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**International Arbitration: a contemporary perspective**

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## OUTLINE

1. *An overview of diversified subjects.*

International arbitration branches out into different subjects at both substantive and procedural level: commercial law, international trade law, domestic and international procedural rules and systems, constitutional and administrative law, conflict of laws, to cite but a few.

2. *A tricky business.*

Many things to say: this is a discouraging premise if one has to put together a variety of subjects and squeeze them into a short time-span.

3. *Need to keep the approach to international arbitration as simple as possible.*

To keep it simple is far from being simple. In performing my present task, I believe that, after hearing the Learned speeches of many eminent Colleagues, and consuming my eyes on innumerable books and articles, the best way is to go back to the original function of arbitration at large and international arbitration in particular. The two notions are far from being equivalent. Within the domestic system arbitration still represents, in practical terms, an alternative to the judiciary. At the international level, arbitration represents the only

viable means to open up a dialogue *super-partes* among subjects (natural persons and business concerns) belonging to different countries, not only at the contentious level, but also at the level of comparative legal and cultural communication. If a subject belonging to country A has a dispute with a subject belonging to country B, the judiciary of either countries cannot be deemed neutral and/or equidistant. This does not mean that it lacks impartiality, but that it is not neutral (culturally aseptic) when put in contact with a different legal/cultural/economic background.

4. *The dual function of arbitration: the borderline between arbitration and conciliation (more generally ADR as explained infra paragraph 14).*

Arbitration is traditionally (and correctly) cited as a means to solve disputes outside of a Court of Justice. It would be wrong to consider it as an alternative to a recourse to the judiciary, the latter being too cumbersome and/or slow. Arbitration has an inner value transcending the bounds of time-consuming legal technicalities. It opens the door to specialized justice, indeed necessary when dealing with sophisticated technical issues, also allowing recourse to fairness and reasonableness when the decision is rendered *ex aequo et bono*. In its more general meaning arbitration is still the pivot around which the system of the alternative (nowadays amicable) methods of solving disputes is rotating. It is an adjudicative method, giving birth to a binding

decision. Conciliation is a non-adjudicatory method of solving disputes, in an amicable fashion, leading to a new *consensus* of the parties by way of settlement of a dispute. In concrete terms, given the high number of arbitral awards spontaneously complied with and the high number of conciliations blessed with a happy end, the distance between the two methods tends to become narrower.

5. *The special features of international arbitration as distinguished from domestic/national arbitration.*

The above succinct remarks are aimed at underlining the general features of arbitration. When carried out internationally, among subjects of different nationalities or having as object a dispute connected to different domestic systems, arbitration generates an added value. It becomes a powerful instrument to be used with a view to putting into motion principles resting at the very basis of comparative law. Traditionally, with a view aiming at the past, each national system was to be equated with a monad as defined in the philosophy of Leibnitz: i.e. without any outward opening. Under the influence of the founding fathers of the Law Merchant (the citation of the Lord Chief Justice Mansfield is obligatory) the interrelation among legal systems (*rectius*, different national laws) started to branch out. Realistically, however, the true internationalization of the law came about after World War II, when the first movement towards an

enlarged international community first saw the light: the Marshall Plan, the International Trade Organization (ITO) and the Havana Charter were the early signs. Then came the European Economic Community, now evolved to the legal and political shape of the European Union, a true laboratory for comparative law in action.

In historical terms, we are moving within a very short span of time. So much so that, without being Mathusalem, I personally happen to have witnessed the first steps in the demolition of the past intellectual and historical wall existing between the common law world and the civil law world. The LL.M. Bologna Program organized by the Loyola Law School and the Alma Mater Studiorum, Università di Bologna, is a mature example of a progress which started, as I pointed out above, after the end of World War II.

6. *The added value of international arbitration in today's world.*

It was a long preface. However, since I was asked to present international arbitration in a more general outlook, I could not refrain from pointing out what, in my opinion, is the added value of international arbitration, whose function can by no means be restricted to the solution of disputes. International arbitration is widening its original function: from the role of a battleground between disputants, it is now acquiring the role of a playing ground in which different subjects seeking to solve a deadlock are striving to find a common path

between diverse legal traditions and cultures. Through international arbitration we are witnessing *inter alia* a revival of the Law Merchant through the re-birth of *Lex Mercatoria*, through the UNCITRAL Rules and through the UNIDROIT Principles. As a result, in a close-knit super-national community, like the European Union, the civil law and the common law now live happily together. The early frictions (at the level of both method and merit) have been overcome and even the different legal technicalities have lost their original conflicting teeth. In this connection a reference is made to the second set of materials that I handed out as readings in the context of this international arbitration seminar.

