

1970

International Arbitration

Jose R. Chiriboga

Recommended Citation

Jose R. Chiriboga, *International Arbitration*, 4 INT'L L. 801 (1970)
<https://scholar.smu.edu/til/vol4/iss4/16>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Arbitration†

In the first stage of juridicial development, procedures similar to arbitration were probably the sole means of administering justice. The Judicial Branch, based on and financed by the state, derives from an evolution of the law that began in the latter days of the Roman Empire.

The institution of arbitrators made it possible for the individual to secure a favorable ruling in litigation or at least to place his adversary under a moral compulsion. The arbitrator was originally a judge who differed from his present-day counterpart in that today's judge not only states the law but also enforces it, while the arbitrator, especially in the Middle Ages, confined himself to stating or expounding the law, with the litigants responsible for its implementation.

During the Middle Ages, arbitration was open to gentlemen and their agents, but recourse to arbitration by serfs and vassals was consistently prohibited. The French Revolution exalted the prestige of arbitration to the point of exaggeration, since it was made compulsory, with public arbitrators elected by the people's assembly authorized to decide cases on which no appeal was allowed, no rules of procedure were followed and no costs were incurred. This marked the beginning, within civil law, of consensual arbitration, subject not to legal regulations, but to the good faith of the arbitrators and also known as arbitration of sound criteria.

Under judicial or legal arbitration, although the arbitrators are not regular judges they are obligated to base their judgment of a disputed case on the statutory legal provisions of a country, and can rule only on evidence submitted to them by the parties.

On the other hand, consensual arbitrators or friendly conciliators are not required to submit themselves to law as such, and in evaluating the matter in dispute, may take into account aspects and evidence not presented by the parties. In other words, the arbitrator's decision is governed by his conscience and he may, on his own and without the need for a specific

*Assistant General Counsel, Inter-American Development Bank (I have sent for additional biographical data—EPN).

†This article is based on an address delivered by Dr. Chiriboga to a joint session of the Section of International and Comparative Law and of the Section of Corporation, Banking and Business Law of the American Bar Association at the annual meeting of the Association in Dallas, Texas, on Wednesday, 13 August 1969.

request, conduct his own investigations in order to provide a sounder basis for his verdict.

Under Anglo-Saxon law, the concept of arbitration appears to involve what in civil law is called juridicial arbitration, although of course the procedure of conciliation is also used. According to Anglo-Saxon provisions, despite the freedom from rigid procedures enjoyed by arbitrators, they cannot ignore the general principles of law recognized by statute. Under such law, we could say that the arbitrators are *quasi* judges, while in civil law the judicial arbitrators are "unappointed" judges and the consensual arbitrators are friendly conciliators who are guided by the dictates of their conscience.

Following the emergence of arbitration in national civil codes, limits were imposed stipulating the aspects that cannot be submitted to decision by arbitration. In effect, modern codes recognize that differences concerning the civil status or legal capacity of persons, matters of interest to the state or the municipalities and, in general, aspects of public order are not eligible for arbitration. Nevertheless, individuals are fully entitled to submit to arbitration a countless number of matters related to property rights, commerce, etc.

It has been almost *habitual* practice under international law to submit to arbitration the problems arising between states, particularly with respect to border demarcation. Almost every modern state has employed the institution of arbitration to solve boundary problems and it should be noted that the method most commonly used has been not legal but consensual arbitration based on the good faith, conscience and impartiality of the arbitrator.

In fairly modern times, some states have placed certain matters wholly outside of the arbitral institution. Accordingly, it is not surprising, for example, to find that in signing protocols for the solution of conflicts, some countries have done so with express reservations indicating that they do not recognize the jurisdiction of arbitration for the solution of problems connected with the essence of the state itself, or with the vital interests of the nation.

The truly spectacular increase in commercial activity as a logical result of industrial development, and development of communications between countries has given arbitration a new vitality and importance in the area of commercial relations. Moreover, in the sphere of international finance, arbitration has been recognized in the charter of the World Bank and subsequently in the Agreement Establishing the Inter-American Development Bank. The other regional banks such as the Asian Development Bank and the African Development Bank have also acknowledged arbi-

tration as the sole method of solving problems arising between the international financing agency and the borrower.

Turning again to civil law, when the commentators deal with arbitration, they cite as the basic requirements for the arbitrator, knowledge of the law, impartiality and honesty. It is understood that when arbitration is judicial, knowledge of the law is a *sine qua non*, especially since the arbitrator must be able to weigh the validity of the evidence presented by the parties. When the arbitration is not judicial, the basic quality of the arbitrator is impartiality, without ignoring such other qualifications as knowledge or experience in the field concerned.

