

International Commercial Arbitration : An Idiosyncratic Overview*

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I am delighted to be here and would like to thank the Korea International Trade Association, Professor Sang Hyun Song and others involved for having invited me to take part in this exciting and valuable conference. With Korea's burgeoning prominence on the international diplomatic, economic, and legal scene, your Association has an increasingly prominent role to play not only in cultivating international law and legal norms in Korea but as well in giving an ever more truly international direction to this important body of rules and practices. Under the guidance of Professor Song, who did us the honor of inaugurating Korean legal studies at Harvard this past year, and his colleagues, I am confident that the Korean Association will indeed make its mark felt both at home and abroad in the immediate future.

As you may know, we Americans seek to carry out certain regulatory functions—in areas as disparate as securities regulation and the oversight of lobbyists—through disclosure. The underlying theory is that rather than prohibit activity in question, we seek instead to provide those in government and the marketplace with pertinent data about it in order that they might make an informed judgment with

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respect to the course of action in question. It is in that spirit that I must disclose to you now that I am hardly up to the rather daunting assignment that my erstwhile teacher Professor Song has set for me of giving a paper that presents an overview of international commercial arbitration and so provides an appropriate introduction to the rather more focused talks that the many learned scholars and practitioners participating in this Symposium on Dispute Resolution in International Trade shall offer later today and tomorrow.

I shall try to discharge the responsibility given me by Professor Song by seeking to provide an overview of international commercial arbitration while simultaneously endeavoring to enliven our deliberations with at least a few observations as to the tensions facing this field. It would be unfortunate for us, after all, merely to sing the praises of that which we are gathered to consider—as I suspect may often be the case when academics and lawyers concerned with international interaction gather to discuss the amicable resolution of problems arising between trading parties of different nationality.

By virtually any quantifiable standard, these are extraordinary times for what we loosely term international commercial arbitration.¹⁾ Although there are much ignored historical antecedents that warrant a good deal more scholarly attention than they have received,²⁾ the

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- 1) The use of the term “international commercial arbitration” to describe this field is something of a misnomer as the dispute resolutions at issue rarely are international in the sense of involving two sovereigns as parties. Typically, at least one, if not each, party is private. Nonetheless, the use of the term international has stuck and I will, therefore, use it in this paper.
 - 2) There has been relatively little recent scholarship in the West on history of arbitration prior to World War II. For a historically well-grounded and thorough discussion of the theoretical bases of arbitration, see Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law*

past twenty-five years—and, in particular, the last ten—have witnessed an unprecedented world wide interest in and acceptance of international commercial arbitration. Since its 1923 establishment, the International Chamber of Commerce's Court of Arbitration (ICC) has been the principal body on the international scene concerned the use of arbitration to resolve international commercial disputes.³⁾ Nonetheless, for decades, arbitrators hearing disputes through the ICC had only a relatively modest number of cases. Of late, that has changed markedly, with "the number of ICC cases in the decade from 1976 to 1986 virtually equal[ing] the number of cases in the preceding 53 years [of the Court's existence]"⁴⁾ and with the frequency of cases rising even more rapidly since the mid-1980s.⁵⁾

Attesting even more powerfully to the expansion of international commercial arbitration is the fact that this growth in the ICC's case load has come at the very time that its once dominant position among institutions providing such arbitral services has ebbed. Although still the most active and renowned center for international commercial arbitration, the ICC today must share the spotlight with more than 70 other organizations located in some 60 nations that profess a general competence with respect to international commercial arbitration.⁶⁾ Moreover, many of these newer entities have in short order made a mark for themselves, as evidenced, for example, by the China Interna-

(Zürich : 1989) at 31–75.

