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Charles N. Brower
University of Virginia Law School

THE GLOBAL COURT: THE INTERNATIONALIZATION OF COMMERCIAL ADJUDICATION AND ARBITRATION

Charles N. Brower*

I begin with first principles: The story of the twentieth century is that of the dilution, the dissipation, and, in some areas, the virtual disappearance of state power. Due in varying parts to the advance of technology, principally communications technology, to pervasive abuses of state power, and to various tendencies to anarchy, this shift in the locus of authority arises in significant part from a widespread popular realization that the collective public responsibility of the state cannot successfully substitute on a broad basis for individual responsibility privately exercised.

To be sure, there are exceptions. Notably in Europe, the authority of states has given way in important measure, not to the private sector, but instead to the supranational sway of European political institutions wielding public authority. By and large, however, privatization abounds: Formerly nationally-owned entities, including even gas and electricity providers as well as airlines, become privately owned; army cooks frequently no longer are military personnel, but instead are contracted from industrial food service suppliers; even jails are operated by profit-seeking entrepreneurs.

Behind all of this there stands, nonetheless, and there must remain, however residually, the ultimate behavior-enforcing authority of the state. The "private versus public" debate always has been over the relative allocation of authority between the two; the complete elimination of state regulatory prerogatives would be at least as disastrous as was the attempted eradication of private property in the late, unlamented socialist economies. But — and this is the nub of it — the relative reduction in the role of states today necessarily means also internationalization, or globalization.

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* President, American Society of International Law; Partner, White & Case, Washington, D.C. B.A., 1957, Harvard University; J.D., 1961, Harvard University. This is a revised version of a paper presented by the author at The George Washington University International Law Forum in Potsdam, Germany on June 7, 1997.

Nowhere is this more evident than in the means by which legal disputes involving international commerce and foreign investment increasingly are adjudicated outside of any national system of courts, even where they directly involve states as parties. I am speaking, of course, of the growth in private international arbitration of such disputes that formerly were heard in national courts. Specifically, I refer to that system whereby parties of different nationalities agree to mandatory and binding arbitration of disputes that may arise, or have arisen, between them, pursuant to a particular set of arbitration rules, usually before a panel composed of three independent and impartial persons of different nationalities, who also come from disparate legal traditions and whom the parties themselves have selected.

The growth of such privatized adjudication has been nothing less than explosive. For many years the International Chamber of Commerce International Court of Arbitration, established in Paris in 1923, held the field alone; it was the only serious player. It took fifty-three years for it to receive its first 3,000 cases; the next 3,000, however, came in just eleven years.[1] In more recent times other institutions have sprung up alongside it like wild flowers proliferating in a summer meadow: The London Court of International Arbitration and the Hong Kong International Arbitration Centre, for example, as well as various other regional, national, provincial, and even sector counterparts. In 1976 the United Nations General Assembly itself entered the field with its promulgation of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The founding of the International Federation of Commercial Arbitration Institutions in 1985 with seventy charter members itself confirmed this growth; its expansion subsequently to embrace ninety members has reconfirmed it. All of these systems are available to disputants worldwide, and, despite the differences in them, are fundamentally the same.

As already suggested, this growth in private adjudication is matched stride for stride, indeed it is made possible by the concomitant convergence of relevant national laws and the elaboration of facilitative international agreements, resulting in the internationalization of adjudicated commercial dispute resolution.

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1. *See* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 4 (ICC Publ'g 1990).

Any arbitration necessarily is subject to the national law of the state in which it takes place. Statutes in major industrial jurisdictions have been modernized so as to minimize state intervention in the arbitral process itself, while offering judicial review to the extent necessary to ensure the integrity of the process by which the arbitral tribunal arrived at its award. To the same end UNCITRAL in 1985 fashioned a Model Law on International Commercial Arbitration designed to provide an "off the shelf" statute for adoption by less sophisticated jurisdictions and to encourage greater convergence, if not uniformity, on the part of others. It has been adopted, albeit with variations, in a considerable number of jurisdictions.

At the same time, the international community has adopted a series of conventions and treaties ensuring mutual and uniform enforcement of agreements to arbitrate, and also of the resulting awards, of which the New York Convention of 1958 is the most prominent. In 1965 the World Bank went so far as to establish, pursuant to convention, the International Centre for Settlement of Investment Disputes (ICSID), and with it, a completely self-contained regime for deciding investment disputes. So effective are these systems that today an international arbitral award is worth far more than a judgment of a national court abroad; the former is subject to comparatively automatic enforcement, whereas the latter must be made the subject of a plenary suit.

