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Past, Present, and Future Perspectives of Arbitration

by KARL-HEINZ BÖCKSTIEGEL*

ABSTRACT

This publication of the Patron's Address at the CIArb's Kuala Lumpur Conference presents selective thoughts on the development and role of arbitration in the past, today and its future perspective, primarily from the view of an arbitrator and from the background of experience the author has and has had in various functions in national and international legal and arbitration institutions. It starts by looking at past developments that were the basis for the present situation. Regarding the situation today, it deals in separate chapters with dispute settlement in general, commercial arbitration, politically sensitive disputes, investment arbitration, globalisation of arbitration, relevance of international law in commercial arbitration, arbitral procedure, promotion of amicable settlements, and the use of electronic media in arbitration. In a last chapter, it presents future perspectives particularly regarding a continuing expansion of arbitration, its subject matters and participating parties, its use for politically sensitive disputes, and the growing harmonisation between national arbitration laws and practices. Finally, it addresses the role of arbitrators in the process and the specific rising role and organisation of young arbitration practitioners.

I. INTRODUCTORY NOTE

WITHIN THE limited space available here, this article cannot and does not claim to deal with the entire volume of developments of arbitration both at the national and international level. Rather, it tries to present a few selective thoughts

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on the development and role of arbitration in the past, today and its future perspective, primarily from the view of an arbitrator and from the background of experience I have and have had in various functions in national and international legal and arbitration institutions.

II. WHERE DO WE COME FROM?

If one wants to understand fully the present role of arbitration, one will have to start by looking at past developments that were the basis for the present situation. This is a truism, though, at any point in time, to the observer and even more to the practitioner, the present circumstances, issues, problems and developments will look specific and unique. Most of the time, they are not and, at least, can be better understood if one looks at the developments leading to them.

Therefore, it may be at least briefly recalled that the origins of arbitration go back to dispute settlement usages in ancient times, in Europe, in Greece and Rome, including Roman law, and in Asia. In Europe, the Middle Ages revived the Roman tradition and, some centuries later, the French Revolution considered arbitration as a *droit naturel* and the Constitution of 1791 (article 86) and the Constitution of Year III (article 210) proclaimed the constitutional right of citizens to resort to arbitration.

Parallel thereto, England already had an Arbitration Act of 1697, to which a number of enactments were added over the years up to the 'new' Arbitration Act 1889, which continued to dominate arbitration law in England into the early part of the last century. During that last century, many substantive changes were then made by the new Arbitration Acts of 1934, 1950, 1975 and 1979, until we now have a modern arbitration law with the new English Arbitration Act 1996.

On the European continent, during the same period, though many countries developed their own arbitration laws with a number of diverging characteristics, particularly stressing either the procedural or the contractual aspect of arbitration, ways have always been found to provide for a binding submission to arbitration for future contractual disputes. And, as is well known, by now, all legislators in the major European countries have reacted to the demands of the modern international business community for efficient specific dispute settlement systems by enacting new legislation, starting from the French legislation in the early 1980s and continuing more recently with the adoption of the UNCITRAL Model Law in Germany, effective from the beginning of 1998, and in many other countries throughout the world, including Malaysia in 2005.

Though I am aware that arbitration has a long tradition in Asia as well, I must admit that I am not very familiar with the historical development of arbitration in this part of the world. But I would be very interested to learn more in this regard.

Parallel to these developments at the national level, inter-state conventions on arbitration have provided progress at the international level. Earlier in the last century, the Geneva Protocol of 1923 and the Geneva Convention of 1927 were the first steps. The quantum leap, however, was provided by the New York Convention of 1958 which has now been ratified by all relevant states throughout the world,

with very few exceptions. And a further landmark was the UNCITRAL Model Law on Arbitration which is accepted by more and more countries throughout the world.

Even this extremely short outline shows that the practical demands of trade, and particularly international trade, throughout history, have led to the creation of arbitration machineries and respective legal frameworks and their continuous updating. Thus, when looking at the situation today, from a historic perspective, there is nothing special about the mere further development of international arbitration. All that is special are the present and future circumstances provided by society and law, and particularly business practice and technology, leading to the demands which will decide how arbitration has been shaped today and what future developments will occur.

