

## **Arbitration: Back to the Future**

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*It is equitable...to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail (Aristotle, Rhetoric, book 1, chapter 13).*

*The existing judicial system is too costly, too painful, too destructive, too inefficient for a truly civilized people... To rely on the adversarial process as the principal means of resolving conflicting claims is a mistake that must be corrected (US Supreme Court Chief Justice Warren E. Burger)*

*Sumario:* I. First. Presentation. Futurology. II. Second. The present. 1. Expansion of arbitration scope. 2. Enlarging arbitrability. 3. Weakening of the “spirit of arbitration”. 4. Consolidation of party autonomy. 5. Judges acceptance of arbitration. 6. Dispelling the “splitting baby” myth. 7. The solitude of the drafting lawyers. 8. III. Third. Some points that can shape the future of arbitration. 1. Arbitration accretion. 2. Privatization of justice. 3. Progressive growth of arbitration. 4. Common law / civil law convergence. 5. Expansion of investor–state arbitration. 6. Expansion of sport arbitration. 7. The “electronization” of arbitration. 8. Time and cost. 9. Specialized arbitration clauses. 10. Integrity, independence and impartiality of arbitrators. 11. Arbitrating class actions. 12. Use of discovery. 13. Interim measures. 14. Challenging awards. 15. Non signatories. Arbitration rests on con-

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\* Dos días después de la entrega de este artículo a la redacción de esta Revista fallecía inesperadamente su autor en su despacho de Barcelona con la consiguiente consternación del mundo jurídico catalán, español e internacional. Tras cincuenta años de carrera profesional, Ramón Mullerat estaba considerado como un referente esencial dentro del arbitraje y uno de los árbitros españoles con proyección más internacionales. Era abogado en los Colegios de Barcelona y Madrid, en la Court de París, miembro honorario de la Law Society of England and Wales, y ex–copresidente del Human Rights Institute de la International Bar Association, entre otros diversos cargos. Asimismo, fue miembro de la London Court of International Arbitration (LCIA) y del Club Español del Arbitraje; autor del informe para la revisión del Código de Ética del Consejo de Colegios de Abogados de la CE; y miembro y ponente del Comité para la revisión del Código de Ética de la International Bar Association (IBA). La Redacción de esta Revista publica este estudio en homenaje a quien ha sido un profesional clave en las relaciones de la abogacía española con las instituciones extranjeras.

sent. 16. Construction arbitration. 17. Mixing processes. 18. Arbitrators' immunity. 19. Arbitration and third party funders. 20. New York Convention 1958. IV. Conclusion.

## **I. First. Presentation. Futurology**

It has been ironically said that it is difficult to make predictions, especially about the future. It is also dangerous. Apollo, Zeus' son, enjoyed showing up at the temples around Greece built in his honor. One day, Apollo swung by the temple in Troy. Cassandra, a beautiful priestess, worked at the temple. The minute Apollo saw Cassandra, he fell in love. Apollo offered Cassandra a deal. He would give her the gift of prophecy – the ability to see the future – if she would give him a kiss. Cassandra thought that was a great deal. Apollo gave her his gift. Instantly, Cassandra saw Apollo, in the future, helping the Greeks destroy Troy. When Apollo bent his head to gently kiss her, she angrily spit in his face. Apollo was furious. He could not take away his gift, but he could add to it. Although Cassandra could, forever after, see the future, no one would ever believe her.

In this paper, my contribution to the International Arbitration Congress in Barcelona, I intend to give some strokes of the present of arbitration and to venture a forecast about its future.

Futurology is a social science that studies the current trends in order to foresee future developments. It is impossible to foretell the future with complete accuracy, but there are signs at present which permit serious predictions. Fuelled by the unstoppable growth of modern technologies, mortals are every time more interested in discovering the forthcoming. Future studies programs and investigation proliferate in most universities and political and business centers.

My curiosity for the analysis of the future originates in three personal experiences. The first was my chairing 20 years ago a CCBE committee (*L'avenir de la profession*) in which a group of lawyers intended to prophesize what destiny had for law and lawyers. The second one is the prospection that the ABA<sup>1</sup> conducted some years ago to decipher the future of the profession and in which task force chaired by Bob Gray I had the honor to serve as a foreign consultant. The last and most recent one is Michio Kaku (*Physics of the future*, 2011) in which the physicist explains, after interviewing three hundred of the world's top scientists, how science will shape human destiny and our daily lives by the year 2100.

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<sup>1</sup> ABA Committee on Research About the Future of the Legal Profession, 2002.

The preoccupation for how arbitration will look like in the next two, three or more decades is constant and the number of articles and conferences is thriving<sup>2</sup>.

## II: Second. The present

Any consideration of future developments of any institution needs to start by looking at past and present developments in the field. It is fitting and proper to reflect on the recent history and the present as a background of the future that lies ahead.

If I would have written this piece a few years ago, I would have referred as the future of arbitration to some trends that today are already a reality. I will only bring up a miscellaneous few of them because, as William Park<sup>3</sup> recognized, the past half century has brought an *embarras de richesse* in the evolution of arbitration's procedural architecture.

1. *Expansion of arbitration scope.* Arbitration has experienced a remarkable growth: i) more matters have become arbitrable; ii) arbitration has proliferated in more sectors (labour<sup>4</sup>, insurance<sup>5</sup>, consumer<sup>6</sup>, securities<sup>7</sup>, sport<sup>8</sup>, intellectual property, investment, air space, telecommunications<sup>9</sup> even in tax matters<sup>10 11</sup>); iii) arbitral insti-

<sup>2</sup> For instance, the Symposium "International Arbitration: A Look to the Future", *Virginia Law*, 27 February 2009; the Conference on "The Future of Arbitration", George Washington University Law School, 17–18 March 2011; the Moot Alumni Association, "Lessons from the past and visions for the future of international arbitration", Hong Kong 18 March 2012; the 21st ICCA Congress in Singapore, "International Arbitration— the Coming of a New Age?", 10–13 June 2012; the Congress on International Arbitration "Back to the Future" in Barcelona 17–20 October 2012; the 29th Joint Colloquium on International Arbitration, co-sponsored by the AAA, the ICC and the ICSID, "Frontiers of Arbitration – Issues and Challenges, 2 November 2012; and many others.

<sup>3</sup> W.W. Park, "Procedural Evolution in Business Arbitration: Three Studies in Change", *Arbitration of International Business Disputes*, 2006, p. 1.

<sup>4</sup> American Arbitration Association, 1978, *The Future of Arbitration* including an article by D. Feller "The Impact of External Law upon Labor Arbitration".

<sup>5</sup> Many insurance policies now require arbitration in disputes with insured. *Public Citizen*, "Arbitration Clauses in Insurance Contracts: The Urgent Need for Reform".

<sup>6</sup> B.J. Fitch, "The Future of Consumer Arbitration in Light of Stolt– Nielsen".

<sup>7</sup> D. Masucci, "Securities Arbitration—A Success Story: What Does the Future Hold? 31 *Wake Forest L. Rev.*, 183 spring, 1996.

<sup>8</sup> M. Mangan, "The Court of Arbitration for Sport: Current Practice, Emerging Trends and Future Hurdles", *Arb. Int'l.*, 2009, vol. 25, no. 4.

<sup>9</sup> K.–H. Böckstiegel, "Some reflections on dispute settlement in air, space and telecommunication law", *Contribution to Liber Amicorum for Ulf France*.

tutions administering arbitration have multiplied or branched out<sup>12</sup>; iv) arbitration is increasingly being used in more countries in Latin–America, Asia and Africa; v) more legal professions are entering the arbitration world (retired judges, notaries, academics); vi) new international arbitrators are coming from more jurisdictions<sup>13</sup>; vii) participation of states and international organizations due to the increasing presence of such organizations in international transactions<sup>14</sup>. According to the 2006 International Arbitration Study: Corporate Attitudes and Practices of the Queen Mary University<sup>15</sup>, a significant majority of corporations prefer international arbitration to resolve their cross border disputes and 73% of the participating corporations prefer to use international arbitration.

*2. Enlarging arbitrability.* Some areas which traditionally were beyond the arbitrability scope are today fully accepted in arbitration and namely disputes in public law<sup>16</sup>, competition, insurance, employment and other fields.

Let us take competition as an example<sup>17</sup>. Competition law is mandatory law (*jus cogens*) that prohibits agreements and practices which

<sup>10</sup> In Portugal Decree–Law n° 10/2011, of 20 January introduced a tax arbitration system to resolve tax conflicts. *Vid.* M. Durham Agrellos, “O Regime de Arbitragem Tributária Português”, *Actualidad Jurídica (Uría & Menéndez)*, n° 29, May 2011. In Spain a similar system was proposed but it failed.

<sup>11</sup> However, some of these arbitrations are very different as compared to the simple scheme of two companies that have a dispute and enter into arbitration. For instance, when talk about consumer and employee arbitrations, many believe that it is a fiction that most people enter freely into those contracts and that we should analyze them as very different methods particularly for the necessity to protecting the weaker party from adhesion contracts.

<sup>12</sup> ICC have national committees in over 90 of the world’s nations, LCIA has branched out in India and Dubai, American Arbitration and International Centre for Dispute Resolution (ICDR) started offices in New York and Dublin, etc.

<sup>13</sup> Since its creation in 1923, the ICC has administered more than 19.000 disputes involving parties and arbitrators from some 180 countries and independent territories.

<sup>14</sup> K.–H. Böckstiegel, “Perspectives of Future Development in International Arbitration”, *The Leading Arbitrators’ Guide to International Arbitration*, 2008, p. 821.

<sup>15</sup> Queen Mary University, 2006 International Arbitration Study: Corporate Attitudes and Practices. This study is one of the largest independently conducted empirical surveys on international arbitration. The study targeted corporations as the end users of the arbitration process, and explored their attitudes and perceptions towards arbitration. It involved 143 corporations through their corporate counsels, from various industry sectors, from Europe, Asia, Americas, Africa and Middle East.

<sup>16</sup> Many countries have opposed to arbitrate contracts related to public law and still do. Ph. Leboulanger, “L’arbitrabilité des contrats administratifs en droit égyptien, note sous l’arrêt de la cour d’appel du Caire du 19 mars 1997”, *Rev. arb.*, 1997, p. 283.

<sup>17</sup> R. Mullerat, “Arbitration and competition law: A basic summary of the debate”, 2011.

restrict competition or lead to a dominant position and is aimed at promoting a competitive marketplace, seen as the main driver towards innovation and development, and to produce decreasing prices to the benefit of consumers<sup>18</sup>. In 1985, the US Supreme Court rendered its decision in *Mitsubishi*<sup>19</sup> embodying recognition of the applicability of arbitration to the adjudication of disputes containing public policy issues (anti-trust law)<sup>20</sup>. In Europe, although in the ECJ *Eco-Swiss v. Benetton*<sup>21</sup> arbitrability of competition law issues was not explicitly recognised, in this influential judgment the ECJ ruled that a national court which is asked to vacate an arbitration award, must decide the vacation if it considers that the award in question is contrary to art. 81 of the EC Treaty. Similarly to the US position, if the arbitrator does not apply EU law, the judge seeking to enforce the award may regard the non-application of EU law as a violation of public policy. The ECJ implied that, even if claims implicating competition law constitute public policy, it considers them as arbitrable.

3. *Weakening of the "spirit of arbitration"*. The potential of arbitration as an effective and economical process alternative to litigation is diminishing so that arbitration is slowly becoming like litigation, so much so that some claim that arbitration is simply "litigation in another guise". Since the Iran-US arbitration in 1981<sup>22</sup>, the tight shoe of

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<sup>18</sup> J. Hrle, *op. cit.*, p. 19, citing S.M. Willinsky, "The Concept(s) of Competition", 1997, 1 *E.C.L.R.*, p. 54, makes a comparison of the different approaches of the US and the EU regarding competition law, saying that the US system is largely predicated on minimizing welfare losses to consumers. The Chicago school of thought proclaims that economic efficiency should be the sole pursuit of the competitive process and antitrust policy should seek to prevent the inefficient allocation of resources. Whereas price fixing cartelization is perceived as anticompetitive, practices such as predatory pricing, tie-ins, and resale price maintenance are perceived as beneficial to the consumer. Contrarily, European competition rules are primarily concerned with market integration and European competition was formulated to ensure that the historical barriers to trade within Europe could not be instituted again by business cartelization of the region. Market integration is then the dominant feature of European competition law.