An astronaut, however able and intelligent he might be, could hardly be entrusted with the role of arbitrator in determining exchange rates in the monetary field, or in ruling on an insurance problem in cases of merchandise shipments.

In the past, arbitration in the international field was largely entrusted to a single person—king or other chief of state—and for that reason, the British Crown, for example, was entrusted with arbitration of the boundaries between Argentina and Chile. Commercial arbitration, which has expanded significantly in modern times, has not usually been entrusted to a single person but to a group of persons forming what is called an arbitral tribunal often appointed from a list of arbitrators consisting of designations made by the signatory parties to a convention. At present, the Inter-American Committee on Commercial Arbitration maintains a list of arbitrators from which the Committee selects, either directly or by lot, the members of the arbitral tribunal for a specific case.

In the financial field, that is, when international credit agencies are concerned, we find that the contracts of the World Bank stipulate that if problems or differences should arise with regard to a loan, such problems are to be resolved through arbitration undertaken by three members: one appointed by each party and a third, the “umpire”, designated by the two parties by mutual agreement, or by the President of the International Court of Justice at The Hague, should the parties fail to agree.

In IDB contracts, designation of the umpire is entrusted to the Secretary General of the Organization of American States when the parties have been unable to reach agreement on appointment of the third arbitrator. The aim of the World Bank and the IDB contracts is to have the umpire designated by a distinguished person of high standing endowed by his status as an international official with corresponding impartiality and integrity.

In recent years, a strong nationalist thesis has gained ground in some countries, which, uncontrolled, could seriously affect the institution of

arbitration. Under this thesis, all matters considered vital to the nation are inappropriate for arbitration. For example, concessions for the development of national resources, such as petroleum, could not be submitted to arbitration, since the nationalist thesis maintains that this is a subject of vital interest to the nation, and the concessionaire should therefore be subject to the national laws and judges of the country which granted the concession. It is easy to see how a foreign concessionaire who is compelled to submit to judges of the country which granted the concession might be placed at a disadvantage if a dispute should arise with regard to the concession. The political pressures on the judge responsible for ruling on the controversy would be so intense that he would need to be endowed with almost supernatural powers in order to view the matter with full impartiality.

Very frequently, lawyers and businessmen from the United States and Europe have expressed surprise that the Latin American countries have not backed the convention sponsored by the World Bank establishing arbitration as the method for solving disputes arising with regard to foreign investments. Without attempting to justify or criticize the Latin American attitude in this respect, I shall merely synthesize the reasons which have led the Latin American countries to refrain from signing the convention originated by the World Bank. The Latin American countries say that they concede the same rights to foreigners as to nationals, except for obvious limitations, as for example participation in political matters or acquisition of property adjacent to borders. If a foreigner enjoys the same rights as a national, it is said that there is no reason for according to the foreign investor different treatment from that received by the national investor. For example, the national investor in sulphur mines in, let us say, Colombia is subject to Colombian laws and judges. If a foreigner is going to invest in sulphur mines in that country, it is fair that he too should be subject to Colombian laws and judges, since if Colombia recognized the institution of international arbitration for solution of a problem arising with the investor who comes from abroad to invest capital in the development of sulphur mines, the concept of equality between nationals and foreigners before the law would be destroyed.

It is not my purpose to refute or justify the Latin American thesis from a legal standpoint. The only observation proper for me to add to the foregoing outline is that in the problem of foreign investments, account must be taken not only of the legal aspect but of the political and psychological aspects as well, for the investment of foreign capital is contingent upon psychological reasons which go far beyond strictly legal considerations.

As a final point, I would venture to say that in Latin America, as in the

rest of the world, the institution of commercial arbitration has acquired considerable momentum and enthusiastic supporters, since there is wide recognition of the benefits deriving from such arbitration in the process of commercial expansion, based on the confidence that should exist with regard to the method of resolving a dispute between domestic parties or between importer and exporter.

The role played by the arbitral tribunal is acknowledged by all the agencies directly or indirectly concerned in the irreversible phenomenon of economic integration between countries in a single geographic region. All economic integration must be based on physical and juridical facilities for commercial interchange, and arbitration is, undoubtedly, a virtually irreplaceable instrument in facilitating and promoting the flow of commerce. This has been understood by the chambers of commerce in the United States, in Latin America and in many other parts of the world, and it is the responsibility of the lawyer, the businessman and the statesman to publicize, through pertinent, cultural and commercial media, the advantages and the mutual benefits deriving from the institution of arbitration, which is at the same time both very old and very modern.