convention on Exclusive Choice of Court Agreements*, opened for signature 30 June 2005 (not yet in force) <[http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98)>.

<sup>189</sup> *Convention on Exclusive Choice of Court Agreements*, opened for signature 30 June 2005, art 3 (not yet in force) <[http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98)>.

clauses, which are strictly defined,<sup>190</sup> and only if the court or courts chosen are situated in a contracting state, thereby leaving to non-conventional law all other clauses. Second, a long list of excluded matters appears in art 2 where, alongside fairly traditional areas such as family law and the law of succession, there appears a host of other matters which may have a strong economic component.<sup>191</sup> Third, the fact that many reasons are given for a court other than the chosen one to accept jurisdiction also demonstrates a lack of cooperation. This is the substance of art 6, which has not changed substantially from earlier drafts.<sup>192</sup> It is quite extraordinary that a court which has not been chosen by the parties would be given wide powers to decide on the validity and the effect of the choice of court clause. In my view, it would have been enough to provide for the operation of the public policy of the other state. This is a result of party autonomy. Article 6 of the *Convention on Exclusive Choice of Court Agreements* favours a *mala fide* party who realises, at the time of the dispute, that the choice made at the time of the agreement is less favourable to its interests than it initially thought it to be.<sup>193</sup> Some argue that obliging a party to go to the chosen court in order to discuss the validity of the choice of court clause is unrealistic,<sup>194</sup> costly, and should not be encouraged.<sup>195</sup> I believe, on the contrary, that this is the only way to avoid competing litigation and the corresponding risk of inconsistent decisions. This problem leads to a loss of time, effort, resources, and is a burden on court systems around the world. In the United States, the tradition has been to let several court proceedings continue simultaneously and apply the first-in-time rule as far as judgments are concerned. However, lately — even in

<sup>190</sup> Article 3(a) of the *Convention on Exclusive Choice of Court Agreements*, opened for signature 30 June 2005 (not yet in force) <[http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98)> defines an exclusive choice of court clause as one

concluded by two or more parties that ... designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.

<sup>191</sup> See especially *Convention on Exclusive Choice of Court Agreements*, opened for signature 30 June 2005, arts (2)(h), (k)–(o) (not yet in force) <[http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98)>. Other exclusions with economic consequences — for example, transport, maritime and nuclear matters — are less problematic because they are mostly covered by other international conventions.

<sup>192</sup> On the draft immediately preceding the diplomatic session, see Catherine Kessedjian, 'L'Élection de For — Vers une Nouvelle Convention de La Haye' in Birgit Bachmann et al (eds), *Grenzüberschreitungen: Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit — Festschrift für Peter Schlosser zum 70 Geburtstag* (2005) 367, 367–81.

<sup>193</sup> The only provision which may work as a counter-incentive for such a party lies in art 8, which only applies to a judgment of the chosen court. In other words, if a court accepts jurisdiction under art 6, its judgment will not benefit from the convention's rules on recognition and enforcement.

<sup>194</sup> The same is also true for an arbitration clause.

<sup>195</sup> Peter Schlosser has a strong opinion against what is known in arbitration as the principle of 'competenz-competenz': see Peter F Schlosser, 'The Separability of Arbitration Agreements — A Model for Jurisdiction and Venue Agreements?' in Talia Einhorn and Kurt Sierh (eds), *Intercontinental Cooperation through Private International Law — Essays in Memory of Peter E Nygh* (2004) 305. However, Schlosser speaks of a 'seemingly elected court': at 306. That is, those cases where it is doubtful (or manifestly doubtful) that the party contesting the clause has ever given its approval to it. It is not so much a question of validity of the clause but of the validity of the exchange of will in the contracting process.

the United States — the costs (in all senses of the word) generated by such an approach have been assessed anew and a proposal for a *lis pendens* rule has been published by the ALI.<sup>196</sup>

In fact, the best rule would have been to encourage and organise cooperation between the courts which are interested in deciding the case. The chosen court could be the leader in the process of cooperation, with a duty to contact the court or courts which are designated by the party contesting the first court's jurisdiction, so that a decision on jurisdiction can be taken jointly. Alternatively, a court seized, if not the chosen court, could contact the chosen court in order to verify whether it accepted jurisdiction or not. Neither of these two courses were even suggested during the negotiations. I realise that even if they had been incorporated into the convention, the potential obstacles to achieving effective cooperation would not necessarily have been eliminated. Indeed, there may be courts which would not have been contacted at the jurisdictional stage but would still have an interest at the recognition level (for example, where the court is located in a country in which some property of the losing party is located). However, the interest of that court in the initial jurisdictional aspect of the case is probably too remote to have any relevance at the recognition stage.

