President's Message

This year, the Federal Arbitration Act celebrates its 80th birthday. It is one of the oldest, or in more respectful terms most venerable, pieces of arbitration legislation in force. The Swiss Chapter 12 and the French, English and German Arbitration Acts, to name just a few among the vast wave of legislation over the last two decades, are much younger, being only 10 or 20 years old.

This 80th birthday provides a good opportunity to reflect on the role of legislation in international arbitration.[1] It is undoubtedly a complex one, depending on many factors, including whether the legislation is that of a common law or civil law jurisdiction. Nevertheless, I would venture to say that there is a *traditional role* and a *prospective role in a globalized world*.

Traditionally, legislation has sought to *legitimate arbitration* by overcoming the resistance of the law and the courts to arbitration generally and, in particular, to binding pre-dispute arbitration agreements. It has further sought to *support the arbitral process*. It has done so by guaranteeing its fairness and efficiency and by making the courts available to enforce these guarantees. Lastly, since the market for arbitration services is competitive, legislation has sought to *promote arbitration venues* by implementing liberal regimes.

Will these traditional roles *evolve in a globalized world*?[2] How will these roles change over the next ten or twenty years? We all know that globalization has caused the disempowerment of states whose actions in a borderless environment are restricted by geographic boundaries. This has left a void which private actors, often global communities of private actors, have been fast to fill.

In arbitration, these private actors are well known: the arbitral institutions (their role is not new, but has grown in importance), the legal profession, academia. These driving forces form a transnational community whose intervention has significantly expanded the informal or non-state layer of the international arbitration regime. Even within international

---

1 For a more detailed analysis, see: Gabrielle Kaufmann-Kohler, *Global Implications of the FAA: The role of legislation in international arbitration*, American Arbitration Association, Federal Arbitration Act at 80, Anniversary Lecture Series, publication forthcoming.

2 The following comments do not apply to investment arbitration, which evolves according to its own logic.

organizations, where the states are meant to rule, such as UNCITRAL, the influence of the transnational community of private actors is essential, sometimes even decisive.

So what is left for national legislation? Obviously, national legislation will continue to provide a legal basis for enforcing arbitration agreements and supporting the arbitral process. These roles are a vital safety net for arbitration at a time when the stakes are high and the parties more and more litigious. Beyond this, legislation is likely to remain the only means for a state to express its own interests and those of the stakeholders who have no say on the transnational level because they are unable to become integrated within the community of private actors driving the evolution of arbitration. Indeed, in spite of an overwhelming harmonization, it is likely that states will retain certain *cultural or political preferences*.

It is also likely that they will seek to *protect the interests of certain categories of citizens*, generally seen as weaker parties. Consumers and employees are the most obvious examples. Legislation as a tool to protect the interests of these individuals does not necessarily mean restricting arbitration and imposing recourse to the courts. It may sometimes mean the opposite, i.e. making arbitration mandatory because it is perceived as the best possible solution in a given segment of social life. Illustrations are provided by US and Canadian legislation imposing arbitration between athletes and national sports governing bodies, and making funding of these bodies contingent upon the submission to binding arbitration. The implementation of an online dispute resolution system for small consumer claims could be another manifestation of this new role for arbitration legislation.

In short, national arbitration legislation is likely to continue to leave broad autonomy to the private actors for commercial disputes and to implement national regimes for specific categories of disputes where one party is thought to need protection. Right or wrong? Only future will tell.

Geneva, June 2005 Gabrielle Kaufmann-Kohler