The Increasing Importance of Arbitration in Trade and Investment in the World. General Trends, Opportunities and Challenges.

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* With thanks to Rory V. Wheeler for his help with the preparation of this presentation.

Introduction

This is a lecture on international arbitration, but I will not dare “lecture you” on (i) legal/arbitral theories, nor on the technicalities of this field of law, as I will rather take a sociological approach and describe it as a phenomenon, with figures and some explanations about its main features and key players and (ii) on how perfect, ideal and magic is arbitration as I will portray an objective, contrasted and nuanced landscape of this alternative means of dispute resolution.

Thus, rather than promoting arbitration, let me start with promoting Barcelona. What better place indeed than Barcelona to speak about the past evolution of arbitration, from its latest trends up to its forthcoming challenges?

Similar to what arbitration attempts to be, Barcelona appears to be a good balance between internationality and the taking into account of local cultures. Universal (think of the Universal Exposition already back in 1888), open (towards the sea) and tolerant (remember the Mozarabes and Jews who escaped from the persecutions of the Cordoue’s kalifat and found shelter in Barcelona) city, it combines today perfectly its already rich and diverse history (the legends say on one hand that the city was founded by Hamilcar Barca from Carthage, the father of Hannibal or by the Phoenician Barkeno) with the challenges of a modern society.

This modernity is exemplified by the subtle balance between centralized/national aspirations and decentralized/local realities, by the way it was capable to renew itself through the 1992 Olympics (with the impulse of Joan Antoni Samaranch) and through its presence in all different aspects of the today’s life and of what will continue to make it the city of the future : a virtuous coexistence of people coming from different cultures, religions and backgrounds, a strong economy, a flourishing industry, a major Mediterranean port, a variety of arts, a dedication to develop sports (and not only football, but also basket-ball), a high-profile medical infrastructure…

For all these reasons, and because Barcelona has the ambition, for the Mediterranean area and even well beyond, to combine its unique universality with its local traditions, it perfectly fits arbitration’s spirit too, and through its spirit, its trends, opportunities and challenges.

Introduction

One talks about the recent boom of arbitration, yet throughout history, especially all around the Mediterranean Sea, there have always been parties willing to submit their dispute to a private third party so that he or she may decide it.

Today however, arbitration is omnipresent in trade and investment, sometimes even making headlines in the general media.

Arbitration's increasing importance comes with exciting new opportunities for practitioners. Yet its success has a price and today arbitration is facing more challenges than ever before.

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Introduction

I – Trends

1. Global Statistical Data
2. Previous and Current State of the Market
3. Latest Trends

II – Opportunities

1. New Types of Disputes
2. New Market Trends
3. What the Users Have to Say

III – Challenges

1. Rising Distrust and Criticism of Arbitration
2. Arbitration, Serving the Interests of Its Users?
3. The Only Alternative

I – Trends
1. Global Statistical Data
2. Previous State of the Market
3. Latest Trends
II – Opportunities
III – Challenges

Trends

The word “trend” is used in reference to a general direction in which something tends to move. It can also be used for a vogue, a popular taste at a given time.

Arbitration is moving in a general direction, but is it just in vogue or will it simply continue its present movement? It is now deeply-rooted in the more general landscape of international investment and trade or can we expect any drawback ?

In order to analyze international arbitration trends today, it is necessary to consider the useful statistical reports published yearly by most arbitration centers. These can help to compare the past with the present and also put a finger on the latest trends.

The Legal Framework of International Arbitration

- Since the 1990s, an overwhelming number of countries have changed their laws and regulation governing arbitration, either following the UNCITRAL model-law, or by incorporating principles and rules from French law or UK law. For instance, just to limit this remark to the Arab countries, only 2 countries (Libya and Iraq) have not modernized their laws on arbitration for years and years, and even Iraq is about to pass a new bill on arbitration.

- States that did not adhere to the New York Convention are today very marginal, the exception which confirms the rule: the latest figures show 144 State-parties to the Convention.

- More and more countries are ratifying the Washington Convention.

As arbitration becomes more widespread, the arbitration clause is no longer that "*midnight clause*". True, judges have also helped a lot to "save" and give effect to pathological clauses.

Right from the start, the parties must deal with the first choice: institutional or *ad hoc* arbitration?

- According to the 2008 PWC study on international arbitration, 86% of arbitral awards are rendered pursuant to an institutional arbitration, leaving 14% that are rendered under *ad hoc* arbitration.*
  - This said, we have almost no means of knowing how many *ad hoc* arbitrations occur nor who resorts to *ad hoc* arbitration.
  - Furthermore, the arbitrations that go well are the ones that do not make the headlines.

- To analyze the trends in arbitration, one must focus on institutional arbitration as, by definition, there are no (or few) figures for *ad hoc* arbitration.

Source: International Arbitration: Corporate Attitudes and Practices 2008, *Price Waterhouse Coopers.*
http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf

Global Trends*

- Nearly every institutions shows an increase in caseload over the last 5 years.
- The total amount of cases is on the rise.
- Despite the multiplication of arbitration centers, the oldest (ICC, AAA) still dominate the scene, with the mergence though of the CIETAC.

Institution	Type	2003	2004	2005	2006	2007	Total
ICC	International and Domestic	580	561	521	593	599	**2854**
AA/ICDR	International	646	614	580	586	621	**3047**
LCIA	International	99	83	110	130	127	**549**
SCC	International and Domestic	169	123	100	141	170	**703**
Swiss Chambers	International	0	52	54	50	58	**214**
HKIAC	International	287	280	281	394	448	**1690**
SIAC	International	35	48	45	65	70	**263**
CIETAC	International	422	462	427	442	429	**2182**
DIS	International and Domestic	81	87	72	75	100	**415**
ICSID	International	30	27	26	24	35	**142**
ICAC	International and Domestic	389	262	366	323	319	**1659**
CICA	International	70	77	72	62	54	**335**
KCAB	International	38	46	53	47	59	**243**
VIAC	International	45	50	54	36	40	**225**
SAKIG	International	46	55	48	40	32	**221**
NAI	International	32	33	32	29	28	**154**
WIPO	International	8	9	22	23	32	**94**
JCAA	International	14	17	10	11	14	**66**
PCA	International	5	5	6	5	9	**30**
ACICA	International	1	1	2	2	1	**7**
	Total	**3023**	**2916**	**2910**	**3120**	**3280**	**15249**

Source: International Arbitration: Corporate Attitudes and Practices 2008, *Price Waterhouse Coopers.*
http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf

