SETTLEMENT OF DISPUTES OF A PRIVATE LAW CHARACTER TO WHICH THE UNITED NATIONS IS A PARTY — A CASE IN POINT : THE ARBITRAL AWARD OF 24 SEPTEMBER 1969 *IN RE STARWAYS LTD. V. THE UNITED NATIONS*

by

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I. GENERAL PRELIMINARY OBSERVATIONS

1. As the subject-matter of the present study is concernend with a dispute of a private law character, the following introductory remarks are limited to that topic. According to Article II, Section 2 of the general Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946 (hereinafter referred to as the Convention) [1], « The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity... » [2]. Pursuant to Article VIII, Section 29 (a) of the Convention,

[1] The Convention has now been ratified by 102 Member States of a total membership of 127. The Convention, as a whole, constitutes the implementation of the principles of the legal capacity, and of the privileges and immunities enjoyed by the Organization in the territory of each of its Members, laid down, respectively, in Articles 104 and 105 of the Charter.

[2] *Cf. Repertory of Practice of United Nations Organs,* Vol. V, Articles 104 and 105; see also *ibidem* under Article 98, p. 164, f.n. 122 :

« ... Contracts concluded by the United Nations contain as a rule an arbitration clause... »

and p. 165, para. 131 :

« The agreements entered into by the United Nations provide as a rule, that any dispute between the parties concerning the interpretation or application of the agreement in question, which is not settled by negotiation or other agreed mode of settlement, shall be referred for a final decision to a tribunal of three arbitrators, one of whom is named by the Secretary-General. The Secretary-General, on behalf of the Organization, conducts the negotiations

« The United Nations shall make provisions for appropriate modes of settlement of : (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party. » Moreover, it should be recalled that under Article I, Section 1 (c) of the Convention, the United Nations has the capacity to institute legal proceedings [3].

2. Thus, while the Organization can institute legal proceedings, it is in principle immune from any legal action against it. The basic *raison d'être* of such immunity is of course to prevent that the United Nations find itself in the invidious position of being subjected to the *imperium* of one of its Member States. This would be the case if it could be brought as a defendant before a national court of law.

3. Such an immunity cannot, however, become a means for the Organization to escape the fulfilment of its obligations. Judicial immunity cannot be equated with denial of justice. That is why Section 29 of the Convention sets out the obligation of the United Nations to « make provisions for appropriate modes of settlement » concerning disputes of a private law character.

4. Similarly, the United Nations, following the example set by the League of Nations, established in 1950 an Administrative Tribunal having jurisdiction over its conflicts with its own officials and over disputes between officials of international organizations, members of the United Nations Pension Fund and the United Nations Joint Staff Pension Board, which manages the Pension Fund. The decisions of the United Nations Administrative Tribunal are binding on the defendant organization or on the Pension Board, as the case may be [4]. It should be pointed out that the conflicts of that nature which are concerned with alleged non-observance of the contracts of employment or of conditions

with a view to settling any disputes that may arise in connexion with such agreements, and, if arbitration proceedings become necessary, represents the Organization in such proceedings. »

The usual types of contracts entered into by the United Nations are described in the *Repertory of Practice of United Nations Organs* under Articles 104 and 105, p. 332, para. 31. It should be pointed out that the number of private contracts made by the U.N. and its specialized agencies has considerably increased throughout the years, mainly in connection with the activities of O.N.U.C. (in the Congo) and of other peace-keeping operations, and also of U.N.R.W.A. (United Nations Relief and Works Agency for Palestine Refugees in the Near East) and of the Technical Assistance Programme [especially of the U.N.D.P. (United Nations Development Programme)].

[3] Article 104 of the Charter has been implemented by Article I, Section 1 of the Convention, which defines the legal capacity of the United Nations as the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings. While said Article 104 of the Charter does not refer to the question of the international personality of the Organization, Article I, Section 1 of the Convention states that the United Nations « shall possess juridical personality ».

[4] Article 10, para. 2 of the Statute of the Administrative Tribunal. *Cf.* also Advisory Opinion of the International Court of Justice of 13 July 1954, pp. 51-54.

of employment are not strictly speaking of a private law character since they are governed by a distinct body of law, namely, international administrative law [5]. The situation with respect to those conflicts has been mentioned only to show that there is no aspect of the relationship between the Organization as such and third parties, contractual or otherwise, which is beyond judicial or quasi-judicial settlement. On the other hand, the law applicable to the conflicts of a private law nature is generally the law of a given country. It is determined in the arbitration agreement, which, in this respect, would follow the relevant provisions of the original contract. In cases involving the Organization's tortious liability, the law applicable would of course be the law in force in the country where the alleged damage was suffered [6].

5. The Organization's duty to make provisions for appropriate modes of settlement of private law disputes does not however imply that the United Nations is under an unconditional obligation to submit to arbitration or to any other acceptable mode of settlement any claim which might be raised. It is indeed essential that the Organization be effectively protected against malicious or frivolous claims. Therefore, the United Nations, before agreeing

[5] International administrative law includes not only the law proper to the International Organizations, but also general principles of law derived mainly form international public law, and from civil or common law.

