Editorial

What future for arbitration?

Where does arbitration, whether domestic, regional or international, generalist or corporative, institutional or ad hoc, go?

The leading specialists of arbitration, honoring us with their friendly participation to this fifth e-newsletter, will try to draw the contours of what arbitration will be tomorrow: an arbitration based on an "unique, stabilized and recognized" model in the words of professor Thomas Clay; an arbitration in which the technological revolution will play a crucial role, more than elsewhere; an arbitration expanded into areas usually reluctant to arbitration; an arbitration better accepted by States and their national courts; an arbitration partially financed by third-party funders; and last but not least, a professionalized arbitration which should not constitute a profession in itself.

On that last point, our guests all agree that being an arbitrator must be a secondary activity but not a main profession. A private justice, agreed and delegated to independent professionals, impartial and objective, is one of the reason of arbitration, of which the International Arbitration Chamber of Paris is today one of the main institutions.

So please read on.

Baudouin Delforge, Chairman of the International Chamber of Paris

REPORT: THE FUTURE OF ARBITRATION

The evolution and future of corporative arbitration

By Irina GUERIF,
General Secretary of the CAIP

The International Arbitration Chamber of Paris (hereinafter "the CAIP") is one of the main institutions in corporative arbitration. It is the result of a long experience but also the consequence of changes in national and international trades which have always influenced actors of economic life and law. Correspondingly, the activities of arbitral institutions, particularly the CAIP, are influenced. This one remains "corporative" in its structure but gradually becomes "generalist" regarding to its activities, to the composition of the arbitral tribunals and the organization of arbitral proceedings.

The evolution of specialized institutions* and the corporative arbitration that they implement is correlated to the evolution of the economy and to the development of commerce.
1. The CAIP, emerging from the practice

The CAIP was born from the practice, based on the needs of merchants willing to be judged by their peers in a minimum of time and with minimal expenses.

Since it was created, the CAIP established a corporative arbitral system, with a restricted access to only thirty corporations, professionals from the same sector. This system explains also its birth at The General Union of the Paris Commodities Exchange (la Bourse de Commerce de Paris) on 25 March 1926, and its structure as a Union of professional associations.

Let us remember the historical context of this creation. In the late 19th and early 20th century, there had been an expansion of corporations and a structuration of them into professional associations, driven by the industrial revolution. At this time were enacted the Waldeck-Rousseau Act of 21 March 1884 which legalized the constitution of professional associations, and the 12 March 1920 Act on the extension of civil capacity for these professional associations, which considerably extended their attributions.

On the legal side, in the absence, at the time, of any legislation on commercial arbitration, the professional associations set up their own arbitration rules, poorly elaborated though. For instance, the CAIP Rules, in its version of 1930, stipulated sanctions for the party who would refuse to enforce an award such as his exclusion from the profession (at the time, the professional associations had enough power to ensure the respect of the awards by themselves, through this type of clause).

Nevertheless, a question soon arose: which arbitrator to designate? Quickly, the associations noticed the difficulty of appointing legal persons as arbitrators.

This was confirmed by the French Legislatur with the reform of 1980 and 1981 (the “Décret” of 14 May 1980 on domestic arbitration and the “Décret” of 12 May 1981 on international arbitration). This reform will expressly exclude the possibility of appointing legal persons as arbitrators, contrary to the Rules of most of the arbitral institutions at the time, including the CAIP.

The new legislation precludes legal persons from being arbitrator but allows them to organize the conduct of the arbitral proceedings. Before this reform, the CAIP, “constituted as sole arbitrator”, acted as arbitrator itself and on its behalf.

2. The path to modern arbitration

The CAIP then modified its Rules, making mandatory the visa of awards by the administrative secretary.

This tradition is maintained today. Pursuant to Article 28 of the CAIP Rules currently in force, the administrative secretary, who works for the secretary general of the Chamber, is appointed by the Chamber’s Chairman in each case and must assist the arbitral tribunal in the conduct of their mission.

Another novelty: if in the earlier versions of the CAIP Rules, the arbitrators had to be French, or to have acquired the French nationality for at least 5 years, the Rules of arbitration of 1980 allow foreigners to be arbitrator. This change could only favour the opening of the Chamber to international scale.

Then, after the enactment of the NRE Act of 15 May 2001, amending Article 2061 of the French Civil Code which now provides that except where there are particular statutory provisions, an arbitration clause is valid in contracts concluded by reason of a professional activity.

