Editorial

The arbitrability of transportation-related disputes is so ancient that we could speak, regarding this area, of real domain of choice of Arbitration.

This analysis is particularly true in maritime matters where arbitration is so to speak consensual to Shipping law. It can be explained by the place given to the arbitration agreement in the shipping of goods contract, especially in marine insurance contracts.

Over time, arbitration has also expanded to other modes of transportation, as the eminent academics who honor us with their participation to this 9th edition of the newsletter explain us, at the forefront of which is Professor Philippe Delebecque, Chairman of the Maritime Arbitration Chamber of Paris, who by evoking the place of arbitration in Transport law emphasized how much arbitration extended to passenger transportation, transportation of goods, road transportation, rail transport, water transport, air transport, ...

And if, as Professor Cécile Legros, we can still wonder sometimes about the opportunity to resort to arbitration in this field, we agree with her that this dispute resolution mechanism appears "appropriate in many ways", as "the litigation issues in the transportation field are complex" and require the intervention of specialists. That is the case for multimodal operations mentioned in conclusion by Philippe Delebecque. We agree with his assessment: "In these new fields where disputes are starting to emerge, Paris needs to position or reposition itself. It should naturally not be done at the cost of the usual and traditional fields of action of the professional arbitration chambers, but these need more than ever to open up to the new areas of their sector, not forgetting their initial activities that remain essential.”

Have a pleasant reading! / Enjoy your reading!

Baudouin Delforge,
President of the International Arbitration Chamber of Paris

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CAIP’s interns chose “Arbitration and transport” as a theme

NEWS OF THE CHAMBER
CIETAC’s delegation visit, November 10th, 2015
Arbitration and transport

By Cécile Legros
Professor of Law at the University of Rouen, Scientific Director of the Institute of International Transport Law and Logistics (ITLL), Member of the Scientific Council of the CAIP

Origins
The settlement of disputes arising out of transport relations by resorting to arbitration is ancient. Since the sixteenth century, the Edict of Moulins in 1566 on the reform of Justice authorized the resort to arbitration. But the Edict of the Marine in 1681 is the one which set up arbitration as a natural way of dispute resolution in maritime affairs. Since then, this dispute resolution mechanism has kept developing. In maritime matters, there are numerous institutions specialized in arbitration. However, such disputes can also be solved in the framework of other non-specialized chambers of arbitration, such as the CAIP, when the matter concerns a dispute in relation with transportation of goods. Thus, all chambers of arbitration that deal with international trade may have to examine transport law issues particularly in the context of disputes between signatories of a contract of sale involving the movement of goods. Most times, these issues arise out of a dispute between a seller and a buyer in relation with their respective obligations in the organization of the transportation of the goods sold. These obligations arising frequently as a consequence of the choice of an Incoterm.

Maritime arbitration
Currently, it is however still in the area of maritime transportation that arbitration is the most prevalent. The fact that the resort to arbitration is based for the most part on the conclusion of arbitration clauses rather than on the use of submission agreements can be explained by the fact that the use of arbitration clauses in this area is frequent. More specifically, the charter parties or – charter contract – are the ones containing such type of clauses. These standard contracts are generally elaborated by the ship-owners or professional associations in accordance with standardized models. Most of the disputes are thus related to relations between owner and charterer of a ship. Nevertheless, disputes arising out of transportation contracts are also sometimes dealt with by arbitration, especially when the shipping title is a bill of lading called “charter party” (or “congenbill charter party”). These bills of lading thus refer to the terms of the charter party, hence the applicability of the arbitration clause in the congenbill. This extension of the binding force of the arbitration clause to disputes arising out of the transportation contract constitutes one of the problems of the relation between arbitration and transport. Indeed, the resort to arbitration involves in principle a prior consent of the parties to the dispute. Yet, in this type of situation, the parties to the transportation contract are being subject to the resort to arbitration even though they have not expressly given their consent to it. This matter of the opposability of arbitration agreements to the parties to the transportation contract – more specifically to the consignee of the goods or to a third party carrying the bill of lading – has been enhancing the jurisprudence and the doctrine with debates for years. It constitutes one of the strongest sticking points of the resort to arbitration in the area of transportation. Indeed, the case law considers that the dispute between the transporter and a consignee of the goods shall be brought before the Arbitral tribunal when there is no ground for nullity or manifest inapplicability of the arbitration clause. Thus, the clause isn’t non-binding on the consignee on principle even if the consignee usually did not personally consented to it. This issue could incidentally be found in all modes of transportation insofar as all transportation of goods contracts are characterized by their tripartite nature (shipper, carrier, recipient), waiver clauses being most of the times inserted in the transportation contract by the carrier of the goods without any real negotiation between the parties.

The specific features of arbitration in the transportation area
The fact remains that in the event that this issue keeps fueling the debate on the opportunity of the resort to arbitration in this field, this dispute resolution mechanism proves to be appropriate in many ways. Contentious issues in the field of transport are indeed complex. They require the intervention of specialists. Even if more and more specialized judges can be found within commercial courts, the expertise required does not generally measure up to the specifics of these disputes. On the contrary, arbitration precisely allows to select a “made-to-measure” composition of the arbitral tribunal depending on the nature of the dispute. The professionalization of the arbitrators in this area is indispensable. Furthermore, concerning the legal substance, transportation law is characterized by a variety of local sources, domestic or international, but also by an important place accorded to the international trade customs. Moreover, the knowledge of these customs by the arbitrators is essential. In this area, legal knowledge is insufficient; the presence of transport practitioners is necessary. When it comes to demurrage, or seaworthiness of the ships, maritime trade professionals are the most capable of solving these conflicts. Moreover, some arbitration centers allow only practitioners as arbitrators in opposition to jurists.

The perspectives
Maritime litigation undoubtedly remains arbitration’s area of specialization. Nevertheless, it is worth wondering if this dispute resolution mechanism has or not a tendency to expand to other spheres of transportation. In other modes of transportation, except in rail transportation law, the resort to international arbitration is usually lic. It is however not widespread, notably in the field of road transport in which arbitration clauses are unusual. Regarding road transport, this apparent disaffection can be explained by the fact that many disputes are settled amicably or are covered by insurances, but also by the comparatively low amount of financial stakes. However, arbitration is still deemed to be a “justice of the rich”. Yet, many arbitration centers have fee schedules and quite reasonable arbitrator fees that could be convenient for that type of conflicts when a litigation stage is considered. In this regard, awareness of the transportation professional associations is undoubtedly essential.
The activity of logistics also deserves to be mentioned as another type of activity related to transportation. Indeed, transports and additional services tend more and more to be carried out by the genuine multi-services manufacturers that are the logisticsicians. However, in contracts of logistic services, especially when it is a question of 3PL to 5PL, the contractor is entrusted with a set of varied and variable services ranging from stock management to transportation and including packaging, storing and tracing of goods amongst others. These complex contracts, usually long-term, create specific disputes that should be dealt with by specialists of this field. What’s more, major logistic contractors such as DHL or GEFCO already ordinarily add arbitration clauses to their contracts.

Finally, the expansion of arbitration in the entire field of transportation would have a veritable interest for the harmonization of case law. Maritime arbitration managed to draw general principles that govern the discipline on a global scale. Thus, the same case should be decided in a very similar way whatever the host arbitration center. Indeed, arbitral jurisprudence spreads and its harmonization can derive from a ripple effect.

This is not as accurate concerning the other modes of transportation, for which the rulings of state courts remain national for lack of a genuine international court, even though in this field the applicable law is most often an international convention. However, unlike the state judges, the arbitrators have no forum. They are thus more likely to interpret an international contract or an international convention in a real global perspective by freeing themselves from the national concepts and practices, thus promoting the consistency of the application of international law.

The transportation field therefore offers great opportunities for the development of arbitration. The French Arbitration Committee has recently established a task group specifically devoted to relations between arbitration and transportation. In this context, sensitive legal issues are brought up as well as perspectives of development of this dispute resolution mechanism in the field of transport.

Notes

2. See amongst others:
- CAIP Award n°3174 – maritime sale CAF / Formula INCOTERM N°12 — lack of seaworthiness of a ship chartered by the seller – seller’s liability (yes) – shared liability with the buyer who has not taken all measures to protect the goods and minimize the damage. International Yearbook Commercial Arbitration 2013.
- CAIP Award n°3181 - maritime sale CAF – seller’s liability – ship’s seaworthiness condition – first class ship – abusive procedure (no). Extract on the CAIP website.

