University of Miami International and Comparative Law Review

Volume 1
Issue 1 *THE UNIVERSITY OF MIAMI YEARBOOK OF INTERNATIONAL LAW VOLUME 1*

Article 4

1-1-1991

Paris, the City of Arbitration?

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PARIS, THE CITY OF ARBITRATION?

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SUMMARY

I. PRELIMINARY OBSERVATIONS

First, I would like to emphasize the fact that it is important in international arbitration to consider the place of arbitration in advance. Second, I would like to explain why, in my opinion, Paris is one of the best cities for arbitration proceedings. Before getting to the heart of the matter, however, I shall make three preliminary remarks.

A. The Time the Choice is Made

The choice should be made at the time the arbitration clause is drafted. It is not realistic to do so beforehand, and afterwards it is too late: once the dispute has arisen, no further agreement is possible between the contracting parties, and it is then that a chosen arbitral institution or arbitrators must decide on the dispute. The contracting parties are no longer in a position to deal with this matter.

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One cannot postpone the choice because one does not know at the time the agreement is drafted who will be the plaintiff and who will be the defendant. The purpose and the advantage of the arbitration clause is to remain neutral and to equally serve both parties; in any case, the defendant will generally file a counterclaim. It would be presumptuous to state that in the field of international business, there are countries that are more favorable to plaintiffs or to defendants.

B. Other Choices to be Made

The place of arbitration is not the only choice to consider at the time a contract is signed. Should one choose an ad hoc arbitration or an institutional arbitration? Should there be one arbitrator or several?

With regard to the choice of the substantive or procedural law applicable to future litigation, in any case, we should take care not to regulate too much in advance.

With regard to the substantive law, is it not better to give more consideration to the appointment of a good arbitrator at the time a dispute arises, and then let the Arbitral Tribunal make the appropriate choice once it becomes familiar with the nature of the dispute?

With regard to the procedural law, obviously it is more reassuring to make advance reference to arbitration rules, if they are well-known and widely used, such as the rules of UNCITRAL. If this is not possible, and the parties do not have the advice of a person experienced in arbitration matters, it is more advisable not to provide anything. Obviously, the lack of such provision on this point may result in the application of the procedural law of the country of arbitration. However, this is another reason for carefully choosing the place of arbitration, taking into account its laws.

C. Difficulties in Understanding Foreign Legal Systems

If one can easily understand the physical and practical advantages of a given country, such is not the case from a legal standpoint. Aside from translation difficulties, access to foreign law is often problematic. Among other issues, one can cite the great number of laws, the widely dispersed source of the rules, conflicting case law and the incomplete nature of legal publications. In addition, one cannot possibly be aware of all the practices that accompany the statutory law and the case law, which change these laws in important ways.

Finally, not only would it be useful to learn foreign languages, but also to ensure the support and assistance of foreign legal correspondents. I would go so far as to say that in the absence of a competent bar in the country being considered, said country should not be selected.

My conclusion to this introduction is that much prudence and careful preparation is vital. Certainly, if the situation is hopeless, an arbitration "forum shopping" spree is an option. As you buy Palmolive soap with your eyes closed, you can select London, Geneva or Amsterdam. However, such a method of choice is not rational. The amount of money involved and the procedural disputes you will have do not justify such carelesness.

II. THE CHOICE OF AN APPROPRIATE LOCATION

There are two types of considerations: non-legal considerations and legal considerations.

A. Non Legal Considerations

1. Neutrality of the Country

An expert on this subject places great importance on a country's neutrality.[1] Obviously, the term "neutrality" is not to be understood in a diplomatic or military sense, but rather according to the definition given by the ICC. The ICC rule is to choose a country other than that of the claimant and respondent. The country chosen is that of the President of the arbitral tribunal. As in international sports matches, the advantage is considerable for the party who is on his home turf, and this is especially true in arbitration cases involving a government or one of its agencies, where such arbitration takes place within its territory.

There are countries traditionally considered to be neutral, such as Switzerland, Holland and Sweden, and the important role that this latter country has played in Soviet-American arbitration is well known. But, in reality, these countries are neutral as well as stable and possess solid traditions in international commerce.