Some other corporative arbitration centres will finally join the CAIP which now organizes on their behalf the disputes arising between their members (fruits and vegetables, IP…) on the grounds of the execution and interpretation of their standard-term contracts.

3. New horizons

The early 2000's witnessed a rapid increase of countries' interdependence in every area: trade, investments, law. Law in general, but particularly international arbitration and corporative arbitration, had to adapt to the new circumstances of business.

The Arbitration Chamber also had to adapt to this situation, its activity being gradually globalised.

At the request of its members, who are increasingly involved in international trade, the Arbitral Chamber of Paris became the International Arbitration Chamber of Paris in 2010.

The enactment of the 13 January 2011 Decree on the new French law on arbitration was the occasion for the CAIP to modify its Rules and adapt them to international arbitration, meeting the challenges of a globalized economy and of the increasing internationalization of trade.

Today, the CAIPs activity is diversified, its jurisdiction is broad: any dispute arising from any area can be submitted to the Chamber, regardless of the profession of the parties.

More precisely, the CAIP manages general contractual disputes (sales, transports, service provision) while keeping a close connection with the agro-industrial sector, its historical focus area.

The CAIP still operates as an Union of professional associations, governed by representatives of the professional associations, members of the CAIP. Therefore it remains a corporative institution in its structure. This is a competitive advantage because through these representatives from the business world, the Chamber remains close to business and is able to understand its concerns and meet its needs.

However, the professional associations are also subject to changes, their activity also diversified and some of them are now organized in larger associations.

These associations are drawn with an immense strength in international and European relations, and all become increasingly
exposed to international trade. The wave of internationalization will not avoid any sector. Then, the customs developed by these associations tend to internationalize too. In this context, domestic law and local customs are no longer in the position of answering the business needs in an European or international environment. These new requirements revolutionized the CAIP list of arbitrators. Today, the CAIP provides a list of arbitrators composed both of merchants, experts in their own sector, and eminent scholars and experts of arbitration law and international business law. All the arbitrators listed by the Chamber are highly qualified and experienced, however the parties are free to appoint their arbitrator from the list provided to them by the Chamber or not.

Businesses are no longer the same. Regardless of their sector, they are hassled by the new constraints, particularly by a duty of transparency and of good management of risks, including procedural risks.

4. The activation of changes by the needs of the economy

Transparency is the key word of the past few years. Under the influence of society’s requirements of transparency, the arbitrators now also have a duty of transparency. Thus, the CAIP responded by implementing a statement of independence and impartiality and adopted Ethics Rules that were reviewed by the Scientific Council of the Chamber and stipulate the main obligations of arbitrators in the conduct of their mission.

Our time is characterized by an easy access to information and by an accelerate broadcast of information. An author points out that “globalization, perceived as pervasive contacts and exchanges in various parts of the world, entered into our daily lives”. He illustrates his point with the example of an Indian tribe, living at the border of Amazonia, at ten days of motorboat from the nearest village, which survived for centuries by swapping latex against salt and fabrics. Today, this tribe has a website and an international representative.

This component of globalization influences law, practices and arbitral institutions. The evolution and transmission of new issues, new techniques, new practices and new challenges are fast and knows no borders.

The specific techniques of international arbitration, although well-adapted to this new situation, are complex and impact the practices of the Chamber which strives to offer a flexible and less formal procedure.

Disputes arising from “professional” areas are more and more complex and now closer to the international disputes that are disconnected from corporations. The borders become blurred. “Quality arbitrations”*, rooted in the deep tradition of corporations, disappeared from the field of the CAIP.

In this perspective, will differences between international and domestic arbitration remain? Some authors even emphasize the potential emergence of an anational arbitration law, regarding to the development of an almost-universal international arbitration law.

Others insist on the combination of two tendencies: if law standardizes arbitration, arbitration law also standardize. Meanwhile, standardization can have an effect of burdening arbitration law. *

Even though the complexity of the issues grows, the CAIP will seek for reality and proportionality in order to avoid heavy proceedings because, prosaically, operators will seek less formal forms of settling disputes. The CAIP wants to provide appropriate procedures, giving high autonomy to the parties for the appointment of arbitrators, and high flexibility to arbitral tribunals in the conduct of the proceedings and in the ability of connecting with the mentality of businesses”.