[6] (a) With respect to most of the claims lodged with the United Nations by nationals of Belgium, Greece, Luxembourg, and Italy for damages to persons and property which had arisen from the operations of the United Nations Force in the Republic of the Congo, the Secretary-General, on behalf of the Organization, agreed with the Governments of these respective countries through an exchange of letters, that the claims in question would be dealt with in an equitable manner. The United Nations did not however assume liability for damages to persons or property which resulted solely from military operation or military necessity or for damages found to have been caused by persons other than United Nations personnel; but the Organization stated that it would not evade responsibility when it was established that its agents had in fact caused unjustifiable damages to innocent parties. Without prejudice to the privileges and immunities by the United Nations, the Secretary-General agreed to pay to the Government of Belgium, U.S. $ 1,500,000; of Greece U.S. $ 150,000; of Luxembourg, U.S. $ 15,000; and of Italy, U.S. $ 150,000 plus 2,500,000 francs from the Democratic Republic of the Congo. [For the agreements between the U.N. and Belgium, Greece, Luxembourg, and Italy, see the *U.N.T.S.*, respectively, vol. 535, I, nº 7780, pp. 198-199; vol. 565, I, nº 8230, p. 3; vol. 585, I, nº 8487, p. 147; vol. 588, I, nº 8525, p. 197; or, respectively, the *U.N. Juridical Yearbook*, 1965, pp. 39-42; 1966, pp. 39-40; pp. 40-41; 1967, pp. 77-78.]

(b) The payment of these sums by the United Nations to the various Governments concerned constituted an outright and final settlement of all claims, the distribution of these sums to be effected by the recipient Governments themselves.

(c) Under Article 1, para. 2 of the Belgian Law of 14 April 1965, individuals who received the indemnification provided for in that Act renounced *ipso jure* any recourse against the Democratic Republic of the Congo, against Congolese public administration and against the United Nations.

(d) The agreement reached between Belgium and the United Nations through an exchange of letters was approved by a Belgian law of 7 May 1965 (*Bulletin législatif*, 1965, pp. 919-920).

to submit a claim to arbitration, would determine first of all whether the claimant submits a *prima facie* case.

6. Such a determination is not made arbitrarily. It rests on the application of certain criteria which normally would be the following : (a) the existence of a relationship between the Organization and the claimant, be it based on a contract or on tortious liability (« responsabilité aquilienne »); and (b) the existence of a damage allegedly suffered by claimant, during the course of that relationship. Any consent by the Organization to submit a claim to arbitration does not in any way imply that it recognizes the existence of a causal link between the alleged damage and the relationship between itself and the Claimant, nor between any action committed by the Organization or its agents and the alleged damage. The recognition of the existence of a *prima facie* case, which is a prerequisite of the submission of a claim to any mode of settlement, does not prejudge in any way the merits of the claim.

7. Similarly, the Organization would not, as a rule, accept to submit a claim to arbitration if the claimant was not the party who had actually suffered the damage, or if the allegedly aggrieved party had prior to the conclusion of the arbitration agreement sold, assigned or transferred the proceeds of his claim to a third party unknown to the Organization [7]. The Organization would not indeed be prepared to waive its judicial immunity if it were not entirely certain that the settlement of a claim is made with the actually aggrieved party and in such a way as to release the Organization once and for all of any liability whatsoever *erga omnes*.

8. In brief, the United Nations would not, as a rule, accept to submit a claim to arbitration until and unless it was satisfied that

(a) the claimant acts in good faith (an element of good faith would be the complete disclosure by the claimant of all particulars about his own identity, the claim itself, and about his right to the claim),

(b) the claimant has a *prima facie* case,

(c) the damage complained of has actually occurred,

(d) the payment of an arbitral award, if any, would extinguish definitively and *erga omnes* any liability of the Organization.

9. There has been some misunderstanding as tho the judicial immunity of the Organization and the meaning of Article VIII, Section 29 (a) of the Convention under which the United Nations is to make provisions for appropriate modes of settlement of disputes of a private law character. Such misunderstanding has apparently its source in the United Nations « critics » failure fully to understand the very nature of the Organization and to realize that

[7] The transfer or assignment of a claim during the arbitration proceedings by the claimant to a third party, if duly notified to the prospective debtor, ould raise a different set of problems.

it enjoys only the rights and functions delegated to it by its Members and that it has no supra-national powers, whether legislative, executive or judicial. Thus, in a Judgment pronounced by the « tribunal de première instance de Bruxelles » on 11 May 1966 [8], the latter seems to have interpreted Article VIII, Section 29 (a) of the Convention as entailing the obligation for the Organization to establish a tribunal with complete and general jurisdiction over conflits of a private law nature.

> « Attendu que dans la section 29 de la Convention il est stipulé que l'Organisation devra prévoir des modes de règlement appropriés pour les différends de droit privé dans lesquels elle serait partie;
>
> Attendu qu'il s'ensuit normalement que la défenderesse doit élaborer des dispositions réglementaires pour ses rapports de droit privé et instituer des juridictions pour trancher les contestations qu'ils feraient naître;
>
> Attendu que l'O.N.U. a bien institué certaines juridictions à compétence spéciale, tel le Tribunal administratif des Nations Unies; que toutefois il n'est pas contesté qu'elle n'a pas institué de juridiction avec une compétence générale et entière; »

It is indeed accurate that an Administrative Tribunal exists, but it was established under a resolution of the General Assembly. No such resolution was ever adopted or even centemplated with respect to the creation of a Tribunal which would have jurisdiction over conflicts of a private law nature between the Organization and third parties. In the absence of such enabling resolution, the Secretariat has of course no authority to establish such a Tribunal. Moreover such courts or tribunals as have been established by the United Nations do not enjoy a complete and general jurisdiction. Thus, for example, the Administrative Tribunal's judicial powers are severely restricted : it has in principle no jurisdiction over claims for a tort imputed to the Organization and its jurisdiction in disciplinary matters is also restricted to purely legal questions. Even its power to grant compensation for nonobservance of contracts of employment is restricted.

