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Third Conference for a Euro-Mediterranean Community of International Arbitration

Milan, Italy
18 January 2017

UNITED NATIONS

Further information may be obtained from:

UNCITRAL Secretariat, Vienna International Centre,
P.O. Box 500, 1400 Vienna, Austria

Telephone: (+43-1) 26060-4060
Telefax: (+43-1) 26060-5813
Internet: www.uncitral.org
Email: uncitral@uncitral.org

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
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Contents

INTRODUCTION

In 2005, the Organisation for Economic Co-operation and Development (OECD) created the Middle Eastern and North African (MENA)-OECD Investment Programme to support investment policy reform for growth and jobs creation in the Middle East and North Africa. This programme was structured around several regional networks and country-specific projects undertaken in collaboration with regional and international partners. In that framework, the Working Group on Investment Security in the Mediterranean (MENA-OECD ISMED Working Group) was constituted in 2013, and its four task forces have independently developed innovative policy proposals to foster private-sector investment in infrastructure in the MENA region. The proposals reflected the following areas of focus: *(a)* Risk Mitigation and Project Finance; *(b)* Arbitration; *(c)* Public-Private Partnerships: legal aspects and risk sharing; and *(d)* Islamic Finance.

The United Nations Commission on International Trade Law (UNCITRAL) was chosen as the leader of the task force on arbitration and, as a first endeavour, it co-organized—together with DiMed (*Délégation Inter-Ministérielle pour la Méditerranée,* France) and the OECD—the first Conference for a Euro-Mediterranean Community of International Arbitration in Marseilles, France on 8 December 2014.

In 2015, OECD and UNCITRAL decided to repeat the experience in a country of the southern part of the Mediterranean in an effort to increase the involvement of lawyers from the Arab region. Therefore, they co-organized, with the cooperation and support of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Second International Conference for a Euro-Mediterranean Community of International Arbitration, which took place in Cairo on 12 November 2015.

Given the success of the two first conferences, OECD and UNCITRAL decided to repeat the experience. Therefore, they co-organized, with the cooperation and support of the Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED), the Third International Conference for a Euro-Mediterranean Community of International Arbitration, which took place in Milan, Italy on 18 January 2017.

By bringing together experts and professionals in international arbitration and investment, the annual conference aims at promoting a sustainable Euro-Mediterranean arbitration community as part of a broader agenda for securing investments, key for stabilization and economic growth in the South and the East of the Mediterranean.

CONFERENCE PROCEEDINGS

WELCOME SPEECHES

Paolo Sannella

President of ISPRAMED, Italy

Ladies and Gentlemen,
Dear guests and participants,
Authorities and representatives of the diplomatic delegations,

I am delighted to welcome you all, thank you for such a large and qualified participation, which confirms the interest and the relevance of these meetings and the international collaboration that finds concrete expression in them.

I thank in a special way the OECD and UNCITRAL for the trust granted to ISPRAMED in the context of an effective and constructive cooperation, which we hope will be strengthening further. In this respect, I would particularly like to express the hope that in future OECD and UNCITRAL will be able to build common platforms for reflection and action, combining the legal requirements with economic ones, thanks to the confident and positive involvement of both institutions in favour of such collaboration.

As a matter of fact, ISPRAMED was set up according to specific wishes coming from legal and business communities, both on a regional and national basis, combined with a similar international sentiment, present in particular in the United Nations, in UNCITRAL, and which has fed back into the work of the main economic and financial institutions. And I wish to mention in this regard, and by way of example, the valuable work of the World Bank and the United Nations Industrial Development Organization (UNIDO). We believe that in the national context, as on the international market, the existence of a coherent and shared legal framework for the resolution of disputes between entrepreneurs—and ensuring its effective, rapid and transparent implementation—are both essential elements in economic development, security investment and an increased level of confidence of the same investors.

For the occasion of this International Conference, the technical discussion will consider more closely the most appropriate ways to consolidate the Mediterranean arbitration community through the examination of the experiences coming from different countries. The aim is to come closer to the political goal of improving, even in this way, the dialogue and reciprocal understanding among the countries of the area. An accurate and an ongoing procedural refinement useful to our great common cause such as that of the strengthening of trade exchanges and peaceful cooperation within our Mediterranean societies.

A great satisfaction comes also from the messages received from the Italian Ministries of Justice and of Foreign Affairs, which are very important for us. I wish to report here some extracts from the message received from the Honourable Lia Quartapelle, Member of the Italian Parliament, she says:

"Developing a Euro-Mediterranean community of arbitration is certainly ambitious, combining two important and priority policy goals in which Italy finds its recognition, that is, to promote the training and the development of a culture of mediation, facilitating its use and reducing its costs, and to promote the economic and commercial relations in the Mediterranean.

The crises that in recent years have destabilized and in some cases inflamed several areas of the Mediterranean region certainly have not weakened but rather strengthened the need to promote Euro-Mediterranean commercial exchanges in order to make them an instrument to create also a cultural and political approach, as well as a factor of development and stabilization. The international commitment of our country in this sense has already been proved and will be more and more convinced and resolute.

The Conference organized by the OECD, UNCITRAL and ISPRAMED has the great merit of enlightening how the challenge of the promotion of arbitration is consistent with the responsibility to contribute to the containment and to give an answer to the crises which are inflaming the Mediterranean, as well as develop a positive and common agenda to all countries of the region and to the European countries, as a multilateral framework."

Joachim Pohl

Legal Expert, Investment Division, OECD, France

On behalf of the OECD, I am very honoured to open this Third International Conference for a Euro-Mediterranean Community of International Arbitration. I would like to express our sincere gratitude to our partners UNCITRAL and ISPRAMED, as well as the Italian Ministry of Foreign Affairs for its patronage of this event.

The OECD is an international organization that helps Governments around the globe design better policies. The OECD works on almost all areas that Governments work on, and it works with almost all Governments around the world. The ambit of OECD's work hence goes far beyond dispute resolution or legal aspects thereof and notably includes assistance to Governments to strengthen governance and make their economies more resilient.

The OECD has been a partner in this series of conferences since its inception. As an international institution, the OECD believes that collaboration and dialogue are crucial for prosperity; that investment is essential for prosperity; and that the rule of law is a key prerequisite for investment.

Using this broad approach, the OECD works with the MENA region mainly through three angles:

1. **It delivers work dedicated to the MENA region in close cooperation with Governments of the region.** For the past 12 years, the OECD has been cooperating with economies from the region under the MENA-OECD Competitiveness Programme to foster regional policy dialogue between MENA and OECD countries with a view to enhancing the business climate in the region. The programme addresses investment and trade policies, small and medium enterprises (SMEs), women's integration in the economy, corporate governance, business integrity and economic resilience in fragile contexts through regional working groups and country-specific projects. In this context, the

OECD takes stock of legal and institutional reforms relating to investment in the region—including investment treaties and disputes—and monitors the impact of investment reforms with a focus on quality and responsible investment.

2. **The OECD works on investment policy, in particular investment treaty policies and investment facilitation.** Almost 60 countries from around the globe participate in OECD work on investment treaties, which seeks to enhance Governments' understanding of the implications of their investment treaty designs, inform efforts to enhance the outcome of these treaties and support reform efforts where issues are identified. Beyond work on investment treaties, the OECD offers Governments analytical tools and support to assess the performance and effectiveness of their policies related to investment more generally, in particular through the Policy Framework for Investment. Several MENA countries benefit from and contribute to OECD work on investment policies, in particular the four MENA adherents to the OECD Declaration on International Investment and Multinational Enterprises (Egypt, Jordan, Morocco and Tunisia).

3. **The OECD provides bilateral support and policy advice to individual countries or groups of countries.** The Organisation moderates and informs dialogue, and provides advice and peer learning so that Governments from around the world can develop informed policy solutions together. In particular, the MENA-OECD Competitiveness Programme organizes meetings of the MENA-OECD Working Group on Investment and Trade. It also conducts specific projects in Egypt, Iraq, Jordan and Tunisia, and implements the European Union-OECD Programme on Promoting Investment in the Mediterranean. The aim is to support investment reforms, improve the legal regime, foster the institutional framework, and monitor the effectiveness of investment policies, through dialogue, peer learning, capacity-building—for example through workshops on dispute prevention—assessment and benchmarking using OECD instruments and tools.

   This dedication to dialogue and learning is why the OECD works with MENA countries and for MENA countries. We are pleased to co-host this event to help further dialogue and understanding about key aspects of investment policy.

OPENING STATEMENT[1]

Giampaolo Parodi

Professeur de droit et Avocat, représentant du Ministère de la justice, Italie

Par cette brève intervention et au nom du Ministre de la justice, Andrea Orlando, je voudrais souhaiter à tous la bienvenue et beaucoup de succès lors des travaux de cette Troisième Conférence internationale pour une Communauté euroméditerranéenne de l'arbitrage co-organisée par l'OCDE, la CNUDCI et l'ISPRAMED.

Ce projet intéresse beaucoup le Ministère de la justice qui a récemment encouragé diverses initiatives normatives et forums de discussions dans le domaine des modes alternatifs de règlement des différends et de l'arbitrage. Il fait ainsi écho à l'exigence placée au cœur de cette Conférence de dessiner les contours d'un cadre juridique favorable au développement des relations commerciales et des investissements dans la zone euroméditerranéenne.

Pour ce qui est de l'arbitrage, il convient de mentionner le projet de loi d'habilitation qui comporte des dispositions relatives à l'efficacité du procès civil, et qui a été approuvé par la Chambre des députés le 10 mars 2016 et transmis à la Commission justice du Sénat.

Ce projet de loi confie au Gouvernement la tâche de renforcer l'arbitrage, notamment en étendant l'applicabilité du mécanisme *translatio iudicii* (mécanisme de renvoi prévu par le Code de procédure civile) aux relations entre procédure civile et procédure arbitrale, et d'augmenter l'efficacité des règles relatives au recours juridictionnel contre la sentence arbitrale. Ce même projet de loi prévoit également un toilettage des règles relatives à l'arbitrage en droit des sociétés, notamment, en élargissant les types de sociétés qui peuvent y recourir, en prévoyant l'efficacité de la clause compromissoire à l'égard des membres du conseil de surveillance et du conseil de gestion, l'arbitrabilité des litiges qui ont pour objet les décisions des associés et les délibérations de chaque organe de la société pourvu qu'elles portent sur des droits dont ils ont la libre disposition.

Il est important de rappeler qu'une commission d'étude a été instaurée au sein du bureau législatif du Ministère de la justice pour travailler à l'élaboration d'une réforme éventuelle des moyens de déjudiciarisation, avec une attention particulière sur la médiation, la négociation assistée et l'arbitrage. La commission, présidée par le professeur et avocat Guido Alpa, a terminé ses travaux et a préparé un rapport détaillé comportant des propositions structurées de toilettage et d'actualisation des règles législatives en la matière.

Parmi les tâches confiées à la commission, outre l'élaboration des propositions de réforme des modes extrajudiciaires de règlement des différends au vu d'en augmenter la capacité déflationniste du contentieux et de contenir, simultanément, les coûts des litiges, il y

[1] Translation by UNCITRAL Secretariat from the original opening speech held in Italian on behalf of the Minister of Justice of Italy, Andrea Orlando.

avait celle de prévoir des mesures propres à favoriser la création, le développement et la diffusion d'une culture de la conciliation parallèlement aux voies de recours judiciaires traditionnelles. La commission avait aussi pour objectif de renforcer l'arbitrage tout comme le projet de loi d'habilitation sur la procédure civile précédemment cité.

L'activité du Ministère est principalement axée vers le développement de la conciliation, de la médiation et de l'arbitrage au niveau national, sans toutefois ignorer les développements de la matière au niveau européen et international. En particulier, les thématiques de la médiation et de la conciliation commerciale feront l'objet d'une attention particulière du Ministère de la justice par sa participation aux travaux du Groupe de travail de la CNUDCI dédié au règlement des différends, qui portent actuellement sur l'exécution des accords issus de la conciliation commerciale internationale.

Pour ces raisons, j'ai le plaisir de vous transmettre un message clair du Ministre de la justice quant à son intérêt à l'égard des thématiques inscrites à l'ordre du jour de cette Conférence internationale en renouvelant nos vifs souhaits de succès pour les travaux de ce jour.

MORNING SESSIONS

Investment for the SDGs: policy trends and reform options

Elisabeth Türk*

Chief, International Investment Agreements Section,
Division on Investment and Enterprise,
United Nations Conference on Trade and Development (UNCTAD),
Switzerland

This contribution gives an overview of recent trends in international investment rulemaking (both globally and in the "Euro-Mediterranean" region)[2] and depicts where we stand on sustainable development-oriented reform of the international investment agreements (IIAs) regime. In this context, the contribution presents two of UNCTAD's key policy tools in the area of IIAs: the Investment Policy Framework for Sustainable Development ("Policy Framework") and the Roadmap for IIA Reform. In so doing, the piece focuses specifically on those areas of reform that touch upon investment arbitration, which is a key topic of interest to the Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED).

I. TRENDS IN THE CONCLUSION OF IIAS—GLOBALLY AND FOR THE "EURO-MEDITERRANEAN" REGION

Investment is needed more than ever to meet the financing gap of the Sustainable Development Goals (SDGs). Seventeen goals are to be fulfilled by 2030. In order to do so, the world must bridge the annual investment gap of $2.5 trillion that currently exists for developing countries alone.[3] The need for investment in the SDGs is also particularly pronounced in the MENA region, which is characterized by high unemployment rates, dependency on natural resources, a particular vulnerability to the follow-on effects of climate change, and political instability. Similarly, despite strong pre-crisis growth in FDI (Foreign Direct Investment) inflows, average inflows to the South-East European (SEE) region have declined over the past decade.[4] Given the stagnating growth of FDI and expectations of further decline,[5] effectively

*Disclaimer: This essay, based on a presentation delivered by Elisabeth Türk on 18 January 2017 has been prepared by Elisabeth Türk and Moritz Obst, a consultant in UNCTAD's Section on International Investment Agreements. The views expressed are those of the authors and do not reflect the views of the UNCTAD Secretariat or its member States. The authors thank Melinda Kuritzky for her support in finalizing the text.

[2] For this purpose, the "Euro-Mediterranean" region includes "MENA countries" (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syrian Arab Republic, Tunisia, and Turkey), "Mediterranean European Union countries" (Croatia, Cyprus, France, Greece, Italy, Malta, Slovenia, and Spain) and "Mediterranean SEE countries" (Albania, Bosnia and Herzegovina, and Montenegro).

[3] UNCTAD World Investment Report (WIR) 2014: Investing in the SDGs: An Action Plan. New York and Geneva: United Nations, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.

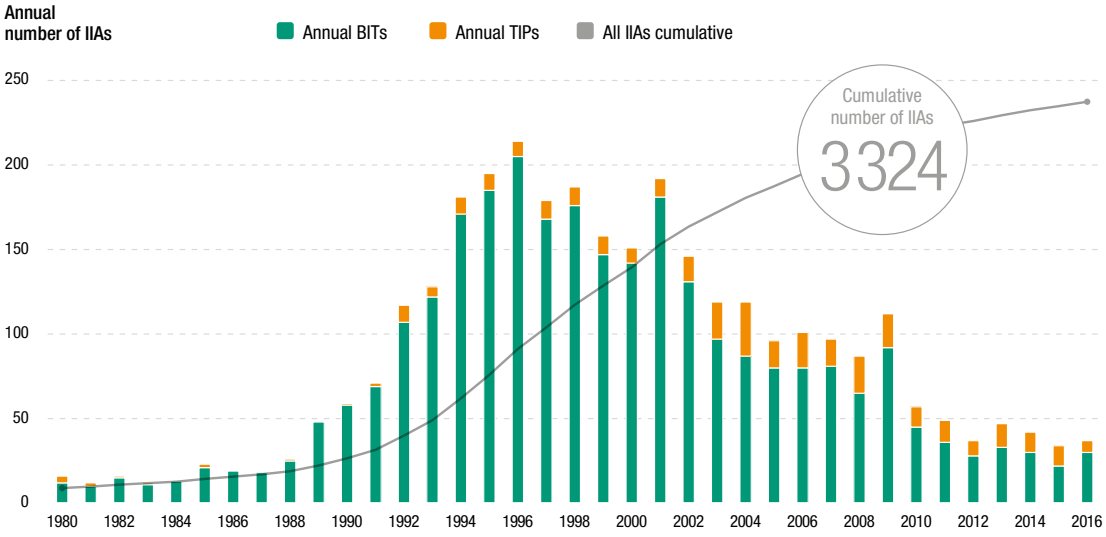
[4] The SEE 2020 Strategy targets a 160 per cent average increase in annual FDI inflows across SEE economies (including Croatia) but progress has been variable; UNCTAD Investment Policy Review (IPR) for the SEE region (2017), available at http://unctad.org/en/PublicationsLibrary/diaepcb2017d6_en.pdf

[5] UNCTAD Global Investment Trends Monitor (GITM) No. 25, available at http://unctad.org/en/PublicationsLibrary/webdiaeia2017d1_en.pdf

channelling investment to the SDGs is more important than ever. A country's investment climate as well as its national and international investment policies play a key role in this regard.

