

International Commercial Arbitration: Liber Amicorum for Martin Domke. PETER SANDERS, ED. Martinus Nijhoff, The Hague, Netherlands 1967. Pp. 360, viii, with portrait; fl. 36.

International arbitration has become a sprawling complex of phenomena, covering a rich variety of third party decision mechanisms and occurring in exotically different contexts.¹ In every context, arbitration has been something of a maverick: more than a contract, different from adjudication; international, yet frequently non-state, and so on. Despite the fact that proponents of world government have proselytized for arbitration with almost religious zeal, international arbitration, functioning without state aid or interference, has been almost Bakuninesque in its individualism, yet frequently more efficient than the behemoth of bureaucracy of a modern state. Arbitration, of course, is not a *res*: it is no more than coordinated subjectivities in men's minds plus a certain pattern of human practice. Yet for those who have studied it, it has become something of a marvel, generating enthusiasm and loyalty and frequently culminating in popular movements aimed at securing its extension. Arbitration's utility cannot be gainsaid; the extent to which it should be permitted or encouraged in the international or any national arena is a complex problem, touching many jurisdictional, political and ultimately socially philosophical issues.

Professor Martin Domke, having dedicated almost fifty years of service to the world arbitration movement, has more than earned the title *l'homme de l'arbitrage*.² Certainly the most appropriate indication of respect and affection for him on his 75th birthday is a collection of papers by thirty leading authorities on various aspects of international arbitration law. Concentrating as it does on international arbitration, the "*Liber Amicorum for Martin Domke*" avoids that problem of diffuseness which seems almost endemic to *genre festschrift*. Yet diversity is not sacrificed. A wide range of arbitration problems are considered and a number of penumbral areas, such as conciliation³ and good offices⁴ are investigated. The papers are presented alphabetically without editorial attempt to arrange them according to any topical scheme. Yet the articles do break down into a number of categories and taken as a whole they provide a sweeping survey of the numerous facets of contemporary international arbitration. It will be profitable as a technique of review as well as overview to

1. The author is W. M. Reisman, Research Associate, Yale Law School, B.A., LL.B., LL.M., J.S.D.; Member of the Connecticut Bar. Dr. Reisman is the author of a forthcoming treatise on the review and enforcement of international judgment and awards to be published by the Yale University Press.

2. RENE DAVID, *L'avenir de l'arbitrage*, INTERNATIONAL COMMERCIAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 56 (1967) [hereinafter cited as *Liber Amicorum*].

3. OSCAR SCHACHTER, *Conciliation Procedures in the United Nations Conference on Trade and Development*, LIBER AMICORUM 268.

4. SOMPONG SUCHARITKUL, *Good Offices as a Peaceful Means of Settling Regional Differences*, LIBER AMICORUM 338.

consider the papers of the *Liber Amicorum* under a number of headings: arbitral theory, international arbitration, claims settlement and procedure.

ARBITRAL THEORY

Perhaps as a reaction against the intensely conceptualistic character of *fin de siecle* arbitral theory, contemporary students of arbitration tend more to virtuosity of practical detail than to consideration of the broader social, constitutional and public order questions which are so crucial to policies regarding the extension or retention of any private form of decision. Implicitly, of course, every scholar operates with a complete set of assumptions, which influence his location of himself in relation to his material, his focus, his conception of his intellectual tasks and so on. But express theory has for the most part become the ideological instrument of those seeking the extension of arbitration. As such, theory has frequently tended to obscure rather than set in relief the critical questions challenging contemporary scholarship. Arguing, for example, whether the basis of arbitration is contractual or institutional (or both, since some useful conclusions flow from each argument) is no aid to the basic policy problems of arbitration within a system of democratic public order.

The traditional theoretical gloss held that arbitration was a creature of contract:⁵ it followed that effective public authority would uphold arbitral agreements and awards with the same commitment which it lent to ordinary contracts.⁶ The contractual theory is a disarming view of private decision—private law prescription and application—but it is at once simplistic and irrelevant. For one thing, the much touted “freedom of contract,” if subjected to empirical examination, quickly crumples into a very limited privilege. The degree of supervision, “blue-pencilling” and abrogation may vary from legal system to legal system, but common to all systems is a set of policies controlling every phase of the process of contractual agreement: who may make contracts, for what purposes, in what circumstances, in what relative power positions, influencing each other by what means, and with what outcomes and effects on themselves as well as on the more inclusive community. The policies governing the freedom to arbitrate and the permissible forms of arbitration have varied according to time, place and values concerned. But the emphatic point is that policy limitations have been present in every system tolerating arbitration. Hence, to seek to explain arbitration by means of the doctrine of “freedom of contract” both begs and beggars the question. Descriptively, we are concerned with the circumstances and conditions under which private arbitration has been, and will be tolerated by public power. Prescriptively, we are concerned with

5. *Extra compromisum arbiter nihil facere potest*; for a general survey of theory, see BIN CHING, *GENERAL PRINCIPLES OF LAW* 259ff (1953).