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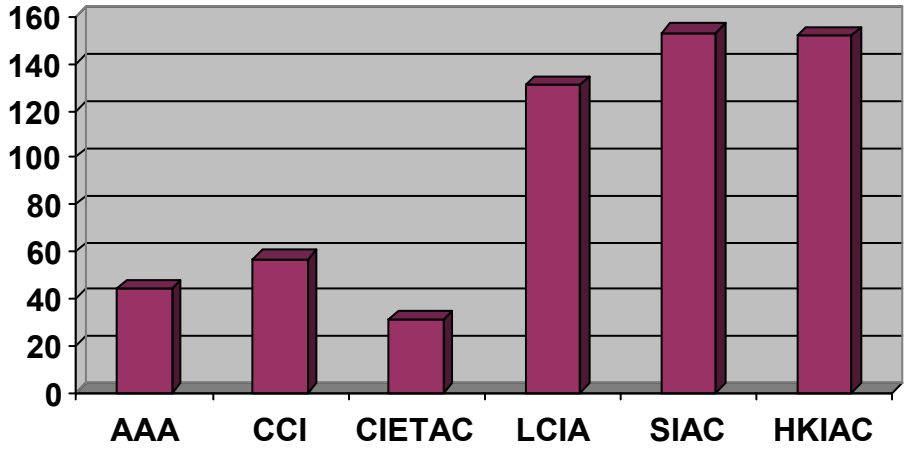
Caseload Variation Between 2005 and 2009 (%)*



- The Cairo Regional Center for International Commercial Arbitration, created in 1978/79, has also increased its caseload: 35 (2007), 48 (2008), 51 (2009).
- Despite some centers relative increase being higher, the fact that all show an increasing caseload demonstrates that recourse to arbitration is still growing and one center's gain is not yet another's loss.

* Source: Singapore International Arbitration Center, www.siac.org.sg.

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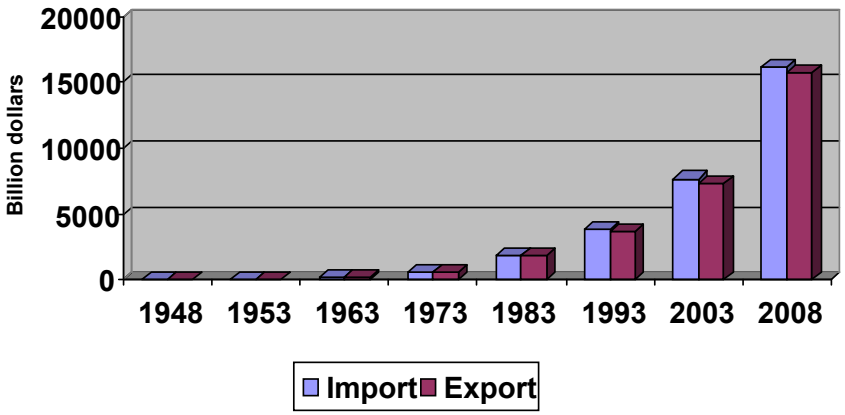
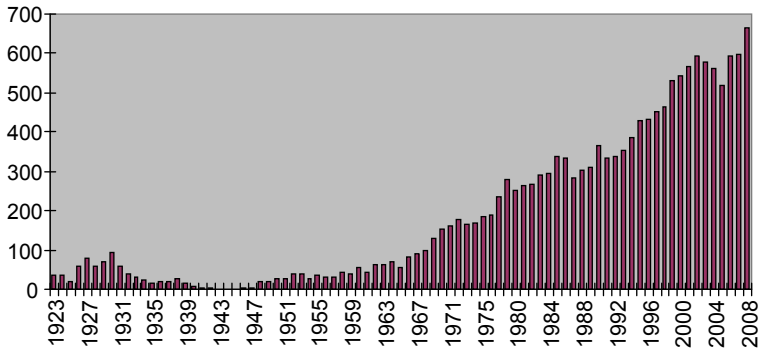
World International Trade (Source: OMC)



ICC Caseload 1921-2008



- The parallel between the exponential development of global international trade and the rise of arbitration is obvious.
- Despite various world crisis since World War II, neither has ever shown a significant drop in numbers.

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Construction arbitration remains in the lead

- Although there still exists a preponderance of construction arbitration, the evolution of international arbitration practice at the ICC shows a movement towards higher specialization:
  - Construction
  - Energy (including oil and gas)
  - Telecommunications and high-technology
  - Finance and insurance
  - Transport and carriage of goods
- The above are all specialized fields, much more so than general trade, industry and commodities.
- Accordingly, practitioners are more and more specialized within arbitration teams.

Contrast of the five most active economic fields in international arbitration, ten years ago and today.*

1998

Economic Field	Share
1. Construction	17,7%
2. General trade	15,1%
3. Industry	8,1%
4. Communication and High-Tech	6,3%
5. Commodities	5,5%

2008

Economic Field	Share
1. Construction	15%
2. Energy	10,4%
3. Communication and High-Tech	8,1%
4. Finance and Insurance	7,2%
5. Transport	6,8%

* Source: *Statistical Reports*, ICC Bulletin, 1999/2009.

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Arbitration has conquered new terrain and is still advancing:

The traditional fields with which international arbitration is associated:

- International trade (goods and services)
- Construction
- Maritime activities

The new fields where international arbitration is developing:

- Energy (oil and gas)
- Intellectual property
- Corporate law (M&A transactions)
- Post-M&A disputes
- Competition law
- Consumers law
- Finance and insurance
- Pharmaceuticals
- Sports

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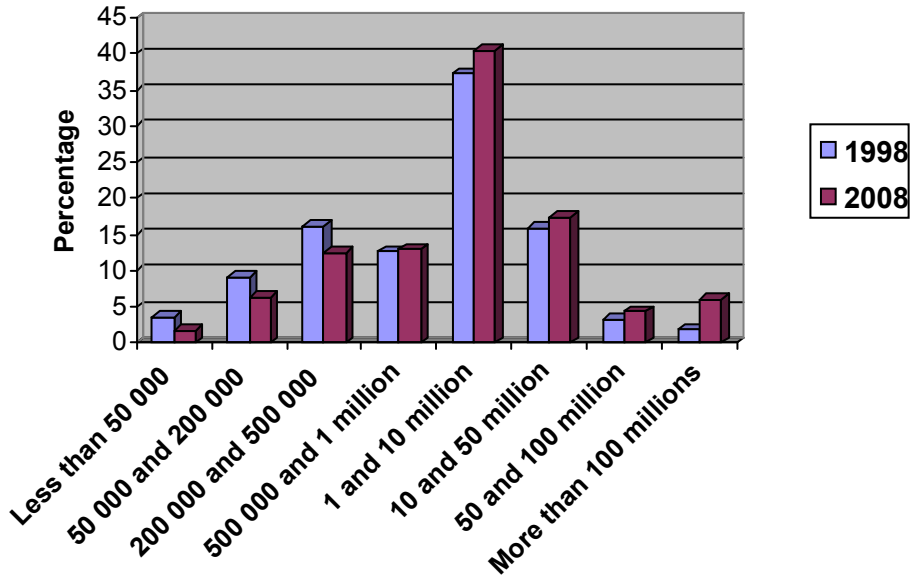
Amounts in Dispute
(Only Quantified Claims, USD)*



- There is a tendency to submit bigger cases to arbitration.
- The statistics show a significant increase in the amount of cases involving more than 100 millions USD.
- The latest statistics * * re annulment claims against awards rendered in Switzerland show that almost 50% of the cases involved an amount in between 1 and 10 million CHF and 3% over 1 billion CHF.

*Source: *ICC Statistical Reports*, ICC Bulletin, 1999 and 2009.
** F. Dasser, International Arbitration and Setting Aside Proceedings in Switzeland : a Statistical Analysis, Bul. ASA 2007, vol. 25, Issue 3, p.444.