2. Practical and Material Advantages

The parties should not only consider the means of communications in the country of arbitration, but also:

(1) existing facilities such as hotels, meeting places, translation services, secretarial services and recording and reproduction facilities (these are often found more frequently and in a more modern form in common law countries,

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[1] Derains, *France as a Place for International Arbitration*, in THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION, LIBER AMICORUM FOR PIETER SANDERS 111 (C. Schultz & A. Van Den Berg eds. 1982); Derains, *New Trends in the Practical Application of the ICC Rules of Arbitration*, 3 NW. J. INT'L L. & BUS. 39, 40 (1981); Holzmann, *The Importance of Choosing the Right Place to Arbitrate an International Case*, in PRIVATE INVESTORS ABROAD - PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 190 (1977).

where oral procedure is the rule);

(2) the existence of a local bar and competent lawyers on the spot;

(3) the rules in force relating to taxes and customs duties, exchange control and entrance visas (to avoid unexpectedly high charges on arbitrators' fees, so that an arbitrator is not reduced to living miserably like a vagabond because he cannot "introduce" his currency, or that another arbitrator is not stopped at the border like a common criminal.

B. Legal Considerations

Many efforts have been made to "denationalize" international arbitration, i.e., to completely detach it from the law of the country where it takes place.[2] Such denationalization is in keeping with the increasing success of "lex mercatoria," and allows the constraints of local laws to be avoided.

If the determination of the place of arbitration were made solely in consideration of the physical and practical advantages of a given city, there would be no need for this article. However, we are not quite there yet. What Mr. Mann said approximately twenty years ago still holds true: "Whatever the intention of the parties may be, the local legislator of the place where the Arbitral Tribunal is located supervises the existence, the composition and the activities of the Tribunal."[3]

We are fully aware of the fact that Mr.Mann does not favor arbitration, but one cannot help but note that, regardless of the increasing liberalization of arbitration in recent years, his comments remain true.

Intervention by the authorities of the country where the arbitration takes place occurs at each successive stage of the arbitral proceedings, to protect the country's public order, and/or international public order, and even to assist the arbitrators or the parties, since lawmakers have understood that it was in their interest, at least from an economic standpoint, to attract arbitrations to their country. Where the local law in a given country is considered to be of international public order, it is binding on the arbitrators, even against the wishes of the parties. Otherwise, local law only applies where the parties do not expressly provide otherwise.

In either case, there can be some very painful surprises. For example, one may learn that the signature of a witness is of international public order or that

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[2] *See* Paulsson, *The Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32 INT'L & COMP. L.Q. 53 (1983); Hirsch, *The Place of Arbitration and the Lex Arbitri*, THE ARBITRATION JOURNAL (Sept. 1979); G. Fouchard, note Cl. 1980, at 669 et seq.

[3] INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 161 (1967).

the international public order is limited to local disputes. An essential precaution is to determine in advance the degree of favor international arbitration has in the minds of that country's judges, in particular at the Supreme Court level, since it is the latter judges who define the extent of the public policy considerations.

Even those laws which only apply where the parties have not provided otherwise can be dangerous, if the parties remain silent on certain points or do not think to expressly exclude in advance such legal provisions, of which they may not even have been aware. Their plans and intentions can be thwarted. It is for this reason that the ICC, in its 1975 arbitration rules, decided to exclude the local procedural law, unless the parties agree otherwise.

In other respects, the local law can be invoked by the arbitrators or by the parties against the arbitrators, e.g., in the event an arbitrator is challenged. As Mr. Devolve has written, the judges are called upon to become the arbitrators' assistants. Thus, the national courts perform a "supportive function."[4] This function usually relates to investigative measures which arbitrators cannot perform themselves,[5] or urgent provisional and protective measures. Last but not least, it is the local judges who, based on the law of the country, enforce the arbitrators' decision by granting an exequatur, and, if necessary, by rejecting all other claims made by the losing party.