III. WHERE IS ARBITRATION TODAY?

Now, turning first to international dispute settlement in general at the present time, we have to realise that it provides more options and is used in practice more than ever before in history for the peaceful solution of disputes. The role of the International Court of Justice today is of much more significance than earlier. Even for the most politically sensitive disputes, it has been possible to form and use specific judicial bodies, as I have experienced in my function as president of the Iran–United States Claims Tribunal at The Hague. Not every such judicial body finds a general support from all major states, as the example of the International Criminal Court shows, which the present administration of the United States does not accept. But in many important fields of international law, there is wide acceptance by all relevant states. The World Trade Organization's dispute settlement machinery is widely used. And for international investment, most of the by now more than 2,400 bilateral investment treaties (BITs) provide for arbitration between the host state and foreign investors which is used in a growing number of cases administered either by ICSID of the World Bank or other mechanisms.

At the non-governmental international level, commercial arbitration, such as of the ICC and the LCIA, has become the generally accepted method of dispute settlement between private enterprises and for international government contracts, including a world-wide enforcement of arbitral awards by the New York Convention of 1958.

At the regional level, the European Union has a fully available court system for the vast body of European law from the European Court of Justice in Luxemburg. The European Human Rights Convention offers legal protection to Europeans against their own and foreign states through its separate court in Strasbourg. In Asia, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has been available for a long time. And on the American continent, NAFTA provides a widely used arbitration system for the protection of investors in North America, and for Central America, CAFTA has provided a similar arbitration machinery since 2007, which is being used for the first time in a case just starting which I have been asked to chair.

Also, some arbitration institutions formed at the national level play an important role not only for domestic, but also for international disputes. Examples are the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Singapore International Arbitration Centre (SIAC) and the Korean Commercial Arbitration Board in Asia, as well as, in Europe, the national arbitration institutions in Austria, Germany, Sweden and Switzerland, and in the United States, the American Arbitration Association.

It must also be noted that judicial adjudication has even been used much more than before to deal with highly politically sensitive disputes. Let me shortly mention two examples with which I have become familiar as an arbitrator:

The first is the Iran–United States Claims Tribunal at The Hague formed after the Iranian Revolution of 1979 by instruments of public international law (the so-called Algiers Accords) to decide all disputes between the two states and their citizens. The Tribunal, in its almost 4,000 cases, using the UNCITRAL Arbitration Rules with some alterations, has issued a large body of decisions and awards. They are of interest not only, because (in contrast to most arbitrations) they are all published, but also because they deal with most procedural problems occurring in international arbitration and with a great many substantive questions relevant in other and later international arbitrations, and particularly modern investment disputes. As some of you will know, the Tribunal was not an easy institution to work in or even to lead. The fundamental political as well as cultural differences between the two states and between many of the persons involved presented a continuous challenge. Nothing could be taken for granted. As President of the Tribunal, my guideline was: 'Try hard to achieve the best, but be prepared for the worst'. And indeed, procedurally, not seldom the worst case scenario did occur. Looking back, it is still astonishing that in spite of the many opposing political and economic interests and rather frequent confrontations at the Tribunal, we succeeded in processing and deciding several thousand cases in an orderly manner.

My second example is the United Nations Compensation Commission (UNCC) which was formed after the first Iraq War, following Iraq's invasion of Kuwait, to deal with foreign claims against Iraq, under the supervision of the United Nations Security Council. Again, the UNCITRAL Rules served as guidance, though the procedure had a number of specific characteristics normally not used in arbitration. Enforcement of awards running into billions of US dollars was available from the large funds coming from a portion of the income Iraq had from the oil sales permitted by the United Nations under the so-called Oil for Food Program. From my experience as panel chairman of the UNCC, it seemed to me that the adjudication worked rather well in spite of the obvious political sensitivity of the disputes and the millions of claims, such as those by Egyptian workers, for which computer programs had to be developed (which were later helpful in other mass claim adjudications).

Furthermore, in this context of politically sensitive arbitrations, one may mention the inter-state cases after the hostilities between Eritrea and Yemen, as

well as between Eritrea and Ethiopia; the 'TABA' case between Israel and Egypt; the 'Rann of Kutch' case between India and Pakistan; and the 'Beagle Channel' case between Argentina and Chile.