10. It should also be recalled that when the Organization discharges peace-keeping functions, it does so under a mandate voted by the membership, and under its essential purpose laid down in the Charter: the restoration and maintenance of international peace and security. Consequently, the Organization cannot be held liable for damages inflicted as a result of military operations in which it would be drawn as a result of the opposition of certain parties or factions against the decisions of United Nations political organs. In brief, a United Nations Peace-Keeping Force cannot, by definition, be regarded as an attacking force; it is an instrument for the prevention of the use of force and for the restoration of law and order, especially where an internal civil war situation presents an admixture of foreign elements. The Organization does not incur any responsibility for the reparation of damages inflicted on

[8] *In re* : *Manderlier v. United Nations and the Belgian State; J.T.*, 10-12-1966, n° 4553, p. 121.

innocent third parties, as a result of such operations, as would be the case for a State which was guilty of aggression or breach of the peace. This is a matter of regret. Such a situation could be remedied through appropriate mechanisms established by the Organization. But one should not overlook the fact that the United Nations is a highly sensitive political organization and that important segments of its membership would oppose settlement of damages suffered even by innocent third parties as a result of military operations into which a United Nations peace-keeping force would have had to react against factions opposed to the purposes of the Organization. In such complex cases, some Member States would always be ready te put the blame for such unfortunate incidents on other Member States allegedly guilty of intervention [9]. If the Brussels Tribunal implied that the Secretary-General, which represents the executive branch of the Organization, should have implemented Section 29 (a) of the Convention by the establishment of Tribunal, it was in error, as the Secretary-General has no such authority, unless it is given to him by the General Assembly. Moreover, it scarcely behoves the Tribunal of a Member State to give its opinion to an international organization or to admonish it as to what it should do or should not do as such questions are intimately related to matters of policy and politics. If the creation of a Tribunal having jurisdiction over conflicts of a private character to which the Organization was a party was felt to be advisable, it would be incumbent upon the Government of the Member State concerned to propose the inclusion of an item to that effect in the agenda of the General Assembly and rally as much support as possible behind its proposal.

11. In the Judgment referred to in the preceding paragraph, the Brussels Tribunal also expressed the opinion that the 20 February 1965 agreement entered into by Belgium, and the Organization does not represent the « appropriate mode of settlement » provided for in Section 29 (a).

[9] This is precisely what happened when the Secretary-General of the United Nations agreed to pay to Belgium a sum of U.S. $ 1,500,000. The U.S.S.R. took exception to the action taken by the Secretary-General which, in its opinion, was contrary to the decisions adopted by the Organization and to the rules of international law according to which the Belgian Government should bear full responsibility for all consequences of its « aggression » against the Congo. (*Official Records of the United Nations Security Council,* 20th Year, Suppl. for July-Sept. 1965, p. 151, S/6589.) In his reply of 6 August 1965, the Secretary-General pointed out that it had always been the policy of the United Nations acting through the Secretary-General to compensate individuals who had suffered damages for which the Organization was legally liable. Such a policy was in keeping with general principles of law, with the Convention, and with the principles set forth in the international conventions concerning the protection of the life and property of civilian populations during hostilities as well as with considerations of equity and humanity which the United Nations could not ignore. The Secretary-General stated the limits he had ascribed to the Organization's liability (see f.n. 6 in this study) and emphasized that all individual claims had been carefully scrutinized (*ibidem,* p. 156, S/6597). This exchange of correspondence has been reproduced in the *U.N. Juridical Yearbook,* 1965, pp. 40-41.

« Attendu que la défenderesse considère bien à tort que l'accord susdit, avenu entre l'O.N.U. et la Belgique le 2 février 9, constituerait le mode de règlement approprié prévu par ladite section 29 [10];

Attendu que la défenderesse a fait examiner par ses propres services, sans aucune contradiction, les réclamations qui lui étaient adressées, et notamment celles du demandeur; qu'elle a pris ensuite une décision unilatérale, à laquelle elle-même, dans sa lettre du 20 février 1965, a cru devoir limiter son intervention spontanée;

Que la défenderesse a en réalité ainsi statué seule dans sa propre cause;

Attendu qu'un tel procédé ne constitue point un mode de règlement approprié pour trancher un différend; »

This is again the expression of an opinion or of a reproach. Obviously, this time, it is the action of the Secretary-General which is questioned. But since the latter has no authority of his own to establish a Tribunal, is it the Tribunal's view that he should refuse to resort to any mode of settlement even when he feels that the Organization is legally liable, because there is no Tribunal to pass judgment. This may very well be a case in point where the maxim « Le mieux est l'ennemi du bien » is again verified. One should not leave this aspect of the problem without pointing out that the Convention does not compel the Organization to resort to a specific mode of settlement, such as the establishment of a Tribunal, and that it refers to « appropriate modes of settlement » (in the plural). As international organizations such as the United Nations enjoy only the powers which sovereign States grant to them by international treaties and conventions, the latter must receive in principle a restrictive interpretation. At any rate, it appears ironical that the Secretary-General should be blamed for doing what he felt was the implementation of a legal and moral duty : on the one hand, he was criticized on the grounds that he did too much or that he acted *ultra vires,* and on the other, on the grounds that he did not do enough or that he did not act in an appropriate manner.