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In parallel to the success of international commercial arbitration, which has constantly increased in addition to attracting the largest disputes, there has been an important rise of investment arbitration.

- International public law is now mingling with national law in these disputes. There is a thin border between contract claims and treaty claims.

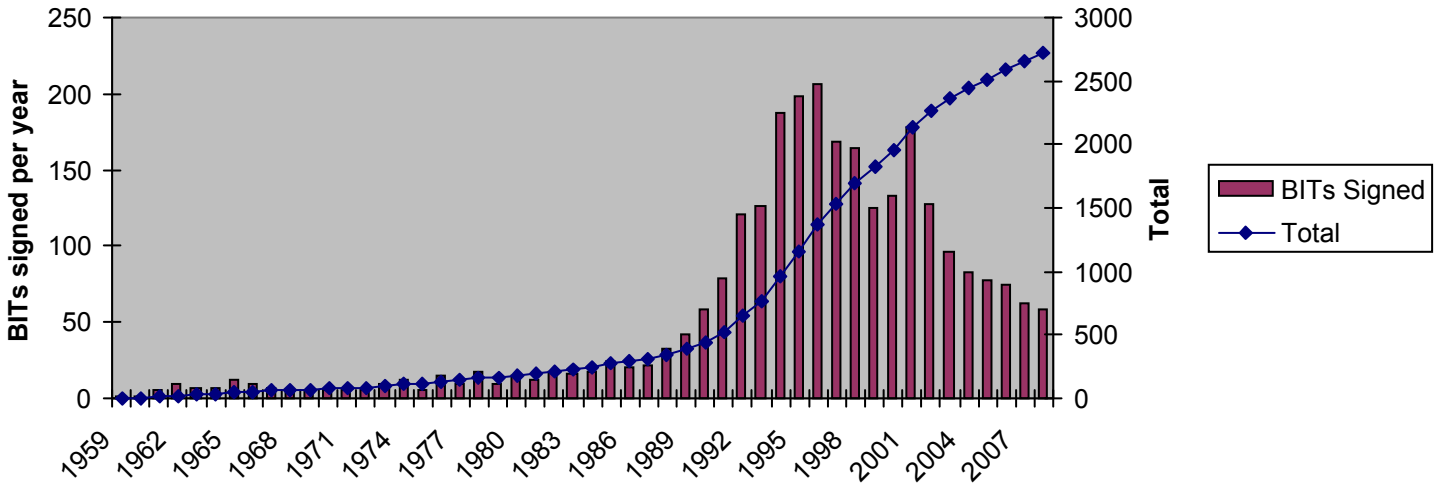
- States are being sued before arbitral tribunals with respect to their political choices and sovereignty.

- Also, there is a developing arbitration practice within the framework of the Word Trade Organization.

Growth of BIT claims

- States have realized that BITs can only help to attract foreign capital and are thus developing a network of BITs.
- Investors now invest with the protection offered by arbitration.
- Switzerland and Germany are amongst the countries with the largest network of BITs signed. Why ? Probably because their nationals are those who commerce and invest most.

BITs Signed 1959-2008*



* Source: *International Investment Arbitration Monitor's Report 2009*, available on www.unctad.ord.

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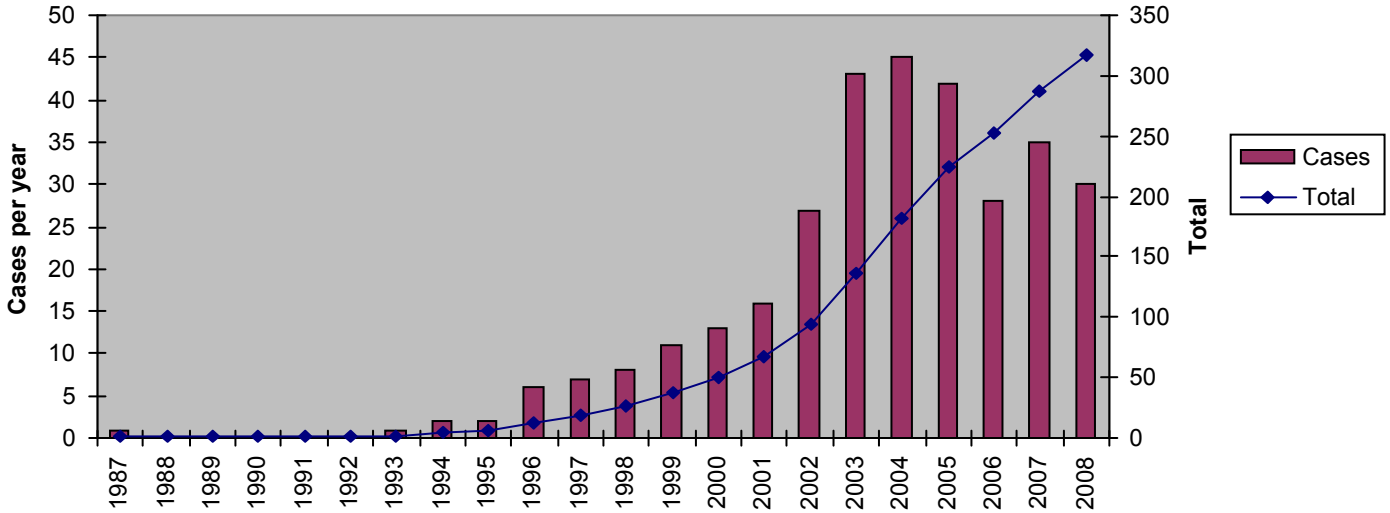
Evolution of Investment Arbitration*



- General rise in the number of investment arbitration procedures. The number of ICSID cases is expected to stabilize around 25-30 cases per year.**
- The spike in the chart coincides with the Argentinian financial crisis in the early 2000s.

* Source: *International Investment Arbitration Monitor's Report 2009*, available on www.unctad.ord.
** Source: *Global Arbitration Review*, December 9, 2009.

