

15th Geneva Global Arbitration Forum (9 Dec. 2010: *Arbitration as a growth industry: where will the growth come from - the BRICs and other emerging economies? Is it a case for supply-side economics?*)

TALK: MAURICE MENDELSON QC.

- At the risk of sounding naive, I do not think that international arbitration should really be viewed as an industry at all - whether growth or not.
 - I realize that we earn fees either for acting as counsel or as arbitrators. However, even acting as a lawyer is traditionally regarded as a liberal profession, a service - remunerated, it is true, but still providing a service to the public. And, as with other liberal professions such as medicine, with its own professional standards and obligations.
 - *A fortiori* arbitrators. They may be paid for what they do, but really they are there to provide a service to those whom they serve, and they too are subject - or should be - to rigorous standards.
 - This is, then, not merely a matter of nomenclature. If we regard ourselves as engaged in a business, wholly or mainly, then there are things that we may do that we should not do if we recognise other obligations.
 - For instance, if we wanted to maximize our profits we could take bribes, and so on. You may object - yes, but if you get caught people will not instruct you as counsel or appoint you as arbitrator again, so it is bad for business.
- But that presupposes that one would be caught.

- And anyway, if the case was big enough and the bribe large enough, it might be enough to retire on comfortably.
- The true reason, I suggest, why none of us in this room - I hope - would accept a bribe has less to do with financial calculation of self-interest, but more to do with standards of decency and probity which are not at all "industrial".
- So much for my self-righteous rant.
- Now let me drop the word "industry" and replace it with something neutral, like "activity".
- The first part of the question asks us to assume that arbitration *is* a growth activity: Is this correct?
- We are all aware of the phenomenal growth of international arbitration since at least the 1970s, at any rate impressionistically. But as a matter of fact I have been able to consult some figures.
 - Starting with international commercial arbitration, Gary Born's forthcoming *Cases and Materials* book contains a table. If you take the period 1993-2003, for instance, which he tabulates by institution, you find an increase of around 300-500% of cases during this period. If one stretched the figures to today, there would in most instances be an even greater increase, for most or all institutions, over the same period.
 - Similarly, there have considerable increases in the number of investment treaty cases brought under the auspices of ICSID and other

bodies like NAFTA. This also seems to be the case for ad hoc arbitrations under UNCITRAL rules and so on.

- Of course, as share prospectuses so wisely warn us, past performance is not a guarantee of future performance, and we would be wrong to take absolutely for granted that international arbitration will continue to grow just because it has in the past.
 - Although one can reasonably anticipate that the increase will continue, broadly in line with increasing globalisation, a number of factors could, in the case of commercial arbitration, at least slow down the rate of increase.
 1. The world's going further into recession, or future economic crises.

Of course, it is a truism of litigation that people tend to sue when the climate is good, because they can afford to; and when it is bad, because debtors are more likely to default and creditors need the money. Still, arbitration must be dependent at least to some extent on the vagaries of the world economy. More about this anon.
 2. If domestic commercial courts became relatively cheaper and more efficient, whether through streamlining of their procedure or for any other reason. After all, the supposed advantages of commercial arbitration are mainly that it is quicker, more informal and confidential. But the more that commercial arbitration becomes like litigation (which often seems to be what is happening), and the more that commercial litigation is streamlined, the less obvious it is that arbitration is preferable to litigation. It is

only in the third respect - confidentiality - that arbitration is pretty certain to retain its edge.

- When it comes to **treaty arbitration**, the confidentiality of the proceedings is more relative. Awards under the auspices of institutions, at any rate, are virtually always published; and there is an increasing trend towards publicity during proceedings, not least because permitting third-party intervention means that confidentiality cannot be guaranteed.
- On the other hand, in general there are no **courts** for the system of arbitration to compete with, because there is no general compulsory jurisdiction of the ICJ or any other body over investment treaties. It depends on consent, either in advance or ad hoc, which is relatively rarely forthcoming.
- My own guess is that commercial arbitration will continue to increase. We are also asked, in that case, where the growth will come from. For instance, the BRICs countries? Or maybe the Gulf and Middle East?
 - The first thing to notice is that a geographical source of arbitral business is not the same thing as the seat of the tribunal being located there. If, say, there were a lot of cases involving Brazil, that is not to say, at all necessarily, that the

arbitral law will be Brazilian, nor the law governing the contract.