3. See the extracts of the annually published awards by the review of French maritime law (FML).
4. The bill of lading is a type of maritime transportation contract with specific properties (including negotiability allowing to transfer the property of goods during their transportation).
5. This is notably the case for the BIMCO bill of lading. A CAMP arbitration clause is stipulated in the SYNACOMEX charter party concerning the transportation of grains.
8. This is the case of the LMAA amongst others.
10. In the area of international transport of goods, a convention exists that is applicable to each mode of transport. Some international conventions expressly provide an arbitration: Convention on Contracts for the International Carriage of Goods by Road (CMR) of 19 May 1956: art. 33; Warsaw Convention of 12 October 1929 (International Convention for the Unification of Certain Rules for International Carriage by Air); art. 32; Montreal Convention of 28 May 1999 (Convention for the Unification of Certain Rules for International Carriage by Air); art. 34; Hamburg Convention (United Nations Convention of 31 March 1978 on the transport of goods by sea), also known as "Hamburg Rules" not in force in France: Art. 22.


11. In the aerial matters, arbitration clauses are also frequent, especially in aircraft freight agreements, or leasing. See amongst others: CAIP Award No. 9676 - leasing contract of an aircraft – lack of payment of invoices by the buyer. Extracts on the CAIP website.
12. "THIRD PARTY LOGISTICS PROVIDER (3PL)” refers to an external company which mainly provides physical logistic operations on behalf of a client company - usually transport and / or dynamic storage. The "FOURTH PARTY LOGISTICS PROVIDER" (4PL) is an integrator that brings its own resources, capacities and technologies with those of other service providers to design and manage complex supply chains. The "FIFTH PARTY LOGISTICS PROVIDER” (5PL), more rarely used, is used in order to appoint an external service provider that coordinates the activities of subcontracting companies and develops new logistics solutions based on information systems and adapted technologies. See: J. Kembeu, Les contrats de prestations logistique : contrats complexes ou contrats sui generis ?, PhD Thesis University of Rouen 2014? (Dir. C. Legros).

13. The French Arbitration Committee is an academic society whose purpose is the development and improvement of arbitration.

Transport and arbitration: assessment

By Philippe Delebecque
Chairman of the Maritime Arbitration Chamber of Paris

1. What is and what might be the place of arbitration in the world of transportation?

This issue must be clarified and delimited. The first one is about the transport of passengers which is rightly or wrongly dominated nowadays by consumerism. Undoubtedly we can see a more systematic resort to mediation or conciliation when passengers facing delays or cancellations or traffic injuries are involved. However, arbitration is not in itself proper for the treatment of this type of disputes, and it could simply come up against the requirements of the established public order (cf. C. civ. art. 2059 and 2060). It does not mean that some recourses – as the one from the transportation company against the manufacturer of the transport machine, or from the one who had as a subject-matter the relations between insured and insurer – could not give rise to arbitration, given that the issues are only about commercial interests at this point.

2. If we confine ourselves to the transport of goods, one is led to wonder whether or not distinctions are imposed depending on us being in a domestic legal framework or in an international legal framework, but also depending on the different modes of transportation. The sociologies are different in the fields of road transport, rail transport, water transport, marine transport or air transport. The same applies to customs; although it is true that arbitration is common and well known in the maritime field, it’s a different matter concerning the road field or the rail field. Once again, the world of ship-owners is different from the world of road transport (small) companies; in the same way, the world of aerospace engineers is different from the world of rail specialists. This fact should be kept in mind when we are trying to present arbitration in the field of law of carriage of goods, even if it regards a law made by professionals and for the use of professionals in all these situations, which does not mean that some evolutions are unimaginable.

3. The rail transport of goods does not give rise to many disputes. The cases are settled mostly out of courts, especially as companies’ legal services are very familiar with the issues and particularly competent, as the SNCF one in France amongst others. As it happens, the texts themselves do not consider arbitration, neither in national relations nor in international relations. The applicable International convention (Annex CIM, COTIF of 9 May 1980) does not mention it, and does not even bring up arbitration in disputes that might regard transporters in their interrelations. Nevertheless COTIF (cf. art. 28 s.) provides that disputes between Member States arising out of the interpretation or application of the Convention, as well as disputes between Member States and the Railway Organization itself (OTIF) can be submitted to an arbitral tribunal. We are here far from commercial arbitration. Similarly, it must be remembered that although the SNCF has the ability to settle and enter into arbitration agreements (C. Transportation, art. L. 2102-6), this important provision which was opportune maintained on the occasion of recent reforms in the field of rail transport was not elaborated nor thought for disputes that could arise about actual transportation activities.

remains important and suitably maintained during the recent railway reforms, was not conceived nor thought about disputes which could involve the transport activities themselves.

4. The road transport is not oriented towards arbitration. At least, arbitration is not the usual mean of solving disputes related to losses, damages or delay. The resort to the Commercial Court is common and professionals are satisfied with it. It must be added that insurers have their requirements and although they encourage transactions – which we understand – they do not wish to go to arbitration for relatively low stakes. In the field of international transportation, the CMR (Geneva Convention of May 19th, 1956, which is the reference Convention) expressly provides (cf. art. 33) that the contract of carriage may contain a clause giving jurisdiction to an arbitral tribunal. There is however a condition that this provision must stipulate that the tribunal shall apply the Convention, which is certainly not promoting the use of arbitration to the extent that some provisions of the Convention may appear to be very restrictive for both the carrier and the loader. It is therefore not certain, in the current state of texts and practices, that arbitration is destined for a booming in the field of road transport of goods, other than for specific cases: we can think of exceptional transports which are more important to the relations of transporters with each other than we may imagine at first, or to subcontracting relationships where the issue of the termination of established commercial relations (cf. C. com. art. L. 442-6-1, 5) arises recurrently. However, case law has repeatedly told us (Cass. 1st civ. 21 October 2015, No. 14-25.080) that the disputes which have their source in the implementation of art. L. 442-6-1, 5 could, despite the public order nature of the text and the fact that the responsibility in question is tortious, be subject to arbitration.

5. In the aeronautic world, the Conventions do not preclude the resort to arbitration; however they only admit it under certain reservations (Warsaw Conv. art. 32; Montreal Convention, art. 34). It is only possible regarding freight, which confirms the previous observations (supra, No. 1). It also implies, at least under the Montreal Convention, a provision that “shall be in writing” and it is finally subject to conditions related to the seat of arbitration. What’s more, under the Montreal Convention, the seat of the arbitration does not result from an agreement between the parties but from a unilateral decision of the applicant, who can choose the place that would be the best to fit his interests. Some additional agreements to transportation contracts are however more open to arbitration: thus, for example, disputes linked with the termination of contractual relationships are not rare in agency contracts or contracts for representation (see ex. Paris Jan. 28th 2009 RD transp. 2010, No. 46). It must be specified that the arbitration clauses stipulated in these additional contracts, as for example in ground handling agreements, refer to the arbitration rules established by the International Air Transport Association (IATA) which, as it happens, do not contain particularly specific provisions. In addition, although it is an area in which arbitration could expand quite remarkably, it is undoubtedly the one of Space Law in which very complex disputes – such as disputes over liability between agents – could arise; all it takes to be convinced of this is to raise the stakes linked with the
commercial exploitation of the constantly increasing number of satellites that orbits the Earth (see the recent Symposium organized by the CREDIMI in Dijon, 9 and 10 October devoted specifically to the settlement of disputes in the space law field).

6. For its part, Water Law is quieter than its cousins and triggers less litigation. The Budapest Convention of June 22
d., 2001 on the Contract for the Carriage of goods by Inland Waterway (CMNI) does not contain any provision on jurisdiction. As a result, arbitration is perfectly possible but remains subject to the applicable law. National law does not consider the resort to arbitration either; however, in time contracts, volume contracts or voyage contracts (cf. v. transp. art. L. 4451-1), to the extent that customs are decisive and the technical aspects are important, arbitration would perfectly fit. Nevertheless, it must be admitted that all professionals of inland water shipping are not yet convinced of the benefits of arbitration, probably because conflicts are most often solved amicably, even though their professional organization (VNF) has a more open position, as we can attest. The situation is undoubtedly called to evolve, as water transportation is expanding. In this regard, it would not be pointless to look into how the professionals of inland water shipping in the rest of the EU countries behave, and particularly in the Netherlands and in Germany where water transport is only a link in marine transport.

