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The Court That Came In From The Cold

Americans have infiltrated the world of international arbitration, and threaten to dominate the field. But their rise to supremacy is far from assured.

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Photo by Michael J.N. Bowles

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When Deutsche Telekom AG wooed Telecom Italia S.p.A. in 1999, France Telecom threw a fit. France T. dropped out of its Italian joint venture with Deutsche T., and filed arbitration claims it valued at up to 19 billion euros ( ). Local suitor Olivetti S.p.A. eventually won Telecom Italia's hand, and Deutsche T. filed a 12 billion counterclaim against France T. for breaking up the wedding. It was a Continental family affair, resolved in European forums by the time-honored European method of dispute resolution with the score kept in the new coinage of the euro. Arbitrators from Denmark, Belgium, France, Italy, and Sweden applied the laws of Germany, France, Italy, Belgium, Switzerland, and the European Community.

But the lead lawyers were American.

Deutsche Telekom tapped Gary Born of Washington, D.C.-based Wilmer, Cutler & Pickering's London office. France Telecom first chose New York's Shearman & Sterling and then, when a conflict developed, hired an American expat at a British firm, Eric Schwartz of Freshfields Bruckhaus Deringer in Paris. "Americans are invading what was traditionally seen as European territory," says Hans Smit, an eminent Dutch-born arbitrator, and head of Columbia Law School's Center for International Arbitration and Litigation Law. "They have woken up to the fact that there is this enormously profitable field that was previously closed to them."

Beyond dramatizing the creeping Americanization of the field, the Deutsche Telekom case offers a

glimpse into a system of private justice that has always been shrouded in secrecy. Even as international arbitration undergoes explosive growth, the system is riven by debates over some of its essential qualities: speed, neutrality, and yes secrecy. The Deutsche T. case represents a new model of international arbitration: a paper-intense, semipublic process, judged by panels distinctly lacking in diversity, and largely lawyered by American or British firms.

Soon after France T. filed its main case against Deutsche T., the Euro telecoms war developed a second front. The main case, dealing with the France T. and Deutsche T. broad collaboration strategy, unfolded in Belgium. Meanwhile, three side disputes, arising out of the Italian joint venture, were filed in Geneva by Deutsche T.'s joint venture partners France T. and Rome-based Enel S.p.A., and by the joint venture itself, WIND. France T. chose London-based Allen & Overy's Italy office for the Geneva matters, and the Italian clients chose Italian boutiques.

All the cases would be chiefly resolved by a July 2000 settlement that cashed Deutsche Telekom out of its Italian joint venture with France Telecom and Enel at a price of more than 2 billion. Each company declared victory, happy to get a huge liability off its books and pursue a new European strategy. Together with the Arthur Andersen Andersen Consulting divorce, resolved only weeks earlier, the Deutsche T. case represented a new high-water mark for arbitration and perhaps a sign of things to come.

The choice of Brussels and Geneva as forums were specified by the contracts, in part for the obvious reason that Deutsche T. feared French courts, and France T. feared German courts. The first real choice faced by the parties was to select lawyers.

To win Deutsche T.'s business, Wilmer, Cutler competed in a beauty contest that included several Continental boutiques. Yet Born is only admitted to practice in the U.S. Why did he get the business? "What I brought to the case," he says, "was expertise in the truly international process that has grown up to deal with that kind of mess, and the ability to argue persuasively in English."

Individual American expats, at any kind of firm, have long competed successfully in the European arbitration bar. Schwartz, who represented France T., is a dramatic example. Before joining Freshfields, he served as secretary general of the International Chamber of Commerce (ICC) International Court of Arbitration once regarded as a French bastion and he was preceded in that post by White & Case's Stephen Bond.

The arrival in force of U.S. law firms, as opposed to expats, is a new phenomenon, and, ironically, it is driven by the decline of American hegemony. Aside from the tech sector, U.S. companies often now opt for arbitration because their share of the world economy is too low to dictate the choice of law. White & Case's Bond explains: "[In the 1960s] every commercial contract was governed by New York law. The U.S. really had the whip hand. Now U.S. companies don't have the clout to impose U.S. courts."

