The Differences Between Conducting a Case in the ICJ and in an ad hoc Arbitration Tribunal – An Inside View

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I. Introduction

Perhaps I might begin by saying that it is a great pleasure and an honour to be allowed in this way to pay a tribute to my good friend and colleague of so many years standing. We first came together, if I remember rightly, as members of the now forgotten 1965 Committee under the chairmanship of the late Professor Friedman (the young Mr. Boutros Boutros-Ghali was also a member, and the committee resulted from an idea of the late Professor Jessup) which studied the constitution and practice of the Hague Academy and recommended important changes which seem to have stood the test of time. A high point of that committee's deliberations was, as Judge Oda will certainly remember, an evening during our session at Bellagio, when the late Professor René Jean Dupuy, with his fine baritone voice, sang Schubert *Lieder*, to the accomplished piano accompaniment of Wolfgang Friedman.

There is already ample discussion in the text books and in the articles about the differences between resort to the ICJ and resort to *ad hoc* arbitration. But most of it is written from a point of view taken from outside the tribunal, whether as an academic observer, as a client, or as an advocate. There is relatively little from the inside point of view of the judges or members of a tribunal. And yet the points which strike a member of a tribunal are also of some significance. No doubt one very good reason for this gap in the literature on the subject is that the deliberations of both kinds of tribunal are, and in the nature of things have to be, strictly confidential (although in the case of the ICJ the procedures followed in the deliberative phases are of course freely available in the officially published Resolution of 1976 on the Internal Judicial Practice of the Court[1]), and in the case of arbitrations the

[1] Available at http://www.icj-cij.org under Basic Documents, Other Documents.

N. Ando et al. (eds.), Liber Amicorum Judge Shigeru Oda, 893-909

pleadings and the hearings too, are often required by the parties to be treated as confidential. But although it would clearly be unacceptable to write about what has happened inside the deliberative chamber in any particular case, there seems to be no good reason to be unduly coy about some of one's general impressions after several years of experience and involvement in both kinds of judicial settlement.

Perhaps the first point to make about the differences between the Court and an *ad hoc* arbitration tribunal is to dispose of the myth that used frequently to be deployed in academic writings, that a permanently established court, and especially the World Court at The Hague, will be inclined to stick closely to applying the law, whereas an *ad hoc* arbitration will be perhaps more inclined to find a compromise solution. No doubt there might have been some truth in this idea in the days of the earliest experiments in arbitration – when indeed there was no international court to compare them with – but the situation for some considerable time has been rather the other way round. An *ad hoc* arbitration is strictly the creature of the *compromise* agreement between the parties and its very continued existence is dependent upon that agreement. The parties therefore control it in a fashion that finds no place in the situation of the ICJ or in any other permanently established court. No doubt the parties themselves, if they do indeed desire a compromise solution, can make this clear in the compromise, although the arbitral procedure would seem an odd one to employ for that purpose. And if it is the overwhelmingly more usual situation in international arbitration that both the parties call unmistakably for the strict application of what they regard as their legal rights, then that is surely the kind of decision the tribunal will and should deliver.

It is rather the ICJ that, on occasion, has not hesitated to be markedly innovatory. One thinks immediately of the *Nottebohm* case, the *Anglo-Norwegian Fisheries* case, and indeed the *North Sea Continental Shelf* case. In the latter case the parties accepted the Court's decision to reject the argument that the equidistance principle was in law mandatory in their particular problem, but had no great difficulty in reaching thereafter an agreed solution which virtually ignored the rest of the Court's eloquent disquisition, including their suggested boundary lines.[2]

One might note also that three very distinguished judges of the International Court – Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Judge Jessup – have indeed declared that a bold and expansive attitude on the part of international judges, at any rate in certain kinds of cases, is actually one to be preferred. It was Sir Hersch who had first spoken of

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[2] The Court was in fact only asked by the parties what were the applicable "principles and rules of international law", as the Court well noted. ICJ Reports 1969, 3 et seq., 13, para. 3.