6. See, for example, remarks of Mr. Haight of the ICC to the U.N. Conference: E/Conf. 26/SR.3 at 5-6.

identifying the conditions and circumstances under which private arbitration rather than public decision will best serve basic public order goals.

Arbitrationists have come to be eminently practical people. In this respect, one notes that the contract theory does not permit the practitioner to perform precisely those tasks which complicate arbitration and require legal expertise. The practical defect is most obvious in the problem of *exces de pouvoir*,⁷ where a contractual orientation results in a methodology indistinguishable from Mr. Justice Robert's technique of constitutional review.⁸

The traditional alternative to the contractual theory has been the "institutional" theory of arbitration. According to it, arbitration is an institution of public order, deriving some of its authority from over-arching public structures and some from its own generative capacities, and creating a regime of lawful conflict resolution independent of public decision-making organs. Although the institutional theory, particularly as developed by Lauterpacht⁹ and Witenberg,¹⁰ had its own mystical elements, it provided, on the whole, a more fruitful heuristic frame, since its location within a manifold of social and political events required more extensive contextual analysis.

Legal consequences follow from theories as surely as given conclusions follow from syllogistic premises, and the consequences of both the contractual and institutional theories have served certain arbitral ends. The contractual theory has been used to make the whole notion of private decision more palatable, while the institutional theory has enhanced the possibilities of public enforcement of private decision, thereby magnifying the overall effectiveness of private decision.¹¹ By emphasizing the notion of contract, an attempt has been made to assuage those concerned with an ouster of public jurisdiction. This formulation of tight "either-or" alternatives is, of course, unrealistic and unimaginative and seems to have confused publicists more than judges. Professor Schmitthoff, in his paper "*The Supervisory Jurisdiction of the English Courts*"¹² notes that despite the purported anti-ouster effects of *Scott v. Avery*,¹³ English courts have exercised continuing judicial supervision over private arbitration.

If the contract theory has been useful in laying the groundwork of an arbitral system, the institutional theory has been formidable in securing public recognition of private awards; under institutionalism, an award is scarcely less than a *res judicata*. Predictably, the private arbitration agencies have resorted to

7. See BALASKO, *CAUSES DE NULLITE' passim* (1938); CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 81ff (1946).

8. *U.S. v. Butler*, 297 U.S. 162 (1935).

9. See, for example, LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958).

10. WITENBERG, *L'ORGANISATION JUDICIAIRE* (1937).

11. See note 6 *supra*.

12. *LIBER AMICORUM* at 289.

13. 1856 5 H.L.C. 811, 10 E.R. 1121.

both contractual and institutional theories. But theory, in these terms, is part of the data which the student of arbitration must study, rather than a key strut in his frame of inquiry.¹⁴ From the standpoint of public policy, the critical question is why favor arbitration over adjudication?

The reasons usually put forward by proponents of arbitration are stated unequivocally by Mr. Neil Pearson, in "*Arbitration and the Businessman*,"¹⁵ as speed, secrecy, economy, and avoiding the trauma of courtroom proceedings.¹⁶ Some of these reasons, speed and economy for example, are probably true, although private arbitration is not necessarily the optimum or ineluctable alternative. Some such as trauma are probably overdrawn and should either be cut down or dismissed. When the stakes are high, there is no reason to assume that cross-examination in commercial arbitration will be any less traumatic than in usual courtroom proceedings. Indeed, Professor Carlston, in his contribution, intimates that the ancillary punitive aspects of the arbitral process may be as important as the actual award.¹⁷ While the relative secrecy of arbitration as opposed to adjudication may appeal to the contemporary businessman, it seems to be a highly suspect motive. There is inevitably some conflict between the right of privacy of a litigant and the need for revelation, both to assure rational decision as well as to permit public appraisal and supervision through monitoring of proceedings. The loss of privacy, it may be added, is not a total personal sacrifice. The history of the Star Chamber emphasizes the individual protection which can be gained through publicity of proceedings. In "*L'avenir de l'arbitrage*," Professor Rene' David writes that "*Sans publicite' l'arbitrage demeurera toujours inferieur a' la justice et suspect.*"¹⁸

If we strike secrecy and trauma-avoidance as legitimate reasons, the only specific advantages remaining to arbitration are the speed and economy it offers over ponderously antiquated docket and court proceedings. If this is indeed the case, proponents of arbitration—municipal and international—might more usefully direct their abundant energy and irrepressible public spirit to the improvement of court proceedings, specifically making them quicker, cheaper and perhaps . . . less frightening to the non-initiated.