This is the moment of truth. Certainly, the unifying influence of the New York Convention has helped to make the various laws similar on this issue,[6] and there is a convergence of solutions. However, as suggested by Mr. P. Lalive, it is possible to distinguish two principal systems of review. First, the civil law system, with a restrictive enumeration of the cases where the court can annul an award, and, second, the customary system of the common-law countries, which refers to general criteria of "misconduct" or "disregard of the law." The risks incurred are probably more difficult to evaluate in the latter system, and they are sometimes considerable.

In this respect, it is also necessary to take into account various practices, when dealing with such legal texts,[7] the ambiguity of certain expressions, such as, "a bad award on its face," and, finally, the cost and delays which occur in certain countries as a result of the delaying tactics used by the parties'

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[4] Holtzmann, R.A., 1978, at 287; Hunter, *Arbitration Procedure in England: Past, Present and Future*, 1 ARB. INT'L 92 (1985); Goldman, 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 271 (1984)(Papers from the 60th Anniversary Conference of the Court of Arbitration of the International Chamber of Commerce, held in Paris, Oct. 11-13, 1983)[hereinafter 60 Years].

[5] B. Moreau, R.A., 1978, at 323.

[6] Shlosser, R.A., 1978, at 344; P. Lalive, in 60 Years, *supra* note 4, at 348; Tieffry, *The Finality of Awards in International Arbitration*, 2 J. INT'L ARB. 27, 33 (1985).

[7] *See* Lalive, *supra* note 6.

counsels.[8] Moreover, Mr. Crawford notes in an interesting article the tendency of certain practitioners to impede the implementation of reforms,[9] as important as the reform provided in the Arbitration Act of 1979, by maintaining the old requirements.

Should one prefer the Belgian system, introduced by the Law of March 29, 1985, which does away with all appeals of those arbitral sentences that involve only non-Belgians? The answer is not clear, because strange arbitral sentences are sometimes rendered , and this danger is even greater than those mentioned above.

In this review of the legal situation of arbitration in the various countries, an important point should be kept in mind. What are the international conventions binding countries to one another? Above all, has the country in question ratified the New York Convention? If one is assured that the confirmation of an arbitral sentence in one country will almost surely be recognized in the others, the effectiveness of the decision is increased compared to the decisions of national courts.

It should be remembered that the country where an arbitral award will be executed is not always that one where the arbitral award was rendered. The ratification by these two countries of the New York Convention should in theory avoid the necessity of researching the legal provisions in the country of execution by the prevailing party.

III. THE ADVANTAGES OF FRANCE AND PARIS

A. Non-Legal Considerations

1. Neutrality of the Country

Even if the reputation for neutrality of France is not that of Switzerland, Holland or Sweden, at least the parties are almost certain to find among French jurists, and particularly among French judges, an open-mindedness and a universalism equivalent to neutrality. The Iranian-American Tribunal was constituted in 1980 with two Swedish judges and one French judge. Among the three "neutral" arbitrators in the recent Israeli-Egyptian arbitration, in addition to a Swiss and a Swedish national, there was a French arbitrator. Finally, some time ago, when a Middle Eastern country objected to France as the country of arbitration, it nevertheless accepted that an arbitral tribunal be presided by a French national, despite an arbitration agreement which provided otherwise.

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[8] For the United States see PAULSSON, APPELLATE REMEDIES IN THE STATE OF NEW YORK (ICC Seminar of October 13, 1988).

[9] Crawford & Feldman, *American Perceptions of London as a situs for International Commercial Arbitration*, 2 ARB. INT'L 232 (1986).

Thus, France is considered neutral, and the leading role of French law over the centuries and the fact that it has been taught abroad has contributed significantly to this state of affairs.

2. Practical Advantages

From the point of view of geography, France is in an advantageous position. It is bordered by three seas, is facing the common law countries, is equally distant from Great Britain, the Northern Countries and the center of Europe, and is linked to North Africa.