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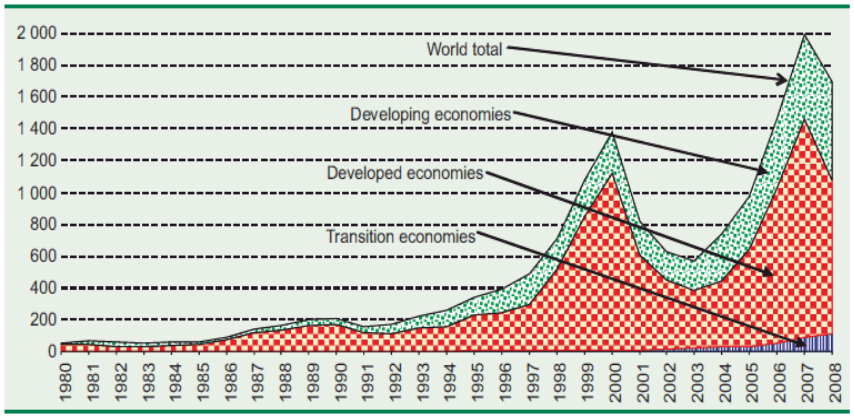
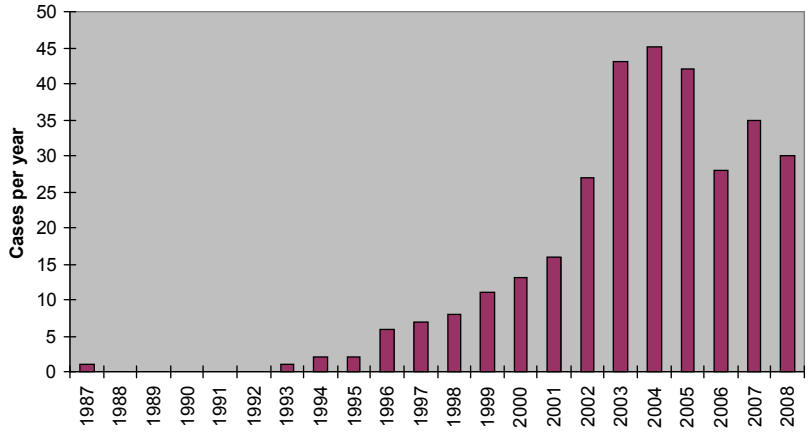
Figure I.1. FDI inflows, global and by groups of economies, 1980–2008
(Billions of dollars)



Source: UNCTAD FDI/TNC database (www.unctad.org/fdistatistics) and UNCTAD Secretariat estimates.

Evolution of Investment Arbitration (Source : IIA Monitor)



- There is an obvious correlation between the growth of international investment and the growth of investment treaty arbitration.

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The development of arbitration centers has created a multitude of different arbitration rules at the cost of harmonization.

- Rise of arbitration centers across the world* :
  - Cairo Regional Center for International Commercial Arbitration ('07: 35, '08: 48, '09: 51),
  - Singapore International Arbitration Center ('07: 70, '08: 85, '09: 132),
  - Chinese International and Economic and Trade Arbitration Commission ('07: 429, '08: 548, '09: 560),
  - Hong Kong International Arbitration Center ('07: 448, '08: 602, '09: 649),
  - Stockholm Chamber of Commerce ('07: 81, '08: 85, '09: 96 (international cases)),
  - Dubai International Arbitration Center, etc.

- The main arbitration centers are opening offices in other areas of the world:
  - ICC in Asia
  - LCIA in India and the U.A.E.
  - AAA/ICDR in Bahrain

* Figures may differ here from slide 8 as those in this slide have been provided by the centers themselves and can refer only to international cases (as opposed to the wider figures of slide 8)

- Any initiative aimed at harmonizing or reuniting the centers has had a limited success.

- The International Federation of Commercial Arbitration Institutions (IFCAI) has limited exposure and influence.

- The arbitration rules of the different centers, although similar and convergent, are not identical (see e.g. the rules applicable to the proceedings for challenging arbitrators).

Opportunities

We are in a changing world, amidst an ever-changing economy. These changes obviously produce new types of disputes and new market trends. Yet in order to exist, arbitration relies primarily on its users who may be moving towards other alternatives.

What doe these users have to say about arbitration ? Are they satisfied of the current state of te « market », a term we will need to analyse a bit further.

New opportunities created by the shift in the world's financial centers

- The rise through petrodollars of the Gulf, as a region both where to invest and of investors.
  - The rise in oil prices between 2004 and 2008 created a huge financial surplus in the Middle-East.
  - This in turn saw a spike of economic development in the form of infrastructure projects and other local investments.
  - Where there is a rise in economic activity, there is a rise in the number of disputes.

- Arab investments abroad
  - In the past, foreign investment in the Arab world were protected by arbitration clause
  - Today, Arab investments abroad are now seeking for more protection (i.e., the Dubai Port World investment in the US that eventually fell through back in 2006/2007), especially through arbitration

Emergence of a new pattern of international trade and investment.

- South-South international trade and investment
  - China took the USA's place as Brazil's leading commercial partner (imports and exports)*,
  - Example of a new generation of investments: Chinese investments in Africa. China is the number 1 investor in Africa. Since 2004, it has invested $14 billion into the African continent.*

- Recently, the 1st South-South legal conference was held: the Forum on China-Africa Cooperation (FCAC) organized a conference in December 2009 in Egypt on "*Strengthening China-Africa Legal Exchange and Promoting All-round Development of China-Africa Relationship*".

* Source: D. Bautigam, Africa's Eastern Promises, Foreign Affairs (2010). Available at http://www.foreignaffairs.com/articles/65916/deborah-brautigam/africa%E2%80%99s-eastern-promise

Change of the world's economic structure

- The economic structure of the world is changing and this change is affecting arbitration.
- Arbitrations are less subject to the stereotypical dispute involving a party from a developed country against a party from a developing country, typically concerning construction.
- We are witnessing an extreme diversification of disputes. Arbitration is venturing into new fields of activity and we can bet that this trend will continue in the future.
  - E-commerce, Pharmaceuticals, Intellectual property, Warranty contracts against the possible increase of liabilities, Islamic finance (soon over a trillion dollars), Energy, Raw Materials.
  - Environmental issues, sustainable development?

This increasing recourse to arbitration will continue to lead to new opportunities for its practitioners.

- Arbitrations involving new “atypical” arbitration languages: Portuguese, Chinese, Arabic, etc.
  - New opportunities for counsel and arbitrators with working knowledge of these languages.
  - New international opportunities for local counsel and arbitration.
- Arbitration involving highly technical issues:
  - Rise of the expert arbitrator, well versed in both law and technology?
  - It is probable that the best arbitrators of the future will be up-to-date with technology in order to remain pro-active.
- A new generation of arbitrators is to be expected:
  - New skills, fluent in several languages and familiar with several cultures and legal systems and with truly transnational profiles.
  - Practitioners from a region will be increasingly specialized in the field most relevant to their region.

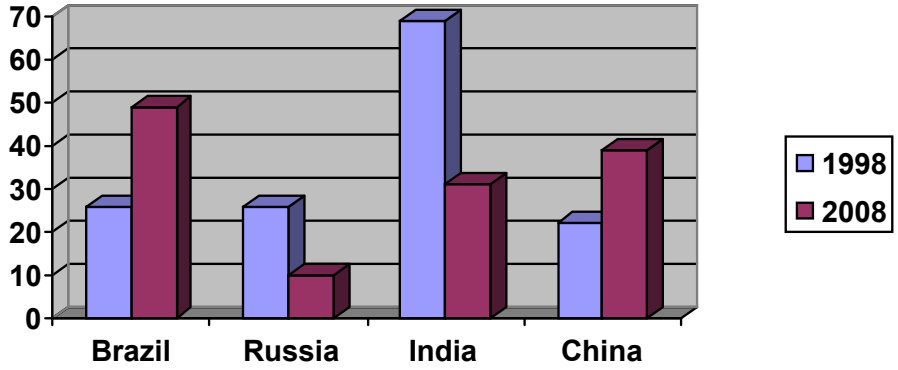
Rise of the BRICs

- Geographically speaking, new areas of the world are rising, giving birth to new economic actors, probably future users of arbitration.

