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INTERNATIONAL ARBITRATION IN THE POSTWAR WORLD

KENNETH S. CARLSTON*

Arbitration is distinctly not a judicial process under our system of law. Arbitration contracts rely upon statute law for their enforceability,¹ arbitrators do not sit as judges of the law,² and arbitral awards depend upon the courts for their enforceability.³ The losing party in an arbitration has an imposing array of legal weapons upon which he may rely to justify a failure to carry out the award.⁴ Though the process of arbitration has proved its usefulness, the source of its strength has been in the efficiency of its functioning rather than in its legal quality. Indeed, its extra-judicial character is considered to be a vital source of its strength.⁵

Yet the process of arbitration was at one time considered to have judicial quality. Samuel Johnson, in his famed *Dictionary*, defines "arbitration" as "the determination of a cause by a *judge* mutually agreed on by the parties." "To arbitrate" is "to decide" or "to *judge* of" or "to give *judgment*." An arbitrator" is "an extraordinary *judge* between party and party, chosen by their mutual consent."⁶ Webster, in 1841, finds that "to arbitrate" means "to decide" or "to *judge* of."⁷ Today Webster defines "arbitration" as "the hearing and determination of a cause between parties in controversy by a *person* or *persons* chosen by the parties, or appointed under statutory authority, *instead of by a judicial tribunal provided by law*."⁸ And Bouvier today defines "arbitration" as "the investigation and determination of a matter or matters of difference between contending

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1. The rule of revocability of arbitration agreements appears to stem from Lord Coke's decision in *Vynior's Case*, 8 Co. 81b (1609).

2. *Byrd v. Odem*, 9 Ala. 755, 766 (1846); *White Mountains R. R. v. Beane*, 39 N. H. 107, 108 (1859) ("their award will not be set aside, however different the decision upon the law may be from the opinions entertained by the court").

3. STURGES, COMMERCIAL ARBITRATIONS AND AWARDS 674-681 (1930).

4. *E.g.*, nearly two printed pages of items appear under the title "Causes to Impeach Awards" in the Index to STURGES, *id.* at 1040-1041.

5. KELLOR, ARBITRATION IN ACTION 4 (1941).

6. JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768), italics supplied.

7. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 94 (1st ed. 1841), italics supplied.

8. WEBSTER, INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 138 (2d ed. 1939).

parties, by one or more *unofficial* persons, chosen by the parties, and called arbitrators, or referees."⁹

International arbitration, however, in the words of John Bassett Moore, is "*judicial*," its object is "to displace war between nations as a means of obtaining redress, by the *judgments* of international *judicial* tribunals."¹⁰ The writer has elsewhere endeavored to demonstrate that "international arbitration is a *judicial* process, involving the settlement of disputes between States by tribunals acting as courts of law."¹¹

It is this judicial quality of the international tribunal that is one of the greatest sources of its strength. Law governs its creation, its functioning and the binding force of its judgments. A creature of contract, and thus responsive to the will of the parties, it still remains a court of law and subject to judicial standards.

Unlike a domestic arbitration agreement,¹² an arbitration treaty may not, under international law, be revoked by the unilateral act of one of the parties.¹³ Unlike a domestic arbitration tribunal,¹⁴ an international tribunal has plenary power to determine its own jurisdiction subject to no superior judicial body;¹⁵ though its decisions outside the scope of its jurisdiction are without legal effect and are not binding on the parties.¹⁶ A party's participation in a domestic arbitration proceeding, even if continued until the rendering of the award, will not preclude it from thereafter contesting the validity of the submission agreement.¹⁷ Not so in an international

9. 1 BOUVIER, LAW DICTIONARY 225 (8th ed. 1914).

10. 7 MOORE, DIGEST OF INTERNATIONAL LAW § 1069 (1906), italics supplied.

11. CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION vi, (1946), italics supplied.

12. "The common law cases in both courts of law and courts of equity are nearly uniform in holding that agreements of submission, like agreements to arbitrate future disputes, are revocable." STURGES, *op. cit. supra* note 3 at 237-238; however, under numerous state statutes and the U. S. Arbitration Act, 9 U. S. C. § 2 (1940), no unilateral revocation of the arbitration agreement is allowed.

13. 1 OPPENHEIM, INTERNATIONAL LAW 745 (4th ed. 1928).

14. It is for the courts to determine whether arbitrators confine themselves in their award to the scope of the submission. *Squires v. Anderson*, 54 Mo. 193, 197 (1873); *Boston Water Power Co. v. Gray*, 47 Mass. (6 Metc.) 131 (1843).

