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RECENT DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION

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RECENT DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION

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1. In a growing world-community with a growing world-wide trade, arbitration is more and more resorted to as a means of settling disputes between trading-partners. The developments are so manifold that it may be useful to give a survey of the more recent ones. I will not go further back than 1958, when the U.N. Convention on the Recognition and Enforcement of foreign arbitral awards was concluded in New-York. Even when confining myself to the last eight years I fear the picture of what happpened in the field of international commercial arbitration will give a rather caleidoscope like impression. In different parts of the world different initiatives have been taken, all for the sake of developing the use to be made of international commercial arbitration. Why?

It might be of some importance to investigate the reasons that are behind this apparent flourishing of international commercial arbitration. When initiatives are taken in New-York, Geneva and Bangkok — to mention only a few of them — there could be a common philosophy behind it, regardless of whether the initiators are conscious of it or not. Some guidance might be found when we turn first to the origin of arbitration in the national field, before entering upon the field of international commercial arbitration.

Arbitration in the national field is older than Court proceedings. We may have forgotten this in our more developed societies, but the

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fact none the less remains. For Court proceedings we need a more developed society. A Judiciary has to be organised. When speaking of Court proceedings we are dealing with an Institution of a society that has developed into a further state of civilisation. From the beginning however the need was felt of a method to get disputes settled in a peaceful way without resorting to force. Arbitration provided this method. Parties to the dispute addressed themselves to a third person of great authority in whom they put their confidence. They trust his wisdom and judgment and abide by his award. They would probably not dare to disregard his decision. This would not be accepted by the community to which they belong. When travelling through what today are called developing countries we still find the grey-beard, the old wise man who decides disputes between members of the local community and whose decision is voluntarily executed. The same applies, I think, to the origin of arbitration in our more developed societies of today. Arbitration came before Court proceedings. Arbitration is as old as the world, or even older: think of Paris who had to decide a famous beauty-contest!

Should I be correct in this analysis of the origin of arbitration in the national field it might offer us a parallel for the developments we notice today in the international field. Here international courts, available to private persons to deal with disputes arising out of their international transactions are still lacking. The international community finds itself as far as private persons are concerned still in a rather primitive stage. Again it is arbitration that leads the way. Of course the parallel is not complete, «omnis comparatio claudicat». Parties can at the present day fall back on national courts to decide their disputes arising out of international transactions. This however presents a national solution for international conflicts between parties who belong to different national communities. What they are looking for however is an international tribunal. So far the international community has not been developed yet. International arbitration is called upon to fill the gap.

Against this background the phenomenon of the increasing importance of international commercial arbitration becomes all the more interesting. It might be the forerunner of international Court proceedings available for private persons. It would lead me too far to develop this theory further, but supposing there is something in it the conclusion seems to be justified that the national Judiciaries should take a positive attitude towards developments in the field of international commercial arbitration and help these developments as much as they can. This

conclusion stands even when one does not agree with the possible follow-up by an international Judiciary available to private persons.

In any case the fact remains that for private persons, international arbitration fills a gap for settling their disputes out of their international transactions on an international basis instead of a national one. This fact alone justifies a positive attitude of the Judiciary towards helping the parties to realise this method. For, today, there exists a close relationship between arbitration and the Judiciary.

This becomes immediately clear when one thinks of the enforcement of arbitral awards. Most arbitral awards, whether national or international, are executed voluntarily. However there always remains a small percentage that is not. In the good old days mentioned above, when there did not exist a Judiciary, the only sanction of an arbitral award was the contempt of the local society towards the person who failed voluntarily to abide by an award. This sanction still exists today and even on the international level: think of the black lists used by international trading societies in special commodities.

But today there is more. A party who does not abide by the award can be sued before a Court. This also applies to foreign international arbitral awards. A Court that is asked to help such award to be enforced cannot be expected to this automatically. It will investigate for instance whether the award in itself or the way it has been arrived at would hurt against principles of public order and if so, it will refuse execution. Therefore: A Court will not enforce an arbitral award without a certain control. This subject was dealt with by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York, June 1958.

2. Here I come to my first example of recent developments in international commercial arbitration. It was one of the objects of the New York Convention to limit the control exercised by national Courts when asked to enforce a foreign arbitral award, to certain specific grounds enumerated in the Convention. This control should be limited as far as possible.