IIAs are part of a country's international investment policy landscape. Countries conclude these agreements with a view to protecting and promoting investment. Over the years, the IIA universe has continued to grow, albeit at a slower rate. The year 2016 saw the conclusion of 37 new IIAs—30 bilateral investment treaties (BITs) and seven treaties with investment provisions (TIPs),[6] bringing the IIA universe to over 3,324 agreements (2957 BITs and 367 TIPs) by end-February 2017 (see figure 1 below). Most active in concluding IIAs in 2016 was Turkey, concluding seven treaties, followed by Canada, Morocco and the United Arab Emirates, with four treaties each, and the Islamic Republic of Iran and Nigeria with three treaties each. Globally, the countries with the most IIAs by end of 2016 were Germany (202 IIAs), China (149 IIAs) and Switzerland (148 IIAs).

Figure 1. Trends in IIAs, signed 1980–2016



Source: UNCTAD, IIA Navigator.

BITs concluded between "Euro-Mediterranean" countries (i.e. intra-"Euro-Mediterranean" BITs) account for approximately 4 per cent of the global number of IIAs.[7] For this group of treaties, 2016 saw the conclusion of one new IIA,[8] bringing the number of intra-"Mediterranean European Union" IIAs to 140 agreements (131 BITs and nine TIPs) by the beginning of 2017 (see figure 2 below). Among these States, the countries with the most intra-"Euro-Mediterranean" IIAs are Turkey (28 IIAs), Egypt (19 IIAs), France (16 IIAs), Jordan and Tunisia (each 15 IIAs).

[6] Treaties with investment provisions (TIPs) encompass economic agreements other than BITs that include investment-related provisions (e.g. free trade agreements (FTAs), regional trade and investment agreements (RTIAs), and economic partnership agreements (EPAs). Unlike BITs, TIPs may also cover multilateral agreements involving more than two contracting parties.

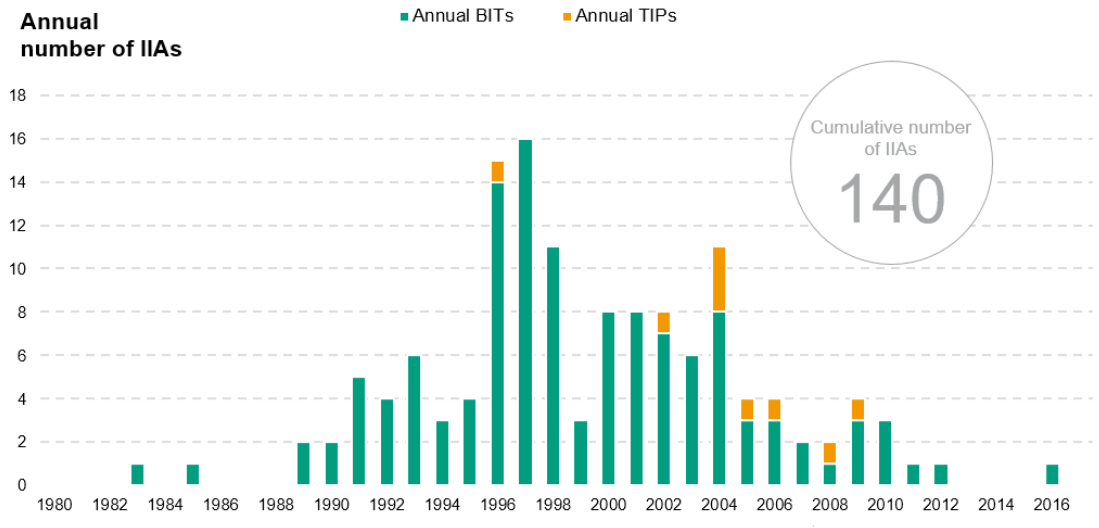
[7] This includes treaties between Mediterranean European Union countries, and MENA countries or Mediterranean SEE countries.

[8] Jordan-Turkey BIT, signed 27 March 2016.

The conclusion of IIAs in the "Euro-Mediterranean" region over time largely corresponds to the global trend. Having peaked at the end of the 1990s, the numbers of new "intra-IIAs" between countries from the European Union, MENA and "Mediterranean SEE" countries has been continuously declining.

Given the variety of country approaches towards international investment rulemaking, the existing international investment system has evolved into a highly atomized, multilayered and multifaceted network of treaties.

Figure 2. Trends in IIAs signed between Mediterranean European Union countries with MENA countries or Mediterranean SEE countries, signed 1980–2016



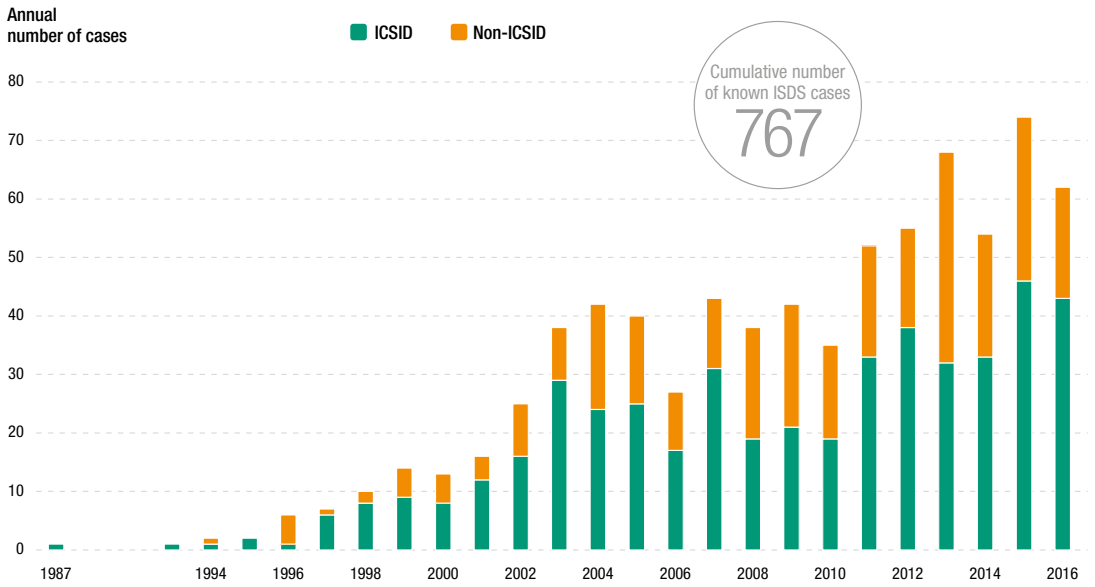
Source: UNCTAD, IIA Navigator.

II. TRENDS IN INVESTOR-STATE DISPUTE SETTLEMENT—GLOBALLY AND FOR THE "EURO-MEDITERRANEAN" REGION

Investors continued using Investor-State dispute settlement (ISDS) in 2016. With 69 new cases, the number of known treaty-based cases initiated in 2016 was slightly lower than the record number of 77 in 2015, but still higher than the 10-year average. As of January 2017, the total number of publicly known ISDS claims stands at 767 (see figure 3 below). As arbitrations can be kept confidential under certain circumstances, the actual number of disputes filed for this and previous years is likely to be higher. Developed country investors brought most of the new known cases in 2016. This follows the historical trend in which developed country investors have accounted for over 80 per cent of all known claims.[9] The majority of new cases invoked BITs, most of them dating back to the 1980s and 1990s.

[9] UNCTAD World Investment Report (WIR) 2017: Investment and the Digital Economy. New York and Geneva: United Nations, available at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

Figure 3. Known treaty-based ISDS cases, 1987–2016[10]

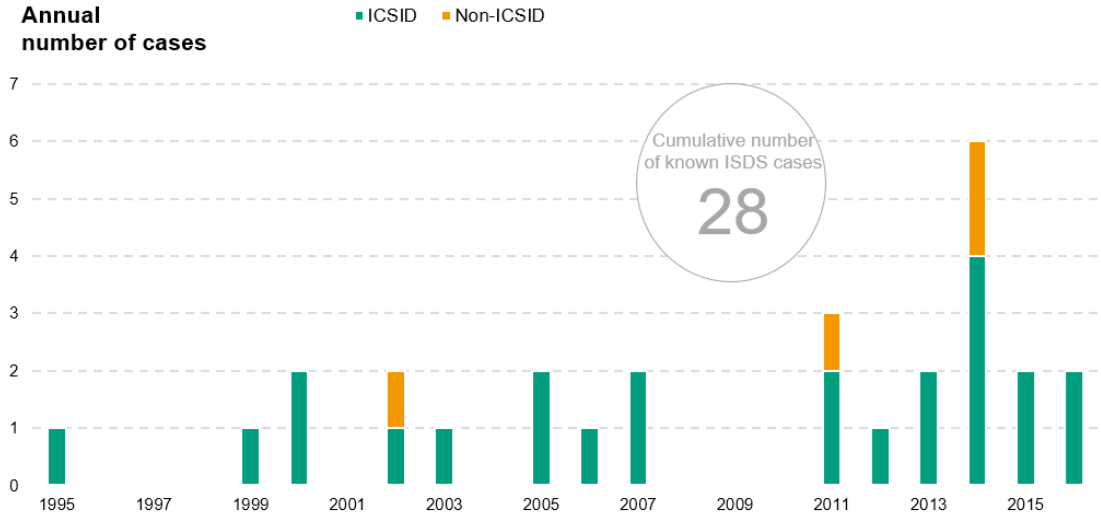


Source: UNCTAD, ISDS Navigator.

Developments on the global scale are mirrored by the overall increasing trend of ISDS cases brought by investors from "Mediterranean European Union" countries (as home States) against countries from the Middle East, North Africa and South-East Europe. Altogether, there were 28 cases filed by investors from "Mediterranean European Union" countries against MENA countries and/or "Mediterranean SEE" countries by the end of 2016, with a record high of 6 cases in 2014 (see figure 4). The most frequent respondent States are Albania and Egypt (six times each). The most frequent home States of claimants are Italy (11 times) and Greece (5 times). In general, just as in the case of ISDS cases globally, and considering the "age" of most IIAs, the majority of cases are brought by means of investment treaties that date back to the 1980s and 1990s.

[10] Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor-State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.

Figure 4. Known treaty-based ISDS cases initiated by investors from Mediterranean European Union countries against MENA countries and/or Mediterranean SEE countries, 1995–2016



Source: UNCTAD, ISDS Navigator.

III. SUSTAINABLE DEVELOPMENT-ORIENTED IIA REFORM: UNCTAD TOOLS AND EVIDENCE OF REFORM

The IIA universe is not only evolving in numbers, but also in content. In recent years, numerous countries have taken a new approach to IIAs and international investment policymaking, aiming to design treaties that are more conducive to sustainable development. Today, a shared view has emerged on the pressing need for systematic reform of the IIA regime to ensure that it works for all stakeholders. Consequently, today, the question is not whether to reform, but rather the extent of such reform.[11]

UNCTAD has answered the call and is actively engaged in advocacy for systemic and sustainable development-oriented reform of the IIA regime. UNCTAD's policy tools help policymakers design "new generation" investment policies that place inclusive growth and sustainable development at the heart of the efforts to attract investment and benefit from it. The catalytic role of UNCTAD's work on IIA reform is evident from the numbers of countries using UNCTAD reform tools (more than 100) and from trends in treaty making. In fact, today, IIA reform has entered the mainstream of international investment policymaking.

One of UNCTAD's tools for IIA reform is the Investment Policy Framework for Sustainable Development,[12] which was first launched as the special theme of the World Investment Report (WIR) 2012.[13] The Policy Framework offers guidance and options for modernizing investment policies at national and international levels and it proposes a set of Core Principles

[11] UNCTAD World Investment Report (WIR) 2015: Reforming International Investment Governance. New York and Geneva: United Nations, available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

[12] UNCTAD's Investment Policy Framework for Sustainable Development, available at http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf

[13] UNCTAD World Investment Report (WIR) 2012: Towards a New Generation of Investment Policies. New York and Geneva: United Nations, available at http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf

for investment policymaking, which serve as "design criteria" for national and international investment policies. On this basis, it presents guidelines for national investment policies and policy options for the formulation and negotiation of IIAs. UNCTAD's Policy Framework has since served as a reference point for policymakers, including through UNCTAD's Investment Policy Reviews, in formulating national investment policies and negotiating IIAs, as a basis for building capacity on investment policy and as a point of convergence for international cooperation and consensus-building on investment issues.

In June 2015, as part of the WIR 2015, UNCTAD launched a policy tool that has since shaped reform objectives and approaches: the Road Map for IIA Reform. UNCTAD's Roadmap for IIA Reform recommends reform to address five key areas (safeguarding the right to regulate while providing protection; improving investment dispute settlement; adding a component of investment promotion and facilitation to the IIA regime; ensuring responsible investment; and enhancing the systemic consistency of the IIA regime), take place at all four levels of policymaking (national, bilateral, regional and multilateral levels), and be guided by six guidelines (harness IIAs for sustainable development; focus on critical reform areas; act at all levels; sequence properly for concrete solutions; ensure an inclusive and transparent reform process; and strengthen the multilateral supportive structure).

Both developed and developing countries consider all these areas of reform important and are pursuing them through different types of reform actions.[14] One reform area that is important globally, but particularly so for the "Euro-Mediterranean" arbitration community is the improvement of investment dispute settlement. This is also the reform area that has sparked the most public debate in recent times and is also of interest to the arbitration community, including ISPRAMED.

Given today's criticism towards the existing ISDS system, maintaining the status quo is hardly an option. UNCTAD's Roadmap for IIA Reform offers a number of policy choices in this regard. On the one hand, there is a stream of reform options that aim at reforming the existing ISDS mechanism, such as the inclusion of provisions designed to improve the arbitral process, refinements to investor's access to investment arbitration, addition of filters for channelling sensitive cases to State-State dispute settlement and the introduction of local litigation requirements. Another stream of options is to add new elements to existing ISDS mechanisms, for example, building in effective alternative dispute resolution or introducing an appeals facility. Finally, there is a third stream of reform options that would abolish the existing system of ad hoc investor-State arbitration. The creation of a standing investment court, limiting dispute settlement to State-State or only relying on the domestic judicial systems of host States fall into this group of reform options.[15]

Evidence suggests that several of these reform options are being used by States. For instance, provisions excluding policy areas from ISDS have increased from eight per cent in earlier BITs (1959–2011) to 34 per cent in recent BITs (2012–2015); the number of treaties containing no ISDS mechanism has increased from four per cent in older BITs to 10 per cent in recent BITs.[16] In addition, there have been recent efforts to establish a multilateral court for settling investment disputes, with exploratory discussions driven by Canada and the European

[14] About 85 per cent of survey respondents considered UNCTAD's Road Map for IIA Reform to be highly relevant; UNCTAD World Investment Report (WIR) 2016: Investor Nationality: Policy Challenges. New York and Geneva: United Nations. See also country statements at the High-level IIA Conference during UNCTAD's fifth World Investment Forum held in Kenya, Nairobi (July 2016) and the Sixty-third Session of UNCTAD's Trade and Development Board (TDB), held in Geneva, Switzerland (December 2016).

[15] For an overview of ISDS reform options and their pros and cons see table IV.6. and related text in World Investment Report 2015, available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

[16] UNCTAD's IIA Mapping Project, available at http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu at UNCTAD's Investment Policy Hub, at http://investmentpolicyhub.unctad.org.