Other than ties to American clients, which Wilmer, Cutler did not enjoy in the case of Deutsche T., experts cite a few American advantages. All, it should be noted, are shared by the top English firms. The biggest is the English language. "Ten years ago, half my cases were in French and half in English," says Jan Paulsson of Freshfields in Paris. "Now it's 90 percent English." Another advantage, to be frank, may be

brainpower. Because of the prestige of law in the U.K. and the U.S., law attracts the best and brightest. In France, they become engineers.

Finally, the British and American firms, because of their sheer size, have the depth to staff the extremely large cases that arise in a more complex world economy [see "Approaching Critical Mass," below]. The Euro telecoms case demanded the work of more than 50 lawyers in different firms. British and American firms have not only the staff but the mentality geared to fact-heavy cases. Robert Smit of New York's Simpson Thacher & Bartlett (son of Hans) has a theory as to why the British-American style of litigation has prevailed: "As the world becomes more globalized, differences in national law become less significant. A rule of reasonableness applies, and that's dictated by the facts. American law firms are better suited."

So, thanks to the ubiquity of English, the advantages of scale, the triumph of a fact-oriented litigation style, and the prestige of law in Anglo culture, arbitration work is increasingly handled by big British and American firms. That said, Continental boutiques and English barristers maintain an important role. And to the extent that the British and Americans have triumphed, it is a triumph only of Anglo law firm culture. It can benefit a litigator of any origin who works at a leading Anglo firm anywhere [see "Bridges to the Future," page 118].

Moreover, Americans as a group have certain disadvantages. One is a collectively poor mastery of foreign tongues. Another is a cultural tin ear. Emmanuel Gaillard of Shearman & Sterling in Paris gives an example of a typical mistake: "An American lawyer will attack the credentials of a witness, which may offend an elderly Swiss arbitrator." A French ICC colleague once told Bond of White & Case, "You need to put more honey in your ink."

In the end, almost any international arbitrator must transcend nationality to thrive. Wilmer, Cutler's Born grew up as a U.S. Army brat in Germany's Black Forest before going to the States for college. "The fact that we were educated in America is an accident that only occasionally has any importance," he maintains. When Deutsche Telekom and France Telecom chose their lawyers, they didn't ask for a passport. Once the lawyers in a case are picked, their first job is to pick the arbitrator. Usually, the parties each choose one arbitrator, and then those two choose a chair. In the Deutsche T. disputes, the parties chose six arbitrators and deadlocked over the rest. The ICC, which was the sponsoring arbitral group, chose the other four arbitrators, including both chairs (one chair for Brussels and one chair to be shared by all three Geneva panels).

The result was a homogenous group: ten European men, all in their fifties.

It's hard to avoid the conclusion that panel selection (whether driven by parties or institutions) favors a small circle of star lawyers, academics, and barristers a group that is unafraid to use "mafia" to describe itself. "An observer from planet Mars may well observe that the international arbitral establishment on Earth is white, male, and English speaking," K. V. S. K. Nathan, a barrister based in Italy, has written. What makes this situation untenable is that most arbitration disputes, as the red alien further would note, involve people of color from the third world.

Diversity on panels is vital in a field with diverse parties, because for an arbitrator the appearance of neutrality is the basis of legitimacy. Indeed, in the absence of state sanction, there is perhaps no other source of legitimacy. "Without neutrality,

arbitration is nothing," says a leading London arbitrator. Arthur Marriott of New York based Debevoise & Plimpton's London office, one of the deans of the field, readily acknowledges the need for diversity. "Progress is being made," he says, "but not fast enough."

Once the arbitrators are selected, their first task is to set the procedures. The Deutsche T. case was placed on what now passes for an expedited schedule. When settled, it was on course to be resolved in about two years. This is hardly egregious, but it is far from the field's founding vision, and the paper piled up fast. Deutsche T. and France T. each submitted memorials running hundreds of pages, with ten or more volumes of evidentiary exhibits.