7. In the maritime world precisely, arbitration is the usual conflict resolution mechanism. Not in liner shipping where companies prefer to stick to the jurisdiction of the commercial court of their home office – all liner bills of lading contain such a jurisdiction clause, to the point that the Court of Cassation has considered it as an international trade law custom, Cass. com. 12 March, 2013, DMF 2013, 712, obs. J.L. Renard – nevertheless in the context of chartering, be it time charter, voyage charter, bareboat charter or even chartering of space and volume charter. Almost all the charter parties contain an arbitration clause giving jurisdiction to professional chambers often in London (LMAA) as well as, nowadays, in Singapore and Hong Kong, and sometimes in Paris (CAMP). Similarly, the recto of the bills of lading of charter parties all refer to the terms of the charter and therefore to arbitration terms (hence the interesting case law well-known by specialists on arbitration clauses by reference). The resort to arbitration is therefore the standard in these chartering operations which, needless to say, are by their very nature international and thus are a good environment for arbitration. In other words, if commercial contracts – i.e. contracts for the sale of raw materials – refer to arbitration (legal and of quality, cf. GAFTA Terms and Incograin Formulas, well known by the CAIP), this also necessarily holds true in the exact same way for chartering agreements which follow on from the sale and which pertain to international trade.

8. Arbitrations regarding chartering raise issues that implies above all else technical knowledge and a perfect knowledge of customs. Are we sufficiently aware that charters are interpreted to the letter; that the phrase “once in demurrage always in demurrage” is not to be understood in the same way depending on whether we consider that demurrage is flat-rate compensation (as do the English) or a freight surcharge (as we do); that the “at utmost dispatch” clause does not have the same meaning as the “maximum safe speed” clause; that the “Himalaya” clause must, for its part, be “updated” (cf. CAMP Gazette, No. 36); that the WIPON clause and the safe harbor clause holds no secrets anymore for good arbitrators that were former sailors; and that the FIOS clause must be taken into consideration at least in the framework of charter parties bills of lading? We could easily multiply the examples of that type of contractual provisions that are confusing for the uninitiated and which entail a good practice of maritime affairs in order to understand them. All that to say that maritime arbitration is a professional type of arbitration, made by industry professionals for industry professionals. It must maintain and enhance this characteristic, which does not obviously mean that it should not pay attention to procedural issues and proper arbitration law. Furthermore, many specific solutions proper to arbitration law originate from maritime affairs. We mentioned the regime of arbitration clauses by reference, which are extremely frequent in the maritime field. We could quote, among other references, the case law on the competenz-competenz principle. (v. partic. editors F. Arradon in the first issues of the Gazette of the CAMP).

9. However, maritime law is not limited to transport or to chartering since it governs all the activities that the sea shapes. The operations that gravitate around transportation and chartering, such as loading, storage, brokerage, consignment, representation and maritime agency, not to mention towing or pilotage are all open on arbitration. Not forgetting shipbuilding, ship sale, assistance and common damages, in addition to traditional issues related to hull insurance or cargo insurance and issues raised nowadays by ship-owner consortiums and maritime alliances.

10. Since its creation in 1966, the CAMP has kept expanding its proficiency to all these maritime disciplines. Its services are appreciated, as illustrated by, notably, the welcome we received during the last ICMA Congress (International Congress of Maritime Arbitrators XIX) held in Hong Kong last May. Although Paris does not have the same position in the maritime world as London – which still holds the first rank and which is undeniably of a very high quality – it remains important. The actors of the maritime world are aware of it, even if it is true that they always constantly need to be convinced of it. The “jurisprudence” of the Chamber is neither pro-ship-owners, nor pro-loaders; above all else, it proposes to solve the disputes submitted to its jurisdiction by providing the necessary explanations in order to facilitate the resumption of the commercial relationship between the parties. It does not try to fall within any struggle of influence between civil law and common law, especially as the cases that are submitted to it lead it, above all else, to enforce and comply with the contractual provisions – admittedly often complex. What it offers in terms of experience and skills and rapidity and fees is absolutely recognized in the maritime world.

Yet, the CAMP mustn’t be satisfied with this. Dispute resolution centers are shifting (more and more towards Southeast Asia). Trade steadily globalizes. Social, environmental and technical data are not the same anymore. Which does not go without consequences on the type of disputes that are emerging or that could emerge. Thus, for example, all that is related to transport commission (for major projects) and to logistics. Thus, for example, multimodal operations. In these new fields where disputes are starting to emerge, Paris needs to position or reposition itself. It should naturally not be done at the cost of the usual and traditional fields of action of the professional arbitration chambers, but these need more than ever to open up to the new areas of their sector, not forgetting their initial activities that remain essential. The CAMP policy has always fallen within this perspective. On its behalf, please allow me to thank the CAIP and its President for the beautiful page I am offered to reassure this fact.

For more information: www.arbitrage.org
Air Cargo transportation and arbitration.

Par François Beaufrils
Chairman of the Logistics & Supply Chain Transport Commission, In-house lawyers French association (AFJE)

**Air freight: an unheralded significance**

Air Freight comprises several sectors: mixed freight (passengers + baggage hold), the “Combi”, general freight and express freight.

Since 1970 (date of appearance of high-capacity aircrafts), this industry’s consistent growth is superior to passenger’s traffic’s.

This mean of transport, which depends a lot on the economic and political context, is a very important economic lever.

"Cargo General Freight" constitutes 50% of Air freight, baggage hold constitutes the other 50%.

*1% of Airfreight tonnage represents 30% in value of world trade*

The economic significance of Airfreight is determined by the value of transported goods.

Roissy-Charles de Gaulle Airport is one of the top 10 world leading Airport Hubs. European and Asian carriers dominate the market.

**How is the Air Freight industry organized?**

Ever since it was created, air freight is of significant importance. As a matter of fact, owning a fleet of commercial aircrafts is the sign of an important power of economic and politic influence.

Two entities control all the activities: I’OACI (one of the UN institutions) and the IATA, which gathers most of air freighters agents who use this compensation chamber to perform operations ranging from travelling activities to air freight activities.

The global regulation for airports together with airline companies and travelling agencies provides an identity network which is very useful to players in the whole world working 24/24h for the Supply Chains ‘agents’.

The professional security of this very organized sector sets the tempo for its economic development.

**Travels of shipped goods are defined by the registered value as opposed to the transport volume. Which observations regarding this affirmation?**

This mode of air transportation tolerates a wide range of goods in its shops and in the baggage hold of air carriers.

The proliferation of regulations and controls (living animals, vegetables (flowers), dangerous products, conventional products, subcontracting traffics (spare parts) etc..) offers a wide range of services within logistics’ structures.

**Depending on the destination country, is Dual-use equipment submitted to embargos, nay, quotas?**

Does the packaging comply with the mode of transportation?

Does it include the original marks of the goods?

What are the exportation and importation obligations for the goods entering the EU?

**IMPORT**

The European regulation established a control system of imports called ICS (Import control system) which came into force on January, 1th 2011.

An electronic entry summary declaration is transmitted to customs of the first point of entry into the EU before the arrival or the loading of the mean of transport.

A declaratory deadline is set for each and every one of these modes of transport.

**Transmission delays for the ENS**

**Short-haul flight** (flight time under 4 hours): “no later than when the aircraft takes off”

**Long-haul flight**: “at least 4 hours before the arrival to the first airport located on the EU customs territory”

For safety and security concerns, the ENS is subject to a risk analysis that might lead to an interdiction to load or to customs controls.

**EXPORT**

The European system ECS (Export Control System) is based on the safety-security amendment of the European Code of Customs. It relies on the advanced shipment of summary declarations to customs, including logistic and commercial details enabling exit risk analysis and targeting of controls.

If transmission delays are not respected, the goods can be seized by customs.

**Does the economic dynamism of this sector compromising a great diversity of high-value goods’ traffics encourage the rise of disputes calling for arbitration?**

The Montréal Convention sets the compensatory damages in relation to a proven damage (goods and luggage), the same does not go for a dispute that is so significant, it might suspend or destroy an important business relationship.

The in-house lawyer is regarded as a “solution finder” by the General management, his role is one of a counsel.

The solutions starts with a well-drafted arbitration clause or agreement established after a several-hour commercial negotiation.

To set the place of arbitration in relation to the New York Convention, to choose ad hoc or institutional arbitration (CAIP or ICC), and the applicable law as well as the language for arbitration and the number of arbitrators.
The quality of the arbitrator, his integrity, his professional experience and his precision, are as many references similar to the ones regarding the professional in-house lawyer.

In any case, when an important dispute involving the company arise, a fast and efficient solution will be needed considering the stakes. Several factors “of circumstance” steer to consider this solution:

• time, the interests at stake, the discretion within the business world and the knowledge of the professions, the dialogue between the parties determine the will to accept this solution or not.