<sup>19</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>20</sup> *Vid.* among many, C. Talbot, *op. cit.* R. von Mehren, "From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law", 12 *Brooklyn J. Int'l L.*, 1986, p. 583.

<sup>21</sup> *Eco Swiss China Time Ltd. v. Benetton International N.V.*, ECJ 126 / 97.

<sup>22</sup> The Iran-US Claims Tribunal was an international arbitral tribunal established out of an agreement between Iran and the US, in 1981 to resolve claims by US nationals for compensation for assets nationalized by the Iranian government, and claims by the governments against each other. The seat of the Tribunal was The Hague and was composed of 9 arbitrators: 3 appointed by Iran, 3 appointed by the US, and 3 by the previous 6 arbitrators. This tribunal represented the starting of the point for the expansion of international arbitration

arbitration had to be stretched out. Fali Nariman<sup>23</sup>, one of the most distinguished international scholars in international arbitration said arbitration has become almost indistinguishable from litigation, which it was at one time intended to supplant. As it has been justly noted<sup>24</sup>, arbitration's growth in the past decades had given businesses and lawyers the confidence to use it in the most complex and important cases. But those cases are often way too complex for the traditional arbitration paradigm when the parties presented their dispute simply to an arbitrator that was knowledgeable in their business without much process at all, and got a final and binding decision quickly based on the presentation of relevant facts. Parties to disputes today usually want the protection of elaborately detailed arbitration agreements, pre-hearing discovery, motions for summary disposition, sophisticated evidence and in some cases the right to challenge the award for legal error. They also want highly experienced arbitrators, trial-like hearings, and reasoned awards. Such requests are difficult to reconcile with the desirable simplicity of arbitration. In the future the arbitral community needs to make all efforts to strike an equilibrium between continue solving complex controversies and at the same time reinvigorating its pristine spirit.

4. *Consolidation of party autonomy*<sup>25</sup>. Party autonomy is the preponderant principle in arbitration, endorsed not only in national laws, but by international arbitral institutions and organizations<sup>26</sup>. Party autonomy has become the basic pillar in arbitration nemine discrepante. A clear exponent of the supremacy of the recognition of the will of the parties is, for example, the 1996 English Act (s. 1(b)): "the parties should be free to agree how their disputes are resolved, subject

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<sup>23</sup> F. Nariman, "The Spirit of Arbitration: The Tenth Annual Goff Lecture", *Arb. Int'l*, 2000, vol. 16, issue 3, pp. 261–278.

<sup>24</sup> R. Chernick, W. F. Rylaarsdam, Th. J. Stipanowich & S.J. Ware, "The Future of Commercial Arbitration", *Pepperdine Dispute Res. L. J.*, vol. 9, 2, 2009

<sup>25</sup> M. Pyles, "Limits to Party Autonomy in Arbitral Procedure", 2009. However, *vid. C. Chatterjee*, "The Reality of the Party Autonomy Rule in International Arbitration", *J. Int'l Arb.*, 20(6), 2003, pp. 539–560: "the party autonomy rule is exercised by lawyers acting on behalf of their parties, then the exercise of the rule becomes a derived one, and its exercise becomes limited to the knowledge of the lawyers concerned practicing under various legal systems" ... "Although in the majority of cases the party autonomy rule is effectively exercised by the lawyers acting on behalf of their parties, it nevertheless offers a degree of psychological satisfaction to the parties that they may have chosen the best arbitrators, the form and forum of arbitration, and the governing law".

<sup>26</sup> Redfern and Hunter, with Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., 2004, p 315.

only to such safeguards as are necessary in the public interest”<sup>27</sup>. Today the autonomy of parties extends to most of the areas and aspects of arbitration including: the appointment of arbitrators; the choice of the seat and the governing law; the appointment of experts; the determination of the timetable; the choice of the language of the arbitration; the form of the awards; etc.

Related to the previous one is the principle of flexibility whereby the parties have an almost absolute freedom to construct the arbitral procedure and to decide the evidence they will use<sup>28</sup>. The present situation of arbitration has permitted to overcome one of the preliminary hurdles for arbitration, and to strike a balance between legislation (a fixed set of rules) and flexibility, which has become one of the stereotypes of arbitration<sup>29</sup>. When in-house counsel were asked to list the advantages of arbitration, according to the 2006 Queen Mary study<sup>30</sup>, flexibility was named more often than anything else. Lawyers lauded the fact that arbitration gives parties great leeway to structure a dispute-resolution process to fit their individual cases.

5. *Judges acceptance of arbitration.* Generally, in many countries and for many years laws and judges did not trust and even had a certain hostility or at least reticence towards arbitration, because justice was felt to be the monopoly of the judiciary. This attitude has given a U-turn and there is an increasing judicial acceptance and endorsement of arbitration. Even more, the considerable development of arbitration as a favored mode of dispute resolution has been largely due to the decisive thrust of jurisprudence particularly of international arbitration<sup>31</sup>. If arbitration has been recently thriving, this

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<sup>27</sup> However, public interest has an overriding effect over the party autonomy rule. Section 4(1) of the Act provides that: “The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary”.

<sup>28</sup> E. Ricci, “Evidence in International Arbitration Between Flexibility and Fairness: A milestone in the road of harmonization of different traditions”, *International Association of Procedural Law*, 2009 Toronto Conference

<sup>29</sup> *Vid.* W.W. Park, “Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure”, *Arb. Int'l*, vol. 23, no. 3, LCIA, 2007, p. 499.

<sup>30</sup> 2006 International Arbitration Study: Corporate Attitudes and Practices. The major advantages of arbitration, as evidenced in the study are procedural flexibility of procedure, enforceability of awards, privacy in the arbitral process and the opportunity accorded to the parties to select their own arbitrators.

<sup>31</sup> In France, C. Reymond, “Reflexions sur quelques problemes de l’arbitrage international. Faiblesses, menaces et perspectives”, *L’avenir du droit. Melanges en Hommage de Francois Terre*, 1999, pp. 786 and ss, notes the role of courts in France in the development limiting to the internal domain the restrictions brought about by legislative provisions to the recourse of public institutions to arbitration. He asks if “*la notion meme*

path has been paved by a change in judicial attitude towards acceptance of arbitration as a true alternative to litigation, coupled with legislative reform across the planet. Nowadays, in many countries judges are able to compel or otherwise persuade parties to mediate or arbitrate.

6. *Dispelling the “splitting baby” myth.* Many in-house counsel and corporate attorneys strongly assume that in their decisions arbitrators tend to rule down in the middle when making awards rather than engage in a decision based on the facts that favor one party over another. This is familiarly known as “the splitting baby myth” or dividing awards evenly among the parties<sup>32 33</sup>. Mostly due to the power of the arbitrator to ‘do equity’, the arbitrator may render an award that, rather than granting complete relief to one side, “splits the baby” by giving each side part of what they requested so both parties leave the table feeling that justice was not served. But tempora mutantur, and every time there is greater confidence on the rightness of arbitrators’ decisions. They believe that arbitration often gives Solomonic solutions<sup>34</sup> or ‘splits the baby’ rather than resolves cases on their merits is visibly disappearing. Several studies demonstrate that

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*d’arbitrage international ... ne doit pas beaucoup a la volonte des juges francais d’echapper a des restrictions propres au droit francais et d’ailleurs inconnues de la plupart d’autres legislations”.*

<sup>32</sup> In a study conducted by the Rand Institute for Civil Justice in 2011, surveying corporate counsel, “Business to business arbitration in the United States”, the conclusion was that over 70% of the respondents agreed that arbitrators tend to “split the baby” and only 14% disagreed.

<sup>33</sup> S. Ritchie, “Arbitration myth busting. What every attorney and client needs to know”, [www.plaintiffmagazine.com](http://www.plaintiffmagazine.com), September 2007. Daphna Kapeliuk, “The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators”, 2010.

<sup>34</sup> The expression “Solomonic solution”, often used for a form of simple compromise solutions which “split the difference” in terms of damage awards or other remedies is the opposite of that of the original metaphor. The expression originates in 1 Kings 3:16–28. Two women who lived in the same house and who both had an infant son came to Solomon for a judgment. One of the women claimed that the other, after accidentally smothering her own son while sleeping, had exchanged the two children to make it appear that the living child was hers. The other woman denied this and so both women claimed to be the mother of the living son and said that the dead boy belonged to the other. King Solomon called for a sword to be brought before him. He declared that there was only one fair solution: the live son must be split in two, each woman receiving half of the child. The liar exclaimed, “It shall be neither mine nor yours—divide it!”. However, upon hearing this terrible verdict, the boy’s true mother cried out, “Please, my Lord, give her the live child—do not kill him!”. Solomon gave the live baby to the real mother, realizing that the true mother’s instincts were to protect her child, while the liar revealed that she did not truly love the child.



today a great majority of cases are outright “wins or loses” awards<sup>35</sup>. It is important to continue develop strategies and tactics that assure no such biases affect results.

7. *The solitude of the drafting lawyers*. Although Albert Einstein said that solitude is painful when one is young, but delightful when one is more mature, it seems that solitude is too often the companion of legal professionals regardless of age. Piero Calamandrei<sup>36</sup>, for instance, reminds that solitude is the “judge’s drama”. Here I want to evoke in particular the aloneness of the lawyers when drafting arbitration clauses. What I mean is these lawyers do not often receive sufficient attention and assistance from clients when drafting the dispute resolution clauses at the end of contracts, what can be called the “solitude of the lawyer”<sup>37</sup>. Take a normal M&A contract. When preparing the contract, the purchaser is obsessed with the finance of the purchase price, the modernity of the plant, the products, the customers and the balance–sheet. He has little interest in discussing how to handle future possible disputes and leaves the lawyer alone to decide about the different choices of mediation/arbitration/litigation, the arbitral centers and rules, the seat, the discovery and other evidence and many other items essential when disputes arise. In the first place, the purchaser alleges no time for “legalisms” and, in the second, he does not conceive even for a minute that his cherished deal may fail or encounter difficulties. It is like a loving couple just to be married who are suggested a possible divorce contract to discuss.

8. *Administered or institutional arbitration absorbing ad hoc arbitration*<sup>38</sup>. As arbitration cases and procedures become more complex and financially significant there is an increasing predominance of institutionalized arbitration in detriment of ad hoc arbitration, where the parties refer their dispute to a certain arbitrator who is not subject to institutional arbitration rules. The organization and regulation of

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<sup>35</sup> Vid. C. Ingwalson, “Dispelling Arbitration Myths”, *Utah State Bar 2011 Summer Convention*, who refers to a number of surveys where the “splitting the baby” myth is dispelled.

<sup>36</sup> P. Calamandrei, *Elogio dei giudici scritto da un avvocato*, 1935, p. 347: “il dramma del giudice e la solitudine”.

<sup>37</sup> Ch. Charriere–Bournazel, President du Conseil National des Barreaux, “... *Mais si l'exercice de notre métier nous fait éprouver, parfois jusqu'à l'angoisse, la solitude, ce qui nous rend fort, c'est notre unité, malgré nos diversités.*”

<sup>38</sup> R. Mullerat, “Ventajas e inconvenientes del arbitraje institucional”, 2006. Paul Friedland, *Choosing Between Administered and Non–Administered Arbitration – Chapter 3 – Arbitration Clauses for International Contracts* – 2nd ed., 2007.

the main arbitration institutions have been stupendously reinvigorated in the last decades and practically all international arbitrations are submitted to the rules and administration of an institution. Over thirty years ago, in 1979, Yves Derains<sup>39</sup> explained how, among the different alternatives at the time lying ahead the ICC International Court of Arbitration, the ICC sought to improve the arbitral mechanism by strengthening its successful features, including a) its international, as opposed to regional character, b) its universal nature in terms of the kind of disputes before the court and c) its institutional rather than ad hoc proceedings.

