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Gerald Aksen

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International Arbitration - Its Time Has Arrived!

by Gerald Aksen*

International arbitration has come a long way in the past twelve years. In 1970, the United States finally acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations Convention). Since then, a host of developments has indeed augured well for the present and future of private dispute settlement.

As this issue of the Case Western Reserve Journal of International Law is published, the United Nations Commission on International Trade Law (UNCITRAL) is meeting to develop a model law on international arbitration. Although it will undoubtedly take several years to devise a law that can be adopted by every country in the world, the fact that the effort has begun demonstrates the growing importance and acceptance of the arbitral form in settling controversies and claims.

Indeed, only this year, Chief Justice Warren E. Burger, in his annual report on the state of the judiciary, strongly urged the use of arbitration to help avoid the expense and burden of the traditional legal process. His review of the subject of alternatives to litigation placed arbitration in the

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* GERALD AKSEN is a Partner in the law firm of Reid & Priest, New York, New York and an Adjunct Professor of Law at New York University School of Law. Mr. Aksen is Chairman-elect of the American Bar Association Section of International Law. He is a member of the Board of Directors of the American Arbitration Association and Chairman of the Arbitration Committee of the United States Council for International Business (formerly the U.S. Council for the ICC). He belongs to the Association of the Bar of the City of New York and served as Chairman of its Arbitration Committee and as a member of its International Law Committee. Mr. Aksen was a member of the legal team participating in the negotiations of the U.S.-U.S.S.R. trade arbitration arrangements. He is a graduate of City College of New York, Columbia University Graduate School, and New York University School of Law. He is a frequent speaker and author on private dispute settlement.


2 April of 1982.

limelight. Chief Justice Burger recommended moving some cases from the adversary system to "mediation, conciliation, and especially arbitrations."  

At the same time, the Chief Justice of the New York Court of Appeals, Lawrence H. Cooke, has appointed a high-level task force to marshal the untapped resources of retired judges to serve as arbitrators in an effort to relieve the overburdened judicial calendar in that state. Thus, arbitration is continually being looked to as an aid in coping with the pressures imposed on the traditional legal process by our highly litigious society.

In the past several years, experimental programs have been enacted in several states that mandate the use of arbitration in certain civil cases. Even now, the federal courts are reviewing the results of a program that has seen arbitration introduced into federal district courts in three jurisdictions. Domestic uses of arbitration seem to be increasing to keep up with their successful counterparts in transnational matters. For it is truly in the international arena that arbitration has achieved its full potential as a salutory dispute settlement mechanism.

The International Chamber of Commerce (ICC) has for 60 years been engaged in promoting the use of international arbitration. The American Arbitration Association (AAA) has been encouraging U.S. parties to include arbitral clauses in contracts since its founding some 56 years ago. More importantly, the AAA has been in the forefront of developing the law on the subject by its careful attention to amicus curiae interventions before the U.S. Supreme Court in landmark decisions that effect arbitral law, both domestic and foreign.

Not only have the AAA and ICC promulgated their own rules for parties to use in international arbitrations, but they have actively participated in the development of the recently issued UNCITRAL Arbitration Rules. These model rules will be assured of their place in history not only because they are truly worldwide in their application, but also because they were used as the framework for the procedures devised by the Iran-United States Claims Tribunal at the Hague to resolve claims by

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4 Id.
U.S. citizens against Iran.\textsuperscript{9} Arbitration procedures were an integral part of the Algiers Declaration that made possible the release of the 52 U.S. hostages held captive in Iran.

The United States has more than kept pace with recent international arbitration developments. Since the adoption of the United Nations Convention by the United States in 1970, there have been a host of court decisions clearly demonstrating the U.S. courts' favorable reception of international arbitration as a dispute settlement mechanism.\textsuperscript{10} On the treaty front, President Reagan has sent to the Senate for its advice and consent another arbitral compact, the Inter-American Convention on International Commercial Arbitration promulgated in Panama in 1975.\textsuperscript{11} The United States signed the Inter-American Convention in 1978,\textsuperscript{12} and there is a strong possibility that this arbitration convention will be ratified by the United States in 1982.\textsuperscript{13}

Other new developments on the near horizon include the possibility of bilateral investment treaties (BITs).\textsuperscript{14} These BITs contain key sections highlighting the use and importance of international arbitration. The BIT provisions call for arbitration between private investors and host governments and between the host and investors' governments themselves.

