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IN CONVERSATION WITH PROF. DR. H.C. INGEBORG SCHWENZER

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Editor's Note: Ingeborg Schwenzer is Professor Emerita of Private Law at the University of Basel. Additionally, she is an adjunct professor at Bond University, Gold Coast, Australia, and has been an adjunct professor at City University, Hong Kong, and at Griffith University, Brisbane, Australia.

She is internationally recognised for her work in international commercial law, contract law, and arbitration. She is widely known for her scholarship on the United Nations Convention on Contracts for the International Sale of Goods and has authored and edited several leading publications in the field of international sales and contract law.

Prof. Schwenzer has also been associated with international law harmonisation initiatives connected with United Nations Commission on International Trade Law. In addition to her academic contributions, she has remained actively engaged with international arbitration and legal education. She has also been associated with the Vis East Moot Foundation and has contributed to the development of arbitration advocacy and mooting culture among law students and young practitioners across different jurisdictions.

Editorial Board ["EB"]: You have had an extraordinary academic and professional journey spanning multiple jurisdictions, institutions, and roles in both academia and practice.

Could you begin by telling us what initially drew you to private law, and what sustained your interest in international sales law and arbitration over the course of your career?

Prof. Ingeborg Schwenzer ["IS"]: Yes. During my studies, very early, I focused on private law. I always found that private law is more rational than the other areas of law. In private law, we weigh the different interests of the parties and then come to solutions. In contrast, public law is very much intertwined with politics. Just take today's world. We may discuss human rights in depth. But the reality is very different. The reality depends on politics, and not what we are discussing in public law. Also, from the very start of my studies, in my second year of law school, I began to study comparative law. I was not so much interested in purely domestic law with all its historical whimsicalities that differ from one country to the other. Rather, I wanted to know what the solutions are outside my own country and how we can compare different solutions, giving regard to their historical background. More and more, I was drawn to the question how we can harmonize and unify laws in order to ease international contracts and international disputes resolution. And hand in hand with unifying substantive law goes the question of international arbitration. Domestic courts in international conflicts are not a viable route for international parties, so international arbitration today is the only way forward in international dispute.

EB: Having taught and engaged with legal systems across all five continents, how have these cross-jurisdictional experiences shaped your approach to comparative law and your understanding of harmonization in international commercial law?

IS: Well, this experience reinforced my approach that we need uniform and harmonized law in international commercial law. What parties need and want in international relationships is predictability. This is amply proven by recent field studies. Only if the outcome is predictable can you provide in your contract accordingly. Fairness is much less important in international relationships than predictability. Domestic laws are often not predictable. If the parties choose the law of one party, this is at least the case for the other party who cannot predict the outcome under this law. But even if the parties choose a third law, – very often parties choose a neutral law, like Swiss law, an apparently neutral law – then both parties do not know the outcome of the case and it is unpredictable for both sides because they are not familiar with the law chosen.

EB: As a leading authority on the United Nations Convention on International Sale of Goods ["CISG"] and former Chair of its Advisory Council, you have played a central role in its interpretation and development. How do you assess the CISG's success in fostering uniformity in international sales law, and where do you continue to see divergence in its application across jurisdictions?

IS: Well, the CISG now has 97 member states throughout the world, almost equally featuring developed countries, developing countries and transitioning countries. With this, the CISG is by far the most successful international private law convention that exists regarding substantive law. The New York convention regarding arbitration is even more successful and has even more – almost double – number of members than the CISG. Furthermore, during the last 30 years, the CISG has exerted an enormous influence on the international and on the domestic level. This fact may be even more important than the sheer number of member states that belong to the CISG. On the international level, all later initiatives are based on the CISG. But also, on the domestic level during the last 30 years, all legislators in civil law jurisdictions that reformed their respective civil codes, took the CISG as a blueprint. From Germany, France, Scandinavia, the Baltic States, Romania in Europe, Argentina in Latin America, Japan and China especially in Asia, they all relied on the CISG. Furthermore, in Africa, where the Organization for the Harmonization of Business Laws in Africa ["**OHADA**"], initiated the harmonization of business laws, they also based their commercial code on the CISG.

