THE PROCESS OF INTERNATIONAL ARBITRATION

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FOREWORD

Recourse to arbitration by States at variance reflects their common and lofty aspiration to adjust by judicial process controversies that have baffled diplomacy and also their common expectation that justice is obtainable and a reasonable adjustment to be had by reference to accepted principles of international law. In very many instances the hopes of arbitrating States have been shattered, partly because of the failure of arbitrators to perceive and heed the scope of the functions entrusted to them, and partly also because of the failure of the States at variance to take the trouble to make comprehensive and exact terms indicative of their own design, and not opening the way to divergent interpretations of their contractual arrangements.

Mr. Carlston has in the present work done yeoman service to show States how they may wisely contract and make arbitration feasible and helpful as a means of adjusting international problems. He has done this by showing the pitfalls into which arbitrating States have fallen. His story is both a warning and a guide. He has shown the propensity of disgruntled losers on good and bad grounds to deny the validity of their arrangements. He has shown how judges have departed from terms of submission and have exceeded the jurisdiction conferred upon them. He has portrayed some notorious instances where arbitrators have handed down decisions upon matters outside the scope of a *compromis;* he has noted cases where the arbitrators failed to apply the law prescribed by a *compromis;* and he has constantly been watchful of situations where for various reasons it could fairly be maintained that an excess of jurisdiction was asserted and exercised. He has also discussed the failure of litigating States to raise in a timely manner their jurisdictional objections. He has dwelt upon the doctrine of "essential

error." He has not lost sight of the problems pertaining to the finality of an award. The jurisdiction of a court to grant a rehearing, in all that it implies, has been faithfully dealt with. The whole matter of revision has been discussed. The problem of appeal has not been overlooked. Timely suggestions have been offered as to the growth of a system of international arbitral jurisprudence.

The outstanding feature of Mr. Carlston's contribution is the fact that in the light of his offering, States at variance have right before their eyes concrete suggestions, the use of which should enable them to make recourse to arbitration both safe and wise. He shows them how to banish difficulties that heretofore have so often been ruinous to arbitral effort. In a word, the careful reader of his text, especially if he be a governmental draftsman or counsellor, is shown how to make a *compromis* responsive to the exact design of the contracting parties. He is also warned as to matters concerning which those parties should, in such an instrument, focus attention and express their thought. With the prospect of greatly increased recourse to arbitration by States at variance, of which their freedom under Article 33 of Chapter VI of the Charter of the United Nations would seem to be prophetic, Mr. Carlston's study is bound to be widely utilized. Before it is, the writer cheerfully points to the expectant fact.

CHARLES CHENEY HYDE

New York
February 15, 1946

PREFACE

International arbitration is a judicial process, involving the settlement of disputes between States by tribunals acting as courts of law. While a large literature exists upon the Continent concerning various aspects of international arbitration considered as a judicial process, our writers have tended to ignore this field and have concerned themselves more with the substantive law applied by the international tribunal than the functioning of the tribunal as a judicial institution. Yet study of the international court itself is as important as that of the law laid down by the court. States must have confidence not only in international law itself but also in the judicial quality of the tribunal which administers it.

Certain questions are fundamental in the consideration of international arbitration as a judicial process. What procedural difficulties have arisen in the conduct of international arbitrations and how can these be remedied by improvement of procedural rules? What guaranties of justice do States have in entering upon a settlement of a dispute by arbitral means? What limitations exist upon international tribunals, both in the conduct of their hearings and in the rendering of their awards? What may be done to correct excess of jurisdiction or error by a tribunal before its final dissolution? What should be done towards the creation of a means for appeal or review of arbitral decisions? If these questions can be answered in some degree, if the channels of future growth can be marked at least in part, a sound groundwork for the wider acceptance by States of the system of arbitration as a means for the settlement of international controversies will have been laid.

A word about the organization of the book is in order. An unusual degree of attention has been given to a study of cases. Aside from the fact that they are a primary source of the law, detailed

analyses and reporting of the precedents have been included for the reason that much of their source material is not readily available, being largely found in libraries and archives in Washington, D.C., and in libraries possessing large international law collections. A number of Central and South American precedents have been included, in addition to the study of the more customary French, German, and English sources. The study of problems of international law requires the broadest possible examination of all relevant material, and we have somewhat tended to overlook the precedents and writers of our sister nations to the south. Detailed case analysis has also been necessary in order to develop adequately the intricate jurisdictional and legal issues involved.

Much of the material in Sections 1 to 7 and 53 to 56 of the text previously appeared in articles in the *American Journal of International Law,* the *International Arbitration Journal,* and the *Journal du Droit International.* The author gratefully acknowledges permission to include it in this volume.

The translations are by the writer unless otherwise indicated. In certain instances this fact is specifically noted, when departures were made from an available printed translation.