So much is happening in the field that the AAA recently circulated a questionnaire to several hundred U.S. lawyers and multinational concerns seeking up-to-date information on key aspects of international commercial arbitration. The official results of that survey are reported in this Journal.\textsuperscript{15} It contains interesting comments on how arbitrators are chosen by arbitrating parties. It is perhaps not surprising that integrity, language ability and knowledge of applicable law were high on the list of factors.

\begin{footnote}
\textsuperscript{12} 78 DEP'T STATE BULL. 58 (Sept. 1978).
\textsuperscript{13} On June 15, 1981, President Reagan recommended to the Senate that the United States become a party to the Inter-American Convention on International Commercial Arbitration, subject to three reservations. S. TREATY DOC. NO. 97-12, 97th Cong., 1st Sess. (1981).
\end{footnote}
sought by parties selecting arbitrators. Another major finding of the survey revealed that most parties prefer the neutral arbitrator in an international case to be of a nationality different from that of either of the parties. According to Robert Coulson, "[i]nternational parties may feel more comfortable with an arbitrator that they know is not identified with their adversary's country."16 These and other revealing and helpful findings are reported in his lead article in this Journal.

International arbitration has become so popular that countries are now actively competing to become centers of arbitration. Historically, London and Switzerland were the places where parties most often scheduled their arbitral hearings, because Switzerland was the heartland of neutrality and London was the center of maritime, insurance, and commodity trade. However, over the years these two locations began to lose their attractiveness as arbitration centers. International business concerns were critical of the United Kingdom’s stated case procedures that permitted legal issues to be decided by the courts. In Switzerland there was confusion over the appropriate canton in which to arbitrate and dissatisfaction with post-award procedures. Whether the criticisms were accurate or not, it was clear that other arbitral situses were beginning to emerge.

Sweden became a focal point for East-West trade disputes when the AAA and the Soviet Chamber of Commerce agreed upon Stockholm as an acceptable place for resolving U.S.-Soviet contract claims.17 Soon thereafter, the Asian-African Legal Consultative Committee began to set up arbitral centers in Kuala Lumpur, Cairo, and Lagos. When U.S.-China trade reopened recently, Hong Kong began preparations to create an arbitral center. Various U.S. sites such as New York, Miami, and San Francisco consider themselves suitable sites for international arbitration. Mexico City has established an academy to train arbitrators in its effort to attract disputants to Mexico. Not to be undone, the United Kingdom has enacted an arbitration statute18 to reattract parties to London. Switzerland also passed a federal law on arbitration eliminating some deficiencies.19 France has just enacted a new domestic and international arbitration code20 to show its receptiveness as a place to arbitrate. The list continues to grow.

The latest entry into the arbitral host arena is Denmark. According to C. Kaare Pedersen, “Danish legislation offers some of the best accom-

16 Id. at 360.
17 See STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION IN SWEDEN (1977).
18 Arbitration Act, 1979, ch. 42.
19 Intercantonal Arbitration Convention, Mar. 27, 1969, Recueil systematique des lois et ordonnances 79.
modations in the world for referring matters in dispute to arbitration."²¹
Thus, another Scandinavian country has set up an institute, "Copenhagen Arbitration," to administer international arbitration. It is particularly helpful to have the Journal publish, for the first time in English, the efforts of the Danes to establish Copenhagen as a center of international arbitration.

There will undoubtedly be other cities and countries seeking to establish themselves as hosts to international arbitration. The international significance of these efforts is that parties will have a real choice when seeking a suitable locale for arbitration. The drawback, however, is that there may be a bewildering array of choices, making intelligent selection difficult in the short run. I suspect the next publication that may soon be needed is a handbook on where the best place is to arbitrate and why.

The Journal's contributions on labor arbitration²² are relevant even though they do not deal in any direct way with international commercial arbitration. They are revealing in their treatment of how different countries have come to almost opposite conclusions in their use of arbitration for resolving domestic labor grievances. Historical antecedents can be burdensome at times—particularly when seeking changes.

Finally, the article on negotiating contracts with the Japanese²³ is of some importance to arbitral practitioners. It demonstrates the differences in cultural and sociological values. Many of these same differences carry over into dispute settlement. Perhaps parties from different countries choose international arbitration so that they can select judges who have an understanding of these differences. Tripartite arbitration has been the bulwark of international arbitration for centuries. This article may help us to understand why.

The editors of the Journal should be complimented for devoting their second 1982 issue to the important subject of international arbitration. It is timely, current and relevant. Its readers will benefit from its contents.