In my opinion the results at which the New York Conference arrived in this respect are not unsatisfactory. Art. V of the Convention enumerates seven grounds on which the recognition and enforcement of a foreign arbitral award can be refused; five of these grounds have to be invoked by the party against whom the recognition and enforcement is sought.

On two grounds, including public policy, the Court can act ex officio. Apart from these grounds for refusal each contracting State recognitizes arbitral awards as binding and enforces them in accordance with the rules of procedure of the territory where the award is relied upon and under the conditions laid down in the Convention[1].

The enforcement of an award, properly rendered in an international commercial arbitration, is therefore practically guaranteed in countries where the Convention has been ratified or who later on acceded to the Convention. Today the Convention is already in force in 32 States. The more States may accede to this Convention, the better it is. The International Chamber of Commerce, a great promotor of international commercial arbitration, is right in constantly making propaganda for ratification or accession to this Convention.

3. Another example of recent developments can be found in the Geneva Convention 1961. This Convention is meant to foster arbitration between the countries of Eastern and Western Europe. Originally it was meant to contain in addition provisions on the execution of arbitral awards. However, since the work in New York came to quick and rather unexpected results this part was left out[2]. The object of the Convention is «to promote the development of European trade by, as far as possible, removing certain difficulties that may impede the organisation and operation of international commercial arbitration in relations between physical or legal persons of different European Countries» (preamble). Although the Convention is called a European Convention and has especially in view the East-West arbitration, accession is also open to States outside Europe[3].

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1. I may refer to my article in Volume II of my Handbook on «International Commercial Arbitration» p. 292-327. A list of 30 States in which the Convention is in force as of Jan. 1965 can be found in Volume III p. 258. (Published 1965 by Martinus Nijhoff, The Hague). To this list can now be added Switzerland, and Trinidad and Tobago.

2. See on the Convention the contribution written by Prof. Pointet in Volume III of «International Commercial Arbitration» p. 262-301.

3. The Convention is by now in force in the following States: USSR, Ucraine, Roumania, Yugoslavia, Hungary, Czechoslovakia, Bielorussia, Bulgaria, Poland and in Western Europe: Austria and the Federal Republic of Germany. In 1965 also Upper-Volta and Cuba acceded to the Convention on the basis of Art. X, par. 2, which clause enlarges the possibility of accession to all the members of the United Nations. This European Convention might therefore become a World Convention.

The substance of the Convention can be found in Art. IV. Here a very complicated regulation has been given for the appointment of arbitrators, the determination of the place of arbitration and the rules of procedure to be followed by the arbitrators, in case the parties themselves fail to agree on these points. A Special Committee has been provided for to make the complicated machinery work. This Committee consists of three members, one from Western Europe, one from Eastern Europe and a Chairman who changes every two years, in order to bring East and West on equal terms. The composition of the Special Committee again shows the origin of the Convention: to promote East-West arbitration in the narrow sense of «international commercial arbitration between physical or legal persons of different European countries». One wonders how this will work out in arbitrations in which parties of non-European countries are involved with the accession of Upper-Volta and Cuba this is no longer a theoretical case.

On the other hand some of the Western-European States concluded as early as 1962 an Agreement to exclude the complicated arrangement contained in paragraphs 2-7 of Art. IV. in arbitrations between parties whose habitual residence or seat is to be found in States Parties to the Agreement[4]. This agreement is open to all States members of the Council of Europe, therefore only Western-European States. In this agreement the settlement of difficulties arising with regard to the constitution or functioning of the arbitral tribunal in international commercial arbitration is referred to the «competent authority» without further definition as to which authority (court) will be competent.

In my opinion the results of the Geneva Convention 1961 are not very satisfactory. It is true that, apart from Art. IV, the Convention contains some useful provisions such as the recognition that legal persons of public law have the right to conclude valid arbitration agreements and that foreign nationals may be designated as arbitrators. In this connection I would also mention the provision about the applicable law: parties shall be free to determine the law to be applied by the arbitrators; failing any indication by the parties the arbitrators shall apply the proper law under the rule of conflict that they deem applicable; in both cases

4. Agreement relating to application of the European Convention on International Commercial Arbitration, signed in Paris on December 17, 1962. The Agreement came into force after ratification by Austria and the Federal Republic of Germany.

they shall take account of the terms of the contract and trade usages. This seems a sensible solution for the difficult question of the applicable law.