7. *The basic categories of international arbitration.*

The traditional dichotomy applied to both international and domestic arbitration is that of *ad hoc* and administered arbitration. It is hard to express a preference in general terms. May I only add that in international arbitration one may suggest recourse to institutional arbitration administered by well-known and highly reputed arbitral organizations, like, for instance, the International Chamber of Commerce and the American Arbitration Association. Other excellent organizations exist at both international as well as national levels (see *infra* number 9).

8. *The main international conventions dealing with international arbitration.*

There exists a great number of multilateral and bilateral conventions and treaties dealing with arbitration and with the enforcement of arbitral awards. I shall limit myself to the citation of the main texts, i.e.: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); the European Convention on International Commercial Arbitration (Geneva Convention of 1961); other international texts as cited by Lord Mustill in the book "The Leading Arbitrators' Guide To International Arbitration" edited by Lawrence W. Newman and Richard D. Hill p. 11 (**see Enclosures 1, 2 and 3**).

9. *A short list of the main organizations engaged in promoting and administering international arbitration.*

See the listing of international business-arbitration centers, organized by country and continent, with links (**Enclosure 4**), the Rules of Arbitration of the International Chamber of Commerce (ICC) (**Enclosure 5**) and the Commercial Arbitration Rules and Mediation Procedures (including procedures for large, complex commercial disputes) of the American Arbitration Association (AAA) (**Enclosure 6**).

10. *The main features of the arbitral function.*

Together with the need for a reasonably harmonized set of principles to be applied by arbitrators, another inescapable need emerges when dealing with international arbitration. This impellent need can be defined as follows by borrowing the title of another article included in my materials: *"The Ethical Implications of the Arbitral Function: Standards of Behaviour of the Arbitrators"*.

In a nutshell, the above standards comprise neutrality, impartiality and independence and these qualifications are to be appraised in a comparative fashion. It is worth emphasizing that the qualifications in question should apply not only to the Chairman, but also to the party-appointed Arbitrators. The Arbitrators' standards of behaviour should be guided by the criteria just mentioned, all leading towards the safeguard of independence in the relations among arbitrators and with the parties.

11. *Cultural neutrality as a prerequisite of arbitral justice.*

This prerequisite encompasses the overall value of international arbitration. At the basis of each arbitration there exists, to a lesser or major degree, a cultural problem. An arbitrator, without relinquishing the most impartial frame of mind, may nonetheless remain very distant, in educational and cultural terms, from one particular party or its counsel. Unintentional violation of cultural neutrality may bring

about the greatest harm to the cause of arbitration. Arbitral injustice stemming from the innocent, yet harmful, behaviour of a honest arbitrator, lacking cultural qualifications, is more difficult to cure than the arbitral pathology of willful partiality and prevarication. As a remedial action, emphasis should be put on the arsenal of tools available to address the difficulties pointed out above, all of which presuppose an intelligent awareness of cultural differences. It is through this awareness that prudent protagonists on the arbitration scene have more often than not achieved a satisfactory *modus vivendi* in international arbitration by exercising conscious self restraints over the habits to which they are accustomed, with a view to opening up channels of intellectual communication with other parties prepared to exercise the same self-restraint over their own habits.

If transplanted into the legal field, the above *caveat* means full awareness of the necessity to apply a comparative law methodology, which has already overcome its original theoretical approach to land, in operational terms, within the common terrain now fertilized through the creation of Unions of Sovereign States and/or by other forms of associations of national States now existing in the context of the international community. The critical topics in which this exercise of self restraint and knowledgeable harmonization is most likely going to be applied, are the following: agreement to arbitrate; preliminary

procedure and disclosure of the case; the features of arbitration proceedings under the systems which come into play in each individual case; presentation of evidence; demeanor of counsel during the proceedings; the award.

In conclusion, one can fairly state that international arbitration offers on a silver plate the best occasion for a cultural compromise. The word "occasion" is a mild expression used to identify a more coercive necessity, which, if unattended, can turn a proceeding meant to bring about a success into a miserable failure.

12. *In arbitration the mores are deteriorating: still it is the most effective tool.*

The foregoing remarks seem to indicate a dreamland in which the definition of an arbitration as a "debate among gentlemen" still prevails. This is not entirely true but, in fairness, not totally untrue. As Pierre Bellet, a former President of the French *Cour de Cassation* once said: "*Dans l'arbitrage le moeres ce détériorant*". The fighting spirit of the parties more often than not transcends the bounds of fairness and loyalty. This is not true, however, when arbitration is practiced in a *milieu* where the amicable settlement of disputes out-of-Court has gained a status through an historical tradition or through a more recent progress.

