

William R. SLOMANSON¹:

Historical Development of Arbitration and Adjudication

Arbitration: historical development

The city-states of ancient Greece used arbitration as a peaceful alternative for resolving their disputes. A treaty in 445 B.C. grew out of the Peloponnesian War between Athens and Sparta. Both agreed not to resort to war as long as the other was willing to resolve their dispute via arbitration. A violation of this treaty subsequently resulted in a ten-year war; after that, the parties again agreed not to engage in war and renewed their commitment to resolving any future disputes via arbitration.²

Modern commercial law is based on European medieval practices developed by international merchants. Their standard expectations were called the *law merchant* (*lex mercatoria*). This body of law was created and developed by specialized tribunals in various Mediterranean ports where private merchants resolved both internal and international business disputes in an arbitral setting. The law merchant thus flourished in the twelfth-century Italian city-states, later spreading to other commercial centers. The customary practices developed by these tribunals were ultimately incorporated into the commercial laws of many nations.

International arbitration had its own "Dark Ages" that lasted until just before the nineteenth century. The famous Jay Treaty (Convention of Amity) of 1794 between Great Britain and the United States established a regime whereby an equal number of British and American nationals were selected to serve on an arbitral commission. It settled disputes that had arisen from the American War of Independence that could not be completely resolved by British—American diplomacy.³ The former enemies further encouraged the use of international arbitration in their 1871 Treaty of Washington. The United States claimed that Great Britain had violated the neutrality rules that had arisen under customary international practice. Great Britain had aided the Southern rebellion during the American Civil War by building ships for the Confederate navy. This arbitral tribunal ordered Great Britain to compensate the United States for its resulting losses. When Great Britain complied, there was a renewed interest in using international arbitration to settle disputes.

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² See L. Sohn: *International Arbitration in Historical Perspective: Past and Present*, in A. Soons (Ed.), *International Arbitration: Past and Prospects* 9 (Dordrecht, Neth.: Martinus Nijhoff, 1990).

³ 8 US Statutes at Large 196 (1802), US Treaty Series No. 108

The national practice of inserting arbitration clauses into treaties increased dramatically. Arbitration began to flourish with the establishment of some 200 arbitral tribunals that would ultimately decide hundreds of cases.

Russia's Czar Nicholas then decided to invite State members of the international community to meet in the city of The Hague in the Netherlands. National delegates attended the Hague Peace Conferences of 1899 and 1907. The resulting 1899 Hague Convention for the Pacific Settlement of International Disputes recognized arbitration as "the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle." The 1907 Convention for the Pacific Settlement of Disputes was the first multi-lateral treaty to provide that "International Arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law." Before these conventions materialized, arbitrations were usually *ad hoc*. Arbitrators were typically limited to available heads of State, academics, national agencies, and politicians.⁴ The Hague Conference process thus produced the Permanent Court of Arbitration in 1907—which still functions but has not had a significant caseload for a half-century.

Articles 12 and 13 of the Covenant of the League of Nations "mandated" that League members could not go to war if the subject of their dispute had been submitted previously to arbitration. Three months were to elapse after an award before a State party could resort to war. This Covenant also created the first "world court"—the Permanent Court of International Justice (PCIJ) in The Hague. As a result, resort to international arbitration declined—from the PCIJ's inception in 1920 until after World War II.

With the establishment of the second world court—the International Court of Justice at The Hague in 1945—the State members of the international community once again envisioned the submission of legal disputes to a permanently constituted judicial body, as opposed to *ad hoc* arbitrations. The foremost collection of data regarding international arbitrations has been compiled by Nijmegen University (Netherlands) Professor A. M. Stuyt. His *Survey of International Arbitrations* lists nearly 180 inter-State arbitrations between 1900 and 1945. In the last half of the twentieth century, roughly the same period of years (1945—present) produced only forty-three inter-State arbitrations.⁵

A growing number of international disputes have nevertheless been submitted to various permanent arbitral tribunals. While States generally moved away from interstate arbitration, other forms of international arbitration involving private parties began to flourish.

Adjudication: historical development

Before the twentieth century, international disputes were usually resolved by diplomatic negotiation, occasionally by arbitration, and often by war. Negotiations did not always subdue the use of force, which unfortunately remained the ultimate instrument of diplomacy.

⁴ See "Introduction" in A. Stuyt: *Survey of International Arbitrations: 1794-1989* 3 (3rd ed.) (Dordrecht, Neth.: Martinus Nijhoff, 1990) (hereinafter *Survey of Arbitrations*).

⁵ See, generally, *Survey of Arbitrations* (cited above in note 4).