12. Finally, the 11 May 1966 Judgment under review, after having stated that Article 105 of the Charter confers immunities and privileges on the Organization only to the extent that they are necessary to achieve its purposes, goes on to say :

« Attendu que, tels qu'ils sont énumérés à l'article 1[er] de la charte, ces buts ne comportent pas des actes contre les particuliers pareils à ceux dont se plaint le demandeur;

Attendu que la disposition de la section 2 de la convention du 13 février 1946 [11] est plus étendue que celle de l'article 105 de la Charte; qu'elle alloue une immunité de juridiction générale et ne la limite pas aux nécessités strictement exigées pour atteindre les buts de la défenderesse; »

In expressing such views, the Tribunal goes much beyond the legal inter-

[10] See *supra,* f.n. 6.

[11] That is, the Convention on the Privileges and Immunities of the United Nations.

pretation of an international treaty : it practically states that, had the Convention not granted an unconditional judicial immunity to the Organization and had Article 105 of the Charter been the only applicable provision in this matter, it would have found for plaintiff if he had proven the existence of the actions complained of by him. The Tribunal should have been aware of the fact that the Organization (in spite of all its shortcomings and imperfections, which are evidently the results of political compromises among big powers) [12] has been successfully used in a number of peace-keeping operations and that when fulfilling such functions, the Organization is discharging the purposes set out in the Charter and in the relevant resolutions of United Nations organs. Of course, there might be cases where agents of the Organization would cause unjustifiable damages to innocent parties in matters totally disconnected from military operations or military necessity. In such cases, the Organization has resorted to a variety of appropriate modes of settlement, including arbitration, after having carefuly and repeatedly scrutinized the claims submitted to it.

13. The Judgment of 11 May 1966 was confirmed on appeal by the « Cour d'appel de Bruxelles » (2e Chambre) on 15 September 1969 and on the same grounds, namely, that the action brought against the Organization was not admissible, as the United Nations enjoys an unconditional and general judicial immunity on the territory of all States having ratified the Convention [13] and that the latter, as a result of its ratification by Belgium, had become an integral part of national law. The Court of Appeals underlined that the Convention did not establish any connection between the judicial immunity granted to the Organization and the observance by it of obligations which other provisions of the Convention might have imposed upon it. The Court stated that one is obliged to recognize that, in the present state of international organizations, there exists no jurisdiction before which the appellant could have brought his dispute with the Organization; but that while one may deplore such a situation which does not appear to be in conformity with the Universal Declaration of Human Rights, the first judge was right when he declared inadmissible the action brought by Appellant.

14. Concerning the references made by the Belgian Courts of law to the Universal Declaration of Human Rights, one might turn to the article published in the *Journal des Tribunaux* on 10 December 1966 [14], in which it was rightly

[12] It is also proper to point out here that the United Nations, while enjoying unconditional judicial immunity, is a very highly sensitive political organization which is not exempt from diplomatic pressure, whether it finds itself in the role of defendant or of plaintiff.

[13] The Convention was ratified by a Belgian Law of 28 August 1948, which was published in the *Moniteur belge* on 15 November 1948.

[14] SALMON, J.J.A., « De quelques problèmes posés aux tribunaux belges par les actions de citoyens belges contre l'O.N.U. en raison de faits survenus sur le territoire de la République démocratique du Congo », *J.T.*, 10 décembre 1966.

pointed out that the Declaration was not part of positive international law and represented at most the expression of praiseworthy goals and wishes. One should not overlook either the fact that the Declaration was addressed to Member States and that the Organization of the United Nations, being a creation of its Member States, is powerless to act and establish instrumentalities to implement the Declaration, in the absence of a valid enabling resolution.

15. Even under the « International Covenant on Civil and Political Rights » adopted on 16 December 1966 by the General Assembly under its resolution 2200 A (XXI), the situation of the United Nations, in this respect, would not be different.

Thus, the Covenant in question[15] contains no provision implementing Article 17 of the Universal Declaration which reads as follows :

> « 1. Everyone has the right to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property. »

This is hardly surprising, given the conflicting political and economic ideologies and the oppositions between industrialized and developping countries, which increased very much between 1948 when the Declaration was adopted, and 1966, when the Covenant was approved.

The same remark applies to the Covenant as to the Declaration : although it is an international treaty concluded among Member States, the United Nations could not apply it *mutatis mutandis* without a prior enabling resolution of the General Assembly.

