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PREFACE

> We know we have become specialists when the things we speak of with pleasure make us boring to others.
>
> Gilbert Cisbron[1]

Mixed emotions beset any thoughtful person contemplating a collection of his or her own essays all focused on a single subject. True, there is the thrill of attempting to separate the disparate intellectual threads that weave themselves into the subject matter's rich conceptual tapestry. Inevitably, however, so many writings in one area will spark worry that specialization has reached the saturation point, where like Gilbert Cisbron's expert we face a serious risk of being inadvertently tedious to friends and family.

My hope, however, is that readers will share more enthusiasm than ennui for the scholarly and professional questions raised in this small volume of studies devoted to international business arbitration. For the evolution of private dispute resolution in cross-border commercial transactions remains one of the great legal success stories of the past century.

At least two intersecting questions lurk in any study of international business arbitration. Each arises from the litigants' desire (at least when the contract was signed) for binding dispute resolution outside the framework of government-administered courts. Each brings analytic challenges that implicate cross-cultural conflicts.

The first question asks how arbitration is actually conducted. What procedures help arbitrators determine facts, ascertain law, and interpret contract language? How does an arbitral tribunal strike an optimal balance between efficiency and fairness for admission of evidence, presentation of testimony, and allocation of time?

The second line of inquiry explores arbitration's interaction with society at large. When should the enforcement of awards be declined in order to protect public interests? What subjects might be too sensitive to entrust to arbitrators? What ethical standards should govern arbitrators and counsel in cases involving several legal systems?

What might be called the "micro study" of arbitration looks at the first matter: the design and implementation of tools to further effective dispute resolution that leaves the parties with a sense of having been treated fairly. Since most institutional rules permit litigants and arbitrators to shape the major contours of their proceedings, much of the arbitral process remains constantly in motion. The civil procedure of international arbitration is regularly being reinvented by practitioners (suggesting novel ways to try cases), arbitrators (seeking

[1] "On s'aperçois qu'on est devenu un spécialiste quand les choses dont on parle avec plaisir ennuient les autres." Gilbert Cisbron, *Ce siècle appelle au secours* (Paris 1955), p 95. Thanks to my Swiss colleague Edgar Philippin for bringing Cesbron to my attention.

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equilibrium in procedural rulings), and scholars (opining on good, bad, and ugly ways of doing things).

Arbitration's "macro study," by contrast, implicates the aggregate social consequences of shifting litigation out of the public arena (before national judges) into the private sector (before arbitrators). Reliable enforcement of awards enhances international economic cooperation by bolstering the vindication of contract rights through neutral dispute resolution mechanisms, thus reducing the risks in cross-border transactions.

Promoting efficiency, however, is not the only consideration in arbitration law. Legislators and judges also seek to safeguard vital community interests, such as regulation of markets and environment, as well as the fair administration of justice. The tension between these two concerns (reliable dispute resolution and the safeguard of community interests) lies at the heart of what most arbitration law is about. These policy rivalries work themselves out in statutes, treaties, and judicial decisions.

None of this would matter much if the loser of an arbitration could unilaterally elect to disregard the award. But such is not normally the case. Arbitration proceeds in the shadow of judicial power. When a recalcitrant party tries to renege on the bargained-for obligation to arbitrate, courts are enlisted to seize assets and grant *res judicata* effect to the arbitrator's decision.

The price of judicial support for arbitration includes respect for the evolving outlines of national and international public policy, or *ordre public* to use the Continental terminology. Sometimes these policy concerns relate to whether the arbitral process itself is fair. In other instances, attention might focus on how arbitration intersects with government efforts to protect those members of society whose welfare might be affected by private decision-makers.

The consequences of arbitration are usually more significant in an international setting. If a Boston seller must sue a Georgia buyer in Atlanta, the dispute will take place within a relatively homogeneous linguistic and procedural context. Some variant of English will be used, and the parties will normally be able to have their case heard in a federal court applying well-known procedural rules. By contrast, if the buyer resides in Milano or Moscow, it might be necessary to engage local counsel to litigate in the language of Dante or Dostoyevsky, pursuant to an unfamiliar code of civil procedure. In some countries, questions might even arise about judicial integrity.

As an alternative to national courts, arbitration permits a more level litigation playing field. Rules of an impartial institution can be applied by a relatively neutral tribunal convened in a mutually accessible country. Proceedings can be held in a common language according to rules that give neither side an undue advantage.

The essays contained in this volume are intended to provide a glimpse into both the "micro" and the "macro" elements of arbitration. The introductory study in Part I attempts a *tour d'horizon* of arbitration's evolution during the past half century by looking at critical changes in three areas: (i) judicial review of commercial awards; (ii) treaty-based arbitration of foreign investment claims; and (iii) the arrival of "soft law" norms to fill gaps in arbitration's procedural architecture.

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The articles included in the remaining chapters are organized by theme, drawing on twenty-five years of writing as a way to address trends that have endured for at least twice that long. Part II explores public controls on arbitration (the "macro study" of arbitration mentioned earlier) related to matters such as judicial review, jurisdiction, subject matter arbitrability, and some of the arbitral challenges to national sovereignty. Part III includes the "micro study" of how arbitration is actually conducted, examining the tension between fairness and efficiency in procedural protocols, as well as trends in the way substantive norms are applied in arbitration. The final part of this volume, Part IV, compares the interaction of "micro" and "macro" themes in three specific substantive areas: finance, intellectual property, and taxation.

There is no magic in the arrangement of these themes, which like any ordering will be somewhat arbitrary. These categories commend themselves, if at all, principally as a series of intellectual pegs on which to hang ideas.

Many of the essays address questions that have been controversial over time, remaining subject to radically different views. My modest aspiration is that the book will provide springboards for debate among international lawyers, and perhaps provide prisms through which to separate the elements inquiry.

Most essays have been reproduced as they were published, edited to reduce the unwieldiness of the collection. Introductory paragraphs provide updates on substantive changes, such as new statutes and landmark cases.

It should be evident that the ideas explored here show the mark of many friends, colleagues, and mentors. Several have given special intellectual comradeship. Laurie Craig inculcated respect for arbitration as a scholarly discipline. Bernard Audit, Axel Baum, Laurent Lévy, and Philippe Neyroud shared invaluable Continental perspectives. Michael Reisman and Jan Paulsson encouraged a sensitivity to theoretical questions implicated by dispute resolution.

Special thanks are due to Gabrielle Kaufmann-Kohler, who with cheerful grace agreed to subject these essays to a welcome reality check. Her erudite Foreword merits the price of this book several times over.

WWP
Boston, September 2005

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