- Rising of the BRICs: Brazil, Russia, India and China.
  - 31% of the earth's arable lands, 42% of the earth's population and 15% of the earth's GDP*
  - The number of companies from Brazil, India, China or Russia on the *Financial Times* 500 list more than quadrupled in 2006-08, from 15 to 62.**
  - Brazil's top 20 multinationals more than doubled their foreign assets in a single year, 2006.**
  - Multinationals expect about 70% of the world's growth over the next few years to come from emerging markets, with 40% coming from just two countries, China and India.**
  - China yields 75,000 people with higher degrees in engineering or computer science and India 60,000 every year.**

* Source: *Le Monde*, 16 April 2010. ** Source: *The world turned upside down*, The Economist, 15 April 2010.

ICC BRIC Caseload 1998/2008*



- For the moment, the BRICs recourse to arbitration is mixed, so far as the ICC is concerned.
  - Russia's decrease may be paralleled with the increase of treaty-based claims against it. (*Yukos* and *Roseinvest*, both high stakes, with hundred of billions USD involved).
  - The fall in Indian parties before the ICC can perhaps be explained by the popularity of its local courts, the fact that some Indian parties have sued the ICC, international law firms cannot yet implant in India.

*Source : Statistical Reports, ICC Bulletin, 1999 and 2009.

A new economy driven by rare but indispensable natural resources

The world is going towards a scarcity of energy and natural resources. One can expect a rush towards natural resources (not only oil and gas) and a growing awareness for the need of a sustainable development (solar and wind energy and, soon and to a lesser extent, water).

European alternative energy projects in North-Africa*

- ***Plan Solaire Tunisien***: 40 solar energy projects worth a total of $3.6 billion.
- **Morocco**: a $9 billion solar energy project to produce 2000 MW in 2020. the project will save 3,7 million tons of carbon dioxide.
- ***Transgreen* Project**: a sub-Mediterranean power line between North Africa and Europe. Involving most North African Countries and the Middle-East, the expected production is 20 giga-watts (GW) of which 5 GW will be exported to Europe. The total estimated price is $450 billion.

We can bet that these types of projects will lead to a new generation of arbitrations involving private entities and States and both public/environmental policies and private interests.

* Source: *Newsletter Franco-Arabe*, No. 38, March 2010. www.ccfranco-arabe.org.

Investment security through arbitration

The possibility of resorting to arbitration offers a non-negligible security to foreign investors.

- Historically, investors requested, especially to Governments, as a condition precedent for their investment, the insertion of an arbitration clause in the underlying agreement
  - Disney's investment in Marne-la-Vallée led to a legislative change in 1986 to allow the State/state entities to conclude an arbitration agreement ;
  - France-EAU 2007 Agreement re the creation of the Louvre in Abu Dhabi).

  And further investments in both developing and developed countries will be conditional on the protection by arbitration.

- Symmetrically, many Governments in developing countries have endeavored to promote and encourage investments through their adhesion to the ICSID Convention or by adapting their own legislation (Lebanon in 2002) so that the recourse to arbitration in case of a dispute would not encounter any impediment.

- Large, long-term infrastructure projects in foreign countries are difficult to imagine without the protection of arbitration

- The Maffezzini ICSID tribunal held that "*there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce*." (Award on jurisdiction, January 25, 2000, para 54)

* Source: *Newsletter Franco-Arabe*, No. 38, March 2010. www.ccfranco-arabe.org.

Arbitration is also a market

- Some call it a dispute resolution method, others a transnational legal order but it should also be reminded that arbitration is market.

- Arbitration is not only a legal concept, a form of justice. It is also more concretely, a market which includes legal services by counsels, arbitrators and institutions but also many other services such as translators, financial experts, hotels, transports, conferences, taxes, etc.

- Enormous amounts are at stake (hundreds of millions at least) which have macro-economic impacts, i.e., on the country as a whole.

- There has never been a true and thorough study on the value and economics of the arbitration “market”. It will deserve, at some point in time, an in-depth scientific contribution.

If arbitration is a market, should it be regulated?

- A market is a system of commercial activity where goods and services are bought and sold.

- The arbitration market which responds to "market forces theory"*
  - Offer and demand, competition, rules that curb "excessive" freedom, minimum of State-intervention.
  - Entrance barriers that had excluded new economic actors but today it is a "true arbitration industry".
  - The market is ruled by economics.

- The immediate actors in this market are
  - Law firms, competing for cases. With more and more firms developing specialized teams that deal exclusively with international arbitration.
  - Arbitrators, competing for appointments.
  - Arbitration Centers, competing for a share of the cases.

- What if arbitration was to be regulated? There is still a debate as to whether arbitration should the proper forum to settle regulatory issues, namely over highly-regulated markets (telecoms, energy…). But here the question is whether arbitration itself, as a market, should be or not regulated.

* See J. El Ahdab & R. Stackpool-Moore, *Arab Arbitration v. International Arbitration? The case for a Reconciliation?,* 25 J Int'l Arb 275, at 281. See also, B. Oppetit, *Théorie de l'arbitrage*, PUF, 1998, p. 10 and Y. Dezalay, *Les marchands du droit, La restructuration de l'ordre juridique international par les multinationales du droit*, Fayard, 1992.

Arbitration as a market: what is at stake?

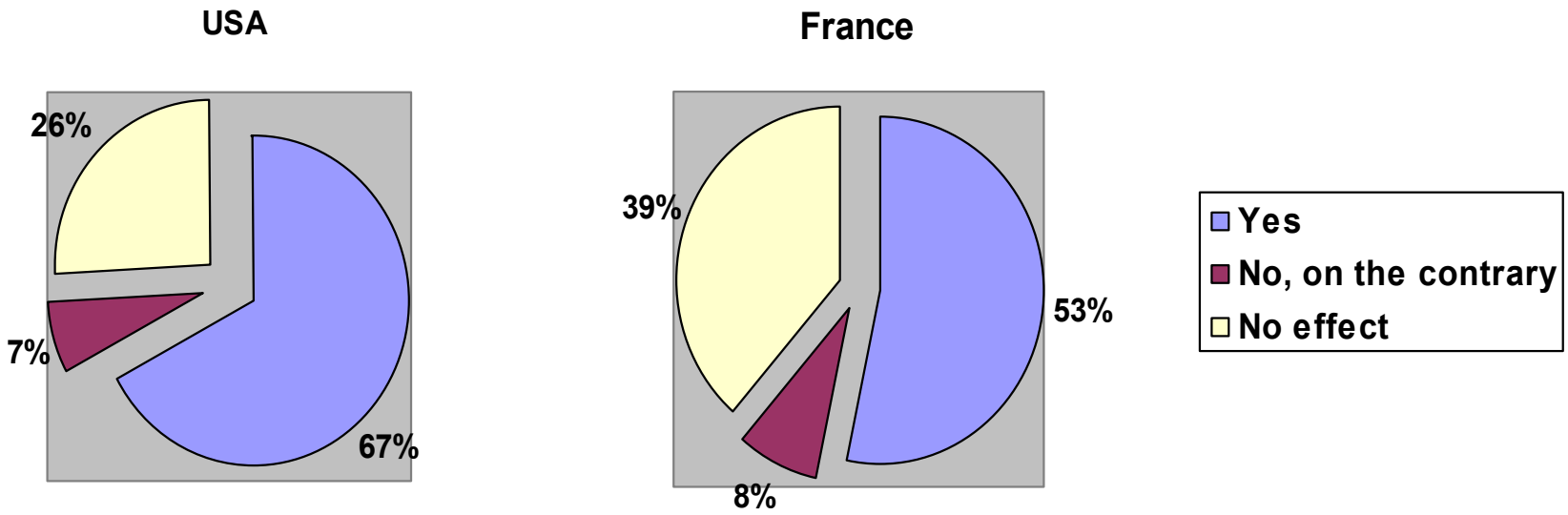
- Indeed, along with the geographical redistribution of the subject matter of the disputes, new and old centers are trying to cash in on these new markets:
  - New centers are being created: Singapore International Arbitration Center, Cairo Regional Center for International Arbitration
  - Old established centers are opening new offices: ICC in Asia, AAA/ICDR in the Middle-East, LCIA in the Middle-East and India.

