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**GLOBAL IMPLICATIONS OF THE FAA:  
THE ROLE OF LEGISLATION IN INTERNATIONAL ARBITRATION\***

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The organizers of this anniversary lecture series have asked me to provide a view from abroad on the Federal Arbitration Act and to reflect on its global implications. I will approach this challenging endeavour by addressing first the traditional role of legislation in arbitration generally and of the US Federal Arbitration Act (FAA) in particular (1 below), and second by reflecting on the prospective role of arbitration legislation in a globalized world (2 below), before reaching a conclusion (3 below).

Before doing so, however, two preliminary comments. First – it does not come as a surprise – the FAA is eighty years old. It is an old or, in more deferential terms, a venerable piece of legislation. All the other jurisdictions with a reasonable volume of activity in international arbitration have more recent statutes. Admittedly, Japan had an act dating back to 1890, but it was changed last year. In other words, the FAA is the oldest (modern) arbitration act in the world.

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A second introductory comment is inspired by the AAA's statistics. The number of international cases filed with the AAA has significantly increased over the past years. From 385 in 1998 to 672 in 2002 and, slightly less, 646 in 2003, followed by a small rise in 2004. The cases in 2003 involved more than 3 billion US dollars in claims and parties from 88 different countries. And the AAA reports on its website: "Those figures reflect the largest number of new international filings of any arbitration institution in the world".

Many jurisdictions in the world have adopted new arbitration statutes in the last decades to boost the local arbitration industry. The US seems different: no new statute, quite to the contrary a very old act and, yet, arbitration is on the rise, a sharp rise. This can be interpreted in many ways: *either* legislation plays no role in the development of arbitration activity, i.e., it is plainly irrelevant; *or* the FAA is an exceptionally good, arbitration - supportive statute, eighty years ahead of its time when it was enacted; *or* it is so adaptable – a characteristic stressed by John Feerick in the first lecture of this series – that courts have been able to construe it evolving with its times, without being hampered by outdated rules. The true answer is likely to involve all of these reasons and maybe others as well. One should keep these possibilities in mind when turning now to the first aspect of our topic.

## **1. The traditional role of legislation and the FAA**

The traditional role of arbitration legislation can be divided in three different functions: first, legislation legitimates; second, it supports arbitration; and third, legislation promotes arbitration venues.

### **1.1 Legitimizing arbitration**

From a historical perspective, there is little doubt that the first role of legislation in arbitration was to eradicate hostility towards arbitration<sup>1</sup>. This was the very purpose of

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<sup>1</sup> Larry E. EDMONDSON, *Domke on Commercial Arbitration*, 3d ed. St. Paul 2003, § 6:1, at 6-1: "*In the absence of a statute recognizing and enforcing arbitration agreements and awards, the courts were reluctant to lend their authority to the enforcement of arbitration clauses to arbitrate future disputes*" (emphasis added). Traditional hostility toward arbitration is rooted in the perception that arbitration allows the parties to circumvent the court's jurisdiction, an act that the State did not wish to encourage. VÁRADY/BARCELÓ/VON

the enactment of the FAA. Or, in the words of the congressional report which accompanied the bill in 1924:

*“The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without a legislative enactment [...]”*<sup>2</sup>

The reason for the hostility of the courts was traced back to the compensation system of the judiciary. Or so Lord Campbell in the famous English case of *Scott v. Avery*:

*“The doctrine, he said, had its origin in the interests of the judges. There was no disguising the fact that, as formerly, the emoluments of the judges depended mainly, or almost entirely, upon fees, and as they had no fixed salaries, there was great competition to get as much as possible of litigation into Westminster Hall for the division of the spoil [...] and they had great jealousy of arbitrations whereby Westminster Hall was robbed of those cases which came not into King’s Bench, nor the Common Pleas, nor the Exchequer. Therefore they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so. That really grew up only subsequently to the time of Lord Coke, and a saying of this was the foundation of the doctrine.”*<sup>3</sup>

Indignation has been voiced at this frank self-revelation and perhaps it is unjustified<sup>4</sup>.

Perhaps, as Arthur von Mehren puts it, the true explanation is the “hypnotic power” of the phrase “oust the jurisdiction” or, in other words, “[g]ive a bad dogma a good name and its bite may become as bad as its bark.”<sup>5</sup>

Whatever the reasons for the original hostility, the FAA has proven a powerful legislative response<sup>6</sup>. From suspicion, the approach of American courts towards

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MEHREN, *International Commercial Arbitration*, St. Paul 2003, pp. 54-55: “The struggle that many legal orders went through to establish a monopoly of the administration of justice in the central political authority has left a residual government antagonism towards – and a related tendency to suspect – private tribunals”.

<sup>2</sup> 65 Cong. Rec. 1931 (1924).

<sup>3</sup> *Scott v. Avery*, 25 L.J.Ex. 308, 313; the report of these remarks in 5 H.C.L. 811 is not as complete.

<sup>4</sup> VÁRADY/BARCELÓ/VON MEHREN, cf. fn.1 above, p. 51.

<sup>5</sup> *ibid.*, p. 52.

<sup>6</sup> The courts have recognized the primary role of the FAA as a countervailing legislative response to judicial suspicion of arbitration: “For a considerable time prior to the passage of the Arbitration Act in 1925, the Congress had come to the conclusion that an effort should be made to legislate on the subject of arbitration in such fashion as to remove the hostility of the judiciary and make the benefits of arbitration generally available to the business world.” (*Robert Lawrence Company v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406).

jurisdiction has evolved towards a strong pro-arbitration bias<sup>7</sup>, which has been reaffirmed on innumerable occasions.

