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CURRENT DEVELOPMENTS

A CONTINUOUS SEARCH FOR NEW HORIZONS

Opening Address
International School of Arbitration and Mediation of the Mediterranean and Middle East
by
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It seems appropriate that the opening address of the International School of Arbitration and Mediation of the Mediterranean and the Middle East, which has been instituted by our European Court of Arbitration, be delivered in Venice, the unique aristocratic Republic with glorious trade and maritime traditions with Europe and the East. These traditions, thanks to Marco Polo, reached China, while two other great Italian explorers, Christopher Columbus and Amerigo Vespucci, respectively discovered the Americas and gave these new continents their name.

These are traditions which, in this world dominated by materialism, may have been forgotten by many, but not by those who have done their classics and who wish that the Mediterranean would come back to discharge – on an intellectual level – the great role which has always characterized it.

Since the seventeenth century the center of business, and of military and political power, has moved away from "*mare nostrum,*" and the old civilizations of the Mediterranean and Middle East have been unable, separately, to remain top players in the new intellectual and spiritual set up of the world. However, united, they may find again their ancient intellectual strength and faith.

This seems to me to be the goal in order to give to our new generation this opportunity and a greater intellectual drive.

This is not to oppose other civilizations, but to discuss and to participate with them in that intellectual movement, which is a great driver of human beings.

The reflections which I propose that we share today concern arbitration and our territory. Much has been and is being written in this respect. It is frequently said that one does not see a tree because his/her attention is absorbed by the forest. Others do not see the forest because they concentrate too much on a single tree. I would propose another metaphor: We do not know a tree if we are unable to understand its roots. I suggest, then, that we try to dig in this direction in the ground of arbitration.

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I. ARBITRATION AS PRIVATE JUSTICE INCORPORATED BY THE STATE

A first step of our research may consist in identifying the perimeter of our reflections: First, a finding that, beyond many subtle distinctions, arbitration is a private jurisdiction, which legal systems incorporate, granting to their courts the authority to confirm or set aside the arbitral award.

This has brought some legal systems even to view the relationship between arbitral tribunals and state courts in terms of distribution amongst them of the State's power to decide disputes, and not to consider arbitral tribunals as belonging to a separate domestic jurisdiction.

II. THE NOTION OF INTERNATIONAL ARBITRATION

Commentators, and even legal systems generally, characterize as international the arbitral proceedings between parties that belong to different jurisdictions or that concern disputes arising from international trade or that have both such elements.

These proceedings should probably be better referred to as "transnational."

In many legal systems arbitration is governed by statutory procedural provisions. Thus, the criterion to characterize such proceedings may then neither be subjective nor objective, but must be procedural. The procedural criterion allows, then, for the identification of – aside from domestic and of foreign arbitration – really international arbitrations – such as those under the 1965 Washington Convention and those governed by supranational arbitration rules.

III. INADEQUACY OF THE REFERENCE TO INTERNATIONAL "COMMERCIAL" ARBITRATION

It is usual to refer to international commercial arbitration versus public international arbitration and investment arbitration. However, the term "commercial" is reductive since it does not include disputes between private parties which concern private , and not commercial disputes.

IV. EXISTENCE OF INTERNATIONAL ARBITRATION LAW

A reluctance to accept the existence of an international arbitration law must be registered. Very authoritative writers, first of all my good friend Professor Pierre Mayer, deny its existence. Nevertheless, international conventions, that part of various national laws dealing with international arbitration, the *lex mercatoria*, the *tronc commun* (which will be dealt with hereafter), and substantive rules of international law as recognized by French courts and writers, seem to allow for its existence.

Having dealt with these matters of a systematic nature, one may turn now to some other issues.

V. OVERCOMING CONFLICTS RULES

The choice of law, when not expressed by the parties, is very frequently the result of conflicts rules, which are not the same in all legal systems and which tend to produce artificial results. Professor Goldman has thus advocated for the *lex mercatoria* which, however – when it is asserted to constitute a legal system – meets serious obstacles, such as those raised by Professor Mann and by the English Judge Sir Michael Kerr. This has induced the development of the doctrine of the *tronc commun*, which starts from the premise that, if the parties have not elected a substantive law, their silence is eloquent and shows that none of them has agreed to be subject to a law that it does not know and that it would have preferred that its national substantive law applied.

The solution to apply the *common part* of the substantive laws of these parties satisfies, then, their wish and is more appropriate than conflicts rules. The resulting law is completed, as to those matters which are not ruled by it, with the usages of the parties and according to their expectations.

VI. ARBITRAL PROCEEDINGS TO BE NOT ONLY DIFFERENT FROM, BUT BETTER THAN, COURT PROCEEDINGS

An analysis of arbitration must be based – it is suggested – on the constant note that the parties refer their disputes to arbitration because they look for proceedings which are not only different from, but better than, court proceedings. Arbitral institutions and the arbitrators should bear this in mind at all times as the *leitmotiv* that their duty is to satisfy this legitimate expectation.

VII. A SOLE ARBITRATOR AND NOT THREE ARBITRATORS

In compliance with the myth of symmetry, a very frequent practice is to provide that each party may appoint "his own arbitrator."

It is submitted that this solution is not satisfactory, first for very practical reasons, since it multiplies by three the cost of arbitration, and parties in middle-sized and small disputes may not be able to afford costs that are out of proportion to the amount in dispute.

However, beyond this practical reason, it is suggested that it is not appropriate to constitute an adjudicating panel in which two out of its three members are appointed by a party (with the frequent expectation that they be sensitive to its expectations). The regular comparison between arbitration and court proceedings confirms that this is not a positive choice.