It is a fact that, especially in administered arbitration, the percentage of awards spontaneously complied with is very large (within the ICC it

exceeds 92%). This means that the arbitral habit and culture are deeply penetrating the *strata* of society, both with reference to large arbitrations among high-powered parties as well as to small arbitrations usually practiced in the domain of consumers' disputes. Arbitration has also become unavoidable in very specialized fields where a judge, whose preparation inevitably tends to be more general in nature, may have some difficulties in his/her *ius dicere*. Finally, one should remember that trade and arbitration are now going hand in hand at international level, and also within the WTO the Appellate Division is at present exercising a substantially arbitral function.

13. *State v. Private/Commercial Arbitration: a common search for quality.*

At this point, however, I have to stop because arbitration carried out among States and other subjects of the international community differs, to a considerable extent, from arbitration carried out among parties which are citizens of national States. It should be stressed, however, that many principles applicable in arbitration between public bodies and/or entities, including national States, tend to be transplanted into the domain of arbitration among private parties.

Finally, another feature is common to all kinds of arbitration: the perennial and never satisfied search for quality. An arbitrator is not gifted with jurisdictional immunities and privileges only pertaining to the Judiciary. He/she has to earn respect and reputation in the field, by

its own deeds. This is indeed a critical matter, because, as always happens in life, no arbitration can be deemed better than the worst of its protagonists.

14. *Is conciliation strengthening or weakening the effectiveness of international arbitration?*

14.1. Arbitration is rapidly expanding worldwide as the most appropriate tool for the settlement of business disputes, thus serving the cause of international trade and economic cooperation.

In recent times, the scope and purposes of arbitration have transcended the domain of purely business and economic interests, as is the case in the Taba and Greenpeace cases.

14.2. Arbitration, as generally known, is only one of the tools in the workshop of the peace-makers, to use a colloquialism well-known to the addicts to the challenging field of out-of-court dispute settlement.

14.2.1. Undoubtedly, certain ADR techniques may ensure greater flexibility in solving transnational disputes. Can one at present envisage the emergence of a new arbitration pattern through recourse to ADR?

Unfortunately, the tyrant time does not allow any deeper plunge into this complex matter. May I only be permitted a synthetic answer with the unavoidable limits of every generalisation. ADR techniques are certainly going to affect the arbitral pattern in a long term perspective.

The same result is hardly conceivable if confined into a shorter time span.

14.2.2. Arbitration has taken time in asserting itself as an alternative method of dispute resolution, although it falls within the sphere of the so-called adjudicative dispute resolution methods. The quintessence of ADR is the non-adjudicative nature of their dispute resolution techniques.

Non-adjudicative alternative dispute resolution involves methods of encouraging the parties to resolve their own dispute. ADR takes different forms, but all rely on the parties in the end to settle their own case. These alternative dispute resolution procedures fall into three different categories:

14.2.2.1. Encouraging the parties to settle their dispute directly through discussion and exchange of views without the intervention of a third party.

14.2.2.2. Mediation and conciliation through the recourse to a third party to encourage the parties to discuss their dispute and to resolve it in a manner satisfactory to both of them.

14.2.2.3. Mini-trials in which each side exposes their main points to the other and a voluntary settlement often results from this exposure.

14.2.3. ADR, like every human institution, has advantages and disadvantages. Without entering into the merits of the se positive and negative

elements, may I only be permitted a sweeping remark. At international level certain countries and regions are ripe for a full acceptance of ADR, others are not. For example, in certain Asian countries conciliation has been considered from time immemorial as a privileged method of dispute resolution. In other countries, roughly corresponding to the Western industrialised countries, the acceptance of non-adjudicative methods of dispute resolution is more tepid. This is why, despite its growing technicality and complexity, arbitration is still preferred, in as much as it is capable of producing a binding decision, susceptible of enforcement in case of non-fulfilment.

14.2.4. For the foregoing reasons when dealing with issues of dispute resolution in transatlantic business relationships, at least at present, the attention should be mainly focused on international arbitration, although the importance of ADR techniques, especially in the United States, is a clear sign of a rapid evolution of the phenomenon in future perspective. It is also noteworthy that a number of issues debated in arbitration also apply *mutatis mutandis* to ADR.

15. *The Decalogue of arbitration.*

15.1. A growing number of countries is involved in international arbitration. These countries is involved in international arbitration. These countries differ greatly in political and cultural background and in experience in arbitration. In some countries international arbitration is still treated

with suspicion, especially when sovereign states or public entities are parties to it.