what he called the "compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals".[2] And indeed those three judges did all make major contributions displaying "a full measure of exhaustiveness" in their separate opinions. But whatever may or may not be compelling considerations for the judges of the Court, it would be difficult to think of anything more astutely calculated to discourage would be litigants before an *ad hoc* arbitration tribunal than the prospect of the tribunal's applying, not the law as they have heard it confidently described by their advisers, but a "developed" law which nobody had previously thought of.[3] So, for the purposes of the present discussion, the point it is desired to make is, that the notion of judges being under compelling considerations of international justice to take an opportunity to "develop" the law, should surely be a stranger to *ad hoc* arbitration, for the simple reason that it is the parties who choose, establish and control the tribunal, and no intending party to an arbitration is going to choose a tribunal that not only might "develop" the law in a new, unknown and unknowable direction, but might conceive itself to be under compelling reasons to do so. This gears onto a further matter in which there is a major difference between adjudication by a court and adjudication by an *ad hoc* arbitration tribunal, in that in the latter kind, the parties themselves choose their judges; and to the making of this choice we shall now turn.

II. The Choosing of the Members of an Arbitration Tribunal

The writer has once or twice found himself involved in the process of choosing members of a tribunal. In most cases the choice will appear initially to be of one, or perhaps of two, persons to be nominated by one of the parties. Nevertheless a party has also to have in mind the eventual composition of the tribunal as a whole, and this involves also the probable reaction of the other party to one's own choice of nominated members; and indeed one's own reactions to that other party's nominations.

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[2] See the citations in the Separate Opinion of Judge Jessup at ICJ Reports 1970, 3 et seq., 162; see also the Separate Opinion of Judge Fitzmaurice, *ibid.*, 65.

[3] And even for the Court it is important to have in mind the warning expressed by Judge (now President) Guillaume: "I should like solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator ... it is the mark of the greatness of a judge to remain within his role in all humility, whatever religious, philosophical or moral debates he may conduct with himself". ICJ Reports 1996, 71.

It seems to be usual for the advisers of parties to prepare for this stage of choosing the tribunal by undertaking thorough research into the publications, decisions and published opinions of proposed names, and by this means presumably to try to establish their likely judicial "attitudes". There may be for instance much eagerness, especially where maritime questions are involved, to find out whether so-and-so is a black-letter-law kind of person or an equity kind of person. One sometimes wonders whether the persons chosen or rejected would have appreciated the apparent assumption that their "attitudes" were already graven in stone and could not be expected to be capable of change; an assumption that does scant justice to the faith of parties in the eventual persuasive powers of their own chosen advocates. Experience suggests, however, that the kind of people who are chosen are usually determined to approach each new case with a mind fully open to consider, and if necessary reconsider, all arguments put to them.

Much more important than the past record of the proposed names – and again this is looking at it from the inside – is the question of temperament. The more important question is not what this person might have thought in the past, but rather whether he or she is a pedant, and if the answer to that question is in the that person be no longer considered. Even if the nature of the pedantry seems to be heading in what is supposed to be the right direction for that party it may still be a danger even for that party because the decisive issues in a case may in the course of the hearing turn out to be quite different from what was expected and probably anticipated; and it is surely right that this might be so, for otherwise it is difficult to see the point of the solemn confrontation of views before the tribunal. There is finally another absolutely crucial question, and one often omitted that from the considerations of the teams making the investigations: will this person get along with the likely other members of the tribunal ? Will the chosen persons be capable of working together as a team and on a friendly basis, even when they find themselves in disagreement? Will this person be prepared to discuss and argue with the others when his or her point of view is challenged, or will he or she decide on an answer early in the proceedings and take the intellectually easier course of sticking to it through thick and thin, and possibly begin preparing a separate or dissenting opinion ? The really good candidate will be more inclined, in face of disagreement, to want further strenuous argument and discussion and to have another good look at the possible merits of alternative points of view other than his or her own preliminary view. Such a discussion, if ably assisted by other members of the tribunal, could well lead, possibly to some compromise; but more desirably, and much more soundly, to the common adoption of a new and different view which the constructive argument might have given birth to. The truth is rarely simple and often emerges not from an eventual choice of the one or the other of opposing

views, but as a new product arising from the confrontation of the apparently opposing viewpoints each of which are now seen to have represented an aspect of the truth.