A long series of Supreme Court cases has encouraged such a bias. The cases which strike foreign observers the most are those broadening the ambit of arbitral disputes, such as *Scherk v. Alberto Culver*<sup>8</sup> or *Mitsubishi*<sup>9</sup>.

Some Supreme Court Justices have criticized this strong arbitration bias as not being in line with the intents underlying the Act. To quote Justice Stevens, "[t]here is little doubt that the Court's interpretation of the [Federal Arbitration] Act has given it a scope far beyond the expectations of the Congress that enacted it."<sup>10</sup> Justice O'Connor, though often in disagreement with Justice Stevens, said as much in 1995: "[...] over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."<sup>11</sup>

From an essentially procedural statute, thus applicable exclusively in federal courts, the FAA has progressively turned into a body of substantive law, equally applicable in state courts with a pre-emptive effect on state arbitration law<sup>12</sup>. In parallel, from a mechanism to resolve disputes among merchants, arbitration has become the primary remedial instrument for the resolution of all kinds of civil disputes including consumer and employment disputes<sup>13</sup>, as if, to use Thomas Carbonneau's words, "the sin of would-be judicial antipathy towards arbitration can never be fully expiated."<sup>14</sup>

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<sup>7</sup> Or a "federal public policy favoring arbitration"; so for instance *Ticknor v. Choice Hotels Intern., Inc.* (9<sup>th</sup> Cir. 2001) 265 F.3d 931, 941-942.

<sup>8</sup> *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974).

<sup>9</sup> *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>10</sup> *Circuit City Stores, Inc., v. Saint Clair Adams*, 532 U.S. 105 (2001), Justice Stevens dissenting at 124, 132, with reference to *Southland Corp. v. Keating*, 465 U.S. 1 (1984), 17-21.

<sup>11</sup> *Allied-Bruce Terminix Companies, Inc., and Terminix International Company v. Michael Dobson et al.*, 513 U.S. 265 (1995), Justice O'Connor concurring at 282, 283.

<sup>12</sup> On the preemption of state law, see below.

<sup>13</sup> Thomas E. CARBONNEAU, *The law and practice of arbitration*, New York 2004, p. 1.

<sup>14</sup> Thomas E. CARBONNEAU, *Cases and materials on the law and practice of arbitration*, 2d ed. New York 2000, p. 76.

## 1.2 Supporting arbitration

Legitimizing arbitration was not enough. In addition, it was necessary to give it a legal framework guaranteeing the predictability of the process. This leads to the second traditional role of legislation which consists in lending support to arbitration. The users of international arbitration seek broad party autonomy, yet, at the same time, they need some measure of control by national states and their courts<sup>15</sup>. In other words, arbitration strives for the best of both worlds<sup>16</sup>. And – like other arbitration legislations – this is exactly what the FAA has given it.

In substance, the FAA supports arbitration by enforcing the arbitration agreement like any other contract “save upon such grounds as exist at law or in equity for the revocation of any contract” (Section 2 FAA)<sup>17</sup>. It was quite a remarkable achievement to enforce pre-dispute arbitration agreements in 1925 at a time when the French system for instance still required a *compromis*, i.e., a confirmation of the commitment to arbitrate after the dispute arose.

In this context, the question arises as to who is to enforce the arbitration agreement. In the end analysis, certainly the courts, by compelling arbitration or in an action for vacation of the arbitral award. Can the arbitrators also enforce the arbitration agreement? The answer is obviously in the affirmative and calls for the application of the principles of separability (i.e., that the invalidity of the underlying contract does not invalidate the arbitration clause contained therein) and of *Kompetenz-Kompetenz* (i.e.,

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<sup>15</sup> LYNCH, *The forces of economic globalization: Challenges to the regime of international commercial arbitration*, The Hague 2003, p. 30.

<sup>16</sup> VÁRADY/BARCELÓ/VON MEHREN, cf. fn.1 above, p. 62.

<sup>17</sup> As a corollary to the principle of enforceability, the legislation sets mandatory limits to the exercise of party autonomy in order to prevent, “*inter alia*, fraud, overreaching, and parties’ failure to understand the commitments they are assuming”, (VON MEHREN, 295 RCADI 9 (2002), at p. 245, citing § 2 of the FAA as the clear expression of this principle.)

the arbitral tribunal's jurisdiction to rule on its own jurisdiction). Unlike other more recent legislations<sup>18</sup>, the FAA is silent on these principles.

The Supreme Court introduced separability in *Prima Paint*<sup>19</sup>, which was at the time considered a milestone in the development of arbitration<sup>20</sup>. Further, in the *First Options* opinion<sup>21</sup>, the Supreme Court held that an arbitral tribunal has jurisdiction to decide on its own jurisdiction only if the parties have agreed to submit such question, which is generally referred to as arbitrability, to the arbitral tribunal. What if the parties' agreement is unclear? The doubts which arose in the wake of this dictum in *First Options* undoubtedly call for more explicit guidance<sup>22</sup>.

Legislation also supports the arbitral process by guaranteeing its fairness. Fairness includes independent adjudication. Or, in the words of the Supreme Court of California in *Graham v. Scissor-Tail*, a private adjudicatory body is an arbitral tribunal if it has "the minimum levels of integrity which we must demand of a contractually structured substitute for judicial proceedings."<sup>23</sup> This is a test on which there is certainly a transnational consensus. In particular, this test calls to mind court decisions on the independence of arbitral bodies in sports matters rendered in Switzerland, England, and Australia<sup>24</sup>.

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<sup>18</sup> See e.g., Article 178(3) (for separability) and Article 186(1) (for *Kompetenz-Kompetenz*) of the Swiss Private International Law Act.

<sup>19</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

<sup>20</sup> Robert COULSON, *Prima Paint: An Arbitration Milestone*, November 1967, in: *Federal Arbitration Act at 80: A Tribute Anniversary Lecture Series*, 25 October 2004, p.37, available on the AAA website: <http://www.adr.org>.

