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The Globalization of International Arbitration

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A. Introduction

International arbitration is often referred to as the area of globalization "*par excellence*." Indeed, it is the preferred means of dispute resolution for multinational companies.[2] It brings together parties, counsel and arbitrators from diverse legal backgrounds, and these various legal influences make international arbitration a "live" example of the globalization of law.[3]

Over the past 10 years, international arbitration has experienced spectacular growth in both commercial and investor-state arbitration. Trade is occurring more and more rapidly, and from one part of the world to the other. This entails a cultural mix of different arbitrators, parties, lawyers and legal systems.

Due to the existing differences, and in order to avoid inequalities, the idea of a transnational arbitration mechanism is gaining traction in the public debate. This would consist of a neutral system far from any local or national regulations, tailored to the circumstances of each case and to the desires of the parties. In other words, an arbitration system capable of adapting to different situations, taking advantage of its flexibility and able to answer the demands of a global world. In summary, international arbitration should: (i) be able to solve any dispute in a rigorous manner; (ii) be reasonably fast; (iii) be cost efficient; and (iv) be easily enforceable in the any part of the world.

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[2] Queen Mary, School of International Arbitration, "International Arbitration: Corporate Attitudes and Practices 2008", p. 2.

[3] Maxi Scherer, "The Globalization of International Commercial Arbitration," Revue de l'Association des élèves et diplômés jurists, Trimestriel No. 2, April 2010.

Confidence in the process of arbitration with its flexibility, relative speed and finality of decisions ensures growing acceptance globally of third-party adjudication of disputes, the very basis of the rule of law. Spreading this concept might well turn out to be one of the most important benefits of globalization.

B. Why is it possible?

Two basic legal texts have primarily contributed to the expansion and generalization of arbitration:

- The UNCITRAL Model Law, which provides countries with a legal template in order to implement and harmonize their regulations and statutes with regard to arbitration.

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), also known as the New York Convention, is one of the key instruments in international arbitration. It concerns the recognition and enforcement of foreign arbitral awards and referrals by a court to arbitration. It has 156 parties.[4]

Arbitration institutions have also played a very important role in the expansion and development of arbitration as a dispute resolution mechanism. These institutions are structured to provide efficiency and procedural predictability and can help with the appointment of arbitrators, and even have fixed fee structures. Examples of such institutions include: the International Court of Arbitration of the International Chamber of Commerce (ICC), which has developed an International Court of Arbitration (ICA) with headquarters in Paris and National Committees in nearly 60 countries; the American Arbitration Association (AAA) and the International Institute for Conflict Prevention & Resolution (CPR), both based in New York City; the London Court of International Arbitration (LCIA); the Swedish Chamber of Commerce (SCC); and the International Centre

[4] As of December 2016.

for the Settlement of Investment Disputes (ICSID). ICSID, created under the auspices of the World Bank and based in Washington, DC, will only address cases where one of the parties is a government or government agency and the other a foreign investor, and both the investor's country and the host country have ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention). In relatively younger markets, arbitration institutions with greater local familiarity are growing. The Hong Kong International Arbitration Centre (HKIAC), the Singapore International Arbitration Centre (SIAC) and the Dubai International Arbitration Centre (DIAC) are examples.

Over the past decade, arbitration has combined features from distinct legal traditions and has, as a result, forged a global "best practice" for arbitral proceedings. This was possible because international arbitration — as opposed to international litigation before national courts — has an inherent, truly international character. International arbitral tribunals have no forum (that is, no anchor in a specific legal system).[5] Accordingly, no predetermined set of procedural rules necessarily applies to the proceedings before them. Rather, most modern arbitration laws and institutional rules allow the parties — and in the absence of the parties' agreement, the tribunal — wide discretion in determining the rules governing the arbitral proceedings.

In determining the procedural rules, the parties or the arbitrators tend to follow their "legal instinct" and rely on familiar practices used in their own legal culture. As a consequence, different features from various legal backgrounds usually co-exist in an arbitral proceeding.[6] Experienced arbitration practitioners use this freedom to determine arbitral procedure, and the co-existence of various legal traditions, to

[5] Emmanuel Gaillard and John Savage, eds., Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International, 1999), p. 50; Philippe Fouchard, "L'autonomie de l'arbitage commercial international," Revue de l'Arbitrage, (1965), p.99.
[6] Gary B. Born, International Commercial Arbitration, (Kluwer Law International, 2009), pp. 1748-1765.

tailor global procedural rules that are best suited to the international arbitration context, as well as to the specific case at hand.