• to bring this affair before the tribunals would be detrimental for the image of the company as well as for its customers, its providers, nay, certain shareholders

• Tribunals do not always have transportation specialists, especially in airport freight.

• Judiciary proceedings incur costs: in time, in costs for significations, acts as well as lawyers’ fees.

• There is no dialogue since it is about condemning the defendant.

In-house lawyers will have to provide a risk analysis to facilitate decision-making.

Eventually, given the values of transported goods, an insurance ad valorem-type of contract might be concluded for the benefit of the customer of the company.

Thanks to contractual subrogation, in case of an important dispute, the insurer, nay, the co-insurer will be parties to the discussion.

Choosing a good-quality arbitration at the appropriate time is the best way to ensure satisfaction for both parties in a limited scope of time compromising a definitive solution faced with a certain damage. It is how you can save a business relationship.

Mediation can be implemented as a way to settle disputes which do not put a significant contractual framework at risk.

The financial costs are significant but less than the ones incurred by a deterioration of the renown of the company.

In this context, the place filled by the International Arbitral Court of Paris (IACP) within the main international places for arbitration, offers first-class services to companies since 1926.

Arbitrability in railway contracts
By Philippe Mettoux, SNCF’s Chief legal counsel, Member of the CAIP scientific council and Stéphanie Noël, In-house lawyer in the SNCF legal department

Arbitration is a technique which is often used as a mean to settle disputes in international commercial transactions because it is fast, confidential and flexible.

Moreover, arbitration is also used to settle disputes in transport-related matters such as maritime transport.

In a competition-friendly globalized world, arbitration proceedings might be used to settle disputes concerning railway transportation. Highly-trained arbitrators specializing in railway transportation-related matters might be a great asset to settle disputes which are very technical.

Arbitration, a method of dispute resolution that can be used by state-owned companies

In France, despite the prohibition of arbitration for disputes concerning state-owned companies as provided for by article 2010 par.1 of the French civil Code, paragraph 2 allows certain companies to accept arbitration only if it is provided for by a special decree.

Several French state-owned companies were authorized to accept arbitration by such decrees.

The French Jurisprudence has also limited the scope of this interdiction to accept arbitration for state-owned companies and provided numerous exemptions depending on the type of dispute in question.

Arbitration is frequently used to settle transportation-related disputes.

In railway transportation, the 2014-872 law of August, 4th 2014 granted the SNCF Réseau (article 6) and SNCF Mobilités (art.14) “the right to compromise and to enter arbitration agreements”. The SNCF and the Réseau Ferré de France already could accept arbitration though.

In international railway transportation, the Convention concerning International Carriage by Rail which binds the state members of the Intergovernmental Organisation for International Carriage by Rail is a uniform act which applies in all state members where it is enforced and replaces national law.

The COTIF, under the protocol of modification of 3 June 1999 enforceable since 1 July 2006, provides for the right to resort to arbitration.
Under article 28§2 of the Convention: “Other disputes arising from the interpretation or application of the Convention and of other conventions elaborated by the Organisation in accordance with Article 2 § 2, if not settled amicably or brought before the ordinary courts or tribunals may, by agreement between the parties concerned, be referred to an Arbitration Tribunal. Articles 29 to 32 shall apply to the composition of the Arbitration Tribunal and the arbitration procedure.”

The nature of the “other disputes”, under article 28§2, can be interpreted broadly. As a matter of fact, the drafting of this article has been changed.

In a previous version, the 1980 COTIF read as follows:

“§ 2

Disputes

a) between transport undertakings,

b) between transport undertakings and users,

c) between users,

arising from the application of the CIV Uniform Rules and the CIM Uniform Rules, if not settled amicably or brought before the ordinary tribunals may, by agreement between the parties concerned, be referred to an Arbitration Tribunal. Articles 13 to 16 shall apply to the composition of the Arbitration Tribunal and the arbitration procedure”

The explanatory Report of the OTIF confirms this broad approach of article 28 by stating, concerning the new drafting of this article in the 1999 COTIF: “Title V (Articles 28 to 32) concerning arbitration corresponds, to a large degree, to the current Title III (Articles 12 to 16) of COTIF 1980. Article 28, § 2 (current Article 12, § 2) has been simplified and extended to other lawsuits arising from the application or interpretation of other conventions devised within OTIF (see Article 2, § 2)”.

According to the OTIF: “If Article 28 §1 of the COTIF relates to disputes between state members arising from the interpretation or application of the Convention, which is arbitration in international public law, article 28§2 relates to disputes between transport undertakings, between transport undertakings and users, between users, arising from the application of the RU, CIV or CIM, which is arbitration in private law”.

The COTIF includes appendixes which apply to international railway transportation and the admission and use of railway material in international traffic.

The Uniform Rules on contracts for international carriage of travelers (UR CIV) form Appendix A, Uniform Rules on contracts of international carriage of goods (UR CIM) form Appendix B of the COTIF.

The URCIV, just like the UR CIM, include provisions about the forum. Article 46 of the URCRIM indicates which state members' tribunals have jurisdiction when parties are willing to bring the action before them. If a judiciary action is brought before state member tribunals, the rules on jurisdiction included in this article must apply.

The UR CIM and CIV, which are part of the 1999 COTIF as stated by Article 6§2, do not include any provision forbidding arbitration as provided for by article 28§2 of the 1999 COTIF.

COTIF provisions apply to its appendixes even they are not included in them.

This is a vision shared by the International Committee for transportation (ICT) whom documents concerning the traffic of goods and the use of the infrastructure, show that arbitration can be utilized.

**Arbitration proceedings**

Disputes between transportation companies, between transportation companies and users, arising from the interpretation or the application of the COTIF or of the other conventions established by the OTIF, can be submitted to arbitration.

The possibility to submit disputes to arbitrators which do not come within the scope of the COTIF, is determined by national laws.

Under article 2016 of the French civil code, the arbitration clause is only valid in contracts concluded for a professional activity. Should one of the party not act as part of a professional activity, the clause cannot be stipulated.

Thus arbitration clauses in transportation contract for travelers seem to be excluded.

Such clauses might be extremely hard to implement and might be contrary to public order.

However, a dispute that has already risen between the transportation company and a traveler might be submitted to an arbitration agreement in order for a tribunal arbitral to deal with it, as long as the parties consent to it and only if the costs of the proceedings are not deterrent.

Nevertheless, both the arbitration clause and agreement might be considered to settle disputes concerning commercial contracts between professionals (transportation companies, charterer…) on passenger transportation.

Likewise, disputes on railway transportation for goods contracts might be submitted to arbitration, especially arbitration clauses, subject to opposability of the arbitration clause to all the parties to the contract.

The same goes for numerous commercial contracts annexed to transportation contracts, after in concreto analysis of the opportunity to use it.

Thus, it seems possible, even desirable, to use arbitration for internal railway transportation and for traveler transportation, in
In transportation, numerous people can be involved in one and only operation. Whether it is the sender, the haulier or hauliers, the receiver (beneficiary), the freight forwarder (the commissioner), the forwarding agent, stevedoring company, even the bankers who are obliged by documentary credits. This journal is not large enough to present every single player in the transportation industry but this is not the point. I aim to highlight the difficulties that judges and arbitrators can face in transportation-related disputes for breach of the contract or poor contract performance: first, the admissibility of the action of the claimant who wish to challenge the hauler’s liability under the contract (I) and who to take action against when several players are involved (II).

I. Who can file an action against the haulier?

In order to answer this question in the context of contractual liability, we need to target what is a party to the contract (A) while judges are very formalist when it comes to transportation-related documentation even though the transportation contract is consensual (B).

A. The party to the transportation contract

In accordance with article 31 of the French Code of civil procedure, when no legal title grants the right to file an action to specific individuals, it is simple: if you have sufficient interest in the matter to which the action relates, you have standing to sue. The standing is merely part of the interest “it is absorbed by the interest” 1. The action must be filed by the party to the transportation contract who is affected/harmed.

As for the sender, he is not necessarily the one who delivers the goods to the haulier but he is the one who enters into the transportation agreement on his behalf 2 (sometimes it is the consignee who is both haulier and consignee). He is the one who gets the haulier to commit to delivering the goods from point A to point B in exchange of the payment of the price. This individual is also called “ordering party” in freight road transportation contract templates or “loader” in maritime law. However, the sender is not necessarily the goods ‘owner which means he still has the right to file an action whatever the sale terms might be only if he can prove an injury arising from losses or damages which occurred during transportation.