- 3) Stephen Toope, *Mixed International Arbitration : Studies in Arbitration Between States and Private Persons* (Cambridge, England : 1990) at 199–217.
- 4) Foreword to the *International Chamber of Commerce Rules of Conciliation and Arbitration* (Paris : 1988), quoted In Toope, *supra* note 3, at 205.
- 5) The Parker School, **1989 Guide to International Arbitration and Arbitrators** (New York : 1989).
- 6) This number is an extrapolation drawn in part from Toope, *supra* note 3, at 6.

tional Economic and Trade Arbitration Commission(CIETAC) or the Korean Commercial Arbitration Board(KCAB). Whereas the People's Republic of China(PRC) once had scant contact beyond the maritime area with international commercial dispute resolution, today CIETAC hears more cases than any other body in the world, save for the ICC itself.⁷⁾ And although less active than its Chinese counterpart, the KCAB, mere decades after its foundation, has for years been receiving well over 500 requests a year chiefly from foreign parties for its arbitration and other dispute resolution services.⁸⁾

The soaring interest in international commercial arbitration of recent years has not been limited to the private parties who bring cases before the ICC and comparable entities. Executive, legislative, and judicial arms of governments throughout the world increasingly have taken measures designed to facilitate such arbitration. This is most readily evident in governmental support for and ratification of international efforts to build a legal infrastructure that gives meaning to international commercial arbitration. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards(The New York Convention) now numbers over 80 signatories, including, during the period in question the United States, the United Kingdom, Korea, Canada and the People's Republic of China(PRC).⁹⁾ More than 90 nations now adhere to the Washington Convention establishing the

7) Moser, "Arbitration in China" *China Business Review*, (Sept./Oct. 1990) at 42.

8) Sang Hyun Song, "Recent Trends in Commercial Arbitration in Korea," in **Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation**(P. Sanders ed., Deventer Netherlands : 1989) at 63-68.

9) 330 UNTS 3. For a current list of signatories to the New York Convention, see 8 *Journal of International Arbitration* 117(1991).

International Centre for the Settlement of Investment Disputes— which body, with appropriate party consent, has the capacity to hear disputes involving commercial disputes arising between a Contracting Party and a private party that is the national of another contracting party.¹⁰⁾ The long-awaited United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration has recently been recommended by the General Assembly to all states, ratified by a sufficient number of governments to take effect, and already has served as the basis for law reform efforts in North America, Europe, Africa, and Asia.¹¹⁾ And increasingly, governments are turning to arbitration or arbitration-like formats to resolve seemingly intractable disputes having commercial elements— as exemplified in the United States creation of the claims tribunal with Iran in the Hague to address the billions of dollars in outstanding contractual and other disputes between the two nations and their nationals¹²⁾ and the more recent establishment through the U.S.-Canada Free Trade Agreement of dispute resolution processes designed to handle trade problems arising between the two countries.¹³⁾

The growing acceptability of international commercial arbitration is also evident at the individual state level. France, which has long been in the forefront of nations receptive to this means of resolving commercial disputes, has revised its Code of Civil Procedure to remedy

10) See Toope, *supra* note 3, at 219–262.

11) For a recent volume of essays concerning the UNCITRAL rules, see **Essays on International Commercial Arbitration**, (P. Sarčević ed., Boston : 1989).

12) Jones, “*The Iran-United States Claims Tribunal : Private Rights and State Responsibility*,” 24 *Virginia Law Review* 259(1984).

13) Anderson & Rugman, *The Canada-U.S. Free Trade Agreement : A Legal and Economic Analysis of the Dispute Settlement Mechanism*,” 6 *Journal of International Arbitration Law* (# 4) 65(1989).