This special geographical situation was one reason why Paris was chosen by the ICC, with its court of arbitration, the Maritime Arbitration Chamber, and more recently the Euro-Arabic Arbitration System. In turn, the presence of these institutions in the French capital has greatly reinforced the advantages of having arbitrations in Paris. Regardless of one's opinion on the respective merits of institutional or ad hoc arbitration, it is clear that the presence of these arbitral bodies is favorable to the development of international arbitration in Paris.

First, on a professional level, their presence attracts meetings, conferences and seminars in which one is certain to find competent speakers and an attentive audience. Second, they attract lawyers and practitioners who constitute a network of arbitration specialists. In this regard, I have always been happy for the presence in Paris not only of the ICC, but also of the many foreign legal advisors. Any competitive disadvantages which may result for some are largely compensated by our capital's rise to the rank of an international arbitration center.

Of course, there are some disadvantages. Too few Frenchmen speak foreign languages, and in particular English, without which nothing can be done any longer. In Paris, we also lack a sufficient number of meeting rooms and translation services. In addition, the régime of foreign exchange and visas should be improved. Nevertheless, Paris has an incomparably advantageous situation.

B. Legal Considerations

On this second aspect, Paris clearly has additional strong points. First, there is the quality of the laws which since 1981 govern international arbitration in France, and second, the high quality of the magistrates who apply such laws, and the decisions they render, which favor arbitration.

1. The Quality of the Laws: Their Preparation

The quality of these laws can essentially be explained by the conditions under which the Decree of May 12, 1981 was prepared. In fact, a handful of professors, lawyers, and judges, including Mr. G. Fouchard and Mr. Jean Robert, both highly specialized in this field, took part in discussions presided over by Mr. Lemontey, then assistant-director in the Ministry of Justice, for the purpose of simplifying the system of appeals, in retaining the good points provided by case law, while on an international level, placing a strong emphasis on the advantages of the parties' contractual freedom. The text, prepared in the form of a decree, received the necessary approval by the *Conseil d'Etat* without changes that might have impaired its quality.

2. The Decree

This decree only contains sixteen very short articles, numbered 1492 to 1507 in the Code of Civil Procedure. This extreme conciseness facilitates research by foreign lawyers. Moreover, the Civil Code, in its Articles 2059 through 2061, contains provisions relating to the arbitration agreement, and a Law of August 19, 1986, which few noticed, which constituted, or was thought to constitute, an exception to Article 2060 in favor of Walt Disney, an American company. Finally, in this respect, the Ministry of Justice, in its report to the Prime Minister on the Decree of 1981, reminded everyone that the Supreme Court's previous decisions on international arbitration stated the law which, had it needed to be incorporated in statutory form, would have required Parliamentary action. The brevity of the decree is therefore slightly misleading!

This fact is explainable, however, by the drafters' wish for clarity, which is the essence of a true codification. It is also due to the decision to distinguish international arbitration from domestic arbitration, and not to render any of the domestic rules mandatory for international arbitration.

Although it may not be original, we have three central ideas: security, freedom and efficiency, which underlie the provisions of an arbitration agreement, the organization of the Arbitral Tribunal, the choice of procedural and substantive law, and, finally, the review of awards.

With regard to arbitration agreements, an implicit approval of prior case law on the independence and the presumption of validity of the arbitration clause is found in the first paragraph of Article 1493 of the Decree (which is corroborated by the Prime Minister's preliminary report).

It was said that this strong line of cases, especially since the *Hecht*

decision,[10] "immunized" the arbitration clause against all attacks on its validity. In this respect, however, Article 1493.1 goes even further: not only does it liberate the parties from the requirements of domestic French law, it also exempts the arbitration clause from mandatory provisions of a particular form or a minimum content of the arbitration clause. It permits the appointment of an even number of arbitrators, as well as the drafting of an extremely vague provision, such as "the arbitration shall take place in Paris," without any further details.

Contractual freedom prevails, where it would not be upheld under domestic French law, by reason of the specific rules applicable to international arbitration, and because in international commerce the parties are presumed to be on equal footing. There is freedom as well as security because, on a substantive level, the arbitration clause appears in principle to be exempted from rules of public order,[11] unless the award is subsequently challenged because *in fact* it violates international public order. In consequence, parties who select Paris as an international arbitration site are almost certain of having their agreement validated, despite the requirements of domestic French law or any other law. Some have sometimes referred to French legal "imperialism," but they are mistaken, because we offer freedom to those who wish to take advantage of it.