The consignee is the one to whom the goods are sent to by the sender, he is the party to whom the duty of delivering the goods is owed by the haulier. Nevertheless, in order for an individual to be deemed consignee, one must express its consent, i.e, to enter into the agreement. The Doyen Rodière thought that the “transportation contract is a three-party contract”.

It is the very nature of the transportation contract as well as its economic function which harmlessly leads us to consider the consignee as a third-party to the agreement which binds the haulier and the sender. This idea of a triparty transportation contract by nature is not shared by everyone. Thus, other authors explained the direct right of the consignee against the haulier through the stipulation pour autrui theory, this legal mechanism was endorsed by the tribunals in order to justify the consignee subscription to the transportation contract 3. This issue appears to be solved by the French Law. Until it was changed by the law number 98-69 dated 6 February 1998, the former article 101 of the French Code of commerce read that “La lettre de voiture forme un contrat entre l'expéditeur et le voiturier, ou entre l'expéditeur, le commissionnaire et le voiturier ». Today, article L.132-8 of the French Code of commerce reads that “La lettre de voiture forme un contrat entre l'expéditeur, le voiturier et le destinataire ou entre l'expéditeur, le destinataire, le commissionnaire et le voiturier. Le voiturier a ainsi une action directe en paiement de ses prestations contre l'expéditeur et le destinataire lesquels sont garants du paiement du prix du transport. Toute clause contraire est réputée non écrite ». Thus, the consignee is legally and immediately associated/subscribed to the transportation agreement.

The ordering party can also challenge the contractual liability of a
haulier, whether as warranty, whether as a main action but only if he has satisfied the claim for compensation made by the claimant or has pledged to do so. Eventually, the insurer that paid the insurance compensation is thus subrogated by law to the insured party rights and actions for this compensation.

B. Formalism

Even though the transportation contract is a consensual contract, the several documents which are issued for the transportation include valued information regarding transportation rules as well as the transportation contract execution. They also and especially have an evidential value. Only the airway bill has a commercial function as well. The bill of lading issued to the sender is a title which is representative of the goods, its transmission transfers possession of the goods.

In freight transportation, judges have had to rule on the notion of party to a transportation contract in a dispute arising from a direct action for payment prescribed in article L.132-8 of the French Code of Commerce for the haulier. Indeed, identifying the people that might be required to pay (the sender and the consignee according to Article L.132-8) is not always easy whether because the consignment is incomplete or illegible, or when it is platforms who shipped the goods on behalf of companies, or who received them so they can be stored, or before a transportation. Are these platforms shippers or consignees according to the law? Considering the Cour de cassation’s decisions, here is the present situation: the one person whom the consignment is addressed to, who receives the goods and accepts them “without signaling he is acting like so on behalf of a mandator” is the consignee and must guaranty payment of the transportation price to the road freight carrier.

In maritime transportation, when a bill of lading is issued in promissory form or in bearer form, the infamous Mercadia case ruled that the liability action for losses or damages against the sea freight carrier was opened to the loader when he is the only one that suffered damage resulting from the transportation. Before this decision, only the person who endorsed the bill of lading could file an action against the carrier, the loader, unless the person who endorsed the bill had transferred its rights to him, could not file any action even if he suffered from personal damage. For the bills of lading made “to the order of”, the holder of the action is the one whose name is on the title but he might have assigned its right through vesting of rights process, a steady Jurisprudence rules that the consignee of goods called “notify” can file an action when the provisions of the bill of lading say so.

In airfreight transportation, the action against the cargo carrier is strictly limited by the French Jurisprudence. Only the people mentioned in the LTA (document which serves as a medium for the contract) as parties to the airfreight transportation contract can file an action. The Jurisprudence usually denies the consignee whose name is not on the LTA because of an intermediary any right of action if he cannot prove that he is subrogated to the rights of the visible consignee.

II. Who to file an action against in a multi-player operation?

As previously underlined, several players may intervene throughout transportation, thus it is important to know who to file an action against, for instance when the goods are transported by multiple carriers (A) or when the transportation was organized by a freight forwarder (B).

A. When there are multiple carriers

When transport was carried out by several carriers, there is a significant difference between French Law and international law. According to Article L.132-8 of the French Code of commerce, the sender or the consignee can use his right of action to challenge all the people involved in the transport as well as their insurers. They do not have to do so, it is a matter of judicial strategy. As for international law, most conventions have set special rules and determine the notion of “successive carriers”.

Thus, when several road carriers execute the same carriage contract, each and every one of them can be held liable when they do not perform their contractual obligations, they become parties to the said contract under the bill of lading conditions (CMR, art. 34). In order for the operation to be regarded as a transport performed by successive carriers, a document covering the whole operation has to be issued from the carriage contract. In this case, according to Article 36 of the CMR, the liability action for losses, damages or delays can be filed by the claimant whether against the first carrier, the last or against the one who carried out the transportation during which damages occurred, together with other carriers.

The same mechanism can be found in road freight according to Article 45 of the UR-CIM. The latter states that the substituted carrier can be held liable as well (art.45§6). As soon as one of the actions is filed against one of the carriers, the right of option ceases to exist. This rule also applies if the claimant can choose between one or several carriers and a substituted carrier.

In Airfreight transportation, no matter if there is one (Warsaw Conv., art.1-3; Montréal Conv. art. 1-3) or a series of transportation contracts. In those cases, the sender will be able to file an action against the first carrier and the consignee against the last carrier. Moreover, the intermediary carrier who carried out the transportation during which the damage occurred can also be held liable by the sender or the consignee (Warsaw Conv., art 30; Montréal Conv., art.36).

When transportation is carried out by one de facto carrier defined as the one who carries all or part of transportation “following an authorization given by the contract carrier” by the Convention of Montreál, who is not the successive carrier for the part he performs (art.39), a liability action can be filed if the claimant means to, whether against one or the other, or “against both of them together or separately” (art.45).

B. When a freight forwarder enters the game

Transportation commission can be used as a simplification measure especially when the goods are to follow a route for which several transport operators and means of transport are needed. The freight forwarder organizes the transportation from A to Z which is practical for the sender. The sender does not have to concern himself with material and regulatory transportation matters either and the freight forwarder is the only one that can be held liable during the whole transportation process, and also have to answer for the people he called in (C.com.art.L.132-6). Should there be any loss, delay or damage, the sender can file an action for damages against the freight forwarder only. However, as a party to the transportation contract, article L.132-8 of the French Code of commerce allows the sender to file an action for breach of the contract against the car valet that can be held liable for loss, damage or delay of the goods.
The sender’s name does not have to be written on the transportation document since the freight forwarder acted as the sender on the consignment, the same goes for the consignee who must be associated with the transportation contract since 1988. And the action against the carrier filed by the sender or the consignee does not prevent them from filing an action against the freight forwarder. This right of direct action is limited to the land carriers since Article L.132-8 of the French Code of commerce is located in section relating to freight forwarders for transportation overseas and overland. For international overland transportation, it only applies to international road transportation.

Indeed, in international railway transportation, only the consignee whose name appears on the “CIM consignment” has the right to act against the carrier since he took delivery of the goods. If the sender happens to be the principal, he cannot file an action against the railway carrier and can only act against the freight forwarder, unless the right of action is transferred by the party which has legal standing to act against the carrier.

Notes

5. Article L.121-12 or Article L.172-29 (sea and rivers) of the French insurance code provide for legal subrogation. When the insurer wants to claim payment for a sum of money he did not have to pay under its contract with an insured, Article 1250-1 of the French civil code applies.
8. Such a right of action is only granted to him in rare situations (when the mention on the LTA was ambiguous: Cass. Com., 23 juin 1987 : BT 1987, p. 423).
10. Only the CMNI, in water transportation, does not include any provision.
13. . The “first carrier” is the one who negotiated with the sender for the all of the transportation, even if he only performed as a second or third-place party in the transportation chain, CA Paris, 3/02/1971, BT 71, p.1971, CA Paris, 20 nov. 1984, BT 85, p.99.
14. Warsaw Convention for the Unification of certain rules relating to international carriage by air of October, 12th 1929, Montréal Convention for the Unification of Certain Rules for International. Carriage by Air of May, 28th 1999. The latter is supposed the former. But as long as all the countries have not abrogated Warsaw Convention and ratified Montreal Convention, the former has to be taken into account.
15. According to French law, the freight forwarder is the one who organizes the shipment of the goods in his own name and on behalf of a principal, with its own means. This definition is given by the Jurisprudence and taken up by the Transportation Commission standard contract (D. n° 2014-530 of May, 22th 1994) and article 1411-1-1° of the French Code of transportation, even though the latter only deals with the free choice of means.