KENNETH S. CARLSTON

Bronxville, New York
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PROCEDURE

1. FUNCTION OF PROCEDURAL RULES.—The drafting of procedural rules for the conduct of an international arbitration is not merely the writing of a timetable for the introduction of pleadings and evidence. Many different factors must be taken into account in the formulation of procedural rules if they are to serve their function of facilitating a prompt and just disposition of the cases to be arbitrated. The requirements of dispatch, of protecting litigants from needlessly protracted procedural steps, must be harmonized with the necessity of ensuring an adequate hearing in the interests of justice. Rules must be adjusted to fit the problems and the difficulties peculiar to the particular arbitration. Differences in types of cases must be recognized. It is obvious, for example, that a case involving intricate questions of fact and law will require, for a proper hearing, a more detailed course of pleadings and argument than one whose facts are simple and involve no other legal issue than whether there has been a failure to meet a recognized international obligation. Differences in the legal systems of the parties must likewise be foreseen and guarded against. If one party is accustomed to the system of the English common law while the other is familiar with that of the Continental civil law, clashes will occur as to the proper contents of the pleadings and the rules applicable to the introduction of evidence. These and all other foreseeable sources of misunderstanding must be minimized by explicit and detailed directions. Provision should be made for enforcement of established rules, but not at the expense of a just decision.

Upon the careful and skilled drafting of the procedural rules, therefore, the successful conduct of an international arbitration will often depend. On the one hand, rules may serve to reconcile the many conflicting demands involved in the conduct of the arbi-

tration, or, on the other hand, they may be merely an arbitrary mechanism thrusting upon the parties burdens and delays which a more realistic and careful approach would have avoided. Procedure is no unalterable and immutable course of conduct to which all tribunals must adhere. On the contrary, procedural rules should be carefully adapted to the requirements of each arbitration as it arises so that it may be consummated speedily, economically and justly.

2. IMPORTANCE OF ADEQUATE PROCEDURAL RULES.—International tribunals are occasionally only too prone to borrow their rules of procedure from one another without considering their suitability for the particular arbitration at hand.[1] It must be recognized that the hurry and pressure attendant upon the opening of an arbitration often makes this unavoidable. Agents and counsel are anxious to proceed with the preparation of their cases. During the course of the arbitration the ever-nearing date fixed for its completion, the mounting expense of maintaining the staffs, and the burden of other official duties awaiting the arbitrators and advocates after the completion of their tasks, all tend to discourage the deliberate consideration of matters of procedure. Though the need for procedural reform was long ago recognized,[2] the problem has received relatively little attention from writers.[3] Their attention has for the

[1] Thus, the General Claims Commission, United States and Mexico, under the convention of September 8, 1923, 43 STAT. 1730, adopted the method of presentation by memorial followed in the prior Mexican claims arbitration of 1868 (Rules and Regulations, Art. 3, 3 MOORE, INT. ARB., 2153), despite the fact that four extensions of time were required by the earlier commission to settle the considerably fewer claims docketed with it (2 *ibid.* 1297–1298). The rules of the General Claims Commission in turn spread, with some modification, to the rules of the other claims commissions charged with settling claims against Mexico, see p. 22, n. 1. This is not to say that uniformity by commissions in recognizing certain basic principles of procedure is not desirable as tending to the establishment of customary rules of procedural law, see SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS (1939) 31.

[2] Dennis, *The Necessity for an International Code of Arbitral Procedure* (1913) 7 AM. J. INT. LAW 285; Lansing, *The Need of Revision of Procedure before International Courts of Arbitration* (1912) 6 PROCEEDINGS AM. SOC. INT. LAW 158.

[3] RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS (1926) 191–213, and SUPPLEMENT TO 1926 REVISED EDITION OF THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS (1936) 96–108, devotes in each case only one chapter to procedure. BISHOP, INTERNATIONAL ARBITRAL PROCEDURE (1930) is primarily descriptive in its approach. CALDWELL, A STUDY OF THE CODE OF ARBITRAL PROCEDURE ADOPTED BY THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 (1921) is necessarily

most part been directed to a description of existing procedural practices. Critical analysis and investigation of the relation of procedural rules to the successful conduct of international arbitrations is almost entirely lacking in the literature on the subject.

This neglect of the procedural aspects of international arbitrations has been not only the source of unnecessary disputes between litigants but also a cause of the expensive, leisurely, protracted course for which international arbitrations have at times been condemned.[4] In at least one international arbitration of note the fail-

