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ACADÉMIE DE DROIT INTERNATIONAL
FONDÉE EN 1923 AVEC LE CONCOURS DE LA
Dotation Carnegie pour la Paix Internationale

RECUEIL DES COURS
COLLECTED COURSES OF THE HAGUE
ACADEMY OF INTERNATIONAL LAW

1987
III

Tome 203 de la collection

ISBN (volume) 90 247 3726 5
ISBN (series) 90 247 2628 X

Compose par / Set by Compo Service, 59800 Lille (France)
Printed in the Netherlands by Samsom-Sijthoff, Alphen aan den Rijn

1988

MARTINUS NIJHOFF PUBLISHERS
Dordrecht/Boston/Lancaster
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PRINCIPAL PUBLICATIONS

Books

- Secured Transactions under the Uniform Commercial Code (1963, with supplements) (with Peter Coogan and William Hogan).

Articles

- "Challenges to Executive Compensation: For the Markets or the Courts?", 8 J. Corporation L., 233 (1983).
CHAPTER I
AN INTRODUCTION

For centuries it has been recognized that international business adds an important new dimension to the normal processes of dispute resolution. At least as early as the Middle Ages we find special merchants' courts sitting at the fairs to give swift and knowledgeable resolution to disputes between traders from different States. Fears of bias and ignorance on the part of local judges, among other things, lead business managers to seek some more reliable and predictable means of resolution for the controversies inevitably arising out of commercial dealings.

In the last quarter of the twentieth century new developments are causing scholars to take a fresh look at the intersection of dispute resolution and international business. On the one hand, there is a new sensitivity to the burdensomeness of dispute resolution as now practised by national legal systems. This scholarship to a large extent has its origins in the United States where the problems are most keenly felt. In part due to a predilection for resorting more freely to courts and laws than do other societies, in part due to the high earnings—and therefore high costs—of attorneys and in part due to the complex and formal methods of adjudication that prevail in United States courts, there is a sense of crisis in the United States.

In preparing these notes I have tried to be conscious of the audience I am addressing. Thus I have avoided some of the fine points of US citation systems—denials of certiorari seemed useless as information for non-Americans and some of the abbreviations used in the United States would be unfamiliar. I have kept a few obvious ones—"L." for "Law," "Rev." for "Review" (or "Revue", "J." for "Journal"). Where possible I have attempted to provide French counterparts for US authority—thus slighting the German, Japanese, and other systems. I here express my appreciation of the work done by my research assistants, Emeralda deGorman Yu, Brian Ganson and Frederick Knowlton.


Some who look at the situation cast their eyes on other legal systems which they see as possibly more efficient and economical. They wonder if other countries have answers to the United States problems. Other writers explore what has come to be known as “alternative dispute resolution” or “ADR”, that is, devices for mediation, arbitration or conciliation that might be more satisfactory than what is offered by the courts.

The other branch of study seeks to get a better grip on what is happening in the world of international business. Statistics confirm what is obvious to the intelligent observer - that the proportion of each country's economic life that is bound up with international aspects is growing steadily. Even in nations such as the United States, which have traditionally been to a large extent self-contained, the ratio between exports or imports and gross national product has risen to the 6 per cent level. In other countries, such as those in the European Economic Community, that proportion has been even higher - up to 50 per cent. The threat of a crisis arising from the overhang of an enormous indebtedness owed by the developing world to institutions in the industrialized world is an ominous one. Memories of what a breakdown in the international economic system can do to the populations of individual countries live on from 1929 - perhaps they will restrain States from repeating the acts of heedlessness that brought on that crisis and its consequences.