What then is the real attraction of arbitration? The answer to this query will depend upon the personalities involved and the type of arbitration adverted to. The attraction of labor arbitration is obviously that it channels a dispute from an unorganized and frequently intensively coercive arena of interaction, to an organized arena in which words and symbolic ritual supplant actual physical violence. International adjudication and some types of international arbitration

14. MANNHEIM, *IDEOLOGY AND UTOPIA*.

15. *LIBER AMICORUM* at 208.

16. *Id.* at 209-10.

17. CARLSTON, *Psychological and Sociological Aspects of the Judicial and Arbitration Process*, *LIBER AMICORUM* 44.

18. *LIBER AMICORUM* at 63.

hold a comparable attraction. In terms of simple cost-benefit analysis, it is not difficult to discern the interests of participants in such arbitration. Considering the side-hazards of economic and nuclear "fallout" from strikes and wars on peripheral non-participants, peaceful arbitration is unquestionably preferable. But commercial arbitration is quite a different phenomenon. It takes a dispute from a highly organized and compulsory process of decision and moves it into a private process of somewhat different structure. By securing privacy and secrecy for the disputants, it endangers rather than enhances the community interest in protecting itself.

The privatizing effect of commercial arbitration is not, it must be emphasized, a conclusive argument against the institution. The search for privacy and, indeed, secrecy, is not inherently contrary to the interests of public order. A democratic society is one which reserves a domain of privacy for each individual. Participatory democracy, moreover, seeks, insofar as possible, to involve each individual in the decisions which affect him most intimately. Where possible, disputes limited to several participants should be left to private resolution, provided that peremptory procedural patterns guaranteeing fairness and the fundamental peremptory substantive norms of the society in question are followed. There is, then, a place for commercial arbitration in contemporary democratic public order systems—and this includes, as Professor Hazard's work indicates, the socialist countries.¹⁹ The challenge to scholarship is the development of a frame of inquiry comprehending social process and structures of authoritative decision, and the clarification of a set of criteria by means of which the jurist can determine the permissible conditions and socially useful limitations of private arbitration.

While many of the contributors to the *Liber Amicorum* touch on this problem tangentially, none formulates the total question or succeeds in recommending criteria for decision. Partial formulations of the problem are framed in terms of (a) the parties' capacity to stipulate the principles, rules, policies or norms by which the arbitrator is to operate, or (b) the capacity of the arbitrator to deviate from the positive law or *lex scripta* and to apply principles of equity, trade usages or a different, non-territorial system of law. In many cases, the methodology used obscures the criteria and public order preferences of the scholar. Thus, A. Broches²⁰ in his illumination of Article 42 (1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,²¹ avoids theoretical and philosophical entanglement and derives, by textual and travaux analysis, the supremacy of international law in regard to the capacity of parties to choose applicable law in an arbitral

19. HAZARD, *Flexibility of Law in Soviet State Arbitration*, LIBER AMICORUM 120.

20. BROCHES, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States; Applicable Law and Default Procedure*, LIBER AMICORUM 12.

21. 4 I.L.M. 524 (1965).

compromis.²² By a similar methodology, Professor Sanders,²³ in his consideration of the ECAFE Rules for international commercial arbitration, gives predominance to the parties' choice with a sustaining background of trade usages. This choice will, according to Professor Sanders, not be subject to review: "[I]n most countries an arbitral award is not subject to revision by courts on material grounds."²⁴ The finality of a private award without criteria for determining whether its content and the prescriptions upon which it is based, and its procedures, are lawful according to the policies of the communities affected—international, regional or national—is, to my mind, an unacceptable conception of arbitration.

A different extreme is touched by Professor F. A. Mann.²⁵ In certainly the most polemical paper in the *Liber*, he castigates the trend toward freeing arbitrators from the *dura lex* by means of vague references to international law, *ex aequo et bono*, *amiable composition* and so on. In a rigorously positivistic manner, Mann argues that there can be no arbitration—national or international—without a supporting system of national territorial law. Mann is guilty of a certain juridical parochialism—[English judicial arbitration is not the only legitimate type of arbitration]—and he relies on a set of assumptions which most American jurists would consider thoroughly incorrect. Authority is not exclusively a territorial notion, but is most importantly a psychological one which is a function of group activity; groups need not be territorial, as the *lex mercatoria* itself demonstrates. There can be competing systems of authority and, moreover, within one personality, authority is susceptible to different levels and intensities. Yet Mann does raise critical policy questions and if he caricatures the "autonomous school" of arbitration, he does underline the flaws in its position.²⁶