Inter-state adjudication and arbitration cases often, in substance, dealt with interests and rights of nationals of one of the two states rather than of the state itself. However, since traditionally only states were recognised as subjects of international law and, in particular, had standing to sue another state in international proceedings, the private persons involved could not be procedural parties themselves, and their home state, by means of the traditional concept of diplomatic protection, had to sue the other state.

An early exception were certain concession contracts which provided mostly for ad hoc arbitration in which the private company receiving the concession, in return for its investment, was granted the right to begin arbitral proceedings directly against the granting state. This led to well-known arbitration cases such as *ARAMCO*, *AMINOIL*, and the like.

Similarly, even without a concession, if states, state institutions and state enterprises concluded commercial contracts with foreign private companies on subjects such as infrastructure or construction projects, they often accepted arbitration clauses referring to commercial arbitration. In fact, over many years, up to 10 per cent of all ICC arbitrations involve such state parties.

However, a fundamental change came with the rise of investment arbitration under modern BITs, which regularly include arbitration provisions, and by the ICSID Convention created by the World Bank providing a special arbitration system for investment disputes. Together with the enormous growth of foreign investment activities in today's globalised world economy, they led to today's great and still growing number of investment arbitration cases.

Specific arbitration rules have been provided for investment disputes by ICSID, NAFTA, CAFTA and the new Energy Charter Treaty. But the traditional systems created for commercial arbitration between private enterprises, such as those of the ICC, the LCIA, the Stockholm Chamber of Commerce and the UNCITRAL Rules, are also frequently used for investment cases. As a matter of fact, in view of some criticism of the ICSID and NAFTA systems, it seems to me that there is a recent trend to turn more often to the traditional commercial arbitration systems. Particularly, the UNCITRAL Arbitration Rules seem to profit from this development. In this context, it is noteworthy that most recently, in the so-called 'Softwood Lumber' cases between the governments of Canada and the United States (of which I chair the first one), the LCIA was chosen to administer the dispute under its arbitration rules.

Thus, in spite of the many differences that investment disputes show regarding the disputing parties and the applicable law, it would seem that the arbitration procedures are not that different to what we are used to in traditional commercial arbitration. One important difference, however, should be noted: while commercial arbitration is still generally confidential, in investment arbitration there is a strong trend for more transparency. This not only leads to publication of more awards. As I know from my 'Softwood Lumber' case and my

NAFTA and CAFTA cases, the procedures provide, or the parties have agreed, that all major submissions of the parties and decisions of the tribunal are made available to the public via the Internet, and hearings are open to the public as well.

But for most aspects of procedure, commercial arbitration and investment arbitration have much in common. Regarding the procedure used in practice, of course, one relies primarily on the rules provided by the arbitral institutions. However, if we look more closely at these rules, we see many similarities and often identical solutions. This is the result of the modernisation of almost all relevant arbitration rules in recent years, trying to take into account the experience and demands of arbitration practice. Additional instruments such as the IBA Evidence Rules, the IBA Conflict of Interest Guidelines, and the UNCITRAL Notes on arbitral procedure, also contribute to a global harmonisation. And finally, as most rules leave a wide margin of discretion to the arbitral tribunal to shape the procedure as it considers best fit for the case at hand, one finds that this discretion is used very similarly in practice regarding such frequent and important issues as case management in general, and in particular interim measures, relying on a full written procedure, including written statements by witnesses and experts, a limited disclosure of documents, shortened oral hearings focussing on cross- and re-direct examination and additional questions by the arbitrators, and finally post-hearing briefs. All this results in a global harmonisation of arbitral procedures, at least in international commercial and investment cases.

In this context, the use of electronic media in arbitration procedures has grown considerably. This can go far beyond the by now general use of email communications and the submission of documents on CDs or USB-sticks in arbitration. Arbitral institutions held a number of meetings and have tried to create options for their most efficient use, for example WIPO for a number of years and, more recently, the ICC through its NetCase system. The recent efforts to demonstrate these options have shown their limitations. Actually hearing and seeing a witness in cross-examination will remain important and, very often, even testimony by video-conference may not be sufficient or of equal value for that purpose.