Some economists have pursued the study of this international economic activity in aggregative terms, using statistical analysis of national exports, imports, balance of payments, and other movements. These operate from general laws which they try to make applicable in ways that will provide better views of what is happening now and better predictions of what is likely to happen in the future. Others take a more institutional approach. They examine what sorts of organizations take part in international economic life, what their decision-making structures look like and what purposes they are trying to achieve when they make decisions about the location and direction of their profit-making activities. On the whole it is the latter approach that more closely relates to what we are trying to investigate in this study. We are interested in motivations of business managers when they decide whether or not to enter into a given line of activity in a given place. More specifically, we are interested in the relationship between those decisions and their judgments as to the likelihood that their activity will produce disputes and the further judgment as to whether the disputes will be settled in a way that is not unacceptable to them. It has been generally understood that, at least in a general way, the rule of law is a prerequisite to the establishment of a modern capitalist economy. In particular, the writings of Max Weber are taken to show the linkage between capitalist rationality and a legal system that provides stability and predictability. Such a system is contrasted with a “kadi” system in which decisions are handed down under a shade tree according to the momentary impulses of the kadi. More sophisticated modern analysis suggests that total legal certainty is not possible or desirable - even if the mainstream of legal thought rejects the more radical view that the outcome of every legal dispute is entirely in doubt. Analysts would say that all business endeavors are surrounded by risk and that the danger of something going wrong legally simply heightens that risk by some roughly quantifiable degree. Since all business calculations are in essence balancings of the necessary investment versus the likely gain, accounting for the possibilities of loss by multiplying the likelihood of their occurrence times the loss if they do occur, legal risks can...
be fed into the calculus. It follows that quite substantial legal risks will be incurred if the expected gain is large enough. A country can enjoy a rather bad reputation among lawyers and still attract investors if it possesses, for example, a large and easily accessible deposit of a rare and useful mineral. On the other hand, if there are close competitors among countries, the possession by one of them of a highly regarded legal system might make a crucial difference in a foreign investor's location decision. This might be the case if several States desire to attract a labour-intensive factory to help with their unemployment problems. In describing decisions thus, one should not exaggerate the degree of mathematical precision that is possible in such calculations. Lawyers are hesitant to make predictions in terms of mathematical percentages. This is true even in cultures such as that prevailing at the top levels of American corporate management where computers, printouts and mathematical models are at the centre. The cultures of different nations produce different attitudes towards the basically subjective problems of litigation risk. A Japanese firm with a corporate culture based on wa or harmony will assign a higher cost to the disruptions and psychological drains that inhere in a passionate and protracted lawsuit than will an American or German. Whatever their sense of the costs and outcomes of litigating in their own court system, business managers will find it hard to think intelligently and coolly about the likely consequences of litigating in some other country's courts. There is always the hope, of course, that things will turn out for the best. The enterprise will be so successful that nobody quarrels, or the quarrels that do arise will be satisfactorily handled by negotiating, with perhaps a little help from a mediator.

Most of our discussion will be devoted to the legal side. However, we start with a review of the business aspects of international transactions. It will take us through a review of the different ways in which transnational business is done, ranging from simple sales contracts through joint ventures. The review will focus on the choices that must be made as between different methods of doing business and on the types of legal risk that are built into each of them. A third chapter considers the general character of dispute resolution theory and the problems it addresses. We then review the way in which litigation involving foreign parties is carried on in the ordinary national tribunals, with particular attention to those ways in which international litigation differs from its strictly local counterpart. We then look at the alternatives which private parties have constructed for themselves rather than face what is offered in the national courts. This will include consideration of the Conventions that assure national support to international arbitration. We then take up the special problems that are built into contests between a foreign private party and a national government, including both those that find their way into national courts and those that wind up in some specially designed tribunal. Finally we terminate this brisk survey of an enormous field with a conclusion looking at the whole complex from a private and then a public point of view.

Clearly some contracts are commercial but are they all? Suppose, for example, that a foreign government Y agrees to buy super-secret air-to-ship guided missiles from a manufacturer in Country X. Can Country X's courts take jurisdiction over any litigation against Y that results? It is a contract case, indeed it is a purchase of goods. But the likelihood is great that litigating the matter in a public forum in X will exacerbate and embarrass relations between X and Y.