Killing that many trees for an arbitration was once unthinkable. The ICC's first hearing, in 1921, lasted a few hours. Today arbitrations can run five years. Some fret that parties who wish to avoid the mire of the courts will opt for mediation instead of arbitration.

In part the intensity of the process is the result of a more complex economy; one of the first ICC hearings involved a Christmas tinsel merchant. In part the intensity of the process is a function of American influence. "An American is incapable of handling a case without discovery and deposition," says Julian Lew, an arbitration specialist at Herbert Smith in London. "Discovery is his shower, and deposition is his breakfast."

A compromise style of dispute resolution has emerged. The contracts and hearings are Anglo in the sense that they are long, detailed, and in English. There is document production but no deposition evidence. There is lawyer-directed cross-examination, but it's tepid by American standards. Facts are taken seriously.

"I don't see it as a matter of judicialization but professionalization," says Freshfields's Jan Paulsson. "A huge German company faced with a huge dispute doesn't have the luxury of preferring the folkloric style of litigation. It needs certainty." Paulsson's partner Schwartz, who represented France T., thinks a slower process is on the whole positive: What may be lost in speed is gained in fairness.

But that leaves more time for breaches of confidence. As the telecoms case progressed, Deutsche T. repeatedly complained that the other parties were issuing press releases and talking to the press about the case, which it saw as a violation both of their contracts and the spirit of arbitration. Deutsche T. charged that the other parties aimed to derail its hostile takeover of Telecom Italia through strategic use of the press.

In Born's view, bare-bones disclosure to the Securities and Exchange Commission is adequate; secrecy lets parties avoid posturing and channel their energies into constructive talks. Schwartz counters by raising a big question. "How," he asks, "can huge, publicly traded, partly state-owned companies, in a multibillion-dollar dispute with obvious potential adverse impact on shareholders, not make public disclosure?" It might also be argued that employees have a right to know and, in cases involving states or state enterprises, taxpayers.

Secrecy is a hot topic. In the past few years the Australian and the Swedish high courts, and the U.S. District Court for the District of Delaware, have declared that there is no right to confidentiality implicit in an agreement to arbitrate. But these

courts don't question the right of parties to contract to privacy as parties almost always do.

Hans Smit, the Columbia Law School arbitrator, thinks arbitral awards should be published over the objections of the parties, in order to refine the law, to honor democratic principle, and to keep corporations honest. "We're developing a new body of international commercial law and nobody knows about it," he argues. Moreover, "arbitration can't be credible unless there is a certain measure of transparency. Confidentiality exists because the executives don't want the public to know what stupid mistakes they make."

The fiercest attack on secrecy comes in the context of the North American Free Trade Agreement (NAFTA), which provides for disputes between nations and investors to be decided under the standard rules of international arbitration. "What we're talking about here is secret government," Joan Claybrook, the president of the Washington, D.C. based consumer group Public Citizen, told The New York Times.

Schwartz argues that confidentiality, like speed, may at times undermine justice, and needs to be reassessed. To his mind, the more basic value of international arbitration is the universal enforceability of the award. He does not see this value in jeopardy.

Deutsche T. and France T. knew that if their case proceeded to judgment before the Brussels arbitral panel, Belgian law meant that it would be virtually unassailable in Belgian courts. Moreover, the New York Convention, the basic document of international law concerning arbitration, would bind the courts of more than 120 nations to honor the judgment. It was in part this knowledge that drove the parties to settlement.

Exceptional resistance to arbitration grabs headlines, but compliance is the norm. In an age when capital flows and foreign direct investment are kings, the trend is for developing nations to honor their commitments.

"If international arbitration didn't exist, I don't think a fiction writer could imagine it," muses White & Case's Bond. "Two parties with a legal dispute can pull in any person off the street, call him an arbitrator, go through certain procedures, and the piece of paper that person issues is more enforceable around the world than any Supreme Court ruling."

It's true that the arbitration world can do a better job of selecting that person off the street in a way that promotes diversity and, by extension, the appearance of neutrality. It's also true that the process is more intense than before. And the principle of secrecy is receiving some well-deserved scrutiny. But as long as that piece of paper can be enforced around the world, major disputants such as Deutsche Telekom and France Telecom will opt to bring their cases to arbitration. And as long as the big cases keep flowing, arbitration will be seen by the world's major law firms as a niche worth dominating.