15. Advisory Opinion No. 16 (August 28, 1928), PERMANENT COURT OF INTERNATIONAL JUSTICE, SER. B, 20; 7 MOORE, *op. cit. supra* note 10 at 33-35.

16. HALL, A TREATISE ON INTERNATIONAL LAW 420 (8th ed. 1924); Morelli, *La Théorie Générale du Procès International*, 61 RECUEIL DES COURS 327, 329-330 (1937).

17. Under all arbitration laws, except the New York Arbitration Law, invalidity of the arbitration agreement may be raised by the parties after the award is made. KELLOR, *op. cit. supra* note 5 at 171, n. 7; see, however, N. Y. Arbitration Law § 1458, permitting such attack in certain qualified circumstances after notice.

arbitration. In the opinion of Judge Moore, it is "inconceivable that a state should be permitted silently to hold in reserve the question of the validity or continuing force of its own agreement, until it should have learned, by the results of the agreement's complete execution, whether it would be advantageous or disadvantageous to raise the question."¹⁸ Failures by an international tribunal to observe a stipulated course of procedure must also be promptly objected to; otherwise silence will be deemed to be waiver or tacit ratification.¹⁹ A domestic arbitration award need not be reasoned,²⁰ the award of an international tribunal must be.²¹ Of salient importance is the fact that the award of an international tribunal does not need, as does a domestic arbitration award,²² a court order to render it enforceable, but is itself binding upon the parties.²³ In the words of Article 81 of the Hague Convention of 1907, "the award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal."²⁴ Failure by the losing party to carry out an award justifies resort to sanctions.²⁵ It is, moreover, clear that the parties are entitled, among other things, to due deliberation by a tribunal duly constituted and free from corruption in the broadest sense of that term. They are entitled to a judgment uninfluenced by fraud.²⁶ Thus contrasted with the corresponding rules governing a domestic arbitration proceeding, the legal strength and judicial quality of an international arbitration proceeding emerges.

There is an international common law upon which states may safely rely when they submit their disputes to arbitration. In entering upon an arbitra-

18. 5 COLLECTED PAPERS OF JOHN BASSETT MOORE 129 (1944).

19. "Rights of Minorities in Upper Silesia" (Apr. 26, 1928) PERMANENT COURT OF INTERNATIONAL JUSTICE, SER. A. No. 15, at 25; BALASKO, CAUSES DE NULLITE DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC 107-108, 142 (1938).

20. In re Curtis and Castle Arbitration, 64 Conn. 501, 513 (1894); McKnight v. McCullough, 21 Ia. 111 (1866); Fraenkel, *Procedural Aspects of Arbitration*, 83 U. OF PA. L. REV. 226, 240 (1934). Kellor declares that "it is scarcely ever beneficial and it is rarely expedient for arbitrators to explain the process of reasoning or the method by which they have reached their decision." KELLOR, *op. cit. supra* note 5 at 115.

21. See the collection of authorities and precedents in CARLSTON, *op. cit. supra* note 11 at 50-53.

22. *Supra* note 3.

23. WITENBERG, L'ORGANISATION, LA PROCEDURE ET LA SENTENCE INTERNATIONALES 352-353 (1937); Limburg, *L'Autorité de Chose Jugée des Décisions des Jurisdictions Internationales*, 30 RECUEIL DES COURS 523, 566 (1929).

24. 1 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, CONFERENCE OF 1907, 605 (Carnegie trans., 1920).

25. Dumas, *Sanctions of International Arbitration*, 5 AM. J. INT'L LAW 941, 955-957 (1911); DUMAS, LES SANCTIONS DE L'ARBITRAGE INTERNATIONAL (1905).

26. See CARLSTON, *op. cit. supra* note 11, §§ 11, 16 and 18.

tion, they are assured that the commands of their *compromis* will be respected, that the tribunal will observe the minimum procedural standards observed by courts of law generally, and that the judgment of the tribunal will be confined to the controversy submitted to it and will respect the law imposed upon the tribunal. With these guarantees of justice existing in the process of international arbitration, states have often resorted to it for settlement of their disputes.

Arbitration has been peculiarly effective in liquidating international claims, such as claims of a state on behalf of its nationals based on denial of justice by respondent state. Cases in this field, known as that of the responsibility of states, have probably occupied the largest volume of litigation before international tribunals; there are literally thousands of such decisions. A number of diplomatic episodes of importance have been decided by arbitration; it has so happened that the Permanent Court of Arbitration provided for under the Hague Conventions of 1899 and 1907 has disposed of a number of such cases. Boundary disputes, many with a stormy diplomatic history, have also been frequently resolved by arbitration. The Central American and South American states can be proud of their record here; numerous and sensitive boundary controversies have been submitted by them to arbitration. Yet the process of international arbitration has not achieved the ultimate object to which John Bassett Moore looked forward—"to displace war between nations."