Still, as you mentioned in your question, problems exist. Unfortunately, to the very day there are many parties who opt out of the CISG, which is possible. The CISG sets its requirements for application autonomously but it is heavily based on party autonomy. Thus, the parties can opt out of the CISG. And unfortunately, especially in countries like Germany and United States ["**US**"], there are many parties who opt out, the reason being, they just don't know the CISG. In German, there is a saying: "what the peasant doesn't know, he doesn't eat". It is the same with the CISG.

Unfortunately, the CISG is not a mandatory course at law schools. I think, nowhere in the world is it mandatory to study the CISG. At law schools, the domestic law of contracts is taught but not the CISG. Maybe the CISG is an elective course, but it is not a mandatory class. So, there are many lawyers who leave law school without having ever heard anything about this CISG. And if they are confronted with an international conflict, and they don't know the CISG so they just exclude it for not knowing it.

Another problem is the so-called homeward trend. Unfortunately, to the very day, many judges see the CISG through their own domestic lenses and do not apply the CISG autonomously and thus in a uniform manner. This is especially true in countries like the US, but also even in countries like Germany that have a very high number of CISG cases.

Fortunately, the importance of the CISG and its uniform application are increasing. This is also due to the Vis Moot Court on international commercial arbitration. There are now more and more bright young people who are becoming partners in leading international law firms that are trained on the CISG, and who know the advantages and benefits of applying CISG instead of applying domestic law. So, I really see a certain progress, but it takes a lot of time. Gradually there are less counsels who are excluding the CISG in their international contracts.

But, as you know we still have certain deplorable lacunae with regards to member states of the CISG, and one deplorable lacuna is India. India is not yet a member state of the CISG. In Africa, too, there are still many states that are lacking. I think especially in India and Africa, parties could really benefit from the CISG in their negotiations with, let's say American or European parties, because they could insist on applying CISG. Where an Indian party contracts with an American party, it is difficult if not impossible for the Indian party to insist on the application of Indian law. But in such a negotiation situation, the Indian party could at least say, "we do have the CISG in common, so let's apply the CISG and not New York Law"

All in all, the progress is slow, but we are progressing, we are going forward.

EB: Given your extensive work on the CISG and uniform sales law, how do you assess the relevance of the International Institute for the Unification of Private Law ["UNIDROIT"] Principles in international commercial contracts today? Do they primarily serve as interpretative tools, or are they evolving into an independent source of norms?

IS: Unlike the CISG which is an international convention and an opt-out instrument the UNIDROIT Principles of International Commercial Contracts ["**PICC**"] are so-called soft law. They only apply if the parties have chosen them. However, most jurisdictions do not allow the parties to validly choose soft law as the law governing their contract. Thus, we have only little case law on the PICC that is published and that can give guidance for the application of the PICC. We do not have much evidence whether the PICC are more often used in arbitration as only few arbitral awards are published. However, as I already mentioned, what parties need is predictability. If we do not have case law applying the PICC there is little predictability. Additionally, The PICC

make ample use of the notion of good faith which makes the outcomes even more unpredictable. At last, the PICC cannot and should not be used to interpret are supplement the CISG. They may be consulted as a tool of comparative law mostly in areas where the CISG does not apply.

EB: Arbitration is often valued for its neutrality, flexibility, and efficiency. However, concerns have increasingly been raised about rising costs, delays, and procedural complexity. In your view, is international arbitration at risk of becoming overly court-like, and how can it retain its distinct advantages?

IS: Well, that is a very difficult question. With arbitration replacing domestic courts' litigation, the requirements for arbitration are getting more and more court-like. Especially with regards to predictability and to due process. This certainly runs counter to flexibility and often to efficiency. For example, due process safeguards can be easily misused by dilatory tactics. Take for example the challenge of an arbitrator or of a whole tribunal for cause. This is a very important tool to guarantee due process. However, such challenge of the whole tribunal, for example the review of such a challenge, may easily take a whole year. So, you will have a delay in the proceedings of one year. If one of the arbitrators has to be replaced or has to resign for other reasons, you have to start the whole procedure anew, this is also different from court proceedings where you might just go on with a different judge. And with regard to the costs that you mentioned, the biggest share are not the fees of arbitrators or the costs of the institution. What is high are the costs of counsel. Arbitration, like the CISG, is firmly based on party autonomy. Thus, you cannot forbid the parties from agreeing on a certain fee with their respective counsel, and very often we see that costs for counsel in arbitration amount to almost 10% of the amount in controversy. With amounts in controversy of several millions these costs are quite high.