Indeed, today most international disputes contemplate international institute of arbitration, such as the world arbitration institutions as the ICC, the LCIA, the International Centre for the Settlement of Investment Disputes (ICSID) and the American Arbitration Association (AAA) and many other institutions, rather than ad hoc arbitration. According to the 2006 International Arbitration Study: Corporate Attitudes and Practices of the Queen Mary University<sup>40</sup>, over three quarters of corporations favor institutional arbitration. Ad hoc arbitration is today generally relegated to disputes involving domestic arbitration and smaller claims and less affluent parties.

### III. Third. Some points that can shape the future of arbitration

Fifteen years ago, Claude Reymond<sup>41</sup> questioned himself whether the arbitration edifice has already attained a certain degree of perfection or there would be changes to arbitration with the inherent risks and threats. The previous miscellaneous comments of chapter Second may help us to understand where arbitration stands today. However, since the main purpose of this paper is to try to foresee the future, in this chapter I plan to outline some topics which may characterize future arbitration in years to come and probable sooner than later since *fugit irreparabile tempus*:

1. *Arbitration accretion*. Benjamin Franklin asked once: “when mankind will be convinced and agree to settle their difficulties by ar-

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<sup>39</sup> Y. Derains, “The Future of ICC Arbitration”, 14 *Journal of Int’l L. & Economics*, 1979–1980, p. 437.

<sup>40</sup> Queen Mary University, *2006 International Arbitration Study: Corporate Attitudes and Practices*.

<sup>41</sup> C. Reymond, *op. cit.*, p.790.

bitration?”. Although not unanimously accepted<sup>42</sup>, today almost everybody concur that arbitration will continue its spectacular expansion in the future. It is comprehensible that in our information and communication age, due to the technology revolution and computer microminiaturization advances, where speed has become an icon, society cannot be satisfied with an administration of justice mostly shaped by the means and needs of the industrial era and requires a quicker and less costly justice. Indeed, the majority of academic and practitioners agree that arbitration and particularly international arbitration will continue increasing and at an accelerated speed<sup>43</sup>. The rapid consolidation of globalization and increase of international relations will be accompanied by a concomitant progression in international disputes. Rather than permit international disputes being decided in national courts, many parties will progressively more prefer to submit them to a tribunal which is not part of the governmental structure of a particular state. The increased desirability and utilization of arbitration as a flexible, expeditious and efficient method of handling inter-

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<sup>42</sup> *Vid.*, for instance, M. Hunter, “International Commercial Dispute Resolution: The Challenge of the Twenty–First century”, 16 *LCIA Arbitration International*, 2009, p. 379. Hunter predicts that over the next few years we shall experience a proportionate decline in the engagement of third parties for assistance in resolving international trade disputes the current level of expansion for work for arbitrators and mediators will decline and there will be an increasing demand for dispute management specialists rather than dispute resolution experts. He states that we are already seeing a movement away from the three classical forms of third party intervention in dispute resolution –the judge in his court; the arbitrator in his hotel conference room; and the mediator trying to get the parties to reach some form of compromise settlement. For him “dispute management” means two things: dispute avoidance and dispute negotiation.

<sup>43</sup> *FTI Journal*, April 2010: “The statistics speak for themselves. There has been a steady rise in international arbitration during the past 20 years but the current climate marks a spike in new cases, sparked by the prolonged global economic crisis. At the LCIA, new claims filed increased by 55% between 2007 and 2008, and again by over 14% in 2009 to 243 cases. Statistics from ICC and the Swiss Chambers’ Court of Arbitration and Mediation (SCCAM) tell the same story. ICC new cases increased 11% in 2008 and a further 23% in 2009, to 817 new claims. New SCCAM claims rose 15% in 2008, before leaping 53% in 2009 to 104 requests for arbitration (the majority of which involved non–Swiss parties). The Dubai International Arbitration Centre reported a doubling of cases in 2009 compared with 2008, as the economic crisis finally caught up with the Middle East. Similar trends have also been observed in Asia. In response, major law firms around the world are expanding their specialist teams to cope with the demand and relocating arbitration specialists to emerging economies and centers of arbitration, principally in the Middle East and Far East”. *ICC* 6 January 2012. The ICC International Court of Arbitration registered 795 arbitration cases in 2011 under ICC Rules of Arbitration, surpassing the previous year by two cases. On average, the ICC has registered 800 cases per year since 2009. arbitration means its practices are not widely known. R. Mullerat, *Arbitraje en el Mundo y en España. Una Vision Estadistica*, 2011.

national commercial disputes will be manifest. As I have advanced, this expansion has being already promoted in some countries by the supportive attitude of the courts. With regard to the USA, as Margaret Moses<sup>44</sup> states: i) the Supreme Court announced a federal policy favoring arbitration and requiring that “any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration”<sup>45</sup>; b) it has held that the FAA’s coverage extends to the full extent of the Congress’ power under the commercial clause; c) it has held that the FAA applies to actions brought in the state court; d) the Court has found that even statutory rights such a those under employment discrimination laws, anti-trust law and security laws are arbitrable; d) it has interpreted the FAA to preempt state laws protective of weaker parties subject to pre-dispute arbitration clauses in adhesion contracts<sup>46</sup>. There is, then, in the US a strong favoritism toward arbitration including in arbitration clauses in adhesion contracts<sup>47</sup>. If today the majority of large and medium international transactions contemplate arbitration, this will become the general rule in the future of the interrelated and interconnected world.

2. *Privatization of justice*<sup>48</sup>. Privatization is the signa temporum. Alternative dispute resolution will increasingly conquer more adepts in public and private spheres and governments and businesses will further support the ADR movement. It has been said that in a not distant future arbitration and mediation will be the normal system for civil disputes and that the state administration of justice will become the alternative. In a more developed world and citizens’ higher awareness of their rights, the cost of an overworked state judicial sys-

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<sup>44</sup> M. Moses, *The Principles and Practice of International Commercial Arbitration*, 2008.

<sup>45</sup> *Mem Hosital v. Mercury Const. Corp*, 460 US 1, 1983.

<sup>46</sup> However, such expansion is being criticized because it may deprive weaker parties such as consumers and employees and favor repeat players. *Vid.* for instance, L.J. Brachter, “Do We Really Want to Privatize the Justice System?: Ethical and Constitutional Problems With Arbitration”, 6 May 2011; M. Moses, “Privatized “Justice” – Loyola University Chicago, 4 April 2005; M.H. Malin “The Privatization of Justice: Ethical Issues in Employment Arbitration” *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 *Hastings L.J.*, 1993, p. 1187.

<sup>47</sup> J.P. Tomaszewski, “The Enforceability of Adhesive Clauses in International Software Licenses”, *Journal of Technology Law & Practice*, Vol. 3, Issue 1, 1997.

<sup>48</sup> P.H. Lindblom, 1992. “The Privatization of Justice: Some Aspects of Recent Developments in American and Swedish Procedural Law”, *Netherlands Int’l L. Rev.*, 39, pp. 199–214. “The Privatization of Justice?: Mandatory Arbitration and the State Courts: Report of the 2003”, Forum for State Appellate Court Judges.

tem for civil claims is an issue that concerns governments. As Murray Miskin<sup>49</sup> thinks, while there will always be a need for society to punish those who commit crimes and thus governing funding of criminal courts, civil justice is another story. And that for the middle class even in publicly funded courts the cost is too high for most people to pursue civil claims for conflict resolution and that government everywhere are looking to privatize the courts and promote SDR rather than fund them more. He puts the example of Ontario introducing mandatory mediation and arbitration of condominium disputes under the Condominium Act and he sustains that society cannot afford to fund court process for civil disputes and that governments will privatize justice in most jurisdictions. He also indicates that many judges also are quitting their careers on the bench for more remunerative positions as providers of ADR services.

3. *Progressive growth of arbitration.* The further increase of the use of ADRs is an easy prediction because most signs go uniformly in this direction. With regard to arbitration, the expectation is that it will be even more pervasive in domestic and especially in international arbitration. In addition to the expansion of arbitration experienced in the second part of the last century (*Vid.* Second, 1 above), it is expected that the privatization of justice and arbitration in particular will be introduced in a few more areas in which arbitration has had difficulties in penetrating, such as arbitration of collective bargaining agreements<sup>50</sup>, medical malpractice claims<sup>51</sup>, arbitration in consumers' credit card agreements and others which continues to be challenged<sup>52</sup>.

4. *Common law / civil law convergence*<sup>53</sup>. The two legal traditions, once considered rigidly parallel and irreconcilable like two railway tracks, will continue, although slowly, converging and arbitration will

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<sup>49</sup> M. Miskin, "Conflict Resolution: The Future is Arbitration not Court", 1 June 2012.

<sup>50</sup> *Eastern Associated Coal Corporation v. United Mine Workers of American*, District 17, 531 U.S. 57, 121S.Ct. 462, 148 L.Ed.2d 354 (2000).

<sup>51</sup> Th. B. Metzloff, "The Unrealized Potential of Malpractice Arbitration", 31 *Wake Forest L.Rev.*, 1996, pp. 203–230.

<sup>52</sup> M. Furletti, "Mandatory Arbitration Clauses in the Credit Card Industry", *Federal Reserve Bank of Philadelphia*, January 2003.

<sup>53</sup> N. Georgiev, "Cultural Differences or Cultural Clash? The Future of International Commercial Arbitration", April 2012; R. Mullerat, "Court and Arbitration Procedures. Common Law and Civil Law Compared. Two Different but Convergent Vehicles". S. Elsing and J. Townsend, "Bridging the Common Law Civil Law Divide in Arbitration", *Int'l Arb.*, 2002; J. Hermida, "Convergence of Civil Law and Common Law contracts in the Space Field"; G. Rojas Elgueta, *Divergences and Convergences of Common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, 2009.

increasingly continue to be one of the decisive factors promoting such approach. In spite of the obvious differences between the two traditions –in substantive and procedural law– civil law and common law are little by little coming together and more particularly in international arbitration. The signs of this confluence in general are manifold. One may mention the flow of international conventions such as the Convention on International Sales of Goods, the Convention on the Applicable Law to Contractual Obligations, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the Lugano Convention on the same subject, and particularly the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which are unifying important areas of law. Civil law countries are progressively taking up common law institutions like leasing, factoring, franchising, merchandising, etc. and adjusting old notions common to the two legal systems (such as the assignment of credits, licensing of know-how, etc.) to the needs of modern trade. In the real estate area, common law long-term leases will become even more frequent in civil law systems and the sale of the mere right of surface which is now already commonly used everywhere<sup>54</sup>.

There is also an incessant interchange of legal concepts, for example the growing use of the “reasonability” concept in civil law and the growing acceptance of the bona fides notion in common law. The approach is also visible by the increasing written steps in procedural common law jurisdictions and verbalism growing in civil law ones. The EU will continue being a great catalyst of the two legal cultures. The EU directives (for example the directives on company law, consumer law, etc.) have acted as catalyst agents of both the EU common law countries and the civil law ones. In particular, with regard to civil procedures, as professor Kerameus rightly pointed out, although there exist some apparently irreducible differences between the two systems (and mainly in trial by jury, and in the conception of jurisdiction), other reveal some signs of convergence particularly in the scope of appellate review or even in discovery devices<sup>55 56</sup>. In international

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<sup>54</sup> M. Rubino-Sammartano, “Language and the Law: Civil and Common Law”, *International Legal Practitioner*, March 2000, pp. 21 and ss.

<sup>55</sup> K.D. Kerameus, “A Civilian Lawyer Looks at Common Law Procedure”, *Louisiana L. Rev.*, 1985, p. 497.

<sup>56</sup> G. Hazard Jr., H.–H. Jescheck, Th. Weigend, S.C. Yeazell, S.C. Yudofsky, M.D., “Procedural Law”, *Enciclopedia Britannica*: “Despite the distinctions between civil and common law just described, there arguably have been recent trends toward convergence.

arbitration in particular, the two legal systems are rapidly converging in a globalized world thanks to *lex mercatoria* and many initiatives such as the UNCITRAL Model Law 1985 and the IBA Rules on the Taking of Evidence in International Commercial Arbitration 1999 (revised 2010) which has the merit of having harmonized different traditions in arbitration, based on the principles of party autonomy and more collaborative role of controller courts and also the symbiosis of legal cultures developed through the arbitration rules of major arbitration institutions (ICC, AAA, LCIA, ICSID, etc.). Therefore, in the future, probably not a near future, but the future, our descendants will witness the unification of the legal systems of a globalized world, first in commercial law, including arbitration law, and subsequently in procedural, family and succession law. As the Romans used to say, *certus an, incertus quando*.