## 2 Provisional Measures

If there is a place where international cooperation is absolutely crucial it is in the provisional measures. Very often a case will be lost or won on the issue of whether a provisional measure is granted and enforced in favour of one party; the losing party in the provisional phase having a strong incentive not to pursue the matter.

Here again, the willingness of states to cooperate has always been meagre. Within the EU, the first provision towards cross-border enforcement of provisional measures was included in the *Brussels Convention*, then later in the 1988 *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*,<sup>197</sup> and most recently in *Council Regulation (EC) No 44/2001*, which replaced the *Brussels Convention* for all member states but Denmark.<sup>198</sup> Interestingly, the provision is drafted in a very conservative way. It is not really a rule on jurisdiction, but an enabling rule which allows member states to use their own law to grant interim measures. This is why the ECJ was

<sup>196</sup> ALI, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, Proposed Final Draft (11 April 2005) § 11. This project is being developed under the leadership of Professors Andreas Lowenfield and Linda Silberman as co-rapporteurs. See also Linda Silberman, 'A Proposed *Lis Pendens* Rule for Courts in the United States: The International Judgments Project of the American Law Institute', in Talia Einhorn and Kurt Siehr (eds), *Intercontinental Cooperation through Private International Law — Essays in Memory of Peter E Nygh* (2004) 341.

<sup>197</sup> Opened for signature 16 September 1988, 1659 UNTS 202 (entered into force 1 January 1992) ('*Lugano Convention*').

<sup>198</sup> [2001] OJ L 12/1. The situation of Denmark is peculiar. Given that the private international law provisions of the *Amsterdam Treaty* were included in ch IV, including competences on immigration, Denmark is constitutionally unable to be governed by the chapter. Hence it negotiated a special opt-out declaration which excuses it from all legislative measures taken under the legal foundation of ch IV. For the current position, see above n 132.

asked several times to resolve specific difficulties in applying the rule.<sup>199</sup> Even in this closed regional context, cooperation has been difficult to foster. Accordingly, it is easy to understand why cooperation is all the more complicated in a true transnational environment.

The development of provisional measures in this area began with work performed by the International Law Association's Committee on International Civil and Commercial Litigation under the leadership of the late Dr Peter Nygh. Indeed, that committee took up as its first mandate a reflection upon and draft of a resolution on provisional measures.<sup>200</sup> Any reader of the resolution which was adopted at the end of the Committee's work on that subject can see that committee members were keen to insist on the utmost cooperation between states. However, because of its state of mind at the time, the Committee was conservative in drafting the resolution and the accompanying comment.<sup>201</sup> Since then, direct communication in fields other than provisional measures has gained momentum.<sup>202</sup> I am hopeful that this will also be developed in the field of interim measures. The latest attempt by UNCITRAL to grant interim measures power to arbitral tribunals may be a step in the right direction,<sup>203</sup> at least as far as the coordination of these powers with those of courts is concerned.

### 3 *The Taking of Evidence*

One of the oldest examples of traditional judicial assistance between countries is the service of documents abroad and the taking of evidence abroad. These matters were the subject of the oldest Hague conventions and have been modernised over time, culminating in the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*<sup>204</sup> and the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*.<sup>205</sup>

<sup>199</sup> See, eg, *Denilauler v Snc Couchet Frères* (C-125/79) [1980] ECR 1553; *Reichert v Dresdner Bank AG* (C-261/90) [1992] ECR I-2149; *Van Uden Maritime BV v KG in Firma Deco-Line* (C-391/95) [1998] ECR I-7091; *Mietz v Internship Yachting Sneek BV* (C-99/96) [1999] ECR I-2277.

<sup>200</sup> See International Law Association, Committee on International Civil and Commercial Litigation, 'Second Interim Report: Provisional and Protective Measures in International Litigation' in International Law Association, *Report of the 67<sup>th</sup> Conference: Helsinki* (1996) 185. These provisional measures were adopted at the International Law Association's Biennial Conference in Helsinki.