15.2. This situation calls for the following remarks:

15.3. The expanded use of international arbitration should be accompanied by the awareness of the differences existing in many countries and/or regions.

These differences are not limited to the legal field but touch upon socio-political and religious matters as well.

15.4. National legislations have developed to a considerable extent. Arbitral bodies and institutions have been created in various parts of the world with a view to promoting arbitration at regional level.

15.5. One is therefore faced with two potentially conflicting phenomena.

15.5.1. On the one hand, there exists a need for harmonization at world level to meet the requirements of business concerns operating in the framework of the so-called global market.

15.5.2. On the other hand, the accentuation of differences at national and/or regional level is likely to create cultural and legal barriers affecting the use of international arbitration on the world scene.

15.6. In my opinion, any remedial action should be guided along the following lines.

15.6.1. International arbitration, as opposed to domestic arbitration, is aimed at fulfilling general needs stemming from trade and economic

cooperation at world level. The affinity of these needs in different parts of the world should be duly stressed and agreement on a number of generally acceptable principles should be sought if arbitration is to play its universal role.

- 15.6.2. These principles are the outward expression of basic requirements of fairness and legality which are to be viewed as inalienable guarantees for the parties and for the arbitrators as well. Compliance with the principles in question will favour the use of international arbitration in a wider legal, cultural and geo-political perspective.
- 15.7. The principles in question can be summarized as follows.
  - 15.7.1. The arbitrators should strictly adhere to the parties' contractual intent as regards the implementation of arbitration proceedings as distinguished from conciliation proceedings. As pointed out above, conciliation, to be viewed in the framework of ADR techniques, has its great merits, but it should be carried out only when the parties so request.
  - 15.7.2. The arbitrators may settle the dispute in equity, or *ex aequo et bono*, or as *amiable compositeurs*, only upon the parties' express authorization.
  - 15.7.3. The arbitrators should be independent of the parties, neutral and impartial, and their qualifications should not be restricted on grounds of nationality and/or religion and/or political belief.

- 15.7.4. The method for designating and appointing the arbitrators should always ensure that the principles set forth *retro*, sub-para. 5.3, are fully complied with.
- 15.7.5. When signing the arbitration agreement states and other public entities should be deemed to have waived any and all sovereign prerogatives and immunities.
- 15.7.6. In international trade no national laws should be successfully invoked to contravene contractual obligations into which states or other public entities have freely entered, nor should the same be permitted to successfully challenge, after the difference has arisen, their own standing to appear in arbitration.
- 15.7.7. Whether or not international arbitration is made the object of *ad hoc* legislation, its specificity should be recognized by national legislators and judiciaries, and its regulations should be substantially patterned upon principles compatible with the provisions of the New York Convention of 1958 and with the philosophy which has inspired the UNCITRAL Model Law.
- 15.7.8. In establishing procedural rules, the arbitrators should see that fair standards be set, ensuring *inter alia* the parties' basic right to be heard and to contradict on equal terms.
- 15.7.9. In international trade the grounds upon which an award may be set aside should be the same as those upon which recognition and

enforcement of the award may be refused, and the scope of such grounds should substantially coincide with the provisions of the New York Convention.

15.7.10. When invoked in the realm of international trade, the ground of public policy should be narrowly construed and its ambit should be confined to international public policy as opposed to national (or domestic) public policy.

16. *The future of arbitration: a forecast on a set of improvements that both the users of arbitration and the arbitrators themselves will plausibly welcome*

16.1. The principles thus sketched should guide the drafters of arbitration laws and regional conventions if an overall harmonization is to be sought. Otherwise parochialism will not be defeated and arbitration as such will be fragmented into a number of different models to be used within a multiplicity of separate geo-political areas.

16.2. Bodies and organizations administering arbitration are called to play a decisive role in strengthening the universal vocation of international arbitration. They should not favour the implementation of principles, rules, ideas and methods which are peculiar to individual countries, regions, or legal families. Without betraying their mission, which may remain national or regional, they should promote recourse to generally accepted principles transcending geographic and cultural boundaries. In case of possible contrast with local rules, or mores, it will be the

duty of the administering body to mediate between the cultural and legal background peculiar to the country and/or region in question and the wider panorama of a truly world arbitration.