5. *Expansion of investor–state arbitration*<sup>57</sup>. Investment arbitration, through the myriad of Bilateral Investment Treaties (BITs) –

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In private–law matters, courts in civil–law countries do not initiate proceedings on their own; rather, they decide only claims brought forward by the parties and normally only on the basis of evidence proposed by them. Indeed, in practice they give the parties much of the responsibility for suggesting lines of proof. Nor do judges in common–law countries always play merely the role of an impartial arbiter. In some cases, such as those involving the welfare of children, they often take a more active role in seeking out the facts. Because a series of separate hearings make a proceeding unduly long, procedural reforms in some civil–law countries favor (but do not mandate) a single, well–prepared, main hearing at which the decision is reached. By contrast, in England, where the civil jury trial originated, the jury has fallen into almost complete disuse in civil cases, except in suits of defamation. In the United States, although trial by jury is a constitutional right, jury trials occur in fewer than 5 percent of filed civil actions. Many civil actions in the United States consist of a series of pretrial motions, often involving discovery, at the end of which the case is terminated by settlement or by pretrial judgment. In such cases—the great majority—the process in many respects resembles the civil law system: a series of staged judicial rulings rather than a compressed trial of the entire case”.

<sup>57</sup> Ch. Dugan, N.D. Rubins, D. Wallace and B. Sabahi, *Investor–State Arbitration*, 2008; K.–H. Böckstiegel, “An Arbitrator’s Perspective of BITs and their Relation to Other International Law Obligations”, *Conference 50 Years of Bilateral Investment Treaties Taking Stock and Look to the Future*, 1–3 December 2009 and “Perspectives of Future Development in International Arbitration”, *The Leading Arbitrators’ Guide to International Arbitration*, 2008, p. 821, 2009. C. Binder, U. Kriebaum, A. Reinisch and S. Wittich, *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer*, 2009; O. Chung, “The Lopsided International Investment Law Regime and Its Effect on the Future of Investor–State Arbitration”, *47 Va. J. Int’l L.* 953, 2006–2007; A. Stone Sweet, “Investor–State Arbitration: Proportionality’s New Frontier”, *Law and Ethics of Human Rights* 4.1, 47–76, 2010; G. Van Harten, *Reform of Investor–State Arbitration: A Perspective from Canada*, 2011.

which have been called both a blight and a blessing— ICSID<sup>58</sup> and the Energy Charter Treaty, is bound to continue as a major factor in the development of the global economic system in years to come. However, the fact that some Latin–American countries have denounced the ICSID Convention (Bolivia 2007, Ecuador 2009, Venezuela 2012)<sup>59</sup> is a concerning sign of flaws in the system which requires an attentive analysis<sup>60</sup>. Indeed, after a considerable success, investor–state arbitration needs to address important technical, legal and political issues. From a technical viewpoint, for instance, the everlasting debate on the definition of “investment”; striking a balance between the competing interests of transparency and confidentiality; the use of precedents in investment arbitration; interim measures and the outcome of the new procedure for dismissal of frivolous claims (2006 amendments to the ICSID Rules). From a juridical–political standpoint, it must be pondered if international investment agreements take insufficient steps to balance the rights and obligations of the parties involved, if investment protection regimes constitute an unjustifiable infringement on the sovereignty of states and place unreasonable constraints on their ability to make laws on social, environmental and economic matters and to act in the public interest; if investor–state arbitration confer greater legal rights on foreign business than those available to domestic businesses<sup>61</sup>; the debate on the MFN (most favored nation) –that foreign and domestic businesses are treated equally under the law–. Other hurdles which need to be overcome are the difficult balance in investment arbitration in determining the point at which a sovereign’s tax measures are tantamount to an ex-

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<sup>58</sup> M. Kinnear, “The Future of ICSID” – Chapter 1 – *Investment Treaty Arbitration and International Law* – Volume 5, June, 2012.

<sup>59</sup> As an example, in 2008 Ecuador denounced the ICSID Convention and 12 BITs with other Latin American countries. As an explanation for their radical actions, the government stated that the BITs in question were not attracting sufficient foreign capital. The denunciations came as part of the government’s unfolding plan to revise the Country’s position towards foreign investment. On September 28 2009, President Correa demanded the denunciation of BITs that Ecuador has signed with Germany, France, Finland, Sweden, Canada, China, the United Kingdom, the Netherlands, Ireland, Argentina, Chile, Venezuela, Switzerland and the United States. He justified this move by arguing that such BITs contain clauses, such as the notorious provision for international arbitration, which both violate the new Ecuadorian Constitution and are harmful to national interests. The President also took issue with the fact that recent international arbitral decisions have been handed down that are in total disregard of Ecuadorian law.

<sup>60</sup> C.A. Rogers and R.P. Alford (eds.), *The Future of Investment Arbitration*, 2009.

<sup>61</sup> In April 2011, the Australian government adopted a policy position which rejects the use of investor–state arbitration in future trade deals. *Vid.* D. Beckstead, “Is the Australian Model the Future of Investor–state Arbitration?”, 13 March 2012.



propriation; to what extent arbitrators should address public policy matters; and in general the relations between BITs and human rights. From an EU special standpoint, the interaction of investment treaty law with European law is also a growing concern for investors and arbitral tribunals, especially in the energy sector and the Energy Charter Treaty (ECT) and the continuing applicability of intra-EU investment treaties, discussing their far-reaching overlap with the protection afforded by European law<sup>62 63</sup>.

6. *Expansion of sport arbitration*<sup>64</sup>. Due to the spreading out of this new sphere of arbitration which was inaugurated only in 1984, and the implementation of significant reforms 10 years later, the activity of the Court of Arbitration for Sport (CAS) is extremely promising. The prediction is that sport arbitration will even improve its attractiveness by resolving some of its hurdles. In particular, CAS sports arbitration will need to look at issues such as those that derive from having a common seat for all CAS cases and an only tribunal (Swiss Federal Tribunal) with the authority to supervise CAS arbitrations no matter where they take place; several types of appeals with the authority to review the facts and the law of a challenged decision on a *de novo* basis; the 270 arbitrators on the CAS list of arbitrators which sacrifices party autonomy for efficiency; some tight procedural timetables; the consolidation of a body of principles applicable to sports disputes, or a *lex sportiva*; the balancing of publicity of the awards and the principle of confidentiality; the problems related to the application of different default laws depending on which sports body has taken action the application of different laws in with the risk of inconsistent decisions; the reforms to the structure of the CAS Code; disciplinary matters to improve the transparency of the proceedings; discouraging unmeritorious claims and appeals, and spread important messages about such things as the fight against doping. The young sports arbitration will undoubtedly see many adjustments in the years to come. As the Olympics Motto proclaims *Citius, Altius, Fortius*.

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<sup>62</sup> J. Kleinheisterkamp, "The Next 10 Year ECT Investment Arbitration: a Vision for the Future—from a European Law Perspective", *LSE law, society and economy working papers*, 07, 2011.

<sup>63</sup> P.M. Blyschak s, "State Consent, Investor Interests and the Future of Investment Arbitration: Reanalyzing the Jurisdiction of Investor–State Tribunals in Hard Cases", *Asper Review of International Business and Trade Law* 99, 2009.

<sup>64</sup> M. Mangan, "The Court of Arbitration for Sport: Current Practice, Emerging Trends and Future Hurdles", *Arb. Int'l*, 2009, vol. 25, no. 4; R.H. McLaren, "The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes", 2011.

7. *The “electronization” of arbitration*<sup>65</sup>. In terms of communications, we are living a transition period. Twenty years ago everything was in paper; twenty years from now everything will be electronic; in the meanwhile we have to juggle with the two<sup>66</sup>. There is a strong tendency for legal authorities to have a digital alternative to time-consuming paperwork and inefficient inter-agency communications. Some of the operations already “electronized” in many countries are communications between parties and courts, document management, computer access in the court house to all filed court documents. Some countries even have already introduced total or partial “paperless courts” or have pilot programs to go paperless. Information technology is already revolutionizing the justice system in general. In arbitration, particularly in international arbitration where by definition arbitrators, parties, lawyers and experts live in far distances, easy and speedy communications are essential. Most arbitration institutions offer already sophisticated means of communication, document reproduction, recording and videoconferencing. It is logically expected that in a non-distant future lawyers and arbitrators’ offices will also be paperless or virtual. The future arbitration (and litigation) will be mostly electronic and over the Internet.

There is a distinction between “online arbitration”<sup>67</sup> and the use of electronic in traditional arbitration communications. As the UNCTAD/EDM<sup>68</sup> has noted, although e-commerce is experiencing continued rapid growth, submitting disputes in e-commerce to the kind of arbitration offline creates notable problems. Can the parties become properly engaged through electronic channels? Will they be able to submit electronic evidence in support of their claims? Under what condition can an exclusive electronic arbitration procedure be organized without the litigants having to be present? Can an award be made electronically? Regarding the use of electronics in traditional arbitration this is experiencing a significant growth. Sensible to this phenomenon, the ICC placed the recent revision of its Arbitration Rules 2011 in line with the modern means of electronic communica-

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<sup>65</sup> A.L. Schwartz, “Navigating Through the Future Complications of International Arbitration Under the Internet and the Expansion into Generic Top Level Domains”, November 2011.

<sup>66</sup> R. Susskind, *The Future of Law*, 1996, says lawyers will not be called lawyers any longer but “legal information engineers”, with its scaring acronym.

<sup>67</sup> F. Badiei, “Online Arbitration Definition and its Distinctive Features”; A. Yutsel, “Online International Arbitration”.

<sup>68</sup> United Nations Conference on Trade and Development, Dispute Settlement. Commercial Arbitration. 5.9. *Electronic Arbitration*, 2003.

tion allowing the arbitral tribunal and the Secretariat communicate by email (as was already being done in practice). Notifications and communications, says article. 3, 2, “may be made by delivery against receipt, registered mail, courier, mail or any other means of telecommunication that provides a record of the shipment”.

It is difficult to imagine what can happen to law and arbitration if, according to Moore’s law, computer power doubles every 18 months. Michio Kaku<sup>69</sup> states that the destiny of computers, like electricity, is “to disappear into the fabrics of our lives, to be everywhere and nowhere, silently and seamlessly carrying out our wishes” and that “the rapid rise of computer power by the year 2100 will give us power like that of the gods of mythology we once worshipped”. It is hard however to imagine a “God–arbitrator”!

8. *Time and cost*<sup>70</sup>. Time and cost are the two main traditional advantages as well as advertising slogans for litigants resorting to arbitration. Since these two stereotypes have been eroded and arbitration is no longer a simple system to settle disputes, too often becoming another long and expensive procedure, there is an increasing interest in the arbitration world, including laws and rules, to recuperate them and to reach fair and impartial results in timely and inexpensive ways<sup>71</sup>. The reasons for this loss are to be found in proceedings becoming more complex and with higher amounts in dispute, and lawyers introducing techniques and strategies proper of court proceedings.

The concern to accelerate and lower costs is demonstrated by the recent reform of arbitration laws in this century, eg, Japan (2003), Check Republic and Malta (2004), Denmark (2005), Italy (2006), Poland (2007), Australia, Ireland and Scotland (2010), France (2011) and Spain again (2011). It has also been the leit–motif of the revision of many rules such as the UNCITRAL Rules (2010), the IBA Rules on Taking of Evidence in International Commercial Arbitration (revised

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<sup>69</sup> M. Kaku, *op. cit.*, p.25.

<sup>70</sup> R. Mullerat, “El tiempo y el coste del arbitraje: como mantener el estereotipo”, *La Notaria*, no. 4/2011–1/2012.