Some other examples could still be added but the fact remains that with regard to the coke of the Convention, article IV, it cannot be said that a satisfactory solution has been found. I rather doubt whether international trade, without the help of specialized lawyers, will find its way through the intricacies of this regulation. Instead of helping international trade with a simple and efficient solution for the problems that might arise out of an arbitration clause in an international contract, the Convention creates new problems and especially the problem whether the Convention itself is applicable or not. For several reasons therefore the States of Western Europe seem to be rather reluctant to ratify the Convention or accede to it.

4. The same group of experts in Geneva who studied the Convention also worked out a new set of Arbitration Rules for use in East-West trade. Many of the provisions of the Convention can also be dound in the E.C.E. Arbitration Rules that were finalized in 1963[5]. These Rules are optional. It entirely belongs to the parties whether they want to refer to these Rules or not. The Rules contain a model arbitration clause, which recommends parties to agree beforehand on the place of arbitration and on the authority that will intervene for the appointment of arbitrators should the parties not act effectively or fail to agree on the nomination of arbitrators. In that case the Rules indicate what body is to act as appointing authority. When the parties do not agree on the place of arbitration it is the arbitrators who decide.

The procedural part of these E.C.E. — Rules is the result of an extensive comparative study of arbitration rules by the U.N. Secretariat in Geneva[6]. As such they might even serve as a model-set of rules when new arbitral facilities are to be created in the internatiobal field. In my opinion these E.C.E. — Rules do not incur the same objections as the Convention. Their optional character guarantees that they will only apply in case parties expressis verbis refer to them. Their wording is clear and understandable; also, I think, for non-lawyers. Last but not

5. See the study of Peter Benjamin in Volume III of the Handbook on International Commercial Arbitration p. 322-359.

6. See the article about this study by Peter Benjamin in Volume II of the Handbook on International Commercial Arbitration p. 350-397.

least, their provisions constitute — as has been rightly said(1.)—a sort of restatement of arbitral practice. They offer us the condensed wisdom of countries experienced in arbitration.

5. Advantage of these Rules therefore has been taken when, at the beginning of 1966, a conference of government — representatives and experts met again in Bangkok in order to foster international commercial arbitration in the ECAFE — Region and between East and West in the largest sense. Here I come to my next example of recent developments. The Far East shows an increasing interest in the development of international commercial arbitration. Therefore ECAFE (Economic Commission for Asia and the Far East) has put this item on its agenda. A first arbitration conference took place in Bangkok in January 1962; a second one four years later. The results of this second conference have been approved by the 22nd meeting of the Commission in New-Delhi, April 1966. For the moment the Arbitration Centre, set up in Bangkok, is working out, with the assistance of the office of the Legal Affaires of U.N. Headquarters, a set of ECAFE Rules of International Commercial Arbitration, based on the guiding principles adopted by the second arbitration conference just mentioned. These ECAFE-Rules may profit largely from the work done in Geneva when drafting the E.C.E.-Rules.

Difficult problems had to be solved, the same problems we always encounter when drafting Rules for international trade arbitration: the problem of the appointment of arbitrators and the problem of the choice of the place of arbitration. It would lead me too far to go into details about both, especially as the ECAFE-Rules are not yet ready. I would like to make an exception regarding the place of arbitration.

Today, most arbitrations in trade with the Far East take place in the Western world, where old established arbitration institutes can be found and arbitration experience is concentrated. Even then the arbitration takes place in the Western world (e.g. in London) when for all practical reasons the arbitration could best be held in the East. This is understandable as long as the East cannot offer equivalent arbitration facilities, such as a good set of Rules and qualified arbitrators. However, the moment an alternative has been created, the choice of the place of arbitration can be made on objective grounds such as the convenience of the parties, the location of the goods and relevant documents, the availability of witnesses, surveys and of preinvestigation reports, the recognition and enforcement of the arbitration agreement and award,

and the advantage, if any, of the arbitration being held in the country of the respondent. These criteria will be found in the ECAFE-Rules in the making.