International arbitration in the postwar world will assuredly continue to perform its task of alleviating lesser controversies among nations. War damage claims have often in the past been disposed of by the process of international arbitration. There is evidence that this process is being resorted to today in the settlement of damage claims arising out of World War II.²⁷ Of more significance, arbitration has been accepted as a means for the settlement of disputes arising out of the peace treaties with the satellite states of the European Axis countries.²⁸ It is to be hoped that its use in the peace settlements will not stop here.

The new international agencies are finding the value of arbitration in settling internal disputes within their organization.²⁹

27. Cahn, *Arbitration of War Claims*, 2 *ARB. J.* 234 (1947).

28. See Domke, *Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties*, 41 *AM. J. INT'L LAW* 911 (1947).

29. Domke, *The Settlement of Disputes in International Agencies*, 1 *ARB. J.* 145 (1946).

Arbitration will also from time to time be utilized to dispose of various other conflicts in the international sphere. There is hope, for example, that a certain Central American boundary dispute will be finally resolved by arbitration.

Claims of governments on behalf of their citizens based on the delicts of foreign states will continue to occupy a large part of the judicial business of international tribunals. It would be a great stride forward in the development of international law if cases involving the responsibility of states would cease to be looked at from the point of view of the *obligations* of states and instead be viewed from the standpoint of the *rights* of individuals. The fundamental interest of all peoples in the establishment of a basic charter of human rights would then be brought to the fore, instead of the alleged interest of imperialistic nations in protecting their nationals in backward territories, which has been a major criticism against the doctrine of the responsibility of states. Instead of a law for the few, for the strong, the law of the responsibility of states would thus become a shelter for the weak and the oppressed of all nations. An international court of human relations, such as Australia proposed in the United Nations Commission on Human Rights,³⁰ would go far in protecting persons of all countries against violations of their individual liberties.³¹

An International Trade Tribunal, such as has been proposed in the American Bar Association,³² would furnish a valuable stimulus to the development of international trade in assuring speedy protection of treaty rights to those engaged in foreign trade.

On a wider front, an International Judicial System, with International Circuit Courts sitting in regular terms in the capital of each member state, has also been proposed by the American Bar Association.³³ This would assure existing, accessible and convenient facilities for the final resolution of controversy.

Others look beyond these specific tasks for the arbitration process and find in it a means for the solution of all international conflict. Hans Kelsen,

30. U. N. Doc. E/CN.4/SR. 16, 6 Feb. 1947.

31. See Cowles, *International Arbitration and Human Rights*, 1 *ARB. J.* 272 (1946); Borchart, *Historical Background of International Protection of Human Rights*, 243 *ANNALS* 112 (1946); LAUTERPACHT, *AN INTERNATIONAL BILL OF THE RIGHTS OF MAN* (1945).

32. 71 *REPORTS OF THE AMERICAN BAR ASSOCIATION* 320 (1946); see Domke, *The International Trade Organization Settlement of Disputes-Provisions of the Draft Charter*, 2 *ARB. J.* 222 at 228 (1947).

33. 69 *id.* 165, 169, see also 373, 378-379.

for example, advocates "an international court endowed with compulsory jurisdiction" to which states would be obliged "to submit all their disputes without exception."³⁴ Professor Lauterpacht contends that the principles evolved by our legal systems are of a maturity and breadth which would make it possible for all conflicts between states to be decided on a basis of law, even in areas in which positive international law has not as yet developed rules.³⁵

On the other hand, Hans Morgenthau, in his brilliant and provocative chapter, "The Science of Peace," in *Scientific Man vs. Power Politics*, points out that it is fallacious to assume that international law and international arbitration can be relied upon to settle basic conflicts of power in the international sphere, such as that of Ethiopia in 1935, the Sudetenland in 1938 and Danzig in 1939. He declares that "what is at stake in conflicts of this kind is not who is right and who is wrong but what ought to be done in order to combine the particular interests of individual nations with the general interest in peace and order. The question to be answered is not what the law is but what it ought to be, and this question cannot be answered by the lawyer but only by the statesman."³⁶

Elsewhere in the same volume a fundamental fallacy in our approach to the problems of international relations is said to be that of the "method of the single cause."³⁷ Tolstoy, in his essay on causation in *War and Peace*, describes the fallacy of "the single cause" in these words:³⁸

"The combination of causes is beyond the grasp of the human intellect. But the impulse to seek causes is innate in the soul of man. And the human intellect, with no inkling of the immense variety and complexity of circumstances conditioning a phenomenon, any one of which may be separately conceived as the cause of it, snatches at the first and most easily understood approximation, and says here is the cause."