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**ENQUÊTE**

**Istanbul Arbitration Center – A New era in Asia-minor**

Par Orçun Çetinkaya, **partner at Moroglu Arseven Istanbul**

et Metin Abut, **junior associate at Moroglu Arseven Istanbul**

Turkey’s Current Economic and Commercial Conditions

Throughout history, Turkey has played a significant role in the relationship between the eastern and western world, particularly considering its geopolitical position and imperial background. It is often said that Turkey constitutes a bridge between Europe and Middle East and Central Asia. Turkey is also located on the legendary Silk Road, as well as connecting Mediterranean countries with Black Sea countries, such as Russia.

Since the 2000’s, Turkey’s strategic importance has significantly increased due to its economic growth, as well as commercial relationships and trade with neighbours. Having said that, the Turkish economy has fallen on hard times in 2015 due to political uncertainty.
The US Dollar and Euro have increased sharply against the Turkish Lira and regional unrest exists among Turkey's neighbours.

However, political stability seems to have established once again following a parliamentary election on 1 November 2015. Therefore, it is widely believed the Turkish economy will continue its rapid development and growth in light of regaining a strong government. The current government has ambitious targets for 2023, the centenary of the establishment of Republic of Turkey which include nuclear plants, dams, agricultural reforms, R&D and technology centres, fast trains, high ways, new airports and many others for which massive project finances, PPPs, foreign loans, direct investments, privatizations and joint ventures have already started but continue to increase.

International Arbitration and Turkey

Turkish corporations have involved in a large number and variety of big-budget construction projects in the Middle East, Russia and Central Asia. Cross-border transactions in the Middle East and the appetite of foreign investors to do business in this region have considerably increased. Middle Eastern, Caucasian and Central Asian countries such as Iraq, Iran and Turkmenistan are considered to be energy superpowers due to their remarkable volume of natural resources and oil reserves. Turkey provides a useful energy transit corridor, acting as a natural bridge between the eastern and western worlds.

The World Bank’s International Centre for Settlement of Investment Disputes (“ICSID”) released its latest caseload statistics (Issue 2015-2). These statistics offer insight into the ICSID’s caseload profile, based on cases registered or administered by the ICSID as of 30 June 2015. In this regard, oil, gas and mining represent the largest economic sector (26%) where dispute arise and parties take recourse to arbitral proceeding, followed by electric power and other energy (15%), then transport (9%). Turkey and Turkish companies are common parties for those cases before ICSID and those statistics by and large echo Turkish involvement in ICSID cases.

When it comes to international commercial arbitration, Turkish parties use arbitration heavily. Particularly in respect of construction, energy, shipping and distributor agreements, the preferred method is arbitration. Equally, for joint ventures and M&A disputes, arbitration is the usual method.

As far as the Turkish parties are concerned, ICC is the arbitral institution which has been used mostly while the LCIA is gathering momentum. As venue, Switzerland takes priority as Turkish parties and lawyers are familiar with Swiss procedural law on which Turkish Civil Procedure is based.

However, domestic arbitration institutions are not preferred due to variety of reasons such as costs, lack of awareness and arbitral culture in Turkey. Several arbitration institutions of chambers of commerce have a little market share.

Turkey’s first arbitration centre was established as part of the Istanbul Chamber of Commerce. Although the Istanbul Chamber of Commerce Arbitration Centre was established in 1979, it has not become widely used and even domestic parties refer their disputes to international arbitration institutions.

In the absence of reliable arbitral institutions, ad-hoc arbitrations composing of academic arbitrators have been more attractive to the parties even though lack of industry expertise, secretariat and their pace are criticized heavily.

In the context of enforcement of arbitral awards, Turkish judges continue to interpret reasons to set-aside arbitral awards widely even though commercial courts in big cities such as Istanbul and Ankara have more reasonable approach. Worse, as there is no special chamber at the Court of Appeals to review set-aside applications, there is no uniform approach on which parties can rely whilst enforcing their awards.

Given the size of its economy and that Turkish companies have been doing a large variety of businesses in the region, Turkey understandably aims to become a regional financial hub, as well as a reliable and preferable legal venue for both domestic and foreign investors for possible disputes in the region.

To become a financial hub, however, is a wishful thinking unless the rule of law, effective court system and reliable alternative dispute resolution institutions are established and protected from internal and external influences.

With this aim in mind, discussions about establishing a reliable and impartial arbitration centre in Istanbul having international standards have increasingly arisen in the last few years.  

Establishment of Istanbul Arbitration Centre

Turkey recently established a new arbitral centre, named the Istanbul Arbitration Centre (“ISTAC”), via the Law on the Istanbul Arbitration Centre numbered 6570 (“Law”). The Law entered into force on 1 January 2015.

The new forum is intended to provide the necessary expertise, impartiality and independency for all parties, as well as to promote a culture and use of arbitration in Turkey, along with other alternative dispute resolution methods. In developing a culture of arbitration, Turkey has the advantage of strong government support with regard to making the country a financial hub, as well as becoming a popular arbitration centre.  

Establishment of the Dubai International Arbitration Centre, as well as the alliance between the Dubai International Financial Centre and the London Court of International Arbitration are both remarkable developments in the Middle East. In light of this increasingly competitive environment for arbitral venues, if the ISTAC is to be a success, Turkey must ensure the ISTAC is fully independent from the government (especially in terms of funding) and offers a neutral hearing space. 

At this point, ISTAC is arguably the more promising arbitration venue than those located in Gulf countries. Factors supporting this view are the prominence in Turkey of key international trade and commerce

sectors such as construction, transport and energy, as well as the local legal culture’s familiarity with European and international legal systems.

Even though the International Chamber of Commerce in Paris or the London Court of International Arbitration Centre are regularly appointed as arbitral venue, due to visa problems for non-European parties, it is increasingly common to have trials in Istanbul, a location which can be reached by %50 of the world’s population within four hours, a crucial factor for businessmen. Therefore, if the other fundamental prerequisites for a successful arbitral centre are met, the ISTAC could be a rising star of international institutional arbitration.

To motivate parties to bring their cases to the ISTAC, its Board of Directors promise to settle disputes faster and cheaper than other institutional arbitration centres, particularly Turkish commercial courts. Comparative court fees and the ISTAC fee are outlined below.

<table>
<thead>
<tr>
<th>Amount of Dispute (TRY)^6</th>
<th>Court Fee (TRY)</th>
<th>ISTAC Fee (TRY)</th>
</tr>
</thead>
<tbody>
<tr>
<td>100.000.000</td>
<td>6.831.000</td>
<td>563.000</td>
</tr>
<tr>
<td>50.000.000</td>
<td>3.415.500</td>
<td>463.000</td>
</tr>
<tr>
<td>25.000.000</td>
<td>1.711.540</td>
<td>338.000</td>
</tr>
<tr>
<td>10.000.000</td>
<td>683.100</td>
<td>263.000</td>
</tr>
<tr>
<td>5.000.000</td>
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<td>71.980</td>
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</tr>
<tr>
<td>500.000</td>
<td>37.860</td>
<td>23.000</td>
</tr>
<tr>
<td>300.000</td>
<td>20.942</td>
<td>15.000</td>
</tr>
</tbody>
</table>

The ISTAC’s competitive fee could potentially attract many market players seeking to avoid high official costs associated with Turkish commercial courts and other arbitration institutions.

However, if the ISTAC offers a low quality service, comparatively lower fees will not attract parties anymore. For arbitration parties, service quality is of primary importance because the stakes are generally high. The lure of lower fees will be become ineffective.

Service quality has several different dimensions for arbitration institutions. The ISTAC has taken a considerable step towards ensuring quality by establishing a list of well-known, experienced and respected arbitrators for international disputes. For now, Prof. Dr. Ziya Akinci is named as the chairman of the centre, Prof. Dr. Bernard Hanotiau, Jan Paulsson, Dr. Hamid Gharavi and Asst. Prof. Dr. Candan Yasan have been announced as being amongst the ISTAC’s arbitrators.

The prestige, experience and neutrality of these names is indisputable. These names will help develop a culture of arbitration in Turkey through the respect they hold internationally, ultimately benefitting the ISTAC.

Therefore, it is important that ISTAC is required to adopt well-drafted arbitration rules, in accordance with principles of neutrality and impartiality, as well as secure support from an experienced secretariat and staff.

It is a relief the ISTAC’s arbitration rules generally comply with and sit well alongside the rules of famous arbitration centres. These include well-known arbitration centres like the Paris International Chamber of Commerce, the London Court of International Arbitration Centre and the Arbitration Institute of the Stockholm Chamber of Commerce.