In differing degrees, Dr. Ernst Mezger,²⁷ M. Jean Robert²⁸ and Professor Kitagawa²⁹ concern themselves with the autonomous character of an international arbitration. M. Robert leans openly toward the possibility and preferability of an autonomous international arbitration, while Dr. Mezger concerns himself with means of supervision and policing of awards which diverge from prescribed law. Unfortunately, neither author indicates the extent

22. LIBER AMICORUM at 17.

23. SANDERS, *ECAFE Rules for International Commercial Arbitration*, LIBER AMICORUM 252.

24. *Id.* at 263.

25. MANN, *Lex Facit Arbitrum*, LIBER AMICORUM 175.

26. A key target of Professor Mann's wrath is FOUCHARD, *L'ARBITRAGE COMMERCIAL INTERNATIONAL* (1965).

27. MEZGER, *La distinction entre l'arbitre dispense' d'observer la regle de la loi et l'arbitre statuans sans appel*, LIBER AMICORUM 184.

28. ROBERT, *De la place de la loi dans l'arbitrage*, LIBER AMICORUM 226.

29. KITAGAWA, *Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective*, LIBER AMICORUM 133.

of his preferred autonomy or how internal or external supervision should proceed.

Ulrich Scheuner³⁰ and Louis Sohn³¹ approach the problem from the standpoint of decision *ex aequo et bono*. The notion of *ex aequo et bono* or its continental equivalent *amiable composition* catches in microcosm the basic uncertainties of material arbitral jurisdiction. To what extent may disputing parties displace the law or complex of community policies which would ordinarily govern them and appoint an arbitrator to decide by his own notion of fairness? His notion of fairness, it should be emphasized, is not absolute, but is a function of his class, personality interest, group affiliation and past experience. Professor Mann overreacts to this question, as he does to some of the others he poses for himself. For decision *ex aequo et bono* is "extra-legal" only if one's definition of "legal" is narrowed beyond procrustean limits. *Ex aequo et bono*, like conciliation in UNCTAD, which Dr. Schacter treats,³² is an institution of authoritative decision, itself governed by policy prescriptions. It may be considered an authorization to decide a dispute with more reference to the idiosyncratic characteristics of the parties and their relationship; but it is not arbitral license. Dr. Mezger notes usefully the *voies de recours* available from an *ex aequo et bono* type award. The Sohn and Scheuner papers both assume the lawfulness of decision *ex aequo et bono*. Professor Sohn, concerned with the control problem involved, suggests that it be incorporated in an advisory procedure. Dr. Scheuner, laboring under a platonic notion of the "true" tribunal, suggests that *ex aequo et bono* may not be extended to prescriptive activities, for a tribunal would then trespass into the domain of the legislator.

Although many of the papers in the *Liber Amicorum* touch upon the basic constitutional question of international and national arbitration, none of them manage to get very deeply into the marrow of the problem. The absence of a viable, contextual theory of arbitration bedevils many of the outstanding detailed studies in the collection. Despite a clear majority opinion in favor of "autonomy" of international arbitration, no one seems willing to face what this autonomy really means. Thus Peter Benjamin characterizes arbitration as a phenomenon that is "economic in content."³³ Arbitration is a power structure which can be applied to any aspect of public order. As Kronstein put it, "Arbitration is power."³⁴ The overall social impact of arbitration is not treated in Professor Carlston's³⁵ provocative paper and this flaws it seriously. The most

30. SCHEUNER, *Decisions ex aequo et bono by International Courts and Arbitral Tribunals*, LIBER AMICORUM 275.

31. SOHN, *Arbitration of International Disputes Ex aequo et bono*, LIBER AMICORUM 330.

32. *Id.* at 268.

33. BENJAMIN, *The Developing Nations and Certain Legislative Obstacles in the Field of International Commercial Arbitration*, LIBER AMICORUM I, 4.

34. H. KRONSTEIN, *Arbitration is Power*, 38 N.Y.U.L. REV. 661 (1963); H. KRONSTEIN, *Business Arbitration: Instrument of Private Government*, 54 YALE L.J. 36 (1944).

35. LIBER AMICORUM at 44. The Carlston paper seems to show that application of Professor

socially critical arbitrations are usually the megavalue arbitrations; in such disputes, one must avoid the anthropomorphism involved in ascribing to corporate entities the feelings and fears of individuals, and subtly attenuating the real value impacts of the decision.