If difficulties are encountered with regard to the Tribunal's composition, the President of the *Tribunal de Grande Instance* of Paris may act upon the request of one of the parties, if the arbitration takes place in Paris or is subject to French procedural law. This original provision, contained in paragraph 2 of Article 1493, parallels that provided in domestic law and does not seem to be found in most other legal systems.

This additional security is a counter balance to the extreme freedom granted in drafting the arbitration clause; it constitutes a safety valve. The judges' obligation to cooperate corresponds to the concept of contractual freedom. The President of the *Tribunal de Grande Instance* of Paris was chosen in order to avoid jurisdictional problems and also because most international arbitrations in France take place in Paris.

Moreover, the judicial authorities' assistance may continue throughout the arbitral procedure, and especially in the event of ad hoc arbitration, where an arbitrator is unable to act or is challenged, or where investigative measures, or provisional or protective measures, must be ordered.[12] This is permitted even though not specifically provided in the Decree. In particular, it is possible to refer the matter to a single judge in summary proceedings ("référé") where the

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[10] Civ. I, July 4, 1972, Cl. 72, at 843.

[11] Cass. I. Impex 5/18/71 D.72, at 36, note Alexandre.

[12] B. Moreau, R.A., 1978, at 331.

outcome on the merits is not affected,[13] if there is urgency, and, finally, if the control of the arbitral proceedings remains with the arbitrators.[14]

One of the principal difficulties with the judges' cooperation is that their assistance must not be transformed into control of the arbitrators during the course of the proceedings, as this would constitute a step backward rather than progress for these institutions. Thankfully, French judges have shown exemplary wisdom in this regard.

There is a total freedom not found in most countries relating to the choice of procedural or substantive laws. With regard to procedural law, one can totally avoid the effect of any national law, provided there is compliance with the requirements of international public order, which are limited to respecting the rights of defense; in the absence of a provision in the arbitration clause one can construct ones own system and not have procedural rules except where necessary as the arbitration progresses.[15]

With regard to the substantive provisions, Article 1496 refers to "rules of law." These naturally include national laws, but also the general principles of law and the rules of public international law.[16] Their combination is allowed, and, leaving aside the problem of lex mercatoria, French law seems to be one of the best adapted for those frequent arbitrations which involve governments or government agencies.

It was the complexity of the methods of reviewing arbitral awards that led to the reform of the arbitration system. There was a choice among several systems, i.e.:

(1)either grant the judges certain rights to revise an award or give them a general power of review (as was the case in Switzerland, with the control of "arbitrariness," or in England, with a theory of "misconduct"), or
(2) restrictively list the conditions under which an award can be annulled,
(3) or finally, as in Belgium, do away with all appeals if the only contact with the country is that the arbitration takes place there.

The first solution appears to give the judges too much power, and the Swiss have recently abandoned it. The third solution is too extreme, and exposes the parties to the risk of arbitrary awards. France has correctly chosen the intermediate system, establishing the necessity of a balance of powers between

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[13] For orders to pay provisional damages, see Couchez, R.A., 1986, at 155, 233 and 565.

[14] *See* Tribunal de Grande Instance de Paris in the *Guinee* case, R.A., 1987, at 371, and also the decisions of the Court in the same case, R.A., 1988, at 657.

[15] Article 1494.2.

[16] *See* Fouchard Cl., 1982, at 395.

the powers of the arbitrator and the scope of review by the judge. Article 1502 provides five cases of annulment which correspond to the cases in the New York Convention of non-recognition of a foreign award.

This system has a double advantage: arbitrary decisions of the judge are avoided, and it is almost certain that a French award will be recognized in all countries having ratified this Convention.