- Secondly, the work might come from these countries, obviously, whether they are claimants or respondents. And the fact that they are growth economies - and, let us suppose - continue to be so - does not necessarily put them on one side or the other of the arbitral process. For at the same time as China, for instance, is entering into more and more export contracts, it is also entering into more and more import agreements - even though some would wish it could do so more.
- Bearing this in mind, I would anticipate that there will be more cases **involving** BRICs countries and the Gulf and Middle East. However, I would probably add to this list some Far Eastern countries, such as South Korea and Singapore, and some Latin American countries, in addition to Brazil.
- When it comes to investment treaty arbitration, some of the factors could be rather different. Once again, some of the countries I have mentioned may find themselves investors as well as host countries: but in the case of treaty arbitration, Latin American states have an historic aversion to treaty arbitration which seems perhaps to have been only temporarily overcome. And this is in any case not a purely cultural or local phenomenon; for as we know, there is

something of a reaction to investment treaty arbitration in many parts of the developing world, where there is a feeling, at least in some influential circles, that the pendulum has swung too far in favour of the investor latterly.

- I think that to some extent enthusiasm for this sort of depends on the swinging of the intellectual pendulum. However, I suspect that it is even more importantly influenced by the **economic** cycle. For instance, when certain commodities are in great demand, countries where they are to be found are likely to be more tempted to bend or break the rules - because even if your regular investor(s) shun you, there will be others in the queue who will be happy to take the risk.
- Finally, is this a case, we are asked, for "**supply side**" **economics**? That is to say, could we increase the demand for arbitration by increasing the supply of arbitral institutions?
 - I think I have partly answered this question at the beginning, where I suggested that it is not appropriate to consider arbitration as a business to be deliberately grown.
 - Furthermore, I suggest that we should in any case view the suggestion with a degree of caution.
 - So far as concerns **treaty** arbitration, it seems to me that ICSID does a pretty good job. There is no empirical evidence of which I am aware to suggest that its arbitrators are systematically or systemically biased in favour of investors;

and in any event, if some rival institution were to offer a more "radical" panel, I doubt that investors would be that keen. Of course, so far as **intra-regional** disputes are concerned, states may prefer a regional regime, such as that of NAFTA. But even the NAFTA makes considerable use of ICSID and the Additional Facility; and the prospect of more regional tribunals is to some extent dependent on a greater degree of regional economic integration, which may or may not be forthcoming. Considerations militating in favour of local solutions in **commercial** arbitration, such as proximity to the parties and - possibly - a common language other than English or French - are less significant here, where the number of cases that a given State will have to handle per year are, typically, few or none. Of course, if ICSID were unable to handle the throughput with sufficient expedition, States will be more keen to look elsewhere; but though it seems to be a bit under pressure at the moment, I do not think we have reached that point. Furthermore, there always remains the option of ad hoc

arbitration. So I do not see any great appetite for adding to the suppliers of **investment** tribunals.

- On the other hand, I can already see a tendency for more and more countries to try and set themselves up as venues for international **commercial** arbitration. As I have already adumbrated, there are a number of **legitimate** reasons why this might be a good idea in some cases - for instance where both of the parties are from the same region, far from such centres as London, Paris or Singapore. Commonality or similarity of language and/or legal systems might be another reason.
- However, I think it is fair to say that there are already significantly more centres for international commercial arbitration being set up than are likely to succeed. Let us take, for example, a "centre" established by the Chamber of Commerce of the imaginary state of Ruritania. Why would people want to use it?

- Well, some Ruritanians companies might be keen to do so, on the grounds of language, familiarity with their legal system etc. But the very factors that make **them** keen to press for choice of that forum might well be a **deterrent** to **foreign** investors. If Ruritanian is not their language, why should they be put at a linguistic disadvantage? (This is not true of English and French, which are *linguae francae* - especially the former; and regionally Chinese too.) And if the arbitrators are drawn from the local Ruritanian pool, there is bound, very often, to be a suspicion of bias. Questions may also arise about the competence of local lawyers, especially if it is a small pool.
- Furthermore, proximity is only an advantage if **both** parties are from the same region. Once that ceases to be the case, proximity to just one party is not a positive feature.
- In a recent essay, ## Jan Paulsson has been rather scathing about this tendency to set up

more and more local centres. He suggests that too often these are vanity projects, leading to cronyism and other ills. Of course, there are bound to be some examples where the setting up of a centre **is** desirable in the public interest; but I do agree that the whole tendency is one that should be viewed with caution, both from the perspective of the public interest, and also in terms of prospects of success.

[This panel will be an exercise in prospective thinking:

A. is arbitration a growth industry?

B. if so, what causes the growth?

- the increased globalization?

- the increased number of arbitral centres and arbitral institutions which create their own demand in arbitration services? Is this a case of supply-side economics in vogue in the US during the Reagan years, whereby it is the supply which creates its own demand, rather than the reverse as taught in conventional economics?

A. will the growth be in commercial cases? investment cases?

B. where will the growth be geographically located: the BRICs countries? Gulf and Middle East countries?

C. are the UN/UNCTAD activities with third world countries a factor of growth? What are their effect on the acceptance in the broad world of arbitration as a mean of settling disputes?}