16. It may be also relevant to remark that so far, all peacekeeping forces created by the Organization were established on an *ad hoc* and temporary basis. In view of the absence of supra-national powers of the United Nations, and of other political and constitutional difficulties, the contribution of national contingents to United Nations Forces has always been voluntary. These contingents have never lost their identity as parts of the national armies to which they belonged, although they were supplied by the U.N. with insignia and special helmets. The conditions under which these contingents and their members were to operate were determined in special agreement entered into by the Secretary-General and the various contributing countries.

Their status was laid down in detail in agreements concluded between the Secretary-General and the Governments of the countries where the Force was to operate[16]. As a rule, it was stipulated that members of the Force

[15] According to its article 49 (1), the Covenant shall enter into force three months after the 35th ratification or adhesion will have been notified to the Secretary-General. As of 25 January 1971, nine countries had ratified or adhered to the Covenant.

[16] With respect to O.N.U.C., the Secretary-General made an agreement on 27 November 1961 with the Government of the Republic of the Congo relating to the legal status of the United Nations in the Congo. (Security Council, Official Records, 1961 : 16th year, Suppl. Oct-Dec. 1961, *S/5004*, pp. 151-162.)

were subject to the exclusive jurisdiction of their respective national States in respect of any criminal offences which might be committed by them in the countries where they operated [17]. Regulations issued by the Secretary-General contained provisions laying down *inter alia* the duties, rights, privileges and immunities of members of the Force [18].

The members of the Force were referred to in said regulations as « agents » of the Organization, but never as staff members or officials. They could not therefore be assimilated to the latter for the purpose of the application of sections 20 and 21 of the Convention, and the judicial immunity enjoyed by members of the Force in the host country derived not from the Convention, but from the special agreement made by the Secretary-General and the country where members of the Force happened to be stationed.

17. The question of the responsibility of the State contributing contingents to the United Nations Forces for acts committed by members of its contingents, who had inflicted unjustifiable damage on innocent third parties was not even mentioned in the special agreement referred to in the preceding paragraph. This was not a result of oversight, it was not referred to for practical and political reasons.

18. If one takes into account all the difficulties and the political as well as financial restraints under which the Organization has had to operate in its peace-keeping missions, one would be in a appropriate frame of mind to assess the United Nations' situation on the whole and to refrain from blaming it too quickly for its alleged shortcomings in its endeavours to compensate innocent third parties for injustifiable damages suffered by them [19].

19. No attempt has been made in this study to deal exhaustively with all the features of the decisions of the Tribunal and the Court of Appeals of Brussels in Manderlier's case. Only the aspects of these decisions which bear on the Convention and on the modes of settlement of conflicts of a private law character have been referred to. A study of the opinion and views expressed in this respect by a national jurisdiction has, it is hoped, permitted to dispel certain misunderstandings and to allocate responsibility for the lack of a comprehensive and general international judicial organization, where such responsibility lies.

[17] *Ibidem,* para. 9, p. 153.

[18] *ST/SGB/ONUC/1,* para. 29, v. Juridiction.

[19] See *supra,* f.n. 6; and also f.n. 14, particularly the part of Professor Salmon's article commenting on paragraph 10 (b) of the Agreement concluded between the U.N. and the Republic of the Congo, with respect to loss and damages resulting from any act performed by members of the Force or officials in the course of their official duties.

II. STATEMENT OF THE FACTS IN THE STARWAYS LTD. CASE

20. On 17 September 1961, a DC-4 Skymaster aircraft belonging to and operated by the British aircraft company Starways Ltd. (hereinafter referred to as the Claimant) was destroyed at the Kamina air base, Katanga, in the Democratic Republic of the Congo during an attack on the air base by a Fouga Magister jet aircraft which was operating against the United Nations Forces in the Congo in support of Katangese forces.

21. Claimant had entered into a contract with Sabena, on 17 March 1961, for the charter of its DC-4 aircraft. Apparently, Sabena had made that charter agreement with the Claimant in order to fulfill its own contract with the United Nations (hereinafter referred to as Respondent) under which Sabena (the carrier) had agreed to provide to the United Nations five DC-4 aircraft for the purposes of the latter's operations in the Congo. Sabena was authorized to enter into sub-contracts without the prior approval of Respondent for the performance of its obligations vis-à-vis Respondent and thus to substitute for its own aircraft planes owned and operated by its sub-contractors. It should therefore be pointed out that there was complete privity of contract between Respondent and Sabena, on the one hand, and between Sabena and Claimant, on the other. No contract in respect of Claimant's aircraft ever existed between Claimant and Respondent. Claimant acted at all times as sub-contractor of Sabena; the services to be performed by claimant were to be performed for Sabena, and its remuneration for such services was to be paid by Sabena to Claimant.

22. The main contract between Respondent and Sabena did not contain a specific provision to the effect that Sabena had to take insurance for war risks, but in the correspondence exchanged between Respondent and Sabena, the latter recognized that it was its own insurer for war risks. Actually, the remuneration paid by Respondent to Sabena for the chartering of its aircraft (i.e., its own aircraft or those of its sub-contractors) was identical with the remuneration paid by Respondent for the chartering of similar aircraft to other companies whose charter agreements with Respondent contained a clause expressly stipulating that such remuneration included an amount sufficient to cover the premiums to be paid for war risks. Sabena never contested that such was the case as far as it was concerned.