While arbitration has thus in many ways become an important feature in international relations and in the framework and enforcement of international law (and vice versa), international law has become more relevant in many ways for and in commercial arbitration. The most obvious relevance in our context comes from instruments of public international law which directly deal with or provide for international commercial arbitration. This category includes the well-known Conventions on commercial arbitration, and similar instruments such as the various Geneva instruments, and particularly the New York Convention, as well as the treaties I have mentioned providing for investment arbitration. Another kind of relevance in the context of our topic can be seen where subjects of public international law provide arbitration services. Examples are the arbitration centres of WIPO, Regional Centres of the United Nations such as those in Cairo and Kuala Lumpur, and of the US States. Another kind of service

is provided, on the one hand, by UNCITRAL through its well-known instruments such as the Arbitration Rules and the Model Law which have a wide impact throughout the world, and on the other hand, by UNIDROIT by its various instruments. Furthermore, in past and present practice, subjects of public international law have been and are parties in many cases of international commercial arbitration. In most of these cases, states as well as their bodies, institutions or enterprises are involved. In this context, many issues of international law arise.

Finally, while in most cases a national law will be the applicable law in commercial arbitration, in quite a number of ways, principles of public international law can become applicable as part of the substantive law in international arbitration. First, there used to be and still are, sometimes, certain contracts such as concession contracts or so-called economic development agreements which contain a choice of law clause expressly selecting public international law, or at least the General Principles of Law which are part of it according to Article 38 of the ICJ Statute. Then there are references to public international law in the rules of certain institutions, such as Article 42 of the ICSID Convention. But even without such express authorisations, certain parts of public international law may be considered relevant as part of the applicable substantive law, particularly if states are involved as parties. Nowadays, this may particularly be true for the Convention on the Law of Treaties, mandatory decisions of the UN Security Council such as those establishing foreign trade embargoes, the European Human Rights Convention, and the competition and antitrust law of the European Union. Furthermore, the General Principles of Law or certain principles of international customary law may be applied, such as those on state responsibility elaborated by the International Law Commission, or those supplying guidance of what can be considered international public policy. Finally, it may be argued that certain obligations of private law contracts are transformed into obligations under public international law either by umbrella clauses in BITs, or as being covered by the property protection provisions in BITs or in customary international law.

Presently, there is still a great variety throughout the world, both in practice and in law, regarding the role arbitrators may play in the promotion of amicable settlements between the parties. In countries such as China, Germany and Japan, at least in domestic arbitrations, there is an expectation by the parties and their lawyers that the arbitrators, at some stage in the procedure, and in consultation with the parties, will try to promote an amicable settlement and suggest solutions for such settlement. In these countries, this is permitted by law and leads to a majority of domestic arbitration cases ending in such amicable settlement, often then put into the form of an Award on Agreed Terms. In many other countries, such a role of the arbitrators is either not permitted by law or at least not performed in practice. But discussions at international meetings have shown that companies and in-house counsel would often like to have such an option available, because an amicable settlement provides a better basis for future business relations between the parties.

IV. WHAT MAY WE EXPECT?

First of all, with the continuing expansion of international trade and investment, the number of arbitration cases in general will also increase.

Regarding the subject matter of arbitration, as they have in the past, so in the future changes in technology and changes in international trade and investment will lead to corresponding changes in international contract practice which, in turn, will be reflected in changes regarding the subjects of international arbitration. Compared to the traditional areas using arbitration, new kinds of contracts in fields such as telecommunication, the transfer of technology, genetic engineering, electronic commerce, entertainment and sports, including sponsorship, will present their specific demands to dispute settlement and probably take a relatively greater share of arbitration cases. And, in a globalised economy, the growing relevance of intellectual property has not only led the World Intellectual Property Organization (WIPO) to create a highly sophisticated dispute settlement machinery with many creative ideas possibly relevant for other fields of business, but will lead to new kinds and new numbers of international disputes, as is already illustrated by the many domain name disputes. Also, the growing commercialisation of sports may lead to new arbitration bodies such as the Court of Arbitration for Sports (CAS), in which either sport federations or individual athletes appear as parties.

