



# Improving International Arbitration

**The need for speed and trust**

Liber Amicorum Michel Gaudet



**International Chamber of Commerce**

*The world business organization*



MICHEL GAUDET DAY

Paris, 7 May 1998



**International Chamber of Commerce**

*The world business organization*

**The President**

Michel Gaudet  
Honorary Chairman  
ICC International Court of Arbitration  
38, Cours Albert 1<sup>er</sup>  
75008 PARIS

6 May 1998

Dear Chairman Gaudet,

On behalf of the ICC, its National Committees in 63 countries and members in 136 countries, it is my great pleasure to pronounce 7 May 1998, Michel Gaudet Day at the ICC.

As part of a long and distinguished career which has included your contribution to the building of the European Community and work in business you have for over 20 years nurtured the development of international arbitration at the ICC and around the world – building peace and trade.

This special day on the topic of the need for speed – an important issue for world business – I hope will be one of joy and pleasure as we celebrate your work.

I wish you and those with you a stimulating day.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'Helmut O Maucher', written in a cursive style.

Helmut O Maucher  
President

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## The need for speed - a word from Asia

By Louise BARRINGTON

For sixteen months now, I have been living in Asia, in what is surely the speediest city in the world. In Hong Kong, the ICC Asia base, everybody carries a mobile telephone; some can even be seen striding along the street with two – one glued to each ear!

The territory of ICC Asia covers some 22 countries, from Pakistan to New Zealand, plus those in between. One of my major tasks is to promote what I refer to as “international arbitration culture” in these countries. This includes ICC arbitration procedure of course, but also the advantages of international arbitration and how to choose and use it.

When visiting, I make a point of meeting with local arbitrators and counsel of course, but perhaps even more important, with potential arbitration users – the clients.

There is wide diversity among the 22 countries of ICC Asia. On one hand, Hong Kong and Singapore, with their highly developed business, financial and legal communities, vie with each other to be the top international arbitration centre for Asia. There is the People's Republic of China, with its 1.2 billion people, a highly sophisticated social structure, whose emerging capitalism places serious strains on a legal system adapted under a planned economy. We are fortunate to have with us today Mr Wang Sheng Chang who will have more to say about the situation in China. Then, consider Bangladesh, a smallish country of just 120 million, one of the newest democracies, which is today struggling with a major commercial revolution in the wake of its creation in 1972.

Spending a great deal of time in these countries, as the visible representative of the ICC, I very often feel like a focal point: I represent the west, come to talk of course, but also to listen – to the hopes, the dreams, the frustrations. The people I meet, the friends I find there, count on me to bring their message home.

Since many of us last met here in Paris at the ICC international arbitration commission meeting a month ago, I have been on tour, speaking to six different groups in four Indian cities, and to another group in Bangladesh. I was also privileged to meet the Foreign Minister and the Justice Minister in Bangladesh, both of whom realize the importance for

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their country's development, of an efficient, impartial and cost-effective system for the resolution of commercial disputes.

Many in my audiences came to hear about Incoterms, Documentary Credits, or how to use the new ICC Model Contract for International Sales of Goods. All got a substantial dose of arbitration as well. And I got a couple of very powerful messages in return.

As these emerging economies follow the path of the free market economy, they are also attempting to change qualitatively – from largely agrarian, resource exporters to producers of manufactured, often highly technical, value-added goods. First, they need top of the line technology and know-how, not some obsolete hand-me-down that can never hope to compete with the west. And if a dispute arises, they need a safe and efficient solution.

Let us take the example of my new friends who have a ceramics factory about 20 kilometers outside Dhaka. When they began in 1984, there was a tiny village surrounded by nothing but rice paddies. Today, 700 people live there, working in or around the ceramics factory.

They, like everyone else on the planet, are going global. They find themselves trying to play the global game by the rules of the west, but without the resources and experience of the west. And for the moment, despite minor frustrations, things are going very well.

These players have good ideas and talent and they are working hard; but the risks for them are enormous. A small, relatively unimportant contract for Galleries Lafayette or for an American chain store, represents several months' employment for the whole factory in Bangladesh. And for the hundreds of other outside workers – suppliers, taxis, fast food vendors and others whose businesses have grown up around the factory.