As for corporative arbitration, it will surely be enriched by the notions of international law, whilst avoiding the burdens that the standardization of arbitration law might entail.

NOTA:

* Interview with Thomas Clay

Meeting with Thomas Clay

Professor, Deputy-Chairman of the University of Versailles Saint-Quentin, Thomas Clay manages the Master’s degree in Arbitration & International Business Law and the research team of international arbitration law. He is the author of numerous publications dedicated to arbitration, including a commented Code of Arbitration (to be published by LexisNexis in 2014). He is also an international arbitrator, managing partner of the law firm Corpus Consultants that he founded with Robert Badinter, assembling a team of university professors to serve legal professionals

Are we heading to an always-more uniform arbitration law, both professional and international?

I do not think so. I believe instead that international arbitration faces a double phenomenon of professionalization and diversification. On one side, in the main arbitration places, the arbitration “boutiques” grow in order to counter the rules on conflicts of interest. On the other side, we notice the multifaceted growth of arbitration based on an unique model, stabilized and recognized. On the merits, investment arbitration between a State and a foreign investor, and domestic arbitration about
distribution agreements or warranties deploy on the same matrix. For better or for worse, it is always a private tribunal, appointed by the parties, which will render an award that is binding and can easily be enforced. This model has been going since the dawn of time, that is to say how strong it is.

Will there be a proliferation of arbitration institutions, or a trend towards bundling these institutions?

I wonder if this issue does not face the same paradoxical double phenomenon of concentration and fragmentation. First, there is a concentration of the biggest centers of arbitration, such as the International Chamber of Commerce with the number of cases increases years after years. Secondly, there is a proliferation of smaller institutions, which try to gain acceptance but not always in clear conditions. Indeed, isn’t it surprising that we find 206 arbitration centers in Riga, the capital of Latvia?

What impacts will the technological revolution have on the practice of arbitration?

The revolution already occurred. Arbitration is a globalized proceeding in order to the use of internet, of email exchanges, of data rooms for documents consultation, of videoconference for meetings and hearings is widely integrated. Dematerialization is obvious in international arbitration. A few years ago, I had to carry my boxes of documents in hearings, or sometimes had to make them delivered because of their volume. Today, I do not even carry an USB key because all the documents are safely stored on my ICloud, with a secured access. I think the next step should be the decreasing of trips (taking into account the impact caused by the systematic use of planes to the environment) and the dwindling of physical meetings that should be kept for the most important steps of the proceedings.

Will we notice an expansion of the arbitrability areas in the future (to employment law or competition law)?

Employment law and competition law can already be subject to arbitration, as all the economic rights. The only limit is for the arbitral tribunal not to violate the public policy rules of each area.

There is an extra precaution in employment law: the arbitration clause cannot be binding for the employee, who can refuse arbitration when the dispute arises. But in practice, the employee will often find his interest in arbitration and shall impose arbitration to his employer.

Will the parties’ autonomy increase in the conduct of the arbitration proceedings?

With the reform of 13 January 2011, I think the French Legislator gave the maximum autonomy the parties could hope. I don’t see what else could be conquered. Indeed, French arbitration law is recognized abroad as the most liberal arbitration law in the world, and this fact is very welcome.

Will the national courts accept arbitration better?

The French courts not only accept arbitration, they encourage, support and promote it and are the main cause of its fantastic development. Without the 1980-1990 case law, arbitration would have never known its current success in France, both in theory and in practice.

Should we fear a subtraction of the disputes from national courts?

There is nothing to fear about arbitration for national courts, unless there is a fraud, which must be severely punished, as a French arbitration case that still makes headlines, remind us. It will be interesting then to observe the following of the proceedings which will show if Paris welcomes or not that kind of suspicious arbitration. From the solution taken by the Courts will depend the image of France in the arbitration world.

Will the third-party funding be widely used in arbitration?

I think this kind of external funding is correlated to the economic crisis. Therefore, if the crisis attenuates, the third-party funding will probably not be necessary anymore.

Nevertheless, the recent development of this funding was a bit anarchical, and it would be better to frame it by enacting rules. On this point, I invite you to look at the last Club des Juristes report, which will be published soon. It proposes new rules on third-party funding in arbitration proceedings, particularly concerning an obligation of disclosure for the third-party funders.

Will arbitrating become a real profession? And should the disclosure obligation be improved?