Parallel to this development of international commercial arbitration, one may have to take into account that, starting in the later part of the last century, arbitral procedures have been used for the peaceful settlement of politically highly sensitive disputes. Though I would not expect arbitration to be the settlement solution in situations of political turmoil or military disputes, as a perspective for the new century, it is comforting to see that at least in some politically sensitive international disputes, arbitral procedures have provided the basis for the peaceful settlement of international conflicts.

Regarding the disputing parties, private companies will, no doubt, continue to represent the greatest number of parties in international arbitration, as they are the most numerous and significant players in international trade. However, as in history and particularly in the last century, states, state institutions and state enterprises, as well as international governmental organisations, can be expected to participate in many ways and by many contracts in international trade and even more in the field of international investment, and consequently in arbitration proceedings.

Domestic arbitration does not exist in a vacuum, but is subject to and influenced by its national political, economic and legal environment, as well as the practice of state courts and the usages of the national business community. For the different regions of the world, cultural differences will continue to play a role regarding the settlement of disputes. For the Asian region, where previously mediation and conciliation were primarily used to solve disputes, a study of the Asian Development Bank[1] confirmed that, as markets expand beyond the national frontiers,

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1 *See* report by M.C.W. Pinto in Aksen, Böckstiegel, Mustill, Patocchi, Whitesell (eds), *Liber Amicorum Robert Briner*, ICC Publishing, 2005, p. 640 *et seq.*

informal dispute settlement mechanisms become less reliable and formal institutions and procedures with powers of decision and enforcement more important. On the other hand, the Asian tradition may have an impact on arbitration in other parts of the world in promoting arbitral procedures in which an amicable settlement is proactively sought with the consent of the parties.

V. CONCLUDING REMARK

In conclusion, first of all, I would expect a *growing harmonisation* between national arbitration laws. National legislators will continue to be pushed by their own constituencies, particularly their business communities, to adapt their respective legal frameworks to the demands of international business practice for efficient dispute settlement machineries. This, and also the many similarities between the other modern national arbitration laws even if they do not follow the Model Law, has already led and will continue to lead to a harmonisation of national arbitration law to an even greater extent in the future.

My next prediction, though it may sound strange, is that international arbitration will become *more international*. With the growing number of international arbitration cases and the growing number of lawyers and arbitrators involved in international arbitration, I would expect them to become less dependent on their specific national particularities and more open and flexible to the specific needs of disputes in the international context.

In a more and more globalised economy and contract practice, regional differences will become less important. A *globalisation of arbitration* can also be noted as parties seem less and less to take the traditional approach of selecting arbitrators from their own legal background, but rather select arbitrators from any region of the world whom they consider best equipped for the particular case.

Finally, the often repeated truism that arbitration can only be as good as its *arbitrators* will also be valid in the future. In view of the fast growing numbers of cases, it may become increasingly difficult to find the best possible arbitrators for each individual case. On the other hand, this growing number of arbitration cases will produce a growing number of lawyers experiencing international arbitration as counsel and a growing number of persons having some experience of the function of arbitrator. However, both in national arbitration, and even more so in international arbitration, it is not sufficient merely to select a good lawyer or a good jurist or a good engineer. If one wants to ensure the specific advantages of arbitration and ensure that the particular arbitration procedure does not become the practice ground for a new arbitrator to the detriment of the interests of the parties, acquaintance with and experience in the particular demands of arbitration, and particularly international arbitration, will continue to be indispensable.

In this context, the educational efforts and programmes now available throughout the world at universities, moot competitions, and institutions such as the Chartered Institute of Arbitrators, will have to play a major role in this context in providing

education to the beginners and a forum for exchange of experience for those already active in arbitration.

In addition, the many groups of young arbitration practitioners who, starting at the LCIA years ago, have constituted themselves in cooperation with important national and international arbitral institutions, provide important fora for meetings and exchange of information and experience. As an illustration from my personal experience, I would point out that the group of young arbitration practitioners created under the name 'DIS-40' (to indicate the age limit for membership) in cooperation with the German Institution of Arbitration (DIS) now has more than 750 members and meets several times a year, both at the national and regional level. It may be permitted for someone from among the 'old' arbitration teachers and practitioners to say that, seeing the intensity and high level of these exchanges in Germany and elsewhere between these 'young' arbitration practitioners seems to provide an assurance that the further development of arbitration is in good hands.