Is Arbitration a Service to Business or to the Legal Profession?

Catherine Kessedjian
Professor
Deputy Director—European College of Paris
Université Panthéon-Assas, Paris II
Paris, France

INTRODUCTION

When Arthur Rovine invited me to participate in this conference, he told me that he liked my way of thinking out of the box and therefore he was expecting me to be provocative.

I am not usually the kind of person who reflects with nostalgia about the “good old days,” and I wonder whether the sense of dissatisfaction I feel nowadays about some aspects of arbitration practice is just the result of old age or whether there is some substance to it. Either way, I have decided to test my findings on you.

In reflecting on the topic, I decided to do what Spinoza and Durkheim advocated: when analyzing human activity, one need not look for the meaning, but only for the cause. Indeed, for Spinoza, meaning and cause were equivalent.

So what could be the causes of this dissatisfaction?

Plato built his Republic upon justice. But, on opening the first book of this magnum opus, one is confronted with a dialogue between Socrates and Cephalus on the topic of wealth. The crux of the argument is that a man who has inherited wealth keeps the right distance from it. On the contrary, the man whose wealth is the result of hard work is more likely to be difficult to

---

1 In fact the real title of the book is “The State,” but it has been known for so long as The Republic that it is hard to change it now.
interact with, since he will love his wealth as he would his children or as a poet loves his verses.

This dialogue made me pause to wonder whether professional arbitrators have not become that difficult man described in Plato’s *Republic*. Indeed, my first concern stems from the fact that the majority of people invited to participate in arbitration conferences or seminars nowadays are people who are either repeat players as arbitrators, or who have a strong personal interest in being appointed. There is almost no disinterested person who has anything to say about arbitration. That, of itself, should make us cautious about the theories developed. Are those conferences and seminars not turning into beauty contests? If two courses are open to a person, one of which will result in less compensation and the other in more, is it not clear that the second route will be chosen whether consciously or unconsciously? If that is true, then I have no more claim to legitimacy than anyone else since I am one of those repeat players. The only difference is that, with full awareness of the potential problem, when confronted with any of the issues I will be discussing here, I always try to take the route most satisfactory to users/clients instead of another that might be better for the “system”2 or for arbitrators.

The second concern deals precisely with what was mentioned earlier by Emmanuel Gaillard: competition. Competition seems to be central to theory and practice in international arbitration. There is competition among countries to attract as many cases as possible; competition among institutions to be at the forefront of practice in the field, now that arbitration has become a business; and competition among arbitrators.3 If we view our topic through that lens, it gives the discussion on theories a different twist. It allows us to apply Derrida’s deconstructionist analysis and look behind the semantics, the theories, and ideas put forward, to try to understand the interests at stake and reassess our assumptions.

I will take just four examples of developments I have noticed in the 25 years I have been involved either as counsel or arbitrator.

**VALIDITY OF THE ARBITRATION AGREEMENT**

The competence-competence rule is seen by many, if not all, as primordial, to be guarded as if it were the crown jewels. After all, *prima facie*, the parties

---

2 I am always puzzled when I hear that “arbitration must be protected,” or “arbitration must be favored” or ideas along similar lines. Arbitration is only one of the potential means of resolving disputes. It needs to be adapted to its purpose, but has no “interest” of its own.

3 There are even proposals to the effect that arbitrators should be rated.