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International Commercial Arbitration: Realities and Perspectives

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Editorial

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The last thirty years have witnessed the decline of ideologies and the dissipation of long-cherished myths. Changing reality does not seem to have left much room for universal constructions supplying an all-encompassing array of ready-made answers to all possible questions.

International commercial arbitration is not an exception to this general phenomenon. The notion of international commercial arbitration as the pivotal jurisdictional device of a theoretical international merchant community, enabling it to apply its self-made rules without state interference, has been convincingly challenged from different angles. The contrary dogma that international commercial arbitration is *ab initio* incompatible with state interests, particularly in certain areas where important public policy questions are at stake, also appears to be receding in a growing number of sensitive fields. The U.S. Supreme Court's recent Mitsubishi decision is not only a proof of that, but may also be read as an open invitation to international arbitrators to apply, or to take into account, relevant international mandatory rules or *lois de police* in their decision-making process, whichever be the proper law of the transaction from which the dispute arises. If such an attitude is widely adopted by international commercial arbitrators, it should lead to a further withdrawal of state objections to the arbitrability of international commercial disputes.

The idealized vision of an arbitral process necessarily leading to a fast, peaceful and non-antagonistic resolution of disputes and to the amicable restoration of deteriorated commercial relations has also lost its somewhat mythic appeal. In arbitration—just as in court litigation—the aim is often total victory at the cost of the adversary's total defeat, even if winning implies

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antagonism for life, or an aftermath of indifference. Arbitral awards seeking a middle way between conflicting claims, without giving absolute reason to any of the parties, is neither necessarily well regarded nor sought. As experience also shows, arbitration does not offer a waterproof guarantee against protracted litigation and chicanery.

What is then really left of international commercial arbitration? A lot, as soon as one gets rid of ideological preconceptions or mythical delusions. International arbitral adjudication allows the parties to choose in advance the most appropriate forum for deciding disputes having international elements, not only in terms of neutrality and expertise, but also of geographical convenience for parties located in different countries. It permits the formation of adjudicators and lawyers specialized in international litigation irrespective of their original legal background. Since international commercial arbitration develops within a special procedural context, it tends to neutralize or at least attenuate the advantages or specialized knowledge any party or lawyer might have on account of his national background, or of the membership of a particular national bar.

As a matter of fact, arbitration leads to the creation of an international bar requiring specific expertise which may be acquired irrespective of any national attachments. This enhances the evenhandedness and equal opportunity basis offered by international commercial arbitration and contrives the formation of a common transnational atmosphere—a shared "arbitral culture"—among practitioners and adjudicators, which is to redound to the better and swifter resolution of international commercial disputes. This culture is in its turn inculcated by the lawyers in their clients through a true educational process, starting by the persuasive influence of the trusted counsel who inserts an arbitral clause when drafting the contract. If any, this seems so far to be the only incipient sociological substratum international commercial arbitration may truly claim as its own.

The fact that international commercial arbitrators often base their decisions on substantive justice rules and principles, not necessarily identical with the type of justice afforded by national courts, is another token of the suitability of arbitration for resolving international commercial disputes. International commercial arbitration generally evidences a non-parochial approach to the application of national laws, favoured by the normally reduced court controls on the enforcement of foreign awards. Within the limits traced by the international mandatory rules and public policy principles of the relevant connected national forums, it can decisively contribute to the formation of specific substantive rules specially adapted to international commercial transactions, and also enjoying wide international recognition at

the level of national courts and authorities. This seems to be the necessary framework circumscribing any social engineering role played by arbitration in the field of international commercial law.

Also, international commercial arbitration has the unique advantage, in a fast changing world, of being detached from aprioristic ideas or dogmas. Arbitral adjudicators are more committed than judges to creating an *ad hoc*, tailor-made solution for each specific case, against the backdrop of the particular facts and related legal implications of the controverted issue at stake. For so doing, they are not tyrannically bound either by prior precedent or by abstract dogmas. In that sense, international commercial arbitrators are not only free from the rigidities of precedent under Common Law, which has been sarcastically characterized (with some exaggeration) as a system where ". . . you can destroy your opponent's arguments by showing that nobody has ever thought of them before", but also from the sometimes inexorable abstractions of the continental law system, which led André Tunc to write, with a touch of humour, a paper under the eloquent title "It is Wise not to take the Civil Code too Seriously".[1]

It seems advisable to wait and see what the future has in store for international commercial arbitration in the light of the foregoing considerations. In the meantime, it is to be desired that the recent and gradually expanding trend favouring the application of international mandatory rules by arbitral adjudicators be accompanied by the growing conviction that, as a matter of principle, reasons should be given for arbitral awards. Thus, it is submitted, many of the reservations of national legislators and courts *vis-à-vis* international commercial arbitrators are likely to fade away.

[1] P. S. Atiyah, *Pragmatism and Theory in English Law*, 3, 7 (1987).