Usually in court litigation you do not have such high amounts in controversy. I once had a discussion with the chair of the sales law senate of the German supreme court and I asked him, "what are your international sales cases that go up to the domestic supreme court?" He said that it is usually the producer of shoes in Italy who is selling the shoes to a German retailer. Those are the cases that come to the courts. The courts today don't know much about the real international commercial world anymore. For example, the international sale of a power plant or a submarine. Whereas in state court litigation the amount in controversy is rarely above one million dollars, in arbitration cases below 5 million dollars are the exception.

EB: In recent years, particularly following developments such as the Mauritius Convention on Transparency, there has been a growing push for openness in investor State arbitration. Do you believe similar transparency obligations should extend to international commercial arbitration where public interest considerations are implicated, or would this undermine confidentiality?

IS: The Mauritius Convention and the United Nations Commission on International Trade Law ["**UNCITRAL**"] Rules on Transparency apply to treaty-based Investor-State arbitration under the UNCITRAL Arbitration Rules. Since 2014, when these rules have been adopted, they have been incorporated in many bilateral investment treaties. If we look at the reason, why we have this trend towards transparency in investment arbitration, we find certain specifics that pertain to investment arbitration. In investment arbitration, the interest of the general public is very often at stake. Take for example, the building of a dam or a nuclear power plant, there you have environmental interests, or interests of indigenous people, of the farmers, whole villages may depend on the water supply and things like that, all these interests have to be considered and taken into account. Here it is appropriate to make arbitration proceedings public and also allow third parties to intervene and to voice the interests of the general public. In general, no such problems exist in commercial arbitration. In pure commercial arbitration, there are two private companies, that are dealing with each other at arm's length. Thus, we have no similar need for transparency in international commercial arbitration. However, I have to mention that investment cases may also be decided in commercial arbitration. That is very often the case, because the investment contract usually contains an arbitration clause, so we have this dual pathway. Investment arbitration can be based on bilateral investment treaties and it can be based on a breach of the investment contract that underlies the whole investment. In this case, it might well be argued that we should have transparency if the underlying contract is an investment that entails also the interests of the general public. The parties themselves may agree in the investment contract on a clause on transparency. . Furthermore, domestic laws referenced in the contract may provide for transparency. However, for the time being, the UNCITRAL Rules on Transparency do not apply if we have commercial arbitration based on a breach of the investment contract. But we might discuss, whether this should also be possible in the future.

EB: You have been involved in international lawmaking and advisory processes, including representing Switzerland at UNCITRAL. From that vantage point, what do you see as the most pressing challenges currently facing international commercial lawmaking bodies?

IS: Well, whereas commercial trade on the one side is becoming more and more global and interdependent, on the other side, we see that the politics is becoming more and more parochial. It is very different from the 1970s and 1980s. Thus, we have been facing severe budget cuts for international institutions and for many United Nations ["**U.N**"] institutions also, especially UNCITRAL. The ever growing "my-country-first" mentality, is certainly not open for discourse for a unification of laws considering foreign approaches.

In my view, the CISG probably could not be elaborated and agreed upon in our days anymore. There was a special and beneficial timeframe in the 1970s and 1980s, when there was much more openness to internationality. However, it did not only start with the current government in the US. It goes back to the 2010s. In 2012, Switzerland proposed at UNCITRAL to work on a general international contract law. This contract law should have covered the areas not yet dealt with by the CISG and could have been based on the PICC. However, the US fiercely opposed this endeavour, and thus it never took off.

EB: The growing use of artificial intelligence ["AI"] in legal practice has raised concerns about reliability, particularly in light of instances of AI hallucinations affecting legal submissions. Given that arbitration relies heavily on pleadings and documentary evidence, what safeguards or best practices would you consider essential to ensure the integrity of AI-assisted work?

IS: Well, you are perfectly right. AI has entered arbitration and will become more and more important. As per a recent survey, over 90% of arbitrators and counsel expect to use AI in the future. Thus, it is very important to have ethical guidelines on how to use AI. There are already different sets of such guidelines. The first one was published in 2024 – the guidelines on the use of AI in Arbitration by the Silicon Valley Arbitration and Mediation Center ["**SVAMC**"]. Last year, the Guidelines on the Use of AI in Arbitration by the Chartered Institute of Arbitrators ["**CIArb**"] followed. One of the most important safeguards for the use of AI is transparency. Parties may already provide for the use of AI in their arbitration clause. If they have not yet done so the tribunal may discuss with the parties how to use AI, which tools they want to use and how to make it transparent which tools have been used. When a tribunal intends to use AI, they also have to consult with the parties on how the tribunal should use AI. Under no circumstances, AI should influence the procedural and substantive decisions. With regard to your concern that counsel will use AI to formulate their submissions, I think tribunals must always verify the accuracy and correctness of any information that has been produced by AI.