We will now consider some aspects that today constitute a transnational approximation between the national regulations and contribute to the idea of a globalized international arbitration framework.

B.1 The arbitrators

Nowadays, it is generally accepted that arbitrators should remain independent and impartial. We can say that this is a general rule in the field of international arbitration. In the light of this tendency, in 2004 the AAA changed its rules in order to include the impartiality and independence of arbitrators as a rule (until then, the presumption was that party-appointed arbitrators were partial).

With regard to the arbitrators' duty to disclose circumstances that could reasonably give rise to justified doubts as to their independence and impartiality, the main instrument is the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"), adopted by resolution of the IBA Council on 23 October 2014. Even though these are only binding when the parties have agreed to them, the Guidelines always have value and relevance.

The IBA Guidelines include the standard of impartiality and independence of arbitrators.[7] Moreover, they establish that if facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator must disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if

[7] General Standard no. 1 of the IBA Guidelines on Conflicts of Interest in International Arbitration.

any, prior to accepting the appointment or, if thereafter, as soon as they learn of them.[8]

In addition, probably the most important contribution of the IBA Guidelines is the "Application Lists." These lists give practical examples of: when the arbitrator cannot act at all (the "Non-Waivable Red List"); when the arbitrator can only act if they first make disclosures and the parties expressly agree to the appointment (the "Waivable Red List"); when the arbitrator has a duty to disclose but can nonetheless act unless the parties make a timely objection (the "Orange List"); and when disclosure is not necessary (the "Green List").

Examples in the Non-Waivable Red List are that the arbitrator cannot be an employee of a party, have a controlling interest in a third-party funder or have their firm regularly advise a party. The Waivable Red List includes, for example, advice by the arbitrator to any party or affiliate that is not a significant source of income for the arbitrator or their firm. With regard to the Orange List, examples are given of situations that may require disclosure, depending on the circumstances, like repeat past appointments by the same party or the same counsel beyond the normal three-year period; an arbitrator concurrently acting as counsel in an unrelated case that involves similar legal issues; and an appointment made by the same party or the same counsel while the case is ongoing.[9] New entries in the Orange List include instances where enmity exists between, on the one hand, an arbitrator and, on the other hand, counsel, a senior representative of a party, or a third-party funder. There is also a new entry in the event that the arbitrator, within the past three years, has acted as co-counsel with another arbitrator or counsel for one of the parties. The arbitrator publicly advocating a position on the case is now flagged — it no longer need be a specific position to be relevant. Last, the Green List

[8] General Standard no. 3 of the IBA Guidelines on Conflicts of Interest in International Arbitration.
[9] Khaled Moyeed, Clare Montgomery and Neal Pal, 29 January 2015, Kluwer Arbitration Blog.

includes entries concerning when the arbitrator's law firm has acted without the involvement of the arbitrator against a party or affiliate on an unrelated matter. Another example is when the arbitrator either teaches in the same faculty as another arbitrator or counsel to one of the parties, or serves as an officer of an entity with another arbitrator or counsel for one of the parties. Similarly, this list includes circumstances where the arbitrator was involved in a conference, seminar or working party with another arbitrator or counsel to one of the parties.

B.2 The arbitral procedure

One of the most accepted principles in comparative law is procedural autonomy, meaning the freedom of the parties to fashion proceedings as they see fit. Parties can make use of this freedom by making individualized arrangements or by selecting particular institutional arbitration rules.[10]

The freedom of the parties to determine their own rules of procedure has nowadays ended in setting a group of rules that rise to the level of what some authors call "procedural Esperanto"[11] or "standard arbitration procedure."[12] This comprises transnational rules and practices, which exhibit considerable convergence on many aspects of the arbitration process, such as the commencement of arbitration, the constitution of an arbitral tribunal, the method that tribunals adopt to determine the applicable law, the requirements for a valid award, the production of documents, the presentation of witnesses of fact and experts, and inspections as well as the conduct of evidentiary hearings.