**C. Arbitration between States and Individuals**

Differences in bargaining power in negotiations between States and private corporations or individuals produce differences in the dispute resolution clauses of the contracts they make. As we have seen, States in a strong bargaining position may get specific Calvo Clauses that inhibit resort to any procedure other than national courts in the State party to the contract. In other cases such a clause is regarded as not necessary. The advent of restrictive sovereign immunity, by providing a new alternative—suit in a foreign State's courts—provided some impetus to spelling out the sole resort idea in explicit contractual terms. Particularly in sales contracts where the United States or the United Kingdom, as well as other jurisdictions that came to limiting sovereign immunity through non-statutory approaches, would take jurisdiction over suits against foreign States, State planners must consider this problem. The Soviet Union, for example, has long had a strong preference for what it terms arbitration before its own special set of international trade tribunals. Sometimes the desire to induce agreement on the part of the other party has led Soviet officials to accept arbitration in some neutral point, characteristically Sweden. Some other States have been willing to accept arbitration clauses in foreign-trade matters, although it is by no means clear that such countries as the United States would be willing ever to make such concessions.

Where arbitration faces severe strains has been in connection with

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187. See notes 167-170, supra.
189. Thus a court held in 87 Bureau Wijnamuller v. United States, [1976] Am. Maritime Cases, 324 (SDNY 1976), that a submission to arbitration of a salvage claim as to a United States naval vessel was not authorized.

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oil or the ore seems easy and well within the capacities of the local personnel who have, in the meantime, been trained by the entrepreneur. Why should that outside party get so extravagant a reward for doing what is easy? Why not either take over the project in its entirety or at least make the concessionaire adjust to a smaller stake in the profits and a smaller part of the control?

Faced with the fear that threats of this type will ultimately develop, prospective concessionaires have long sought arbitration clauses. They have feared that the local courts could not withstand the pressures of their government and would co-operate in dispossessing the foreign party. To some degree this is the result of the fact that local courts are generally bound by whatever result of the fact that local courts are generally bound by whatever is now the local law. By changing its statutes the local government can make its courts enforce its designs upon the foreign concessionaire, any contract to the contrary notwithstanding. For one thing, there simply may have been little or no relevant local law for the districts where the foreigner has enterprise to serve as a base for an equal (national) treatment analysis. So foreign concessionaires will ask for clauses that not only displace local courts but will also, at least to some degree, displace the local law. Not infrequently they have achieved these results. They have not always succeeded, since, particularly in times of high oil prices, States with petroleum under their soil have been able to set their terms. But they have prevailed often enough so that we now have quite a repertory of cases decided by


192. See, e.g., the clauses included in the model agreements in D. Smith and L. Wells, Negotiating Third World Mineral Agreements, 203 (Cambridge, Mass., 1975), and in the various agreements reprinted in M. Al Ofatia, The Petroleum Concession Agreements of the United Arab Emirates (London, 1982). The awards listed in note 193, infra, are also illustrative, though often they raised problems by their draftsmanship.


194. On drafting ad hoc clauses see M. Dubisson, "La négociation d'une clause de règlement des litiges", 7 Droit et pratique comm. int. 17, 77 (1981).

195. The treaty creating the Center is found at 575 UNTS, 159. Official data concerning it is published in News from ICSID and in a recently established ICSID Review. For an earlier review see A. Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 Collected Courses, 331 (1972).

196. 4 News from ICSID, No. 1, pp. 6-7 (Winter, 1987).


198. 4 News from ICSID, No. 1, p. 6.

In some cases the arrangements are strictly ad hoc. The dispute settlement provisions of the contract set forth an autonomous mechanism for taking disputes to arbitration, deciding who the arbitrators are to be and defining what procedural rules are to govern the decisional process. There is a wide variety in these arrangements on all of these points; some aspects are modelled after State-to-State arbitration and others after private commercial arrangements. States do seem to feel there is an element of added dignity in following a State-to-State model.

