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"TWILIGHT ISSUES: LATENT CHOICE OF LAW ISSUES IN ARBITRAL PRACTICE": LECTURE BY PROFESSOR GEORGE A. BERMANN

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On Tuesday March 19, 2024, Paris Place d'Arbitrage and Sorbonne Arbitrage, two associations committed to promoting Paris as the world's leading seat of arbitration, on the premises of the University of Paris 1 Panthéon-Sorbonne, hosted a lecture by Professor George A. Bermann presenting his latest book entitled *Twilight Issues in International Arbitration: Latent Choice of Law Challenges*. This was the sixth meeting organised by Sorbonne Arbitrage, whereby an author who has recently published a book was invited to present and discuss it.

Professor Bermann is a leading figure in litigation and commercial arbitration and has been teaching for 47 years between Columbia University, Sciences Po, The University of Paris 1 and Paris 2. Following a presentation of his new publication, a panel moderated by Professor Thomas Clay (*Head of Sorbonne Arbitrage*) and Gaëlle Le Quillec (*President of Paris Place d'Arbitrage*) discussed the insights offered by the volume. The panel was composed of Isabelle Michou (*Partner at Quinn Emanuel*), Matthieu de Boisséson (*Partner at de Boisséson Arbitration*), and Caroline Kleiner (*Professor of Law at Université Paris Cité*).

Professor Bermann started his lecture by defining his book as "a collection of high-level reflections on the direction international arbitration is taking today, specifically focusing on regularly encountered issues of arbitral practice". He defined the collection by the metaphor "twilight issues", referencing the image of tribunals in the dark when facing issues of practice, as arbitral tribunals are often without any clear guidelines to address these frequent issues. He analysed the lack of identification of a proper normative source for addressing these issues and explained their frequency in arbitral practice. Exhibiting some issues as examples, he followed the cycle of an arbitration from the question of parties waiving the right to arbitrate, to the relevance of the role of non-signatories, or the stakes of litigating first in investment cases. He also particularly insisted on the use of tribunal secretaries in arbitral tribunals and sanctioning of counsel in audiences, which he deemed particularly pertinent for the development of arbitral practice as a whole.

Moving forward, Prof. Bermann focused on the key role of the relationship between arbitration and jurisdictional laws. He proceeded to compare different laws and their sources, and their adaptability to arbitral practices by asking questions such as: Is national law the one that best fits the establishment of a common framework for twilight issues? Is the law of the Seat still prevailing over all considerations? Should awards still be considered in every jurisdiction? Does *lex causae* exacerbate procedural issues? While leaving the audience to discover his findings in the book, Prof. Bermann concluded the ongoing debate on the law of the seat by clarifying that "if the arbitrability of a case is put into question, then the law of the seat is not to be ignored". His final point concerned the link between 'twilight issues' and the relationship between international standards and their normative sources. He discussed soft law and doctrinal sources that have the advantage of being codified and easily revised. In pure arbitral custom, he discussed institutional rules (mainly those of the ICC and the LCIA) and their place as a standard, as well as arbitral jurisprudence and its recent developments. Prof. Bermann then concluded by clarifying that the aim of identifying these 'twilight issues' was to plant the seed for an international standard that is "gravely missing in arbitral practice"; an international standard that is only possible "through cooperation between doctrine and practitioners".

The discussion that followed saw panellists nuance the findings of Prof. Bermann. Firstly, Mr. de Boisséson questioned the mere existence of twilight issues, assuming that twilight issues are "in the essence of arbitral culture, as darkness is to a certain extent is the light, the aim of arbitration", making a reference to the adaptability of practice. Prof. Bermann emphasised that the goal of creating a common framework for those twilight issues was not to eradicate flexibility but rather to orient it, adding that "guidance is not mutually exclusive with nuance and subtlety". Ms. Michou inquired about the sources of arbitral practice, asking whether arbitral agreements, the law of the seat of arbitration, and international rules are truly providing insufficient guidance.

Prof. Bermann answered that taking these considerations together would defeat the purpose of arbitration and would end in arbitral tribunals imitating what courts do. He added that national law shouldn't be examined, except, and only to a certain extent when considering *lex arbitri*. Prof. Kleiner analysed bodies of national law and their use to tackle these 'twilight issues', especially from a French perspective, while keeping in mind that looking at national law is frowned upon in international practice.

Prof. Bermann finally agreed that some issues are well addressed by national law, and that there is no compulsion in that case to look for an international standard. He concluded the discussion by noting that he supports balance between national and transnational practices, and invited the panel to nuance their take on the question depending on the case at hand, especially distinguishing investment cases from commercial ones.