

# President's Message

## Pivotal Times – But Which Way Will the Pivot Point?

Amateur historians (like the author) frequently come across expressions such as “a watershed year” or “an historic fork in the road”. My personal favourite is “pivotal times”. The metaphor is perfect: it conveys the uncertain path that the course of history treads; the sometimes haphazard train of events that shape our world; and perhaps best of all the use of a geometric figure that invariably concentrates the mind... the circle.<sup>1</sup>

We are certainly living “pivotal times”. One can easily – and without any tinge of narcissism – imagine historians writing in, say, 2116, that there was a “before” and an “after” the second decade of the twenty-first century. In the “before”, the world had its certainties: democracy and science were on the march; globalisation and free trade would pull hundreds of millions out of poverty and increase standards of living worldwide; only twenty years previously a historian had even announced the end of history. And then everything changed, and the world entered the “after”.

The only problem we have, we who are living in the middle of this change, is that we do not know which way the pivot will eventually point. The same can be said, on a (happily) smaller scale, of international arbitration.

### The age of irrationality

One common feature in our contemporaneous world is the rise of irrationality in public debate. Of course, irrationality is by no means the product of our age. One could even say that irrationality has receded: for example, the author does not recall reading of any recent burnings of witches in the town square (at least not where he votes and does his shopping).

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<sup>1</sup> For precisely that reason, the title of this President's Message was very nearly “*Spin the Bottle – Kiss Whom?*” In what must be a highly congenial pastime for bored and hormone-charged teenagers, winsome young men and women sit in a circle; one of them spins an empty bottle placed on the floor at the middle of the circle and must kiss the person of the opposite gender to whom the bottle points when it stops its gyrations. The exciting part of the game, apparently, is that the spinner never knows who she or he will end up kissing. Regrettably (for him), the author has never actually been asked to participate in such a *séance*, be it the basic version or more esoteric variations (which need not be discussed here but of which Wikipedia provides a fascinating description). Having only vicarious knowledge of the thrills that “spin the bottle” is said to produce, the author decided that it would be unscientific for him to use the concept in the title.

Nevertheless, irrationality has a tough hide. Witness the tone and slogans in the lead-up to the Swiss vote of February 2014, when 50.34% of Swiss voters approved an anti-EU immigration initiative, despite (and very possibly because of) clear warnings that to do so could be harmful to medium- and long-term Swiss economic interests. The author personally heard people explaining their “yes” vote by stating that they did not want to have the Euro as Switzerland’s currency – no doubt a defensible economic opinion, but one that was egregiously unrelated to the actual issue on which Swiss citizens were called to vote. More recently, the Brexit vote in the UK was, judging from commentary and interviews seen by the author, fuelled in part by the slogan according to which “*voters are fed up with experts*” (which seems to imply that they would place trust in ignorance) and by fears of an imminent flood of Turkish immigration (although, unless the author has missed something, Turkey is not an EU member). Whether Swiss and British voters were right or wrong is not the point. What is striking is the extent to which their motivations could be based on irrationality. And turning to the United States of the America, by the time the next 2016 ASA Bulletin appears the outcome of the presidential election will be known. In terms of irrationality, the 2016 presidential campaign has been and will continue to be “the biggest in history” (to parody one of the candidates).

So will historians writing in 2116 look back and observe that our times were the pivotal point at which the world tipped into an age of irrationality?

Or will the pivot go the other way? While irrationality is rising, others are also acknowledging that one cannot simply dismiss irrational behaviour in the body politic and continue to do business as usual. The current malaise and confusion are also a perfect opportunity to set a number of things straight, things that should have been set straight long ago but were left as they were largely by complacency.

## **Irrationality and arbitration**

Leaving the realm of armchair politics and entering that of international arbitration, are we not witnessing many similar things?