<sup>201</sup> The second limb of Principle 15 reads: 'The possibility is not even excluded of states conferring on their courts permission, where authorised, to communicate directly with relevant judicial authorities in other countries.' The accompanying comment stresses the difficulties that some members of the Committee on International Civil and Commercial Litigation had with this part of the resolution:

The Committee recognised that direct communication between courts would not be possible at least without State sanction. Professor Takakuwa (Japan) was mindful of the potential difficulties which could lie in the way of such a measure. Nevertheless, on balance the Committee wished to give some encouragement to further developments in this area.

International Law Association, Committee on International Civil and Commercial Litigation, above n 200, 198–9.

<sup>202</sup> See above Part III(E).

<sup>203</sup> *Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Second Session (New York, 10–14 January 2005)*, UN Doc A/CN.9/573 (2005).

<sup>204</sup> Opened for signature 15 November 1965, 658 UNTS 163 (entered into force 10 February 1969).

<sup>205</sup> Opened for signature 18 March 1970, 847 UNTS 231 (entered into force 7 October 1972) ('Hague Evidence Convention').

In the EU, these two topics were among the very first to become Community law after the *Amsterdam Treaty* established judicial cooperation as an area of Community competence.<sup>206</sup>

I will limit my comment to evidence, as it is in that particular field that some recent developments have taken place which may be of significance for my argument. The *Hague Evidence Convention* limits itself to evidence taken abroad, outside the judicial system, through a system involving a central authority, while the proceedings are taking place in the home jurisdiction. Usually, the evidence is gathered in a manner that is known in the home country, while the requested country may impose its public policy if those procedures are incompatible with its own. Several countries, including France, amended their procedural codes and rules when acceding to the *Hague Convention* to allow foreign measures to be used more readily in their courts.<sup>207</sup>

The United States had already gone further than that before acceding to the *Hague Evidence Convention*,<sup>208</sup> allowing parties to proceedings outside the United States (either before a foreign or an international tribunal) to seek judicial cooperation in the United States to obtain the production of documentary or testimonial evidence under § 1782 of the *United States Code*.<sup>209</sup> Section 1782 is very broad, as it applies to proceedings outside the United States which are before any kind of tribunal (not only a court).<sup>210</sup> This applies whether or not the evidence is requested by ‘any interested person’, as well as whether or not the

<sup>206</sup> Article 65(c) of the *Consolidated EC Treaty* [2002] OJ C 325/33 (entered into force 1 February 2003) provides:

Measures in the field of judicial cooperation in civil matters having cross-border implications ... shall include ... eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in member states.

The approximation of law for notification was achieved through *Council Regulation (EC) No 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters* [2000] OJ L 160/19, while the approximation for evidence was achieved through *Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil and Commercial Matters* [2001] OJ L 174/1. The latter only came into force on 1 January 2004 as member states had to put in place special mechanisms to allow court-to-court direct transmission and execution of requests.

<sup>207</sup> In France, for example, it is possible to obtain United States-style testimonies, conducted before a court reporter and with examination and cross-examination: see, eg, *Code de Procédure Pénale*, art 694 (France).

<sup>208</sup> In its current form, r 44 of the *Federal Rules of Civil Procedure 2005* (US) essentially dates back to 1965. It was adopted after a recommendation by the Commission on International Rules of Judicial Procedure, established by Congress in 1958 with the mandate to ‘investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements’: *Act of September 2*, Pub L No 85-906, § 2, 72 Stat 1743 (1958).

<sup>209</sup> 28 USC § 1782 (2005).

<sup>210</sup> There is still some controversy over the exact meaning of the word ‘tribunal’, as some argue that it cannot cover purely private bodies such as arbitration tribunals: see, eg, *National Broadcasting Co v Bear Stearns & Co*, 165 F 3d 184 (2<sup>nd</sup> Cir, 1999); *Republic of Kazakhstan v Biedermann International Inc*, 168 F 3d 880 (5<sup>th</sup> Cir, 1999). Although arbitration proceedings are aimed at avoiding the judicial system, sometimes the help of the judicial system makes arbitration all the more effective. Hence, it is preferable to favour an interpretation of § 1782 which also covers arbitration, so long as the arbitral tribunal maintains control of the process.