Commission, and the UNCITRAL/CIDS initiative for an International Tribunal for Investment (ITI) and Appeals Body (AB).[17]

It must be noted, however, that reform of investment dispute settlement cannot be viewed in isolation. Only a comprehensive package that addresses both the substantive content of IIAs and issues related to investment dispute settlement can achieve effective reform towards a sustainable development-friendly IIA regime.

In fact, numerous countries are taking new approaches to both dispute settlement as well as the substantive provisions of IIAs.[18] Although to varying degrees, evidence of sustainable development-oriented IIA reform can be found at all levels of policymaking: national, bilateral, regional and multilateral levels.

Additionally, "Euro-Mediterranean" countries are progressively engaging in sustainable development-oriented IIA reform. Looking at national level reform, a number of "Euro-Mediterranean" countries introduced modernized content into their recent model treaties. The model treaties of Egypt (draft model), Slovakia and Turkey, for example, provide clarification on what constitutes an indirect expropriation, contain general exceptions provisions (e.g. for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources), and include provisions on the promotion of corporate social responsibility, as well as explicit mention of the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble. Similarly, these models include provisions that limit access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS and limiting time period to submit claims).

Similarly, on the bilateral level, a review of IIAs signed in 2015 or 2016 by "Euro-Mediterranean" countries shows certain reform elements included in new treaties.[19] For example, the Guinea Bissau-Morocco BIT, just like the Rwanda-Turkey BIT, both contain detailed exceptions to the transfer of funds obligation as well as general exceptions. The latter additionally contains an explicit recognition that parties should not relax health, safety or environmental standards to attract investment. Similarly, these IIAs also contain elements that reform investment dispute settlement. Two examples of "Euro-Mediterranean" treaties that limit access to ISDS are the Rwanda-Turkey BIT and the Republic of Korea-Turkey BIT.

IV. THE WAY FORWARD: GOING BEYOND TRADITIONAL IIAS

Clearly, reform of the IIA regime to make it more conducive to mobilizing investment and channelling it to sustainable development outcomes is happening: countries continue concluding IIAs, but the treaties concluded today look significantly different from those concluded in the mid-1990s.

In addition, policy attention is shifting to investment facilitation, a set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day operations. Investment facilitation focuses on alleviating ground-level obstacles to investment, for example through improvements in transparency and

[17] More information available at http://www.cids.ch/events-2/past-events/634-2/

[18] UNCTAD IIA Issues Note No. 1 'Taking Stock of IIA Reform', March 2016, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d3_en.pdf

[19] For more information about these investment policy measures, please visit UNCTAD's Investment Policy Hub at http://investmentpolicyhub.unctad.org; all treaties available at UNCTAD's IIA Navigator, available at http://investmentpolicyhub.unctad.org/IIA.

information available to investors, and through more efficient and effective administrative procedures for investors. Despite its fundamental importance for growth and sustainable development, to date, national and international investment policies have paid relatively little attention to investment facilitation.

To remedy this, in September 2016, UNCTAD added an additional pillar, its Global Action Menu for Investment Facilitation ("Global Action Menu"),[20] to its toolbox for international investment policymaking. The Global Action Menu responds to the systemic gap posed by the absence of investment facilitation measures in national and international investment policies. In order to tackle ground-level obstacles to investment, this initiative proposes 10 action lines with a series of options for investment policymakers and government agencies for national and international policy measures.

Among the 10 action lines, several relate to the settlement of investment disputes, mediation, and dispute prevention, and that are relevant for the arbitration community, including ISPRAMED.

The UNCTAD package includes actions that countries can choose to implement unilaterally and options that can guide international collaboration or that can be incorporated into IIAs. The Global Action Menu incorporates extensive feedback obtained from multi-stakeholder consultations and intergovernmental processes that took place during the UNCTAD14 Conference and the World Investment Forum (WIF), held in Nairobi, Kenya, in July 2016. In December 2016, it was endorsed as a "high quality reference for investment facilitation policies" at UNCTAD's governing body, the Trade and Development Board in Geneva, Switzerland. It is hoped that this contribution also places UNCTAD's Global Action Menu for Investment Facilitation and UNCTAD's forthcoming 2018 World Investment Forum (WIF), scheduled for 22–25 October 2018 in Geneva, on the agenda of the global and the "Euro-Mediterranean" arbitration community.

[20] The Global Action Menu for Investment Facilitation is available at http://investmentpolicyhub.unctad.org/Upload/Documents/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf

Introduction à la seconde Table ronde

Charles Jarrosson

Professeur de droit, Université Panthéon Assas Paris II et Coordinateur du Réseau de centres d'arbitrage ISPRAMED, France

1. Le but que poursuit cette Conférence est exprimé par son intitulé général: "Pour une Communauté euroméditerranéenne de l'arbitrage international". Créer une telle communauté est donc l'objectif à atteindre. La première Table ronde a montré que les mécanismes de règlement des différends peuvent avoir un impact direct sur les échanges économiques et notamment sur les investissements au sein de cette région.

2. Il est donc naturel que notre deuxième Table ronde s'attache aux caractéristiques de l'arbitrage dans l'espace euroméditerranéen. Le sujet est vaste, il faut le cerner plus précisément. Géographiquement, nous nous intéresserons aux pays bordant la Méditerranée, avec parfois un élargissement vers des pays du Moyen-Orient qui n'ont pas d'accès direct à la Méditerranée, mais qui se trouvent en bonne partie dans la même situation que ses riverains.

3. Les divers intervenants ont choisi des angles particuliers. Certains ont choisi d'aborder la question sous l'angle de l'exposé de leur droit national, seul ou comparé avec d'autres droits voisins. C'est ainsi que Maître Bennar Aydogdu exposera les principales caractéristiques du droit turc de l'arbitrage et les efforts de la Turquie pour s'imposer comme place d'arbitrage, en montrant que le droit turc se veut un peu comme la charnière entre l'Europe et les pays du Moyen-Orient. De son côté, le professeur Mostefa Trari Tani présentera les caractéristiques de l'arbitrage dans la sous-région d'Afrique du Nord (Algérie, Égypte, Libye, Maroc, Mauritanie, Tunisie).

4. Il est une autre piste, orientée plus directement vers la pratique, et plus précisément celle de l'arbitrage institutionnel. Elle sera explorée par M. Nassib Ziadé qui décrira et analysera les défis et perspectives qui s'ouvrent pour les institutions d'arbitrage à vocation régionale dans les pays du Moyen-Orient et par M. Stefano Azzali qui présentera l'expérience de la Chambre arbitrale de Milan et les objectifs d'ISPRAMED dont on verra qu'ils se conjuguent très exactement à ce que j'aurai l'occasion de vous dire juste avant de lui passer la parole.

5. Il me revient de présenter, en ouverture de cette deuxième Table ronde, une vue générale des caractéristiques de l'arbitrage dans l'espace euroméditerranéen dans la perspective de son développement. Je le ferai en ayant à l'esprit que la réflexion sur la création d'une Communauté de l'arbitrage international n'est que l'une des pierres d'un édifice plus vaste, celui d'une Communauté méditerranéenne, juridique, mais également culturelle.

6. L'histoire a montré combien les divers pays du pourtour méditerranéen ont entretenu en ces domaines des liens constants. Dans le domaine juridique, l'Empire romain a montré

qu'une communauté et même un droit commun était possible, puisque le droit romain s'appliquait sur les deux rives de la Méditerranée, alors désignée de manière imagée comme le *Mare Nostrum*.

Qu'en est-il aujourd'hui ? Je me propose d'approcher la réponse en faisant d'abord un constat (I) et en envisageant ensuite les perspectives qui s'ouvrent (II).

I. CONSTAT

7. On ne peut pas dire qu'il existe aujourd'hui un droit commun méditerranéen de l'arbitrage. Il y a, en revanche, des droits nationaux de l'arbitrage dans chacun des pays riverains. Le commerce intraméditerranéen, et tout particulièrement celui des petites et moyennes entreprises, pourrait largement se développer s'il était davantage sécurisé, c'est là une évidence. Cette sécurisation passe non seulement par l'octroi de crédits, d'informations sur la manière d'exporter, mais aussi — et c'est ce qui nous intéresse — par l'instauration d'un mode de règlement des litiges qui présente les garanties d'indépendance et de rapidité nécessaires aux exportations comme aux investissements. Où en sommes-nous?

8. Lorsqu'on s'intéresse aux caractéristiques de l'arbitrage dans l'espace euroméditerranéen, on aperçoit divers facteurs, orientés en sens contraires. Certains vont dans le sens d'un rapprochement (on pourrait parler de forces centripètes), tandis que d'autres conduisent les divers droits dans le sens d'un éloignement (forces centrifuges), ou dans le maintien d'une diversité certaine. Quelques mots sur chacune de ces forces permettent d'éclairer la situation.

A. Les forces centripètes

9. J'en vois trois principales qui concernent : *a)* les règles de fond du droit des contrats ; *b)* les conventions internationales relatives au droit de l'arbitrage ; et *c)* les principes fondamentaux du droit de l'arbitrage.

a) La convention d'arbitrage

10. Le recours à l'arbitrage se fait sur le fondement d'une convention, qu'il s'agisse d'une clause incluse dans le contrat ou d'une convention conclue lorsque le litige est né. On peut donc commencer par relever que les droits de fond (les droits substantiels) applicables au droit des obligations ont, pour la plupart des pays bordant la Méditerranée, une origine commune dans le droit romain. En effet, une partie importante des pays qui nous intéressent ont partagé ce que l'on a justement appelé le *jus commune*, et qui est issu de la redécouverte au XI^e^ siècle du droit romain tel que compilé par Justinien cinq siècles plus tôt, notamment dans son Digeste. Ce *jus commune* est la résultante des travaux des glossateurs qui ont alors commencé leur œuvre à l'Université de Bologne au XI^e^ siècle, puis des postglossateurs au XIV^e^ siècle et ensuite de l'École du droit naturel aux XV^e^ et XVI^e^ siècles. Voici donc déjà une base commune.

11. Il en existe une deuxième, qui a consisté en la diffusion des codes napoléoniens (et principalement du Code civil), soit rapidement vers les pays voisins (Espagne, Italie, et pour citer des pays non riverains de la Méditerranée : Belgique, Pays-Bas, Portugal), soit plus tardivement à l'occasion de la colonisation (Algérie, Liban, Maroc, Syrie, Tunisie), soit encore pour des raisons de circulation du modèle juridique français (Égypte et pays du Golfe, notamment

par le biais du grand professeur égyptien Sanhoury). Dans une moindre mesure, la codification allemande et suisse a également eu une influence en Grèce et en Turquie.

b) Les conventions internationales sur l'arbitrage

12. Si l'on en vient maintenant plus spécifiquement au droit moderne de l'arbitrage, il faut relever que tous les pays bordant la Méditerranée ou presque sont des États membres de la Convention de New York de 1958 (la Libye fait exception) ou de celle de Washington de 1965. Tous ces pays ou presque ont édicté une législation relative à l'arbitrage qui, souvent, puise aux mêmes sources, que ce soit celle de la loi type de la CNUDCI (c'est le cas de la Tunisie, par exemple, qui, comme 75 États, s'est inspirée ou a repris la loi type) ou qu'il s'agisse d'un emprunt à un autre droit (c'est le cas du droit libanais au regard du droit français, par exemple).

c) Les principes du droit de l'arbitrage

13. Au-delà des instruments internationaux relatifs à l'arbitrage, il existe certains principes du droit de l'arbitrage international sur lesquels je reviendrai, mais qui peuvent être cités ici, comme l'autonomie ou l'indépendance de la convention d'arbitrage par rapport au contrat principal, comme la nécessaire indépendance de l'arbitre, comme l'aptitude des personnes morales de droit public à recourir à l'arbitrage qui sont partout reconnues au moins à titre de principe.

14. Pourtant, et malgré ce qui vient d'être décrit, on ne peut pas dire qu'il existe entre ces pays un droit unifié. C'est parce que, à côté de ces forces centripètes, qui pourraient rapprocher les droits de l'arbitrage les uns des autres, il existe des forces centrifuges qui les éloignent.

B. Les forces centrifuges

15. C'est apparemment paradoxal, mais la mise en œuvre du droit de l'arbitrage suppose souvent le recours à la justice étatique. C'est particulièrement vrai pour l'arbitrage ad hoc, en début de procédure, lorsque l'une des parties ne veut pas nommer un arbitre ou lorsqu'il s'agit de récuser un arbitre. C'est également vrai en cours de procédure, s'il faut remplacer un arbitre ou obtenir une mesure provisoire, et après la sentence, lorsque vient le temps de l'exécution de la sentence et des voies de recours exercées contre elle.

16. Or, si les droits de fond (les droits substantiels) peuvent être proches, les droits de la procédure resteront toujours différents, dans les textes et dans la pratique. En effet, le droit de la procédure est plus facilement spécifique. Il dépend davantage des spécificités politiques et institutionnelles du pays en cause. Ainsi, un État fédéral aura nécessairement une organisation judiciaire différente de celle d'un pays centralisé. Un pays qui connaît une division entre juridictions judiciaires et administratives ne pourra partager une même procédure avec un pays qui ignore cette division. Un pays qui distingue dans sa législation l'arbitrage interne et l'arbitrage international n'aura pas le même système de voies de recours.

17. Ces spécificités de l'organisation de la justice vont avoir une répercussion immédiate. On comprend dès lors que, s'agissant du droit de l'arbitrage, on va assister à une forte diversité non seulement du point de vue de l'existence ou des pouvoirs du juge que l'on appelle le juge d'appui, c'est-à-dire le juge qui peut être saisi selon une procédure rapide et dont le rôle est de permettre de débloquer l'arbitrage, surtout au début de la procédure (nomination, récusation ou remplacement d'un arbitre, prorogation du délai d'arbitrage), mais aussi pour les étapes ultérieures.

18. Si l'on prend l'exemple de l'*exequatur*, on ne peut qu'être surpris de constater combien en pratique le rôle du juge de l'*exequatur* varie entre des pays qui pourtant ont tous adhéré à la Convention de New York. Certains juges de l'*exequatur* opèrent un contrôle assez approfondi, et leur décision fait l'objet d'un recours en appel ou même en cassation, le tout pouvant durer des années. Dans d'autres pays, comme la France, le juge de l'*exequatur* opère un contrôle extrêmement léger et l'*exequatur* est obtenu dans les quarante-huit heures. Le véritable contrôle est centralisé au niveau de la cour d'appel et est limité.

19. Il faut avoir en tête, c'est fondamental, qu'un droit se juge à son application et non seulement à ce qui est officiellement écrit dans les codes ou les lois. Cela est particulièrement vrai en matière d'arbitrage international, matière où l'on a besoin de réponses concrètes.

C'est ce qui me conduit à envisager maintenant les perspectives ouvertes à l'arbitrage dans l'espace euroméditerranéen.

II. PERSPECTIVES

20. Si l'on veut être efficace, dans la perspective qui nous intéresse, celle du développement de l'arbitrage international dans le monde méditerranéen, il faut être pragmatique et pas trop ambitieux. Il n'est à mon avis pas souhaitable de rechercher un droit uniforme, car même si l'on devait l'imaginer possible — ce qui prendrait au moins vingt ans — ce mouvement qui consisterait à partir des textes devrait être impérativement complété par des moyens propres à s'assurer de l'unité et de l'homogénéité de leur application pratique par les tribunaux.

21. Laissons donc tomber l'uniformité qui est inatteignable. Quelle direction prendre alors ? Il reste deux voies principales.

22. L'une d'elles est celle suivie par la CNUDCI : proposer une loi type que les États sont libres d'aménager à leur guise. L'avantage est que l'on peut espérer que les États vont limiter au maximum les modifications. Mais ce n'est pas toujours le cas : la loi iranienne s'est par exemple trop éloignée de la loi type, jusqu'à contredire parfois son esprit. Même en admettant que la loi type soit adoptée sans grandes modifications, il subsiste une limite qui réside dans l'application effective de la loi. On l'a dit, le même texte peut être appliqué de manière très divergente selon les pays.

23. Il me semble qu'une deuxième voie peut être suivie et qui a pour caractéristique de n'être pas exclusive de la première. Il s'agit de chercher une harmonisation non seulement des textes, mais surtout des solutions pratiques et de leur application concrète.

