# President's Message

## Is Arbitration a System?

Users of international arbitration, when providing for arbitration in a contract or when commencing an arbitration, are not very likely to ask themselves the question: is arbitration a system? One would expect that their principal concern is ensuring a timely and cost effective procedure with an acceptable result. Aimed at the resolution of a specific dispute between specific parties and before persons selected for this specific dispute, arbitration, in its archetypical form, is ephemeral and might take place without any reference to a system or other framework. It might be seen as the very opposite to a "system".

Such ephemeral, or purely ad hoc, arbitration may have occurred at the origin of arbitration and it may still occur today; but arbitration as it is practiced nowadays relies on rules and mechanisms which give effect to an agreement to arbitrate present and future disputes, ensure the functioning of the arbitral process and the effectiveness of the outcome. These rules and mechanisms may well be perceived as a system, and indeed systemic questions regularly are addressed by lawyers analysing arbitration. Recently, a study on the theoretical underpinnings of international arbitration has received much attention. Discussion fora such as OGEMID hosted exchanges on the subject and the newly created International Arbitration Academy invited its students to address the subject in a competition. Significantly, the ICCA Anniversary Conference, which Geneva had the privilege of hosting a few months ago, devoted a major part of its programme to the proposition that "Arbitration is moving from a process to a system"; wisely it combined the discussion of this subject with that of the "needs and expectations of the users".[1]

The discussion on that occasion centred on the examination of the judicial mechanisms at the national and the international level which are intended to ensure that the arbitral process works even if one of the protagonists does not wish to play by its rules. The nature of the relationship between such system and the arbitral process has been subject to debate and doctrinal controversy at least since the 19th century.[2] Although the

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1 The full title of the proposition was: "The Proceedings are Changing. Arbitration is Moving from a Process to a System with Far-Reaching Implications for the Future"; together with the proposition that "The Needs and Expectation of the Users are Changing", it formed the subject of the afternoon session of the one day conference on 20 May 2011.

2 The introduction in Peter Schlosser's seminal work remains a useful overview of this development: *Das Recht der internationalen privatenSchiedsgerichtsbarkeit*, 2nd ed. 1989, p. 28 et seq.

controversy about the legal nature of arbitration – judicial or contractual – has resolved itself in a sort of a compromise, some of the old theories seem regularly to appear in new clothes with new followers. Today, the doctrinal controversy seems to have a somewhat different focus: some say that arbitration, domestic and international, is a creation of the judicial system of States and exists only if and to the extent to which it is authorised by these systems; others explain the international arbitration system as a coordinated network among the judicial systems of nation States in what has been described as the Westphalian system; and others, since the second half of last century, see in arbitration the presence of an international or transnational order at work.

The relationship between the arbitral process and the judicial system primarily concerns situations in which the arbitral process is in difficulty, for instance because one of the parties, instead of resorting to arbitration, turns to the courts of a State or when a party does not comply with the award. A system regulating this relationship may appear as peripheral to the arbitral process itself; but it is indispensable for the reliability and success of arbitration as a method for dispute resolution. In view of this importance the question deserves attention.

However, the vast majority of arbitration proceedings take place without the intervention of any State court and there are strong indications that most of the arbitral awards are complied with voluntarily.

Indeed, one need not return to a society of merchants of an earlier age to find systems which provide a large part of the support mechanisms otherwise expected from State courts. Such mechanisms exist in closed arbitration systems for instance in commodity exchanges, where the risk of sanctions, blame or exclusion, provide a powerful incentive for compliance. Sports arbitration also may serve as an example: arbitrators sit in disputes about the application of the rules adopted by professional associations regulating the exercise of the sport as a profession. No courts or outside enforcement authorities are needed to give effect to the decisions of the arbitral tribunals: the contravening player or club simply will not be permitted to participate in the games – the role of the courts is likely to be limited, as can currently be observed in Switzerland with the on going dispute between the FC Sion and the FIFA with a marginal role of the local courts. And when the courts at the place of arbitration step in to annul the award, the effect of such annulment, according to the position taken in the systemic debate, may remain limited to the judicial system of the annulling court.

There may be other such systems, operated by groups or networks of commercial operators of which we do not hear much, precisely because they function without the intervention of the State.

Against this background, the concept of a system in the form of an international arbitral legal order, as it is advocated by some as part of the on-going debate, is attractive since it may be extended to include such other specific arbitral systems, along with their effectiveness. The concept may assist in approaching the questions and challenges raised by international arbitration in a manner that adequately takes account of its specificity.

For the time being, however, much of the debate seems to be focused primarily on the "normative architecture of arbitration" and on the relationship between arbitration and the State courts in their function of providing both support and limitation to the arbitration process. Arbitration, whether viewed as a system or not, is seen through the prism of the judiciary. As a result, court proceedings related to arbitration receive far more attention, at least in commercial arbitration, than the proceedings before the arbitrators; and such attention is not without impact on the manner in which the arbitration itself is conducted.

The debate at the recent ICCA conference confirmed this situation and provided a useful lesson. As the discussion evolved, the balance which the organisers had planned between the "System" and the "users", became lost and the interest centred on systemic questions; the complaints of the user on the panel received hardly any attention, except from one of the panellists: in response to the proposition that the needs and expectations of the users were changing, she observed that it was not these needs and expectations that had changed but the manner in which the arbitral community dealt with them.

Her message is important: while the discussion about the legal periphery of arbitration and its systemic underpinning is important, we must not lose sight of the core. Or, to answer the question with which we started: arbitration may well be a system, an autonomous system, or even a plurality of such systems; but first of all it is a method for resolving a specific dispute between specific parties by a specific arbitrator. If we fail the challenge of performing this task in a satisfactory manner, the question whether arbitration is a system may no longer need to be posed.

Geneva, September 2011

MICHAEL E. SCHNEIDER
ASA PRESIDENT

# SAVE THE DATES

**ASA ARBITRATION PRACTICE SEMINAR**

*Annecy, France, 20 – 22 January 2012*

Organised with
the Comité français de l'arbitrage (CFA) and
the International Arbitration Institute (IAI)

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**ASA CONFERENCE**

**Sports Arbitration: a Coach for Other Players?**

*Beau-Rivage Palace, Lausanne, 27 January 2012*

For more information see the ASA website: www.arbitration-ch.org