An attempt to regularize and popularize such arrangements was sponsored by the World Bank in the form of the International Centre for the Settlement of Investment Disputes. By acceding to the Convention creating the Centre and then referring to it in an arrangement with the foreign investor, a State can offer an assurance that disputes can be sent to an impartial and experienced panel of outsiders under regular and predictable procedures. There have been as of 1987 a total of 21 proceedings filed with the ICSID of which a total of 7 have gone to a final award stage. In two cases a special review panel has set aside awards of the primary board of arbitrators. One does observe that decisions tend to go against the host State in a very high proportion of the cases and that the panels typically consist of international lawyers whose training and experience tends to make them inattentive to the concerns of developing countries. The Centre also offers mediation services although these have been drawn upon only on two occasions.

Issues between host States and foreign concessionaires can also come in an indirect way before arbitrators in the concessionaire's home State. The United States, like most other capital-exporting...
States maintains a programme for insuring its nationals’ investments in approved countries. If the investor makes a claim against the insuring entity (the Overseas Private Investment Corporation) and the OPIC rejects the claim, the matter is referred to arbitration. Technically the issues before such arbitrators are all matters of contract law, depending on the special formulation in the insurance contract governed by United States law. In a broader sense, however, the arbitrators have had to look to international law for guidance as to the meaning of provisions designed to parallel that international disposition. Several opinions have had to decide such matters as “what is an expropriation” or what is a “repudiation of a contract”.

Thus private party/national government dispute resolution has become a specialized but important part of the overall field of international dispute resolution. States are always reluctant to consent to such treatment but from time to time most of them are willing to consent if it is the price for profitable investment or trade relationships. Special talents on the part of the arbitrators are required if these delicate adjudications are not to become explosive, but the record indicates that in the great majority of cases national governments have bowed to adverse determinations by these panels. Thus they make a distinct contribution to a sense of legal security that in turn makes easier the flow of international investment and other economic activity.

199. For a survey of investment guarantee programmes, see T. Meron, *Investment Insurance in International Law* (Dobbs Ferry, N.Y., 1976).

200. Arbitration of disputes with OPIC is authorized by 22 U.S. Code, § 2197 (i).


203. Contrary to the American Arbitration Association position reflected in note 47, supra, some contractors may want written opinions. Interestingly the American practice in arbitration under agreements between business managements and unions does ordinarily require written opinions. These are collected by Commerce Clearing House in its Labor Arbitration Reports. See generally F. Elkouri and E. Elkouri, *How Arbitration Works* (Washington, 4th ed., 1985). This series, now at two volumes a year, contains vastly more substantive law than the arbitral awards that emerge in print in the *Journal du droit international*, the *Yearbook of Commercial Arbitration* and Appendix IV to 2 W. Craig, W. Park and J. Paulsson, note 152, supra.
mined—if there has been a prior decision to include a dispute resolution clause. If it is valid, the procedures set forth in it are exclusive and the choice is one between following them or doing nothing. If there has been no such provision the field of choice is wider, offering various judicial solutions as well as the possibility of negotiating an *ex post* arbitration clause. All of these choices demand knowledge, good judgment and lack of prejudice on the part of the deciders.

The perspective of States involves different considerations.

Ever since States have existed as such they have guarded fiercely their most elemental internal function—the making and administering of laws. This prerogative was often hard won, as by the founding rulers of the European monarchies, Edward the Law Giver or Philip Augustus. Even those who have sought to reduce the State’s functions to those carried on by what is called the “nightwatchman State” have conceded that law-making, like defence, diplomacy and police protection, should not be handed over to private functionaries. Recognizing that private parties, such as guilds, churches, etc., always did some legislating and that not every dispute ever came to government adjudication, the observer would have thought that these two prerogatives were in essence safely in governmental hands. Now that position is under siege. Alternative forms of dispute resolution are being pressed as solvents for the congestion and sloth of the courts. Particularly, on the international commercial scene, national adjudication is on the defensive. Potential disputants are, in substantial numbers, opting out of the formal governmental judiciary processes. The courts, far from defending their jurisdiction, welcome the relief that private alternatives bring to their heavy workloads.