24. Il faut savoir — et admettre — qu'il restera toujours une irréductible spécificité du droit de l'arbitrage d'un pays par rapport aux autres, par exemple, pour le contrôle de la conformité de la sentence à l'ordre public international, car la notion et le domaine de l'ordre public international restent affectés par des considérations qui varient selon les États. De même, le recours à l'arbitrage par les personnes morales de droit public dépend de considérations moins juridiques que politiques et l'harmonisation dépend donc d'une volonté politique.

25. L'harmonisation reste possible en dépit de tous ces éléments. Elle peut être recherchée par des emprunts réciproques, par des échanges d'expériences. Il me semble qu'il existe un mouvement, assez lent, mais continu, d'harmonisation naturelle. Elle s'opère à partir d'un phénomène d'imitation des règles et des pratiques des États dans lesquels l'expérience d'arbitrage est importante et ancienne. Lorsque la Cour de cassation française a, en 1963 et au

lendemain du premier Congrès international de l'arbitrage international, affirmé l'autonomie de la clause compromissoire par rapport au contrat qui la contient, cette règle était limitée au droit français. Elle s'est rapidement répandue et, aujourd'hui, il n'est pas de pays où il existe une réelle pratique de l'arbitrage et où cette règle n'a pas été reprise. De même, certains règlements d'arbitrage l'ont reprise (c'est le cas du règlement CCI).

26. Pourquoi certains pays sont-ils des places d'arbitrage internationales importantes ? Si l'on recherche les raisons de cet état de fait, on trouve divers éléments de réponse : une loi qui ne limite pas exagérément le domaine de l'arbitrage, et surtout une jurisprudence étatique qui assure le respect d'un certain nombre de règles sur chacune desquelles je voudrais dire quelques mots rapides. À chaque fois, on verra si une harmonisation par l'exemple et l'imitation est plus ou moins facilement réalisable.

27. L'existence d'un juge d'appui ne s'improvise pas, mais même si un tel juge n'est pas individualisé dans les textes, il est possible pour le juge étatique saisi de chercher à intervenir au minimum et dans le sens de l'efficacité de la convention d'arbitrage, en ordonnant à la partie défaillante de nommer un arbitre ou en le menaçant de le faire à sa place à défaut.

28. L'absence de contentieux préarbitral devant le juge étatique : ce contentieux porte généralement sur la validité de la convention d'arbitrage et pose donc la question de savoir qui, du juge étatique ou de l'arbitre, est compétent. La jurisprudence peut renvoyer la question de la connaissance de la compétence de l'arbitre à l'arbitre lui-même en application du principe selon lequel tout juge est juge de sa propre compétence. Ce comportement est une conséquence de la règle selon laquelle une convention d'arbitrage a pour effet d'ôter au juge étatique sa compétence. Toutefois, j'ai bien conscience que cette règle, souvent dénommée effet positif de la compétence-compétence, n'est pas partagée par beaucoup de pays.

29. La limitation des interventions judiciaires au cours de l'instance arbitrale. C'est là un résultat plus facile à atteindre, surtout dès lors que l'arbitrage est institutionnel et que le règlement prévoit la compétence des arbitres pour ordonner de telles mesures. En effet, si le règlement, ou la clause d'arbitrage, contient une telle stipulation, cela signifie que les parties ont au moins tacitement retiré au juge le pouvoir d'ordonner ces mesures (sauf si, par leur nature, elles étaient réservées par une disposition d'ordre public au juge).

30. L'attachement à l'indépendance de l'arbitre : la règle est universellement proclamée, mais pas universellement mise en pratique de manière uniforme. C'est ici véritablement une question de pratique que la jurisprudence peut aider à résoudre par des décisions claires et équilibrées. Il faut sanctionner les récusations dilatoires et rester ferme sur les principes qui relèvent de la simple honnêteté. Mais ici encore, la situation est très simplifiée si l'arbitrage est institutionnel car il est facile d'adopter des critères communs pour le choix des arbitres, leur récusation ou leur remplacement.

31. La rapidité des procédures de contrôle de la sentence. C'est une question d'organisation pratique de la justice, mais c'est aussi un effet indirect des textes. Rien n'est pire que l'abus des voies de recours qui paralyse l'exécution des sentences. Et rien n'est pire qu'un contrôle qui dure des années. Cette question, il ne faut pas se le cacher, dépasse le domaine de l'arbitrage. On peut tout de même signaler que le fait qu'une cour d'appel décide de centraliser les questions d'arbitrage devant la même chambre qui aura donc des magistrats qui vont rapidement se spécialiser est de nature à améliorer les décisions et à les accélérer.

32. La limitation du contrôle à des cas précisément énumérés et exclusifs d'une révision au fond. Ici encore c'est assez largement a priori une question qui relève du législateur, mais

souvenons-nous que les pays qui nous intéressent aujourd'hui sont parties à la Convention de New York : l'article V § 1 e) de cette Convention limite donc les cas de nullité: reste à les appliquer en pratique avec discernement.

33. Tous ces objectifs peuvent passer par la formation des magistrats et des avocats, et par l'information: par exemple faire connaître et faire circuler la jurisprudence des cours qui ont l'habitude de l'application des différents griefs retenus par l'article V, organiser des séminaires de pratique arbitrale et de pratique judiciaire de résolution des affaires d'arbitrage, c'est-à-dire du contentieux préarbitral, périarbitral et postarbitral.

34. L'harmonisation est plus facile à réaliser si l'arbitrage se déroule dans le cadre d'une institution d'arbitrage, car, d'une part, les règlements d'arbitrage sont rédigés avec moins de contraintes que les textes de lois et, d'autre part, leur rédaction est souvent inspirée par les mêmes modèles. En outre, le recours aux institutions d'arbitrage permet de leur conférer des tâches qui, dans un arbitrage ad hoc, relèveraient du juge étatique. En privilégiant l'arbitrage institutionnel, on privilégie donc un arbitrage internationalisé et homogénéisé.

35. C'est là tout le rôle et l'ambition d'ISPRAMED: coordonner, harmoniser, mais pas uniformiser. Sur ce sujet, je laisse la parole au deuxième intervenant de notre Table ronde: M. Stefano Azzali.

The need to elaborate a common practice among arbitration centres of the region administering arbitral proceedings

Stefano Azzali

Secretary Treasurer of the International Federation of Commercial Arbitration Institutions (IFCAI), Secretary-General of Milan Chamber of Arbitration and ISPRAMED Director, Italy

I. A QUESTION OF PRINCIPLES AND METHODOLOGY

I wish to start this contribution quoting the Report "Dialogue Between Peoples and Cultures in the Euro-Mediterranean Area":

> *"Broadening the circle of cultural exchanges is the only way out of this impasse. The Euro-Mediterranean dialogue must be envisaged less as the problem to be solved than as a part of the solution to the problems that arise, in different forms, in the North and South respectively."*
>
> *"Exchanges mean more than just settling oneself down somewhere and talking within small, restricted circles. Exchange also means moving, crossing the street and then the sea, taking the road that leads to other peoples and cultures."*[21]

It is commonly known that a correctly-functioning alternative dispute resolution (ADR) system promotes trade and investment relations on a national and international basis; but it is not enough: in order to increase business relations (hopefully, successfully for all the players involved) a political commitment towards the interested regions is also necessary. As a matter of fact, no type of commercial relations can be properly set if not preceded by a favourable political and institutional environment. A kind of "ring of friends" in the Mediterranean should be created, a *community*[22] which cannot be only nourished by historical and geographical proximity but should be inspired by common principles such as co-ownership and equality, both leading to cross-fertilization.

How can all this be achieved?

First, in order to create relations of trust, we need to recognize our differences on the basis of which we can share a set of common principles.

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[21] From the report "*Dialogue between Peoples and Cultures in the Euro-Mediterranean Area*" by the High-level Advisory Group established at the initiative of the President of the European Commission, Romano Prodi (2003), p. 20.

[22] The term "community" is used here making reference to the definition given of it in the article by Georges Abi-Saab, "*The existence of A Euro-Mediterranean Legal and Arbitration Community*", included in the proceedings of the "*Second International Conference for a Euro-Mediterranean Community of International Arbitration",* held in Cairo (November, 2015), p.17, available at: http://www.uncitral.org/pdf/english/publications/sales_publications/Conference_Cairo_2015.pdf

In ISPRAMED, we do not talk about homogeneity of arbitration rules but, given the diversity of juridical systems, rather of a *harmonization of practices.* Harmonization that should be done at a regional level, in order to guarantee a minimum — and common — procedural standard, as correctly stated by Michel Gaudet "*un arbitrage universel, ce qui ne signifie pas qu'il ne peut être recherché dans un comportement culturel et un système juridique identique: l'universalité réside dans la reconnaissance par tous de quelques principes et d'une méthode*".[23]

There is a real need of a common core of principles inspiring arbitral proceedings; a sort of qualitative "minimum standard of treatment" in administering arbitration applied by all the major arbitration institutions of the MENA region.

A core of shared practices and principles should be a crucial step in the promotion of an ADR culture among the local enterprises, in the establishment of a stronger cooperation among the arbitration centres of the Euro-Mediterranean region and, as a consequence, in the increase of foreign investments.

Talking about the harmonization of practice and the work done within the ISPRAMED Network,[24] a specific methodology had been approved by all members before starting the work of comparison of practices, which it is inspired by such principles (see below, under III).[25]

The final achievement is to strengthen regional centres (of both shores of the Mediterranean), as grounded in their contexts, so as to make arbitration services more familiar to the local business culture and more accessible and predictable by foreign investors.

II. A POSITIVE AGENDA FOR THE MED AREA

In the last two years, a number of symposiums and conferences shaped the public debate about the Mediterranean, focusing on the issue of a *Med Common positive agenda* aimed at boosting again commercial exchanges as well as increasing investments. This need is quite understandable since data concerning import and export during the period 2014–November 2016 show steadily decreasing trends: with regard to North Africa, Italian exports went from 13.989 in 2014 to 11.232[26] recorded in November 2016. Currently the percentage of the Italian export to North Africa is 3 per cent of the total percentage of Italian export (in 2014 it was 3.5 per cent). Considering the historical and geographical proximity, it is still a very low rate.[27]

[23] Quotation from the speech given by Michel Gaudet on 10 October 1983, on the occasion of the sixtieth anniversary of the International Court of Arbitration of the International Chamber of Commerce, also reported in "*Théorie de l'arbitrage*", by Bruno Oppetit, Presses Universitaires de France (1998), pp. 15 and 16.

[24] The Centres of the ISPRAMED Network are: Arbitration Center of the Istanbul Chamber of Commerce; Cairo Regional Centre for International Commercial Arbitration; Centre d'Arbitrage et de Conciliation de la Chambre Algérienne du Commerce et d'Industrie; Centre de Conciliation et d'Arbitrage de Tunis; Cour Marocaine d'Arbitrage; Milan Chamber of Arbitration; Lebanese Arbitration and Mediation Center.

[25] The description of the type of work done within the ISPRAMED Network—and the results produced by its Working Group—is available in the article "An Illustration of a Mediterranean Arbitration Community: the ISPRAMED Network, included in the proceedings of the "Second Conference for a Euro-Mediterranean Community of International Arbitration", Cairo, November 2015, p. 21: http://www.uncitral.org/pdf/english/publications/sales_publications/Conference_Cairo_2015.pdf

[26] Millions of Euro.

[27] Economic Observatory of the Italian Ministry of Economic Development, based on data elaborated by the Italian National Institute of Statistics (ISTAT) (March 2017): http://www.mise.gov.it/index.php/it/commercio-internazionale/osservatorio-commercio-internazionale

I wish to conclude quoting a milestone concept, expressed perfectly by Frédéric Bastiat,[28] which summarizes the possible consequences of an unsuccessful commercial relations policy: *"When goods don't cross borders, soldiers will."*

III. THE METHODOLOGY[29]

What is the "methodology"?

The methodology is an operational pattern for the working group established according to the provision of art. 4.4.1. of the memorandum of understanding signed by ISPRAMED and the seven Centres.[30]

The methodology will hopefully allow each of the parties involved in the Working Group to actively participate and contribute to the definition of common principles exemplified through practical cases. These principles and their practical application will constitute the (so-called) common practice in administering arbitral proceedings in the Mediterranean Area.

Why do we need to explain how to reach this objective?

The implementation of a working method allows all the parties involved to work in the most effective and efficient way. Moreover, the method proposed here aims at encouraging the active involvement of all the participants.

In addition, it should also be considered that the method can affect the results.

Implementing a working method ensures the participation of all the members of the group, and that the results will be better accepted.

Knowing how the Working Group has operated also helps to ground the validity, seriousness and reliability of the outcome.

The process suggested here is not intended to be exhaustive and final. It has to be seen as a starting point that can be adapted along the way.

Who are the participants in the Working Group and what are their roles?

The Centres

The Centres are the key actors of the Working Group. Their tasks are described in the present document. All the decisions of the Working Group will be taken by unanimous vote of its member Centres. Neither the Coordinator nor ISPRAMED has the right to vote.

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[28] Frédéric Bastiat, (29 June 1801–24 December 1850), supporter of the theories of free trade and critic of every form of protectionism, was a French economist and author of essays and written works connecting economic theories to the political, which had great influence during the nineteenth century and the beginning of the twentieth century.

[29] The Agreement on the Methodology was signed by all members of the ISPRAMED Network in Cairo in April 2010, when the Network was made up of six Centres. The document is the property of ISPRAMED and any reproduction of it must be authorized by ISPRAMED.

[30] See footnote 24 for the list of Centres. The Lebanese Arbitration and Mediation Center joined the Network after the signature of the Agreement on the Methodology.

The Coordinator

The Coordinator is a renowned and distinguished expert in the field of international arbitration, with significant experience both on an academic and practical level, and with deep knowledge of the Euro-Mediterranean region. As a conductor, he or she will assure the harmonic and concrete development of the Working Group's activity and his or her task will be to elaborate the common principles and their concrete applications. The Coordinator will work in close connection with ISPRAMED.

ISPRAMED

ISPRAMED activity will focus on the collection of practices from the different Centres, according to the following agreed work methodology. ISPRAMED will also be in charge of the final drafting of the Handbook on the basis of previous work carried out by the Coordinator.

What is the working method?

1) Preliminary phase: Establishing themes

On the basis of previous meetings and exchanges of ideas among the members of the working group some issues have been already highlighted as decisive issues for the "good" administration of arbitral proceedings.

The themes so far indicated are: Independence/impartiality; criteria for selection of the arbitrators; time of the arbitral proceedings; costs of the arbitral proceedings; confidentiality; transparency of the decision-making process; multiparty arbitration.

The list is not final and new themes might be added.

For each of these themes the working group will go through the following phases in order to elaborate the common principles and their concrete applications.

2) First phase

In order to define common principles, it is necessary to begin with the study of the Centres' rules, practices and cases.

Comparing the rules: For each of the listed themes, the Centres will fill in the rules comparison chart. Each Centre will fill in the columns of its competence and send the form to ISPRAMED, which will gather all the charts and will elaborate the final one to be circulated among the working group members.

Comparing the practices: For each rule of the comparison chart the Centres will illustrate their practice and will proceed so as described above.

Comparing the cases: For each rule of the comparative chart, the Centres will illustrate their cases (using the model in annex II) and will proceed as described above.

Submission of a report: Each Centre will also prepare a summary on the law and practice in the respective jurisdictions related to each theme.

3) Second phase: Identifying and elaborating common principles

The Coordinator will receive from ISPRAMED all the materials collected according to the above-mentioned procedure and, with the support of ISPRAMED, will prepare a first Draft Report on Independence and Impartiality (and so on for each theme) in which he or she will define the general common principles to be submitted to the Centres for their consideration. The principles should comply with the international practice and be respectful of the different legal cultures involved. The definition of the principles should be flanked by a number of practical examples, which should exemplify the general principle for a practical guidance for the Centres and for arbitrators and parties too.

The first Draft Report will be circulated, through ISPRAMED, among the Centres, which will submit their comments.

On the basis of the comments and after deep and extended debate with the Working Group members the Coordinator will finalize the Report on the concerned theme. The Report will be submitted to the Centres for the final approval.

4) Third phase: Drafting the handbook

The outcome of the working group activity is expected to be a practical guide (guidebook/ handbook) for the Centres, arbitrators, parties and their counsel. The guide should be issued in an electronic format.

The handbook will comprise different sections, one for each theme. Each section will include the rules comparison chart and the Report (made of common principles and exemplifications).

ISPRAMED will carry out the editorial work necessary to put together the handbook, which ultimately will be the sum of the rules comparison charts and Reports produced throughout the process described above.