Arbitration should not become a profession, to my mind, because arbitrators would be professionally dependent on their nomination and would lose in objectivity and in independency. My concept of arbitration is only as a secondary activity, not a principal professional activity. The judging profession already exists and belongs to judges. Furthermore, arbitrators have higher requirements of transparency than judges since they are appointed by the litigants. After years, French arbitration law has finally found a good balance on the disclosure obligation thanks to case law, doctrine and legislation, particularly Article 1456, 3rd paragraph, of the French code of civil procedure. We still expect one final decision from the Cour de cassation (the French Supreme Court) for the end of June / beginning of July 2014, in the famous case Tecnimont, which should definitely impose an ethical practice of arbitration to the resisting parties or arbitrators.
What immunity for arbitrators in the future?

On 15 January 2014, the *Cour de cassation* fixed the civil liability regime of arbitrators, taking into account the previous propositions made by doctrine: no liability for arbitrators as long as they are not guilty of serious misconduct constitutive of a fraud, a dol, a gross negligence or a miscarriage of justice. The French Supreme Court aligned the arbitrators’ liability regime on the judges’ liability regime. In essence, the arbitrator is immune from any claim on the merits of its award (it is important that he does not incur any personal risk, if not, he would not be able to settle the dispute), but he can be found responsible for the way he renders his award, on the basis of the contractual liability deriving from the contract he signed with the litigants.

Meeting with Louis Degos

Lawyer at the Paris Bar, MCO, managing partner of the Paris office of the international business law firm K & L Gates LLP, Louis Degos is renowned for his practice of arbitration law and has extensive experience in commercial litigation and alternative dispute resolution. He regularly appears before the French courts and arbitral tribunals (ad hoc and institutional) in domestic and international disputes and frequently acts as counsel in alternative dispute resolution procedures.

Do you think we are heading to a standardization of the arbitration law?

I think we are actually heading to a kind of standardization of arbitration, or at least towards the harmonization of an almost-unique arbitration scheme. In the 19th and early 20th centuries, arbitration was mostly corporative. We found it in certain fields such as raw materials (cereals and cocoa, for example) or in specific sectors such as telecommunication, film industry, insurance, or transports. Today, this particular kind of arbitration tends to disappear, mainly for economic reasons: more and more stakeholders, such as financial institutions, or factoring companies, intervene in arbitration even if they do not belong to the profession of the specific sector concerned. These financial third parties, intervening without really being from the field concerned, bring something new in the arbitration and undoubtedly influence the market practices: for example, before, in the context of a sectorial arbitration, when a professional did not execute the arbitration award rendered, he was necessarily blacklisted by the other members of the profession. Suddenly, everyone knew that if this professional was condemned, it would not perform its obligations, so that the other members of the profession would no longer deal with it. But today, the financial institutions do not care about a sector concerned, and bring with them their sector’s discipline. Thus, we can notice a diversification of the arbitration actors, and the sectorial arbitration is likely to disappear. Besides, a legal reason also tends to make the sectorial or corporative arbitration disappear: the modernization of the legislations on arbitration and Rules of arbitration. Indeed, in the 19th and 20th centuries existed several types of Rules of arbitration: for instance, the Commodities in the United Kingdom were secular Rules of arbitration with regard to food, insurance and sea transport.

Similarly, in France, the example of the legislations of 1980 and 1981, which founded our arbitration law, shows us the importance the gave to the second degree proceedings which were in use in sectorial corporative institutions. This is no longer the case today since the 2011 arbitration law reform, after what the International Arbitration Chamber of Paris amended its Rules of arbitration to take into account this legislative review. This was certainly not a total revolution and some reformers – including myself - wanted, during the 2011 reform, to purely and simply eradicate this appeal mechanism in arbitration, but it was eventually partially preserved as a resurgence of the past, somehow as an exception. In summary, we are witnessing an evolution towards a generalist system of arbitration based on the model of International commercial arbitration.

What about the harmonization of arbitration at an international level and its recognition by the States?