proceedings are pending or the evidence is likely to be used in a proceeding which is yet to be instituted.<sup>211</sup>

However, the interpretation of § 1782 divided the federal circuits in such a way that the Supreme Court decided to grant certiorari in the case of *Intel Corp v Advanced Micro Devices Inc*.<sup>212</sup> The facts are fairly simple: in October 2000, Advanced Micro Devices ('AMD') filed an antitrust complaint against Intel Corporation ('Intel') with the European Commission in Brussels.<sup>213</sup> In order to prove its case, AMD suggested that the European Commission seek discovery of documents that Intel had previously produced in a private suit before a district court in Alabama.<sup>214</sup> After the European Commission declined to do so, AMD sought the help of the District Court for the Northern District of California under § 1782. The District Court in turn refused AMD's request,<sup>215</sup> but the Court of Appeals for the Ninth Circuit reversed that decision,<sup>216</sup> which resulted in the case being heard by the Supreme Court.

The 7:1 decision of the Supreme Court demonstrates the willingness of United States courts to lend their powers to aid foreign proceedings, even where it goes against the will of the foreign tribunal itself. Indeed, the Supreme Court decided that parity and comity concerns do not represent categorical bars to § 1782, but are merely considerations which the federal courts should weigh in reaching their decisions.<sup>217</sup> Although there are a number of very promising features in the *Intel* decision, there are other aspects that go far beyond what would be a willingness to cooperate. The Court reached the conclusion that the European Commission is a tribunal under § 1782 when it acts as a first-instance decision maker.<sup>218</sup> Whether the proceedings at that level are adversarial in nature or not, and whether the foreign institution views itself as a tribunal, have no influence on the interpretation of the meaning of § 1782.<sup>219</sup> I agree with this finding.<sup>220</sup> The Court also decided that AMD qualified as an 'interested person'.<sup>221</sup> This point is beyond controversy.

<sup>211</sup> 28 USC § 1782(a) (2005).

<sup>212</sup> 159 L Ed 255 (2004) ('*Intel*'). See Wilhelmina A de Harder, 'US Supreme Court Rules that Courts May Grant US-Style Discovery to Private Party in Antitrust Investigation' (2005) 32 *International Business Lawyer* 257.

<sup>213</sup> The European Commission is divided into a number of Directorates-General including the Directorate-General for Competition.

<sup>214</sup> *Intergraph Corp v Intel Corp*, 3 F Supp 2d 1255 (ND Ala, 1998).

<sup>215</sup> *Advanced Micro Devices Inc v Intel Corp*, C-01-7033 MISC WAI (ND Cal, 7 January 2002).

<sup>216</sup> *Advanced Micro Devices Inc v Intel Corp*, 292 F 3d 664 (9<sup>th</sup> Cir, 2002).

<sup>217</sup> *Intel*, 159 L Ed 255, 375-6 (Ginsburg J) (2004).

<sup>218</sup> *Ibid* 366.

<sup>219</sup> *Ibid* 375-6.

<sup>220</sup> The European Commission filed an amicus curiae brief to explain that if it were to be considered as a tribunal it would lose the privileges necessary to maintain its enforcement programmes; that the non-discoverability of confidential information would be compromised together with its special powers under the leniency programme; and that it would be considerably burdened if it were obliged to defer to judgments of discovery in a large number of cases: *ibid* 378. It is argued that most of these arguments are not pertinent for the interpretation of the concept of tribunal in § 1782. However, some of them could have been used to insist that due consideration was given to the home legal system.

<sup>221</sup> *Ibid* 372-3.

The Court went on to decide the requirement for discoverability. In that respect, its decision is much more controversial. Intel argued that the United States courts, in deciding which documents or testimony could be the subject of discovery, should look to the foreign law. In other words, the United States courts should not go beyond what would be available under the foreign rules on evidence. The Supreme Court looked at the text of § 1782 and noted that there was no statutory language defining a ‘foreign-discoverability requirement’.<sup>222</sup> It concluded that Congress did not intend to impose such a limit on the powers of United States courts. The Court stated that

while comity and parity concerns may be important as touchstones for a district court’s exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782.<sup>223</sup>