“many of the uncertainties that attended the application or interpretation of the previous legislation,”¹⁴⁾ and, in particular, to clarify the relationship between judicial and arbitral processes. The United States has continued down the path illuminated by the landmark Supreme Court cases of *Bremen v. Zapata*(1972)¹⁵⁾ and *Scherk v. Alberto-Culver* (1974)¹⁶⁾ which marked a turning point in the American courts historic antipathy toward private arrangements that derogated from their authority. Indeed, recent Supreme Court cases — such as *Mitsubishi v. Soler*(1985)¹⁷⁾ and *Shearson/American Express Inc. v. McMahon* (1987)¹⁸⁾ have even gone so far in upholding private parties’ agreements to arbitrate international commercial disputes in the face of antitrust and other powerful policy considerations as to lead so strong a supporter of international arbitration as Professor Thomas Carbonneau to suggest that the Supreme Court’s “unqualified recourse to the principle of freedom of contract is as dangerous as it is unintelligent. It transforms the invocation of that principle into indiscriminating sloganeering.”¹⁹⁾

As impressive as these French and American efforts to facilitate international commercial arbitration may be, they arguably pale before the transformations that a number of other nations throughout the world are now undertaking to make their domestic legal regimes more hospitable for such dispute resolution. Long the most skeptical of developed western nations about arbitration, even the British have of

14) Thomas Carbonneau, *Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds*(Urbana and Chicago : 1989).

15) 407 U.S. 1(1972).

16) 417 U.S. 506(1974).

17) 105 S. Ct. 3346(1985).

18) 107 S. Ct. 2332(1987).

19) See Carbonneau, *supra* note 14, at 153.

late taken pains to create a more welcoming climate for international arbitration. This has been evidenced most notably in the Arbitration Act of 1979, which limits the rights of parties to an arbitration to take their matter to the courts and otherwise accords greater, if still constrained, respect for the integrity of international arbitration than had heretofore been the case in the United Kingdom.²⁰⁾ Nor is the United Kingdom the sole nation of consequence to have undergone a conversion with respect to arbitration in recent years. The newly emancipated nations of Eastern Europe have turned eagerly to arbitration in their efforts to foster an environment that will draw in foreign capital. As previously noted, after considerable reticence about such matters, the PRC has endeavored to promote arbitration with an alacrity that only a state still largely centrally directed is capable of mustering. Arab states, "which manifested a strong distaste for international commercial arbitration, have displayed some change in attitudes..."²¹⁾ as evidenced by the signing in 1987 of the Arab Convention for Commercial Arbitration by all Arab nations, save Egypt.²²⁾ "[A]rbitration is becoming more accepted..." in Africa.²³⁾ And even the nations of Latin America, which for long provided the most consistent principled opposition to reliance on arbitral solutions, have shown an increasing recent tolerance of international commercial arbitration.²⁴⁾

20) *Id.* at 72-75.

21) See Toope, *supra* note 3, at 5.

22) El Ahdab, "*Le Centre Arabe d'Arbitrage Commercial a Rabat*," 4 **Review of Arbitration** 631(1989).

23) Atanda, "**Review of Arbitration Law and Practice in Sub-Saharan Africa**," 1 **The American Review of International Arbitration** 123(1990).

24) Echeverria & Siqueiros, "Arbitration in Latin American Countries," in Sanders, *supra* note 8, at 82-97.

Rounding out this picture of arbitration's ascendancy has been the mushrooming of international commercial arbitration as both a scholarly sub-discipline and an area of professional specialization. Where years ago legal educators and their professional colleagues barely took note of international commercial arbitration, today it provides the organizing focus for institutes such as the School of International Arbitration (established within the Center for Commercial Law Studies at Queen Mary College, London),²⁵⁾ journals such as the *American Review of International Arbitration* and the *Journal of International Arbitration*, and firms and other specialized professional groupings such as Endispute.

The reasons for the growing support for international commercial arbitration are not hard to identify. The period of its ascendancy has been one of unprecedented growth in international commerce—and not coincidentally so. The possibility of resolving disputes through arbitration rather than through national courts—even be they of countries as avowedly wed to the rule of law for national and foreigners alike as the United States and Canada—has clearly encouraged traders, technology transferors and investors more readily to part with their goods, data, and capital. Arbitration, so goes the argument, fosters business confidence by ensuring a relative stability and predictability as it spares foreign parties the political and other vagaries of local legal processes.²⁶⁾ Moreover, as countless articles have pointed out, such arbitration has an array of additional advantages.²⁷⁾ It, for exam-

25) Sanders, "The Birth of the School of International Arbitration," in **Contemporary Problems in International Arbitration** (J. Lew, ed. London : 1986).