Autonomy in international commercial arbitration means permitting an international wealth elite (de facto, a Northern elite) to control a vital aspect of world economy. In a world in which Keynesian planning is widely accepted, this sort of 19th century laissez faire is at once anachronistic and healthy. The wealth elite should, indeed, have a "say" in these affairs; but the question is how much of a "say." Or, in different words, how much autonomy? Whether the autonomy is framed in the undefined institutional terms of "arbitrage autonome," or the traditional legal problems of applicable law, *ex aequo et bono* etc., or in terms of the political power problem of decision-review, the ultimate query is not "either-or," but "how much," under what conditions, with what checks?³⁶ The answer to this question cannot be defined. It is a question of a formulation of procedures and criteria facilitating a flow of responses to policy goals in different contexts. And this can only be accomplished with a comprehensive framework of inquiry. Unfortunately, the theoretical papers do not provide this crucial element of theory.

"PUBLIC" INTERNATIONAL ARBITRATION

The maverick character of arbitration is acknowledged in the diversity of papers in the *Liber Amicorum*. In a collection entitled "international commercial arbitration," more than a fifth of the articles deal with subjects of international public law and, of these, two are concerned with conciliation (by Dr. Oscar Schachter)³⁷ and good offices (by Dr. Sucharitkul).³⁸ In fact, the definition of adjudication and arbitration in international law has always been plastic. John Bassett Moore defined it as almost any form of dispute resolution³⁹ and Professor Quincy Wright, in an authoritative definition, declared that Security Council decisions could be considered international adjudication.⁴⁰ Such definitions will offend the linguistic purist and confuse the liberal functionalist, but there is historical logic in them. The burgeoning "peace movement" of the 19th century was concerned with peace.⁴¹ While the popular

Parson's "role theory" without a surrounding contextual framework can overemphasize the "humanity" of composite participants. This is particularly misleading in a legal world which is rapidly becoming populated more with corporate than with real personalities.

36. For a well placed critique of the lawyer's penchant for reducing problems to exclusive disjunction, see FRIEDRICH, *International Federalism in Theory and Practice*, SYSTEMS OF INTEGRATING THE INTERNATIONAL COMMUNITY 119 (Plischke ed. 1964).

37. LIBER AMICORUM at 268.

38. LIBER AMICORUM at 338.

39. 1 MOORE, INTERNATIONAL ADJUDICATIONS XII (J. Moore ed. 1929).

40. GOULD & KOLB, DICTIONARY OF THE SOCIAL SCIENCES 9 (1964).

41. See generally DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE

impulse to international arbitration in England and the United States was aided by domestic experience with courts—veritable pillars of folklore to whom social stability was often attributed—the peace movement as a whole was enamored of arbitration because it convinced itself that this was the panacea of international ills. But the peace movement was too pragmatic to become an arbitration movement. It was willing to try anything which might secure the peaceful resolution of international disputes. Thus, the 1899 and 1907 Hague Conferences, arising from a singularly curious blend of early vintage Aldermaston and late vintage Czarist *realpolitik*,⁴² set out a spectrum of third party dispute mechanisms, from fact-finding by Commissions of Inquiry through to institutional arbitration. If these other mechanisms cannot be considered forms of functional arbitration (and many would argue that they can), they do, at least, serve as a foil for the unique features of international arbitration.

In different ways, Dr. Scheuner and Professor Seidl-Hohenveldern are plagued by the terminological problem. In "*Arbitration by Organs of International Organizations*," by Professor Seidl-Hohenveldern, many of the methods of dispute resolution are referred to as forms of international arbitration. The problem is that Professor Seidl-Hohenveldern entertains deeply held notions of what arbitration is. Some of the difficulties might have been obviated if he had assumed that international arbitration refers to a more diverse sampling of phenomena than does municipal arbitration and had considered in specific cases whether the demand for the application of the peremptory characteristics of arbitration was feasible and sound policy.⁴⁴ Dr. Scheuner, whose contribution has already been considered, is upset by the necessarily prescriptive functions of tribunals, which are magnified to legislative proportions by a mandate to decide *ex aequo et bono*.⁴⁵

In "*Conciliation Procedures in the United Nations Conference on Trade and Development*,"⁴⁶ Dr. Schacter reviews the constitutional background of this technique of institutional decision-making within UNCTAD.⁴⁷ UNCTAD's conciliation is a *sui generis* creation, which might have been more aptly called international parliamentary bargaining. The fact that the word "conciliation" was chosen to designate the procedure suggests that this term of art has a positive emotive impact and leads to speculation on the possibility of

(1962); HINSLEY, *POWER AND THE PURSUIT OF PEACE* (1963); FLEMING, *THE UNITED STATES AND THE WORLD COURT* (1967).