<sup>71</sup> The American Arbitration Association (AAA) announced in 2010 a new Flexible Fee Schedule, allowing clients to initiate arbitration proceedings at a reduced rate, available. This pilot program applies to all claims involving the Commercial, International, Employment, and Construction Rules and offers lower initial filing fees and increased flexibility for parties. Both parties can agree to choose the same fee schedule, or each party can individually choose the schedule that is best for them, either the Flexible Fee Schedule for the Standard Fee Schedule.

in 2010), and the recent reform of the ICC Rules for Arbitration 2011. In the last example, in September 2011 (into force on 1 January 2012), the ICC revised its Arbitration Rules with two main goals: to modernize and to reduce the time and cost of their procedures. With respect to modernization, allowing the incorporation of “additional parties” in the process, the regulation of multi-party arbitrations and arbitration consolidation, creating an emergency arbitrator for action before the constitution of the tribunal, the possibility that courts order the confidentiality of arbitration and recognizing that communications and hearings may be made electronically. In order to save time and money specifically, in 2007 the ICC had already published a report (Reducing Time and Costs in Arbitration set up by the ICC Commission on Arbitration), in which task force I had the honor of participating. Now, the amended Arbitration Rules order the parties and the Court to make “every effort to conduct the arbitration in an expeditious and cost-effective manner”, give the tribunal express case management responsibilities, including a mandatory case management conference to establish the procedures for the arbitration (art. 24.1) and in Appendix IV offers “Techniques for the conduct of the case” that provide examples of methods to control the time and cost. Some of the suggested case management strategies consist of: identifying issues that can be decided on the basis of documents alone, without a hearing; limiting document disclosure to those documents that are material to the case; and allowing the parties to continue settlement discussions.

One of the reasons for the unfortunate increase of delays and cost is that arbitration has become too formal—with too much discovery, too many motions and challenges, and too often superfluous evidence which make lose the primordial characteristics and approach it to the judicial system. The present activity by the arbitration players to improve the situation —the parties, their lawyers (particularly limiting discovery, time-periods, etc.), arbitration institutions (offering expedited procedures, less delays, etc.) and the courts to mitigating this problem will continue in the future<sup>72</sup>.

With the aim to minimize the time and cost, it has become fashionable in recent years the use of certain methods of dispute resolution within the family of arbitration, especially suitable for some sectors such as construction, for example:

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<sup>72</sup> R. Chernick, W.F. Rylaarsdam, Th.J. Stipanowich & S.J. Ware, “The Future of Commercial Arbitration”, *Pepperdine Dispute Resolution L.J.*, vol. 9, 2, 2009.

*Adjudication*, where the parties submit their dispute to the opinion of a “contracting authority” (which resolves in a short time). The procedure does not follow the rules of arbitration and is faster and more effective than court proceedings and even arbitration. The main difference is that an arbitration award is final and binding, whereas the adjudicator’s ruling is binding only if accepted by the parties or confirmed by the courts.

*Fast track or accelerated arbitration*, for the expeditious resolution of less complex disputes or claims. These methods substantially reduce paperwork and delays to a minimum, the test limit (number of witnesses and documents), delete the hearings and have a highly experienced referee with wide powers in resolving the process. The essence is that deadlines are strictly determined in advance for each action by the parties or by the arbitrator and parties are not allowed to ask for extensions or postponements<sup>73</sup>.

*100-day arbitration*, in which within 7 days of his appointment, the arbitrator establishes a procedural timetable to include an overall period of no longer than 100 days including a hearing for a period not exceeding 10 days and 28 days to have conclusions of the findings for the award. Any extension of the 100 days has to be agreed by the parties (or the arbitrator if given power to do so).

*Partnering*, a management procedure aimed at the prevention of conflict over a project, usually construction. It uses a neutral facilitator to guide the process of communication between the various disciplines involved in a project, from conceptual stages of design to completion of construction, incorporating principles of mediation and negotiation. The process reorients the objectives of confrontation to a set of common goals and open communication and provides methods to deal with conflicts and creates a collaborative environment for economic advantage.

*Baseball arbitration* is probably the best paradigm of reaching rapidly an economy in arbitration. In the “baseball arbitration” the arbitrator decides choosing between two proposals necessarily complete and firm awards that the parties submit to the referee after the exchange of written pleadings.

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<sup>73</sup> Many institutions have created rules for this type of fast track procedures, among them, the Swiss Rules (42), the WIPO Expedited Arbitration Rules, the Stockholm Chamber of Commerce Rules for Expedited Arbitrations (SCC), the AAA Commercial Arbitration Rules (Part E) CIETAC Arbitration Rules and (50 ff), and others.

*High–low arbitration*, where the parties mutually establish, before the hearing, upper and lower limits for the award decision. If the arbitrator's decision is between the high and low amount, that amount is the final award. However, if the award is above the preset maximum, it automatically moves down to the high amount previously agreed. Conversely, if the arbitrator's decision is below the minimum, the award amounts to the predetermined lower figure.

*Sealed offer* is an offer made by one or both parties in an arbitration. If the receiving party does not accept the offer and subsequently, does not get an award more favorable than that given to the offer, is responsible to pay all costs of arbitration from the date of the filing of the sealed bid. The sealed bid may provide an incentive for a deal transaction and, therefore, a quick solution to the dispute.

9. *Specialized arbitration clauses.* All arbitral institutions offer and drafting lawyers too often end up incorporating in their agreements uniform arbitration clauses to a “one size fits all” form of arbitration. This gives security and avoids pathological arbitration agreements. But since there is no rose without a thorn, this pre–fabricated formulae offer the risk that, when the dispute arises, the envisaged procedure by the manufactured clause may not fit because it does not take into consideration the specificity of the procedure and/or the type of evidence that each dispute (M&As, distribution, franchise, etc.) may require. An additional problem is that the arbitration clause is often drafted by excellent and experienced company or commercial lawyers but with less experience in arbitration law. Therefore, parties to a contract may lose some, if not all, of this flexibility and efficiency if the arbitration clause is not properly tailored to the contours of the contract and to party needs. Special language particularly within the context of each industry, expected type of dispute, or desired type of remedy may be necessary for parties to take full advantage of the efficacy and efficiency of arbitration. We can reasonably expect that specialized clauses envisaging adequate procedure to the disputes usually arising in special sectors stemming from the flexible and efficient nature of arbitration will be considered. With this aim, the AAA already adopted in 2007 a Practical Guide for Drafting Dispute Resolution Clauses proposing (chapter IV) arbitration clauses for specific contexts for use in international disputes, disputes in construction, employment and patent disputes<sup>74</sup>. Again, in the future every time draft-

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<sup>74</sup> AAA, *Practical Guide for Drafting Dispute Resolution Clauses*, Amended and effective September 2007.

ing lawyers will take advantage of the flexibility characteristic of arbitration that allows tailoring the best arbitration procedure for the specificities of potential disputes arising from the interpretation or execution of their contract.

10. *Integrity, independence and impartiality of arbitrators*<sup>75</sup>. It is essential that arbitrators maintain and respect high ethical standards (and the appearance thereof). All arbitration laws and rules without exception already emphasise independence and impartiality as the most conspicuous ethical principle of arbitrators. The more arbitration expands and becomes an effective substitute of the state court justice, the more these principles will be required and in a higher level<sup>76</sup>. Laws, rules and courts will become even more inflexible regarding the arbitrators' independence and impartiality.

One of the most conspicuous efforts to promote arbitrators' independence and the avoidance of conflicts of interests is undoubtedly the IBA Guidelines on Conflicts of Interest in Arbitration 2004, which have received a very favourable acceptance<sup>77</sup>. The Guidelines represent a significant contribution to the arbitration institution and particularly to the independence and impartiality of arbitrators, which constitute a crucial element in arbitration. The arbitration world should be grateful to the IBA for this important initiative.

In my view, however, although the Guidelines have followed the case law of jurisdictions with greater experience in arbitration, they have adopted in many instances a too great pro arbitro attitude rather than pro partibus or pro institutione arbitralis. The revision that is currently taken place is then a great opportunity to redress this flaw.

Indeed, the Introduction declares that the working group "has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions" and Part II, 8 recognises that "the borderline between the situations indicated is often thin" and that "it can be debated whether a certain situation should be on one

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<sup>75</sup> W.W. Park, "Arbitrator Integrity: The Transient and the Permanent", *San Diego L. Rev.*, vol. 46, 2009, p. 629; J.C. Fernández Rozas, "Clearer Ethics Guidelines and Comparative Standards for Arbitrators", *Liber Amicorum Bernardo Cremades*, Madrid, 2010, pp. 413–449.

<sup>76</sup> R. Mullerat, "Judges' and arbitrators' independence compared", 2008.

<sup>77</sup> *Vid.*, for instance, D.A. Lawson, "Impartiality and independence of International Arbitrations. Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration", *ASA Bulletin*, vol. 23, no. 1, 2005, pp. 22 and 55; M. Ball, *op. cit.*, p. 323. L. Trakman, *op. cit.*, p. 2. Hilmar Raeschke-Kessler, *op. cit.*, p. 655; G. Born and R. Kent, *op. cit.*, p. 22.

List instead of another” and that “any doubt as to whether an arbitrator should disclose ... should be resolved in favour of disclosure” (GS–3(c)). In spite of this, as I say, in many cases the Guidelines have taken an attitude too pro arbitro. In the equation between the need that arbitrators are, and are seen as, independent and impartial as possible and the parties’ right to select arbitrators of their choice (Introduction 2) the first option should prevail in the interest of the reputation of the institution of arbitration. That is why I sustain that the Guidelines should undergo some chromatic operations.

A few examples of imbalance: an arbitrator who regularly advises the appointing party should be disqualified, either if he derives a substantial financial income there from or not (1.4 or 2.3.7); the arbitrator that has given legal advice or provided an expert opinion on the dispute (2.1.1) should also be disqualified and this situation included in the Non–Waivable Red List. Also, circumstances like the arbitrator representing the parties (2.3.1) or the arbitrator working as a lawyer in the same law firm as the counsel to one of the parties (2.3.2), or when the arbitrator is in the same firm as the counsel to one of the parties (2.3.3), which the Guidelines allow to waive, should be non–waivable.

The relation of the arbitrator and his law firm is also treated with not sufficient rigor. It is a general principle of legal ethics that a lawyer and his law firm are considered a single entity (CCBE Code, 3.2.4; ABA Model Rules, 1.8). This principle is also accepted by Explanation to GS–6(a) of the Guidelines providing that “the arbitrator must in principle be considered as identical to his or her law firm”. In spite of this clear statement, the reality is that the Guidelines’ attitude is the reverse as shown in several situations. For example, if the arbitrator’s law firm is currently rendering services to one of the parties, whatever the circumstances (3.2.1) or two arbitrators are of the same law firm (3.3.1) and in a similar case would require not the implicit but the explicit waiver of the parties. An arbitrator should disclose that his law firm has acted against one of the parties even in an unrelated matter and without the involvement of the arbitrator (4.2.1), etc. Unlike what circumstance 4.4.2 recommends, I think that if the arbitrator and counsel for one of the parties have previously served together as co–arbitrator or co–counsel this circumstance should be disclosed by the arbitrator.

My suggestion to improve the Guidelines making them a stricter set of recommendations is motivated by the need to protect and improve the good reputation of arbitration, which needs to enhance the perfect



independence and impartiality of the arbitrator but particularly the appearance of such independence and impartiality not only to the eyes of the parties but to the eyes of the general public or “fair minded lay observers”<sup>78 79</sup>.

It is not difficult to predict that some of the Guidelines, today mere recommendations, will become soon binding rules, either through the court evocation in their decisions<sup>80</sup> or by their introduction in the revise of rules and code of conduct.

11. *Arbitrating class actions*<sup>81</sup>. Is class action arbitration a “uniquely American device” or will become normality in the future of other parts of the world? With regard to class action in arbitration in the *US Green Tree Financial Corp. v. Bazzle*, the Supreme Court recognized for the first time class wide arbitration as a permissible procedure under the Federal Arbitration Act and empowered arbitrators to decide issues of class certification. The decision calls into question defendants’ use of mandatory arbitration provisions to prevent class actions, a practice that has grown in importance as companies look for new ways to insulate themselves from the dangers of class actions.

Class actions present a difficult case from an international arbitration viewpoint because they are seen in many countries as a phenomenon exclusive to the United States<sup>82</sup>. Civil law jurisdictions dislike representative actions because they are often looked at as violating extended concepts of litigation —as the right of a claimant to assert a cause of action is individual, not representative in nature. Also, defendants have the right to —kind of like in criminal law— defend against individual people<sup>83</sup>. With regard to class actions in general, in

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<sup>78</sup> *Webb v. The Queen*, 1996, 181 CLR 41 (HCA).

