Globalization and the Future of Courts of Arbitration

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A. Introduction

Arbitral justice is the most ancient form of justice. Its origins date at least as far back as ancient Rome and Greece, where a number of arbitration awards are reported at both domestic and international level. The Roman arbitral tradition was reviewed during the Middle Ages and then embedded, as far as the European Continent is concerned, in the French Constitutions of 1791 and of Year III, which proclaimed the constitutional right of citizens to resort to arbitration.

Arbitration was entirely subordinated to state justice. The extent of this subordination varied according to the progress of society, law and justice within the given jurisdiction. States often showed resistance to arbitration, since it was perceived more as a way of ousting state jurisdiction than an acceptable method of rendering justice. Arbitration agreements therefore used to require rigid forms. The parties' capacity to arbitrate, the arbitrability of disputes and the arbitrators' competence to decide on their own jurisdiction required the fulfilment of strict conditions.

This antagonistic attitude of states towards arbitration began to change with the progressive growth of international business transactions and the evolving needs of the international business community for new methods of dispute resolution.

The first half of the 20th century saw the beginning of autonomous arbitration although conciliation or expertise were often more important as a form of dispute resolution. To a large extent the procedures were conducted within closed business groups and the arbitrators and conciliators came from the same professional backgrounds.

During that period the first international instruments on international arbitration were signed, such as the Geneva Protocol of 1923, which aimed in particular at ensuring the validity of arbitration agreements at a time when many countries did not recognize the validity of such agreements.

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At that time the first true arbitration system in the world was created by the International Chamber of Commerce (ICC). Until the end of the World War II it dealt with some 730 arbitration cases. Until the second half of the 20th century the need for the services of an autonomous international forum for the resolution of commercial disputes was, however, limited.

B. Growth

The real change began after World War II with the growth in the volume of international business transactions. The pressure exerted by the needs of international trade and commerce contributed to the emergence of arbitration as the preferred alternative to state justice, which is often not in a position to guarantee prompt, effective and knowledgeable dispute resolution of international business disputes.

Thus the initial disfavour and mistrust of arbitration was replaced by a general acceptance, provided that limitations imposed by national law for allowing the parties to adopt this method of dispute resolution were respected. The scope of these limitations was gradually reduced by changes in national legislations and also thanks to an increasingly liberal attitude by state courts. The autonomy of the arbitral process from state proceedings became more and more significant.

This positive attitude of states towards arbitration was reflected in the adoption of a new international legal framework.

C. Major Conventional Steps and Modification of National Laws

In 1953 the ICC took the initiative for a new instrument on the execution of foreign arbitral awards and submitted to the United Nations (UN) the draft of a Convention on the enforcement of international awards, which was to become the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The Convention has been ratified by more than 120 countries, including most major trading nations.

This international effort was extended to the then-socialist Council for Mutual Economic Assistance (CMEA) countries with the signing in 1972 of the Moscow Convention, which aimed at satisfying the need for an independent dispute resolution forum in this part of the world, despite political and economic characteristics that differed from those of the Western countries. According to the Moscow Convention, all disputes between economic organizations resulting from contractual and other civil law cases arising in the course of economic, scientific and

technical co-operation among the parties to the Convention were subject to arbitration, excluding the recourse to the state courts' jurisdiction. It should be mentioned that the recourse to arbitration in this case was not chosen by the free will of the parties. However, the arbitrators acting in these 'compulsory' arbitral proceedings, as well as the parties and their legal representatives, adopted a 'capitalist' form of dispute resolution, which permitted the spreading of the arbitration culture within these countries.

Another international instrument was the European Convention on International Commercial Arbitration of 1961, which provided some important supplementary provisions at a regional level. This Convention was open to Western and the then-CMEA countries and strengthened the role of arbitration as the preferred method to resolve international business disputes.

Parallel to these conventional developments, states were being pressured by the interested circles regarding the growing practical relevance of arbitration and of international arbitration in particular for their national economies. States were encouraged to modernize their arbitration laws in order to offer an attractive and effective forum for the resolution of international business disputes.