42. See, in particular, DAVIS, *Id.*

43. LIBER AMICORUM at 322.

44. See, in this regard, BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 292 n. 13 (1953).

45. LIBER AMICORUM at 275.

46. LIBER AMICORUM at 268.

47. G.A. Res. 1995 (XIX) paragraph 25.

manipulation of terms of international law for legitimizing purposes.⁴⁸

Dr. Sucharitkul, in "*Good Offices as a Peaceful Means of Settling Regional Differences*,"⁴⁹ considers this minimal form of third-party decision-making as it was applied in two Asian disputes. Good offices is such a discreet form of "interposition conciliatrice" that it almost eludes scholarly investigation. Yet it can be, as Dr. Sucharitkul notes, an important technique in the arsenal of dispute resolution.

Professor Wortley and Ambassador Rosenne consider different aspects of the problem of the individual in interstate adjudication. Professor Wortley surveys the extent of *locus standi* of individuals in a number of international instances.⁵⁰ Dr. Rosenne⁵¹ notes the de facto relation of individuals to a number of PCIJ and ICJ cases, but also the reticence of the Court actually to allow the individual to participate, thereby enlightening it in its adjudicative functions. He argues that the Court may, as the European Court did in the *Lawless* case,⁵² devise procedures permitting, in effect, direct presentation by a concerned individual.

A number of matters of international public law which bear directly on international commercial arbitration are surprisingly not treated. With the exception of a brief reference by Professor Francois, no detailed mention is given to the supervisory role of the International Court of Justice over international arbitration. Professor Francois is concerned that the ICJ not intervene in the content of the arbitration but restrict itself to overseeing the procedural efficiency of the case.⁵³ He approves of *Ambatielos*⁵⁴ and the *Award of the King of Spain* case.⁵⁵ The decisive, if subtle effect of the *Anglo-Iranian Oil Co.* case,⁵⁶ *Ambatielos*, and the pending *Barcelona Traction Co.* case⁵⁷ on international commerce, as well as international arbitration, is given little mention. The work of the International Law Commission on arbitration⁵⁸ is, apparently, a shelved legacy of the past.

48. Cf. CLAUDE, *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367 (1966).

49. LIBER AMICORUM at 338.

50. WORTLEY, *Quelques developpements modernes qui touchent les controverses entre les particuliers et les Etats et les entites etatiques*, LIBER AMICORUM 348.

51. ROSENNE, *Reflections on the Position of the Individual in Inter-state Litigation in the International Court of Justice*, LIBER AMICORUM 240.

52. "Lawless" Case, [1960] EUR. CONV. ON HUMAN RIGHTS Y.B. 336.

53. FRANCOIS, *La liberte des parties de choisir les arbitres dans les conflits entre les Etats*, LIBER AMICORUM 89.

54. [1953] I.C.J. 10.

55. [1960] I.C.J. 192.

56. [1952] I.C.J. 93.

57. [1964] I.C.J. 6.

58. Commentary on the Draft Convention of Arbitral Procedure A/C.N. 4/92 (1955).

CLAIMS SETTLEMENT

The *Liber Amicorum* is particularly fortunate in its two papers on international claims arbitration, for the contributors include a past chairman of the Foreign Claims Settlement Commission of the United States, Professor Edward Re,⁵⁹ and the leading academic authority on claims procedure, Professor Richard Lillich.⁶⁰ Both papers are concerned with different sequences of the difficult problem of lump sum settlements.

Professor Re considers the presettlement adjudication of international claims. This technique is new, dating as it does from the Gut Dam Controversy and the Lake Ontario Claims Act of 1962.⁶¹ Briefly, presettlement adjudication comprises the internal adjudicative investigation of the merit and quantum of claims of American citizens *before* the Department of State presses these claims, on the international level, against the allegedly liable government. The presettlement technique is advantageous to a number of participants in the international claims process. The deprived individual is permitted to bring his evidence, while it is relatively fresh, to an authoritative instance, which will record and retain it until some form of settlement is reached. Additionally, the deprivée probably gets some small psychic satisfaction from the process. In a more material sense, the relatively authoritative confirmation of quantum of loss facilitates other activities, for example, computation of capital loss for tax or general bookkeeping purposes. In the longer run, the determination of quantum of loss by an American administrative organ provides criteria for appraisal of negotiations and serves as some form of defense for the deprivée when he finally sees his government pursue his claim, in lump sum, against the foreign government: there is no difficulty in seeing what percent of the authoritatively liquidated damages is actually being realized. In this respect, the presettlement and lump sum techniques mesh. From the standpoint of the Department of State, the actual claiming agency, presettlement techniques permit it to introduce a high degree of realism in its negotiation for damages. It has an extremely accurate and reliable conception of the facts of the deprivation, the criteria by which the U.S. characterizes the foreign act as a deprivation under international law, and the quantum of damages. From a structural standpoint, presettlement is an internal administrative operation. Functionally, however, it is a critical facet of the process of international claims and may be crucial to the accuracy and essential justice of the lump sum technique.