It is true that, as the Court noted, even if a document is filed as evidence under § 1782, the foreign court has discretion not to accept it. However, anyone who has practised in litigation knows that discovery is a burdensome and costly process which should be exercised only when absolutely necessary. This concern could be addressed by limiting orders to evidence that would be acceptable to the foreign court beyond any reasonable doubt. Also, one knows that once a document is filed as evidence, even if the court ultimately decides to disregard it, the influence of the filed document is hard to eliminate entirely. For all of these reasons, it would have been preferable to set out some kind of requirement that the foreign concept of discoverability be applied by United States courts.<sup>224</sup> This is particularly true since the Supreme Court agreed that the purpose of the statute is to ‘promote harmony and provide assistance to foreign or international tribunals’.<sup>225</sup> The Court went further and listed the factors to be considered by district courts when asked to grant such orders. These factors include:

- 1 When the person from whom discovery is sought is a participant in the foreign proceeding, as Intel was here, the need for assistance under § 1782(a) is not generally as apparent as it ordinarily is when evidence is sought from a non-participant in a matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it and can itself order them to produce evidence. In contrast, non-participants in foreign proceedings may be outside the foreign tribunal’s jurisdictional reach. Consequently, their evidence, available in the United States, may be unobtainable in the absence of § 1782(a).<sup>226</sup>
- 2 A court presented with a request made under § 1782(a) may consider the nature of the foreign tribunal, the character of proceedings under way there, and the receptivity of the foreign government, court, or agency to federal court judicial assistance.<sup>227</sup>

<sup>222</sup> *Ibid* 376.

<sup>223</sup> *Ibid*.

<sup>224</sup> It should also be recognised that the general aversion of United States courts to the application of foreign law probably influenced the Supreme Court’s reasoning.

<sup>225</sup> *De Harder*, above n 212, 260.

<sup>226</sup> *Intel*, 159 L Ed 255, 377 (Ginsburg J) (2004).

<sup>227</sup> *Ibid*.

- 3 The grounds on which Intel argued for categorical limitations on the scope of § 1782(a) may be relevant in determining whether a discovery order should be granted in a particular case. Specifically, a district court could consider whether the request made under § 1782(a) conceals an attempt to circumvent foreign proof-gathering, or other policies of a foreign country or the United States.<sup>228</sup>
- 4 Unduly intrusive or burdensome requests may be rejected or trimmed. The Court rejected, at that juncture, Intel's suggestion that it exercise its supervisory authority to adopt rules barring discovery under § 1782(a). Any such endeavour should await further experience with applications under § 1782(a) in the lower courts.<sup>229</sup>
- 5 The Court left it to lower courts, applying closer scrutiny, to determine what, if any, assistance is appropriate. For example, it should be scrutinised whether § 1782(a)'s preservation of legally-applicable privileges and the controls on discovery available under rr 26(2)(b) and (c) of the *Federal Rules of Civil Procedure 2005* (US) would be effective to prevent discovery of Intel's confidential information.<sup>230</sup>

All of these factors are welcome, but make district courts' decisions all the more difficult and perhaps unpredictable for applicants. It would be less so if the Court had requested the lower courts to liaise with the foreign tribunal (the parties being duly informed and having an opportunity to participate) in order to render a decision that would fit both the needs of the foreign or international judicial system and that of the United States. Instead, as interpreted by the Court, the United States system works somewhat unilaterally under the assumption that United States-style discovery is good in itself, whatever the proceedings may be, even if they take place in a country where no such discovery is known.<sup>231</sup> Hence, although the intentions of the Court were sensible and the willingness to assist foreign or international courts welcome, the reasoning of the Court did not take into consideration the needs and means of the foreign court itself. It also has a counter effect, as it encourages the party to the foreign proceedings who wants to harass the other party to do so. Indeed, discovery is time-consuming, expensive and may lead to disclosure of documents which may be harmful in the very competitive environment in which companies operate nowadays.

#### 4 *Bankruptcy*

It is quite interesting that the field of bankruptcy, which has always been considered to be an area where public policy is important, has seen one of the best efforts to actually put into place a direct form of court-to-court cooperation. It started in an informal way with the demise of the Bank of Credit Commercial International. It became rapidly evident to a number of administrators that, unless they cooperated, there would be little money left for the creditors. Hence,

<sup>228</sup> Ibid.

<sup>229</sup> Ibid 378.

<sup>230</sup> Ibid.