As previously mentioned, one example of the blend of different procedural traditions in international arbitration, and probably one of

[10] Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure," p. 1322, 36 Vand. J. transat'l L. 1313 2003.
[11] Stavros L. Brekoulakis, "Chapter 1: Introduction: The Evolution and Future of International Arbitration," Volume 37, Kluwer Law International 2016.
[12] Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure," p. 1323, 36 Vand. J. transat'l L. 1313 2003.

the most relevant ones, concerns the use of document disclosure and pre-trial discovery. These are important features in common law proceedings where the claimant often files a rather skeletal statement of claim and then relies on discovery to obtain vast amounts of documents from the other side.[13] The scope of documents the parties may seek, or are obliged to produce, varies significantly among common law countries.[14] In any form, these disclosure or discovery practices are highly surprising (or even shocking) from a civil law perspective, where each party is responsible for providing the documents supporting its case.[15]

In certain civil law countries, the claimant is even obliged to file all of its factual evidence with its statement of claim, additional documents being allowed only under exceptional circumstances.[16] The possibility of obtaining documents from the other side is generally very limited, and only concerns cases where such documents can be precisely identified.[17] In international arbitration, the use of document disclosure and pre-trial discovery is commonly accepted these days, but to an extent that is significantly limited compared to, for instance, US practice.

To bridge the gap between these different traditions, international arbitration has developed a practice embracing elements drawn from both camps. In this respect, the IBA Rules on the Taking of Evidence

[13] Siegfried H. Elsing and John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration," Arbitration International, 18(1) (2002), p. 59; see also Gabrielle Kaufmann-Kohler, "Discovery in international arbitration: How much is too much?" SchiedsVZ (2004), p. 14.
[14] Lucy Reed and Jonathan Sutcliffe, "The 'Americanization' of International Arbitration?" Mealey's International Arbitration Report 16(4) (2001), p. 39.
[15] Christian Borris, "Common Law and civil law: fundamental differences and their impact on arbitration," JCI Arbitration 60 (2) (1994), p. 82.
[16] Siegfried H. Elsing and John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration," Arbitration International, 18(1) (2002), p. 59.
[17] Emmanuel Gaillard and John Savage, eds., Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International, 1999), p. 690: "Continental systems are familiar with the principle of compulsory disclosure of documents, but they implement it in a far more limited way."

in International Commercial Arbitration (the "IBA Rules"), adopted by a resolution of the IBA Council on 29 May 2010, have set forth a middle ground that is widely accepted and applied today.

Under these Rules, requests for documents must be reasonably specific, relevant to the case and proven to be within the control of the other party, thus excluding so-called "fishing expeditions" for broad categories of documents. The IBA Rules have harmonized the Anglo-Saxon legal tradition with the continental juridical tradition. Again, these rules are not mandatory except in those cases where the parties agree. In practice, they are often useful for the arbitral tribunal and, in any case, when experienced arbitrators review these requirements and exercise their discretion, they usually take into account the origins and expectations of the parties. They consider whether the parties come from jurisdictions with broad, limited or no disclosure at all; whether they expected disclosure when they entered into the arbitration agreement, or whether they would be shocked to learn that, by agreeing to arbitrate, they had made all their documents available to their adversary. This balancing test is an additional driver of the merger of the various legal systems that meet in international arbitration.[18]

Last but not least, it is important to stress that international arbitration rules have been an additional vehicle for standardization in the field and major institutional arbitration rules, including those of the ICC, LCIA, SCC, AAA, HKIA and SIAC, converge in the way of regulating the procedure.

B.3 The public procedural order

There is a reasonable international consensus on the fundamental principles that should govern the entire arbitration procedure and which are the basis for what has been named the transnational public procedural order of arbitration. These principles include:

[18] Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure," p. 1328, 36 Vand. J. transat'l L. 1313 2003.