16.3. Cultural and legal isolation cannot be reconciled with international arbitration. Remedial action can be pursued, in the first place, through the search for arbitrators culturally open and able to cope with differences in educational and professional background. Comparative law is the password, certainly easier if one remains within the bounds of the same legal families, undoubtedly more difficult if one transmigrates from one family to another. The difficulties increase in geometric proportion if the comparison touches on systems in which the legal phenomena are deeply imbued with ethical, religious, and socio-political elements peculiar to individual countries or regions. When faced with such a juncture, the comparative lawyer/arbitrator must exercise the utmost prudence to avoid hasty and misconceived judgments and opinions which may adversely affect the equanimity and correctness of his/her legal conclusions.

16.4. International arbitration requires mutual understanding and trust to achieve reasonable function. This frame of mind in turn presupposes knowledge and familiarity not only with legal rules, but also with habits and concrete ways of behaving other than those to which each

party is accustomed. The cultural connotations of the problem are self-explanatory.

16.5. The above remarks are the expressions of a personal opinion on what should be done to strengthen the use of international arbitration throughout the world. The theme of our Panel discussion goes further by putting a specific question; i.e., how the different parts of the world are likely to be approaching arbitration in the Nineties.

16.5.1. With the margin of error inherent in any educated guess, it is my opinion that the development of international arbitration will take place along the lines pointed out above. The symptoms supporting this optimistic forecast are the following:

16.5.1.1. The trend inspiring the amendments which have occurred in many national legislations is by and large compatible with the principles which have been indicated as fundamental for the promotion and growth of international arbitration;

16.5.1.2. The UNCITRAL Model Law is generally regarded as the most reliable source of inspiration for legislative reform throughout the world. In addition to the instances in which adoption of the Model Law in its entirety is sought at national level, the basic principles characterizing the Model Law are being substantially followed in many countries.

- 16.5.1.3. The New York Convention of 1958 is constantly implemented by the national judiciaries in a satisfactory way without betraying its inherently international nature.
- 16.5.1.4. The realization of the single market within the EEC and the dramatic events which have changed the socio-political physiognomy of East-European countries allow the forecast of a wider use of international arbitration, together with a reinforced implementation of the Geneva Convention of 1962.
- 16.5.1.5. The increased recourse to international arbitration shows that in terms of concrete practice there is no option to the comparative approach to settle the substantive and procedural issues stemming from the implementation of arbitral proceedings under different legal latitudes. Below the minimal ceiling represented by the principles pointed out above, Para. 5, there really exists no room for a satisfactory recourse to arbitration.
- 16.6. To sum up, whilst pursuance of a wider range of unification/harmonization of national laws is a worthy endeavour, it obviously entails greater difficulties. A body of rules like the UNCITRAL Model Law is complex and articulated. Its introduction into domestic legal systems or its adoption at regional level may encounter major difficulties; in the best hypothesis, a reasonably long gestation. It may be quoted as the optimal choice, especially in

countries where the legislation on arbitration is still at a rudimentary stage. However, as it is often the case, its overall appraisal involves no minor endeavour.

16.7. Adherence to fewer basic principles, on the contrary, may prove an easier and faster process, provided, however, that such principles do not contradict the basic values prevailing in the legal habitat into which they are to be transplanted. This is why my forecast is that in the Nineties one will witness, in addition to initiatives favouring legislative unification/harmonization, the pragmatic adherence by the circles concerned with international arbitration to the principles which I have cited as representing the minimal ceiling of arbitral liberties. Compliance with such principles will be assured through the building of a consistent case law without putting into motion cumbersome legislative processes.

Conscientious arbitrators and responsible administering bodies will be of invaluable help in shaping the future practice of international arbitration.

16.8. It is also my forecast, to conclude, that ADR techniques will undergo a rapid progress. Non-adjudicative alternative dispute resolution, which is the characterizing mark of ADR, is going to acquire an ever increasing degree of recognition in direct proportion with the strengthening of the ties within the international business community.

The need for a decision susceptible of enforcement is going to give way in favour of self-responsibilisation of entrepreneurs which are aware of their belonging to a close-knit business community (the *societas mercatorum*, to use the expression of the supporters of *lex mercatoria* as an autonomous source of law). This phenomenon is already clearly detectable in smaller sectorial communities of traders and merchants which are the descendants of the Medieval Guilds. Within these communities, quite compact in nature, out-of-court settlement is a way of life in case of disputes. Whether it is arbitration in the strict sense, or conciliation, it is really hard to tell. It is called quality or commodity arbitration and the award is legally binding. However, the number of decisions which are not performed spontaneously is reduced to the bare minimum. The sense of belonging to the community constitutes for the merchants a very strong inducement to perform their obligations without the need for court intervention at the stage of execution. Under these circumstances, the difference between adjudicatory and not-adjudicatory techniques tends to disappear, thus paving the way for an increased use of ADR even at transnational level.

Bologna, June 5, 2008

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