And then there are very practical considerations which however are very seldom even looked at by the parties in choosing their possible names. This is simply whether a proposed person, however eminent and skilled, is likely to be able in fact to devote sufficient time to be available for meetings? For if the arbitration is really doing its job the meetings will almost certainly need to be frequent and sometimes to extend over several days A relevant consideration might therefore be the geographical distance between the bases of chosen members and, if the parties are not very rich, what may the bill for long-distance business class travel look like when considered alongside other costs of the operation ? Nowadays technology makes a telephone and television conference possible and it can sometimes be useful. But there is absolutely no technological substitute for the actual meeting and working together of human beings. Very often the right solution of a problem appears during the informality of a sandwich working lunch, a coffee break, or even over a supper together after the working day is supposed to be over.

The ideal tribunal membership will therefore be of persons who are likely to be able to work together, and preferably also enjoy working together, in these sorts of ways. But choosing is not an easy task for there is no end to the possible even esoteric considerations that may get introduced in this crucial task of choosing members of the tribunal. The writer remembers one case of some time ago when the English speaking side was finding it very difficult to choose a candidate for a still undecided place, who did not for one reason or another arouse the opposition of the other side, which happened to be francophone. Finally the English speaking party, almost in desperation, hit upon the idea of trying to satisfy the preoccupations of the other party, by proposing the name of a person having French as mother tongue, though also equipped with somewhat limited English, but whose juridical qualifications and experience, both technical and personal, were manifestly of the very highest order – in fact a famous and much respected name And yet back came the answer, "No". The difficulty now appeared to be that the parents of the person concerned had been refugees from their own country who fled to England during the First World War, and it so happened that this person had actually been born in England; though it was true that he was taken back to his own country in 1918 whilst still a tiny tot not having yet learned English, or indeed at that stage any other language. The situation seemed not wholly free from absurdity, and years later I had the opportunity of asking the legal adviser who had said "No" about his very odd objection. Oh yes, he said, of course the person concerned was in every way entirely acceptable to me personally, but

you have to consider what my position would have been if the case had gone badly against us and a member of the opposition in parliament had got hold of the fact that a crucial member of the tribunal accepted by me had been born in England. Of course the argument would have been absurd. But that would not have prevented my position being made impossible by one of my political enemies.

III. The Size of the Tribunal

It is obvious that there is an important difference between an arbitration tribunal of three or five members in all, and the ICJ with probably fifteen members, or with *ad hoc* judges, even seventeen members. The difference is usually put in terms of the difference for counsel between addressing a small tribunal and addressing the Court, which is certainly very important to them. But the main difference by far, and one of very great practical importance, and one which affects the members of the tribunal themselves, and especially at the stage of the deliberations, is the difference between a discussion of a group of 15 or more, and a discussion in a group of three or five.

In the full Court the general rule has to be, in the terms of the Resolution on Internal Judicial Practice 1976, that "Judges will be called upon by the President in the order in which they signify their desire to speak". The inevitable outcome is a series of speeches rather than a discussion. It is true that sometimes a particular matter can be concentrated on for a short time where a judge asks leave of the President to be allowed to speak out of turn "on the same matter". But quite soon those who are still waiting their proper turn will be getting restive, and when dealing with the list in the order of "signifying their desire to speak" is resumed, it will probably be an entirely different set of issues and views that is then being raised. This kind of deliberation is different from deliberation in a smaller group, not only in degree but in kind.

Within a group of at most five judges the situation is entirely different, for it is then easily possible to have arguments across the table for as long as it seems to the chairman to be profitable to pursue that matter. Moreover, when there arises a strenuous difference of view on a particular issue, it is usually possible to have a considerable general argument and full discussion, concentrating on finding a solution for the particular matter or matters involved. This might resolve the matter one way or the other. But the important point to appreciate is that a thorough-going discussion between not only the protagonists of the opposing arguments but also the other members of the tribunal, may quite often lead to agreement on a different and new solution.

The smaller type of tribunal is also much more manageable when it comes to the very important drafting stage. Some or indeed probably all of the members can be allotted the task of drafting chapters or sections of the award according to the particular knowledge or inclination of each, and perhaps also depending on how much time each of them has available, having regard to other commitments. The president or chairperson will normally have to edit the whole. But the great advantage of a tribunal of not more than five members is that all of them can become the drafting committee, preferably going through and discussing every paragraph together, and if necessary doing so more than once. This is not only good for the drafting but also assists greatly to weld the tribunal together as a team. When the point is reached when the member who produced the original drafts is genuinely grateful when another member points out a weakness and offers a suggested solution or a better or clearer draft, then one knows that the aim of becoming an efficient team is being achieved. The other side of the coin is of course a genuine sadness and sense of loss all round when the final award is handed down and the work together is at an end.