When reforming their laws, states have generally been guided by the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) of 1985, now adopted by some 40 jurisdictions throughout the world. The Model Law contains universally elaborated solutions reflecting an international consensus regarding the proper conduct of arbitration proceedings. Such solutions have often been recognized and utilized even by courts in jurisdictions which have not adopted the Model Law, as they were seen to reflect generally accepted principles and could therefore be taken into account in the absence of specific national norms.

By now all major European countries have enacted new legislation, starting with the French legislation in 1981, and ending with the adoption of the Model Law in Germany 1999. One of the major features of these recent enactments, many of them influenced by the UNCITRAL Model Law, consists in further reducing the role of state courts in international arbitral proceedings.

Only when absolutely unavoidable do state courts continue to have some measure of jurisdiction over arbitral proceedings, as their assistance may become necessary. For example, state courts may be required to act when the constitution of the arbitral tribunal is blocked or when there is a general failure of the arbitration rules or the arbitral institution. Also, the assistance of state courts may be required for questions relating to conservatory and interim measures.

Finally courts, either at the place of the arbitration or at the place of enforcement of arbitral awards, have retained their oversight regarding the basic due process of the proceedings and the conformity of the awards with international public order. Within these limitations arbitrators are free to establish the facts, apply the law and decide on the merits of the dispute.

D. Arbitral Institutions

The real growth of arbitration went hand in hand with the increasing globalization of international commerce. States began to realize that the reduction of barriers to global commerce was in their interest as it produced more wealth.

This growth contributed to the development of arbitral institutions and other organizations offering dispute resolution services throughout the world. The ICC International Court of Arbitration was created in 1923. Other institutions, usually with a strong local base regarding both the parties seeking their services and the arbitrators appointed by them, participated in this institutional emergence, such as the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration. The same can be noticed with regard to the Cairo and Kuala Lumpur Regional Centres for International Commercial Arbitration or the China International Economic and Trade Arbitration Commission (CIETAC).

The growth of international business transactions and therefore of the number of disputes arising therefrom significantly increased the caseload of the major international arbitration institutions. The number of new cases annually registered by the ICC grew as follows:

1970:	126
1980:	250
1990:	365
1999:	529

In addition to the major international arbitration institutions, which have been existing for some time, many local organizations have set up their own centres. Usually the expectations to attract international business have not been fulfilled but they often do play an important role for domestic arbitration and as a training ground where arbitrators, parties and their counsel can gain first-hand experience of the arbitral process.

Other than the development of a truly international approach to arbitration, detached from the idiosyncrasies of national procedural laws, a similar development has taken place regarding the substantive law.

Obviously the parties can and often do agree on a national law to govern their contract. The solutions developed within one law for a homogenous business community are, however, not always best suited to deal with international business disputes. Arbitrators have therefore been called upon to apply unwritten anational rules, sometimes referred to as *lex mercatoria*.

Based on an interplay between published decisions of arbitrators, especially those of institutions like the ICC, and the work of practitioners and scientists, transnational rules such as the UNIDROIT principles of 1994 have emerged. These principles endeavour to articulate suitable norms for the special requirements of international business by trying to identify rules common to

the majority of legal systems and which appear to be suited for cross-border transactions.

E. Evolution of the Legal Profession

All these legislative and institutional efforts to make arbitration receptive to the needs of the expanding international business community go hand in hand with the globalization of the legal profession, which is restructuring itself in order to be able to respond to the needs of international business. This has brought about an increased sophistication of the legal profession and often a collaboration or integration of major law firms throughout the world. Also countries which traditionally were reluctant to accept arbitration, especially in international relations, such as Latin American countries, realized the benefits of a reliable international dispute resolution system for the local economy.

Another example of enlarging the horizon for international dispute resolution systems was that which took place in the US in connection with the Iran-US Claims Tribunal.

This Tribunal was set up in The Hague, Netherlands, in 1981 under the Algiers Accords in the attempt to resolve the crisis, which had developed between the two countries after the Iranian Revolution of 1979. Over 900 claims of American parties for amounts for more than USD 100,000 were submitted to the Tribunal against Iran. Previously, international commercial arbitration in the US was basically handled by a small number of large East Coast law firms. Suddenly, American lawyers throughout the country were called upon to represent their clients before an international arbitral tribunal in a procedure which previously had been completely alien to them. This exposure led to a larger understanding of the benefits of international commercial arbitration. Furthermore, a considerable number of young American attorneys worked in the staff of the Tribunal and familiarized themselves with the arbitral process. Many of these lawyers have since become partners in American law firms or professors at various universities, with the benefit of this first-hand experience in international arbitration.

