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Chapter 22

PERSPECTIVES OF FUTURE DEVELOPMENT IN INTERNATIONAL ARBITRATION

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I. INTRODUCTORY NOTE

When Lawrence Newman approached me regarding a contribution to the first edition of his intended Guide, I agreed with pleasure. The subject and scope of the publication as well as the authors he mentioned looked like ensuring an interesting publication. Furthermore, many of the other authors are well known to me from personal cooperation over the years in institutions and cases of international arbitration. The success of the book and of related conferences made the project of a second edition an obvious choice and it is a pleasure to update my contribution for that purpose.

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Though the usual pending load of current arbitration cases motivates one to comment on more practical issues of arbitration, his suggestion for me to deal with future perspectives looked both intellectually stimulating and dangerous. The danger comes from the inevitably subjective and speculative character of such considerations. The subjectivity remains despite my own practical experience involving cases in the very different major arbitration systems throughout the world, and the speculation can only be tested by the future reader as time goes on.

Finally, in view of the understandable limitations in length that the editor has expressed for contributions to this volume, no more than a few thoughts can be offered and this outline cannot provide any detail or documentation in relation to these thoughts.

II. LOOK TO THE PAST FOR FUTURE PERSPECTIVES

Any serious consideration of possible future developments will have to start by looking at past developments in the respective fields. This is a truism, though, at any point in time, to the observer and even more to the practitioner, the present circumstances, issues, problems and developments will look specific and unique. Most of the time, they are not and, at least, can be better understood if one looks at the developments leading to them. Similarly, future developments will not come “out of the blue,” but will result from past and present developments, both in arbitration itself and in the social, economic and political environment in which the disputes are conducted.

Therefore, it may be at least briefly recalled that the origins of arbitration go back to dispute settlement usages in ancient times, in Europe, in Greece and Rome including Roman law, and in Asia. The Middle Ages revived the Roman tradition and, some centuries later, the French Revolution considered arbitration as a “*droit naturel*” and the Constitution of 1791 (Article 86) and the Constitution of Year III (Article 210) proclaimed the constitutional right of citizens to resort to arbitration. Parallel thereto, England already had an Arbitration

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Act of 1697, to which a number of enactments were added over the years up to the “new” Arbitration Act of 1889, which continued to dominate arbitration law in England into the early part of the last Century.

During that last Century, many substantive changes were then made by the new Arbitration Acts of 1934, 1950, 1975, 1979 until we now have a modern arbitration law with the new English Arbitration Act of 1996. On the European continent, during the same period, though many countries developed their own arbitration laws with a number of diverging characteristics, particularly stressing either the procedural or the contractual aspect of arbitration, ways have always been found to provide for a binding submission to arbitration for future contractual disputes. And, as is well known, by now, all legislators in the major European countries have reacted to the demands of the modern international business community for efficient specific dispute settlement systems by enacting new legislation, starting from the French legislation in the early 1980's and continuing more recently with the adoption of the UNCITRAL Model Law in Germany effective from the beginning of 1998 and in many other countries throughout the world. .

Parallel to these developments at the national level, inter-state conventions on arbitration have provided progress at the international level. Earlier in the last Century, the Geneva Protocol of 1923 and the Geneva Convention of 1927 were the first steps. The quantum leap, however, was provided by the New York Convention of 1958 which is by now ratified by all relevant states throughout the world with very few exceptions.

Even this extremely short outline shows that the practical demands of trade and particularly international trade, throughout history, have led to the creation of arbitration machineries and respective legal frameworks and their continuous updating. Thus, when looking from today into the future, from a historic perspective, there is nothing special about the mere further development of international arbitration. All that is special are the present and future circumstances provided by society and law and particularly business

practice and technology leading to the demands which will decide on how and what future developments will occur.

III. GENERAL FUTURE PERSPECTIVES

A. Which Subjects (Fields of Business, Inter-State Relations)?

As it has been in the past, so in the future changes in technology and changes in international trade and investment will lead to corresponding changes in international contract practice which, in turn, will be reflected in changes regarding the subjects of international arbitration.

With regard to the fields of business in which arbitration cases will occur, while with the expansion of international trade and investment the number of arbitration cases in general will also increase, these changes will lead to a decrease in the relative share of certain traditional fields of business appearing in arbitration such as the supply of hardware material, the construction business, and the erection of large plants. Compared to these, new kinds of contracts in fields such as the transfer of technology, genetic engineering, electronic commerce, entertainment and sports including sponsorship will present their specific demands to dispute settlement and probably take a relatively greater share of arbitration cases. As investment in the commercial use of outer space has, in recent years, moved into a majority participation of private industry, this field of business, particularly pushed by the boom of telecommunication, will also become more important as a subject of international arbitration. And, in a globalised economy, the growing relevance of intellectual property has not only led the World Intellectual Property Organization (WIPO) to create a highly sophisticated dispute settlement machinery with many creative ideas possibly relevant for other fields of business, but will lead to new kinds and new numbers of international disputes, as is already illustrated by the many domain name disputes.