The debate on investor-state dispute resolution has reached a level of irrationality has nothing to envy from its general-politics cousin. This is no doubt because the debate has been framed mainly as a political one by those who oppose arbitration as a means of resolving investor-state disputes as a matter of principle. Predictably, off-the-cuff nonsense such as “*If we accept TTIP our country will face claims for billions of dollars (or euros, or francs) just for having applied the laws voted by its own citizens*” (an expostulation

actually voiced by a parliamentarian that the author will charitably refrain from identifying) makes great political show. Never mind that people who actually know what they are talking about can point to statistics demonstrating again and again that states are not treated unfairly; do not even try to point out that “our” investors (being those of the country whose politicians are scrambling to score political points) do not feel comfortable litigating against foreign states in “their” courts. Just remember one thing: “*voters are fed up with experts*”.

Likewise, sports arbitration has not ended its rough ride. The “phew” of relief many of us breathed when Germany’s highest court overturned lower courts’ rulings in the *Pechstein* case was a welcome respite. However, in the meantime, scandal after scandal has rocked the sports world. Predictably – again, very predictably – sports arbitration has been caught in the storm and many people do not see (or do not wish to see, or feel that the story is better told if they pretend not to see) the fundamental separations between the world of sports organisations and the world of sports arbitration.

And let us not forget international commercial arbitration, which is, after all, the heart, the brain and the backbone of international arbitration in general.

To begin with, we should believe for one instant that the irrationals who decry investor-state and/or sports arbitration have any understanding for or interest in the differences between these fields and commercial arbitration. “Arbitration” has become a dirty word for some, no matter which variety is involved. The arbitration world must realise that the mixture of confidentiality, (perceived) exclusiveness, (perceived) big-business interests and (sometimes perceived) high financial stakes is a highly combustible one for public opinion. And it is a dream topic for the irrationals who are currently dominating public debate.

Even where there is understanding of the specificities of commercial arbitration compared to its ever more distant relatives, the debate seems all too often to migrate from reality to Palookaville.<sup>2</sup> The calls for complete transparency, for appellate arbitral tribunals, for uniformity in procedures... you name it. Just forget about what users invariably name as the reasons why they opt for arbitration: let us apply our expert minds to develop exactly what users do not want. This theme is the subject of a pet rant of the author and has already been addressed in a previous President’s Message<sup>3</sup>; out of pity for the reader the author will refrain from revisiting the topic. One remark suffices in

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<sup>2</sup> This term has many possible meanings. The author is referring to that used by Harold Angel to Dr Fowler in the film “Angel Heart”.

<sup>3</sup> “*Let’s Get Rid of the Presiding Arbitrator*”, 32 ASA Bulletin 2/2014 (June).

this context: one gets the strange impression that it is the experts who are “*fed up with voters*”.

### **So How Will the Pivot Go?**

All of this may sound terribly depressing. However, we must not succumb to despair, because, quite simply, there is no reason to.

Consider for an instant the increasing awareness in developing economies that arbitration is part and parcel of healthy business environment. To take the example of Mauritius, it is striking that it is the Ministry of Financial Services, Good Governance and Institutional Reform that is taking the lead on international arbitration in that country. In most jurisdictions this would be the exclusive remit of the ministry of justice. The author's hat is off to an original and visionary approach.

Consider also the continued development of arbitration if one takes even only the statistics of the major arbitration institutions of the world. If, as some doomsayers claim, arbitration is in decline or even being challenged as a viable way of settling international commercial disputes, users do not seem to have noticed.

Consider the increasing number of students and young lawyers who sign up for specialised arbitration courses: they are the future and they are acquiring knowledge of the subject far quicker than their elders could.

One could go on like this for quite some time.

And, anyway, if indeed international arbitration is facing an existential crisis, then we should roll up our sleeves with determination and realism, never forgetting Winston Churchill's timeless advice: “*Never let a serious crisis go to waste*”.

So which way will the pivot point? If the author were able to make such predictions, he would likely already be enjoying retirement in a tropical paradise. For the time being, all we can say is that we are indeed living pivotal times, and therefore face only a minimal risk of boredom.

ELLIOTT GEISINGER

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## SAVE THE DATE

**ASA General Meeting & Conference**  
16 September 2016, Bern  
*Quantifying Claims in Post-M&A Disputes*

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**ASA/DIS Arbitration Practice Seminar 2017**  
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**ASA Annual Conference 2017**  
3 February 2017  
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