<sup>21</sup> *First Options of Chicago, Inc. v. Kaplan et al.*, 514 U.S. 938 (1995).

<sup>22</sup> William W. PARK, *Amending the Federal Arbitration Act*, *The American Review of International Arbitration* Vol.13 (2002), p. 75, at pp. 115-116.

<sup>23</sup> *Graham v. Scissor-Tail*, 28 Cal. 3d 807, 828. One can also mention the decision of the Supreme Court of California in *Dryer*, where the majority considered that "national labor policy favors arbitration [...] Courts can best serve this policy by giving full effect to the means chosen by the parties for settlement of their differences under a collective bargaining agreement [...] — without regard to the possibility that the arbitration machinery might run afoul of the Graham ["minimum levels of integrity"] standards" (*Dryer v. Los Angeles Rams*, 40 Cal. 3d 406, 412-416), with Judge Bird dissenting on the ground that he could not "find any federal law which requires the enforcement of arbitration procedures which are so unfair as to come under the Graham holding" (*Dryer v. Los Angeles Rams*, 40 Cal. 3d 406, 436).

<sup>24</sup> *Larissa Lazutina & Olga Danilova c. CIO, FIS & TAS*, ATF (Swiss Supreme Court Reporter) 129 III 425, 27 May 2003; *Gundel c. Fédération équestre internationale*, ATF 119 II 279, 15 March 1993; *Walkinshaw v. Diniz*, 19 May 1999, Arb. Int. 2001, p. 193; *Raguz v. Sullivan & Ors*, [2000] NSW 240, also reported in Gabrielle Kaufmann Kohler, *Arbitration at the Olympics*, the Hague (Kluwer) 2001, p.51.

In addition to independence, fairness also implies the guarantee of fundamental procedural rights. Beyond procedural rights, does fairness in arbitration encompass fairness in terms of the outcome? Does it require a review of the merits of the award? Today there is a transnational consensus to answer this question in the negative, but on very restrictive international public policy grounds. On this issue again, the FAA is silent. In an *obiter dictum* in *Wilko*<sup>25</sup>, the Supreme Court added a ground consisting of “manifest disregard of the law” to the procedural grounds for vacation explicitly listed in Section 1 of the Act. This ground causes some perplexity in the minds of foreign observers. Even if the risk of vacation appears minimal, it carries “potential for mischief and misuse”<sup>26</sup>. Indeed, some more recent cases, especially Second Circuit cases, do show the potential for misuse<sup>27</sup>.

State support to the arbitral process is not unlimited. Most national legislations provide for some limitations of arbitrability (in the meaning of the ability of a dispute to be resolved by arbitration). For instance, labor disputes are nonarbitrable under Italian law; patent validity is nonarbitrable under French law; and the arbitrability of consumer disputes is restricted under EU law<sup>28</sup>. By contrast, US law seems to know no real limitation of subject matter arbitrability.

Courts have progressively added entire areas of law to the subject matter of arbitration, including securities, RICO claims, anti-trust, and employment contracts, to name but a few<sup>29</sup>. Some argue that it may be desirable for Congress to set certain limitations on the arbitration of matters involving essential public policy<sup>30</sup>. This would represent an amusing paradox, as it would mean legislation would assume a new role consisting in

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<sup>25</sup> *Wilko v. Swan*, 246 U.S. 436-437 (1953).

<sup>26</sup> PARK, *Amending the Federal Arbitration Act*, cf. fn. 22 above, at p. 86.

<sup>27</sup> *Ibid.*, with references to *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002), and *Hoelt v. MVL Group Inc.*, 242 F.3d 57 (2003).

<sup>28</sup> See J.-F. POUURET / S. BESSON, *Droit comparé de l'arbitrage international*, Paris 2002, p.332; Bruno OPPETIT, *L'arbitrage en matière de brevets d'invention après la loi du 13 juillet 1978*, 1979 Rev. Arb. 83; Council Directive 93/13/EEC on unfair terms in consumer contracts, Art. 3 and annex letter q, Art. 6(1).

<sup>29</sup> See e.g. for RICO and securities *Shearson / American Express, Inc., v. McMahon*, 482 U.S. 220 (1987); for anti-trust law *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*; for employment discrimination *Gilmer v. Interstate / Johnson Lane Corporation*, 500 U.S. 20 (1991).

<sup>30</sup> Larry E. EDMONDSON, *Domke on Commercial Arbitration*, cf. fn.1 above, § 7:6, at 7-19.

restraining the pro-arbitration fervor of the courts which it generated 80 years ago. This paper will return to this evolution.

### 1.3 Promoting arbitration venues

Another now traditional role of legislation which emerged a few decades ago is the promotion of an arbitration venue. Because the parties are free to choose the site of an arbitration, legal systems have amended their national laws to attract arbitrations with increasingly liberal arbitration regimes or *laissez-faire* regimes<sup>31</sup>.

In this competition, the US appears to suffer from a self-inflicted comparative disadvantage<sup>32</sup>. For foreign litigants, US arbitration law is not easily accessible when one thinks of the maze of case law implementing the FAA<sup>33</sup>, the ground for vacation of awards for “manifest disregard of the law” introduced by *Wilko v. Swan*<sup>34</sup>, the somewhat unclear residual scope of state law after *Volt*<sup>35</sup> and *Mastrobuono*<sup>36</sup>, and the “one size fits all” approach making no distinction between domestic and international arbitration. All these may be obstacles to the choice of an arbitration venue in the US for a foreign observer.