Parallel to this development of international commercial arbitration, one may have to take into account that in the later part of

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the last Century arbitral procedures have been used for the peaceful settlement of politically highly sensitive disputes. This is illustrated by particular arbitration cases such as the Taba arbitration between Israel and Egypt, the Greenpeace arbitration between France and New Zealand, but even more so by the large dispute settlement machineries set up in bodies such as the Iran-United States Claims Tribunal at The Hague and the United Nations Compensation Commission in Geneva, the two latter being, both by the number of cases and by the many billions of US Dollars in dispute, the two largest international dispute settlement systems in history. Though I would not expect arbitration to be the settlement solution in situations of political turmoil or military disputes, as a perspective for the new Century, it is comforting to see that at least in some politically sensitive international disputes arbitral procedures have provided the basis for the peaceful settlement of international conflicts.

B. Which Parties (Private Companies, States, International Organisations)?

Private companies will, no doubt, continue to represent the greatest number of parties in international arbitration as they are the most numerous and significant players in international trade.

However, in history and particularly in the last Century, states, state institutions and state enterprises have participated in many ways and by many contracts in international trade and even more in the field of international investment, concluding contracts with foreign investors. Among these, the many contracts concluded by state entities in socialist countries have decreased considerably as most countries have turned to market economy, and thus respective arbitrations such as the traditional “East-West” cases no longer play a major role. The same effect will be seen for the traditionally large number of infrastructure contracts awarded to state entities in Western private economy countries, as the general trend of privatising most of these infrastructure services continues. However, in many developing countries, the limited financial and know-how capacity of private companies will continue to allow state entities to

be the major players through which the respective country participates in international trade. States and state entities are still in the range of about 10% of the parties in ICC arbitrations and other major arbitration institutions, and this situation can be expected to continue in the future.

This is even more so in the field of international investment. The rise of foreign investment as a major aspect of a globalised economy has already led in recent years to a dramatic increase in the number of arbitration cases between foreign private investors and host states or their institutions. This is perhaps best illustrated by the growing number of ICSID arbitration cases and also by the fact that most of these new cases are not based on traditional arbitration clauses in contracts between the foreign investor and the host state, but on bilateral investment treaties (BITs) or even national investment laws in which the host state unilaterally submits to ICSID arbitration. In view of the usual time lag between submitting to arbitration and cases actually coming up, I would expect many more investment cases to be heard in the future. A confirmation of this expectation may be seen in the wide acceptance of the Energy Charter Treaty and its arbitration system which has, in a short period, already led to a number of important cases. In this context, it is also interesting to note that China which normally restricted the use of arbitration in its BITs, has recently re-negotiated its BITs with the Netherlands and Germany particularly allowing arbitration on all aspects of expropriation. It is not much of a speculation that this is related to China's changing role from receiving foreign investments to also making investments of its own in many other countries. On the other hand, I have some doubts whether a similar increase can be expected in NAFTA investment arbitrations, because it seems that, at least in the United States, one has second thoughts in this regard after experiencing the role of respondent in such arbitrations so that some commentators see a new kind of Calvo-Doctrine developing in the United States. A similar development may occur in Latin America where a few states have recently expressed their intention to re-examine their general acceptance of arbitration with foreign investors.

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Finally, it should be noted that the appearance in recent years of international organisations not as organisers, but as parties in international arbitration may continue. This is partly due to the growing involvement of both governmental and non-governmental international organisations in international contracting for the supplies and services they need and want to offer to their constituencies. And this is also due to the growing commercialisation of sports leading to new arbitration bodies such as the Court of Arbitration for Sports (CAS) in which either sport federations or individual athletes appear as parties.