If a dispute arises, there is only one option to avert disaster: get it over with. Get it out of the way so that scarce and precious resources can be put back to work immediately to continue creating wealth. This is not an unfamiliar story. A western business executive will tell you the same thing. The difference here is that one dispute, in the Bangladesh context, may mean the difference between survival and bankruptcy. Where the western partner is inconvenienced, the Bangladeshi's economic life is on the line.

Time and time again, whether in India, Bangladesh, the Philippines or Indonesia, the message is clear: arbitration is a great idea, especially in countries whose public, state justice systems are ill-adapted for the challenges of international business. But arbitration that takes a year, or two, or three, is not an option. The company will be closed down by then. The only realistic solution becomes a commercial compromise that, whether "fair" or not, minimizes losses and allows the operators to go on to the next project. The result is in fact no access to justice, either public

or private, and growing frustration. Plainly, in this context, justice delayed is justice denied. For the Bangladeshi, for the Malaysian, Sri Lankan, Thai or Chinese manufacturer, speed is not a luxury. Speed is not an option. Speed is primordial.

Granted, many of these are small cases, of perhaps half a million dollars or less. But they still need to be decided, and a quick and efficient arbitration is the obvious solution. So obvious in fact, that in parallel with the west, nearly every one of the Asian countries has set up its own arbitration centre or commission. These centres – either national or regional in focus – fill a gap in the market. They provide relatively inexpensive arbitration or mediation, within a short time frame, usually between two and six months.

The mushrooming of these centres is not without risks. For example, if the quality of the procedure or the impartiality of the arbitrators is less than ideal, they risk bringing the whole arbitral process into disrepute.

Another observation to keep in mind. For the small or medium-sized Asian entrepreneur, these local centres are virtually the only viable choice. However, we should be aware of the incredible diversity in Asian business, and of the speed of its growth. Our ceramic factory owner of today will probably be a banker or a real estate magnate – or both – in a few years. An amazing fact for westerners, is the diversity of what appears to be a small, closely held business. One is surprised to find that the owner of XY Garment Exporters is also the builder and principal tenant of the building where it is located. Also that the XY Bank, the XY Real Estate Development Corporation and the XY Brokerage Firm, are all part of XY Garment. Nearly everyone knows the story of Li Ka Shing, who 40 years ago was selling paper flowers door to door, and now owns half of the city of Vancouver.

The point is, if arbitration cannot respond quickly and efficiently to the smaller business operator today, it will never become the natural choice for this same operator, when the business goes global tomorrow. Unless Asian businesses “grow up” thinking of arbitration as an effective, efficient, logical solution in the context of their smaller, simpler disputes – how can we expect them to turn to it first when the stakes are multiplied?

There are of course practical challenges in combining efficiency with high quality of arbitration. We will hear more about those during the course of this colloquium. Not only the length of the proceedings, but also their cost, are prohibitive when measured by the standards of my Bangladeshi friend, in whose country the average annual per capita income is just over \$250. They say that, given the pay scales and administrative costs of western arbitration, they cannot even afford to WIN an international arbitration case.

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There have been suggestions as well, for increasing efficiency without sacrificing quality. Many are not novel to this colloquium. Many are controversial and carry with them their own risks. Some examples: a fast-track system for smaller claims; summary or documents-only proceedings if the parties choose; use of mediation or other ADR procedures; increased use of local arbitrators; arbitration without lawyers; regional offices for the ICC Court.

Some of these suggestions, were they to be implemented, would entail training and education in these countries, for both professionals and their clients. This brings to mind the dream of Michel Gaudet – shared by myself and now carried on by Serge Lazareff and Ben Davis – of taking the PIDA seminars into the regions where the need is greatest and resources are few. There is no shortage of work to do, no limit to the investment to be made in Asia.

You are in this room, attending this colloquium, because you are committed to arbitration, convinced of its advantages. I bring you all a challenge from my friends in Asia. If the international arbitration community wants to succeed in persuading Asian entrepreneurs that arbitration is in **THEIR** best interests, that it is not simply a western solution imposed on a weaker negotiating party by western partners, then we must ensure that arbitration can provide a rapid, efficient solution to their disputes, while at the same time maintaining the high standards of quality, independence and fairness that we know are integral to the system.