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<sup>31</sup> The combined effect of legislation on arbitration and the NY Convention has contributed to the transformation of international commercial arbitration into a highly competitive marketplace between nation States: “By siting their arbitration in a State that sets awards aside only when natural justice or due process norms are clearly violated, parties are usually able to ensure the enforceability of awards. The parties’ freedom of choice respecting the site of arbitration has caused legal orders to modify their national laws governing arbitration to meet the requirements of those who prefer private-dispute resolution to national-court litigation” (von MEHREN, RCADI, cf. fn.17 above, at p. 304, citing the successive changes of the German and English arbitration regime).

<sup>32</sup> PARK, *Amending the Federal Arbitration Act*, cf. fn.22 above, at p. 83.

<sup>33</sup> National legislation plays a significant role because statutory text constitutes the primary factor on which foreign parties and their lawyers rely in deciding to arbitrate in a country. This was explicitly acknowledged in the government report in support of the German 1998 Reform Act (see passage cited and translated in von MEHREN, RCADI, cf. fn.17 above, at p. 276).

<sup>34</sup> *Wilko v. Swan*, 346 U.S. 427 (1953), at 436-437. In order to examine this ground for setting aside, the court will have to analyze the underlying applicable law (including a subjective element in the assessment of the arbitrator’s intent), which may lead to long and costly post-award litigation. Under these circumstances, it is generally argued that legislation should correct the *Wilko* dictum to support arbitration in the US; see e.g. PARK, *Amending the Federal Arbitration Act*, cf. fn.22 above, at p. 89: “Giving the litigants from abroad a measure of confidence that the U.S. judiciary will not unduly meddle the substance of the case, such an amendment would promote efficient international dispute resolution and would make the United States a more user-friendly place to arbitrate”.

<sup>35</sup> *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989).

<sup>36</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc., et al.*, 514 U.S. 52 (1995).

Obviously, one cannot ignore that the reform of the FAA is viewed with scepticism by many<sup>37</sup>. They fear that it would open a “Pandora Box of special interests”<sup>38</sup>, paving the way for alliances of interest groups and that the process would end up being detrimental to arbitration as a whole. It is certainly not for a foreigner to assess the risks and benefits of a national legislative reform process. One could, of course, oppose the AAA’s impressive increase in case load referred to at the outset. But who knows, the increase may be much stronger with a more transparent and more easily accessible legal environment.

## **2. The prospective role of legislation in a globalized world**

Are the traditional roles of legislation evolving as a result of globalization? If so, how? What will these roles be in ten years? How will the FAA perform at 90 in a globalized environment? These are the questions which this second part seeks to address.

This section starts with some considerations about globalization (2.1 below), then reviews the forces that drive arbitration in a globalized environment (2.2 below), and finally assesses the residual roles of legislation (2.3 below).

### **2.1 The effects of globalization on the law**

Globalization is generally perceived as a challenge to the traditional role of national sovereignty and the so-called Westphalian system of states<sup>39</sup>. One knows about the reasons and effects of globalization. The facilitation of transport conditions, increased demographic movements, and the acceleration of communications have led to globalized economic exchanges. This evolution has disempowered states, which are

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<sup>37</sup> As recently noted by Richard W. Hulbert, “[m]any institutions and a large number of individuals have a professional stake in the system we know and, with some justification, they fear what might replace it”; Richard W. HULBERT, *Should the FAA be amended?*, Mealey’s International Arbitration Report, Vol 18, #12 (December 2003), p. 37; see also David W. RIVKIN / Frances L. KELLNER, *In support of the FAA: An argument against U.S. adoption of the UNCITRAL Model Law*, The American Review of International Arbitration 1999, p. 535).

<sup>38</sup> PARK, *Amending the Federal Arbitration Act*, cf. fn.22 above, at p. 135. The fear is that an alliance of consumer advocates and plaintiff lawyers may reduce the enforceability of pre-dispute arbitration clauses generally.

limited by their geographic territory and are becoming increasingly irrelevant to the activities they seek to regulate<sup>40</sup>. It has also brought about the globalization of communications<sup>41</sup> and transformed the manner in which social networks are formed<sup>42</sup>. As a result, global communities are developing<sup>43</sup>.

The disempowerment of the state has weakened the fundamental functions that state law traditionally fulfills, including the operation of an adequate dispute resolution system. These functions need to be rebuilt in the global sphere. Because states are entangled in their national boundaries, their traditional functions are overtaken by other actors. In certain fields, they are taken over by international or regional organizations, such as the EU or NAFTA. In the area of commercial arbitration, state functions are overtaken by private actors. In other words, the states lose the race to globalization, as global communities<sup>44</sup> of private actors are much faster in producing new legal norms and institutions<sup>45</sup>.

What are the ethical consequences of such a privatization of the sources of the law? The answer to this question may contribute to determining the prospective role of legislation in arbitration. To cut a long story short, the main issue raised by the displacement of the state in favor of private sources of law is one of “social reflexivity”

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<sup>39</sup> In arbitration specifically, the current status of the legislation is the result of a long struggle to overcome what Bruno Oppetit called the “*velléités régaliennes de l'Etat nation et de la justice étatique*” (B. OPPETIT, *Théorie de l'arbitrage*, Paris 1998, p. 10).

<sup>40</sup> F. OST et M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Brussels 2002, p. 133.

<sup>41</sup> Th. FRIEDMAN, *The Lexus and the Olive Tree*, Glasgow 2000, p. xvi et seq.

<sup>42</sup> M. CASTELLS, *La galaxie Internet*, Paris 2001, pp. 147-169.

<sup>43</sup> F. OST, *Mondialisation, globalisation, universalisation : s'arracher, encore et toujours, à l'état de nature* in: *Le droit saisi par la mondialisation*, Ch.-A. MORAND (Ed.), Brussels / Basel 2001, p. 5, at p. 28; and D. ARCHIBUGI / D. HELD, « Introduction » in *Cosmopolitan Democracy : An Agenda for a New World Order*, D. ARCHIBUGI and D. HELD (Eds.), Oxford / Cambridge 1995, p. 1, at p. 13.