Case study: international arbitration framework and practice in Turkey

Bennar Aydoğdu[31]

Founder of BennArb Law Firm, Turkey

I. INTERNATIONAL ARBITRATION FRAMEWORK IN TURKEY

The term "arbitration" first appeared in the Code of Civil Procedure ("CCP") which governs domestic, voluntary arbitration. The CCP, however, does not govern international arbitrations and only applies to domestic arbitrations taking place in Turkey without any foreign element, but is a modern law based on the UNCITRAL Model Law.

In 1982, the Private International Law and Procedural Law Act ("PILA"), which contains provisions on the recognition and enforcement of foreign arbitral awards, came into force. The PILA was then amended in 2007.

Turkey is a party to the 1961 European Convention on International Commercial Arbitration ("Geneva Convention") and the 1958 New York Convention. Turkey also ratified many bilateral and multilateral treaties and conventions, such as the Convention on Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).

Due to the increase of investments and development of the build-operate-transfer models, the importance of resolving disputes by arbitration increased, and it was then that the Constitution was amended in 1999 in parallel to this need and also several other amendments were made to the relevant administrative acts. Accordingly, it was agreed that the disputes arising out of the concession agreements for public services, where the Turkish State is one of the parties, would be resolved by arbitration and the powers of the Council of State (which is the highest instance for reviewing decisions and judgments rendered by administrative courts) would be limited to the Council giving its opinion within two months after the drafting of draft legislation, conditions and contracts under which concessions for public services are granted.

Also, addressing the need for a legal regime on international arbitration, Turkey enacted the International Arbitration Law ("IAL"), which entered into force in 2001. The IAL is based mainly on the UNCITRAL Model Law on International Commercial Arbitration and chapter XII of the Swiss Federal Statute on Private International Law. However, the "Terms of

[31] Founder of BennArb Law Firm in Turkey, the author acts as arbitrator, mediator and counsel and is notably member of the Board of Management of the Chartered Institute of Arbitrators (CIArb) and of the Board of the Istanbul Arbitration Association.

Reference" concept is influenced by the Rules of Arbitration of the International Chamber of Commerce.

The IAL provides a brand new legal framework in Turkey for international arbitration proceedings, with a view to attracting foreign investors. The main features of this Law are as follows:

- The IAL applies to disputes which have a "foreign element" (e.g., a foreign party) and designate Turkey as the place of arbitration, or to disputes in which the provisions of this Act are designated by the parties or the arbitrator or arbitral tribunal.

- If an action is brought before the court in a matter that is the subject of an arbitration agreement, the respondent may make an objection as to the arbitration.

- It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure and for a court to grant such measure.

- The parties are free to determine the number of arbitrators. However, the number shall be odd. Arbitrators must be impartial and independent.

- Subject to the mandatory provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. They may make reference to any law or international or institutional arbitration rules. If there is no such agreement between the parties, the arbitral tribunal shall conduct the proceedings in accordance with the provisions of this Law.

- The parties are free to determine the place of arbitration and the language to be used.

- Unless otherwise agreed by the parties, arbitration commences on the date on which a request for the appointment of arbitrators is made to the civil court of first instance or to a person or an institution.

- Unless otherwise agreed by the parties, an award shall be rendered within one year, which—in the case of a sole arbitrator—is from the date of his appointment or, in the case of a tribunal of three, from the date when the minutes of the tribunal's first meeting are kept.

- Recourse to a court against an arbitral award may be made only by an application for setting aside the award. Such recourse shall be made before the civil court of first instance.

II. THE ROLE OF TURKEY AS A SEAT OF INTERNATIONAL ARBITRATION

Today Turkey is the eighteenth-largest economy in the world and seventh-largest economy in Europe, with a gross domestic product (GDP) of about $800 billion in 2014. With the 2023 vision of economy, which is a list of goals released by the Turkish Government to coincide with the centenary of the Republic of Turkey in 2023, Turkey aims to count itself among the world's top 10 economies and in that regard tripled its investment over the last decade.

As reported by the Turkish Ministry of Foreign Affairs in its economic outlook of Turkey report, Turkey's successful economic performance, young population, qualified and competitive labour force, liberal and reformist investment climate, highly developed infrastructure, advantageous geographic position, low tax rates and incentives and large domestic market, as well as customs union with the European Union since 1996, provide ample opportunities for foreign investors. What makes Turkey unique in terms of trade and FDI is that it is a gateway to Europe, the Middle East, North Africa and Central Asia. Indeed, a four-hour flight from Istanbul gives access to more than 50 countries and a vast market that accounts for one fourth of the world economy. Besides, access to Turkey is efficient and easy, where advance visa application is usually not required.

Turkey is actually not only a gateway to these regions but also a point of connection between Western and Eastern cultures, which is appealing to foreign parties within the region, especially for the resolution of disputes between Western and Eastern States. The importance of geographical advantage with respect to selection of the seat for international arbitration has also been the case, for instance, for Stockholm, Singapore and Dubai.

Turkish companies are highly involved in major international construction, energy, and transport projects, which attracts foreign companies to build strong relations with Turkey. Not surprisingly, settlement of commercial disputes by arbitration in these major international projects and international trade is widely used. This also provides a good environment for Turkey to promote itself as a seat of international arbitration.

Turkey is signatory to major international conventions related to arbitration and is a model law country with a modern arbitration framework. Besides that, there are certain arbitration centres established by the major chambers of commerce, such as the Bursa Chamber of Commerce Arbitration and Mediation Center (BTSOTAM), Arbitration Center of the Union of Chambers and Commodity Exchanges of Turkey, Istanbul Chamber of Commerce Arbitration Center, as well as the Istanbul Arbitration Center.

According to the 2010 International Arbitration Survey on the choices in international arbitration conducted by the School of International Arbitration at Queen Mary University of London, formal legal infrastructure (such as national arbitration law, and the neutrality and impartiality of legal systems), law governing the substance of the dispute and convenience of location and culture were the top three influencers on the choice of the seat of arbitration. All in all, because of its geographic location, its role as a regional and global player, dynamic and developed industry, modern legislations and existence of arbitration centres, Turkey should be the preferred seat for international arbitration.

III. EFFORTS TO DEVELOP INTERNATIONAL ARBITRATION IN TURKEY

Cooperation agreements with international organizations for accredited ADR training

In May 2015, the Arbitration and Mediation Center under the leadership of the Bursa Chamber of Commerce and Industry (BTSOTAM) was established. As such, BTSOTAM is unique as being the first arbitration and mediation centre established within the chambers of commerce and industry in Turkey. The city of Bursa represents an active and leading force in the development of the Turkish economy, as the "locomotive of Turkish industry", and has a

thriving chamber of commerce with almost 40,000 active members. Upon its establishment, the centre first aimed to promote the use of ADR by way of organizing training both on arbitration and mediation. The reason behind this initiative was the lack of any educational institution in Turkey providing training specifically on arbitration. With regard to mediation, mediation training in Turkey is offered by the institutions approved by the Turkish Ministry of Justice, given that only those with a legal background can become accredited mediators by law. However, individuals who want to become professionals in arbitration can only attend short courses or training sessions on certain aspects of arbitration, or they opt for writing their thesis on arbitration during their postgraduate studies due to the lack of an institution offering accredited training on arbitration. Therefore BTSOTAM wanted to fill this gap and, with that in mind, in 2016 a collaboration agreement was signed between the Chartered Institute of Arbitrators (CIArb), BTSOTAM and Uludağ University to promote and develop the education and training of dispute avoidance and dispute resolution techniques. CIArb is a not-for-profit, United Kingdom-registered charity and provides a wide range of services and support to members and others involved in ADR, and offers the only globally recognized professional qualifications through its accredited training.

Under the agreement signed in May 2016, BTSOTAM and Uludağ University undertook the training and education of judiciary; practitioners and other interested parties within Turkey in the field of ADR so that those participating are fully trained within the field of arbitration and eligible to become members of CIArb. Thus, BTSOTAM and the Uludağ University became the contact point and subject matter experts for other similar institutions within Turkey with respect to CIArb accredited training. And for the first time in CIArb's history, it was agreed that the training would also be delivered in Turkish so that those who are not proficient in English, but eager to become experienced in ADR methods, would be able to take the training in their mother tongue. The aim was also to reach practitioners not only from legal background but also from other fields. Thus, training sessions were organized for lawyers, judiciary, academicians and financial advisers, which were all very well attended. Advanced level of training with further modules, including an award writing course, will follow in due course.

Of course, raising the awareness to ADR is not only achieved by organizing training. The culture of resolving disputes through ADR methods should be spread to a large mass of people, that is, we need to ensure that the parties in dispute, their legal representatives and the arbitrators/mediators/judges adopt and make us of these ADR methods effectively. For instance, in order to be a role model and to encourage others to do so, Uludağ University in Bursa decided to include ADR clauses in their agreements as the dispute resolution method instead of litigation. Also, one of the municipalities in Bursa resolved a major dispute by mediation, and a major textile company in Bursa resolved its dispute with more than 200 of its employees through mediation. In this way a major dispute was resolved with all the employees and in one day. These institutions and the company were then rewarded by the Bursa Chamber of Commerce as contributors to work peace. You cannot make others believe in you if you do not believe in what you are doing. When esteemed institutions make use of ADR methods, this serves as a model to the community and as a result the awareness of ADR is raised.

Identification and resolution of the problems in practice

Although there are positive developments in the field of ADR in Turkey, there are also certain problems faced in practice, but thanks to the efforts of the local institutions, these problems have either been recently resolved or are yet to be resolved in the very near future.

One of them is the high fees applied to the enforcement proceedings. Under the Turkish Law on Fees, a court filing fee equal to approximately 1.7 per cent of the entire claim amount is payable in advance by the applicants where there is a monetary claim and where the court is to consider the merits of the case. In other cases a nominal fixed fee of approximately $10 is payable to the court. According to the New York Convention, there should be no examination on the merits during the enforcement proceedings and as such a nominal fixed fee should have been payable given that the courts would not consider the merits of the case. However it was not clear from the Turkish Law on Fees whether a percentage or nominal fixed fee was payable for the enforcement proceedings on the enforcement of arbitral awards and thus the Turkish courts had differing practices. Some courts required payment of a nominal fixed fee, whereas others required payment of a fee equal to a percentage of the claim.

This ambiguity in practice caused major problems with respect to enforcement. Among others, recently the officials from the Bursa Chamber of Commerce had a meeting with the Turkish Minister of Justice to draw attention to this problem, which had generated complaints from the practitioners for a long time and explained why there was the need for the waiver of high fees on enforcement proceedings. The Ministry considered the requests and complaints of the local institutions and the practitioners, and accordingly an amendment to the Law on Fees came into force on 4 October 2016 for the waiver of the percentage fee applied to the enforcement proceedings. This shows the importance of the efforts of the local institutions and practitioners in drawing the attention of the politicians and judiciary to structural problems, and how these institutions such as the chambers of commerce or arbitration centres can influence the choices of the political authorities.

Another problem faced in practice, which is yet to be resolved, is the need for a special circuit at the Turkish Court of Appeal for arbitration-related cases. Currently there is no such specialized circuit at the High Court and this sometimes leads to contradictory decisions of the Court of Appeal with respect to the enforcement and annulment cases. Besides that, annulment action can be brought against an arbitral award at the courts of first instance, but the decision rendered by the courts of first instance in the action of annulment is subject to appeal. This also raises complaints in practice and it is requested by the local institutions and practitioners that the competent authority for annulment actions would be the Court of Appeal instead of the courts of first instance, again a special circuit is assigned for annulment cases and the decision rendered by the Court of Appeal would be final. Hopefully these problems will soon be resolved and Turkey will have a more arbitration-friendly environment.

The need for judicial training in ADR

In relation to the identification and resolution of the problems in practice, the need for judicial training is also highly important in order to make sure that the judiciary is thoroughly conversant with ADR law and its framework, in particular with respect to the enforcement and annulment cases.

For instance, public policy considerations comprise an undefined area of Turkish law. A number of issues may be determined to be against Turkish public policy and, as such, would preclude successful enforcement of a foreign arbitral award, where some issues may meet the approval of enforcement without facing the notion of public policy. Public policy in the New York Convention refers to “international public policy” rather than “domestic”. However, narrow interpretation of public policy is not in each case adopted by the Turkish Court of Appeal. The notion of public policy is rather regarded as vague and subjective under Turkish law and the judges have a wide discretion in terms of interpretation of public policy. Based on the

decision of the Constitutional Court stating that "*…the power granted to the legislator can under no circumstances be used to undermine or exclude the public policy*", this wide discretion granted to the judges is with limitations. Nevertheless, a country cannot define itself as truly arbitration-friendly if there is a growing number of cases where an arbitral award is annulled or its enforcement is refused frequently due to public policy or if the courts adopt different approaches. Thus the importance of the need for judicial training comes into prominence at this point, because in this way the number of contradictory decisions in enforcement and annulment cases will drop significantly, which in return will increase predictability.

IV. CONCLUSION

Despite some conflicting rulings of the Turkish courts, I believe international arbitration has a bright future in Turkey. With its IAL based on the UNCITRAL Model Law, newly established arbitration and mediation centres and with the wide acceptance of international conventions such as the New York Convention and bilateral agreements, Turkey is becoming an increasingly popular location for international arbitration. Turkish courts are coming to be more familiar with arbitration, particularly in the context of the growing number of enforcement cases.

The more importance Turkey gives to harmonized legal principles, the more confidence this will provide for companies seeking to safeguard their commercial interests and the more attractive Turkey will become for foreign businesses and investors. Turkey is uniquely positioned to become a distinguished centre for international arbitration.

L'arbitrage international en Afrique du Nord: réalités et perspectives

Mostefa Trari-Tani

Professeur de droit à l'Université d'Oran et Avocat, Algérie

INTRODUCTION

L'Algérie, l'Égypte, la Libye, le Maroc, la Mauritanie et la Tunisie ont adopté une nouvelle approche de l'arbitrage international bien avant les autres États de la région MENA. L'adhésion à la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères (1958) et à la Convention de Washington de 1965 instaurant le Centre international pour le règlement des différends relatifs aux investissements (CIRDI)[32] ont permis des avancées considérables, perceptibles aujourd'hui sur plusieurs plans.

Pour ce qui est de la notion d'arbitrage, et ce malgré l'influence au cours des siècles de différentes cultures juridiques qui auraient pu aboutir à une approche disparate de la matière, l'acception est identique dans le monde entier : l'arbitre rend un acte obligatoire qui met fin au litige[33].

Aussi, et malgré les critiques et réticences initiales envers les institutions d'arbitrage du nord dans un contexte politique enclin à soutenir le développement d'un nouvel ordre économique mondial dans les années 70[34], l'arbitrage institutionnel est aujourd'hui reconnu, voire préféré à l'arbitrage ad hoc[35].

Ensuite, la quasi-totalité des pays de la zone ont adopté une position dualiste de l'arbitrage avec des règles pour l'arbitrage interne et d'autres pour l'arbitrage international[36].

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[32] La Libye est le seul pays qui n'a signé ni la Convention de New York, ni la Convention de Washington. Elle a cependant signé un nombre important de conventions à l'échelle du monde arabe dont la Convention de Séoul qui a créé l'Agence multilatérale de garantie des investissements (AMGI).

[33] Par une loi de 2000, la Mauritanie s'est dotée d'une législation dédiée à l'arbitrage, car le code de procédure civile et administrative de 1962 ne contenait que des dispositions relatives à la conciliation. Voir Charles JARROSSON, Arbitrage vs médiation : concurrence ou complémentarité ? *dans* Vers une *lex mediterranea* de l'arbitrage, pour un cadre commun de référence ; colloque de Tunis des 10 et 11 avril 2014, sous la direction de Filali Osman et Chedly Lotfi, Bruylant 2015, p. 53.

[34] Mostefa TRARI TANI, L'arbitrage commercial international — Avec référence au droit et à la pratique des pays du Maghreb (Algérie, Libye, Maroc, Mauritanie et Tunisie), Bruylant, Bruxelles 2011, p. 13 et s.

[35] Un centre régional a été créé au Caire (CRCICA, Cairo Regional Centre for International Commercial) sur une initiative afro-asiatique en 1977 pour répondre à des besoins régionaux. Le CRCICA est aujourd'hui un véritable centre international actif et reconnu dans le monde arabe.