<sup>79</sup> R. Mullerat, “The IBA Guidelines on Conflicts of Interest Revisited. Another Contribution to the Revision of an Excellent Instrument, Which Needs a Slight Daltonism Treatment”, *Spain Arbitration Review*, no. 12, 2012, p. 61.

<sup>80</sup> *Vid.* M. Scherer, “The IBA Guidelines of Conflicts of Interest in International Arbitration. The first five years 1004–2009” with a summary of international court decisions introducing the Guidelines into their considerations.

<sup>81</sup> P.J. Kreher, Pat D. Robertson III, “Substance, Process, and the Future of Class Arbitration”, Spring 2004, 9 *Harvard Negotiation L. Rev.*, 409.

<sup>82</sup> H. Aragaki, Ch. Drahozal, M.S. Greve, P.B. Rutledge, B.T. Fitzpatrick, “The Future of Arbitration and the World of Class Action Litigation – Podcast”, *Litigation Practice Group Podcast*, 21 March 2012. *AT&T v. Concepción* is one of the most controversial Supreme Court decisions in many years. Most of the discussion to date has centered on its implications for the future of class action litigation.

<sup>83</sup> S. Stone, “Experts Discuss Future of International Arbitration”, *Virginia Law*, 10 March 2009.

Europe the encroachment of such actions is slow and there is a resistance to introduce US style class action for fear of perceived abuses. However, some countries have already accepted limited class actions especially in consumer litigation (*v.gr.*, Sweden 2003, Finland 2007, Norway 2008, Denmark 2008 and Italy Law 2007 reforming the Consumer Law 2005). In addition, the EU Commission in the context of “Consumer Policy Strategy 2007–2008, called for consultation of possible actions for consumer to enforce their rights.

The prediction is that if class action has been admitted in the US arbitration, it is not difficult to believe that they may not become accepted, even with limitations and conditions, *urbi et orbi*, and may be a “collective” arbitration will be more likely to emerge as the useful procedural device in international disputes subject to arbitration<sup>84 85</sup>.

12. *Use of discovery.* The recognition and use of discovery has also historically divided common law and civil law procedural traditions<sup>86</sup>. In principle, discovery does not exist in civil law systems where basically each party has to prepare its defense on the evidence in its possession. However, a limited type of discovery is gradually being accepted by arbitration laws although under the control of the arbitral tribunal. This is the case, among others, of the German Code of Civil Procedure (amended 2002), s.142, which allows the judge to order the production of documents in the possession of the adverse or even a third party and the Civil Procedure Law in France, reformed by Decree n° 2011–48 of 13 January 2011<sup>87</sup>.

Discovery in arbitration is generally designed to be minimal and informal and less extensive than discovery under litigation because the object of arbitration is to foster final disposition of disputes in an eas-

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<sup>84</sup> S.I. Strong, “From Class to Collective: The De-Americanization of Class Arbitration”, 26 *Arb. Int'l* 2010, p. 493.

<sup>85</sup> ABA, “The Future of Class Arbitration: Forecasting the Fate of American Express Merchants’ Litigation”.

<sup>86</sup> *The Principles of Transnational Civil Procedure* ALI/UNIDROIT, 2004, an initiative led by G. Hazard and M. Tarufo, in which I had the honor to serve as international advisor, states (Reporters’ preface) that “we conclude that a system of procedure acceptable generally throughout the world ... would require much more limited discovery than is typical in the United States”.

<sup>87</sup> Art. 1469: “*Si une partie a l’instance arbitrale entend faire état d’un acte authentique ou sous seign privé auquel elle n’a pas été partie ou d’une pièce détenue par un tiers, elle peut, sous l’invitation du tribunal arbitral, faire assigner ce tiers devant le président du tribunal de grande instance aux fins d’obtenir la délivrance d’une expédition ou la production de l’acte ou de la pièce*”.

ier, faster, and more economical manner than by litigation. Courts<sup>88</sup> have noted that parties willingly accept the absence of procedures employed in the justice system in return for the benefits of a quick, less expensive resolution of their dispute. Gradually, however, as more and more matters are submitted to arbitration, and as these matters become more complex, the need for discovery in arbitration has gained more attention<sup>89</sup>. The IBA Rules on Taking Evidence (Docs 3.3) allow a party to submit a 'request to produce' to the arbitrator, in which the requesting party may describe documents or 'a narrow and specific requested category of documents' that are reasonably believed to exist and to be in the possession of the adverse party, together with an explanation of how the documents requested are 'relevant and material to the outcome of the case'<sup>90</sup>.

A debate has originated in the US with regard to the application of Section 1782 of Title 28 of the US Code "Assistance to foreign and international tribunals and to litigants before such tribunals", that allows a litigant to a proceeding outside the US to apply to an American court to obtain evidence for use in the non-US proceeding. Under s.1782, parties in litigation outside the US may directly petition US federal courts to compel the production of documents for use in foreign or international tribunals, rather than seek such discovery through more indirect methods, such as the issuance of letters rogatory or Hague Convention requests emanating from the foreign court. Historically, this statute was conservatively applied. But since the 2004 US Supreme Court decision *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>91</sup>, federal district courts have granted s.1782 applications more liberally. In essence, an applicant under s.1782 needs to show three things: (a) it is an "interested person" in a foreign proceeding, (b) the proceeding is before a foreign "tribunal," and (c) the person from whom evidence is sought is in the district of the court before which the application has been filed. As it has been said<sup>92</sup>, a difficult

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<sup>88</sup> For example, Peterson, 242 Ill. App.3d at 1095, 611 N.E.2d at 1142 (citing *Drinane v. State Farm Mutual Automobile Ins. Co.*, 153 Ill.2d 207, 606 N.E.2d 1181 (1992)). 10. *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980), cited by R. Oliver, "Pre-Hearing Discovery in Arbitration: Is It Illusory?", 2001.

<sup>89</sup> R. Oliver, "Pre-hearing discovery in arbitration: Is it illusory?", 2001; P.J. Martínez-Fraga, *The American influence on international commercial arbitration: Doctrinal developments and discovery*, 2009.

<sup>90</sup> S. Elsing and J. Townsend, "Bridging the divide in common law arbitration", *Arb. Int'l*, vol. 18, no. 1, 2002.

<sup>91</sup> *Intel Corp. v. Advanced Micro Devices, Inc.* (02-572) 542 US. 241 (2004).

<sup>92</sup> Johns Day, "Developments in U.S. Law Regarding a More Liberal Approach to Discovery Requests Made by Foreign Litigants Under 28 U.S.C. § 1782", April 2009.

task for the forecasters is to predict the future of s.1782 and whether it may be invoked, including in particular whether it may be used to compel discovery for use in private commercial arbitration. The majority of US district court cases decided after Intel has allowed the use of s.1782 for private arbitral panels. However, federal appellate courts have not yet ruled on the issue post-Intel. But with an upsurge of litigation and arbitration outside the US that involves activity connected to the US, the need for foreign discovery of testimony and documentary evidence within the US could well escalate.

13. *Interim measures*<sup>93</sup>. In any legal controversy, in both judicial or arbitration jurisdictions, it is necessary to protect the effectiveness of the final decision. If the arbitration system cannot provide such protection, arbitration could not be a real alternative to the court system. Due to the complexity of today disputes, as the UNCITRAL General Secretary, when revising art. 17 of the Model Law, recognized today “parties are seeking interim measures in an increasing number of cases” At the same time, provisional, conservatory or interim measures are more complex in arbitration because the arbitrators who can grant them do not hold the judicial *imperium*<sup>94</sup> to enforce them. For these reasons, the 2006 revision of the Model Law replaced the timorous art. 17 for a full Chapter IV with a detailed organization of the procedure to obtain interim measures.

Indeed, the contractual nature of arbitration gives rise to several difficulties: a) the non-enforceable nature of interim measures granted by an arbitral tribunal is a disadvantage that an arbitral tribunal faces when granting interim relief and without any coercive enforcement powers; b) when resolution of the dispute involves a third party against whom no order of the tribunal shall be valid for the reason of lack of jurisdiction; c) when interim measures of protection are needed against one of the parties to the arbitration, issues arise as to the availability of such remedies when they are sought at early stages in an arbitral proceeding; d) parties to arbitration also face difficulties when one party seeks interim relief at an early stage of the proceeding because the arbitral tribunal has not yet been constituted and thus,

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<sup>93</sup> C. Mouawad & E. Silbert, “Interim Measures” (Interim Relief) in International Arbitrations Involving Energy Investments”, King & Spalding June 2011. D.R. Bucy, “How to Best Protect Party Rights. The Future of Interim Relief in International Commercial Arbitration under the Amended UNCITRAL Model Law”, *American Univ. Int’l L. Rev.*, 25, n° 3, 2010, pp. 579–609.

<sup>94</sup> As G. Bernini, ICCA president, said “*l’arbitre dispose de la balance de la justice, mais non de son glaive*”, cited by C. Reymond, *op. cit.*, p. 797.

most parties in need of this immediate assistance seek the aid of national courts for this emergency relief; e) the tribunal's jurisdiction to grant interim measures may be limited by the governing law of the arbitration<sup>95</sup>. However, requests for interim measures of protection will continue to increase in future years as more parties select arbitration over litigation to resolve their disputes since if interim measure cannot be made or are not enforceable, the interest in arbitration and its awards decreases substantially.

Despite the advances of UNCITRAL<sup>96</sup>, still the current position on interim measures available in international arbitration in different legal systems, including national legislations, court ruling, international institutions and international conventions is multiform. There is a substantial confusion surrounding this issue, probably because in many cases interim measures are not completely in the hands of more or less uniform arbitration styles but depending to diverse state jurisdictions.

Special problems of interim relief occur in investor–state arbitration. The various forms of interim relief issued by tribunals suggest that plaintiffs in energy–related arbitrations generally consider whether their needs would be met by a well–developed interim measures request. The benefits of interim relief in the context of international investment disputes are significant since they may provide an expedited procedure to challenge the most egregious conduct by host states all in the context of protecting the parties' legal rights during the arbitration<sup>97 98</sup>.

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<sup>95</sup> Ophiuchus, Interim Relief from Court, Interim Measures under the Indian Arbitration and Conciliation Act, 1996.

<sup>96</sup> UNCITRAL reformed art. 17 Arbitration Rules 1977 (revised 2010).

<sup>97</sup> For example, art. 47 of the ICSID Convention states that “the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party,” with Rule 39 of the ICSID Arbitration Rules further specifying that the tribunal may recommend provisional measures “on its own initiative or recommend measures other than those specified in a request.” The UNCITRAL Arbitration Rules also confer broad authority on the tribunal to issue interim measures. While the 1976 version of the UNCITRAL Rules authorized an arbitral tribunal to issue “any interim measures it deems necessary in respect of the subject–matter of the dispute” (art. 26(1)), the revised Rules 2010 provide even greater detail regarding the tribunal's authority, and explicitly allow interim measures to: (i) maintain or restore the status quo; (ii) prevent imminent harm or prejudice to the arbitral process; (iii) preserve assets; and (iv) preserve evidence. Similarly, under art. 23 of the ICC Rules, the tribunal may order “any interim or conservatory measure it deems appropriate,” which may further be conditioned on giving of security, and which may take the form of an order or award. The SIAC Rules (art. 26) and the ICDR Rules (art. 37) take this author-

In spite of the criticism for court intervention and specific legislations regulating tribunal ordered interim measures, there is an urgent need for a more favorable and harmonized international structure to support arbitration for arbitration to adapt itself to the changing circumstances and remain as an alternative dispute resolution method in international commerce.