- The above-mentioned impartiality of the arbitral tribunal

- The right to be heard and the principle of contradiction before the arbitral tribunal

  This means the right of the parties to present their cases before a decision is rendered. Under this principle, each party is entitled to argue their case freely, with regard to the factual grounds or the merits.[19]

  The content of this right is very varied. The European Court of Human Rights, for example, has ruled that this right includes the duty of the arbitral tribunal to conduct an adequate examination of the written submissions, arguments and evidence submitted by the parties.[20] Similarly, the Swiss Federal Court has determined that this right enables the parties to participate in trial proceedings.

- Equal treatment of the parties

  This principle is closely linked with the principle of contradiction,[21] since it implies that: (i) all parties should have the same opportunity to present their case; and (ii) similar and balanced rules should be applied with regard to the presentation of briefs, administration of evidence, etc. Thus, an arbitral tribunal must treat similar situations in a similar way, and adopt different measures only if the circumstances so warrant.[22]

  During the course of arbitration, this principle will affect aspects such as deadlines for the submission of briefs, the

[19] L. Chedly, Arbitrage Comercial Internacional & Ordre Public Transnacional, Tunisia, Centre de Publication Universitaire, 2002, p. 219.
[20] ECHR Kraska, Series A. 254-B, ECHR, Spang, 11 October 2005, p. 28.
[21] E. Loquin, JDI, 1994.446, Paris, 13 October 1993.
[22] P. Lalive/J-F. Poudret/C.Reymond, Le droit de l'arbitrage interne et international en Suisse, Lausanne, Payot 1989, p. 353.

possibility of pronouncing at the hearing and, in particular, the administration of the evidence.

Similarly to the right to present its case, this principle is also considered to be contained in Article 6.1 of the European Convention on Human Rights.

B.4 The arbitral clause

The intention to submit to arbitration and the written form are today the requirements of the arbitration agreement common to most countries. However, there is a tendency in international arbitration to admit, in cases that may be considered exceptional, the extension of the arbitration clause to parties that did not originally sign it.

It is not easy to translate these trends into the rules of the institutions or the UNCITRAL Model Law. Some attempts have been made to converge on the necessity of the consent of the parties, although this need not be explicit. In any case, it must be pointed out that these attempts have not been successful for the moment.

Arbitral institutions have also tried to adapt to this new reality, and have changed their rules on these points. These institutions include the AAA/ICDR,[23] ICC,[24] and LCIA.[25] On 26 April 2016, the Stockholm Chamber of Commerce (SCC) released its draft Arbitration Rules 2017, which propose the introduction or development of provisions relating to multiparty and multicontract disputes.[26]

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[23] The 2014 AAA/ICDR Rules contained a number of changes over prior versions of the Rules. Most importantly, for the purposes of this chapter, Article 7 (Joinder) and Article 8 (Consolidation) were added to the Rules.

[24] The ICC revised its Arbitration Rules in 2012 to address, among other things, "disputes involving multiple contracts and parties." To that end, the ICC added Articles 7 to 10 covering multiple parties, multiple contracts and consolidation.

[25] In Article 22 (Additional Powers) of the LCIA Rules.

[26] Angela Carazo Gormley and James Contos, "Institutional Approaches To Multi-Party And Multi-Contract Disputes In Arbitration," at www.mondaq.com

C. Conclusion

In conclusion, it should be emphasized that there is a reciprocal flow of benefits and advantages between economics, society and arbitration. Indeed, arbitration owes a lot to economic growth and international trade. It is a reality that could not exist without trade. But it is also true that the economy and development owe much to arbitration. Possibly, many of the investments abroad would not have been made if the disputes had had to be resolved before the courts of the receiving country of the investment.

In the same way, arbitration would not be the same if there were only one legal and social culture. If there was only one way of looking at the world, arbitration would have lost some of its substance or perhaps would have ended up being confused with a national judiciary. Hence, there is no doubt that arbitration benefits from the multiculturalism of the world in which we live, since it is the need to find a neutral system that promotes the resolution of conflicts through arbitration. And there is no doubt that international business players benefit from the multicultural and flexible approach that arbitration provides.

Last, from all this flow of benefits we have already seen how the idea of a global arbitration system has been born, or is being born, indispensable to understanding the important role that arbitration plays in the world. Arbitration has its problems, of course, as does any living institution, but it is certainly part of our culture and therefore, we must strive to make it a service more and more useful to society.