[36] Cour d'Alger, 25 décembre 1973, Rev El Mouhamat, 1975, n°11, p. 30, note A. Zahi. Cour de Casablanca, 21 juin 1983, ONTS c/ Philippines Sugar Company Ltd (PCS), Rev. Mar. Dr. 1988, b°17; F. Serhane et N. Lahlou-Rachid, Chronique de jurisprudence marocaine, Clunet 1997, p. 427.

Par le biais de lois spéciales[37], ils sont parvenus à aménager un cadre juridique plus ou moins favorable à l'arbitrage international (I). Mais ce cadre juridique, aussi encourageant soit-il, n'a pas pour autant permis une participation effective de la rive sud à cette justice devenue planétaire; des obstacles à l'avènement d'une véritable pratique de l'arbitrage sont encore à déplorer (II). Par conséquent, il convient d'œuvrer, de part et d'autre de la Méditerranée, à une mise à niveau de la pratique de l'arbitrage dans cette partie du monde (III).

I. UN CADRE JURIDIQUE PLUS OU MOINS FAVORABLE À L'ARBITRAGE INTERNATIONAL

Les lois adoptées ont indéniablement permis des avancées en matière d'arbitrage international (A). Des réticences subsistent cependant sur certaines questions (B).

A. DES AVANCÉES CONSIDÉRABLES

Les avancées sur la voie d'une consécration des règles de l'arbitrage moderne sont perceptibles à tous les niveaux et touchent les différents stades du processus arbitral :

1. La convention d'arbitrage

L'inaptitude de l'État et des personnes publiques à compromettre a constitué pendant longtemps un frein majeur au développement de l'arbitrage dans les pays du sud de la Méditerranée, qui plus est au sein d'États fraîchement indépendants où les opérateurs publics constituaient un maillon essentiel dans la marche vers le développement. Aujourd'hui, l'aptitude de la personne publique à compromettre est reconnue dans les contrats mettant en jeux les intérêts du commerce international[38] et la participation des États à l'arbitrage de litiges d'investissement ne pose plus de problème. On assiste même à un début de reconnaissance de l'arbitrage en matière administrative, en particulier en Algérie[39], en Égypte[40] et au Maroc[41].

2. L'instance arbitrale

Au cours de l'instance arbitrale, la résolution des incidents pouvant survenir relève de plus en plus de la compétence des tribunaux arbitraux.

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[37] C'est le cas du Code tunisien de l'arbitrage (Loi tunisienne n° 93-42 du 26 avril 1993, portant code de l'arbitrage, JORT du 4 mai 1993, p. 580, Rev. Arb. 1993, Documents, p. 722); de la Loi égyptienne nº 27 du 21 avril 1994 portant promulgation de la loi relative à l'arbitrage en matière civile et modifiée par la loi n°9 du 13 mai 1997 (LEA), du Code mauritanien (loi mauritanienne n° 2000-06 du 18 janvier portant Code de l'arbitrage, publication du Ministère de la justice, mai 2000) ; du Code algérien de procédure civile et administrative (Loi n°08-09 du 25 février 2008, JORA du 23 avril 2008, abrogeant l'ordonnance n°66-145 du 8 juin 1966 portant Code de procédure civile et avec elle le décret législatif n° 93-09 du 25 avril 1993 qui avait modifié ladite ordonnance pour y incorporer des règles particulières à l'arbitrage international, JORA du 27 avril 1993, p. 42, Rev. Arb. 1993, Documents p. 478) ; du Code de procédure civile marocain (modifié par le Dahir n°1-07-169 du 30 novembre 2007 portant promulgation de la loi n° 08-05 abrogeant et remplaçant le chapitre VIII du titre V du Code de procédure civile, B.O. n°5584 du 6-12-2007, p. 1369 ; seule la Libye ne dispose pas encore de législation spécifique à l'arbitrage international, les dispositions existantes sont celles du Code de procédure civile et commerciale de 1954.

[38] Art. 310 et 311 du Code de procédure civile marocain (CPCM), art. 975 et 1006 Code de procédure civile et administrative algérien (CPCAA), art. 7-5 du Code tunisien de l'arbitrage (CTA) et art. 8-5 du Code mauritanien de l'arbitrage (CMA).

[39] Art. 975-977 CPCAA.

[40] Art. 327, al. 4. CPCM.

[41] Art. 1er de la LEA, voir sous note 37.

Tout d'abord, le principe de compétence-compétence s'applique[42].

Ensuite, le tribunal arbitral peut ordonner des mesures provisoires ou conservatoires[43], et ce alors que certains systèmes juridiques réservaient une telle prérogative aux tribunaux étatiques[44].

C'est encore l'arbitre qui, face au silence des parties[45], définit d'une manière quasiment autonome le droit applicable à la procédure.

Quant au fond, et hormis lorsque les parties ont prévu qu'il juge en équité ou en amiable compositeur[46], l'arbitre est admis presque d'office à appliquer les règles découlant de l'ordre public international[47], de l'ordre public transnational[48], ou des règles informelles, tels que les usages du commerce international[49], les principes généraux du droit ou encore la *lex mercatoria*[50].

3. Les voies de recours

Elles se résument à la voie de l'appel et du recours en annulation contre la sentence et s'inspirent globalement du droit français issu de la réforme de 1981[51] et, partant, de la Convention de New York.

Le juge se limite à un contrôle de régularité interne en matière de procédure et de conformité à l'ordre public international sur le fond[52].

B. QUELQUES RÉTICENCES

Ces réticences ont concerné la forme de la convention d'arbitrage et le droit qui lui est applicable.

1. La forme écrite de la convention d'arbitrage

Les législations nationales exigent, aussi bien en matière d'arbitrage interne qu'international, que la clause compromissoire soit écrite, soit pour des raisons probatoires[53], soit à titre de

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[42] Art. 21 de la LEA ; art. 1044 CPCAA ; art. 61 CTA ; art. 61 CMA ; art. 327-9 CPCM.

[43] Art. 24 LEA ; art. 62 CTA ; art. 1046 CPCAA ; art. 42 CMA.

[44] Art. 327-1 CPCM.

[45] Art. 1043 CPCAA ; art. 427-10 CPCM ; art. 31 CTA.

[46] Elle a disparu dans le nouveau Code algérien de procédure civile alors qu'elle figurait dans l'ancien code depuis le décret législatif de 1993.

[47] Le Code tunisien préfère l'expression : ordre public au sens du droit international privé (art. 78 et 81 CTA).

[48] Cf. *infra* sous note 52.

[49] Cf. spécialement l'art.427-44, alinéa 2 du CPCM.

[50] Cf. spécialement l'art. 1050 du CPCAA; l'art. 73 du CTA et l'art. 59.2 du CMA, renvoyant aux « lois » à l'instar de la loi type de la CNUDCI.

[51] Cette unité vient du fait que ces règles s'inspirent du droit français issu de la réforme de 1981, même pour le droit algérien qui s'est inspiré largement de la Loi fédérale suisse sur le Droit international privé (LDIP) puisque sur ce point celle-ci renvoie purement et simplement à la Convention de New York (cf. art. 1051 et 1056-6 de ladite loi).

[52] Le texte marocain cumule l'application des deux types d'ordre public : interne et international, art. 327-46 du CPCM.

[53] Art. 6 du CTA, art. 6 du CMA, art. 150 du Code civil libyen concernant toutes les conventions limitant la compétence des tribunaux.

validité[54]. Une conception large de l'écrit est toutefois globalement admise ; acte authentique, sous-signature privée, télex, fax, courriel, etc. L'écrit doit par ailleurs être signé, la signature électronique étant admise[55].

Cette exigence de l'écrit apparaît comme une réaction à la pratique du CIRDI par laquelle il se déclarait compétent même en l'absence d'une convention d'arbitrage formelle établissant le consentement de l'État à l'arbitrage[56]. Elle se démarque aussi du libéralisme de certains systèmes juridiques du nord quant à la forme de la convention d'arbitrage[57].

2. Autonomie de la clause compromissoire

Le principe d'autonomie de la clause compromissoire par rapport au contrat principal, que l'on doit à la jurisprudence Gosset[58], ne pose désormais aucun problème au sein des pays étudiés. Il a ainsi pu trouver à s'appliquer dans des arbitrages par nature sensibles, car touchant à la souveraineté des États en matière de ressources naturelles, et a permis de faire subsister la clause compromissoire incluse dans des contrats de concession annulés par des lois de nationalisation dans le domaine pétrolier[59].

Cette autonomie ne signifie pas pour autant, comme avait pu l'admettre une certaine jurisprudence, que la clause d'arbitrage soit autonome des droits nationaux[60] et soit soumise aux seules règles de la *lex mercatoria*[61]. La clause compromissoire, dans la plupart des pays du sud, est toujours soumise au droit national (méthode conflictualiste), et ce même si des indices de rattachement multiples sont proposés alternativement (autonomie, loi de fond, etc.) afin d'augmenter les chances de validité de la clause d'arbitrage[62].

II. LES OBSTACLES À L'AVÈNEMENT D'UNE PRATIQUE DE L'ARBITRAGE AU SUD

Certains obstacles sont subjectifs et liés aux rapports de force économique et technologique entre cocontractants (A). D'autres, en revanche, sont objectifs car liés à des manques au plan local (B).

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[54] Art. 12 de la LEA, art. 1040 du CPCAA, art. 472 du Code de procédure civile et commerciale libyen (CPCCL) qui se démarquent du Code civil en exigeant l'écrit à titre de preuve en matière internationale.

[55] Art. 1040 du CPCA.

[56] Mostefa TRARI-TANI, Le consentement de l'État à l'arbitrage d'investissement dans l'espace méditerranéen, *dans* Vers une *lex mediterranea* des investissements, ouvrage sous la direction de Filali Osman, Bruylant 2016.

[57] Cf. l'affaire *Dalico* où il a été donné effet à une clause d'arbitrage non signée se trouvant parmi les documents contractuels d'un marché public d'une municipalité libyenne. Pour rappel, le droit libyen applicable exigeait que la clause compromissoire soit non seulement écrite et signée par les parties, mais qu'elle porte aussi le numéro de la décision gouvernementale qui l'avait autorisée. Voir dans ce sens M. El Alem, L'arbitrage dans les litiges administratifs, Rev. Arb. 1983 P. 269 et Cass. 1re civ., 7 mai 1963, JCP 1963.II. 13405, note B. Goldman ; *Clunet*, 1964. 82, 1re esp. J.-D. Bredin, Rev. Crit. Dr. Int. Pr., 1963. 615, note Motulsky ; D. 1963, note J. Robert.

[58] Arrêt Gosset du 7 mai 1963 par lequel la Cour de cassation française a déclaré qu'*"En matière d'arbitrage international, l'accord compromissoire, qu'il soit conclu séparément ou inclus dans l'acte juridique auquel il a trait, présente, sauf circonstances exceptionnelles…une complète autonomie juridique, excluant qu'il puisse être affecté par une éventuelle invalidité de cet acte"*. Cf. dans la pratique les célèbres affaires des nationalisations libyennes ; cf. p.48 de notre ouvrage précité sous note 34.

[59] Article 61.1 du CTA ; art. 21.2 du CMA ; art. 1093 al. 4 du CPCAA ; art. 318 du CPCM ; pour la Libye, on cite généralement dans ce sens un arrêt de la Cour suprême libyenne du 5 avril 1970, Cass. adm. n° 1/71, 05.04.1970, publié dans la Revue de la Cour suprême, cité par A. H. El Ahdab, L'arbitrage dans les pays arabes, Economica 1990, p. 397.

[60] C'est le cas de la jurisprudence dite *Dalico* citée sous note 57 et qui a fait l'objet d'une controverse même en France, justement à l'occasion d'un litige impliquant une collectivité publique libyenne.

[61] Ph. FOUCHARD, E. GAILLARD et B. GOLDMAN, Traité de l'arbitrage commercial international, Litec 1997, n° 439, p.248.

[62] Art. 5 du CTA ; art. 62 du CMA ; art. 1040 du CPCAA.

A. LES OBSTACLES SUBJECTIFS

Ces obstacles, qui affectent la procédure d'arbitrage au détriment de l'entreprise nord-africaine, résultent du déséquilibre contractuel entre l'entreprise du nord de la Méditerranée et celle du sud.

1. Le choix du centre d'arbitrage

Certes des centres d'arbitrage existent sur les rives sud de la Méditerranée (Centre de la Chambre algérienne de commerce et de l'industrie d'Alger, Centre de Tunis, de Rabat et d'Alexandrie[63]), il demeure toutefois difficile pour ces derniers de développer leur pratique de l'arbitrage. En effet, les entreprises du nord imposent généralement un centre situé au nord[64], et ce parfois en échange du choix du droit local comme droit du fond du litige, sans que ce dernier élément ne confère quelque avantage que ce soit à l'entreprise du sud[65].

2. Le choix du siège de l'arbitrage

Le siège de l'arbitrage est souvent choisi en dehors de la région, et ce même lorsque les États eux-mêmes ont vocation à prendre part à la procédure d'arbitrage.

Outre le fait que le choix d'un centre d'arbitrage au nord implique presque mécaniquement le choix du siège correspondant, le partenaire étranger use également de son poids pour imposer un choix en faveur d'un siège situé en dehors de la région. Ce choix peut s'expliquer par l'inexpérience des centres d'arbitrage du sud. Il peut aussi parfois être le fruit du calcul personnel du cadre chargé du différend au sein de l'entreprise du sud.

3. Le coût et la monnaie de paiement des frais de l'arbitrage

Cela peut constituer un véritable problème pour les PME-PMI de la région, et qui plus est en période de crise, que de réunir les sommes nécessaires au paiement en devises des cabinets d'avocats, des arbitres et des frais liés à l'arbitrage. L'impuissance de l'entreprise du sud peut parfois déboucher sur un véritable déni de justice, d'autant que la pratique du tiers-financeur n'est pas encore à l'ordre du jour[66].

Les centres locaux ne sont pas aussi coûteux mais ne répondent généralement pas aux exigences d'un arbitrage de qualité, notamment pour des dossiers épineux.

B. LES OBSTACLES OBJECTIFS

Les obstacles objectifs sont liés à plusieurs particularités locales.

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[63] Notons que la Convention arabe d'Amman sur l'arbitrage commercial signée le 14 avril 1987 par 14 pays arabes qui avait prévu la création d'un Centre arabe d'arbitrage commercial pour la région et qui avait été complétée par la Convention de Nouakchott signée en 1991, n'a pas connu de suite.

[64] Cf. Annexe 5 du Règlement de la Chambre de commerce internationale 2012.

[65] C'est le cas de la plupart des contrats conclus par les entreprises publiques algériennes à l'époque où l'arbitrage était à peine toléré dans les années 80.

[66] Mostefa TRARI-TANI, Vers une Cour euroméditerranéenne d'arbitrage: pertinence et faisabilité, *dans* Vers une *lex mercatoria mediterranea*: Harmonisation, unification du droit dans l'Union pour la Méditerranée, sous la direction de F. Osman, Bruylant 2012, p. 264.

1. La situation sécuritaire

La situation sécuritaire contribue à la marginalisation du choix des pays de la zone comme siège de l'arbitrage. À tel point qu'il arrive que l'arbitre fasse tout pour délocaliser les audiences ou réunions de travail au profit d'un siège en Europe, et ce alors même que le siège théorique se situe sur la rive sud de la Méditerranée[67]. Ainsi, des sentences sont signées comme ayant été rendues dans des capitales d'Afrique du Nord par des arbitres qui n'ont jamais foulé le sol africain. Cela introduit une incertitude sur le lieu où la sentence a été rendue, au point que l'on ne sait pas si le recours en annulation est recevable devant le siège convenu des parties ou le siège où les audiences et réunions se sont réellement déroulées.

2. Les infrastructures et les ressources humaines

Même si le nombre de professionnels du droit tentés par une expérience dans le domaine de l'arbitrage, en qualité d'avocat ou d'arbitre, ne cesse de s'accroître, peu nombreux sont encore ceux à investir ce nouveau champ du contentieux. Il en va de même pour les agents de soutien tels que secrétaires, sténodactylographes, interprètes, etc.