If this statement be taken as a major premise, we may find in Morgenthau the following minor premise and conclusion:

"The age is forever searching for the philosopher's stone, the magic formula, which, mechanically applied, will produce the de-

34. KELSEN, *PEACE THROUGH LAW* 14 (1944).

35. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933).

36. MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* 120 (1946).

37. *Id.* at 95.

38. 3 TOLSTOY, *WAR AND PEACE* 208 (Garnett translation, London, 1904).

sired result and thus substitute for the uncertainties and risks of political action the certitude of rational calculation. Since, however, what the seekers after the magic formula want is simple, rational, mechanical, and what they have to deal with is complicated, irrational, incalculable, they are compelled, in order to present at least the semblance of scientific solutions, to simplify the reality of international politics and to develop what one might call the 'method of the single cause.'

"The abolition of war is obviously the fundamental problem confronting international thought. What makes a solution of this problem so difficult for the nonrationalist mind is the variety of causes which have their roots in the innermost aspirations of the human soul. Were it possible to reduce all those multiple causes to a single one capable of rational formulation, the solution of the problem of war and peace would no longer seem to be impossible.³⁹

In short, the problem of war and peace, being a problem of multiple causation, can never be solved by the technique of isolating the "single cause."

When the issue is thus crystallized, however, the asserted universality of the phenomenon of a restless search for the "single cause" may be questioned. Sometimes one may be tempted to believe that man, in the exercise of his reason, is as blind in his efforts to adapt himself to convulsive changes in his environment as are the simpler forms of animal life in their reliance upon instinct. But the simple psychological mechanism of trial and error, coupled with the intellectual resources of man, has in the course of history developed a national and international institutional life of infinite complexity. The shattering effects upon this institutional life of the blows of two World Wars have, if nothing else, made evident that interdependency of the various phases of this institutional life. At the same time, man's efforts to restore and preserve his ways of life have exhibited a variety of method and form that belie the asserted tendency to reduce events to a "single cause" and to prescribe as a consequence a "single remedy."

Out of bitter experience and disillusion a greater maturity and wisdom is being born. The circumstance that the greatest war in modern history ended on a note of abstraction, "V-E Day" and "V-J Day," rather than on the plane of moral fervor attendant, in this country at least, upon the winning

39. MORGENTHAU, *op. cit. supra* note 36 at 95.

of the preceding World War I, is not without significance. Though the plea may be made that "the worst settlement of international disputes by adjudication or arbitration is likely to be less disastrous to the loser and certainly less destructive to the world than no way of settlement except war,"⁴⁰ its hearers now realize that the demonstrable truth of statements of this nature has not prevented war in the past and will not be likely to prevent it in the future. For even though the fact of the outbreak of war may be completely irrational, the prediction of that fact may be rationally demonstrable. The formulas of an earlier day, the League, the neat mechanisms of Locarno⁴¹ and the General Act,⁴² are now viewed with skepticism. One of our leading political scientists recently confessed:

"I think probably one of the greatest indictments of our attitude in teaching in the last twenty years has been to write off glibly the institution of war and to write off the books the influence of power politics. I think political scientists made a great mistake in doing so. We should be the very ones who are studying power politics and its implications and the situations growing out of it, and we should be the ones who study the institution of war."⁴³

Morgenthau's own volume is but evidence of our awakening to the "immense variety and complexity of circumstances" conditioning the phenomenon of war. Wright's profound *Study of War*⁴⁴ reveals something of the vast forces which must be understood and controlled if the problem of war is ever to be solved. For peace is not static, it is dynamic; it is a nexus of many forces which are constantly shifting and which demand constant effort to preserve their equilibrium. There is a technology of peace as well as a technology of war. The successful waging of war on the technological front demands primarily the skills and knowledge of the physical sciences. The successful waging of peace demands the skills and knowledge of the economist, the political scientist, the lawyer, the psychologist, the geographer, the publicist, even the military scientist, to mention but a few.

40. Jackson, *Address*, PROC. AM. SOC'Y INT'L L. 18 (1945).

41. 54 LEAGUE OF NATIONS TREATY SERIES 315 (1926).