But this kind of welding together of a team in which all members take a full part in both the decisions and the drafting, does take a great deal of time and patience. And this therefore illustrates the vital importance of what was said above about parties choosing members of the tribunal who will be prepared to make and spend the considerable time required for a deliberation which goes very much further than a mere exchange of views. If this can be done, however, there is no doubt that the small arbitral tribunal has important advantages for some kinds of cases. What it may still lack, no doubt, is the authority which comes from a broadly representative decision of the full ICJ. By the same token, however, it follows that even for the full Court, the size of the majority decision is important, and there is no doubt that when, as sometimes happens, the Court is split down in the middle this cannot but somewhat, or even in some instances gravely, weaken the authority and persuasiveness of the decision. And it must also be said that the addition of long and wide ranging separate or dissenting opinions will often weaken the authority and persuasiveness of the judgment. They must also, however much they may sometimes please, and provide materials for professors of international law, merely bewilder the layman parties who brought the case.

IV. Chambers of the Court

This is the point at which it may be convenient to look at the *tertium quid:* the use of a Chamber of the Court for a case as a possible alternative to a separate arbitral tribunal. Of the use of this kind of

Chamber of the Court there is now a considerable experience. It can be said straight away that the kind of thorough and argumentative discussion mentioned above is, or should be, also readily available in a Chamber of the Court. Indeed in some ways it is perhaps even more readily available for the simple reason that all the members, other than perhaps the *ad hoc* judges if there are such, should be available together in The Hague in any event and without having to make special arrangements about accommodation and so on, so that the travel and timetable problems are much more easily solved or avoided. And of course the considerable expense of setting up a tribunal is entirely avoided. Moreover, the Chamber members will presumably already know each other very well, so that in theory at least, it ought to be easier for a Chamber to have thoroughgoing deliberation and sufficiently longer deliberation meetings than in an *ad hoc* tribunal.

We say "in theory", because the theoretical advantage of the Chamber is, in this matter of available time and established mutual acquaintance of its members, offset by the difficulties that arise because the regular judges who are members of the Chamber are also at the same time continuously members of the full Court. And the time table of the full Court might be thought by the full Court, and not least by a hard pressed President of the Court, to have precedence. This doubtless was not a difficulty that would have been even thought of in the days gone by when the Court had so few cases that the expansion of the Chamber system was produced with the express intention of finding work for at least some members of the Court. But now that the full Court has a list of almost too many cases waiting to be dealt with, it is a real problem for the Chambers system. And then there is another difference between a Chamber of the Court and an *ad hoc* tribunal, and that is the possibility of parties before a Chamber deciding to nominate *ad hoc* judges as members of the Chamber. And this they can certainly do, and are therefore likely to do, under the ordinary Rules of the Court. This important factor requires separate consideration.

1. Ad hoc Judges as Members of a Chamber of the Court

Thus far at least the parties have been in effect allowed to decide on the membership of a Chamber of the Court to which they might bring a case; though of course there can be no guarantee that this will also be so. But the possibility of choosing the members is certainly one of the attractions of the Chamber system; and it will be remembered that in the *Gulf of Maine* case the parties made it clear to the Court that, if they were not allowed their own choice of judges, they would abandon the idea of a Chamber and resort instead to an ordinary *ad hoc* arbitration for which the formal agreement of the parties and even the agreed

tribunal was, so to speak, ready waiting. This attitude, it is believed, was not wholly popular with the Court, though it is not easy to see on what juridical grounds a valid objection could be made. The Court can obviously refuse to accept the chosen list if it wants to; but that is all it can do. As a corollary of the hitherto accommodating attitude of the Court towards the choice of the members of a Chamber, it must also seem reasonable to hold that the system of *ad hoc* judges should also hold good for Chambers of the Court. And actual practice is in accord. It may no doubt be said in defence of that practice that, in the alternative of arbitration, it is normal for all the members of the arbitral tribunal, including the chairperson, to be appointed by the parties.