23. After the destruction of Claimant's DC-4, Claimant addressed itself to Sabena to obtain reparation for the loss of its aircraft [20]. Sabena having declined any responsibility in the matter, Claimant did not institute any legal

[20] The charter sub-contract entered into by Sabena and Claimant contained no provision for war risks.

proceedings against it; instead, it preferred to address itself to Respondent, alleging that its liability was engaged. In view of the absence of any contractual relationship btween Respondent and Claimant, the latter alleged that Respondent had committed a tort in exposing its DC-4 aircraft to was risks while Claimant never intended to assume such risks when it had agreed to charter its aircraft to Sabena for the purpose of the United Nations Operation in the Congo [21].

24. Respondent and Claimant finally concluded on 21 March 1966 an arbitration agreement which defined as follows the issue to be resolved, i.e. :

> « ... the liability of the United Nations, exclusive of contractual liability, and the extent of liability, if any for the loss of the aircraft... »

The arbitration agreement stipulated that the applicable law was that of the former (Belgian) Congo remaining in force in the Democratic Republic of the Congo, pursuant to Article 2 of the Loi fondamentale of 19 May 1960.

25. The arbitration agreement was signed on behalf of Starways Ltd. by its English solicitor. As a result of facts elicited by Respondent shortly before the arbitration proceedings began on 23 September 1969, it became evident :

(a) that in November 1963, the shareholders of Starways Ltd. (the Wilson Group) had sold the entire issued share capital of the Claimant to another company, British Eagle International Air Lines Ltd.,

(b) that part of the purchase price of Starways Ltd.'s shares of stock paid to the vendors (the Wilson Group) by the purchaser (British Eagle, which became sole owner of Starways) actually consisted of

> « ... the benefit of the outstanding claim made by the Company [i.e., Starways Ltd.] in respect of the loss of its DC-4 aircraft G-APIN in the Congo on the 17th September 1961 less any income tax and profits tax at the standard rate in respect of monies recoverable thereunder... [such benefit] shall be

[21] While the arbitral award did not go into the merits of the claim, it should be pointed out that prior to 17 Sept. 1961, the general situation in the Congo had deteriorated, that the political organs of the United Nations had adopted a number of resolutions referring to the hostile actions conducted against the United Nations Force, that the newspapers were full of details about the events in the Congo, and that, finally, the possible exposure of Sabena's aicratt to war risks, which was understood in the relationship between Sabena and the United Nations, included all aircraft put by Sabena at the disposal of the Organization, whether those were its own or those of its sub-contractors. The alleged absence of an understanding to that effect between Sabena and Starways was, at any rate, a matter belonging in the realm of the contractual relationship between those two partie and was *res inter alios acta* as far as Respondent was concerned. Moreover, Claimant or its representatives could not plausibly contend that they were unaware of the warlike situation in the Congo while their agents operating aircraft were witnesses to what was happening there and while any normally sensible person was kept informed of that situation every day through the mass media of communication. Not only was Claimant aware of that situation, but it had not withdrawn its aircraft from the charter agreement with Sabena, although it was free to do so.

> added to the monies payable to the Vendors... and the Purchaser [i.e., British Eagle International] shall cause the Company [i.e., Starways Ltd.] to pursue and prosecute such claim after the completion date through the Vendors' solicitors at the expense of the Vendors so far as the Vendors may require... »

(c) that in July 1964, i.e., eighteen months prior to the execution of the arbitration agreement, the Claimant, Starways Ltd., by appropriate corporate action, changed its corporate name to British Eagle (Liverpool) Ltd.,

(d) at some unspecified time, another company of the British Eagle Group, not appearing in the arbitration proceedings, adopted the name of Starways Ltd.,

(e) that on or about 2 May 1969 British Eagle (Liverpool) formerly named Starways Ltd. became insolvent, moved for voluntary liquidation and that a Liquidator was duly appointed to wind up its affairs,

(f) that on 15 September 1969 the Chancery Court of the County Palatine of Lancaster (Great Britain), upon motion filed by the Liquidator of Claimant, issued an order specifying in what manner the prospective proceeds of the arbitration (if any) should be applied to costs and how the remainder, if any, should be divided between the Vendors of the Claimant's company's shares of stock and British Eagle (Liverpool), formerly known as Starways Ltd.

III. THE ARBITRAL AWARD OF 24 SEPTEMBER 1969 : *IN RE : STARWAYS LTD. V. UNITED NATIONS*[22]

26. After the parties had proceeded with the submission of their written pleadings and of the legal authorities on which they proposed to rely, the oral hearing was scheduled for 23 September 1969 and did commence on that date.

27. Late in the summer of 1969, Respondent had gathered information concerning the facts stated above in paragraph 20 (a) and (b), and had come to realize that the Claimant had ceased all commercial activities and might even have been dissolved prior to the conclusion of the arbitration agreement. But, Respondent became fully aware of all the particulars of the agreement whereby the Wilson Group sold their shares of Starways Ltd. to International on the morning of the hearing, when the agreement was exhibited for the first time, together with the order of the Chancery Court of the County

[22] The Claimant will be henceforth referred to as Liverpool or as the Claimant [i.e., British Eagle (Liverpool) Ltd.] for short; British Eagle International Airlines, the purchaser of Starways Ltd.'s shares of stock will be referred to as International for short; the Vendors, i.e., former sole stockholders of Starways Ltd. are referred to as the Wilson Group, and the United Nations if referred to as the Respondent.