The issue of standardization between domestic and international arbitration is slightly different from the issue of standardization in sectorial arbitration. This question requires distinguishing different systems: in France - one of the most liberal system in favor of arbitration almost wholly based on the freedom of choice - where the parties can stipulate and organize their arbitration as they want, as long as they comply with the principles of public policy, we clearly notice a standardization between domestic and international arbitration, an internationalization of the standards. Even the French domestic arbitration law tends to internationalize, to the extent that in the French Arbitration Law Reform Committee, of which I was Secretary General and which seated from 2000 to 2011, we wondered if the dualistic distinction between domestic and international arbitration in the French code of civil procedure had to be preserved. In France, international arbitration is, with a few reservations, the “classical arbitration” contrary to some other countries where arbitration is considered as an “underneath-justice” and international arbitration is slightly accepted, as a proceeding that ultimately must be controlled and incorporated in one way or another into domestic law. On the opposite side fall a series of countries with their own arbitration system. France is kind of a pioneer with its international arbitration policy when some other countries are far behind. Between these two extremes, there are other countries which agree on the interests and autonomy of arbitration but have to incorporate it in their legal and judicial system. These are the Anglo-Saxons countries where the legal system is based on Common Law, i.e. the stare decisis principle: law is developed by court decisions and precedents. Then, paradoxically, arbitration comes to undermine law: indeed, the economic sectors who benefit from arbitration escape from the Common Law system which is contrary to its own philosophy: stick to reality by developing law according to the daily case-laws. All these regional differences makes difficult to assert there is a real standardization of arbitration, it is rather an harmonization. Governments logically attempt to maintain their sovereignty. However, the sense of history seems to follow the French way in the expansion of the parties’ autonomy principle and the economic and business globalization will slowly lessen the Governments’ sovereignty. It is already noted at the regional level
Do you think we are heading to an extension of the areas of arbitrability, especially to employment law or competition law?

I do think we are heading to an extension of the areas of arbitrability. In employment law, arbitration already exists. Under the French employment law, the arbitration clause contained in an employment contract is not unenforceable against the employees but arbitration can be decided after the dispute arose, by way of an arbitration agreement, or with the employee’s acceptance to the arbitration clause. In this respect, the legislator probably tries to guard against the sophistication and technicality of arbitration. Employment law, consumer protection and competition law intend to protect employees and weaker parties to contracts. Indeed, arbitration could preclude these weaker parties from their recourse to their natural judge (meaning the nearest judge). But we can notice a loss of this natural judge which is supposed to be a proximity judge. Indeed, we can wonder if a consumer still has a natural judge when he buys on the internet and the contract provides that any dispute should be held before the seller’s courts abroad or if goods or services bought are originated in far-away countries.

At the procedural level, in what extent the technological revolution will impact arbitration?

The digital revolution will more and more affect the proceedings in general, and it will firstly impact arbitration more than judiciary proceedings, simply because the digital revolution impacts business. Arbitration will have to adapt to this technological revolution. In the proceeding itself, I also notice an increasing recourse to numerical and so the appearance of different types of software for storage, documents rating. We are witnessing a digital mechanization of the arbitral proceedings.

What does the opposition between institutional arbitration and ad hoc arbitration inspire you?

Institutional arbitration gives everyone the opportunity to have recourse to arbitration whereas ad hoc arbitration requires having solid knowledge and skills precisely because the institution is not here to act as a keeper and to administer the proceedings or to assist and train the arbitrators in their mission. But in practice, ad hoc arbitration is almost always inspired by institutional arbitration and the professionals who happen to be ad hoc arbitrators are also often institutional arbitrators. Also, ad hoc arbitration can still be very interesting for some parties such as States or public bodies which need the proceedings to be absolutely confidential. These parties may think that in the context of an ad hoc arbitration, there would be less people involved in the proceedings, so potentially less information leaks, and they also feel that they do not submit themselves to any private institution, which would damage their sovereignty, and are able to have an entirely custom proceeding.

Do you think that the arbitrator should be more professional? Should arbitration be a profession?

First, I see the necessity of having arbitrators better trained and more professional. But when I say “more professional”, I do not mean “professionalization of arbitration”. Being more professional means having specific knowledge and skills, but arbitrators must have a profession besides their arbitrator mission, if not they are judges. Judging is not arbitrating, because parties want their arbitrators to have other skills than the ability of rendering justice. For instance, leading law professors are often criticized as arbitrators because they make arbitration their profession. They teach and know the law but do not apply it. Scholars are, however and of course, very good arbitrators, but I believe in professionals that happen to arbitrate some disputes such as attorneys, lawyers, experts, consultants: they have a real and practical view and knowledge of business and law. I am also in favor of a status for the arbitrators which could clarify the arbitrators’ liability without tainting their legal immunity. I am therefore obviously in favor of the disclosure obligation and the independency of the arbitrators, and national justice should be inspired by these principles, but that’s another debate. Arbitrator, as an exclusive profession, is a good idea only at first.