C. Which Arbitrators ?

The often repeated truism that arbitration can only be as good as its arbitrators will also be valid in the future. The growing number of arbitration cases will bring along a growing number of lawyers experiencing international arbitration as counsel and a growing number of persons having some experience in the function of arbitrator. However, both in national arbitration, and even more so in international arbitration, it is not sufficient merely to select a good lawyer or a good jurist or a good engineer. If one wants to ensure the specific advantages of arbitration and ensure that the particular arbitration procedure does not become the practice ground for a new arbitrator to the detriment of the interests of the parties, acquaintance with and experience in the particular demands of international arbitration will continue to be indispensable. I would expect the number of arbitrators fulfilling this requirement to the satisfaction of the parties and their counsel to grow considerably less quickly than the number of arbitration cases in general. If one looks at the names chosen by the parties and institutions in recent major international arbitrations, particularly investment arbitrations, one finds “the usual suspects” quite often as the arbitrators chosen not only by parties from industrial, but also from threshold and developing countries. Thus, in view of the fast growing numbers of cases, it may become increasingly difficult to find the best possible arbitrators for each individual case.

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This is even more so in view of the continuing mergers between law firms active in international business and arbitration. Though the new larger law firms will often have a greater number of lawyers active and experienced in international arbitration, conflicts of interest may arise more and more frequently. It has already become a major logistic effort to find out, before an arbitration starts, whether and which services have been provided to a company appearing as a party in the arbitration by any of the offices of a particular law firm spread all over the world. And often this due diligence effort will bring up possible conflicts of interest which prevent a partner of the law firm who, by his experience as arbitrator, would otherwise be suitable for the case to accept appointment. In the first edition of this book, I expressed concern that there was no internationally accepted standard to distinguish between an irrelevant former relationship between the law firm and a client, and services and cooperation which should be considered as raising doubts regarding the future arbitrator's independence and impartiality and expressed the hope that at least some internationally accepted guidelines could be developed in this regard. In the meanwhile, the International Bar Association (IBA), after long discussions in its Arbitration Committee, has approved its *Guidelines on Conflicts of Interest in International Commercial Arbitration* which seem to become a widely used reference to deal with this difficulty. But experience from actual case law shows that, irrespective thereof, many difficulties in this context can be expected to continue to come up for decision.

D. Which Developments of Procedure ?

Some 20 or 30 years ago, it was a common difficulty at the beginning of an international arbitration case to agree on the major aspects of the procedure, because the parties, their counsel and the arbitrators started with an expectation of using the procedures with which they were acquainted in their national court systems. With the tremendous growth in the number of arbitration cases, and the related growth in the experience of all concerned regarding the practice of international arbitration, this has changed fundamentally.

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While there may still be differences of opinion regarding certain aspects of how the procedure should be conducted, the major fundamentals of international arbitration are now mostly taken for granted, such as an extensive written procedure including the submission of major documents and including written statements by witnesses and experts, followed by a hearing or hearings in which these presentations are not repeated, and one can concentrate on disputed factual and legal issues within a limited hearing time required by the impossibility of getting busy party representatives, counsel and arbitrators together for very long periods agreeable to all concerned.

While ad hoc arbitration will continue to play its role, particularly if combined with the UNCITRAL Arbitration Rules, one can expect institutional arbitration to continue to provide the procedural framework for the greatest number of arbitration cases. And though we will see continuously new institutions trying to enter the arbitration “market,” parties and their lawyers will continue to use their due diligence to the effect that the traditional major international and national institutions of arbitration will most often be chosen, because one does not want to run the risk of using procedures which have not yet been sufficiently exposed to the challenges of practice.

Some of the existing difficulties in international arbitration procedures will not disappear. Even if US-style discovery is not any more insisted upon by US law firms in international arbitration, the disclosure of documents will continue to be a debated issue of great relevance for the outcome of the case, though the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* seem to be accepted more and more often as the guideline for a compromise solution between common law and civil law participants in individual cases.

A rather recent issue, but one of obvious growing relevance is due to the fact that business and particularly international business is today to a great extent done by the use of electronic media. In arbitration proceedings, this has the consequence that a major part of the relevant evidence is only available in that format. This, in turn,

has the consequence that the requests for disclosure of evidence are and, in the future, will even more be requesting that the other party agree to, and otherwise the Tribunal orders, the disclosure of e-mails, documents, and other evidence from their electronic systems. While it seems clear that the usual principles for the disclosure of evidence also apply to electronic evidence: How far do they reach into the thousands of e-mails and other evidence ? Is there a duty to invest great efforts in recovering evidence deleted but still recoverable by sophisticated specialists ? And who pays the considerable costs involved ? While a number of rules and criteria in this regard have been developed in the judicial system of the United States, can these be transferred into application to or at least as a helpful reference in international arbitration ? Similar to the situation with conflict rules some years ago, it would seem highly desirable to discuss and finally agree on some international standards in this regard. And in view of the success of the IBA Evidence Rules, it would seem to be preferable that again the IBA, taking into account the disclosure principles in these Rules, takes the lead to develop such standards for the disclosure of electronic evidence.