A further contribution of this Tribunal to the general practice of arbitration was that all of its decisions have been published including its jurisprudence on the application of its rule, which basically are the UNCITRAL Rules of Arbitration, therefore giving guidelines and precedents regarding these rules.

A further example of the use of arbitration to resolve international disputes in a new field on a global basis is given by the Court of Arbitration for Sport. The expanding role of sport and its increasing commercial importance led the sports community, originally under the initiative of the International Olympic Committee, to set up this tribunal to deal with sport related disputes, including those of a commercial nature, and involving arbitrators familiar with the specific problems.

F. New Challenges

It is fair to say that arbitration always played an important role in fostering international relations. In this article we are not dealing with the important role of arbitration in international public law. As outlined earlier, arbitration accompanied the growth of international commerce. It saw its role as offering the tools best suited to international business to resolve disputes whenever they arose. The major institutions especially see their role in facilitating the growth of international business by offering the necessary tools to resolve the disputes arising in international business.

New challenges have recently arisen. One of the problems of the success of arbitration in international commercial relationships has been the increasing tendency to conduct proceedings as a quasi state court procedure. The growing involvement of lawyers, often not familiar with the specific advantages of arbitration on the procedural level, has resulted in a tendency often to treat arbitration as if it was the same as a lawsuit before a national court. A growing need for further alternative dispute resolution methods, such as mediation or conciliation and other procedures referred to as Alternative Dispute Resolution (ADR), have emerged. ADR can be a voluntary, party-controlled and highly flexible procedure, which, subject to contractual clauses or subsequent agreements between the parties, aims at consensual resolution of disputes between the parties and leaves them free at any time to step out of the procedure. Such procedure can be informal, flexible and ideally render a fast resolution, at low cost, obviously without the final binding and executionable result which arbitration can give.

The ICC is therefore presently evaluating its role in the field of ADR practice. What must be kept in mind is that such methods are complementary and not antagonistic to the further development of arbitration. ADR may also favour the development of arbitration by adding to its flexibility, in particular by combining ADR and arbitration. No ADR is conceivable without preserving the right of the parties to resort to arbitration or to state court proceedings in the event that no consensual solution is arrived at.

The need for new dispute resolution methods is particularly notable with regard to the recent explosion of electronic commerce, where no satisfactory dispute resolution mechanism permitting the resolution of this kind of dispute has so far emerged. Many state courts are currently, for various reasons, unable to ensure the effective resolution of electronic commerce disputes. International arbitration, as we know it, still needs to properly define the role it can and should play in this growing field of trans-border commercial activity.

There is, therefore, a real need for new, international methods that provide sufficiently predictable and cost-effective solutions. Without such methods, the tremendous expectations created by electronic commerce might be severely jeopardized.

What is required under the circumstances are dispute resolution mechanisms that

are suitable for the type of disputes arising out of electronic commerce, and which will permit a swift and fair resolution of disputes.

The growing number of small transactions taking place across borders is a reality of globalization, which goes beyond the scope of electronic commerce. The handling of small claims by international arbitration is thus another challenge to be met. Traditional methods and procedures, notably those that concern the remuneration of arbitrators, will have to be adapted or replaced if the international arbitration community is to meet this challenge. Another challenge is to find appropriate solutions of a global nature to resolve in a fair and objective manner specific issues which could not be decided by state courts for political reasons or because of the lack of flexibility in state courts' procedures. The Iran/US Claims Court is one of the examples of this tendency; other examples can also be noted such as the UN Compensation Commission or the Claims Resolution Tribunal for Dormant Accounts in Switzerland.

The role of the major international arbitration institutions is to actively participate as leaders in the development of adequate answers to deal with the disputes arising from continuously growing international commerce. Based on their experience and the great number of cases submitted to them, they are in a prime position to present, together with business, solutions suitable to assist the business community and thereby contribute to the growth of prosperity.