Of course a good set of Rules never suffices. The quality of the arbitration depends on the quality of the arbitrators. One of the most important tasks of the new Bangkok Arbitration Centre therefore will be the composition of a List of qualified persons from which arbitrators can be chosen. A difficult and very delicate task, which however does not seem impossible to fulfil. The moment this List has been composed and a good set of Rules is available, the division of arbitrations between the Eastern and Western world can take place on practical and objective grounds. This is long term policy, but I am convinced that in the end international commercial arbitration can only gain by bringing the East on an equal footing with the West also where arbitration facilities are concerned.

6. This is still not the end of my summary of recent developments. A well known feature of our post World War II age is the growing importance of investments made in countries in the cause of economic development. Here again the need was felt for arbitration as a means of settlement of disputes arising out of these relationships. This brought the World Bank (International Bank for Reconstruction and Development) to a new set-up provided for in the Convention on the Sttlement of Investment Disputes between States and Nationals of other States, approved by the Executive Directors of the Bank on March 18, 1965[7].

Here a complete new machinery, including a Centre with an Administrative Council, a Secretariat headed by a Secretary-General, and a Panel of Arbitrators (and Conciliators) has been created in order to settle disputes between private foreign investors and States in which investments are made. The jurisdiction of the Centre extends any legal dispute, arising directly out of an investment which the parties to the dispute consent in writing to submit to the Centre.

In this connection it should be mentioned that as early as 1962 the Permanent Court of Arbitration, seated in the Peace Palace, issued rules of arbitration (and conciliation) for settlement of international disputes

7. As of April 1, 1966 this Convention had been signed by 33 States, members of the World Bank and ratified by 4 (Nigeria, Mali, Ivory Coast, Central African Republic). The Convention will come into force after ratification by twenty States.

between two parties of which only one is a State. Similar facilities, although not the same, will therefore also be found in the Hague.

7. This survey of recent developments in international commercial arbitration is certainly not complete. I did not mention the development of actual arbitration practice exercised by already existing arbitral bodies like the International Chamber of Commerce nor the new arbitration facilities created by Chambers of Commerce and international trade organizations all over the world. It could be the subject of another study to investigate the actual growth of international commercial arbitration. I confined my study to new international agreements. Taking the same period for a research of actual arbitration practice I should not be surprised if the outcome would show a considerable increase of international commercial arbitration practice. This brings us back to the question with which I started this article: The reasons for this trend, of which the treaties I mentioned in paragraphs 2-6 are already an indication.

8. The lack of international Court-proceedings, available for private persons might be one explanation. As in the early days in the national field so parties create their own judicial machinery on an international scale. Instead of falling back on national judges they choose their own judges for the settlement of disputes arising out of international trade. International arbitrators act as international judges.

In these international judges of their own choice parties put their confidence. They also put their confidence in Rules of procedure drafted directly (ad hoc in their arbitration agreement) or indirectly (when reference is made to Rules of existing arbitral institutes) by the parties themselves. These Arbitration Rules, that guide arbitrators when arriving at their decision, have much in common. In theory they could differ greatly as they are to a great extent left to the discretion of the parties. In practice however they show a great similarity. Harmonisation of Arbitration Rules, although not officially organized, takes place in fact. The result is an international judicial machinery, based on the free will of the parties, with which international trade can feel itself at home and in the outcome of which it has more confidence than when submitting itself to the intricacies of national court proceedings.

Last but not least, international arbitrators have more freedom to arrive at equitable solutions than do national judges. Here we come to the difficult question of the applicable law. What international trade is looking for are decisions based on the contract, international trade

usages and principles common to the law of civilised nations. All those, engaged in drafting international contracts, know how difficult it is to make parties agree on a specific national law to which their contract should be submitted. International trade is not thinking in national terms, but on international lines. International arbitration seems more qualified to develop such a new lex mercatorum, international in essence, than national judges are. I cannot develop this suggestion further in this context but have to limit myself to the statement that international commercial arbitration may be attractive in addition from this point of view.

In concluding I think that international commercial arbitration is in full development. It offers a fascinating working-field for all members of the legal profession interested in the promotion of international justice.