Palatine of Lancaster, dated 15 September 1969, and two supporting affidavits, one from the solicitor of the Liquidator of Liverpool who was appearing as Applicant in the proceedings before the Chancery Court (the solicitor stating *inter alia* in his affidavit to that Court that he had become aware of the events concerning the application on Tuesday 9 September 1969); and the other, from the Liquidator of Liverpool, himself.

28. The facts stated above in paragraph 20 (c), (d), (e) and (f) with documentary evidence were brought to the knowledge of Respondent on the day of the hearing.

29. While in possession only of the facts and information indicated in paragraph 20 (a) and (b), Respondent had submitted on 10 September 1969 a request to dismiss the case on the grounds that the Claimant, Starways Ltd., had lost its *locus standi,* since it had no longer any cause of action against Respondent as the prospective proceeds of the claim against Respondent no longer belonged to it, but had been assigned or transferred to the Wilson Group which was not a party to the arbitration agreement. Furthermore, admitting that after the transfer of the prospective proceeds of the claim, Starways Ltd. could lawfully have been made the agent of the Wilson Group to prosecute the claim, the Claimant had then the legal duty to reveal to Respondent its capacity of agent and the identity of its principals in the arbitration agreement in application of the rule of law that « *nul ne plaide par procureur* »[23]. No such disclosure had been made by Claimant although it knew or should have known of the fact that it was no longer acting as the party entitled to the proceeds of the claim.

30. Respondent also pointed out that, according to universally recognized rules of law, litigation can be initiated and pursued only by a person who has a cause of action and that, with respect to arbitration, persons are able to arbitrate only with respect to rights of which they may dispose freely[24] and that the Claimant was not legally capable in March 1966 to engage in an arbitration agreement concerning a right of which it could no longer dispose freely.

31. Practically up to the eve of the hearing, Respondent had no reason to

[23] *Cf.* BERNARD, A., *International Commercial Arbitration,* « Belgium », Paris (Dalloz et Sirey), p. 125; *Halsbury's Laws of England,* 3rd ed., vol. 2, V. « Arbitration », Subsection 2, « Parties to the Agreement and Persons bound thereby », p. 9, para. 19; *Revue critique de jurisprudence belge* (1963), « Examen de jurisprudence (1958-1961) », Procédure civile », p. 147, para 1.

[24] Article 1003 of the Belgian Civil Code is a mere application of a general principle of law, according to which one cannot dispose of properties or of rights of which one is not the owner, unless the power so to dispose has been regularly vested in an agent by the actual owner of these rights and properties and the contracting party of the agent is fully aware that he is dealing with an agent.

doubt that Starways Ltd. was a proper party to the arbitration agreement of 21 March 1966. But meanwhile, it had become clear that Claimant had failed to reveal to Respondent : (a) the fact that it was no longer vested with the claim it purported to submit to arbitration, (b) the fact that the prospective proceeds of the claim had been assigned or transferred to the Wilson Group, (c) the identities of the assignees or transferees of the claim, (d) the fact that it was actually acting as agent for the Wilson Group. Respondent underlined that failure to disclose such facts went much beyond the non-observance of procedural formalities, as such disclosure constituted an indispensable safeguard for the protection of Respondent's interest and for a proper adjudication of the case.

32. Respondent therefore requested the Arbitrator to order the proceedings discontinued and dismissed since the arbitration agreement had been concluded with a juristic person which was divested of the right of action with which the arbitration agreement was concerned and, alternatively, since it had failed to disclose its quality of agent, and the identity of its principals, assuming that it had signed the arbitration agreement in that capacity.

33. Before the Chancery Court, Liverpool's Liquidator had taken the position that the clause of the sale agreement concerning Starways Ltd.'s shares of stock, whereby the prospective proceeds of the claim were to be paid to the Wilson Group did not operate at English law so as to assign or transfer the benefit of Starways Ltd.'s claim to the Wilson Group; neither did it constitute Liverpool agent or trustee for the Wilson Group. According to his contention, the clause in question merely obliged International to pay a further sum to the Vendors if and when Liverpool succeeded with its claim.

34. Prior to the order of the Chancery Court of 15 September 1969, Liverpool's liquidator and his solicitor had obtained a legal opinion from the London barrister who was the Counsel involved in the arbitration on behalf of the Claimant. On the basis of that opinion, the Wilson Group and the Liquidator of Liverpool had made a provisional arrangement (subject to the approval of the Chancery Court) as to the manner in which any monies recovered in the arbitration were to be shared between the Wilson Group and the Liquidator. That provisional agreement was endorsed by the Chancery Court in its order of 15 September 1969.

35. At the hearing, Claimant's counsel argued that the order in question was binding upon the Liquidator of Liverpool, while the Wilson Group would be free to litigate the propriety of the division of the proceeds. He conceded that Respondents were entitled to raise their preliminary objection though he argued that it was technical in character and contented that in the exercise of his discretion the Arbitrator should grant a motion by Claimant for leave to amend.