Nevertheless there is in actual practice a great deal of difference between the position of *ad hoc* judges as members of the full Court and *ad hoc* judges as members of a Chamber of typically five members in all. It is not only that one in five has manifestly a very different position from 1 in 16 or 1 in 17. There is the additional factor that an *ad hoc* judge of a Chamber of the Court is in a much stronger position than an *ad hoc* judge in the full Court because of the possibility in the Chamber of the kind of that much freer cross argument and discussion already described above. So the fact is that the position of an *ad hoc* judge in a Chamber is at least potentially an altogether very much stronger and more influential position than that of the *ad hoc* judge in the full Court. And where there is the possibility of the exercise of relatively great power, it may be assumed that there will be at least some *ad hoc* judges who may fall to the temptation to make use of it.

Moreover the position of the *ad hoc* judge of a Chamber of the Court is quite different from that of the members of the normal arbitration tribunal notwithstanding that, like an *ad hoc* judge, they will have been nominated in the first place by just one of the parties. (Normally only the chairperson will have been nominated by both parties or, sometimes, chosen by the agreement of other members of the tribunal, or failing that nominated by some third person or institution.) But they are all nominated for the purpose of serving in a completely impartial judicial capacity as ordinary but full members of the tribunal and not with the special position and preoccupations of an *ad hoc* judge. So also, it may be objected, should an *ad hoc* judge. An *ad hoc* judge, however, does have the recognised duty to see that the nominating State's case gets a full hearing and that its case is fully understood and not forgotten. And where this is coupled with the potentially much more powerful position of the *ad hoc* member of a Chamber of the Court, a question of balance could arise. At any rate this is a possible factor that those having to decide between a Chamber of the Court and an Arbitration Tribunal might wish in one way or another to bear in mind.

2. The Question about Questions from the Bench

Quite a lot has been written about the problem of questions posed from the bench during the course of an oral hearing in the ICJ. The impression to be gleaned from some of the writing on the subject is that there are two opposed schools of thought: the common law school which favours the asking of questions from the bench and the continental school which does not. If, however, counsel pleading before the ICJ were to assume that he need not expect searching questions from the francophone members of the Court, he might be in for a great disappointment. But there are some ways in which the common law judge may, and indeed is rather expected, to intervene which does seem to be peculiar to the common law.

The common law judge does not so much think of the matter as one of asking questions but rather of taking an active part in the whole proceeding whenever he opines that it might be useful to do so. Therefore he does not hesitate to do so whenever, for example, he feels that he had not entirely followed the argument being put to him. He will then not just ask about it but also probe it with counsel and there may be in effect a short debate between judge and counsel until the judge is satisfied that the issue is clear in his own mind. And if the judge, after understanding the point being put thinks that it is a non-point, or a waste of time, he often will not hesitate to say so there and then.

But the situation in the ICJ before 15 or more judges is a very different situation; and that not just in climate or tradition, but physically. It is obvious that it cannot be permissible for any one of 15 judges to intervene with a question, much less a discussion, just when the spirit moves him or her. That would simply produce a chaotic and impossible situation. Questions are indeed nowadays often asked from the ICJ bench; partly it may be from the pressure in that direction of common law trained judges. But the questions have to be asked at an announced time – the end of a session and just before adjournment for lunch is a favourite time, but the President will probably decide on the time for asking questions – and they will as a matter of courtesy probably have been circulated beforehand to the whole bench and therefore inescapably discussed and probably modified, typically during one of the so-called "coffee breaks"; and indeed some of the proposed questions might not have survived the coffee break. Moreover, the questions will probably be prefaced by the usual statement that the questions need not be answered immediately, and indeed may be answered in written form within a certain time even after the formal end of the oral hearings. And printed copies of the questions are normally handed to the parties immediately after their asking. This blunting of the edge of the questions is of course supposed to be necessary because one

is dealing with "sovereign States" and so counsel will probably wish to seek instructions before answering the questions.

This form of asking questions, though no doubt as already mentioned probably partly the result of pressure from common law members of the Court, could hardly be more different from the common law practice. It may on occasion be very useful, especially when the question is one that the whole Court wants to put, and which will then be asked by the President or other presiding judge and in the name of the Court. But it can often also be somewhat of a waste of time, for very often, even when the question is a pertinent one, any member of the Court could make a very good shot at writing out pretty accurately, perhaps even as to matters of style as well as substance, the answers that will inescapably be given by the party concerned, or as more often is the case by each of the parties.