Being more professional also means being trained: there is a difference between practicing as an attorney, or an expert, or even a judge and being arbitrator. The techniques and skills required are different: the proceedings are different so the reflexes must also be different. Indeed, arbitration procedure is hybrid and highly sophisticated, which asks for arbitrators to be particularly diligent and highly available. I understand the criticisms on the lack of availability of most arbitrators, which is a cause of the lengthening of the arbitration proceedings. If the argument has relevance, I would refer the parties to the importance of the choice of the arbitrators they appoint. In practice, I noticed the development of a new kind of counsel for the parties: some counsels are specialized in advising parties on who to appoint as arbitrator and how. The arbitrators chosen must have impeccable credentials and must be nonpartisan to make sure their decision will be blameless. The formation of the arbitral tribunal should be similar to the selection of juror panels in Anglo-Saxon countries. More and more, this foreign practice of advice on the constitution of an arbitral panel is expected by the parties from their attorneys.

Meeting with Didier Ferrier

Professor Emeritus of the University of Montpellier, Didier Ferrier directs a Research Master’s degree in business contract law. He is a recognized specialist in distribution law, and works as Of Counsel at Fidal law firm. He is the author of several books in economic law (esp. Droit de la distribution, Litec, 5th edition, 2009). Vice-President of the International Distribution Institute, he is also co-Chairman of the working group
“international contracts” of the International Chamber of Commerce (ICC).

Are we heading to a uniform arbitration law, professional and international?

Over the past few years, we noticed a significant development of professional and international arbitration as well as a convergence between the different statutory and treaty rules in arbitration law. It seems obviously useful to promote this alternative dispute resolution mechanism which meets the specific needs of professionals (looking for confidentiality and specific skills from their arbitrators) and international litigation (choice of the applicable law, choice of a neutral judge). However, it does not seem necessary to stand for a uniform professional arbitration law (except in some very particular areas such as space law, for example). The offer of Rules of arbitration now enables to satisfy both the parties’ freedom of choice and the establishment of an interesting competition.

Will we notice an expansion of the arbitrability areas, for instance to employment law or competition law?

Arbitration tends to grow in new areas (competition law, intellectual property law) but it seems excessive to speak of “expansion”.

Will there be a proliferation of arbitral institutions, or rather a trend towards consolidation?

Local institutions in some places or specialized institutions in certain subjects always existed and there are still initiatives to create some of them. One can imagine some groupings of these institutions including some kind of federal structures on a regional or supranational level. But what appears to be a healthy competition must be maintained.

Are we heading to an increase or a restriction of the parties’ freedom, particularly in the conduct of the arbitral proceedings?

On one side, parties must be free to choose their arbitrator and the applicable law (to the procedural issues and to the merits) because this is the first interest of arbitration. On the other side, this freedom should obviously not attempt the leading principles underlying the act of judging: access to justice, respect of the rights of the defense, respect of the right to a fair trial... Consequently, a balance must be struck in this dialectic of freedom and its limits. As a corollary, the greater freedom is, the greater vigilance must be.

What immunity for arbitrators in the future?

It is unclear what could be the content of this immunity and why arbitrators would benefit from it. Indeed, the arbitrator is both a judge and a contracting party. As a judge, he must meet the requirements of independency and impartiality, without being entitled to claim any immunity. As contractor, he must perform with due diligence his obligations, but still without being entitled to any immunity.

Will the third-party funding be generalized in arbitration?

If the issue of an impecunious party arises sometimes, it remains that arbitration is still based on a contract. Thus, it is the responsibility of the counsels, when they intervene in the drafting of the arbitration agreement/ clause or advise a client to recourse to arbitration, to draw their clients’ attention on this pecuniary issue. Even so, in practice, we can notice the appearance of rules of arbitration cost pooling, these rules should be limited.

Will arbitrating become a real profession?

We can hope it will not. Recourse to arbitrators who are professionals from the specific area concerned is interesting for the parties because these professionals will have the relevant experience and skills for their mission. Indeed, the foundation of the relation between the parties and the arbitrator is the confidence of the former in the ability of the latter to arbitrate its case. However, it seems complicated to promote professional-arbitrators because the success of this professionalization would rapidly lead to its abandon, particularly because of the conflicts of interest it would develop.