A Founding Father

Before globalization was a buzz word and arbitration was a profit center, there was William Laurence "Laurie" Craig, Harvard Law School class of '57.
Craig caught the travel bug on his first world tour, as an officer on the Navy destroyer the U.S.S. Dewey. On a military leave he jumped on a transport from New

Jersey to Paris and fell in love with croissants. After leaving the Navy and spending three years in Washington, D.C., he joined Coudert Freres in Paris and scanned the horizon for arbitration cases. "Starting with the Marshall Plan, people kept putting those clauses in contracts, like their lawyers told them to," he says, "but it was only in the seventies you started to get a real flow of contentious cases." Craig speaks in both English and French with a thick New York accent, about which his kids tease him mercilessly.

When arbitration came of age during the oil crises of the 1970s, Craig and his protege Jan Paulsson (now in the Paris office of Freshfields Bruckhaus Deringer) helped to pioneer the principle of holding states liable for the expropriation of corporate assets, in a case arising out of Libya. "Because so much of the world was socialist at that time," he recalls, "businessmen started saying, Well, now we can go there; and if necessary, we'll arbitrate.' "

The arbitration life has not lacked for excitement. In 1973 Craig found himself on a runway in the Rome airport between one plane bombed by the PLO and another that had been hijacked. During the Iran-Iraq war, he found himself in Baghdad. But Laurie Craig has no regrets. As he sits at his desk today, he can see on one side a picture of his old ship, the U.S.S. Dewey, and on the other a window framing the Eiffel Tower.

Bridges to the Future

Where are the arbitration stars of the future, and which firms will they call home?

"The firms with an edge," says Emmanuel Gaillard of New York based Shearman & Sterling's Paris office, "are those that can pack together common law and civil law lawyers as a team and bridge the cultural gaps."

Gaillard himself is a bicultural package. "Fifteen years ago this guy was a French law professor who barely spoke English," says William Laurence "Laurie" Craig of Coudert Freres in Paris. Today, by contrast, Gaillard is known for his "American litigation style" which is a compliment when used to describe a Frenchman.

Or look at Freshfields Bruckhaus Deringer. In its Paris office, Jan Paulsson has assembled the kind of polyglot team that may be well-suited to the next stage of market evolution. A child of missionaries, he was born in Sweden and raised in West Africa, but all his higher education took place in the U.S. His group in Paris includes a Canadian, an Australian, a New Zealander, and a Greek Cypriot. Gaillard says admiringly: "Jan is a very international animal."

But they both face competition. Take a look.

A Slightly Arbitrary List of the Arbitration Elite

Allen & Overy	77 lawyers (64, Europe; 28, London)
Baker & McKenzie	94 lawyers (31, Europe)
Clifford Chance	85 90 lawyers (36, London)
Coudert Brothers	25 30 lawyers (7, Paris)
Debevoise & Plimpton	43 lawyers (35, New York)
Freshfields Bruckhaus Deringer	70 lawyers (20, Paris)
Fulbright & Jaworski	21 lawyers

Herbert Smith	40 lawyers (19, London)
Hughes Hubbard & Reed	32 lawyers (16, New York)
Ince & Co.	114 lawyers (83, London)
Jones, Day, Reavis & Pogue	50 lawyers outside the U.S.
Linklaters	100 lawyers (34, London)
Shearman & Sterling	55 lawyers(45, Europe; 32, Paris)
Simpson Thacher & Bartlett	30 lawyers (25, New York)
skadden, arps, slate, meagher & flom	30 lawyers (25, New York)
White & Case	46 lawyers (30, Europe; 9, New York)
Wilmer, Cutler & Pickering	25 lawyers (14, London)

SOURCE: The firms.

NOTE: This chart approximates the collective commitment of resources to international arbitration by major British and American firms.
It is not exhaustive, and cross-comparisons are perilous, because the definition of "arbitration lawyer" varies among firms.

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