

THE FUTURE OF THE PERMANENT COURT OF  
ARBITRATION

by

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The second international conference of the International Bar Association is being held at the Peace Palace at The Hague, the seat of the International Bureau of the Permanent Court of Arbitration. This Court was founded, when on July 29th 1899 at the first Hague Peace Conference the representatives of 26 States signed the Convention for the Pacific Settlement of International Disputes. To prevent war is the main object and amongst different means the way of international arbitration was found to achieve this purpose.

"The object of international arbitration is the settlement of disputes between states by judges of their own choice and on the basis of respect for law". The parties to the dispute have to state, a consequence of considerations about means to prevent war.

The "Permanent Court of Arbitration" consists of a group of Arbitrators, out of which the States can choose their arbitrators, if they want to do so, after having tried in vain to settle their dispute along diplomatic lines. of an International Bureau which can administrate the arbitrations, and of the Secretary General who can function as secretary to the Arbitrators.

It is only the panel of arbitrators that is permanent, the court itself isn't. On this panel each State, having ratified the Convention can nominate four persons as a maximum. So the organization of the Permanent Court of Arbitration would be best characterized by the term: Permanent Arbitration Service, because of its temporary existence after the setting up by the disputing States.

On the occasion of the second Hague Peace Conference eight years later in 1907 it was tried to change the institution into a real permanent Court that deserved the name, but all efforts failed, because it was impossible to give every power to one arbitrator. There would have been too many members in the court. No other satisfactory solution could be found. So a new convention was agreed upon, the Convention for the Pacific settlement of Disputes of 1907, an improvement on the former one on minor points.

After World War I in 1920 at the suggestion of the Council of the League of Nations 10 jurists met at the Peace Palace and made a draft for a Permanent Court of International Justice, the present International Court of Justice, a permanent court indeed. The choice of its 15 judges is made out of candidates, nominated by the national groups in the Permanent Court of Arbitration, chosen with a majority in the General Assembly of the U.N.O. in former times of the League of Nations, as well as in the Council. Only States can be partners in cases before this court. An effort to give an individual the opportunity to sue a State before the International Court of Justice was rejected.

The creation of the Permanent Court of International Justice led to a diminution of the "Permanent Court of Arbitration"'s importance. The latest annual report of the Arbitration Court announces 23 cases in its list of arbitrations, six of them between the two World Wars. Of this last number of six arbitrations five belong to the category of special arbitrations according to article 47 of the 1907 Convention.

On March 15th 1948 the panel of arbitrators consisted of 126 persons nominated by 34 states and the Permanent Court of Arbitration is nevertheless a very useful institution.

1. Because the disputing states can choose their own tribunal for the adjudication of their disputes. Each party appoints two arbitrators of whom one only can be its national. These four arbitrators together choose an umpire.

2. because its national groups nominate the candidates for the election of the 15 judges of the International Court of Justice.

3. because it is mentioned and referred to in many international agreements.

The proposal of the Argentine delegation to the first general assembly of the United Nations to abolish the court has therefore unanimously been rejected in the Committee to which the matter was referred.

First of all the States should become more Arbitration-Court minded. The procedure before the Court is very elastic, especially according to art. 47 of the second Convention ("the International Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration") To give one example of a very successful arbitration the famous case of the North Atlantic Coast Fisheries between England and the United States may be considered; in that case according to art. 45 five arbitrators were chosen from the panel of the Court.

Formally all cases concerned disputes between two states, but many of them dealt with private claims against foreign states.

The first arbitration of the court was based on the claim of the Californian bishops against Mexico for the payment of rent of a fund collected in the 17th and 18th century, for the benefit of the Roman Catholic mission in California. Another instance can be found in an arbitration of 1921 between the U.S.A. and Norway. After entering into the war the U.S.A. requisitioned certain contracts under which ships were being constructed in the U.S.A. for Norwegian nationals. The Norwegian Government espoused the indemnification, claims of their nationals. In one case - arbitration No. 22 - the court even rendered services in an arbitration directly between a State and a Corporation, viz Radio Corporation of America against China. This case, however, cannot be taken as a usual case for the Court, although there is a possibility for further developments.

On the condition that diplomacy has already tried in vain to settle the dispute, a bold interpretation of art. 47 enables in such a case the disputing states to pretend to the services of a "special Board of Arbitration" if only one of the parties is a Contracting Power.

According to the rules of the abortive Convention for the establishment of an International Prize Court 1907, also an individual could apply directly to this proposed Prize Court, unless the State to which he belongs

may forbid him to bring the case before the Court or may itself undertake the proceedings in its place.

Because of the consequences every dispute with a foreign State may always entail, it seems to me a wise provision that the State has to decide whether or not the action may be brought before the Court, and I suggest that the activities of the Permanent Court of Arbitration should be extended to claims of individuals against a foreign State, if both the foreign State and the State of the individual agree in bringing the claim before a special Board of Arbitration. (Art. 17, Conv. Perm. Court of Arbitr.)

Any activity of the Permanent Court of Arbitration in pure private international arbitration without an amendment of the Convention will not be possible; at least one of the parties has to be a state. So private persons who want to use arbitration for the settlement of their international commercial disputes can make use of the facilities of other organizations, for instance the American Arbitration Association and the International Chamber of Commerce.

An amendment of the Conventions would also be necessary for the realization of a suggestion concerning the unification of the different commercial laws in the world.

There are many abortive attempts to create as an international body a Court of Appeal in international commercial differences and therefore I should like to start on a more moderate scale.

I suggest to create different chambers of the Court, which are, contrary to the Court itself, really permanent.

In these chambers the internationally recognized experts

experts on e.g. maritime law or any other part of the commercial law that might be appropriate for the purpose of unification are brought together, they give their judgment on international cases every time that such a case is brought before them on the initiative of a high national authority to whom attention such a case was brought by one of the parties. The value of the judgments of these chambers is only theoretical and will entirely depend on the high quality of their reasoning. They may however be of great use for developping common principles in the field of international commercial law.

The judgments have no influence on the decision which has been given in the different cases already before in last resort.

Next year on July 29th 1949 we will commemorate the fiftieth anniversary of The Hague Convention 1899, which brought into existence the Permanent Court of Arbitration. Would it not be a good idea to bring all members of the panel of arbitrators or at least, one of each national group together on this occasion and to put before them the question of the future of the Court of which they are members?

Never before the members of this Court have all been together at the same time.

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