The components of the lump sum agreement have been stated as

an agreement, arrived at by diplomatic negotiation between governments, to settle outstanding international claims by the payment of a given sum without resorting to

59. RE, *The Presettlement Adjudication of International Claims*, LIBER AMICORUM 214.

60. LILLICH, *International Claims: Their Settlement by Lump Sum Agreements*, LIBER AMICORUM 143.

61. 76 Stat. 387 (1962).

international adjudication. Such a settlement permits the state receiving the lump sum to distribute the fund thus acquired among claimants who may be entitled thereto pursuant to domestic procedure.⁶²

Professor Lillich is concerned with the prescriptive effect of two centuries of lump sum settlement practice. Since the lump sum generally comprises settlement for less than the nominal amount put forward by the claimant state on behalf of its nationals, and since there is no authoritative liquidation of the damages, (for example, by an international tribunal), a number of commentators have argued that the lump sum settlement technique is a customary modification if not abrogation of the classic compensation rule of international law. Professor Lillich's view is that the agreements in fact buttress the compensation policy, for the depriving state invariably insists that what it pays in lump is complete compensation.

The real problem, as Lillich emphasizes, is not the question of compensation, but the criteria by which quantum will be determined. And this, it may be added, turns on the fundamental notion of property. Since "property" has no meaning other than in a socio-cultural context, different public order systems, with different value systems, will define property differently and conclude with different estimates of damage attendant on deprivation.⁶³ The challenge to creative international law is, then, the integrative prescription of principles of content and procedure for determining "property" and "inclusive community right" to be applied to any case of deprivation, in any context, such that the result advances a world order of human dignity.

ARBITRAL PROCEDURE

The *Liber Amicorum* is rich in international and comparative procedural studies and this is particularly appropriate for a book dedicated to Martin Domke. Overall studies are presented by Professor Sanders,⁶⁴ Dr. Glossner,⁶⁵ Professor Minoli⁶⁶ and Professor Doi.⁶⁷ It is quite impossible to review the wealth of material presented, but some comments must be made on the more controversial aspects of these articles.

International arbitration has tended to be characterized more by authority than by control, and a recurring challenge to those who would make arbitration effective is the question of how to deal with a party to a submission who either

62. RE, *Domestic Adjudication and Lump-Sum Settlement as an Enforcement Technique*, 58 ASIL PROCEEDINGS 39, 40 (1964).

63. On this matter, see CARLSTON, *LAW AND ORGANIZATION IN WORLD SOCIETY* (1962).

64. SANDERS, *ECAFE Rules for International Commercial Arbitration*, LIBER AMICORUM 252.

65. GLOSSNER, *International Commercial Arbitration: Some Practical Aspects*, LIBER AMICORUM 95.

66. MINOLI, *L'Italie et la convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères* LIBER AMICORUM 199.

67. DOI, *International Commercial Arbitration in Japan*, LIBER AMICORUM 65.

does not submit to arbitration when the preagreed conditions have been fulfilled, or who withdraws, presumably in protest, before award is delivered. The apparent contradiction between the obligatory character of an arbitral agreement (like all other agreements) on the one hand, and the notion of voluntary international jurisdiction on the other, tended to paralyze doctrine from creative solutions. Because the effectiveness of law is a component of its being law, doctrine was reluctant to move toward institutional rather than voluntary jurisdiction without complementary enforcement structures. Contemporary international law is, after all, more than abundantly endowed with grasswidow rights; rights without remedies.

In the light of this background, the default procedure in international arbitration is particularly important. In his contribution, Mr. Broches considers the default procedure of the IBRD arbitration convention,⁶⁸ a provision roughly comparable to that found in the Statute of the International Court.⁶⁹ There is no genuine default procedure in international law. An international tribunal may not give judgment or award simply on the basis of the defendant's failure to appear or to plead. Burden of proof remains on the plaintiff and the tribunal must satisfy itself that the plaintiff's case is sound. Yet the tribunal may not put itself *in loco defendentis*, for that would prejudice the case of the plaintiff and encourage defendants to "default." The question is how much independent evidence does an international tribunal need in order to find for the plaintiff upon the defendant's default?