Arbitration was not a good vehicle for preventing military escalation. If States chose arbitrators on an *ad hoc* basis, then it was to handle a specific problem after the dispute arose. This would effectively permit the stronger State to dictate terms that were not the product of a fully bargained-for exchange. Furthermore, States rarely consented to arbitrating their more sensitive problems absent a forced compromise.

Some national leaders wanted a more durable dispute-resolution alternative. The Latin American participants in the Hague Conferences proposed and then implemented a judicial response to the perennial problems with inter-State dispute resolution. They established the first international court designed to address regional disputes, the Central American Court of Justice, in 1908.

It closed in 1918. One reason was the forecast that the French-conceived League of Nations and the Permanent Court of International Justice would supplant any need for a regional international court. A global court would, it was hoped, shift the resolution of inter-State disputes from the battlefield to the courtroom. The States that were creating the PCIJ wanted it to play a role in the achievement of world peace through law. Some believed that this court would function as a judicial buffer between adversaries who would otherwise resolve their disputes in a military arena. Others anticipated that a world court would, at the very least, be a neutral forum for settling certain disputes. Many national leaders, including US President Woodrow Wilson, believed that an international court could positively influence national adherence to International Law.

The concept of a world (as opposed to regional) international court evolved through two phases that are commonly associated with a particular international organization: the former Permanent Court of International Justice and the current International Court of Justice. The PCIJ was not a part of the League, however. A State that desired to use it would enter into a treaty with another State. Several hundred bilateral treaties among the various nations of the world conferred jurisdiction on the PCIJ. On the other hand, States that join the United Nations are automatically parties to the Charter's companion treaty—the Statute of the International Court of Justice—but are not required to use the ICJ. This involuntary nexus with the Court's Statute attested to the judicial role the Charter drafters envisioned for the fledgling UN organization.

The PCIJ was the first permanently constituted dispute-resolution mechanism that was available to all nations of the world. In the case of States that were unwilling to actually litigate their differences, organs within the League of Nations could (and did) request "advisory" opinions from the PCIJ, which had the power to theoretically apply International Law to situations in which a potentially liable State was unwilling to appear in judicial proceedings as a defendant. From 1922 to 1940, the PCIJ heard twenty-nine cases between adversaries who litigated their cases in the Court. It also rendered twenty-seven advisory opinions.⁶

Two paradoxes contributed to the demise of the PCIJ. First, although this court was

⁶ Details about the Permanent Court of International Justice are available in S. Rosenne: *The Law and Practice of the International Court, 1920-1996* (The Hague, Neth.: Martinus Nijhoff, 1997) (four volumes) (hereinafter Rosenne treatise). See also A. Zimmern: *The League of Nations and the Rule of Law 1918-1935* (Holmes Beach, FL: Gaunt) (reprint of MacMillan & Co. [London], 1936).

sponsored by the League of Nations, it was not an official organ of the League. Second, even though President Wilson of the United States played a fundamental role in developing international support for the League, the United States did not join the League and never appeared as a litigant before the PCIJ. The Senate blocked US participation in the League. Because of rampant post—World War I isolationist sentiment, US senators feared any international alliances because any one of them might one day draw the United States into a second world war.

The outbreak of World War II in 1939 destroyed the PCIJ's potential effectiveness. The Court conducted its last public sitting in that year—when most of the judges fled to Geneva to take advantage of Switzerland's enduring neutrality.

The dream of a global judicial body was not totally shattered by the abrupt reality of war. In 1943, the so-called Four Powers (China, the Soviet Union, Great Britain, and the United States) determined that another global international organization should replace the League of Nations. The possibility of another world court was also rekindled by Great Britain's invitation to a group of International Law experts who met in London.

These experts also agreed that another global court was needed. It would have to be a fresh and innovational court, however, to diffuse the criticism of the earlier PCIJ, which had been perceived by many States as a European institution designed by European jurists to dominate the legal affairs of other regions of the world.

William R. Slomanson: L'évolution historique de l'arbitrage international

Le développement des mécanismes de résolution pacifique des disputes internationales est issue de nombreuses sources. L'exploration succincte de ses sources permet de prendre conscience des avantages de l'arbitrage et de l'adjudication sur le processus de litige. Depuis la Grèce antique, l'arbitrage a été utilisé comme solution pour éviter les conflits ouverts et circonvenir les situations délicates. Les États évoluent maintenant vers des méthodes alternatives de résolution de leurs disputes. Ces méthodes sont d'un coût plus restreint, une approche consensuelle et donc une possibilité réelle d'une résolution à la satisfaction des parties. Ce sont ces méthodes alternatives qui sont présentées ici.