Recent adaptations of the arbitration rules of most major arbitration institutions have tried to provide help with regard to certain difficulties experienced too often in recent years. They try to prevent the abuse of procedural options by the parties or party-appointed arbitrators, and address the much discussed problems of validly appointing an arbitral tribunal in multiparty arbitrations. But the variety of cases where such problems occur causes difficulties which go beyond such generally offered solutions in the rules and will thus continue to occupy future arbitral procedures.

Presently, there is still a great variety throughout the world, both in practice and in law, regarding the role arbitrators may play in the promotion of amicable settlements between the parties. In countries such as China, Germany and Japan, at least in domestic arbitrations, there is an expectation by the parties and their lawyers that the arbitrators, at some stage in the procedure, and in consultation with the parties, will try to promote an amicable settlement and suggest solutions for such settlement. In these countries, this is permitted by

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law and leads to a majority of domestic arbitration cases ending in such amicable settlement, often then put into the form of an Award on Agreed Terms. In many other countries, such a role of the arbitrators is either not permitted by law or at least not performed in practice. But discussions at international meetings have shown that companies and in-house counsel would often like to have such an option available, because an amicable settlement provides a better basis for future business relations between the parties. Future adaptations of the arbitration rules of institutions may, therefore, in addition to the usual option of Awards by Consent, provide a further legal framework for such procedural cooperation between the parties and the arbitrators

Obviously, the use of information technology and electronic media in arbitration procedures will grow considerably. Arbitral institutions have held a number of meetings, have published texts, and have tried to create options for their most efficient use such as WIPO for a number of years and, more recently, the ICC by its *NetCase system*. Other institutions have been created in this context such as the *E-Arbitration-T Open Source Platform*. At least in the near future, I would not expect this to mean that real online arbitrations will occur in many and particularly larger international disputes. The recent efforts to demonstrate these options have shown their limitations. At least in large cases, it would still seem preferable to start by a Procedural Meeting in person between counsel of the parties and the members of the tribunal in order to get acquainted, establish a personal professional contact and freely discuss the further procedure. And later in the proceedings, actually hearing and seeing a witness and expert in cross-examination will remain important and, very often, even testimony by video conference may not be sufficient or of equal value for that purpose.

However, using electronic media for communications of all kinds in international arbitral procedures can be expected to grow in quantity and variation. Written communications both between the tribunal and the parties and even more so between the arbitrators will become more important. Especially in larger cases which nowadays have the tendency to develop into battles of documents, providing

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the submissions and the documents in electronic form on searchable CD-ROMs will not only enable lighter travelling for all concerned, but will often be the only efficient way to deal with the tremendous volume of documentation. It will enable the parties to produce any text on a screen during the hearing, highlighting and blowing up important sections, and, if processed with sufficient tables of contents and indexes, enable the arbitrators to go to any document and part thereof in their work and deliberations with the possibility of highlighting and adding their own notes on their own electronic texts.

New challenges to the arbitral procedure and particularly the decision making process of the arbitrators will continue to arise in a globalised economy from the growing number of cases in which the value of companies or certain sections thereof have to be evaluated. Mergers and Acquisitions (M&A) are not only growing in international contract practice, but also lead to a growing number of respective arbitration cases. In an entirely different legal context, similar evaluation tasks come up in the growing number of expropriation claims presented in ICSID and other investment disputes and, in fact vice versa, in cases arising out of the many privatisations still pending both in traditional private economy and even more in former socialist countries. In all of these cases, while the parties will normally submit evaluations by experts and often prominent accounting firms, the arbitrators will have to find procedures for a convincing decision process between the diverging evaluations presented. The traditional solution of appointing a neutral expert is often practically not available, because the parties have already chosen the most prominent experts available in the field. Obviously, it is important for the parties in such cases to appoint arbitrators with know-how and experience regarding such evaluation issues. But generally applicable procedural solutions may still have to be developed, including witness conferencing and expert conferencing in which the disagreeing witnesses or experts of the parties are examined together and can confront each other in the oral hearing.

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The same need may be expected for the interrelation between arbitration procedures and other ADR procedures. With the growing interest in such procedures as mediation, conciliation, med-arb, arb-med etc., at least in a number of countries and also at the international level, new solutions may be developed to combine arbitration with such other procedures in an efficient and legally acceptable way. . The growing number of newly developed mediation or conciliation rules offered by arbitral institutions do not always provide a basis for a combination with or use within arbitral proceedings.