I am suggesting here that this process needs to be closely monitored. Behind all the cheerful talk of party autonomy, peaceful resolution of disputes and private ordering of transactions, lurk questions and dangers. Will it be possible to maintain an international legal order if State systems do not enforce it? How will the

bargaining of parties be affected by their lack of knowledge of what the law means, an ignorance caused by the fact that courts are not getting chances to apply the rules for lack of jurisdiction and arbitrators are not revealing what they think the rules are? Can even businesses live comfortably with the sort of anarchy that would entail if more or less everybody resorts to private, extra-judicial means of settlement? Will the raw economic power that goes with superior market positions and longer purses reign on the international front unhampered by governmental attempts to counteract it?

The challenge to national legal systems, then, is two-fold. First, to what extent can they, and should they, drive back the forces that are arrayed in the name of party autonomy and alternative dispute resolution? Should they follow the lead of *Mitsubishi v. Soler* and allow a large measure of enforcement of the most critical national policies, including those aimed at controlling private economic power, to be assigned to private parties’ agencies? Or should they widen the scope of non-arbitrable subject-matter, as the New York Convention permits? Should they assert supervisory jurisdiction over arbitrators, examining their awards for major errors and violations of public policy? This would entail insisting that arbitrators give reasoned judgments in support of their awards. Second, can national courts compete with these non-national bodies and make judicial settlement sufficiently attractive to draw even foreign disputants into their wake? Would such steps, as being more generous in the recognition of foreign judicial judgments, as well as the awards of arbitrators bring trade back to the courts? Can judicial procedures be made less burdensome and repellent, as perhaps by a more general resort to specialized commercial courts? Can special assurances of unbiased treatment be given to foreign litigants? National courts do have competitive advantages; they can provide their services without charge and they have judges who spend years—often lifetimes—perfecting the difficult skills of judging. They alone can compel third parties to produce evidence

204. The best evidence available as to the incidence of transnational arbitration is that in 1 W. Craig, W. Park and J. Paulsson, note 152, supra, at § 1.02. It indicates that the International Chamber of Commerce averages some 240 cases per year, that the American Arbitration Association has about 120 international cases (i.e., cases with a foreign party) annually and that the London and Stockholm centres average about 50 and 10 a year respectively.

205. See notes 143-146, supra.


207. From the beginning the United States Constitution in Article III has provided a so-called “diversity jurisdiction” for suits involving aliens, thus giving them access to the presumably more cosmopolitan federal courts.
and ultimately only they can enforce judgments or awards. As yet the 200-300 cases brought before international arbitration institutions do not in any general way threaten the hegemony of national courts even in this field. Thus the present relationship may be optimal — courts decide the bulk of the cases while private parties settle disputes or arbitrators dispose of them with reference to that law. Finally, one wonders about the possibilities of an intermediate institution, State supported and regulated, but international in character, that would handle transnational commercial disputes in much the same way as the ICSID handles investment controversies.

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- Galanter, M., "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society", 21 Univ. of Calif. (L.A.) L. Rev., 4 (1983).
- Goldberg, S. E., Green and P. Sandor, Dispute Resolution (Boston, 1985).

Dispute-Resolution Mechanisms in International Business

- Meron, T., Investment Insurance in International Law (Dobbs Ferry, N.Y., 1976).
Dispute-Resolution Mechanisms in International Business

Restatement, Third, Foreign Relations Law (American Law Institute, 1987) (previous drafts were captioned "Restatement (Revised)).
Trebek, D. J. Grosman, W. Felstiner, H. Kritzer and A. Sarat, Civil Litigation Research Project: Final Report: Civil Litigation as the Investment of Lawyer Time, 5-23 (Madison, Wisc., 1983) (of the cases in ten courts studied by the Civil Litigation Research Project, only 9 per cent went to trial).