<sup>231</sup> Discovery is considered by the United States to be an inherent right of individual parties involved in proceedings, wherever they take place.

some administrators took it upon themselves to call their counterparts around the world and arrange a meeting so that they could agree on a scheme. This was done without the blessing of the law but, in the end, was by and large successful. Thereafter, the International Law Association and the ALI worked on a cooperation scheme, used for the first time in a number of instances between Canada and the United States.<sup>232</sup> In 2003, the ALI published its *Principles of Cooperation among the NAFTA Countries* as part of its Transnational Insolvency Project.<sup>233</sup> Part of that endeavour was devoted to developing 'Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases',<sup>234</sup> which by early 2004 were already endorsed by a number of judges around the world.<sup>235</sup> Within the same period, the International Bar Association published its concordat model, which was applied in a number of cases between Canada and the United States. Finally, the UNCITRAL working group on bankruptcy endorsed all of these efforts in a recent report to the European Commission's meeting in July 2005, although the secretariat recognised that there were difficulties in implementing the guidelines and that many cross-border cases still exist where they are not used.<sup>236</sup>

#### IV CONCLUSION

As a result of globalisation, civil and commercial legal disputes have become increasingly complex. In this context, there is a significant need for access to justice by private individuals. It is possible to address such needs through the means of aggregate litigation, which has been commonplace in common law jurisdictions, particularly in the United States. The adoption of such a practice in the EU is, as yet, unforeseeable. There may also be a justification for the explicit consideration of public interests at stake, through the *amicus curiae* system. If amici are truly representative of the groups for which they claim to act, it is arguable that they should play a greater role in domestic courts and arbitration tribunals.

There is also a need for greater cross-border cooperation, perhaps by forming networks of central authorities and judges. In this way, the shared experiences of the participants may lead to better practices and outcomes. Such networks already exist in some fields of law. Cross-border cooperation could be increased by encouraging the inclusion of a support judge in arbitration, a concept which has already found some favour in Switzerland. Nevertheless, there are significant practical issues that must be addressed for such a mechanism to succeed. Courts may be also able to cooperate by combining cases where a jurisdiction is in

<sup>232</sup> See UNCITRAL, *Developments in Insolvency Law: Adoption of the UNCITRAL Model Law on Cross-Border Insolvency; Use of Cross-Border Protocols and Court-to-Court Communication Guidelines; and Case Law on Interpretation of 'Centre of Main Interests' and 'Establishment' in the European Union*, UN Doc A/CN.9/580 (2005).

<sup>233</sup> ALI, *Transnational Insolvency: Cooperation among the NAFTA Countries — Principles of Cooperation among the NAFTA Countries* (2003).

<sup>234</sup> *Ibid* 115 (appendix B).

<sup>235</sup> See also UNCITRAL, *Developments in Insolvency Law*, above n 232, [51]–[52].

<sup>236</sup> UNCITRAL, *Insolvency Law: Possible Future Work in the Area of Insolvency Law*, UN Doc A/CN.9/582/ADD.3 (2005).

dispute. Furthermore, there should be greater cooperation with regards to the enforcement of provision measures and the taking of evidence. One may turn to the field of bankruptcy, where court-to-court cooperation has been very effective, to see that the difficulties of transnational dispute resolution may be overcome.

In conclusion, it is worth noting Principle 31 of the *ALI/UNIDROIT Principles and Rules*, which states:

The courts of a state that has adopted these Principles should provide assistance to the courts of any other state that is conducting a proceeding under these Principles, including the grant of protective or provisional relief and assistance in the identification, preservation, and production of evidence.

While this illustrates that the drafters have accepted the idea of direct communication between judges,<sup>237</sup> unfortunately they have not provided judges with much guidance in the absence of an elaboration of a system for implementation. It is hoped that young scholars will continue the project by working with judges and practitioners around the world to put together a set of guidelines and best practices which could be used as a more effective means of private dispute resolution in today's complex international society.

<sup>237</sup> See, eg, International Law Association, Committee on International Civil and Commercial Litigation, above n 200; the discussion in Comité Français de Droit International Privé (ed), *Travaux du Comité Français de Droit International Privé: Années 1995–1996, 1996–1997, 1997–1998* (2000) 89–90; the preparatory work done at the Hague Conference 1996–7.