A sole arbitrator (jointly appointed by the parties or, if not, appointed by the arbitral institution) seems to be the proper solution.

VIII. SHORT DURATION OF THE PROCEEDINGS

The arbitrator frequently imitates the state court judge. Noting that a judge frequently, indeed too frequently, takes little care of the duration of the proceedings and of the need for an expedited decision, these arbitrators are induced to imitate this behavior, with the result that arbitral proceedings which last two years are not the rule, and occasionally they even last ten years.

The target in the organization and management of arbitral proceedings should be to make the award within one year. Our rules so provide and I believe that it is our precise duty.

IX. DE NOVO REVIEW OF THE AWARD

One of the dogmas of commercial arbitration is that the award must be *taboo* and that consequently nobody – be it a judge or another arbitrator – may review it (except – what could not be avoided – on procedural grounds). The consequence of this approach is that the award benefits from immunity from errors of law (for example for a wrong choice of the applicable law) and from errors on points of fact or in the assessment of the evidence. If this immunity were the charm of arbitration, it would not be worth resorting to arbitration.

A *de novo* review of the award does not weaken arbitration, but allows for satisfying the legitimate expectations of an innocent party.

The formula which has been adopted on my proposal by the European Court of Arbitration is an internal appellate arbitral degree, to which the loser (totally or in part) in the first arbitral proceedings may have access, provided that he deposits with the Registrar of our institution the amount which has not been granted to him by the first arbitrator, and the costs of the second arbitral degree.

This allows arbitration to achieve the impossible dream of being self-executing and consequently to be enforced without the need to have state courts step in. In this way, the victorious party obtains immediately the enforcement of the second instance award, without having to go through the long and expensive path first to obtain enforceability and then to actually enforce. This, while allowing challenges against the award remains possible. This is an important achievement, which is provided for in our rules.

X. A PERMANENT INTERNATIONAL ARBITRAL TRIBUNAL FOR CHALLENGES AND ENFORCEABILITY OF TRANSNATIONAL AWARDS

The challenge on the one hand, and the proceedings on the other to obtain the enforceability of transnational awards, give rise to conflicting or at least to non-harmonious decisions such as *Hilmarton* and *Chromalloy*, in which an award, which has been set aside in its country of origin, is recognized and made enforceable in another state, in this case respectively in France and in the United States.

To reserve to a permanent international arbitral tribunal the decision on challenges and on the enforceability of transnational awards seems to represent further progress, which has been put forward by our school of thought.

XI. WHAT KIND OF JUSTICE DOES THE HONEST CITIZEN EXPECT FROM THE ARBITRATOR ?

I believe that, in the Mediterranean and Middle East, we strongly feel, maybe even more so than other civilizations, that citizens resort to arbitration, not to have a copy of court proceedings, but to obtain a decision which will not just be a brilliant intellectual exercise, but which will do justice, applying the law with humanity. This goal is not unknown even in common-law systems.

Thus, Boyd[1] quotes with favor the Lord Chancellor's speech in *Knox*:[2]

> The arbitrator has a greater latitude than the Court in order to do complete justice between the parties: for example he may grant relief from a right which bears hard upon one party but which, having been acquired legally and without fraud, could not be resisted in a Court of Justice.

and the Privy Council in *Moses*[3] which, while hearing a petition for leave to appeal from a decision of the Supreme Court of Tasmania, referred to the statute which provides that in exercising these powers the Court

> shall be guided by equity and good conscience only … nor shall the Court be bound by the strict rules of law or equity in any case, or by any technicality or legal form whatever.

There could be no better echo from writers to the very learned comments made by Lord Denning in the *Eagle Star*[4] case in which the English Court of Appeal dealt with an arbitration agreement which was worded as follows:

> The arbitrators and umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of these agreements.

In his speech Lord Denning said:

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[1] Stewart Boyd, *"Arbitrator not to be Bound by the Law" Clauses*, 6 ARB. INT'L 122, 128-29 (1990).

[2] Knox and Co. v. Symmonds, (1791) 1 Ves, 369.

[3] Moses v. Parker, (1896) AC 245, *cited in* Boyd, *supra* note 1, at 131.

[4] Eagle Star Ins. Co. Ltd. v. Yuval Ins. Co. Ltd., [1978] 1 Lloyd's Rep. 357.

> The public desires order and dislikes law, though without law there would be no order. The judicial qualities which the public singles out for praise are common sense and humanity; devotion to the law is less admired than a willingness to restrain it. It is not surprising therefore that from the earliest times English law has accommodated various devices designed to enmesh the legal system with the justice of the case.

XII. THE ROLE OF THE ARBITRATOR

Our vision of arbitration could not disregard the role of the arbitrator.

The arbitration community registers a tendency to spread an image of arbitration as a luxury clinic. It includes on the one hand some clubs of very well connected arbitrators and on the other an increasing number of new arbitrators, recently appointed and with limited experience.

Amongst those arbitrators, a goal to receive fees as high as possible, and to be admired and glorified is not unknown. The arbitrators must take in my opinion a different goal, which the user is entitled to expect: to serve the parties, deciding with attention and humility in the best way.

XIII. IN CONCLUSION

I submit that even a quick review of these matters, which for this reason has not indulged in rendering account of the scientific analysis behind those issues, confirms that we have a view of arbitration (which is the result of my research over the years and is reflected in the rules of the European Court of Arbitration), that does not rest on common perceptions of arbitration, but tries to go to the roots of arbitration and is thus much different from the great majority of other views.

With these thoughts, I open our International School of Arbitration and Mediation of the Mediterranean and Middle East, with the hope that we proceed together in a constant joint research for new and better horizons.