<sup>44</sup> On the concept of community, Gregory S. ALEXANDER, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 Cornell L. Rev. 1, 17-33 (1989), at 25; also Harvard Law Review, *Developments in the Law – The Law of Cyberspace*, Part II, *Communities Virtual and Real : Social and Political Dynamics of Law in Cyberspace*, 112 Harv. L. Rev. 1586 (1999), at 1589.

<sup>45</sup> See e.g. J. HABERMAS, *Après l'État-nation. Une nouvelle constellation politique*, Paris 2000, p. 56; G. TEUBNER, *Un droit spontané dans la société mondiale ?*, in: *Le droit saisi par la mondialisation*, cf. fn.43 above, pp. 200-201; G.-P. CALLIESS, *Rechtssicherheit und Marktbeherrschung im elektronischen Welthandel : die Globalisierung des Rechts als Herausforderung der Rechts- und Wirtschaftstheorie*, in J. DONGES / S. MAI (Eds) *E-Commerce und Wirtschaftspolitik*, Stuttgart 2001, p. 189, at 199.

(or “overlapping consensus”)<sup>46</sup>. Social reflexivity embodies the ethical necessity underlying the very notion of democracy that all those to whom a given set of rules applies be allowed to participate in the creation of this set of rules. In other words, every form of regulation should ensure as much as possible that all those who are affected by the regulation have some say in the regulatory process.

Many examples could show that this is not so in the context of globalization. Suffice it to refer here to the most obvious one, i.e., the development of the social democratic globalization movement, often called alterglobalist movement, which seeks to insert ethical clauses into the law of globalization. In the specific context of arbitration, one may for instance think of the effect certain awards in investment arbitration may have on the right of access of local communities to public resources.

## 2.2 Forces driving international arbitration in a globalized world

Who are the private actors, the driving forces who have invaded the space left by the states? First, the arbitral institutions. Their influence is not new. One will remember that the first draft of the New York Convention was prepared by the ICC<sup>47</sup>. Nevertheless, they have gained in importance and influence. Some have a longstanding history, like the AAA; others are more recent but already carry an important caseload, so for instance the Hong Kong or the Singapore Arbitration Centers. In addition to arbitral institutions, there are a number of arbitral or other organizations which contribute to the development of arbitration. The International Council for Commercial Arbitration (ICCA) is one example. Through its well-attended biennial congresses and publications<sup>48</sup>, it disseminates information on arbitration law and practice to a large audience, which

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<sup>46</sup> U. BECK / A. GIDDENS / S. LASH, *Reflexive modernization, Politics, Tradition and Aesthetics in the Modern Social Order*, Cambridge Mass. 1998; J. HABERMAS, cf. fn. 45 above; A. HÉRITIER, *After liberalization: Public Interest Services in the Utilities*, Preprints of Max Planck Projektgruppe, Recht der Gemeinschaftsgüter, Bonn, No. 5, <[www.mpp-rdg.mpg.de/publik1.html](http://www.mpp-rdg.mpg.de/publik1.html)>; J. LENOBLE / M. MAESSCHALCK, *The Action of Norms*, London 2002.

<sup>47</sup> See P. SANDERS, *The History of the New York Convention*, in: *ICCA Congress Series no.9, Improving the efficiency of arbitration agreements and awards: 40 years of application of the New York Convention*, VAN DEN BERG (Ed.), The Hague 1999, at p.11.

<sup>48</sup> *Yearbook Commercial Arbitration; International Handbook on Commercial Arbitration; ICCA Congress Series*.

works towards uniformization. Another example is the International Bar Association (IBA), with its Rules on the Taking of Evidence<sup>49</sup> and its Guidelines on Conflicts of Interests<sup>50</sup>.

How does UNCITRAL fit into this picture? Its texts undoubtedly influence the law of arbitration and it is a UN body with sixty member states. Does this not contradict the theory that private actors set the rules? No, it does not for several reasons. Looking at the UNCITRAL Model Law, it appears more like a minimum standard nowadays than a restatement of global rules<sup>51</sup>. The same applies to the UNCITRAL Arbitration Rules on which recent institutional rules improve substantially<sup>52</sup>. Finally, the recent work on the revision of the Model Law dealing with provisional remedies show that private actors play an important part in this forum as well. Such private actors include the arbitral organizations and institutions with observer status and the academics representing states.

The legal profession is another private actor participating in rulesetting. Its role is not really new either. Interestingly enough, the adoption of the FAA was made possible because the American Bar Association dropped its initial opposition to the bill<sup>53</sup>. Nowadays, even though some Continental Europeans may dislike it, multinational Anglo-American law firms do exercise substantial influence on the way in which arbitrations are conducted. This observation is often made disparagingly with aggressive litigation tactics in mind. Without denying that these may be employed at times, one more often notes the professionalism and quality of these firms' counsel work.

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<sup>49</sup> *IBA Rule on the Taking of Evidence in International Commercial Arbitration (adopted 1999)*, found on [http://www.ibanet.org/publications/IBA\\_Guides\\_Practical\\_Checklists\\_Precedents\\_and\\_Free\\_Materials.cfm](http://www.ibanet.org/publications/IBA_Guides_Practical_Checklists_Precedents_and_Free_Materials.cfm).

<sup>50</sup> *IBA Guidelines on Conflicts of Interest in International Arbitration*, same source as above fn.48.

<sup>51</sup> See paragraph 2.3 below.