36. The Arbitrator decided on 24 September 1969 that he should not

exercise his discretion as urged by Counsel for Claimant. As stated by the Arbitrator, the reasons for his conclusions in this matter were the following :

« I. It appears to be common ground between the parties that :

(a) An arbitration agreement shall state the name of the plaintiff or claimant (Articles 1003 and following, and specifically articles 61 and 1005 of the Belgian Code of Civil Procedure).

(b) The motion for leave to amend in the instant case is not one endeavouring to correct a mere ministerial mistake in the description of a party. It involves the claim of a corporation owned by interests different from those that owned the company at the time of the loss and discloses the existence of parties different from Claimant as being entitled to the whole or to a part of the proceeds.

II. Consequently, the facts as they now appear are not comparable to those that gave rise to the case of *Spitaels v. Société Polskin,* decided by the Belgian Cour de Cassation on November 20, 1941, (I *Pas.,* 28, 1941), to which Counsel for Claimant has directed the attention of the Arbitrator. In the Polskin case, the summons and complaint had incorrectly described the defendent as being a « société anonyme » whereas in fact it was a « société à responsabilité limitée ». The Court found that this minomer could not have had the effect of causing a party to be under a misapprenhension regarding the identity of the other.

It is evident that, in the instant case, the designation of the Claimant was so radically different from the state of facts as it appears now as to distinguish that case from the Polskin case.

III. This difference is all the more noteworthy as Respondents' Counsel has shown that Respondents'[25] original consent to submit to arbitration with the designated claimant had not been obtained without a substantial degree of hesitation. In his words, it was a borderline decision.

IV. Claimant's further argument that his motion for leave to amend operates no actual change in the beneficiaries of the award is deemed to be without merit. In arriving at the decision to enter into an agreement to arbitrate, Respondents were entitled to know who were the real parties to the proceedings, and to make such further inquiries as Respondents might have deemed advisable. One of the reasons — but by no means the only one — is that a party, prior to entering into an agreement to arbitrate, must have the means of deciding whether the proceedings in which it is about te engage will have the effect of adjucating the issue definitively and as regards all possible claimants. Arbitral awards may not be opposed to third parties (Article 1022, Belgian Code of Civil Procedure; J. Robert, Traité de l'arbitrage, par. 32; to the same

[25] The Arbitrator refers to the United Nations as Respondents.

effect see, Russell on the Law of Arbitration 17th ed., 1963, p. 35, where the author points out that an arbitration agreement, while binding on assignees, does not bind strangers. To the same effect see article 1165 of the Belgian Civil Code and Wehringer, Arbitration Precepts and Principles, par. 7.43, at p. 33).

In the instant case it seems clear that if Respondents, prior to the execution of the arbitration agreement, had been able to learn that Liverpool rather than Starways Limited was the Claimant, Respondents would have had sufficient notice to make such prior additional inquiries into the circumstances surrounding the change of name of the Claimant corporation as they may have deemed appropriate. The circumstances of the case have denied this opportunity to Respondents.

In this context it is appropriate to quote from the decision of the Belgian Cour de Cassation in the Polskin case afore mentioned : « ... les mentions prescrites à l'article 61, 1° du Code de procédure civile ne servent qu'à écarter, tant chez la partie adverse que chez les juges, *tout doute quant à l'identité du demandeur* » (emphasis supplied). (The provisions contained in art. 61, 1° of the Code of Civil Procedure have for sole purpose to eliminate, as regards the opponent and the Court, any doubt concerning the identity of the plaintiff). And the decision states further that the Court will appreciate whether this requirement has been met. I find that it has not been met in the instant case.

V. Moreover, Article 1003 of the Belgian Code of Civil Procedure provides that persons may arbitrate concerning rights of which they may freely dispose. The record before the Arbitrator shows that this was not the case for Liverpool.

VI. This is not a case where shareholders of a practically defunct and insolvent corporation, at their expense, provide that corporation with funds to prosecute a claim, in the expectation of recovering the proceeds in the event the corporation is successful. Had such been the facts — and all the facts — the Arbitrator would not have found it difficult to grant leave to amend as a result of a mere change of the corporate name. But in the instant case the prospective ultimate beneficiaries *in toto* or in part are *former* shareholders who have sold their shares evidencing their interest in the corporation, to third parties while still retaining some interest in the prospective recovery as part of the sales price of their shares.

VII. The Arbitrator could have rested his opinion on these grounds as well as on the statement to be found in *Russell* that an arbitrator has no power to allow an amendment the effect of which would be to alter the terms of the submission under which his powers arise (Russell, *loc. cit.*, p. 163). Yet, it is important to note that, in the instant case, one of the parties to the arbitration agreement is the United Nations which ordinarily would enjoy immunity from being sued. What has been said concerning the right of a party to an arbitration

agreement to be able to identify its opponent and to determine the likelihood of a definitive adjudication applies with even greater strength to a sovereign government or an international body. If it be deemed to be in the public interest to encourage such immune international bodies to consent to arbitration, the required corollary is surely not to use judicial fiat or discretion to compel an international organization to litigate directly or indirectly with a party or parties whose identity or indeed existence could not have bee anticipated when the agreement to arbitrate was made.

For these reasons, Claimant's motion for leave to amend the claim had to be denied, Respondents' preliminary objection concerning the standing of Starways Limited as Claimant had to be sustained and Respondents' motion based on this objection to dismiss the action had to be, and hereby is, granted.