- Cities themselves are now competing in that market, often with the helping hand of politics:
  - Singapore's investment in the Maxwell Chambers.
  - LCIA Dubai inaugurated by the Lord Mayor of the City of London.
  - See the 2007 Law Society Report « England & Wales : the jurisdiction of choice » with a forward sealed by the then British Ministry of Justice J. Straw.
  - See also the Paris EuroPlace/Commission of Islamic Finance's report of Sept. 2009: « Proposal Group on Governing Law and Dispute Resolution in Islamic Finance » with the aim of attracting disputes related to Islamic Finance into Paris.

What next?

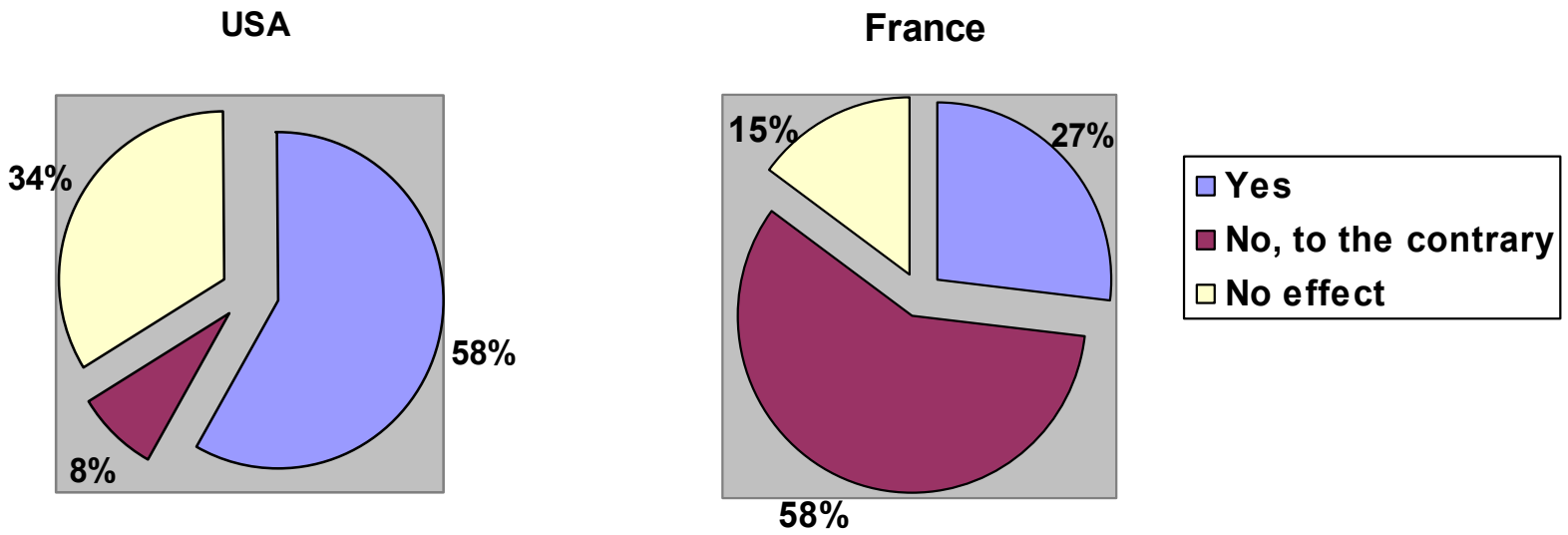
- What is arbitration to become, as a market? Is there room for new players?
- Three scenarios are imaginable:
  - Will the cake grow, so that new players can get a piece of the cake while the older players keep theirs?
  - Will the cake grow, but not fast enough to keep up with the arrival of a multitude of new players?
  - Will the cake remain the same size, with more players having to share the same amount of cake?
- What about the users?

Is arbitration faster?



Source: FIDAL/AAA 2009 Study on ADR, available online at http://www.cmap.fr/uploads/_cmap/ani_fichiers/brochure_enquete_marc_vv.pdf.

Is arbitration the cheaper solution?



Source: FIDAL/AAA 2009 Study on ADR, available online at http://www.cmap.fr/uploads/_cmap/ani_fichiers/brochure_enquete_marc_vv.pdf.

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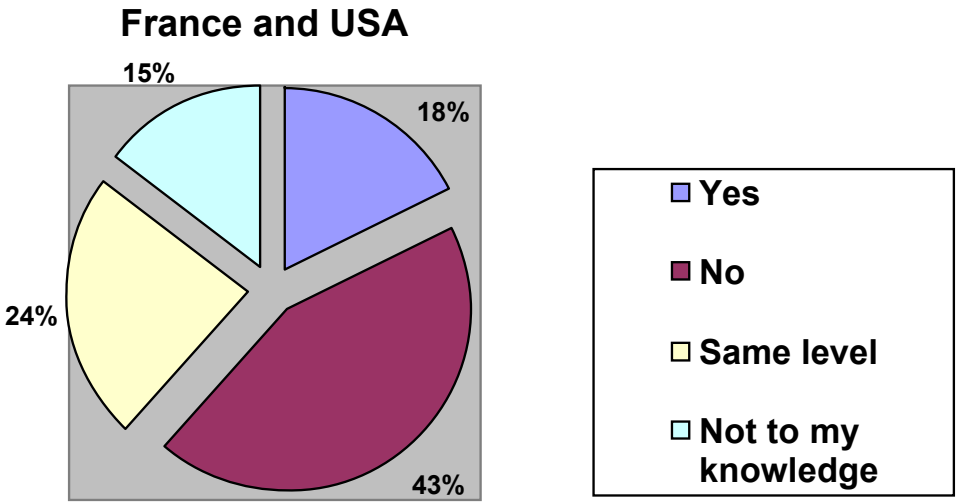
Will you increase your use of arbitration in the future?



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What are the main advantages of international arbitration?

- Enforceability*
- Confidentiality*
- Flexibility*
- One should add : Predictability (meeting the parties' expectations) and Neutrality (having a judge neutral and unbiased)

What next for us practitioners?

- Protect the characteristics that makes arbitration attractive.
- Find a solution to maintain the pressure to keep arbitration as attractive as before.

