Editorial

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Where is International Arbitration Going?

Five years ago, on the occasion of the 60th anniversary of the ICC Court of Arbitration, Frédéric Eisemann described the development of arbitration as an 'increasingly pronounced trend towards an arbitration giving all the guarantees of a major jurisdiction'.[1] The much-quoted Mitsubishi decision of 2 July 1985 by the US Supreme Court represented a further step in this direction, and is thus regarded as another milestone in the development of international arbitration towards genuine jurisdiction.

This development, however, is being steered by avant-garde arbitration circles in a direction not without dangers for what has been achieved. The recognition which international arbitration has gained in the course of its development is being taken by the avant-garde as a reason for striving towards increasing liberalization of arbitration. More and more conferences and papers are dealing with the idea of freeing international arbitration from its ties to national law, whether substantive or procedural. It is claimed that equipping arbitral tribunals with the authorization of *ex aequo et bono* decisions is on the march (although ICC statistics have not yet been able to confirm this). From such authorization it is deduced that agreeing on *lex mercatoria* for the parties to arbitration not only constitutes a permissible choice of law, but is even to be recommended, since only in this way can the tribunal apply the universally accepted principles and achieve the goal of international justice. Not without intellectual links to this trend, the setting up of alternative dispute resolution procedures (mini-trial and conciliation) is being hurried forward. These procedures are offered as quicker and cheaper methods of

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[1] Frédéric Eisemann, *The Court of Arbitration: Outline of its Changes from Inception to the Present Day*, in ICC Publication No. 412, page 396.

settling disputes, but are already filled with so many formalities stemming from arbitration that they are to be viewed more as a surrogate for, rather than a preliminary to, arbitration.

Necessarily, the question has to arise whether this new trend is in fact in line with what the business community expects. Anyone with practical knowledge of the decision-making mechanisms of enterprises knows that most of the enormous number of disputes arising out of international contracts have always been settled by the parties themselves, without there being any need for outside help. Those issues which resist all settlement attempts are nearly always concerned with deep basic differences of opinion, which have been worked through by each party in all their factual and legal details long before settlement procedures are considered. There are thus firm fronts which can be overcome only by means of legal decisions, which contain predictability on which the parties could have based their course of action.[2] These legal decisions can be created only by binding the agreements and disputes to national law and to jurisdictional preconditions.

Are we not therefore faced with the danger of these liberalization efforts leading to a split in international arbitration into, on the one hand, international arbitration attached to national law with predictable decisions, and on the other hand a code divorced from national law, with arbitrary decisions more or less unforeseeable? Is there not also a danger that the liberalization propagated by the innovators will lead to results which can no longer be recognized as enforceable by the judicial powers of the countries concerned with respect to *ordre public*?

The purpose of this editorial is to promote discussion of these dangers.

[2] There has already been much literature concerning this expectation. Clear views on this matter are expressed by F.A. Mann in *Private Arbitration and Public Policy*, in Civil Justice Quarterly, 1985, page 259.