The discussions within the Court about questions being proposed to be asked do, however, sometimes reveal crucial differences in attitudes; and differences moreover that cannot always be explained by the differences between the common law and civil law traditions. For example the writer remembers one very distinguished judge of the Court who could be relied upon to make not just objection, but deeply shocked objection, to any question which might be thought on careful examination to reveal, or even possibly reveal, the direction in which the questioner's mind was tending. And no doubt that particular objection is the more strongly felt if that direction happens to be in the opposite of the direction in which the objector's mind is tending in the case. Other judges of course might feel that a revealing question has virtue in that it is useful to counsel on both sides to have early warning of a tendency of at any rate one, and possibly more, judges. For there may still be time to do something about it and to put in stronger, or longer, arguments on the point involved; and the very need to answer the question gives a new and separate opportunity of doing so. These differences between judges again seem to be more about differences of temperament rather than supposed differences of legal traditions.

This matter of questions is however one in which the situation in an arbitral tribunal of three or five members is completely different from that of the Court. There it is entirely possible for any member who wishes to ask a question or raise a point in the course of counsel's argument to do so, though preferably after first indicating to the chairman the intention to do so and having received his or her agreement. Such a question or intervention is not usually intended to be answered in writing much later but to be answered immediately if counsel is prepared to do that, when it might well lead to a short, or even a longer, further probing or argument. This kind of intervention, very much in the common law tradition, can be very useful and instructive and indeed productive for the tribunal as a whole. The attitude of

counsel to this kind of intervention varies and is again a matter of temperament rather than tradition. Some counsel, though they will of course answer the question in some form or at any rate go through the motions of attempting to answer, are manifestly irritated by having their presentation interrupted. Other counsel plainly flourish on questions and are disappointed if they do not come. It is not really "questions" that are at issue here. It is the possibility of a fruitful investigative exchange between judges and counsel; and this, if prudently and reasonably indulged in, can be of very great value. But in its valuable form such interventions are obviously a luxury only to be enjoyed, and indeed carefully controlled, by small tribunals such as the typical arbitration tribunal.

Something also depends no doubt on whether the proceedings are in public or are confidential. And the latter possibility is pretty well confined to those arbitrations in which the compromise stipulates the privacy of the pleadings and oral proceedings. When the proceedings are open to the public, or at any rate not strictly, or at any rate effectively confidential, this is a factor to be taken into consideration in the framing of the questions. One remembers the famous *Beagle Channel* arbitration between Argentina and Chile. This was essentially about the rival claims to sovereignty over three islands in the Beagle Channel. At one point the tribunal asked the sensitive and politically charged question whether it was in the view of the parties a question of three islands or none, or whether some compromise, some splitting up of the islands might be acceptable. The apparent naivety of this question is still surprising to the observer. The tribunal must have known, or certainly should have known that, the answers would certainly be reported to the respective Governments. The tribunal might have guessed therefore that the question would be answered not by counsel but by the Agents, who would in effect be addressing the members of their own Governments at home rather than the tribunal, and would inevitably each have to say, with the maximum vehemence and obduracy of language possible, that his Government demanded its entire legal rights and could not even contemplate the idea of a compromise of those undoubted full legal rights. One doubts whether counsel on either side even bothered to listen to the answers, which anybody present on either side could have written out for the tribunal. But the writer still has an uneasy feeling that the tribunal took the answers seriously; whether through innocence or guile is still unclear.

Where one has counsel on both sides who know each other well and are both very experienced, as may happen, at least in the commercial type of international arbitration, then an element of profitable dialogue about the case may also very usefully occur between counsel even outside the confines of the court. The writer remembers one such commercial arbitration where the counsel had much experience of each

other in the High Court and in particular of the Commercial Court, in London. When the arbitration had been running for some days, counsel on one side began his morning's speech by saying that he would not that morning be spending much time on a certain argument that had been put forward by the other side. This, he went on to explain, was because in a discussion he had had with his "learned friend" on the other side that morning and before the court assembled, he had gathered the impression that his learned friend might not be going to press that particular argument in its present form. His learned friend on the other side immediately intervened, not to protest, but to say that he thought it might help the court, and his learned friend, to know that he had now discussed that argument with his clients and they had come to the opinion that that argument had certain weaknesses – "would not run" was how he put it – and had therefore decided to abandon it altogether. This astonished the two international lawyers on the tribunal but not so a domestic UK Lord of Appeal, very used to cases in the London Commercial Court, and who was a member of the tribunal. He simply asked the question: Does that mean that we no longer need to look at volume X of the pleadings? Yes, Sir, replied counsel, you can now forget that volume.