26) This theme is expressed, for example, in Carboneau, *supra* note 14, at 4.

27) See, e.g., the articles found in *International Commercial Arbitration: Recent Developments* (E. Galliard & R. von Mehren, eds., New York : 1988).

ple, enables parties to select both dispute resolvers and substantive rules suited to the peculiarities of the business involved. It deemphasizes the adversarial nature of disputes and so fosters on-going relations which is of especial importance in long term projects. And, with the possibility of confidentiality, it creates greater opportunities for negotiated settlements than does the more public spectacle of adjudication.

Yet, for all of international commercial arbitrations advantages—and they are many—its explosive growth has not been as uniformly and unambiguously positive a phenomenon as it is customarily depicted to be. Indeed, as I shall endeavor to sketch below, one might even say that they vary features of international commercial arbitration that are extolled as its greatest strengths also contain its most consequential limitations. To take heed of these serious—and, in some respects, virtually intractable—tensions is not to argue against arbitration or to deny its obvious accomplishments. Rather, it is to seek to redress an imbalance in discourse on the topic that has obscured many of the potential cost of arbitration. The goal, ultimately, is to paint a fuller and, one hopes, more nuanced picture of the process and its broader implications for all involved.

The first concern that I would like to voice is perhaps so abstract that those among you who routinely face the immediate need to resolve actual disputes between parties from different nations may well find it an acceptable cost. Typically, entities doing business across borders opt for arbitration to avoid being subject to municipal legal systems, which, as outlined above, are all too often perceived as insufficiently competent and impartial to provide the degree of stability and predictability international commerce requires. Assuming for now that this perception has validity (and I will have more to say

about it below), I can not help but wonder whether sparing municipal legal systems the challenges international commercial disputes pose unwittingly perpetuates in these systems the very incompetence and partiality about which concern is being professed.

Foreign and domestic entities thinking of engaging in international commerce, together with host governments that seek to generate more such business activity, arguably have a singular capacity to foster conditions conducive to international transactions in a municipal system. It is evident, for example, in the case of agreements between foreign businesses and host governments to arbitrate disputes, both that the former possesses sufficient leverage to persuade the latter to derogate from its sovereign prerogatives to have disputes resolved by its courts and that the latter has the "willingness," albeit at times induced under pressure, to address in some fashion the problems that foreign parties perceive concerning the quality of its judicial organs. Although one ought not to be naive either about the ultimate ability of either side to effect meaningful change or even the degree to which any of the parties involved genuinely wish courts to decide cases involving their interests in a wholly even-handed manner, it is clear that the decision by these potential agents of change to bypass the courts altogether diminishes sharply the courts' need to address problems that impede their effectively accommodating international transactions.

The foregoing phenomenon is evident, for example, in the PRC. Although, as reported above, CIETAC, the PRC's principal international arbitral body, now has one of the largest active case loads in the world, there has been little spillover to China's municipal court system. Foreign parties continue studiously to avoid Chinese courts, for the very reason that they are seen as lacking the budding profes-

sionalism of CIETAC's arbitral process.

Nor is this phenomenon limited to the courts of socialist or third world nations. The past twenty years have been heralded by many as a golden age of arbitration, during which the United States courts, recognizing the needs of international commerce, finally overcame their longstanding hostility toward arbitration clauses thereby facilitating an explosion of interest in and reliance on arbitration.²⁸⁾ Foreign parties, however, remain less than fully convinced of the degree to which American courts, for all their rhetoric, have transcended parochial interests and so they all too often remain wary about subjecting themselves to such courts' jurisdiction.

