President's Message

Some Thoughts on Arbitral Reform and Chapter 12

In recent years we have seen a wave of revisions in the laws and regulations governing international arbitration. Many of the arbitration rules, UNCITRAL, ICC, Swiss Rules, Stockholm Chamber, Singapore and many more, have undergone more or less drastic changes, often with the declared objective of making the rules more attractive in the international competition for arbitration business.

These revisions are accompanied by an increasing number of ancillary rules dealing with other forms of ADR processes such as mediation, conciliation, adjudication, Dispute Boards and with particular types of disputes such as construction or corporate law disputes.

Some of these changes follow trends – no sooner one institution introduces a new feature other institutions follow suit. A striking example is the "emergency arbitrator", which was first introduced in 1990 by the ICC in the form of the Pre-Arbitral Referee procedure, and in recent years suddenly attracted new interest and has now become a service which is offered by most institutions.

In the field of legislation, the movement does not appear quite as hectic: in the United States the American Law Institute continues to work since 2007 on the Restatement of the U.S. Law of International Commercial Arbitration and still seems to have a long way to go. Elsewhere legal reform is widely driven by the UNCITRAL Model Law; over sixty countries are listed on the UNCITRAL Website as having adopted the Model Law with or without changes. Countries which continue their own arbitration-friendly traditions also are prominent in this development; they revise their arbitration legislation from time to time, with the objective of becoming more attractive as a place of arbitration. Recent legislative revisions include France with its Decree of 2011 (largely codifying existing judicial practice), Portugal in 2012, Spain in 2011, Ireland and Scotland 2010, Austria and Italy in 2006.

In this move for reform one might distinguish two stages. First the legislation is brought to a standard meeting the principal requirements of modern commercial arbitration – and the UNCITRAL Model Law has largely contributed to bringing many countries to that level. Once this level is achieved, the difference among places of arbitration is less in the details of the *lex arbitri*, than in its practical implementation, in particular in the

manner in which the courts apply the law, in which counsel conduct arbitrations and arbitrators use the powers available to them. At that level, one may say that further legislative reform is subject to the law of diminishing returns.

Switzerland was among the first to reform its arbitration legislation into a modern codified set of rules. Compared to the "anarchic character"[1] of the legislation in many countries in the 1960s, the Concordat of 1969 was rightly praised as a "modern procedural framework".[2] The next major step of reform in Switzerland started in the 1970s and in 1978 took the form of a first draft of what in 1987 became Chapter 12 of the PIL Act. It removed, with respect to international arbitration, the constraints and deficiencies of the Concordat and again placed Switzerland in the forefront of arbitral seats. This process of reform now has been completed, with respect to domestic arbitration, by the arbitration chapter in the new unified Code of Civil Procedure.

Is there a need for further reform? During the last 25 years, Swiss law on international arbitration has continued to develop, thanks to abundant legal writing and above all thanks to many decisions of the Federal Supreme Court; gaps were filled, ambiguities clarified. Some of the decisions were criticised and occasional voices were heard calling for modification of one or the other provision of Chapter 12. But, taken as a whole, the law has stood remarkably well the test of time. It still remains one of the principal attractive features of Switzerland as a place of arbitration.

It was therefore with great prudence that the Swiss Parliament approached the question of a revision of Chapter 12. Following the initiative of Christian Lüscher concerning an extension of the "negative effect" of an arbitral tribunal's Kompetenz-Kompetenz, the Parliament's legal commission recommended that a more general review of Chapter 12 be initiated but did so in cautious terms, speaking of what may be translated by a "touch up" of the law ("*Nachführung*" or "*toilettage*"). This includes in particular incorporating into the Act some of the important judicial developments, whilst possibly correcting some others. On 27 September 2012 the Federal Parliament mandated the Federal Government to prepare a draft of a proposed revision of Chapter 12.

ASA had followed this development with great interest and had scheduled a conference on a review of Chapter 12 in September 2012, as it

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1 Fouchard, *L'arbitrage commercial international*, 1965, p. 29.

2 Craig, Park, Paulsson, *International Chamber of Commerce Arbitration*, 1st ed. 1985, part V, p. 78.

turned out on the day after the parliamentary decision. At this conference a wide range of questions were examined, from the need or desirability of any revision at this stage to a variety of possible amendments. While the principle of a revision was generally welcomed, the views diverged as to its scope, as to what was necessary, what would be "nice to have" and what should be avoided.

Following this conference, ASA formed a Taskforce led by Dr Markus Wirth to gather comments and prepare suggestions for possible action. The Taskforce would like to benefit from the experience of ASA Members. All of those who have encountered in their practice situations which should be taken into account in the revision are kindly invited to communicate them to Dr Markus Wirth at: markus.wirth@homburger.ch. This should be done by no later than 15 December 2012.

One of the issues being considered by the Taskforce is the body of jurisprudence of the Supreme Court and its possible incorporation into the text of the Act. On the one hand it appears desirable to include in the Act decisions of principle which are now firmly established, such as the possibility of seeking the "revision" of an award in certain exceptional circumstances, distinct from those required for setting aside applications under Article 190; such an important feature should be clearly set out and easily accessible to the users of Swiss arbitration – including abroad – without the need to search for it in the jurisprudence of the Federal Supreme Court or in textbooks. There are also areas where clarification could be desirable, for instance how ad hoc arbitration clauses providing simply for "arbitration in Switzerland" should be dealt with. However, in other respects, it may be premature to fix in the Act certain new developments before they have been fully tested in practice and considered by legal writers.

One of the great attractions of Chapter 12 is its succinct nature, regulating what is necessary for ensuring the essential functions for an arbitration, but allowing the parties and the arbitral institutions choosing Switzerland as their seat to organise the arbitration as they consider best. This succinct drafting style is not only an illustration of good Swiss legislative tradition, it also expresses respect for the diversity in international arbitration and party autonomy. The revision, or rather the "*toilettage*" of Chapter 12 should not change this essential feature.

Finally, whoever thinks about revising Chapter 12 should bear in mind the advice that Mr Justice Christopher Clark gave us at the 2009

annual ASA conference; speaking about legal reform, he mentioned "two basic rules":

"*The first is that every attempt to improve civil procedure usually carries with it at least one compensating disadvantage. The second is that there is no procedure or practice, however sensible that some lawyer cannot screw up.*"[3]

MICHAEL E. SCHNEIDER

As this issue of the Bulletin is going to the printer I learn with great sadness that **Dr Daniel Wehrli**, Vice-President of our association, has passed away. Our thoughts are with his family and his partners. A full In Memoriam will be in the next issue of the Bulletin.

SAVE THE DATES

Arbitration Practice Seminar

Badenweiler, Black Forest/Germany, 18 – 20 January 2013
Organised by ASA together with
Deutsche Institution für Schiedsgerichtsbarkeit E.V. (DIS)

ASA Annual Conference

Zurich, Marriott Hotel, 1 February 2013:
Inside the black box : How arbitral tribunals operate and reach their decisions

For more information see www.arbitration-ch.org

[3] In Wirth, Rovinez, Knoll (Eds.) *The Search for « Truth » in Arbitration*, ASA Special Series N° 35 (2011), p. 149.