Mr. Broches argues that the independent evidence requirement resting on the suing party and on the tribunal is the same as that found in the Statute. But despite the linguistic identity, it is sobering to recall that in the one case in which the ICJ resorted to a default-type procedure, the judgment was impugned and never received any measure of compliance.⁷⁰ In the future, default procedure, whether in The Hague or in Washington, might set a higher standard of independent evidence and also develop a refined political sensitivity to the possibilities of enforcement.

Both Frederic Eisemann and Professor Francois deal with aspects of the arbitrator in process. Professor Habscheid, in a comparative study, considers some problems of the expert arbitrator or specialist panel member.⁷¹ M. Eisemann reconsiders the vexed problem of the litigant-arbitrator, that hot-house creation of legal schizophrenia, who is simultaneously an arbitrator with the official loyalties thereby owed and a representative of the litigant which appointed him. The "*arbitre-partie*," as M. Eisemann calls him, has also been called a national member, or, as Fox and Simpson neatly put it, a "judge-

68. Convention Article 45.

69. Art. 53, Statute of the International Court of Justice. *See also* A/CN.4/92 at 78 ff for the ILC's approach to default procedure.

70. Corfu Channel [1949] I.C.J. — (Compensation).

71. HABSCHIED, *L'expertise-arbitrage. Etude de droit compare*, LIBER AMICORUM 103.

advocate.”⁷² While the presence of a party-arbitrator gnaws at the *nemo iudex* canon, it is checked by a panel member appointed by the antagonist and both are ultimately neutralized by the third member or umpire. On the credit side of the ledger, the judge-advocate encourages arbitration, and probably facilitates communication in intercultural cases where the possibility of misunderstanding verbal and non-verbal communication is magnified. The operational problem, as M. Eisemann intimates, is not in the institution of the “judge-advocate,” but rather in the normative structure which should, in clarified form, direct and regulate the arbitral behavior of this most delicate and difficult function.⁷³

The right to choose one’s arbitrators is, according to Professor Francois, a critical distinction between arbitration and adjudication.⁷⁴ This has been, it may be noted, a concern of the Dutch Foreign Office in the past. As a matter of policy, Professor Francois feels that the distinction should be maintained on this criterion. Insofar as the distinction can be drawn, I am not certain that I would base it on the capacity to choose one’s own judge or not. But there can be little dispute that a complex world such as ours is best served by a diverse spectrum of conflict-resolving processes, some of which should permit the disputants to choose, among other things, the persons who will settle the matter.

Four papers deal, in whole or in part, with the problem of enforcement and Professor Schwarzenberger charts the past strategy of using arbitration as a wealth strategy.⁷⁵ The other enforcement papers remain close to the new international conventions. Enforcement brings us back to the policy problems with which we began this survey of contemporary international commercial arbitration. For enforcement, as the writers in the *Liber Amicorum* put it, is the problem of securing the willing participation of national courts in enforcing (in what is essentially a non-reciprocal manner), the private awards and the private law of certain organic and/or functional trade groups. National courts should facilitate the realization of agreements, provided that the content and the procedures by which they were reached do not infringe on the community interests which these same national courts are expected to uphold. The prescriptive supervisory and policing mandate of these courts includes, I submit, international law.⁷⁶ The critical issue is the extent to which a national court should defer to speed and economy and hardly examine the award in question, or should defer to its obligation to uphold the peremptory norms of its own immediate and extended system and go deeply into the content of the award and the procedures by which it was reached. In short, enforcement returns the student of arbitration to the basic constitutional problem—interna-

72. FOX & SIMPSON, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 88 (1959).

73. EISEMANN, *L'arbitre-partie*, *LIBER AMICORUM* 78.

74. *LIBER AMICORUM* at 89.

75. SCHWARZENBERGER, *The Arbitration Pattern and the Protection of Property Abroad*, *LIBER AMICORUM* 313.

76. This submission would have been quite uncontroversial until delivery of the Sabbatino decision, 376 U.S. 398 (1964).

tionally and nationally—of delimiting spheres of public and civic competence. Regrettably, no writer in the *Liber Amicorum* comes to grips with this.

THE FUTURE

The *Liber Amicorum for Martin Domke* conveys, in a most remarkable way, the vigor of international arbitration, its rich variety and, above all, its challenge. To those who are committed to a world public order of democracy, the future includes private decision by arbitration. Democracy both assures the retention of arbitration and indicates, in rough outline, its limits. For democracy means a sharing of power and not a secret or open monopoly of it. In international arbitration, then, we may see the grid of future democratic world order.

W. M. Reisman