* Source: PWC report on international arbitration and corporate attitudes and practices, 2006. http://www.pwc.co.uk/pdf/2006_international_arbitration_study.pdf .

Challenges

As a general counsel from a major MNF has said “Arbitration is broken”, and “needs to be repaired.”*

The main challenge comes from the rising distrust that governments and users are showing towards arbitration. On the other hand, arbitration is not immune to criticism from its own users. At the end of the day, however, there does not yet seem to be an alternative to arbitration.

Is it, as the organizers of a conference once put it, “*The End of the Golden Age*” (7th ITA-ASIL Conference, March 2010) ?

* Source: Jean-Claude Najar, "Inside Out: A User's Perspective on Challenges in International Arbitration", (2009) LCIA- Arbitration International, Volume 25(4), at 515; see also A. Clarke, “Arbitrage international : sujets de préoccupation actuels des entreprises”, ICC Bull., vol. 20/2 - 2009, p.47.

Distrust for arbitration is reemerging among courts and legislators.

- Indeed, legislators and courts are becoming weary of arbitration:
  - The possibly new federal law in the USA: the 2009 Bill "Fairness Arbitration Act".
  - European Commission's proposal to partially delete arbitration exclusion from the scope of Brussels I.
  - Stricter review by the courts
    - Investment arbitration award annulled by the French courts (*Commercial Caribbean Niquel v. Overseas Mining Investment*, March 25, 2010.) The court ruled that the tribunal had breached the French Civil Procedure Code by not giving both parties the opportunity to enter submissions on the issue of loss of a chance.
    - Creation of the standard of "manifest disregard of the law" by the American courts (*Hall Street Associates v.* Matel, 128 S. Ct. 1396).
  - Criticism against the confidentiality of arbitration (*Tapie* case and ICSID).
  - The arbitration clause described as a "grey clause" in French consumer-contracts in application of the EU Directive on Consumer Rights adopted by the Commission on October 9, 2008.
  - Arbitration against States: first the Oil Awards in the 1970s, then the Argentina ICSID Awards in 2000

In addition to the "public" distrust for arbitration, it is also under criticism by the users themselves.

- Criticism includes:
  - Arbitration may no longer be more cost-effective than litigation before state courts.
  - Arbitration is no longer necessarily faster than litigation in state courts.
  - The "discovery" tsunami, even if the principle of document production is somehow accepted, today the overwhelming scale of the exercise is rejected.
  - The difficulty to obtain and enforce interim-measures
  - The inability to enforce an award *ergo omnes*, i.e., against third parties
  - The proximity between arbitrators and counsels
  - Overwhelming presence of common law and its culture
- Such criticism has not fallen on deaf ears, practitioners are attempting to react to what may be the beginning of the end. Yet, the reactions see still remain discrete.

Is cost inevitable?

- To take five examples of the past and current hurdles that arbitration has to clear: cost, interim measures, third parties, confidentiality and anti-suit injunctions.

- The cost of arbitration… an inevitable "deterrent"?
  - Nowhere is justice free of charge

- In civil law countries, the comparison of cost between arbitration and litigation is generally unfavorable to arbitration.
  - In France 58% of users hold arbitration to be more expensive than litigation (however, in France, access to a magistrate is free of charge)*
  - Even in France, arbitration may turn out to be a more efficient option (arbitrator's expertise, procedural flexibility, no appeal)

* Source: FIDAL/AAA 2009 Study on ADR, available online at http://www.cmap.fr/uploads/_cmap/ani_fichiers/brochure_enquete_marc_vv.pdf.

Issues regarding cost should not be over-emphasized

- In common law countries, however, arbitration is often regarded as the cheaper solution when compared to the judicial system.
  - In the USA, only 8% of users hold arbitration to be more expensive than litigation

- In any case, even if arbitration comes at a cost:
  - The users did chose arbitration as the method of resolving their dispute
  - Arbitration has a cost, but that cost is for a service
    - You get to chose your judge
    - Arbitrators are generally more available and specialized than judges
    - You get flexibility

- Shifting of the cost from the client to third parties
  - Clients are asking that firms share more of the risk with them
    - Success fees and disappearance, to some extent, of the hourly rate*
  - Rise of investment funds specializing in the funding of international proceedings

* Source: *Law firm of the 21st century: The clients' revolution*, Eversheds, 2010.

Interim Measures in Arbitration

- Interim measures: with the ever-increasing length of arbitrations, the issue of interim measures has been brought to the front of the scene.
  - Interim measures, by definition, have to be obtainable in a short period of time and be effective
  - State courts may offer the possibility of rapidly obtaining interim measures
  - Somes Rules (UNCITRAL) are being changed to increase interim measures' efficiency
- For interim measure to work, there must be a genuine "*juge d'appui*" and an effective cooperation between judges and the arbitrators.
- It is in the judges interest to favor arbitration.
  - Arbitration is an opportunity for the judge to deal with international affairs
  - Arbitrators can share the judge's workload

Another example of a hurdle that arbitration needs to clear is the issue of third parties.*

- To maintain efficiency, the arbitral clause must be able to be extended to third parties sufficiently involved in the contract while maintaining the principle of consent to arbitration. Typically, this is the case for subsidiaries of a party and sub-contractors.

- Third parties also raise the issue of multi-party arbitrations and their administration.
  - Parties' "right to an arbitrator" as someone would have his/her "day in court";
  - Arbitration is often contemplated as a bilateral process, not a forum where any additional party could opt in or where cross-claims could be easily managed among multiple parties

* On the subject, see K. Youssef, *Consent in context: fulfilling the promise of international arbitration*, 2009 Edition.

Keeping arbitration confidential or opening its doors?

- Confidentiality remains one of the main reasons that parties chose arbitration, yet arbitration is facing pressure to become transparent.

- As arbitration gains terrain and ventures into fields which touch public policy, State sovereignty and public interests – there is more and more pressure for transparency
  - *Amicus curiae* problem *
  - Towards environmental questions in arbitration? * *

•See *Biwater Gauff v. Tanzania*, **ICSID Case No. ARB/05/22, Procedural Order No. 5;** ***AES Summit Generation v. Hungary***, ICSID Case No. ARB/01/4, where the European Commission filed an unprecedented petition to appear as *amicus curiae.*

* * See : Th. Clay, "Arbitrage et environnement", in 2 Les Cahiers de l'Arbitrage 17 (2004)

Arbitration and anti-suit injunctions: two visions

- The English and US turn to anti-suit injunctions to stop the parties from turning to another forum and to give effect to the arbitration-agreement:
  - The injunction is directed at the parties and not at the courts of another State.
  - The penalty for ignoring the anti-suit injunction is contempt of court.
  - It is an important weapon in common law's arsenal to grant effectiveness to an arbitration clause.

- Yet Europe has condemned them as a violation of EC law:
  - "It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement." *West Tankers*, ECJ, February 10, 2009.

Cultural Challenges in International Arbitration

- Arbitration must also maintain its ability to deal effectively with cultural differences. Indeed, although arbitration is no longer considered a Western method of resolving disputes, cultural barriers may still stand in the way of further progress
    - Arbitration in China, under the CIETAC rules can be surprising to users used to Western arbitration rules (short delays, arbitrators appointed from a list, Chinese default language, etc.)