Now this seems to the present writer to be a highly desirable way of conducting a case, economical of both time and money, as well as being quite astute advocacy in readily abandoning a whole argument, where the other side had so weakened it that it was better honestly and openly to abandon it than to persist. One can only hope that such enlightened behaviour from commercial courts and arbitrations may eventually infect even fully international tribunals with such civilised forensic behaviour. We have, alas, probably some time to wait before counsel will do something so sensible when pleading before the ICJ.

3. The Importance of the Registrar and Supporting Staff in an Arbitration

From the point of view of the members of an arbitration tribunal, and especially from the point of view of the president or chairperson, there is one very important difference between their situation and that of the judges of an established court like the ICJ. The arbitration agreement will usually have said something about the rules of procedure to be applied; usually some form of the UNCITRAL rules. But usually it says nothing or very little about certain big problems that have to be faced immediately: the appointment of a registrar and supporting staff; the hire of equipment such as word processors, fax machines, duplicating machines, and supplies of various kinds of paper and envelopes; telephone and computer connections; the collecting of the funds from the

parties to finance the arbitration and the making of the estimates of costs and time, in order to know the sums to demand; the need to establish a bank account or perhaps several bank accounts, and some system of accounting acceptable to both to the parties and to the other members of the tribunal and staff; the amount and the basis of the remuneration of members of the tribunal and of the registrar and auxiliary staff when they are found and engaged; and finally but by no means least there is the question of suitable premises in which to hold meetings and the oral presentations, and again the question of the cost of premises and for how long they should be hired and all the dates likely to be involved. There may also be later questions about the appointment of simultaneous translators and/or those firms that provide daily a transcript of the oral proceedings with the help of those remarkable young ladies who, on little machines, take down every word with astonishing accuracy, never letting their attention be diverted or to miss a single word. And there may be a need, especially where maps or charts are involved, to appoint experts to assist the tribunal, and again the ancillary questions of pay and timetable, and the agreement of the parties. And all of these matters will have to be costed before one can determine the amounts to be added to the sums to be asked of the two parties and eventually accounted for. And many other technical problems will be met on the way. For example counsel these days do not expect just to talk. They often demand what are now called visual aids of various kinds. Screens that can be seen by both counsel on both sides and the bench are therefore necessary and this also creates problems about portable microphones and wiring. And so on and on. The possible problems are endless and many arise unexpectedly and require quick remedies. All these things cost money and some of them a great deal of money. The premises, which will include not only a large court room but also retirement room for the judges, rooms for the parties, rooms for the secretaries and transcribers, and facilities for security guards, and preferably some means of providing at least a working lunch of sandwiches for judges and staff both during hearings and during deliberations. The premises, if in a capital city will certainly cost many hundreds of dollars for every day of money which has usually to be paid without delay. The classic way for the president or chairperson to deal with these problems, or some of them, used to be to appoint some good and energetic and strong and therefore probably young-and-coming international lawyer as registrar and tell him to get on with it, no doubt offering wise and advise or admonishments from time to time; and of course to arranging to pay him relatively little in return for the honour thus bestowed upon him (it was always "him" in those days). What is mainly needed, however, is skill in organisation and management. If a person with such abilities is also an international lawyer that will be a bonus; but the essential skill required is

management and the training of international lawyers does not usually include courses in management and accounting.

It is not surprising therefore that more arbitration cases are now being taken to institutions to organise, and particularly to ICSID which deals with investment disputes, or to the Permanent Court of Arbitration (PCA) at The Hague, which deals with all kinds of disputes and can provide a staff with great experience both of the management problems and of international and procedural law; and also can provide magnificent premises in the Peace Palace at costs which compare very favourably with other possibilities such as large hotels and other kinds of public buildings; although the PCA can also organise an arbitration where the place of arbitration is elsewhere than in The Hague. There is also in the Peace Palace a professional accountant who can look after the money side and the PCA will take responsibility for that side too; and this is a great relief to any person who has the charge of a tribunal. This is very important because it cannot be right for a president of a tribunal to have the responsibility of paying himself and his colleagues for his and their services. The PCA in fact in these administrative matters complements its younger partner in the Peace Palace, the ICJ, which of course does have the very great advantage of its own permanent staff and splendid premises of the Peace Palace at its disposal.