<sup>52</sup> See e.g., *Swiss Rules of International Arbitration (2004)*, which are based on the UNCITRAL Arbitration Rules and, among others, contain changes and additions reflecting modern practice and comparative law in the field of international, found on [www.swissarbitration.ch](http://www.swissarbitration.ch).

<sup>53</sup> L. E. EDMONDSON, *Domke on Commercial Arbitration*, cf. fn.1 above, § 2:5, at 2-11, noting that “[t]he resumption of opposition to this principle by that Association and the subsequent proposal of a Draft Act b the Commission on Uniform laws, which was carried forward the opposition, have been instrumental in retarding further progressive statutory legislation in that direction”.

Academia is a driving force as well. In the US especially, academics have long looked with suspicion at arbitration as a valid tool of dispute resolution<sup>54</sup>. The same is not true everywhere. It is often said that the *laissez-faire* regime is primarily the legacy of French professors, specifically Berthold Goldman and Philippe Fouchard<sup>55</sup>. This may be an overstatement, but they certainly played a part and academics continue to contribute to the development of arbitration<sup>56</sup>.

Part of the legal profession and academia merge with arbitral institutions and other arbitration organizations to form what one author has called the epistemic community, a global community of knowledge. Such community is undoubtedly the major driving force in the development of arbitration law.

How does this force exercise its influence? Put simply, what does it do? Through a process of intellectual cross-fertilization or cross-pollination<sup>57</sup>, or *acculturation juridique*<sup>58</sup> in which private actors play the dominant part, a transnational consensus on the core principles of arbitration law has emerged<sup>59</sup>. That consensus encompasses broad party autonomy. The states have enacted new legislations – or the courts have interpreted existing statutes – making party autonomy a genuine source of arbitration law. That phenomenon is reinforced by the professionalization of the arbitrator community. This has led to largely harmonized arbitration laws and practice and a kind

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<sup>54</sup> Larry E. EDMONDSON, *Domke on Commercial Arbitration*, cf. fn.1 above, § 2:6, at 2-12.

<sup>55</sup> See on the concept of “delocalized” arbitration” : William W. PARK, *Procedural Evolution in Business Arbitration: Three Case Studies*, to be published shortly by Oxford University Press as part of a collection of Park’s arbitration essays, with references to Berthold GOLDMAN, *Les conflits de lois dans l’arbitrage international de droit privé*, 109 RCADI 347 (1963), at pp.379-380, 479-480; Philippe FOUCHARD, *L’arbitrage commercial international*, Paris 1965, nos. 499-500 at 321-22; and P. FOUCHARD / E. GAILLARD / B. GOLDMAN, *Traité de l’arbitrage commercial international*, Paris 1996, nos. 1172-92 at 650-662.36. In Switzerland, Chapter 12 of the Private International Law Act, which is the international arbitration statute, was mainly drafted by Prof. Pierre Lalive, Prof. Claude Reymond, and Dr. Marc Blessing, the first two being academics and practitioners. The parliamentary debates focused primarily on the constitutionality of the statute, not on its content.

<sup>56</sup> Park notes how “tenure hungry professors and eager practitioners churned out treatises (on both domestic and international arbitration) and casebooks at a pace that made arbitral scholarship a veritable industry.” (PARK, *Procedural Evolution*, cf. fn.55 above).

<sup>57</sup> Park, *Procedural evolution*, cf. fn. 55 above, p. 8.

<sup>58</sup> OPPETIT, *Théorie*, cf. fn.39 above, pp. 113-114: “*par osmose, les idées, les pratiques, les jurisprudences, avant même les législations nationales et les conventions internationales, ont progressivement convergé [...] vers un consensus sur des principes, souvent très proches, d’organisation et de fonctionnement*”.

<sup>59</sup> See e.g., Gabrielle KAUFMANN-KOHLER, *Globalization of Arbitral Procedure*, 36 Vand. J. Transnat’l L. (2003), pp. 1313ff.

of “unwritten procedural code of International Arbitration”<sup>60</sup> has crystallized. The result is that the same arbitrators conduct arbitrations in the same manner in different countries irrespective of the applicable legislation<sup>61</sup>.

Interestingly enough, this de-legalization movement, that is, the enactment of a series of flexible arbitration legislations, has not resulted in fewer rules. Quite to the contrary, the intervention of these new transnational actors has caused an increase in the informal layer of the international arbitration regime<sup>62</sup>. There are rather more procedural rules, norms, and guidelines that tend to be more extensive, detailed, and specific than ever. In other words the de-legalization has triggered a densification of the procedural rules or proceduralization (some speak of judicialization) of arbitration.

From an anthropological point of view, such an evolution is not surprising: arbitration is developing as the equivalent of courts, and courts are, according to legal anthropologists, the most perfected form of dispute resolution towards which all other forms of dispute resolution tend to evolve<sup>63</sup>. The evolution is also not surprising from a sociological point of view. Sociologists consider that, to a certain extent, the arbitration world forms a community<sup>64</sup>. Within that community, it appears natural that its evolution tends to coalesce into a harmonized phenomenon<sup>65</sup>. By contrast, nation-states do not form a community and consequently, the evolution of the normative production of states may remain divergent while the production of the community of private actors tends towards consolidation and harmonization.

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<sup>60</sup> M. MUSTILL, *The History of International Commercial Arbitration – A Sketch*, in L.W. Newman/R.D. Hill (Eds.), *The Leading Arbitrators’ Guide to International Arbitration*, New York, 2004, p. 23.

<sup>61</sup> P.-Y. TSCHANZ, *Vers un arbitrage international préventif ?*, SSJ 1/2002, p. 13.

<sup>62</sup> At the same time, however, states acquire new roles of legitimating and supporting the new institutions they have helped create. In this sense, such international arbitral institutions are ‘system preserving’ in that they reinforce the legitimacy, power and authority of the states and their governments, as well as the legitimacy of the international regime. (LYNCH, cf. fn.15, p. 121).