The ISTAC’s arbitration rules include trending mechanisms in international arbitration, such as emergency arbitrator and fast track arbitration. The ISTAC’s Board of Directors have made the right choice by following widely accepted and recognized arbitral methods, while avoiding new and untested rules.

The market’s first response has been to appoint the ISTAC as the arbitral venue for disputes which may arise within the scope of Istanbul’s third airport construction project. The project is one of the largest and most important projects in Turkey, as well as Europe. Therefore, with government support in this way, the ISTAC has begun to attract attention from both the private as well as public sectors.

However, although strong yet subtle government support is vitally important and essential for the ISTAC during establishment, the ISTAC must maintain its focus on independence and impartiality, which are fundamental elements of successful arbitration.

Certain Critics on ISTAC

The ISTAC’s impartiality, independence and autonomous character have been questioned from the early stages of its conception.

There have been discussions that the Law contains certain provisions jeopardizing the ISTAC’s independence and giving the impression that a risk of governmental interference might exist. For instance, the Office of Prime Ministry will fund the ISTAC’s budget for the first two year (Provisional Article 1/4 of the Law).

The ISTAC will be comprised of two separate courts: domestic and international (Article 12 of the Law). Separate courts and regimes for domestic and international disputes gives the impression of double standards and cause questions to be raised.

An annulment lawsuit was initiated before the Turkish Constitutional Court. The claim was brought by CHP (The Republican People’s Party), which is the main opposition party in Turkey at that time. 123 deputies of the Turkish Grand National Assembly asked the Constitutional Court to annul and suspend execution of certain expressions from Article 6(1)(b) of the Law. The lawsuit claimed that the method for composing ISTAC’s general assembly damages its independence and impartiality.

The Centre will have a 25 member General Assembly. Four members of the General Assembly will be lawyers, each registered

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5 Interview made by Jülide Yiğittürk Gündamar with Prof. Dr. Ziya Akinci which is published on the issue of newspaper named “Dünya” on November 19th of 2015

6 As of 23 November 2015, 1 Euro equals to 3,0235 Turkish Liras.

with a bar association and elected by bar presidents (Article 6(1)(b) of the Law).

The deputies argued that election of lawyers by bar presidents to the Centre’s General Assembly is contrary to Article 2 of the Constitution. The deputies claimed that election of the lawyers by bar presidents:

- Aims to establish a politically-aligned General Assembly.
- Damages the Centre’s independence and impartiality.
- Runs contrary to public interests.

The deputies claimed that election by the executive organ of the Turkish Bar Union is a more appropriate method.

The lawsuit was ultimately dismissed by the Constitutional Court. The Constitutional Court’s summarized reasoning is as follows:

- Legislators are empowered to stipulate rules and decide whether these comply with public interests, provided the rules are not contrary to the Constitution and general legal principles.
- The Constitutional Court does not evaluate whether legislation reflects general public interests. Rather, it considers whether in a given fact situation, specific individual or group interests exist, as opposed to general public interests.
- A Report by the Justice Commission of the Turkish Grand National Assembly states that the phrase relating to bar presidents electing lawyers to be members of the Centre is intended to ensure political pluralism since bar presidents themselves are elected to office and have publicly known political allegiances.
- The Constitutional Court could not detect any private or individual interests served by the provision. Therefore, it held that legislators cannot be deemed to be pursuing purposes contrary to public interests by including a provision in the establishing legislation which requires bar presidents to elect lawyers to the Centre.

**Conclusion**

The establishment of ISTAC has been discussed for almost five years now. The Centre was recently established and has been drawing much attention. Its respected chairman, list of internationally-known arbitrators, fee structure, local and regional aims are all promising factors.

If the promised high quality service is provided, there is no reason that ISTAC cannot become the reliable, efficient, commercially minded, fast and specialized disputes venue which has been long awaited in Turkey.

It has been publicly discussed that a new approach to adjudication of commercial disputes is an urgent need in Turkey. Turkish Lawyers, parties, judges, expert witnesses have all become frustrated by the way commercial disputes are handled in Turkey by state courts, ad-hoc arbitral bodies and local arbitration institutions. However, a realistic proposal had not been presented until now.

This frustration could present an opportunity for the ISTAC to gather momentum, becoming the arbitration centre which stakeholders across the region have long waited for. It also has the opportunity to inspire state courts by setting a good example of trustworthy, efficient, fast and specialized commercial adjudication.

Arguably, the Turkish government should support the ISTAC in a more subtle and indirect way, to ensure the centre’s impartiality or reputation are not damaged, even before it starts hearing cases.

Only time will show whether the ISTAC will be widely used for all types of arbitration, regardless of whether a dispute is domestic or international. However, we are happy and optimistic that this initiative has begun moving forward, hopefully continuing to gain traction and momentum in the near future.

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“Collaborative law”

**By Marilyn Foucault-Perron**

Ecole Centrale of Paris graduate in Harvard interest-based negotiation
Collaborative law practitioner
Mediator
Graduate in Procedural and technical Sciences

Collaborative law is part of the techniques for alternative dispute resolution called MARD, just like mediation and arbitration. This technique comes from the USA and Canada. It is called “Collaborative law”. This technique has been used for 10 years in these countries.

In 2008, the first French lawyers were taught about this technique which is continuously spreading. It is part of a social movement in which citizens are willing to find the solutions which will apply to them in case they are in a dispute.

Judicial decisions which take months to be issued and enforced are ill-adapted, especially in business law and commercial law related disputes. Time is not as precious for Justice as it is for Economy.

Another major downside of state Justice is that the business ties which bind the parties can disappear while the case is still pending. One won, the other lost and they will likely never work together again which can be detrimental to the both of them.

Collaborative law aims to bring clients together in total transparency in order to find a peaceful and lasting solution and to save the ties that unite them. It is about finding a global and lasting solution.

In order to do so, collaborative law is very formalist, strictly confidential and uses Harvard interest-based negotiation as a tool.

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[www.arbitrage.org](http://www.arbitrage.org)
Strict formality
A collaborative law contract binds the parties as well as the lawyers who take part in this process.

Lawyers
Lawyers who are part of the collaborative law process must be trained because its practice is very specific. If the success rate is very high (85%), it is because of the interest-based negotiation tool which is also very effective in diplomacy-related matters.

This process also complies with contractual ties which bind the parties as well as lawyers.

Indeed, lawyers are mandated to find a balanced deal which should lead to a win-win situation. They must avoid any dispute while seeking solutions.

Should they fail at fulfilling their mission, lawyers have the obligation to drop the case. This obligation is essential as lawyers’ goal should not be to win against the other party but to favor fair negotiations between parties.

Lawyers of both parties shall have the same purpose which is to provide their clients with the most fitted solutions.

If need be, they shall ask other professionals (certified public accountant, notary, legal expert or any other professional whose expertise could be useful to craft an agreement between parties).

Lawyers and their clients shall define these contributors’ mission who shall have to keep everything strictly confidential and who shall be under neutrality and impartiality obligation. These contributors shall not undertake or carry on a mission for either of the two parties in a dispute between them.

Lawyers shall be creative. Abiding by the law is essential but it should not be the only criteria when developing solutions. Lawyers and their clients shall seek for any other option that would be the most appropriate to meet the needs of both parties.

They shall ensure that each party complies with their obligations under the collaborative law contract and shall end the process should one party breach the contract.

Parties
The collaborative law contract is compulsory to the parties who sign it.

First commitment is transparency, none of the elements arising from the dispute shall be hidden for an agreement based on hidden or incomplete information shall be defective, non-lasting and shall destroy the relationship which was meant to be saved.

Transparency and confidentiality go together. It is essential since each party pledge to give any necessary information. Evidences and expert reports are strictly confidential as it is prescribed in the collaborative law contract. The most important evidences together with all correspondence between lawyers, are to stay in Lawyers’ office, who are subject to the obligation of professional secrecy because of their ethics.

No information regarding or arising from those negotiations shall be released to any tribunal or anyone.

The aim of the parties is not to provide each other with material that could be used in a litigation but to elaborate an agreement.

Parties are not allowed to discuss any sensitive issues for the duration of the negotiations outside these negotiations.

This is to avoid any misunderstanding that could freeze the negotiations.

So that the process can be successful, Lawyers must not negotiate with the idea that their client’s solution should win like they use to for regular negotiations called “sur position” negotiations.

They might fail if their mind is set on a precise solution so there is a need for new tools such as the Harvard interest-based negotiation.

A method: Harvard interest-based negotiation
This method was developed by two lawyers who teach at Harvard, Roger FISHER and William URY, and applied for the first time during the Camp David accords. It was then used by anglo-saxon lawyers in several fields of law.