A further growing trend seems to be that arbitral institutions elaborate and offer specialized rules for specific procedural or substantive contexts. Examples are the specific clauses suggested by the LCIA or such products of the ICC such as its *Rules for a Pre-Arbitral Referee Procedure*, *Dispute Board Rules*, *Rules for Expertise*, and *ICC DOCDEX*. For the time being, there seems to be only a limited use of such instruments in practice, but that may be due to the usual time lag between their creation, insertion into contracts, and future application in concrete disputes.

E. Which Applicable Substantive Rules of Law?

New challenges may also arise regarding the applicable substantive law in international arbitrations. In this context, a word of caution may be appropriate: While we find many writings and meetings dealing with general or specific aspects of determining the applicable substantive law in international arbitrations, in practical cases, I have found that this issue plays much less of a role, because, at least in larger arbitrations, the contracts have been drafted by sophisticated businessmen and lawyers trying to deal with all foreseeable difficulties in great detail. Thus, it is my experience that in most cases the contract and its interpretation play a much larger role for the outcome of the case than the applicable substantive law. I would expect this to continue to be so in the future.

Nevertheless, one has to realise that the determination of the applicable law becomes more and more complex. The starting point

will still be that either the parties include a choice of law clause in their contract or that the arbitrators use traditional methods of private international law to determine the applicable substantive law. Most modern rules of the major institutions playing a role in international arbitration include at least one provision on the determination of the applicable substantive rules of law. Their adapted versions which provide already, either expressly or by implication, not only for the application of a certain national substantive law, but also for the application of other "rules of law", give a new dimension to the discretion of the arbitrators the importance of which will grow in the future. Such additional rules of law continue to be created and accepted internationally with the growing globalisation of the world economy, though considerable differences of opinion are still found regarding the respective roles of the INCOTERMS of the ICC, the UNIDROIT contract principles, the *lex mercatoria* and the like.

Other fields of law may become more and more important in international arbitrations. In national law, this may be true for certain fields usually considered as public law such as competition law or specific laws such as the RICO Statute in the United States. Similarly, contracts and their performance may be subject to regional law such as the by now enormous volume of the law of the European Community and of NAFTA. Finally, a greater role will also be played by public international law, such as multilateral treaties like the World Trade Organization and their indirect effects on the activities of private companies, bilateral treaties particularly in the form of BITs for investment cases, and also customary international law and general principles of law for such questions as the compensation due in expropriation cases.

IV. FINAL NOTE: HARMONISATION, INTERNATIONALISATION, GLOBALISATION

In conclusion, first of all, I would expect a growing harmonisation between national arbitration laws. National legislators will continue to be pushed by their own constituencies, particularly

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their business communities, to adapt their respective legal frameworks to the demands of international business practice for efficient dispute settlement machineries. The modernisations of national arbitration laws which have taken place in all major countries, starting with the French arbitration laws in the early 1980s, and which continue, for the time being, as by the adoption of the UNCITRAL Model Law, were mostly due to that pressure. In particular, the number of countries adopting the UNCITRAL Model Law, presently well over 30, can be expected to still grow considerably. This, and also the many similarities between the other modern national arbitration laws even if they do not follow the Model Law, has already led and will continue to lead to a harmonisation of national arbitration law to an even greater extent in the future.

My next prediction, though it may sound strange, is that international arbitration will become more international. With the growing number of international arbitration cases and the growing number of lawyers and arbitrators involved in international arbitration, I would expect them to become less dependent on their specific national particularities and more open and flexible to the specific needs of disputes in the international context. This will be facilitated by the fact that the modern and adapted rules of all major arbitration institutions provide identical or very similar procedural solutions to most major aspects of arbitration cases. And, in addition to this written legal framework, the growing experience of counsel and arbitrators in international cases will make them apply and interpret such rules and use their remaining broad procedural discretion in ways that meet the specific demands of international disputes.

Those involved in arbitration cases in various regions of the world will realise that there are still considerable differences in approach and practice of the use of international arbitration procedures. But, in a more and more globalised economy and contract practice, such regional differences will become less important. Illustrations may be that, on one hand, civil lawyers of continental Europe are by now used to certain discovery procedures

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and cross-examination of witnesses in international arbitral proceedings and that, on the other hand, the new International Rules of the American Arbitration Association (AAA) now discourage “non-neutral” arbitrators and awarding punitive damages. A globalisation of arbitration can also be noted as parties seem less and less to take the traditional approach of selecting arbitrators from their own legal background but rather select arbitrators from any region of the world whom they consider best equipped for the particular case.

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