<sup>63</sup> J.S. AUERBACH, *Justice without Law? Resolving Disputes without Lawyers*, New York 1983, p. 15; A. SARAT / L.M. FRIEDMANN, *Courts Over Time : A Survey of Theories and Research*, in K.O. BOYUM / L. MATHER (Eds.), *Empirical Theories About Courts*, New York 1983, p. 9, at pp. 15-16.

<sup>64</sup> Y. DEZALAY / B.G. GARTH, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago / London 1996.

<sup>65</sup> G. KAUFMANN-KOHLER, *Globalization of Arbitral Procedure*, cf. fn.59 above; See also P. BERNARDINI, *L’arbitrato commerciale internazionale*, Milano 2000, p. xii; B. GOLDMAN, *Instance judiciaire et instance arbitrale internationale*, in *Études offertes à Pierre Bellet*, Paris 1991, p. 219, at p. 225.

### 2.3 Residual roles for national legislation

These observations beg the question of whether there remains any part for legislation at all. Traditional roles are tending to diminish in importance. Except in countries where arbitration is not accepted yet, legitimizing arbitration is not necessary anymore. Obviously, national legislation will continue to enforce arbitration agreements and support the arbitral process. This role is an important safety net for arbitration, especially when arbitration is under attack by recalcitrant and fearless respondents. That role has diminished, however, as the activity of arbitration institutions provides practically all the support needed.

The promotion of arbitration venues also becomes less relevant the more legislations look alike<sup>66</sup>. Here again, the weight shifts from the state to arbitral institutions. Nowadays, competition is more between arbitral institutions than arbitration sites.

In addition to traditional roles in a globalized world, new roles are emerging for national legislations. The observation of the contemporary arbitration scene points to two main roles for legislation in a globalized environment. First, in spite of an overwhelming harmonization, it is likely that states will maintain certain cultural or political preferences. Legislation will be the privileged channel for expressing such preferences.

As a matter of fact, a comparative analysis of arbitration legislations (even limited to Europe and the US) demonstrates that significant differences continue to exist. The enactment of the UNCITRAL Model Law is a good illustration for such a proposition. The states which have adopted the Model Law are jurisdictions with limited experience of arbitration and which have played a minor role on the international arbitration scene. States with a tradition of arbitration have either not adopted the Model Law at all, like Switzerland or France, or adopted it with important changes. These changes seek to

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<sup>66</sup> Although there is a vast movement towards uniformization, the applicable legislation or *lex arbitri*, which depends particularly on the seat of the arbitration, often remains relevant (on this topic, Gabrielle KAUFMANN-KOHLER, *Identifying and Applying the Law Governing the Arbitration Procedure*, in: *The Role of the Law of the Place of Arbitration in Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series nr. 9, 1999, pp. 356-365).

implement what was perceived to be the national arbitration policy. This position applies to Germany or the United Kingdom. Interestingly, much of the argument against the adoption of the Model Law in the US refers to the elimination of case law interpreting the FAA and to the jettison of a considerable amount of nationally developed expertise<sup>67</sup>.

The second residual role of national legislation is the protection of the interests of certain litigants, generally seen as the weaker party in the transaction and the litigation. This role, which may overlap with the previous one, is a direct consequence of the ethical concerns brought about by the globalization of the law which are discussed above<sup>68</sup>. A 2002 amendment of the FAA is an illustration of such a role (although it may be a misconceived one). Pursuant to the Motor Vehicle Franchise Contract Arbitration Fairness Act<sup>69</sup>, notwithstanding any other legal provision (namely the FAA), an arbitration clause in a motor vehicle franchise agreement is enforceable only if, after the controversy arises, the parties agree in writing to arbitrate. This requirement was introduced because – says the Senate Report on the original Hatch Bill - of the unequal bargaining power of the automobile dealer compared to that of the manufacturer, wholesaler or distributor.

One may have hesitations about the merits of this amendment and the legitimacy of protecting car dealers. Be this as it may, there is no doubt that applying the same standards to large international commercial disputes and minor local disputes is bound to raise difficulties because the underlying needs are different. This “one size fits all” approach certainly raises concerns for other categories of disputes, especially consumer and employment disputes<sup>70</sup>.

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<sup>67</sup> See e.g. David W. RIVKIN / Frances L. KELLNER, cf. fn.37 above, at pp. 553 ff.

<sup>68</sup> See part 2.1 above.

<sup>69</sup> Originally proposed by Senator Hatch as a new Section 17 of the FAA (that is, as an addition to Chapter 1), it was ultimately enacted as Section 11028 of an omnibus bill entitled the "21st Century Department of Justice Appropriations Authorization Act.", H.R. Con. Res. 2215, 107th Cong. (2002).

<sup>70</sup> See Senator Russel D. FEINGOLD, *Mandatory Arbitration: What Process is Due?* 39 Harvard Journal on Legislation 281 (2002).

The U.S. Supreme Court supports an extensive application of the FAA to consumer contracts. For instance, in *Green Tree Financial Corp. v. Randolph*<sup>71</sup>, it held that an arbitration agreement in a consumer contract is enforceable even if the arbitration agreement is silent with respect to arbitration costs. Unlike the lower court, the Supreme Court did not accept the consumer's argument according to which potentially high arbitration costs could preclude litigants from effectively vindicating their rights<sup>72</sup>.