EB: As a member of the Board of Directors of the Vis East Moot Foundation, you have closely observed the role of mooting in arbitration training. From your experience, what distinguishes an exceptional moot participant or young arbitration professional, both in terms of technical ability and professional approach?

IS: Well, if I bring it down to three simple words, it's openness, flexibility and responsiveness. Openness, to different legal approaches and different cultures and different personalities of arbitrators. In this regard I can recommend a book on different cultures by Erin Meyer, "The Culture Map". There, she places the different cultures on diagrams regarding, for example, directness or flexibility or punctuality or openness with regard to criticism and the like. Itis very important to know that arbitrators coming from different cultures have different expectations. One must be open to these different cultural and legal approaches. You must be flexible and have to adjust to these different cultural challenges, not only as a mooter, but also in the real world if you have arbitrators coming from a different legal culture other than your own. You should be responsive, be attentive to what is verbally said, but also non-verbally communicated. For example, be always aware if an arbitrator is not following your submissions, and anticipate any doubts and questions and try to respond to them and thus advance your own case.

EB: You recently served as a judge at the final rounds of the Vis East Moot. How would you compare the role of oral advocacy in international commercial arbitration with that in traditional court litigation?

IS: Well, I give you the answer of any good lawyer, and the answer is "it depends". It depends with which traditional system you are comparing arbitration. Because, you have an enormous gap between civil law jurisdictions and common law jurisdictions.

Civil law jurisdictions, are usually called inquisitorial systems. This implies that the judge is active and in control and command of the whole proceedings, whereas counsel do not take a real active part in the proceedings. Thus, take for example, the interrogation of witnesses. It is the judge, who asks the witness, counsel won't be allowed to address the witness, if counsel wants an additional question to be asked to the witness, they have to go through the judge, they have to request the judge to ask the witness the additional question. This is a very different situation from the one in common law countries. The same goes for the role of experts, they are not nominated by the parties, but by the court and again interrogated by the judge.

On the other hand, we have the common law systems, called adversarial systems, based on the firm belief that the truth should come forward by vigorous competition between the parties. The judge remains passive, he or she does not intervene directly, the judge ensures that the rules are respected by the parties. Very rarely the judge asks additional questions to witnesses after the witness is interrogated by the legal counsel.

The procedure in arbitration is very close to common law systems. One of the reasons is that in arbitration usually you have one oral hearing only. Everything must be ready by that date. It must be ensured that all documents, all witnesses have been properly presented in order to avoid any delays or postponements. Common law civil procedure is better suited to guarantee this as the old English law was based on the idea of having "one day in court", whereas in civil law jurisdictions postponements of oral hearings are the rule rather than the exception.

And by the way, moot courts go back to old English Law, where the education and training of barristers took place in the Inns of Court. The crucial elements of the education were the dining terms, where the future barristers mooted real cases and thus learnt how to appear in court and plead a case.

EB: Finally, as international commercial law and dispute resolution continue to evolve in response to globalisation and technology, what excites you most about the future of the field?

IS: Well, it is exactly these constant ongoing developments in the technology field and in the global society at the same time. If you look at arbitration and legal practice during the last 30 years, it has enormously developed. In the 1990s, arbitration was "pale, male and stale", as we used to call it. It was dominated by old white males and this has changed a lot. Many younger lawyers, men and women both, are entering the scene. Asia, Latin America, and Africa have become new hotspots of arbitration. And above all, international arbitration is far more flexible to respond to new challenges of globalisation and technology compared to static domestic court systems. This has been proven especially during the pandemic, when we all started to develop different tools of remote procedures in arbitration. We are now all used to upload documents to secure platforms in arbitration, whereas many domestic jurisdictions are still firmly paper-based, counsel have to sign their submissions sometimes even in handwriting. Many court systems are really rusted and are still based in and stuck in not only the 20th century, but sometimes in the 19th century. Arbitration is much more flexible and ready to adjust to the challenges of the future.