14. *Challenging awards.* Challenges of judicial and arbitration procedural decisions are often necessary. But in arbitration, where simplicity and rapidity are treasured sought values, appeals and challenges should be kept to an indispensable minimum. In spite of that, some studies assert that more than 50 % of Fortune 1000 corporations that don't resolve disputes by international arbitration abstain because of concerns over having restricted appeal rights<sup>99 100</sup>. However, opinions are divided and jurisprudence is contradictory. On the one hand, the Supreme Court of California (*Cable Connection, Inc. v. Direct TV, Inc.* – 44 Cal. 4th 1334) held that parties can agree on court revision and that parties to a contract may narrow the scope of the powers of an arbitrator by expressly stating that the arbitrator shall not have the power to commit errors of law and that such errors would be subject to judicial review. But on the other hand, the Federal Supreme Court indicated that parties have limited rights to appeal arbitration awards. In *Hall Street v. Mattel, Inc.*<sup>101</sup>, the Court found that parties to an arbitration agreement could not supplement by contract the

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ity a step further, allowing a party to apply for interim relief even before the constitution of the tribunal, through a fast-track procedure employing an emergency arbitrator.

<sup>98</sup> In a number of recent cases, arbitral tribunals have considered interim measures requests brought predominantly by claimants and seeking relief in the following categories: a) security for costs (*vid. RSM v. Grenada*, ICSID Case No. ARB/05/14); b) preservation of the status quo (*vid. Chevron v. Ecuador*, UNCITRAL, PCA Case No. 2009–23; *Occidental v. Ecuador*, ICSID Case No. ARB/06/11; *EnCana v. Ecuador*, LCIA Case No. UN/3481); and c) suspension of parallel proceedings (*vid. Burlington v. Ecuador*, ICSID Case No. ARB/08/5; *Perenco v. Ecuador*, ICSID Case No. ARB/08/6; *City Oriente v. Ecuador*, ICSID Case No. ARB/06/21; *Chevron v. Ecuador*, UNCITRAL, PCA Case No. 2009–23; *Plama v. Bulgaria*, ICSID Case No. ARB/03/24).

<sup>99</sup> H. Burnnet, "Experts Discuss Future of International Arbitration", *Virginia Law*, 10 March 2009.

<sup>100</sup> R. Callahan, "Arbitration v. Litigation: The Right to Appeal and other Misperceptions Fuelling the Preference for a Judicial Forum", *Bepress Legal Series*, Paper 1248, 2006: "In November 2005, approximately 400 litigators Southern California were surveyed to test the perception that attorneys generally prefer litigation over arbitration for the resolution of general civil disputes. The survey showed that approximately 87 % of the respondents do prefer litigation over arbitration and that one of the reasons for this preference is the availability of appellate review".

<sup>101</sup> *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)

statutory grounds for challenging arbitration. Until the Hall Street decision appellate courts had used the “manifest disregard” doctrine as a supplement to the statutory standards for vacatur of an arbitration award. Lower courts have been left to struggle with the aftermath<sup>102</sup>. A debate persists on whether, if the parties have so expressly contracted, the parties may obtain judicial review of the merits<sup>103</sup> or at least have the right to appeal internally within the arbitration process to three other arbitrators.

With regard to the right to challenge in arbitration, the evolution in France is remarkable. So far, in domestic arbitration, the party not satisfied with the ruling against it could make an appeal on the merits on the state court, unless the parties had expressly excluded this possibility (what happened normally), being the waiver on a standard formula. After the recent legal reform in 2011, the award is not subject to appeal, unless the parties’ contrary agreement (art. 1489), which is a reversal of the previous situation. Another salient feature of the new arbitration law but specifically for international arbitration is the possibility for the parties to waive at any time the action for annulment. The law states (art. 1522) that “by special agreement, the parties may at any time waive expressly the annulment action” and therefore before the award is given. This means that, if the parties waive at any time the action for annulment, the international award rendered in France cannot be overridden, even if it remains the possibility of making extraordinary review (art. 1502) or an appeal against the order authorizing the *exequatur* (art. 1522)<sup>104</sup>.

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<sup>102</sup> Ch.H. Brower, II, “Hall Street Assocs. v. Mattel, Inc.: Supreme Court Denies Enforcement of Agreement to Expand the Grounds for Vacatur Under the Federal Arbitration Act”, 2008; T. Pivateau, “Reconsidering Arbitration: Evaluating the Future of the Manifest Disregard Standard”, July 26, 2010; R. Mullerat, “Pacta (not always) sunt servanda. *Hall Street v. Mattel* or the Right of the Parties to Broaden Judicial Review: the View of an Outsider”, *Spain Arbitration Review*, 2010.

<sup>103</sup> The California Supreme Court in *Cable Connection v. Direct TV* held that parties can agree on court revision of the arbitral award. In this decision, the Court applied a contract interpretation that recognizes one more basis for appeal from an arbitrator’s award. The courts have refused to honor appeal rights in arbitration agreements that call for the right of appeal on the merits of the case. In *Cable Connections*, the agreement between the parties provided for binding arbitration, but contained the unusual language that “the arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error”. Thus, the agreement does not permit a review on the merits, but does allow for an appeal to question the arbitrator’s interpretation of the law.

<sup>104</sup> R. Mullerat, “*Allons enfants (arbitres) de la patrie... 50 pinceladas impresionistas sobre los puntos más relevantes de la nueva ley de arbitraje francesa 2011*”, *Spain Arbitration Review*, n° 11, 2011.

In my view the future, even respecting the will of the parties will be to restrict challenges or at least allow the parties to agree on such restriction. If arbitration represents the will of the parties to avoid state court intervention and the same parties agree that the award may be reviewed by courts on the merits, it is a sort of *contradictio in terminis*.

15. *Non signatories*. Arbitration rests on consent<sup>105</sup>. Contracts are generally effective only between the parties, their assigns and their heirs. For third parties a contract is *res inter alios acta*. However, in the complexity of today's economic and commercial relationships progressively more parent companies, subsidiaries, governmental entities and other third parties non-signatories of the arbitration agreement may be affected by the arbitration and its decision. Though it is widely accepted that a party that has not agreed to arbitrate cannot be forced to arbitrate, and arbitration cannot be a matter of coercion, it is not uncommon for non-signatories to seek to take advantage of an arbitration agreement, or for a signatory to seek to compel a non-signatory to arbitrate. Many theories are invoked to justify the joining of third parties to arbitration such as: incorporation by reference, assumption, agency, veil-piercing, alter ego, estoppel and others. In spite of the voluntary nature of arbitration, experts advise challenges to be introduced at an early possible notice that they are involved in an alien arbitration<sup>106</sup>.

As William Park has perspicaciously indicated, all such theories relate either to implied consent or to lack of corporate personality or disregard of the corporate veil. Park concludes that in large measure, the health of international arbitration depends on how arbitrators apply these elements in light of the reasonable expectations of the international business community. The to be or not to be dilemma here is that no one can be held liable for the breach of contract or obligation he has not agreed upon and that in the other hand there are cases in which even non-signatories should be involved in an alien

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<sup>105</sup> W.W. Park, "Non-signatories and International Contracts: An Arbitrator's Dilemma", *Multiple Party Actions in International Arbitration*, 3, 2009; T. Courtney, "Binding Non-signatories to International Arbitration Agreements: Raising Fundamental Concerns in The United States and Abroad", C. Corrie, "Challenges in International Arbitration for Non-Signatories"; J. Townsend, "Non-signatories in International Arbitration. An American Perspective", *ICCA Congress Series*, 2007, p. 259; K. Gorenber, "Recent Efforts by or against Non-signatories to Compel Arbitration under Equitable Estoppel"; B. Thornburg, *Commercial Litigation Update*, 2011; Ch.F. Crozier, "Estoppel Doctrine Allows Arbitration Provisions to Be Enforced By and Against Non-Signatories", *Haynes and Boone's Newsroom*, January 2008.

<sup>106</sup> C. Corrie, "Challenges in International Arbitration for Non-signatories".



arbitration agreement. The evolution of the paradigm of legal personality and limitation of debt responsibility of business corporations and the crisis of legal fiction of personhood for corporations and the application of the economic interpretation of law<sup>107</sup> and the Pareto's concepts of efficiency, superiority, optimality, allocation and distribution of wealth all of them, should help constructing solutions to the non-signatory obstacle. The solution must probably be found case by case and the future must lead to arbitrators and courts to sharpen their wisdom to separate the wheat from the chaff.

16. *Construction arbitration.* Arbitration has been the dispute resolution method preferred by the construction industry<sup>108</sup> which takes up a significant number of arbitration processes in the world due to its complexity particularly in big projects. Construction arbitration offers some problems which are inherent to it such as multi-party arbitration peculiar types of evidence, and the like. Another issue in this field is the difficulty to create a solid jurisprudence because in similar disputes awards are far from short of homogeneity. An analysis conducted in 2000 by CM eJournal on Construction Arbitration: A Survey of Arbitrators Award's Consistency definitely confirms this assertion<sup>109</sup>. If arbitration was once the alternative to litigation over

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<sup>107</sup> R. Posner, *Economic Analysis of Law*, 2007

<sup>108</sup> The number of lawyers and experts cultivating and working in construction arbitration is immense. There exist also some organizations to promote and develop this area such as the Society of Construction Arbitrators which has promoted the Construction Industry Model Arbitration Rules – CIMAR and others. Some organizations such as the AAA have also Construction Dispute Resolution Committees with Arbitration and Mediation Rules and Procedures including Procedures for Large Complex Construction Disputes.

<sup>109</sup> Survey conducted by CM eJournal on Construction Arbitration: A Survey of Arbitrators Award's Consistency, 2000. The scenario described a hypothetical construction contract dispute and a questionnaire was presented to survey participants acting as arbitrators 2000. The survey asked the arbitrator to decide on damages for a delay dispute involving a General Contractor, Owner and Sub-contractor. The parties asked the arbitrator to determine if the Sub-contractor should be compensated \$60,000 for damages incurred in a 30-day delay to a project's critical path noting that all 3 parties had agreed the Sub-contractor was not at fault for the delay and all had agreed the Subcontractor had incurred daily delay damages of \$2,000. If the arbitrator found the Subcontractor should due compensation, the arbitrator was asked to decide who was ultimately responsible for payment of the Subcontractor's damages. The arbitrator was also asked to decide if the Owner was due liquidated damages or if the General Contractor was due delay damages, both of contractually provided daily amounts, and, if so, how much Of the entire group: 94% determined the Subcontractor should receive \$60,000; 34% determined the Owner and the General Contractor should each pay the Subcontractor \$30,000 with no further exchange of funds between the Owner and General Contractor; 35% determined that the

time, when arbitration is considered litigation in another guise, domestic arbitration has become less common in the construction industry following the decline of its main advantages, although international arbitration still appears to be the dispute resolution mechanism of choice. The reason of this debilitation is perceived to be the “judicialization” of the arbitration process, characterized by arbitrators lacking arbitration management skills, over-lawyering, unlimited discovery, extensive motion practice, unnecessary hearing delay and time-consuming post-award disputes over judicial confirmation or vacation of awards.

The reality is that construction disputes, when not resolved in a timely manner, become very expensive – in terms of finances, personnel, time and opportunity costs. The less visible costs (e.g., company resources assigned to the dispute, lost business opportunities) and the intangible costs (e.g., damage to business relationships, potential value lost due to inefficient dispute resolution) are also considerable. It is estimated that construction litigation expenditures in the US have increased at an average rate of 10 % per year over the last decade, and now total nearly \$5 billion annually<sup>110</sup>.

A consequence of this is that over the past two decades the construction industry has made tremendous progress in developing more efficient methods of dispute prevention and resolution (Construction Dispute Resolution) as strategies for negotiation and compromise to promote early dispute prevention and minimize the risk of disputes<sup>111</sup>. In fact, experts refer to the construction industry as being on the innovative edge regarding dispute resolution<sup>112</sup>. Despite the progress, there remains much room for improvement<sup>113</sup>. The prevention approach is particularly relevant with a full spectrum of new ADR techniques. Emphasis is particularly placed on dispute review boards because of their success in resolving disputes at the project level.

The lessons of the present tell us what is needed for construction arbitration to retain dominance over litigation as the industry’s preferred binding dispute resolution method. Arbitrator expertise re-

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Owner was liable for at least \$60,000; 18% determined the General Contractor was liable for at least \$60,000; the other 13% found a variety of intermediate awards.

<sup>110</sup> Michel 1998, Peña-Mora, Sosa, and McCone, 2003.