The point is borne out, for instance, with regard to antitrust law. Following U.S. Court of Appeals Judge Herbert Choy's opinion in the initial *Timberlane Lumber V. Bank of America* case(1976)²⁹⁾, a number of distinguished American jurists went to considerable lengths to engage in a so-called balancing of domestic versus foreign interests in determining whether to assert jurisdiction—particularly in the anti-trust context.³⁰⁾ Notwithstanding the good faith effort undertaken by Judge Choy and his colleagues to pay full heed to the foreign interests at stake, our closest allies remained unconvinced throughout as to the capacity of American federal judges to take adequate account of their legitimate interests. So it is that the United Kingdom,³¹⁾ Australia,³²⁾

28) See, e.g., Carbonneau, *supra* note 14, at 105–155.

29) *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* 549 F. 2d 597(9th Cir. 1976).

30) See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.* 595 F. 2d 1287(3rd Cir. 1975).

31) United Kingdom Protection of Trading Interests Acts of 1980.

32) See e.g., *The U.S.—Australia Antitrust Cooperation Agreement.*

and Canada³³⁾— which are as close to the United States in their legal traditions and current legal systems as any nations in the world³⁴⁾— each took serious steps during the 1980s aimed at attacking judicial efforts to apply American anti-trust law to their nationals. Although there are obviously profound differences between courts in the PRC and the US, one can not help but wonder whether both the perceived and actual capacities of each to deal effectively with commercial cases involving foreign parties might be better if recourse to arbitration were not so readily available.

Some advocates of arbitration might take issue with the degree of my concern over the systemic impact of ready recourse to nonjudicial vehicles for the resolution of international commercial disputes. Arbitration, such commentators might argue, ultimately derives its legitimacy from the agreement of two parties having legal capacity to structure their legal relations in a particular fashion.³⁵⁾ Such thinking is evident, for instance, in the growing deference of the United States Supreme Court over the past two decades toward agreements to arbitrate in international commercial contracts,³⁶⁾ although, to be sure, the Court has not stated the underlying principle in such a stark manner.

Municipal courts, obviously, should pay serious heed to the principle of party autonomy, especially when one or more of the parties are for-

33) The Canadian response was limited to the uranium industry and was a reaction to the uranium antitrust cases such as *Westinghouse Elec. Corp. v. Rio Algom Ltd.* 617 F. 2d 1248 (7 Cir. 1980).

34) Other nations that have promulgated such “blocking statutes” include France, Germany, the Netherlands, the Philippines, and New Zealand.

35) See e.g., F.E. Klein, “Autonomie de la Volnote et Arbitrage,” 47 *Revue Critique de Droit International Prive*.

36) See e.g., Carbonneau, *supra* note 14, at 105–155.

eign. Nonetheless, persons who stress contract and free will as forming the basis for international commercial arbitration would do well not to dismiss its dependence on municipal law and what I would suggest is its concomitant self-interested obligation to enhance the capability of municipal courts effectively to address international commercial issues. The decision of sovereign governments initially to sponsor and later to accept 'such undertakings as the New York Convention and the UNCITRAL rules clearly laid the infrastructure making possible the explosive growth of arbitration in recent years. No less crucially, the on-going willingness of the courts of signatories of the New York Convention to recognize and enforce arbitral awards provides the practical lynch-pin without which international commercial arbitration would lose much of its attractiveness.³⁷⁾

The tensions regarding arbitration that warrant our attention are internal, as well as external, to the process. Witness, for example, the never ending pull within arbitration between fixity and flexibility. There is, one might say, an inexorable struggle being waged between these laudable ends for the very soul of arbitration. Stated differently, in its effort to accommodate these competing goals, arbitration is at once neither and both akin to litigation and negotiation, bearing, at least potentially, characteristics central and contrary to each.