Meeting with William Nahum

Chartered accountant and auditor, forensic expert, arbitrator, President of the ACAREF, an association linked to the CAIP, William Nahum conducted in parallel a professional and an institutional career that led him to occupy almost all the elective positions of his profession: President of the Parisian Association of Chartered Accountants and President of the Paris Institute of Auditors (Compagnie Régionale des Commissaires aux Comptes de Paris) for 12 years and President of the national Association of Chartered Accountants. He evokes for us the future of arbitration:

How the technological revolution can impact the habits of arbitration?

The technological revolution will necessarily affect arbitration. Before the courts, an important part of the proceedings (mostly
the exchange of documents) are already made digitally. But on the merits, nothing changes. The arbitrators keep on analyzing, thinking and rendering justice. I have heard online arbitration proceedings exist. I did not study them but it is probably a good way to reduce costs in small disputes.

**Are we heading to an extension of the arbitrability areas?**

I believe that the areas of arbitration aim to be extended because it is a highly interesting alternative dispute resolution process. It is our role to promote arbitration and its benefits, especially after the negative media coverage of some arbitration.

**Will the funding of arbitration by third parties become widespread?**

I do not think so. This is a recent phenomenon; I do not have any statistics on this matter. One could imagine it may increase in the coming years, but I doubt it could be predominant in 10 or 20 years.

**Will arbitration involving Governments increase in the future?**

For many reasons – including image and communication – Governments have always preferred judges to arbitrators. I do not think this trend will reverse in the future.

**Does the future of arbitration depend on geopolitical considerations?**

Arbitration can only work in democratic constitutional states; therefore geopolitics is an important factor in domestic arbitration. That being said, arbitration is sometimes questioned even in democratic countries.

**Will the appointment of arbitrators include other criteria than independence and impartiality (professional experience, age, religion, …)? Could arbitrators have an availability disclosure obligation?**

The designation of arbitrators already meets, even informally, the criteria you specify. If religion is only an important criterion for specific communities, experience, age, and qualifications undoubtedly play an imminent role.

**Will arbitrator become a profession?**

I cannot make predictions on this point. In a way, arbitrator is already a profession since a lot of former lawyers, judges, accountants devote most of their time at retirement to arbitration.

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**CASE LAW**

**Overview of French case-law related to corporative arbitration**

The corporative arbitration, organized by the institution incorporated in a professional association, has been defined by the Court of Appeal as the arbitration held under the auspices of a professional association, which concerns only the professionals members of this organization and which competence is limited to the disputes arising between its members (Court of appeal (CA) of Paris, 18 November 1993).

If corporative arbitration is subject to the general law of arbitration, as pointed out repeatedly by jurisprudence (for instance, see Cour de cassation, 1st Civil Chamber, 9 June 1993; CA of Paris, 18 November 1993), it may raise a number of legal issues particularly with regard to the principle of independence and impartiality of arbitrators.

Thus, state courts have had to deal with several cases in which the parties opposed the lack of freedom in the appointment of arbitrators or the breach of their duty of independence or impartiality.

In this regard, in a first decision, the Tribunal de Grande Instance of Paris decided that by giving their consent to an arbitration clause designating a corporative arbitration institution, the parties had accepted its Arbitration Rules and could not ignore the specificity of corporative arbitration: the appointment of professionals from the same economic sector as the parties as arbitrators. Then, the judges held that the parties cannot ignore that such arbitrators are necessarily in business relationships among themselves or with the litigants and this should not lead to any doubt regarding their independence or impartiality (TGI of Paris, 28 October 1988, Philipp Brothers case).

This approach was later confirmed by the Court of Appeal (CA of Paris, 6 April 1990; CA of Paris, 27 June 2002).

The Court of Appeal of Rouen also ruled to this effect, stating that in corporative arbitration, the mere fact that arbitrators are in a business relationship with the people who operate in the same economic sector is not a sufficient fact to characterize a state of dependency or partiality of the said arbitrators. According to the Court, the independence of the arbitrators must be assessed objectively and in concreto (CA Rouen, 28 October 1998). For example, the Paris Court of Appeal noted that when the plaintiff demonstrate that the Chairman of an arbitral tribunal was personally interested in the solution of the dispute submitted to arbitration, his independence could be questioned (CA Paris, 10 June 2004).
Moreover, the First Civil Chamber of the Cour de cassation recently had the opportunity to rule on this issue, confirming that in matters of corporative arbitration, the parties cannot ignore that the arbitrators can have professional links between them or even with the parties. Therefore, it would be unfair to criticize an award for that reason alone (1st Civil Chamber, 19 December 2012).