The FAA refers to employment contracts in its Section 1 when it provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce". The Supreme Court has adopted a restrictive interpretation of such exemption in *Circuit City v. Adams*, holding that "the § 1 exclusion provision [must] be afforded a narrow construction"<sup>73</sup>. The topic of arbitrability of labor and employment issues is still the object of heated debate in the US. The narrow construction of the FAA exceptions is seen as far from satisfactory by a number of organizations active in the field of employment and workplace discrimination. Even while admitting certain advantages of arbitration, Thomas Carbonneau gives us a lead as to the preoccupations of its opponents: "How serious is U.S. society about integrating minorities, blacks, and women into the workplace if claims of sexual harassment are submitted to private remedial mechanisms at the employer's choice?"<sup>74</sup>.

Legislation as a tool to protect the interests of certain individuals does not necessarily lead to restraining arbitration. On the contrary, well-concerned protection may also

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<sup>71</sup> *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000).

<sup>72</sup> According to the Supreme Court, "the 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement" (*Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 [2000], at 90-91). Thus, the Supreme Court does not deny the possible relevance of costs with respect to the litigants' rights, but puts the onus on the consumer to bring proof in support of the assertion that the costs would be prohibitive. It also "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants'" (*Green Tree Financial Corp. v. Randolph*, at 59-60).

<sup>73</sup> *Circuit City Stores, Inc. v. Adams*, at 116-121, 118. For a critique of the *Circuit City* decision, see W. PARK, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 Vand. J. Transnat'l L. (2003), pp. 1288ff.

<sup>74</sup> Thomas CARBONNEAU, *Cases and Materials on the Law and Practice of Arbitration*, cf. fn.14 above.

mean imposing arbitration in segments of social life, where arbitration is perceived as the best possible solution. Sports disputes between athletes and governing bodies are the most noticeable example.

The 1998 Ted Stevens Olympic and Amateur Sport Act<sup>75</sup> directs the US National Olympic Committee to provide for "swift resolution of conflicts and disputes involving amateur, [i.e., "Olympic", including professional] athletes, national governing bodies and amateur sports organizations"<sup>76</sup>. Recognition of the status of national governing body is contingent upon the sports organization agreeing to submit to binding arbitration<sup>77</sup>.

This type of legislative intervention appears to have spread to other countries. For instance, the Government of Canada has recently enacted legislation making the

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<sup>75</sup> The Amateur Sports Act (Public Law 95-606) was adopted in 1978. It was amended in 1998 to become the Olympic and Amateur Sports Act (OASA). Because of the efforts of Senator Ted Stevens of Alaska to shepherd the act through Congress, the 1998 amendments are often called the "Ted Stevens Amendments."

<sup>76</sup> 36 USC 220509(a). This provision further states that "[i]n any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate in the Olympic Games, the Paralympic Games, or the Pan-American Games, a court shall not grant injunctive relief against the corporation within 21 days before the beginning of such games if the corporation, after consultation with the chair of the Athletes' Advisory Council, has provided a sworn statement in writing executed by an officer of the corporation to such court that its constitution and bylaws cannot provide for the resolution of such dispute prior to the beginning of such games".

<sup>77</sup> 36 USC 220522, which reads as follows:

" (a) An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it—

[...]

(4) agrees to submit to binding arbitration in any controversy involving:

(A) its recognition as a national governing body, as provided for in section 220529 of this title, upon demand of the corporation; and

(B) the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, upon demand of the corporation or any aggrieved amateur athlete, coach, trainer, manager, administrator or official, conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified and provided for in the corporation's constitution and bylaws, except that if the Athletes' Advisory Council and National Governing Bodies' Council do not concur on any modifications to such Rules, and if the corporation's executive committee is not able to facilitate such concurrence, the Commercial Rules of Arbitration shall apply unless at least two-thirds of the corporation's board of directors approves modifications to such Rules."

funding of national governing sports bodies contingent upon the establishment of a mechanism of “independent arbitration as an element of its grievance procedures”<sup>78</sup>.

### 3. Conclusion

It is time to reach some conclusions.

The FAA is an outstanding piece of legislation, not only for its durability<sup>79</sup>, but mainly because it has achieved the goals of legitimating and supporting arbitration remarkably well. It certainly received help from the courts in doing so, but then again it was adaptable<sup>80</sup> enough to accept such help. This being so, from a foreign perspective a revision would certainly be welcome. Indeed it would create the easily accessible and transparent legal framework that non-US lawyers currently miss.

With the advent of globalization, the power to regulate arbitration has shifted from the states to private actors. These private actors form a global community of knowledge, or epistemic community, which is the major driving force in the development of arbitration nowadays. These private actors fill the void left by the states, and this de-legalization movement has resulted in a densification of the informal layer of arbitration regulation. On this basis, it is likely that the prospective role of legislation will remain minimal for larger international commercial disputes.

The same does not hold true when it comes to the protection of categories of actors that have no access to the epistemic community and thus no say in the formulation of the new private rules. Claims which involve litigants with a need for protection do require different regimes than the one applicable to larger international disputes. Hence, one could think that the role of legislation in the future will increasingly be to provide special regimes for certain specific categories of disputes.

Time will tell whether this analysis is correct and – who knows? – the 90<sup>th</sup> anniversary of the FAA might provide a good opportunity for an update.

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<sup>78</sup> Quoted by Susan HASLIP, *A consideration of the need for a national dispute resolution system for national sport organizations*, Canada Marquette Sports Law Review 2001, p. 245 at p.250.

<sup>79</sup> William H. WEBSTER, *The FAA – Going the Distance: Elements of Legislative Durability*, Second Lecture in: *Federal Arbitration Act at 80: A Tribute Anniversary Lecture Series*, 10 February 2005, available on the AAA's website: <http://www.adr.org>.

<sup>80</sup> John FEERICK, *Why a Federal Arbitration Act?: Modern Arbitration at its Core*, First Lecture in: *Federal Arbitration Act at 80: A Tribute Anniversary Lecture Series*, 25 October 2004, available on the AAA's website : <http://www.adr.org>.