This three-tiered and essentially global system, consisting of private adjudication under agreed rules, supported by only the most limited national regulation necessary to ensure its integrity, and an international exercise of state power to the extent required to guarantee enforcement of the results, is based on the parties' reciprocal mistrust of state power. This mistrust takes a special form, however. It is not mistrust of state power per se; rather it is the lack of faith on the part of each party that the courts of the other party's state of nationality in fact will administer justice fairly and impartially. In short, neither party wishes to be judged in the other's "backyard." In addition, relative detachment of the process from state power facilitates a degree of internationalization, and consequent uniformity, which has its own merits for international commerce, but which otherwise would be unattainable.

This trend goes much deeper, however, than the adjudicatory process itself; it goes also to the heart of the matter, the applicable substantive law. Just as trading partners who are foreign to each other eschew each other's courts, so, too, do they prefer not to be

judged by each other's national legal norms. This concern is highest, of course, where one of the parties is itself a state or a peristaltic enterprise. In such circumstances the parties, with increasing frequency, will concoct for themselves a jurisprudential corpus that either is divorced from any national system of law or combines a relevant national legal system with another body of law to supplement or modify it and which any national court system would have considerable difficulty to apply. For example, under the 1955 Libyan Petroleum Law, the law applicable to oil concession agreements in that country (some of which still are in effect), it is provided that the applicable law is "the law[] of Libya and such rules and principles of international law as may be relevant but only to the extent that such rules and principles are not inconsistent with and do not conflict with the laws of Libya."[2] Another example is Article 42(1) of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which provides that in the absence of any other agreement on the matter "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[3] Another favorite source is the *lex mercatoria*, a concept reflected, inter alia, in Article 13(5) of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, providing that "[i]n all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages." In 1994 the International Institute for the Unification of Private Law (UNIDROIT) promulgated Principles of International Commercial Contracts,[4] a compendium of principles derived from both the civil law and common law traditions, which a 1997 report of UNIDROIT on their implementation confirms now are frequently adopted by name as the governing law in contracts. Finally, Article V of the Claims Settlement Declaration between the Islamic Republic of Iran and the United States of America establishing the Iran-United States Claims Tribunal, which has adjudicated hundreds of commercial claims of American businesses and individuals against Iranian entities, provides as follows:

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2. Robert B. Von Mehren & P. Nicholas Kourides, *International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 477, 482 n.22 (1981).
3. Convention on the Settlement of Investment Disputes Between States and Other States, Mar. 18, 1965, 575 U.N.T.S. 159.
4. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994).

> The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.[5]

The fact that this "global court" works, and works well, is proven by its consistent triumph over adversity. Numerous arbitrations against foreign parties, including pariah governments such as, in recent years, Libya, have proceeded to a conclusion, with payment being achieved, notwithstanding the most determined efforts of some defendants to disrupt, or even to abort, the proceedings. Tactics to this end have included failure to appoint an arbitrator, or appointment of a patently biased arbitrator; refusal to appear, or alternating sporadic appearances with demonstrative "walkouts" and other intentional absences; unwarranted objections to jurisdiction; unjustified challenges to the service of particular arbitrators, or even attempts to intimidate them; and all manner of lesser forms of abuse of the process. In one famous case at the Iran-United States Claims Tribunal two Iranian judges even assaulted an elderly Swedish colleague. In the end, none of these tactics succeeds, however, because all modern sets of arbitral rules provide the means for demolishing or overlooking such obstacles and are backed, as noted a moment ago, by indispensable attachment to state power.

In conclusion, let me say that based on my by now rather considerable experience in this "global court," as counsel both for private parties and for states, for defendants as well as claimants, and as arbitrator and judge, I firmly believe that by and large the results that it achieves are as just as are those experienced in the preferred national court systems of highly developed jurisdictions. Moreover, for those privileged to participate in its proceedings it is indeed highly enjoyable and rewarding.

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5. *See* DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA CONCERNING THE SETTLEMENT OF CLAIMS BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (Jan. 19, 1981), *reprinted in* 1 Iran-U.S. C.T.R. 9-12.