La spécialisation n'étant pas de mise, une infime minorité de praticiens du droit suit une formation en arbitrage. Les formations et les stages à l'étranger ne sont pas à la portée de tous notamment en raison de leur coût. Par ailleurs, la plupart des formations organisées localement sont théoriques car dispensées par des académiques n'ayant jamais eu à gérer de dossiers d'arbitrage en pratique. Enfin, la formation continue, qui pourrait notamment permettre aux jeunes avocats de se former en arbitrage, n'est pas suffisamment exploitée par les différents barreaux de la région.

En outre, les infrastructures susceptibles de recevoir des arbitrages font cruellement défaut. On se tourne donc généralement vers des structures hôtelières qui n'offrent ni la tranquillité, ni la sérénité, ni la confidentialité requises.

3. La place des tribunaux étatiques

Dans la région, les juges ne voient plus en l'arbitrage un affront à leur compétence et se montrent de plus en plus coopératifs. Toutefois, plusieurs facteurs font qu'ils demeurent moins sollicités que leurs homologues du nord de la Méditerranée.

En matière de contentieux relatif à la constitution du tribunal arbitral, soit l'arbitrage est institutionnel et les centres d'arbitrage seront compétents pour statuer[68], soit l'arbitrage est ad hoc et le choix d'un siège au nord exclura le juge du sud. En matière de mesures provisoires et conservatoires, les centres d'arbitrage sont en train de développer des procédures d'urgence qui de fait écartent le juge national[69]. Dans ces conditions, pouvons-nous vraiment parler de juge d'appui dans cette partie du monde ?

Enfin, le contrôle du juge étatique du sud s'est parfois avéré très tatillon, de sorte que l'on a pu assister à un véritable *forum shopping* de l'*exequatur* et des voies de recours au profit des juridictions du nord. Cela accentue par là même le sentiment d'être soumis à un mode de

[67] Cela introduit une dose supplémentaire d'insécurité pour déterminer le lieu où la sentence va être rendue, pour l'exercice des voies de recours comme le recours en annulation qui peut être dirigé devant les tribunaux où la sentence a été rendue.

[68] Cf. référence sous note 46.

[69] Cf. article 29 du règlement d'arbitrage CCI.

règlement qui échappe totalement au contrôle des États du sud, d'autant plus lorsque des tribunaux européens ou américains accordent l'*exequatur* à des sentences annulées dans des pays d'Afrique du Nord[70].

III. QUELLE STRATÉGIE EN FAVEUR D'UNE PRATIQUE DE L'ARBITRAGE AU SUD ?

Les pays du sud ont changé leur approche et position vis-à-vis de l'arbitrage international. Il reste toutefois encore à définir une stratégie de développement sur le plan local (A), ce qui nécessitera une coopération avec les institutions du nord de la Méditerranée (B).

A. STRATÉGIE DE DÉVELOPPEMENT DE LA PRATIQUE LOCALE

Cette stratégie devra permettre de développer la pratique de l'arbitrage à tous les niveaux et dans tous milieux juridiques.

1. Les milieux académiques et l'arbitrage

Les maîtres-mots de la stratégie locale devraient être « formation » et « spécialisation ». En effet, malgré l'adoption au sud du système LMD (Licence – Master – Doctorat) qui devait permettre de favoriser la création de formations ciblées et hyperspécialisées, très peu de facultés de droit proposent des formations académiques en arbitrage international. Au meilleur des cas, la discipline est enseignée dans certains cursus de droit des affaires ou de droit des investissements.

La cause principale réside dans le manque d'enseignants suffisamment qualifiés pour dispenser des cours ou des travaux dirigés. L'absence de documentation spécialisée, ainsi que de salles de travail spécialement dédiées à la discipline sont également à déplorer. Le phénomène est accentué par l'enfermement linguistique, alors que la communauté de l'arbitrage international est de plus en plus internationale et plurilinguistique.

Dans le domaine de la recherche, et malgré la demande croissante, très peu de laboratoires, de revues et de thèses sont consacrés à l'arbitrage international. Le peu de recherches existantes peinent par ailleurs à se détacher de la pratique de l'arbitrage dans les pays du nord et sont souvent trop isolées. À ce titre, les moyens et structures devraient être mutualisés et fédérés à l'échelle régionale afin d'atteindre des objectifs plus ambitieux. La région est par exemple saturée par un nombre assez pléthorique de revues spécialisées qui peinent à tenir la cadence adéquate ; une revue à l'échelle maghrébine ou de l'Afrique du Nord constituerait là encore un choix optimal[71].

2. Les milieux judiciaires et l'arbitrage

Les présidents des tribunaux et des cours, notamment ceux des capitales économiques, sont généralement choisis en fonction de leur aptitude dans la maitrise des dossiers d'arbitrage.

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[70] Affaire *Bacon Davis* c */Sonatrach*, la sentence a été annulée par la Cour d'alger ; affaire *Chromalloys*, la sentence a été annulée par les tribunaux égyptiens ; l'affaire *Hilmarton* concerne indirectement l'Algérie.

[71] On ne peut que saluer l'édition par Lexis Nexis d'une revue spécialisée en droit des affaires pour la région MENA.

Bien que les tribunaux étatiques au sud de la Méditerranée soient moins sollicités que leurs homologues du nord, ils ont su beaucoup évoluer dans leur connaissance de l'arbitrage. Toutefois, des efforts supplémentaires peuvent toujours être effectués en termes de formation[72]. On pourrait en dire autant pour les greffiers, mais surtout pour les huissiers, qui ont vocation à intervenir dans la phase fatidique de la procédure, à savoir l'exécution forcée.

3. Les milieux professionnels et l'arbitrage

Les entreprises du sud semblent avoir intégré la nécessité de s'adapter à l'arbitrage international. Toutefois, la vision du droit comme une contrainte plus que comme un outil de performance économique demeure prégnante.

L'arbitrage international est au cœur de cette problématique. Il est demandé à l'entreprise ouverte à l'international de traiter la question de l'arbitrage non pas dans le cadre classique du contentieux mais dans le cadre du management de ce contentieux (*Dispute management*). Il appartient alors au manager et au juriste de l'entreprise de collaborer dès la phase de choix du mode de règlement des différends : arbitrage ou tribunaux étatiques et arbitrage ou autres modes de règlement amiables (ADR). Ensuite, le rôle du juriste sera primordial dans le choix du droit applicable, et qui plus est au sein d'entreprises du sud souvent convaincues que le droit national protège mieux les intérêts nationaux que la loi étrangère, ce qui peut s'avérer erroné. Enfin, le juriste participera au choix du siège de l'arbitrage et éclairera son manager sur les conséquences de ce choix quant à la procédure d'arbitrage et aux voies de recours. Enfin, le choix des arbitres constitue le réel gage de réussite de l'arbitrage et joue souvent un rôle dans la préservation des intérêts de l'entreprise du sud.

Les Chambres de commerce et d'industrie ont très bien saisi ces enjeux, si bien que l'on ne compte plus le nombre de colloques, de conférences et d'ateliers dédiés à l'arbitrage. Ont même été créés des centres de médiation et d'arbitrage qui, pour des raisons objectives comme subjectives (difficultés à concilier humeurs, intérêts en jeux et bien commun), n'ont pas encore atteint leur vitesse de croisière.

B. RENFORCEMENT DE LA COOPÉRATION À TOUS LES NIVEAUX

Même s'il est difficile d'engager une coopération entre des institutions qui sont censées être en concurrence, l'effort qui reste à faire sur le plan local doit nécessairement être soutenu par une politique plus ou moins volontariste, car le danger qui guette l'arbitrage est qu'il soit uniquement perçu comme un marché. Ainsi, il convient de développer la coopération à tous les niveaux: sud-sud, méditerranéen et même international.

1. La coopération sud-sud

Sur le court terme, les institutions d'arbitrage du sud devraient s'engager dans un processus de concertation afin de faire le bilan de leur participation à l'arbitrage international, d'identifier les problèmes et de se fixer des objectifs. Cela pourrait également leur permettre de parler d'une seule voix et ainsi faciliter la tâche des institutions du nord ouvertes à un échange.

[72] À titre d'exemple, on observe que, dans certains pays, les affaires d'arbitrage sont traitées conformément à la procédure de référé, car c'est le président du tribunal — également juge des référés — qui est compétent en matière d'arbitrage. En conséquence, il n'est pas rare que ce juge intervienne sur des questions de fond.

2. La coopération euroméditerranéenne

Sur le moyen terme, le débat doit être mené entre les différents centres d'arbitrage de la Méditerranée, du nord comme du sud, afin de dégager des axes de coopération capables de stimuler la pratique de l'arbitrage au sud, en se focalisant sur son aspect interne dans un premier temps, puis international ultérieurement. L'expérience montre qu'il est inutile de chercher à développer la pratique de l'arbitrage international, si la pratique de ce même mode de règlement des différends reste marginale sur le plan interne.

3. La coopération avec les institutions internationales

Sur le long terme et une fois les objectifs bien déterminés à l'échelle méditerranéenne, des négociations pourraient être engagées avec les centres internationaux d'arbitrage qui captent la majeure partie du contentieux arbitral, tels que la Cour internationale d'arbitrage de la Chambre de commerce internationale ou le CIRDI.

Pour la bonne cause, ces institutions pourraient réserver aux centres du sud, par exemple, le contentieux dont le montant ne dépasse pas un certain seuil. Ainsi, les PME-PMI pourraient avoir plus facilement recours à l'arbitrage dont l'accès est aujourd'hui limité en raison de son coût et de la difficulté d'obtenir certaines devises. Cela engendrerait un besoin de professionnalisation des praticiens du sud, qu'ils aient vocation à jouer le rôle de conseil ou d'arbitre. Des mesures de discrimination positive pourraient également être implémentées afin de favoriser l'insertion des praticiens du sud au monde de l'arbitrage : coûts de stages réduits, incitation à la nomination d'arbitres du sud. Aussi, un barème de frais d'arbitrage différencié pourrait être proposé temporairement pour les entreprises du sud.

En conclusion, la Méditerranée met certes face à face des pays inégaux en termes d'expérience et de pratique de l'arbitrage. Toutefois, et malgré les conflits qui ont jalonné leur histoire, le socle commun de valeurs des peuples des deux rives, fait d'échanges, de tolérance et de règlements amiables[73], doit permettre la création d'une communauté soudée de l'arbitrage international, qui fera de l'institution non pas un mode banal de règlement des différends, mais un moyen pour faire régner la justice en tant que nouveau langage de la paix.

[73] Mostefa TRARI-TANI, Vers une Cour d'arbitrage euroméditerranéenne : pertinence et faisabilité, p. 263, sous note 66.

Institutional arbitration in the region: challenges and future perspectives

Nassib G. Ziadé

Chief Executive Officer, Bahrain Chamber for Dispute Resolution

Before considering challenges and future perspectives for regional arbitration centres, let us first ask why regional arbitration centres exist at all. Their emergence cannot be dissociated from local disenchantment with international arbitration in general, and with the performance of Western-based arbitration institutions in particular. I deliberately call them "Western-based", rather than "global", as some of them are still a long way from understanding the expectations and aspirations of developing countries.

But why, just as they are winning more cases than before, are Arab countries, and developing countries in general, disillusioned with international arbitration? The answer is simple: they have come to realize that the only way to win a case is to hire an army of foreign counsel, who in turn select foreign arbitrators. And when the appointment of arbitrators is left to Western-based institutions, most of them usually select arbitrators who are themselves Western-based. In such circumstances a win is at best a pyrrhic victory, while the process itself smacks of modern-day legal colonization.

According to statistics published by the International Chamber of Commerce (ICC),[74] a total of 175 Arab parties were involved in cases filed with the ICC International Court of Arbitration in 2014, yet only 46 arbitrators from Arab League countries were appointed or confirmed during the same year. This contrasts with 216 arbitrators from the United Kingdom alone, 131 from the United States, 119 from Switzerland and 117 from France.

There was little improvement in 2015, with 221 Arab parties involved in the cases filed during the year, but only 54 appointments or confirmations of arbitrators from Arab countries. This figure pales in comparison with the number of appointments and confirmations of Western arbitrators during the same period (185 from the United Kingdom, 133 from the United States, 111 from Switzerland, 97 from France, and 90 from Germany).[75]

If we look at another organization with a global caseload, the London Court of International Arbitration (LCIA), the situation is hardly more encouraging. The LCIA Registrar's Reports for 2014 and 2015 list the nationalities of the arbitrators appointed without providing any statistics,[76] which does little to allay concerns over lack of diversity.

Turning to investment arbitration, the exceedingly small proportion of arbitrators from developing regions is disquieting. ICSID statistics show that the vast majority of arbitrators

[74] See "2014 ICC Dispute Resolution Statistics", published in the ICC Dispute Resolution Bulletin 2015, Issue 1

[75] See "2015 ICC Dispute Resolution Statistics", published in the ICC Dispute Resolution Bulletin 2016, Issue 1.

[76] Available at http://www.lcia.org/LCIA/reports.aspx.

appointed in ICSID cases are Western European or North American. In 2013, although only 15 per cent of the cases registered at ICSID involved a State party from Western Europe or North America, 70 per cent of the arbitrators came from those regions. Also in 2013, 68 per cent of the cases registered involved a State from Eastern Europe, Central Asia, the Middle East, North Africa or Sub-Saharan Africa, yet a grand total of 4 per cent of the arbitrators came from those regions. Although the figures for 2014 and 2015 are slightly better, they still point to a highly unbalanced appointment system.

Reflecting on this trend in a speech, the President of the International Court of Justice, Judge Abdulqawi Ahmed Yusuf, made a telling remark: "Imagine cases concerning the European Union or European countries, in which most of the arbitrators are Africans or Latin Americans. What would Europeans feel like?"

But beyond the West's domination in arbitration (appointment of Western European and North American arbitrators by law firms and arbitration institutions based in the West, and the choice of Western locations for holding arbitration hearings), Arab and other developing countries have additional concerns. When they see arbitration practitioners wearing multiple hats and regulating their own activities, with arbitration institutions remaining passive and very often not even establishing basic guidelines for the conduct of arbitration practitioners, let alone for their own staff, their consternation is even greater.

Regional arbitration centres were created in reaction to the perceived lack of fair representation in, and transparency of, traditional Western-based arbitration centres. There was also a desire to have disputes originating in the region decided there, so as to give local arbitration users a sense of ownership over the dispute resolution process. Besides administering disputes, regional arbitration centres are also well placed to play a pivotal role in educating and training arbitration practitioners, judges and parties from the region.

Can this need for a presence in a given region be fulfilled by Western-based arbitration institutions through local branches or committees? So long as key decisions continue to be taken by the usual players in the institution's headquarters in the West, a regional branch of a Western institution can hardly claim full legitimacy in the eyes of regional users. I believe that the only way in which a Western-based arbitration institution can have an effective presence in the region is through a partnership with a credible local arbitration centre.

Developing countries should not content themselves with simply dismissing Western-located arbitration institutions, and international arbitration generally, as flawed. They must ensure that the arbitration institutions in their region operate in accordance with the highest international standards and best practices. Here, much work remains to be done.

What, then, are the requirements regional arbitration institutions need to meet in order to acquire credibility and legitimacy?

First, there are requirements linked to the centres themselves. They should above all equip themselves with modern arbitration rules, which can easily be done given the availability of many fine and tested models from which inspiration may be drawn. They then need to recruit diverse and specialized staff. Next, they need to assemble a diversified pool of arbitrators from which they may draw when constituting tribunals. In addition, the internal work of the centre should be overseen by an international board whose members agree to lend their good names and reputations to the centre. Last but not least, the governing structure under which the regional centre operates should give the centre a minimum level of administrative and financial autonomy which allows it to breathe unencumbered.

In addition to requirements that regional centres themselves must meet, the environment in which they operate must be favourable to arbitration. Legislation supportive of arbitration should exist in the country in which the centre is located, and the country's judicial system should be arbitration-friendly. Nothing—not even an array of six-star hotels with associated spa facilities—can compensate for a lack of truly liberal arbitration legislation and unequivocal legal provisions guaranteeing arbitrators' immunity from suit in local courts.

In the United Arab Emirates, the amendment of article 257 of the Penal Code, introduced by Federal Decree Law No. 7 of 2016, which allows arbitrators to be imprisoned if they fail to meet the requirements of neutrality and integrity, may deter some parties from choosing the country as a seat of arbitration. The words "neutrality" and "integrity" are not defined in the Penal Code, which increases the fear that the provision may encourage vexatious proceedings against arbitrators. Even before this provision was enacted, there had been several occasions when arbitrators hearing cases seated in Dubai had found themselves in court, including in criminal proceedings.

