Berkeley Journal of International Law

Volume 4
Issue 2 *Fall*

Article 1

1986

Introduction

Richard M. Buxbaum

Introduction

Richard M. Buxbaum†

Can anything new or significant still be written about international commercial arbitration? Every week another article, every year another hopeful center,[1] every five years another journal or yearbook[2]—and once in a while even an award appears in print.[3] More importantly, can anything new or significant still be written in a positive vein about the subject? For just when the United States Supreme Court has put the finishing touches on its pathos-tinged apotheosis of the joys of arbitration,[4] the first stirrings of doubt about its promises begin to rise to academic respectability.

The end of significant judicial control of the arbitral process, signalled by the Supreme Court in 1973[5] and anchored in Articles II and V of the New York Convention,[6] was echoed in Great Britain's 1979 abandonment of the "case stated"[7] and by its courts' adamant closure of the door to discretionary judicial review of awards thereafter.[8] Other courts, especially those in the United States, also have hewed firmly to a narrow reading of their discretion under those two Articles to stay proceedings or to overturn awards.[9] As a result, international commercial arbitration, no matter how well conducted as

---

† Professor of Law, School of Law (Boalt Hall), University of California, Berkeley.

1. For example, on May 20, 1986, the International Law Section of the Los Angeles County Bar Association established the Los Angeles Center for International Commercial Arbitration, chaired by Robert E. Lutz, Professor of Law, Southwestern University. Information about the Center is available from Daniel Kolkey, 333 South Grand Ave., Los Angeles, California 90071.

2. *See generally* INTERNATIONAL JOURNAL OF ARBITRATION; YEARBOOK COMMERCIAL ARBITRATION; *cf.* ICSID REVIEW—FOREIGN INVESTMENT LAW JOURNAL (beginning publication in Spring 1986) [hereinafter cited as FOREIGN INVEST. L.J.].

3. Amco-Asia v. Republic of Indonesia, 23 I.L.M. 351 (1984); Klöckner Industrie Anlagen GmbH v. United Republic of Cameroon, Decision of the Ad Hoc Committee (May 3, 1985), *reprinted in* 1 FOREIGN INVEST. L.J. 89 (1986).

4. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), *rev'd in part, aff'd in part*, — U.S. —, 105 S. Ct. 3346 (1985).

5. Scherk v. Alberto-Culver, 417 U.S. 506 (1973).

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (*entered into force* for the United States, Dec. 29, 1970).

7. Arbitration Act 1979, *reprinted in* Current Law Statutes Annotated 42 (Sweet & Maxwell 1979).

8. *See* Pioneer Shipping Ltd. v. B.T.D. Tioxide (The Nema), [1981] 3 W.L.R. 292 (establishing strict requirement before granting leave to appeal an award); *see also* Berggen, *Judicial Implementation of the United Kingdom Arbitration Act 1979*: Pioneer Shipping v. B.T.P. Tioxide (The Nema), 24 HARV. J. INT'L L. 103 (1983); The Rio Sun, [1982] 1 All E.R. 517; The Kerman, [1982] 1 All E.R. 616; The Emmanuel Colocotronis, [1982] 1 All E.R. 578.

9. Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1973); McCreary Tire & Rubber Co. v.

an immanent process, has developed within an increasingly "lawless" context, literally speaking.

As a result, inevitable questions are beginning to arise. The role played by the unmotivated, apodictic award in achieving the arbitration process' promise of speed and dispatch fell under critical review in 1985, when Carbonneau argued for the need for opinions if arbitration were to retain its legitimacy.[10] At the same time, Fiss moved the debate to a more central, process-oriented one, though in the domestic, not the international, context:

> Adjudication is more likely to do justice than . . . arbitration . . . or any other contrivance of [alternative dispute resolution], precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason.[11]

Only this year an American federal appellate court, although again in the domestic context, added some official weight to this view:

> The present day penchant for arbitration may obscure for many parties who do not have the benefit of hindsight that the arbitration system is an inferior system of justice, structured without due process, accountability of judgment and rules of law. . . . We write . . . not to denigrate the use of arbitration in commercial transactions. We write only to provide notice that where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.[12]

Of course, whether that last sentence is a threat or a promise varies from court to court, state to state, and situation to situation. In that variance, especially at the transnational level, lies the explanation for the persistence and expansion of international commercial arbitration and the concomitant explanation for the continuing praise heaped upon its performance and, even more, upon its promise.

CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974); Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334 (5th Cir. 1976).

Some irony exists in the fact that the law firm closely associated with the effort to promote AAA international commercial arbitration (Holtzmann, Wise & Shephard) first partially succeeded in arguing that U.S. courts should lend their provisional relief powers to tribunal proceedings (Sperry Int'l Trade, Inc. v. Government of Israel, 670 F.2d 8 (2d Cir. 1982)) but then failed in an effort to convince a trial court in the same jurisdiction to review the final award despite the argument that the tribunal acted in such an egregious manner as to vitiate its processes under even the most cursory standards of review. *See* Sperry Int'l Trade, Inc. v. Government of Israel, 602 F. Supp. 1440 (S.D.N.Y. 1985).

10. Carbonneau, *Rendering Arbitral Awards With Reason: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579 (1985). Already the year before, an expert group sounded some warnings about the illusory promise of arbitration generally. Higgins, Brown & Roach, *Pitfalls in International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 30 BUS. LAW. 1685 (1983).

11. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985).

12. Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986).

The Colloquium at which the following papers were presented[13] was co-sponsored by a major national arbitral institution (American Arbitration Association), the leading private international body (Court of Arbitration for the International Chamber of Commerce), and the leading public international organization through which investment disputes involving a sovereign state can be "privately" resolved (International Centre for Settlement of Investment Disputes). That sponsorship alone suggests some of the reasons for a continuing place for arbitration in the international setting: the availability of commercial and industrial expertise; the availability of a neutral setting with neutral if rudimentary procedural rules for the hearing of disputes; and, for some situations, the availability of a supranational public agency to which even sovereign states can submit jurisdictionally without diminishing their sovereignty. These themes run throughout the colloquium papers. The last point, for example, is clearly made by the contribution of *Shihata*, now ICSID's Secretary-General, when he points to its "objective . . . to provide a climate of confidence between investors and states,"[14] even as he wisely calls for an increase in the number of experts from developing countries among its panel members if that purpose is to be achieved. The first and second themes are clearly stated in the introductory remarks of *Gaudet*, Chairman of the ICC Court of Arbitration.[15]

If one unique thematic contribution distinguishes the Colloquium presentations, it is inherent in the papers' discussion of the Asian-African Legal Consultative Committee's efforts to capitalize on the UNCITRAL work on arbitration through the establishment of regional and national centers (*Sen*,[16] *Aboul Enein*,[17] and more generally *Saleh*),[18] the related paper on Latin American regional arbitration efforts (*Eyzaguirre*),[19] and the review of the function of the Foreign Trade Arbitration Commission of the USSR and analogous CMEA member states' tribunals (*Pozdnjakov*).[20] For if international commercial arbitration is to remain legitimate and useful, the diffusion and decentralization of what are still fairly centralized centers of activity will be necessary.

13. Resolving International Commercial Disputes, Oct. 24, 1985, Paris, France (Colloquium sponsored by ICSID, ICC, and the AAA).

14. Shihata, *Obstacles Facing International Arbitration*, 4 INT'L TAX & BUS. LAW. 209, 211 (1986).

15. Gaudet, *The International Chamber of Commerce Court of Arbitration*, 4 INT'L TAX & BUS. LAW. 213 (1986).

16. Sen, *AALCC Dispute Settlement and the UNCITRAL Arbitration Rules*, 4 INT'L TAX & BUS. LAW. 247 (1986).

17. Aboul Enein, *Arbitration Under the Auspices of the Cairo Regional Centre for Commercial Arbitration*, 4 INT'L TAX & BUS. LAW. 256 (1986).

18. Saleh, *The Settlement of Disputes in the Arab World: Arbitration and Other Methods*, 4 INT'L TAX & BUS. LAW. 280 (1986).

19. Eyzaguirre, *Arbitration in Latin America: The Experience of the Inter-American Commercial Arbitration Commission*, 4 INT'L TAX & BUS. LAW. 288 (1986).

20. Pozdnjakov, *Commercial Arbitration in CMEA Member Countries*, 4 INT'L TAX & BUS. LAW. 272 (1986).

This is not to argue for or against an essentially private or essentially public source of procedural rules and location of institutional activity: ICC versus UNCITRAL. The true question of the legitimacy of arbitration as a dispute resolution mechanism lies at a deeper and more pragmatic level. The practice of arbitration needs to become familiar, routine, and comfortable at the locations and among the parties (not only the immediate contracting parties) whose relations, and thus whose disputes, feed and make necessary this mechanism. Whether that can happen everywhere is a matter of legal culture and political context as well as of positive law. Arbitration is not necessarily the carrier *par excellence* of institutional modernization to regions not yet acquainted with similarly modernized official dispute resolution institutions; nor can the arbitration center necessarily function well as an enclave of efficient dispute resolution in a host setting that is far different. By the same token, however, it will not necessarily function any better as an exclave either, even though *Shihata's* call for a modified version thereof can only be supported (and for the ICC as well as the ICSID). The success of that call also depends, in part, upon the development of ICSID jurisprudence, a development only very recently begun;[21] and upon the completion of the current, apparently successful development of a clear procedural regime for confirmation as well as for recognition of ICC-derived arbitral awards, both of which *Delaume* reviews in his paper.[22] In the long run, that expansion and diffusion of arbitration is a necessary condition for the institution's success; and, in turn, resolution of these described problems of transparency, broadly based participation, and procedural clarity is a necessary condition for that expansion.

Whatever the eventual result of these current developments, it can only be aided by this set of papers (not least among them the comprehensive annotated bibliography)[23] on international commercial arbitration. They function as a useful contribution even in a crowded field.

21. *See* Lalive, *The First "World Bank" Arbitration* (Holiday Inns v. Morocco)—*Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123 (1980); *Klöckner*, *supra* note 3; *Amco-Asia*, *supra* note 3; *Indonesia Wins an Appeal of Award in Hotel Seizure*, Wall St. J., May 30, 1986, at 22, col. 1.

22. Delaume, *ICSID Arbitration Proceedings*, 4 INT'L TAX & BUS. LAW. 218 (1986).

23. Hiramoto, *A Pathfinder to Resources in International Commercial Arbitration 1980-86*, 4 INT'L TAX & BUS. LAW. 297 (1986).