Lawyers are supposed to work with their client in order to unveil the interests. This preliminary meeting, before negotiations, is extremely important to find solutions.

Lawyers must comprehend their clients’ fears and weaknesses arising from the dispute, how they think the other party sees the dispute. Understanding the cultural notions, even affective notions, which lie behind any dispute will allow lawyers to have the widest vision possible of the dispute and of its sources, hidden or not. It is about being the most helpful to the clients during the negotiations.

Harvard interest-based negotiation is based on opened questions, active listening and rephrasing and this is what should guide the parties along the negotiations. During the first meeting, the collaborative law contract must be signed as well as the commitments previously mentioned.

Lawyers tell their clients that each and every one of them will have to give their own vision of the dispute, without attacking each other. Listening to one another is essential at this moment. Each party’s lawyer shall rephrase its client word in order to bring trust and team work to the negotiations.

Clients will be informed of this process so they are not surprised when they see their lawyers being sympathetic to one another. Since they have been informed, they know that their lawyers are not letting them down for it is part of the work which is supposed to lead to a balanced and lasting agreement.

After everyone’s vision of the matter has been expressed, Parties shall be able to raise issues they want to be dealt with throughout the process.

Each party shall be left with the other party’s questions as well as its own and shall aim to find at least two acceptable solutions for each of the issue.

The party and its lawyer shall work together to find creative and law-abiding solutions. The client shall not be passive, he shall be part of this process and the lawyer shall not take his place but help him find these solutions.

At the next meeting, to each issue must correspond four options that will enable the parties to build the solution that fit their interests best.
For every dispute, the parties' opinion about what the dispute is, its sources and how it can be solved is different.

A dispute is subjective and in a regular negotiation, each's party side is denied since everyone feels like its own solution is the most appropriate without caring about the other party.

The Harvard interest-based negotiation is all about focusing on the issues each party wish to solve in order to find the most appropriate solutions which prevent any blockage.

Parties can manage the time dedicated to negotiations as they like. Nevertheless, after several years of practice, I can say that clients are taking over this process and are willing to find lasting solutions as fast as possible.

As for lawyers, it is extremely satisfying to work with a client to solve crisis and to find long-lasting innovative-solutions respectful of everyone's wish.

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**We are talking about it**

**International Multidisciplinary event**

**Arbitration and Religion**

**University of Strasbourg, July 7th 2016**

The Alumni association of the Comparative law faculty is the bearer of the project of the event called “Arbitration and religion” which will be held at the University of Strasbourg on July 7th 2016.

In occidental societies as well as in the world in general, Religion is becoming of important significance again. Several legal systems are based on religion or give religious rules an important place, such as Charia in Saudi law. Moreover, as a private justice and prevailing technique of dispute resolution in the economic world, arbitration can be a great ‘feeding ground’ for manifestations of the religious phenomenon in law. Confessional Arbitral tribunals' decisions can be real binding arbitration awards just like state justice’s decisions. Few publications have tackled these questions related to arbitration in the great religious traditions. However, these questions deserved to be addressed on a larger scale.

From a multidisciplinary perspective, everybody can join the event, research professional or not, unexperienced or experienced in its field, as long as one is interested by the topic. It not just about legal research. Participations in history, in economics as well as sociology are also required.

The Scientific committee proposes to study different sides of arbitration in Hebrew, Muslim and Christian religious traditions. For instance, a study on a hypothetical arbitration law in Buddhism can be submitted.

The geographical scope of the study can also be very large so as to match the Comparative law Faculty’s state of mind ever since it was created. The only boundary is that the work in religious law must focus on classic sources. For instance, the study of Charia law will not consist in examining the different contemporary variations which exist between the application of this law in Sudan and in Iran. These themes raise several issues related to the existence of religious arbitration but also to the existence of a religious arbitration law.

If you are willing to take part in this event, you must send the Scientific Committee a 4-page essay written in French or in English, in PDF format or in WORD format, a bibliography and a résumé by email to arbitration.religion@gmail.com before January 7th 2016, 11:59pm.

After this event, a publication will be issued at the beginning of 2017. Transportation, housing and food will be provided to the candidates by the event planner.

For more information: themes that could be considered, Scientific committee composition etc.: http://les-comparatistes.over-blog.com

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**Expertise, Arbitration and Mediation Institute (IEAM) (IEAM)**

**2016 Mediation training**

Mediation is an alternative resolution of dispute technique which combines impartiality, efficiency, rapidity and cost-effectiveness.

Next session for IEAM’s mediation training will take place in Paris at the following dates:

- Tuesday and Wednesday, January 19th and 20th,
- February 9th and 10th, 8 et 9 mars,
- March 8th and 9th.

Combining both theory and practice training, this formation will be held by:

- **Sylvie ADIJES**, former lawyer, mediation instructor,
- **Dominique DOLLOIS**, lawyer and mediator

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www.arbitrage.org
The parties who choose arbitration as a mean to settle their dispute risk much more than if they choose state justice. The comparison between these two techniques of dispute resolution is to highlight how high these risks are and to identify them.

In terms of guarantees for the litigants, the importance of the difficulties that litigants can face seems low. Arbitration offers guarantees which are identical to those offered by state justice. Sometimes, they are even stronger than those of the justice state: transparency and celerity obligations.

Nevertheless, threats to the efficiency of arbitration proceedings are much more concerning: the arbitrator benefits from a liability regime less advantageous than the state judge’s. Moreover, the Arbitral Tribunals decisions are not Jurisprudence. Finally, Arbitral Tribunals do not have imperium merum. They cannot append an order for enforcement.

CAIP’s interns chose « Transportation and arbitration » as a theme

Thesis : “the Arbitration agreement in contracts for the maritime transport of goods : comparative study of French, Greek and English law”
by Marina Papadatou, Phd holder, Paris Bar and Athens Bar, Leboulanger & Associés

This study focuses on the efficiency of the arbitration convention for operators of the maritime transportation of goods sector. First, we must determine the law applicable to the efficiency of this agreement. The validity and the opposability of arbitration agreements included in contracts for the maritime transport of goods must be analyzed considering maritime transport law and international maritime conventions.

Then, the comparison of the concrete solutions chosen in the three legal systems (French, greek and English) regarding the applicable law shows that the conditions for the engagement of the people who are involved in maritime transport by the arbitration agreement are related to their contractual position.

Among the people involved in this commercial transaction, the consignee of goods is the most interesting. As the consignee is not present during the formation of the contract, he is regarded as whether a party to the contract for the transport of goods (see French law) or as a third-party to the contract (see Greek and English laws).

Thus, the conditions of his commitment through an arbitration agreement included in the transport document, almost always by reference to another document, are heatedly discussed in the doctrine and the Jurisprudence.

Dissertation “Arbitration and dispute resolution in aviation”
by Damien Berruyer, LLM at the University of Pennsylvania

The number of disputes in aviation is increasing and becoming even more complex as this industry grows. The techniques for resolution of such disputes must meet the specific needs of this industry such as technical and judicial knowledge, neutrality and confidentiality.

Arbitration is seen as the most fitted way to settle disputes in aviation.

Indeed, the arbitrator knows no forum and appears to be more neutral than a national judge to parties who are nationals of different states. Furthermore, arbitration allows parties to appoint lawyers specializing in aviation law or experts of the aviation industry as arbitrators.

Yet, from a practical point of view, arbitration is not systematic. First, because of the success of several alternative dispute resolution techniques (negotiation, mediation, even diplomacy when a state is involved) which are deemed to be more confidential and used in a pre-arbitration stage. Then, because of the absence of an arbitral institution specialized in aviation litigation. Parties are forced to organize an ad hoc arbitration by themselves. Therefore, it is up to the arbitration institutions to promote arbitration in aviation law by adopting specific arbitration rules and by proposing a list of arbitrators specializing in the aviation industry.
The International Arbitration Chamber of Paris is a non-profit organization with general jurisdiction which aims to provide companies of all size with the necessary means to solve their disputes whether through arbitration or conciliation.

Founded in 1926, the IACP is the oldest active arbitration center in France. This is a world-famous organization whose action helped settle almost 30,000 business and industry-related disputes.

CIETAC’s delegation visit, November 10th, 2015.

On 10 November 2015, the IACP welcomed CIETAC’s delegation as part of a study visit in Paris. Arbitration in France and in China and IACP and CIETAC’s practices are among the topics that were discussed during this meeting.

Partners since 2011, both institutions have expressed the will to strengthen collaboration with one another in the near future.