Although, over the last decade, the United Arab Emirates has indicated that it intends to modernize its legal framework for arbitration, this promise remains unfulfilled at the time of writing and the country continues to apply the arbitration provisions of the 1992 United Arab Emirates Code of Civil Procedure. As a result, serious delays may occur in the execution of awards rendered in the United Arab Emirates, and United Arab Emirates courts on occasions did not shy away from setting aside awards for minor technicalities, such as the failure by the arbitrators to follow the oath-taking procedure which is mandatory for the hearing of witnesses under the Code of Civil Procedure, or the failure to sign in the United Arab Emirates an award rendered in an arbitration seated in the United Arab Emirates.

Although the accession of the United Arab Emirates to the New York Convention in 2006 has significantly improved the recognition and enforcement of foreign arbitral awards in the United Arab Emirates by removing them from the scope of Articles 235 and 236 of the Code of Civil Procedure, which assimilate foreign arbitral awards to foreign judgments, some published court judgments have drawn occasional criticism.

For example, on 18 August 2013, the Dubai Court of Cassation, in the *Canal de Jonglei* case, upheld the rulings of the Court of First Instance and the Court of Appeal rejecting the enforcement of an ICC award rendered in Paris on the misguided ground that the United Arab Emirates courts did not have jurisdiction over claims brought against foreigners not domiciled or resident in the United Arab Emirates, unless the claims were related to agreements that had been concluded or were to be performed in the United Arab Emirates.

Another setback to the correct application of the New York Convention came with the Dubai Court of Appeal's decision of 30 March 2016 in the *Fluor Transworld Services v. Petrixo Oil and Gas Co.* in which the Court, on its own motion, and without the issue being raised by the party resisting recognition and enforcement, held that an ICC award rendered in London could not be enforced in the United Arab Emirates because no evidence had been submitted of United Kingdom accession to the New York Convention. When acceding to the New York Convention, the United Arab Emirates did not, however, avail itself of the reciprocity reservation contained in the Convention. The Court of Appeal seemed to confuse the New York Convention with Articles 235 and 236 of the United Arab Emirates Code of Civil Procedure, which include a reciprocity condition for the enforcement of foreign judgments and arbitral awards. The Dubai Court of Cassation fortunately overturned the Court of Appeal's judgment on 19 June 2016.

Similar attitudes have been encountered in Qatar where, despite its ratification of the New York Convention in 2002, the old arbitration provisions remained in the 1990 Code of Civil and Commercial Procedure until the enactment of Qatari Arbitration Law No. 2 of 2017. Relying on the 1990 Code, the Qatari Court of Cassation, in a decision handed down on 12 June 2012, annulled an award that had been rendered in Qatar under the auspices of the Qatar International Centre for Conciliation and Arbitration on the grounds that the award violated public policy as it was not rendered in the name of the Emir of Qatar. Between June 2012 and August 2013, several arbitral awards were set aside by lower Qatari courts for the same reason. On 17 December 2013, the Qatari Tribunal of First Instance followed this trend by deciding to set aside an ICC arbitral award rendered in Paris, again on the grounds that the award was not rendered in the name of the Emir of Qatar.

The Qatari Court of Appeal upheld the decision of the Tribunal of First Instance. However, on 13 April 2014, the Qatari Court of Cassation quashed the decision of the lower court, holding that the provisions of the New York Convention should be applied, and sent the case back to the Court of Appeal. Thereupon, another battle erupted, this time over the enforcement rather than the annulment of the award. Relying on the New York Convention, the Qatari Court of First Instance held that the award needed to be certified and authenticated by "competent authorities" before being enforced, and the Qatari Court of Appeal upheld this decision. When the case returned to the Court of Cassation, it held that the award should be enforced despite the lack of compliance with the local requirement to certify and authenticate foreign official documents.

A more positive picture is found in Egypt. Since the enactment of Law No. 27 of 1994, entitled Arbitration Law in Civil and Commercial Matters, Egyptian courts have been more receptive towards arbitration. This openness to arbitration has boosted the prominence of the Cairo Regional Centre for International Commercial Arbitration.

For example, the Egyptian Court of Cassation has held that the New York Convention prevails over any contrary rules of the 1968 Code of Civil and Commercial Procedure in proceedings to enforce a foreign arbitral award.

Egyptian courts have also shown restraint when reviewing arbitration awards rendered in Egypt. The Cairo Court of Appeal has repeatedly asserted that an annulment action is not an appeal, and that a court's role is not to re-adjudicate a case or reconsider the arguments raised during the arbitral proceedings. It has notably held that even if the arbitral tribunal has adopted solutions at variance with the law, this is not valid grounds for annulment.

If regional arbitration centres are unable to satisfy the requirements listed earlier, which unfortunately is sometimes the case today, then their legitimacy understandably suffers. Indeed, a regional arbitration institution will be in a weak position if it is denied basic administrative and financial autonomy by the hosting chamber of commerce, is deprived of the required number of staff to be able to operate properly, operates in a country without modern arbitration legislation, and finds itself in an environment where its arbitrators are routinely sued in the local courts. In such cases, the sweetest dreams may turn into horror stories.

At present, the choice for Arab and other developing countries seems to be between Western-based institutions, which have generally brought disillusionment, and regional arbitration institutions, which are not yet performing at a sufficiently high level.

If all this sounds pessimistic, it is not my wish to wallow in despondency or to sound the death knell of arbitration institutions. On the contrary, my aim is to raise awareness by

asserting that arbitration institutions, whether regional or Western-based, will have a viable future only if they are capable of controlling costs, maximizing efficiency, achieving real and not just token diversity, and ensuring transparency, including in their handling of appointments and challenges of arbitrators. More importantly, their viability will depend on their ability to respond effectively to the legitimacy crisis affecting international arbitration and to understand that the system requires more than cosmetic changes when it comes to conflicts of interest.

It is time to reject the fallacy that, through self-diagnosis and invisible hands, the system can somehow adequately regulate itself. It is time for institutions to shoulder their responsibilities by establishing, firstly, internal codes of conduct applicable to their staff and practices, and then external codes of conduct applicable to the arbitrators and counsel who appear before them. Only in this way will arbitration institutions fulfil their mission, strengthen their legitimacy, and be able to look forward to a life ahead.

TRAINING SESSIONS

I. THE APPLICATION OF THE NEW YORK CONVENTION (NYC)

Summary report of the training session conducted by Jean-Pierre Ancel, Miriana Belhadj, and Mohamed Shelbaya[77]

Training session 1 was tailored towards judges and lawyers. The training was aimed at informing participants about the main issues raised by the application of the New York Convention (the "Convention") and the challenges that domestic judges may be faced with. The training was divided into three parts.

The first part consisted of an introduction to the training, which was presented by Mr. Jean-Pierre Ancel, Honorary President of the French Court of Cassation. President Ancel discussed the Convention's general historical background and its main objectives. He made a distinction between the provisions relating to international arbitration law (article II (1) and article II (3)) and the specific provisions on the enforcement of international arbitral awards (article V, article VII and article VIII). President Ancel, recalling his long-standing experience as a judge, revealed the consequences of inconsistent interpretations of key provisions. He highlighted the usefulness of referring to the *travaux préparatoires* to understand the rationale of each provision. Additionally, President Ancel addressed the French courts' reaction when facing an application to enforce a foreign award and noted that they generally applied French Law and its more favourable enforcement regime, rather than the one of the Convention (which was not contrary to the Convention, pursuant to article VII(I)). Several practical questions were raised by the audience. One participant described the difficulty he was facing in a case where a contract contained both an arbitration clause and a choice of court clause. President Ancel stated that none of the clauses would have had effect, as the consent of the parties for one or the other dispute settlement mechanism could not be clearly established. It would be necessary to look at the circumstances of the case to demonstrate a certain willingness of the contractual parties to recourse to arbitration. Another question dealt with the distinction between domestic public order and international public order, which—it was said—should be construed as a more restrictive notion as the former.

The second part of the training was conducted by Mr. Mohamed Shelbaya, Partner at Shearman and Sterling, who presented three cases he had worked on as a professional lawyer and which involved parties from European and MENA countries. For each case, Mr. Shelbaya pointed out the key questions a lawyer should identify and demonstrated how the problem was solved by referring to key provisions of the New York Convention and the applicable domestic law. The first case dealt with the issue of the enforcement of arbitration agreements by national courts (in particular, the validity assessment of an arbitration agreement and the consequence of the existence of a valid agreement). The second case touched upon the issue of res judicata effect of awards on jurisdiction (in particular the interpretation of the term "binding" in article III of the New York Convention and the law applicable to the res judicata effect of foreign awards). Finally, the third case was regarding the recognition and enforcement of awards set

[77] Jean-Pierre Ancel is Honorary President of the French Court of Cassation, Miriana Belhadj is Associate Legal Officer at UNCITRAL Secretariat (Austria) and Mohamed Shelbaya is Partner at Shearman and Sterling (France)

aside at the arbitration seat. The audience, which included party representatives and arbitrators, were encouraged to ask questions and give feedback on their specific personal experience. This interactive forum provided a great opportunity for young practitioners to benefit from Mr. Shelbaya's long experience in international arbitration and his recommendations when facing challenging cases.

The third and final part of the training was aimed at presenting the tools recently finalized by the UNCITRAL Secretariat and its experts to assist legal practitioners from around the world who require thorough information on the New York Convention and the interpretation and use of each of its provisions. Ms. Miriana Belhadj, Associate Legal Officer at the UNCITRAL Secretariat, gave a brief presentation on UNCITRAL, its mandate (harmonization and modernization of international trade law) and activities and explained the link between UNCITRAL and the New York Convention. Ms. Belhadj noted that the work of UNCITRAL does not end with the finalization and adoption at the Commission level of an instrument, but necessarily requires follow-up activities, which are carried out by UNCITRAL Secretariat. Promoting the instrument to have it adopted by a large number of States and then promoting its effective use and uniform interpretation are key elements of this follow-up work. Ms. Belhadj recalled that 156 States[78] have ratified the New York Convention, and underlined the particular importance of the promotion work related to this instrument. In this context, she explained that the UNCITRAL Secretariat had worked very closely with high-level and internationally renowned experts and their research teams (Shearman and Sterling LLP and the Columbia Law School) in order to prepare the UNCITRAL Secretariat Guide on the New York Convention (the Guide) and create the accompanying interactive online platform, www.newyorkconvention1958.org. The presentation then examined the historical background of the project, the methodology followed by the research teams, the structure of the Guide and its findings. It was noted that the Guide will be soon available in the six official languages of the United Nations. It provides an objective analysis, paragraph by paragraph, of the provisions, and of the judicial application of the Convention by reference to case law from a wide number of common-law and civil law jurisdictions. While surfing live on the UNCITRAL website, Ms. Belhadj demonstrated to the audience how the sophisticated global database was conceived, and exhibited the user-friendliness of the site. The website notably offers free access through separate icons to: the several linguistic versions of the Convention; the travaux préparatoires; each provision independently accompanied by related case law; information on the signatory States; case law database containing over 1200 decisions; and a bibliography containing over 800 references. Finally, the participants were shown how to access to electronic versions of the Guide.

In conclusion, the UNCITRAL Secretariat Guide on the New York Convention and the website together form an essential reference tool that shall contribute to further promoting the adoption of the Convention and its uniform interpretation throughout the world.

[78] At the publication date, there are 159 Contracting States. Angola, Cabo Verde and Sudan are the most recent ratifying States..

II. PRACTICAL ISSUES RAISED BY INVESTMENT ARBITRATION

Summary report of the training session conducted by Mathias Audit, Antonio Crivellaro, Judith Knieper and Michael Schneider[79]

Training session 2 was tailored towards government officials. The training focused on practical issues raised in the area of investment arbitration and was divided into two parts: a general introduction into investment arbitration and the practical aspects when facing an investment claim and negotiating an investment treaty.

Mathias Audit, Law Professor at the University of Paris I (Panthéon-Sorbonne) and Partner at Steering Legal, France, started the session by giving an overview of investment arbitration fundamentals. This included the application of bilateral and multilateral investment treaties as well as the concept of arbitration without privity. Mr. Audit stressed the concepts of "investor" and "investments", as generally defined by those treaties. Additionally, Mr. Audit discussed the standards of foreign investors/investment protection such as national treatment, fair and equitable treatment or full protection and security. Judith Knieper, Legal Officer at the UNCITRAL Secretariat, focused on the procedural aspects of Transparency in Investor-State dispute settlement and presented the UNCITRAL Transparency Standards. This included the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (a mechanism to make the Transparency Rules applicable to treaties concluded before 1 April 2014), and the Transparency Registry,[80] which is the repository of published information.

The second practical component was commenced by Antonio Crivellaro, Head of the International Arbitration department at BonelliErede, Italy. Mr. Crivellaro highlighted the differences between commercial disputes and treaty-based investment cases, and stressed the importance of umbrella clauses and the difficulties related to divergent interpretations of standard protection clauses. Mr. Crivellaro also addressed the Most Favoured Nation clauses and their related jurisdictional issues. Moreover, Mr. Crivellaro underlined the importance of the nationality of claimants for the purposes of denial of benefits clauses. Finally, Mr. Crivellaro illustrated his statements with references to a number of cases from numerous areas, including construction contracts, joint venture agreements and concessions, concluding with recommendations to investors and States when facing a claim before an arbitral tribunal.

Michael E. Schneider, Lawyer, Arbitrator, Founding Partner of LALIVE, Honorary President of Swiss Arbitration Association Switzerland, UNCITRAL Vice-President (Forty-eighth Session in 2015), discussed with participants in an interactive manner the "recommendations

[79] Judith Knieper is Legal Officer at UNCITRAL Secretariat (Austria); Mathias Audit is Law Professor at University of Paris I (Panthéon-Sorbonne) and Partner of Steering Legal (France); Antonio Crivellaro is Of Counsel at Bonelli Erede (Law firm in Italy); and Michael Schneider is Lawyer, Arbitrator, Founding Partner of LALIVE (law firm in Switzerland), Honorary President of the Swiss Arbitration Association and Vice-President of UNCITRAL (Forty-eighth Session—2015).

[80] The Registry is operated with funding of the European Union and of OFID (the OPEC Fund for International Development).

when facing a claim from an investor". Mr. Schneider emphasized the need to consider the defence in the very initial stage, if possible when the potential conflict first arises and before the claim is filed. It is also important that from the beginning the right government departments are informed and involved. Mr. Schneider stressed the usefulness of the period of negotiations or conciliation preceding arbitration (cooling-off period) during which the claim should be carefully examined in fact and in law and a risk analysis performed. Delegates noted this may lead to a settlement and, if it does not, is essential for the preparation of the defence in the arbitration. In the discussion, several delegates stressed the difficulties faced when preparing a claim: limited time and budget resources, unclear competencies between different ministries, the difficulty of fact-finding and the need to engage external expertise. The discussion that followed focused on the question of how to find the best possible legal advice and representation by counsel in the arbitration and its preparation. Mr. Schneider pointed out the desirability to involve counsel early in the preparation and discussed with the delegates different methods for choosing counsel, including public tender proceedings. Delegates recognized and discussed the difficulties in making the choice in an efficient and transparent manner. These problems exist with respect to service providers in general, but are particularly great when choosing legal representation for an arbitration. The difficulties were demonstrated by reference to invitations to tender by a number of Governments, which the participants were given to analyse.

At the conclusion of the session, advantages for States agreeing on procedural transparency in ISDS were discussed. It was stated that these advantages were also relevant when negotiating an investment treaty.

CLOSING REMARKS

Paolo Sannella

President of ISPRAMED, Italy

The belief that unites us all, which was clearly expressed in the messages received and which has been confirmed during the course of the Conference, concerns the importance of having a shared and efficient regulatory and procedural framework for economic development. This objective can be achieved only through concrete initiatives of cooperation carried out in a continuous way.

The pursuit of this goal inspired ISPRAMED's action, favouring in particular the establishment of a Network of Arbitration Centres in the area, gradually strengthening their skills, their role and their exchanges.

We intend to expand and build up this activity with the cooperation and support of the operators of the business community, in particular that of SMEs, and of the legal community, as well as of national and international institutions.

Our ambition is to make available to the Mediterranean community of arbitration the gained experience as a point of reference for the members of the Network.

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