The Registrar of an arbitration is not only a manager both of the necessary staff and of the tribunal. He is also a necessary link between the president or chairperson and the parties. All correspondence between the tribunal and the parties must in principle be duple in the sense that copies of everything must be immediately available to both parties. Experienced Agents and counsel know this very well and will take great care never to communicate with the tribunal (or the president) except with a copy to the other party; and of course never correspond with the other party about the case without a copy to the tribunal. Nevertheless there are times when a discreet inquiry to one party can be useful. Suppose for example an important note is sent by one party to the tribunal with a copy to the other party. A question often arises whether the other party will wish to comment or to make a counter proposal and if so how long they think it will take to do that. A formal letter of inquiry to that party with copy to the other party would sometimes be appropriate, but more often that would not be without an element of absurdity and might waste time pointlessly. A telephone call to the Agent might be a better answer. And the registrar or his staff can do that quite properly and in accordance with normal expectations. A good registrar will also try to ensure that he or she has good and on-going relations with both parties, and will try to pick up any hints about how things are going and will hope to know about and deal with small disputes, such as those about procedures or the production of documents, before they become serious and create bad feeling. The registrar may

quite properly in the ordinary course of arrangements make himself available to a party which simply wants to ask advice about the way to do some things or the way to organise its case so as to fit in with the normal arrangements and expectations. For not all parties have experience, or indeed any experience, of international litigation. In these ways the registrar, and probably also his staff, will have opportunities of getting to know the parties and assessing the climate of opinion.

The Registrar therefore may often be in a uniquely informed position to advise the President and the Tribunal on the details of the conduct of the case and help generally to avoid bad feeling arising, as it can so easily do when people are under great pressure. In these matters it is the ICJ Registrar and staff that set the pattern and have the longest experience. An important difference, in these matters of organisation, between the ICJ – whether full Court or Chamber – and arbitration is that, in an *ad hoc* arbitration, it might well be the first case that the registrar has had any experience of the scale and complexity of the organisation required. Then it is clear that putting the organisation of an arbitration case into the hands of the Permanent Court of Arbitration at The Hague, has much to commend it.

An undoubtedly great advantage of resort to the ICJ is that, in addition to the availability of the advice and services of a probably very experienced Registrar and staff, it is all free, being paid for in the United Nations budget. And of course so are the salaried members of the Court; but in an arbitration each one is to be paid, usually by the hour. So the fact is that resort to the Court is for these reasons very seriously cheaper than resort to *ad hoc* arbitration. One cannot but wonder whether the vast difference in costs is always realised by parties and taken into consideration at the appropriate time; and one wonders also whether their advisers always realise the differences in the scale of the costs. It is one of those very serious factors that the academic books on the matter seldom adequately explain.

Certainly the scale of the differences in costs is all the time getting more serious not least because of the demands of modern technology. These problems of organisation have become much more complicated than they used to be, because the pressure to use modern technology seems now to be irresistible: computers and word-processors; copying machines; the often irritating diversionary ploy of "visual aids", even though these as often as not, merely add a further layer of obscurity to what is better said in carefully chosen words; amplification to encourage mumbling; and the rest of the always expensive extras, almost certainly none of them even referred to or thought of in the agreement for arbitration. Even before the World War II, virtually none of this technology was available or even invented, and tribunals seemed to get along just as well without it. And any president of a tribunal who has tried to run an early morning preparatory meeting at the time when

members are habitually busy with their laptops checking their largely pointless "e-mail", may well think there was something to be said for days when manual typewriters were the smartest available technology and visual aids, if they meant anything at all, suggested large maps hung on the wall, and long-distance telephone calls required booking several hours before the call could be expected to become available. But the contemporary situation, which is certainly not going to go away, calls unmistakably for some institution with experienced staff to see to these matters and here the institutions like the Permanent Court of Arbitration and the ICSID do readily supply the required detailed service economically and as, to them, a routine service.

In conclusion we may say that there are many differences between resort to the ICJ, or to one of its Chambers, and resort to *ad hoc* arbitration. Some of these are subtle and some are very evident. And of course there are factors that have not been considered in this paper and which might arise in certain cases, such as political prejudices of one kind or another in favour in particular circumstances of the one method rather than the other. But a major difference and factor, is the very considerable difference in the scale of costs between a system where virtually all has to be paid for by the parties and a system which is charged to the United Nations budget.