<sup>111</sup> J. Stougas, “Strategies for Dispute Prevention and Management in Commercial Arrangements” *ADR Bulletin*, vol. 4, no. 9, 2002. *Alternative Dispute Resolution and Prevention in the Construction Industry – Chapter 9 – AAA Handbook on Construction Arbitration and ADR – 2nd ed.*, 2010.

<sup>112</sup> ENR 2000, Hinchey and Schor 2002.

<sup>113</sup> American Bar Association, *Construction Disputes*.

mains probable the most important factor that commends the use of arbitration over court room litigation. Expert arbitrators can do much to restore arbitration's long-standing reputation as the most efficient, cost-effective and fair binding dispute resolution method<sup>114</sup>. The present strong trend to find methods not only to resolve but to prevent the raising of disputes will probably continue through different methods such as review deliberation boards, structured negotiation and dispute preventive methods, and others that can facilitate cost minimization, relationship preservation and speedy resolution<sup>115</sup>.

17. *Mixing processes.* ADRs are proliferating in number and methods in order to adapt to the peculiarities of some sectors, the dispute, the size of the parties etc. The advantages of ADRs have revolutionized the administration of justice in general and even some ADR features are also been applied in the state court justice<sup>116</sup>.

Clearly the evolution is that the existing main ADR methods (fundamentally arbitration and mediation and other forms such as negotiation, third party evaluation, early neutral evaluation, ombudsman, mini-trial, third party adjudication, etc.) will increase mixing the respective advantages in a practical osmosis action.

There has been an old and unfinished cultural debate about the role of arbitrators to help finding settlement between the parties confronting American and European practitioners. In spite of the problems arising from mixing processes, such as the "med-arb" (in which the arbitrator starts as a mediator but in the event of a failure of mediation, the arbitrator imposes a binding award)<sup>117</sup> because of the conflicting missions of the same neutral operating in different fields and wearing different hats, the reality is that lawyers' creative invention on the bases of the parties' autonomy (there is freedom of contract as the baseline) will try new ADRs formulae with an important compo-

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<sup>114</sup> Ph. Brunner, "The Future of Construction Arbitration", *JAMS Global Construction solutions*, vol. 4, no. 1, Winter 2011

<sup>115</sup> Sai-On Cheung, "Critical Factors Affecting the Use of Alternative Dispute Resolution Processes in Construction", *International Journal of Project Management*, vol. 17, issue 3, June 1999, pp. 189-194. M. Osama Jannadia, S. Assaf, A.A. Bubshait & A. Naj, "Contractual Methods for Dispute Avoidance and Resolution", *International Journal of Project Management*, vol. 18, issue 1, February 2000, pp.41-49.

<sup>116</sup> It is interesting to read the speech by R.T.Y. Moon, Chief Justice of Hawai, "Visions of a New Legal System: Could There Be a Legal System Than Better Incorporates the Strengths of ADR in Existing Legal Institutions", at the *ADR Workshop of the Association of American Law Schools Annual Meeting in San Antoni Texas* 4 June 1996.

<sup>117</sup> Med-arb conducted by the same person has been prohibited by some laws, *v.gr.*, Spanish Arbitration Act 60/2003 revised by Law 2011, art. 17.4.

ment of arbitration and mediation in which neutrals receive invitations to serve in multiple roles and in spite that some initiatives have resulted in ill-fated experiments<sup>118</sup>.

18. *Arbitrators' immunity.* Arbitration is continuously confronting with serious issues derived from its hybrid nature as a child of contract and a child of procedure, as an instrument of merchants' relationships and a cooperator of the administration of justice. One of the most salient of this issue is undoubtedly arbitrators' liability or immunity. Must arbitrators be immune as judges or liable as hired professionals? There are different schools of thought with regard to the nature of the relationship between the arbitrator and the parties and to the arbitrator's liability or immunity in the discharge of their function, and both national laws and regulations of arbitral institutions adopt different attitudes. There are two main positions: the one which argues in favor of the immunity of arbitrators in being relieved of liability due to the arbitrator's "status" closer to the judge or as a "quasi-court", mainly sustained by the common law traditions (for instance US, Canada and Hong Kong); the other rejects arbitrators' immunity, as any other professionals who are hired to conduct a private job, based on the concept of contractual liability since arbitrators are hired by the parties under a service agreement and thus subject to liability for breach of contract.

Arbitrators enter also into relationship with the arbitral institution, witnesses, expert witnesses and others involved in the proceedings whose interests may be affected and even damaged by the arbitrators' conduct. Some national laws, like the Spanish Arbitration Act<sup>119</sup>, request that arbitrators and arbitral institutions, on their behalf, must subscribe an insurance policy to cover their liability.

Since liability may in many circumstances be justified as regards the failure of arbitrators to conduct the arbitral proceedings in a timely and proper manner, arbitrators are increasingly challenged on the contents of their decision. Therefore voices have been raised<sup>120</sup> denouncing the danger of unscrupulous parties trying to silence arbitrators unsympathetic to their case by confronting them with liability claims.

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<sup>118</sup> G. Kaufmann-Kohler and F. Kun, "Integrating Mediation into Arbitration: Why It Works in China" 25(4) *Journ. Int'l Arb.* (2008).

<sup>119</sup> Spanish Arbitration Act 60/2003 revised by Law 11/2011, art. 20.1.

<sup>120</sup> J.C. Najjar, "The User's Perspective: Liable or not Liable?", *Vienna Arbitration Days* 2011.

With the convergence of legal cultures of common and civil law, some sort of middle ground shall be reached between those who believe that arbitrators may be liable for negligence, and those who believe that arbitrators, like judges, enjoy immunity or quasi-immunity<sup>121</sup>. It is necessary to harmonise the rules of liability of arbitrators in the exercise of their functions and the adoption of a qualified immunity standard, which balances the needs of arbitrators to function independently and render just decisions without concern for personal reappraisal<sup>122</sup>.

19. *Arbitration and third party funders*. International investment arbitration involves high costs both for the investor and the state. A recent phenomenon in international investment arbitration is the financing of the proceedings by a third party funder. The third party funder as such has no interest in the substantive issues of the arbitral proceedings, but instead invests in the proceedings hoping to make a profit upon the settlement of the dispute.

In principle, arbitrators have no competence to address the third party funding agreement because their competence is limited to the dispute between the foreign investor and the host state. The funding agreement is thus alien to the legal relations between the foreign investor and the host state. One of the issues is whether tribunals may nevertheless use their discretion to take into consideration the relationship between the investor and its third party funder, in particular in view of the allocation of costs in the arbitral proceedings and whether the existence of a funding agreement is subjected to any rule on transparency and to an obligation of disclosure, in essence in order to ensure the respect of the principle of 'equality of arms'<sup>123</sup>.

Recently, in an arbitration against a state pursuant to a BIT, the claimant disclosed publicly it had recourse to third-party funding. The claimant issued a press release stating that it had "entered into a litigation funding agreement" and that under the terms of this agreement, "the Funder has agreed to pay [its] legal costs in relation to the international arbitration proceedings ... on a non-recourse basis."

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<sup>121</sup> M. Hwang, K. Chung and F. Lee Cheng, "Claims Against Arbitrators for Breach of Ethical Duties", in *Contemporary issues in International Arbitration and Mediation, the Fordham Papers* (A. Rovine, ed. 2008) p. 22515/04/2009.

<sup>122</sup> R. Mullerat & J. Blanch, "The Liability of Arbitrators: a Survey of Current Practice", *IBA Dispute Resolution International*, June 2007. M. Domke, "The Arbitrator's Immunity from Liability: A Comparative Survey", 3 *U. Tol. Law Review*, 99, 1971.

<sup>123</sup> E. De Brabandere & J.V. Lepeltak, "Third Party Funding in International Investment Arbitration", June 5, 2012. Grotius Centre Working Paper, no. 2012/1.

The press release also explained that the claimant “has agreed to pay to the Funder a material portion of any final settlement of the arbitration claim against the Defendant”. This upfront, voluntary and public disclosure of the existence of a funding agreement has intensified ongoing discussions in the international arbitration community as to whether these disclosures should become more common, or even mandatory<sup>124</sup>.

The questions are then: when should a funding agreement, or its existence, be disclosed? What is the rationale for requiring that disclosure? What exactly should be disclosed (the existence of the funding agreement or the terms of agreement itself) and to whom? Who should impose and effectively enforce any general and mandatory disclosure obligation? The future will probably solve some of those questions.

20. *New York Convention 1958*<sup>125</sup>. To replace or to repair, this is the question. The NYC, the foundation of international arbitration in the 20th century, has addressed the free movement of arbitral awards in the world and has a decisive influence on the solution of the main technical problems of arbitration, and particularly the cross-border enforceability of awards with effects not only to international, but also local arbitration. Even more, the NYC is in the vanguard in the movement of unification of law and justice in the world.

The NYC has achieved a remarkable success. The main question regarding the NYC is whether it has to be replaced or simply mended. It is true that over fifty years have elapsed since its adoption and a lot of water has flown under the bridge. I think a new convention which repeals and replaces the NYC as proposed by some authors and more conspicuously by professor Van den Berg<sup>126</sup>, while recognizing its advantages and indisputable quality of his proposal, would take many years of preparation bearing in mind that 146 countries have already

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<sup>124</sup> M. Scherer, “Out in the Open? Third-Party Funding in Arbitration”, 26 July 2012.

<sup>125</sup> A.J. van den Berg, “An Overview of the The New York Convention of 1958”, 2008 and “New York Convention of 1958: Refusals” (2009), 15/04/2009. W.W. Park, “Respecting the New York Convention” in 18 (2) *ICC Court of Arbitration Bulletin* 65 (2007), 17/11/2009. R. Mullerat, “Los segundos 50 años del Convenio de Nueva York; reflexiones sobre la falta de interpretación uniforme de algunos de sus preceptos”, *Spain Arbitration Review*, no. 5, 2009, pp. 111 and ss. K.-H. Böckstiegel, “Public Policy as a Limit to Arbitration and its Enforcement”, *Journal of Dispute Resolution* Special Issue, 2008 The New York Convention – 50 Years, 11th IBA Arbitration Day and United Nations New York Convention Day, 2008, p.123.

<sup>126</sup> A.J. van den Berg, “The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation” (1981)

ratified (many more than in the 50s) and it is premature, being in any case advisable to wait until a greater number of jurisprudential experiences are gathered. The English say that what it works does not fix it. Personally I am inclined by the adoption of an annex or supplementary agreement to clarify, supplement and amend any deficiencies of the NYC<sup>127</sup>. This formula would have the advantages of maintaining the optimal legal technique, high quality and simplicity of the original text, which would be welcome by the arbitration community and users of arbitration. The proposed annex, as I say, should include all denounced as dark spots by doctrine systematically arranged under CNY own plan, using their own terminology and clear and simple language.

#### **IV. Conclusion**

I am aware that I am leaving many topics in the inkwell (or rather in the key board) but my crystal ball has its limits. Make new or for a longer term predictions would change forecasting into divination and require answers to extra-arbitral clear unknowns, such as what will be the next world geopolitics, especially Europe, Arab countries, the BRICs I PIGS?; the two traditions of common law and civil law, as currently parallel railroad tracks, will they continue their convergent evolution?; how will impact the technological revolution in justice?; shall lawyers become simply “legal information engineers” as Richard Susskind (The future of law) maintains with its terrible acronym?; when will we have courts with universal jurisdiction along the lines of the International Criminal Tribunal?, is it the New York Convention, the cornerstone of arbitration, replaced or minimally retouched, as I hope? And other arcana.

There is a clear bright future for arbitration in front of us. Finding new and more effective ways of providing these services to meet the needs of people in an even greater array of human transaction is clearly a worthwhile pursuit from both a social and economic viewpoint, and which will require effort, enthusiasm and optimism of the arbitral community. As Helen Keller put it, “no pessimist ever discovered the secrets of the stars or sailed to the uncharted land or opened a new heaven to the human spirit.

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<sup>127</sup> I explain the deficiencies and my proposal in R. Mullerat, “Los segundos 50 años del Convenio de Nueva York; reflexiones sobre la falta de interpretación uniforme de algunos de sus preceptos”, *Spain Arbitration Review*, n° 5, 2009, pp. 111ss.

It has been said that the future is not something we enter; the future is something we create<sup>128</sup>.

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<sup>128</sup> L.I. Sweet.