42. The General Act for the Pacific Settlement of International Disputes. Geneva, Sept. 26, 1928. 93 *id.* 343 (1928).

43. PROCEEDINGS OF THE EIGHTH CONFERENCE OF TEACHERS OF INTERNATIONAL LAW AND RELATED SUBJECTS 66 (1946).

44. WRIGHT, A STUDY OF WAR (1942); see also Wright, *Accomplishments and Expectations of World Organization*, 55 YALE L. J. 870 (1946).

The interdependence of economic well-being and political security are seen. Thus the authors of a recent study of the problems of *Rebuilding the World Economy* conclude that economic rehabilitation is indissolubly linked with the restoration of political security. They point out that "the need for economic rehabilitation, though pressing, is only a temporary obstacle to the [multilateral trading] system's re-establishment. A more basic obstacle by far is the sense of political tension and insecurity that continues to pervade large areas of the world. . . . For under conditions of political insecurity, either internal or external, accompanied as they are by the imminent fear of loss through war destruction, invasion or confiscation, the motivations that operate in a free economy do not lead to long-term production investment designed to increase output and to raise standards of living."⁴⁵ A Truman Doctrine for Greece and Turkey borne out of the fear of war leads to a Marshall Plan directed solely to the economic reconstruction of Western Europe. A Marshall Plan in turn ushers in Bevin's proposal for a "western union" of European countries.⁴⁶ And as progress is made toward the economic reconstruction of Western Europe, the linking of its economy and our own with that of Asia will come to the fore and a program for the rehabilitation of Asia will doubtless be proposed.

International law as an instrument for the control of relations between states is today approached realistically with a more scientific appreciation of its limitations as well as its possibilities. The gaps or *lacunae* in international law, such as the lack of any substantial body of rules governing the economic aspects of relations between states, for which it has been condemned,⁴⁷ are seen to be but reflections of the insistence of states that these areas of international life shall be subject to sovereign, not international, regulation. As Brierly aptly says, "international law has hitherto been in the main a *laissez-faire* system, having as its chief function to demarcate the spheres within which each sovereign state is to be free to exercise its domestic jurisdiction without any legal obligation to defer to the interests of any other state."⁴⁸ In international law, as in any system of law, the strength

45. BUCHANAN AND LUTZ, *REBUILDING THE WORLD ECONOMY* 299 (1947).

46. N. Y. Times, Jan. 23, 1948, p. 1, col. 8.

47. Dickinson, *International Law: An Inventory*, 33 CALIF. L. REV. 506 (1945). Kelsen denies the existence of gaps in the international legal order on the dialectical ground that the legal order may privilege as well as require action, *i.e.*, that there are permissive as well as obligatory norms of conduct. KELSEN, *LAW AND PEACE* 164 (1942).

48. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 95 (1944).

of the law lies in its acceptance by those under its governance as well as the strength of its sanctions.⁴⁹ Holmes' classic statement is again apposite: "the life of the law has not been logic; it has been experience." In a law based on custom and consent, as is international law, it is self-evident that its scope and content is moulded by those who are both its creators and its subjects.

We may create an elaborate hierarchy of international tribunals, we may multiply their number and refine their procedure, and find that the reign of law still eludes us. The new International Court of Justice has until recently been without any judicial business, and even now it has before it only the Albanian-British controversy concerning the mining of the Corfu Channel. Resolutions of the Assembly of the United Nations drawing attention to the availability of the International Court of Justice and recommending the submission to it of "legal disputes" will be relatively ineffective in influencing the course of national policy in resorting to judicial methods for the solution of controversy.⁵⁰ Not even the wider adoption of the compulsory jurisdiction clause will transform the International Court of Justice into the paramount international body and establish a universal reign of law if its jurisdiction is not invoked by plaintiff states.

International arbitration thus becomes one of many instruments to be utilized in the struggle for peace. It must be approached with an awareness of its limitations as well as its strength. The work of refining its technique and usefulness should not be dropped, in a spirit of disillusion, but should rather be pressed with greater vigor and broader wisdom. On every front effort should be made to create an environment which will be favorable to its adoption and growth. The loss of the illusion of an earlier day that international arbitration will become a royal avenue to world peace is at the gain of an understanding of its role in the conduct of international affairs which will far better serve the cause of world peace.

49. Cf. VON IHERING, *LAW AS A MEANS TO AN END* 181-194, 243-246 (1944).

50. 3 UNITED NATIONS WEEKLY BULLETIN 787 (1947); see Sohn, "Drumming Up Business" for the World Court, 33 A. B. A. J. 1224 (1947).