With its approach being confirmed by the Cour de Cassation, the Paris Court of Appeal stated again a few months ago that in corporative arbitration, the plaintiff could not ignore that the arbitrators or some of them could have professional relationships together. In this case, the Court noted that the composition of the Board of FEDEPOM (a professional association of the apple industry) is known in the profession (CA Paris, 17 December 2013). It should be noted that the requirement of awareness has been raised by the Court of Appeal under a previous decision in which it considered that, the Appellant, exercising in grain trading, could not ignore the functions of its arbitrator, also Chairman of the Federation of Agri Trading, which is common knowledge in agricultural trade. Thus, the appellant is not entitled to rely on this fact to challenge the composition of the arbitral tribunal (CA of Paris, 16 December 2010).

Thus, the current state of jurisprudence illustrates a pragmatic vision of arbitration by the French judges, requiring parties a form of "lucidity" in corporative arbitration because of "its singularity: the unavoidable proximity between the parties and the arbitrators since they belong to the same professional community" (see the article of Sandrine Sana-Chaillé de Neré, in Journal of International Law (Clunet), No. 3, July 2013).

This approach of the judges is laudable, the interest of corporative arbitration residing precisely in the knowledge and expertise of the sector concerned, its customs and constraints, by the arbitrators appointed.

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**Cour de cassation, 14 May 2014 (No. 13-15.827)**

The French Supreme court confirms an award rendered under the auspices of the CAIP.

The Cour de cassation upheld an award rendered under the auspices of the CAIP which was set aside in December 2012 by the Paris Court of Appeal.

As a reminder, the Paris Court of Appeal set aside the arbitral award on the grounds that the contract was not signed by the seller; that there was no prima facie proof in writing of its existence; and that, in the case of a civil contract, this deficiency cannot be made up by alleging the practices of the profession or the existence of a business flow between the parties.

By infirming the appeal decision and confirming the arbitral award, the Cour de cassation reaffirmed that "an arbitration clause is independent from the contract in which it is incorporated and is not affected by the inefficiency of it".

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**NEWS**

**Round Table : “Perspectives on the International Arbitration Chamber of Paris and Russian Arbitration Association practices”**

The International Arbitration Chamber of Paris is pleased to announce the signing of a cooperation agreement with the Russian Arbitration Association.

On this occasion, a round table will be held on 23 October 2014 at 6 p.m. in the premises of Freshfields Bruckhaus Deringer LLP – 2 rue Paul Cézanne, 75008 Paris – followed by a signing ceremony of the partnership.

The ceremony will end with a cocktail.

To attend this event, please register at : caip@arbitrage.org

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**Advances training in Arbitration**

The CAIP organizes advanced training for current and future arbitrators, lawyers and professionals. This training will be held over four days on Tuesdays 23 September, 7 October, 28 October and 18 November 2014.

For further information, please visit our website : www.arbitrage.org

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The CAIP joined the Federation of Arbitration Centers (FCA)

The CAIP is honored to inform you of its recent membership to the Federation of Arbitration Centers (www.fca-arbitrage.com). Gathering different centers with headquarters in France, the FCA allows greater cooperation with the common goal of promoting institutional arbitration.

Meeting with a delegation of the Arbitration Court of Togo (CATO)

The CAIP had the pleasure of receiving on 14 May 2014 a delegation from the Court of Arbitration Mediation and conciliation of Togo (CATO) composed of Mr. José Kwassi SYMENOUH, Chairman of the Board of Directors, and Mr. Komlan Espoir ASSOGBAVI, General Secretary.

This visit allowed rich conversation about arbitration in France and in Togo as well as experience exchanges of our two institutions in international arbitration.

INTERNATIONAL ARBITRATION CHAMBER OF PARIS

The International Arbitration Chamber of Paris (CAIP) is a not-for-profit institution which has a general competence in arbitration. It offers the companies of all sizes, all necessary services for their disputes resolution through the means of arbitration ou mediation.

Established in 1926, the International Arbitration Chamber of Paris is the first arbitration center in France. Having resolved about 40 000 disputes arising from transactions of all commercial and industrial sectors, the CAIP has acquired today an important international reputation.