- Three possible cultural difficulties in international arbitration as listed by a leading arbitrator:*
    - Application of Shari'ah law
        - High Court of London's decision holding that parties may validly select Shari'ah law to govern a commercial contract (see *Musawi v. R.E. International (UK) Ltd*, [2007] EWHC 2981)
        - Coexistence of Shari'ah and western public policy (woman arbitrators, non-Muslim arbitrators)
    - Enforcement of awards despite their annulment in the seat of arbitration
    - The problem of how evidence should be managed and, more widely, of procedural issues, in which there are divergences between the practice of the common law countries, the civil law countries and the Middle East

* I. Fadlallah, *Arbitration Facing Conflicts of Culture*, Arb Int'l, Vol. 25 Iss. 3, pp. 303 – 317.

Does arbitration need to be regulated…?

- No, the main feature of arbitration is that it is delocalized and not dependant, but to some extent, arbitration is already starting to show signs of regulation.
  - ICC requires arbitrators to disclose the number of cases they are following
  - The Court of Arbitration for Sport has asked its affiliates to chose their side: arbitrators or counsels
  - IBA Rules on Conflict of Interests
  - Obligation of disclosure: disclosure over independence (*Tecnimont*, February 12, 2009, Cour d'Appel de Paris)
    - See the *Alpha Projektholding GmbH vs. Ukraine* case (ICSID ARB/07/16), where an arbitrator was challenged because he did not disclose that he attended Harvard at the same period as the counsel. The challenge was rejected.
    - Arbitrator disqualified amid confidentiality concerns: A US court disqualified an arbitrator from proceedings after ruling that he might prove unable to disregard his knowledge of a confidential earlier case he arbitrated featuring the same parties. (see *Trustmark Insurance Company v. John Hancock Insurance Company*, US District Court, Nothern Illinois, January 21, 2010)

Arbitration and Mediation

- Rise of ADR: the development of commercial mediation but strangely with the same actors
- Progressive judiciarization of international commercial arbitration
  - Rising cost
  - Longer delays
  - Multiplication of recourses
- Mediation avoids a destruction of the commercial relationship between the parties
  - No longer the gentleman's justice but rather full fledged litigation
  - Mediation is an effective way to preserve and even strengthen the relationship
  - Companies are more and more attracted to mediation

" *Arbitration is a tool, its existence is justified only as long as it serves the interests of trade. The important people are not the arbitrators, the lawyers, the professors or the judges, they are the parties to the dispute. One never, or hardly, sees them at the conferences on arbitration and we are their servants. If we do not offer the work they need, they will go without our services.*"*

Lord Mustill, 1998.

* Source: Conclusion, Special Supplement 1999, ICC Bulletin.

In 1998, a very well-known French professor and arbitrator stated:

> « ***L'arbitrage fascine*** : par l'impression qu'il peut donner d'échapper en grande partie à l'emprise des sociétés organisées, par l'ambiguïté, facteur de liberté, que lui confère son faible ancrage spatial, par l'influence qu'il exerce sur le jeu des intérêts et le dénouement des conflits, par son indétermination au regard du droit, qui en fait un phénomène dont l'existence précède l'essence, il entretient chez l'homme le sentiment, ou tout au moins l'illusion, qu'il peut constituer entre ses mains **un instrument au service de sa volonté de puissance** et un moyen de se soustraire ainsi à la norme commune.
>
> […]
>
> Il existe à présent un **véritable marché de l'arbitrage**, dans tous les sens du terme. Cette nouvelle donne n'a pas été sans conséquences aussi bien en doctrine que dans la pratique. Pour la plupart des auteurs, la systématicité de l'institution, sa cohérence, sa propre rationalité, ne présentent plus le même intérêt qu'autrefois et n'impliquent plus de débat de fond : **le droit de l'arbitrage est devenu un droit de solutions, axé principalement sur la traduction d'intérêt matériels, et a quelque peu perdu son caractère de discipline méthodologique** ; par suite, les discussions doctrinales, pour leur plus grande part, gravitent autour de **questions très concrètes**. Mais il y a plus préoccupant : les opérateurs et leurs conseils, ainsi que les tribunaux arbitraux, infligent trop souvent à l'arbitrage **d'inquiétantes dérives** ; dans un climat général de plus en plus délétère, sur fond de corruption et de manquements répétés à la déontologie des affaires, les procédures arbitrales subissent un alourdissement et un renchérissement très sensibles ; les manœuvres déloyales se développent et la bureaucratisation des grandes institutions d'arbitrage s'accentue ; les manifestations et congrès divers abondent, mais, loin d'être des lieux de réflexions, ils ne constituent plus guère que des forums commerciaux où règne une âpre **concurrence entre « marchands de droit »** avides de se saisir d'une part de la manne, et ou s'épanouit l'autopromotion publicitaire : dans l'atmosphère d'utilitarisme qui entoure l'activité juridique des Temps modernes, **l'arbitrage, comme le droit lui-même, plus généralement, est-il condamné à n'être plus qu'un produit marchand ?** »

Bruno Oppetit, *Théorie de l'arbitrage*, PUF, 1998, p.8 to 10.

The fact is, in some cases, confrontation is inevitable. When it comes to that, arbitration cannot be ignored.

"*In the foreseeable future, there is no alternative to arbitration that would be universally practicable*."*

Philippe Fouchard, 1989.

"*Democracy is the worst form of government, except for all those other forms that have been tried from time to time*."

Winston Churchill, 1947.

* Source: Où va l'arbitrage ?, *34 McGill L.J. 435* (1989).

Arbitration needs to rely on its strengths:

- Invariably arbitration
  - Allows parties to chose their judge, both neutral and competent,
  - Is the best fit to the parties' "predictability",
  - Prevents jurisdictional conflicts between state courts,
  - Neutralizes forum shopping,
  - Avoids one party having to "play an away match",
  - Permits, in most cases, a confidential resolution of the dispute,
  - Limits further recourses.
  - Warrants a better and more effective circulation of international awards.

- These strengths have made arbitration the success it is today and they are still crucial to the parties. But for how long will the advantages outweigh the disadvantages?

Conclusion

Today arbitration must deal with tensions where:

- Arbitration must be universal, governed by general principles of due process (even human rights some say) and justice, yet arbitration must also stay flexible, conciliatory and private.
- Arbitration must be transnational, within its own legal order yet anchored in a national legal order.
- Arbitration must be confidential, away from the public eye yet arbitration must meet transparency requirements.
- Arbitration must try to find the right balance between law, economics an politics.

The challenge to build a truly integrated Mediterranean geographical zone, with hurdles and tensions therein, is exactly the type of challenge arbitration is facing. Hence, by coping with its own challenges, arbitration will contribute to the larger success of the *Union pour la Méditerrannée.*

At any case, we must keep in mind that, even more in this part of the world than anywhere else, arbitration must and should remain the ultimate and peaceful way of rendering justice and settling international disputes between parties from different cultural background. With this aim in mind, arbitration will help all Mediterranean rim countries realize that they share a common historical background and ambition for the future, that is to build a society and a commerce based on justice.