3. Judges and the Case Law

It is clear that judges only rarely intervene in international arbitration matters, yet the influence of their decisions which annul or enforce an award is considerable. Those involved in international arbitration find that French judges are well informed and consequently support arbitration proceedings. This is because only a few magistrates are involved. Everything is concentrated in the hands of the President of the *Tribunal de Grande Instance* of Paris, the First President of the Court of Appeals of Paris and the first auxiliary chamber of said Court of Appeal. The latter in practice assumes the role of a Supreme Court because all cases are concentrated in Paris and appeals to the Supreme Court are very rare. In addition, a well-established tradition exists in this chamber, inherited from Counselor Holleaux. Finally it is fortunate that the President of the Tribunal and the First president of the Paris Court have agreed to personally take charge of these matters.

Thus, these legal rules on arbitration are in good hands. Even prior to the reform, the judges had succeeded in transforming a defective Code into a harmonious whole. They continue today in the same direction, although now they have excellent rules to apply, The case law is clearly favorable to arbitration and unfavorable to holding an award null or invalid. In addition, it increasingly restricts the definition of public order.

For arbitration agreements, the judges make a careful examination with respect to international morality (drugs, corruption, etc.), and they refuse to hold that French economic legislation constitutes part of the international public order.[17]

With respect to awards, the judges strictly apply Articles 1502 and 1504 of the Code, and there is no attempt by them to change the substance of awards using the pretext that the arbitrators exceeded their mission. Their control over the proceedings is limited to ensuring respect for the rights of the defense, that the parties have equal chances, and the principles posed by Article 6 of the Convention on Human Rights.

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[17] J. Robert, 5th edition, n° 396.

With regard to the arbitrators' compliance with international public order, French judges usually sanction only violations of "the most fundamental concepts of morality and justice." This is the same concept as that used in the United States,[18] and it is true that, for a number of years, the French have been the closest to the Americans in this respect.

In order to reduce the number of awards held null and void, French judges utilize the usual procedures, i.e., they substitute valid reasons for improper reason, discover the existence of a waiver by the plaintiff, or invoke an absence of prejudice. It is by the use of such methods that the Paris Court, in a decision dated March 19, 1981,[19] the importance of which was not sufficiently noticed, admitted the validity of an award with a "dissenting opinion" for international arbitration proceedings taking place in France.

The French judges are, in my opinion, the least formalistic in the world, and are well placed to contribute to the progress of international arbitration. One should not believe, however, that French case law is too lax. The limits have been very clearly defined with regard to the freedom of the parties, the arbitrators and the judges themselves. Ample proof of this fact is provided in the decisions rendered by the Court of Appeals of Paris, presided by Mr. Drai, in the famous *Guinee* case.[20] As a result, if judges can intervene to assist the parties or the arbitrators prior to the constitution of the Arbitral Tribunal, and to review the sentence after it is rendered, between these two periods the arbitrators not only are the sole judges of their powers, they must act freely.

This prompted Mr. Fouchard to rightly state,[21] in commenting on the mixture in the case law of liberalism and interventionism, that there is a sort of tailor-made justice for each case that is "perhaps a luxury, but in any case a model."

IV. CONCLUSION

Perhaps, either through undue modesty or masochism, we have not attracted enough international attention to the advantage of Paris as a city for international arbitration, and the combined benefits of French legislation and case law. In contrast, the great foreign centers actively promote their arbitration systems: London, New York, Amsterdam, Geneva and Stockholm, among others. We should learn to promote ourselves more, because Paris is a "city of arbitration" that is at least as desirable as the others.

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[18] *See, e.g.*, Fotochrome Inc. v Copal Ltd., 517 F.2d 512 (2nd Cir. 1975).

[19] R.A., 1982, at 83.

[20] *See* the decisions of November 18, 1987, and May 4, 1988, R.A., 1988 at 657, reversing the decisions cited in R.A., 1987, at 371

[21] R.A., 1985, at 5.

Once again, steps have been taken by the man to whom we owe so much, Mr. Jean Robert. His accomplishments demonstrate to the world that our capital is a choice location for international arbitration which is supported by the Paris Bar Association under the leadership of its President.

No one doubts that, as 1993 draws near, these initiatives shall prove both necessary and fruitful.