The foregoing internal tension manifests itself with respect to issues of procedure, substance, and the very personnel who conduct international commercial arbitration itself. Much has been written, for instance, about how the desire to foster greater regularity and fairness in arbitration has led to the introduction of procedural and evidentiary devices borrowed from litigation—such, in the extreme, as discovery,

37) See, e.g., Mauro Rubino-Sammartano, *International Arbitration Law* (Boston : 1989) 378.

that singularly American contribution to world jurisprudence—that diminish such principal rationale resorting to arbitration as simplifying and “internationalizing” the process. Essentially the same point could be made with respect to substantive law. Put affirmatively, greater reliance in arbitration on a single nation’s substantive law typically provides arbitrators with a clearer and more comprehensive set of rules on which to base a decision than does reliance on international law or general principles of law, or the principles of equity on which arbitrators might rely when acting *ex aequo et bono* or as *amiable compositeur*. Put negatively, that same reliance constrains arbitration’s capacity to exercise discretion so as to reach creative solutions to problems involving parties from more than a single jurisdiction.

If the impact of arbitration’s competing objectives upon issues of procedure and of substantive law has been the subject of extensive critical scrutiny, the same has not been the case with regard to its effect on the men and women who serve as international commercial arbitrators—although they arguably are the fulcrum of the very tension that underlies international commercial arbitration. Are these individuals intended to act akin to judges, to be honest brokers or to be advocates? Or ought they to be striving to combine elements of each of these different roles? And if they should be endeavoring to do the latter do the dictates of these different roles undermine one another? Further complicating the difficulties posed by this potential multiplicity of roles is the tension embodied in the fact that parties choose to have their disputes settled by international commercial arbitrators for the very reason that these people are not judges who have been selected, trained and employed by a government. This is attractive because it presumably means that the parties are able to choose from a broader universe of individuals who are perceived to be less suscepti-

ble to state influence. But by the same token, it means that the individuals engaged in arbitration are not subject to any mandatory, state-sanctioned regulatory regime and discipline (unless they violate criminal laws) and that they may well be less schooled in the procedural and substantive laws they may be called upon to apply than their judicial counterparts.³⁸⁾

Afficiandos of international commercial arbitration may well take issue with the foregoing. Private institutions such as the ICC, they might contend, play a role in insuring the quality of at least some international arbitrators while the concern of individual arbitrators with reputation³⁹⁾ and future marketability acts as a constraining force, even for persons not affiliated with any institution. These are laudable aspirations, but in the absence of any firm, empirically supportable data showing their impact on the behavior of arbitrators, that is all they are. Indeed, given the shroud of secrecy that envelops many international arbitrations—which, after all, is a key attraction of arbitration for some parties⁴⁰⁾—it is questionable whether such data might be accumulated. Nor are efforts to look soberly and dispassionately at

38) This tension was driven home to me during my service as a member of an Article 19 dispute resolution panel pursuant to the U.S. –Canada Free Trade Agreement (FTA). Although that panel was comprised of three U.S. nationals and two Canadian nationals, pursuant to the terms of the FTS, we were required to decide procedural matters and apply the countervailing duty laws of the United States as if we were members of the federal judiciary of the United States. I, at least, felt far less well equipped to make such procedural decisions than a judge and at the same time believed that the benefit of having the perspectives of Canadian panelists was somewhat undercut by the requirement that they try to act as if they were United States judges.

39) The ICC's efforts to promote the quality of international arbitrations are considered in Toope, *supra* note 3, at 206–210.

40) Rubino-Sammarino, *supra* note 37, at 448.

the way in which arbitrators perform aided by the fact that a great many scholars and practitioners who write extensively about such arbitration area part of the none too populous fraternity of international commercial arbitrators.

To raise these questions is neither to disparage the impressive efforts of international commercial arbitrators nor to disregard the valuable contribution that such arbitration makes to international economic interaction and through it to world understanding, peace and prosperity. It is, instead, to endeavor to raise questions designed to help us all work together for better and more harmonious international interaction. I thank you for considering these remarks and eagerly await your comments and questions.