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restricted in scope. A condensed but most interesting description of procedural processes appears in HUDSON, INTERNATIONAL TRIBUNALS (1944) 84–98. ACREMENT, LA PROCÉDURE DANS LES ARBITRAGES INTERNATIONAUX (1905) is a thoughtful early study. An illuminating analysis of procedural problems and suggestions for reform with respect to functioning of the American and Panamanian General Claims Arbitration established under the Conventions of July 28, 1926, and December 17, 1932, appears in REPORT OF THE AGENT FOR THE UNITED STATES, DEPARTMENT OF STATE, ARBITRATION SERIES No. 6 (1934) 7–29. Some excellent procedural suggestions out of his ripe experience as an international judge are found in a few pages of NIELSEN, INTERNATIONAL LAW AS APPLIED TO RECLAMATIONS (1933) 67–69, 72–74. WITENBERG, L'ORGANISATION JUDICIAIRE, LA PROCÉDURE ET LA SENTENCE INTERNATIONALES (1937) 110–261, while comprehensive and well documented, is also primarily descriptive of procedural steps rather than a critical study. HOIJER, LA SOLUTION PACIFIQUE DES LITIGES INTERNATIONAUX (1925) 250–270, is broadly descriptive in content. Of the early studies on arbitration see MÉRIGNHAC, TRAITÉ THÉORIQUE ET PRATIQUE DE L'ARBITRAGE INTERNATIONAL (1895) 244–282, 435–439; KAMAROWSKY, LE TRIBUNAL INTERNATIONAL (1887) 175–180, 510–512; DREYFUS, L'ARBITRAGE INTERNATIONAL (1892) 271–296. An extensive literature on the Mixed Arbitral Tribunals created under the Treaty of Versailles and the other treaties of peace exists, however; see bibliography collected in TEYSSAIRE AND SOLERE, LES TRIBUNAUX ARBITRAUX MIXTES (1931) 231–243. See also Nielsen, *Progress in Settlement of International Disputes by Judicial Methods* (1930) 16 A.B.A. JOUR. 229; Garnier-Coignet, *Procédure judiciaire et procédure arbitrale* (1930) 6 REV. DE DROIT INT. 123; the author's article *Procedural Problems in International Arbitration* (1945) 39 AM. J. INT. LAW 426.

[4] See remarks in 75 CONG. REC. 14424. As to the costs of international arbitrations, consider the following examples.

Appropriations for arbitrations embodying a single issue or claim:

Landreau claim (U.S.) v. Peru	$45,000,	42 STAT. 336
Norwegian Claims Case	60,000,	42 STAT. 336

For arbitrations embodying many claims:

United States–Germany Mixed Claims Commissions	1922–1932	
Tripartite Claims Commission	$1,339,863 *	
United States–Mexican Mixed Claims Commissions	1924–1932	
	$2,574,730 **	

* 42 STAT. 1051; 43 STAT. 215, 1023; 44 STAT. 359, 1189; 45 STAT. 74, 913, 1105; 46 STAT. 183, 886, 1581; 47 STAT. 25.

** 43 STAT. 691, 1024; 44 STAT. 340, 865, 1190; 45 STAT. 74, 1105; 46 STAT. 184, 1318; 47 STAT. 25.

ure to adapt the procedural rules to the necessities of the arbitration led to its abandonment and the transfer of its task to a domestic body. During the first eight years of its existence, the Special Claims Commission, United States and Mexico, created under the convention of September 10, 1923, decided 18 claims. In a corresponding period of time the General Claims Commission, United States and Mexico, decided 148 claims, making an aggregate of 166 claims decided out of some 5,736 claims filed with both commissions.[5] Yet the Special Mexican Claims Commission, functioning as a statutory national commission under the Act of April 10, 1935,[6] and not under the Convention of September 10, 1923, and untrammeled by elaborate procedural rules, decided 2,833 claims in a little more than two and one-half years, and this on a budget of less than $90,000 a year, as against an aggregate expenditure by the commissions during their existence of more than $2,000,000 when they functioned in the traditional manner of international tribunals.[7]

As the web of international commerce is again woven into its intensely intricate pattern in the postwar years, every means must be taken to lessen the strains to which differences in language, laws and culture will subject it. Disputes and misunderstandings will inevitably arise because of clashes caused by varying national back-

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The foregoing computations, of course, fail to take into consideration any unexpended appropriations turned back to the Treasury. Deduction of a specified percentage from awards to cover the expenses of the arbitration is sometimes made, 56 STAT. 1058, 1063, but this only adds to the burden of claimants without affecting the amount of expenses incurred.

[5] See FELLER, THE MEXICAN CLAIMS COMMISSIONS, 1923–1934 (1935) 60, 68; Turlington, *Comments on the Rules of the Special Mexican Claims Commission* (1936) 3 JOUR. D.C. BAR ASS'N 22, 23; McDonald and Barnett, *The American-Mexican Claims Arbitration* (1932) 18 A.B.A. JOUR. 183, 184.

[6] 49 STAT. 149.

[7] See McKernan, Special Mexican Claims (1938) 32 AM. J. INT. LAW 457, 461. It was recognized that the commission had at its disposal "a veritable mine of information" collected by the former agency and that its task was confined to a review of the records and did not include the preparation and prosecution of cases undertaken by the former agency, *ibid.* 463; *Rules and Regulations of the Special Mexican Claims Commission*, Rules II and VII. Moreover, approximately 500 claims were submitted to the former commission by the American agency in memorial form, of which 150 were briefed as to facts and law, and evidence probably sufficient for memorialization was obtained by the agency on some 200 additional claims. Turlington, *supra* note 5, fn. 11.

grounds. If arbitration is to carry out successfully its task of solving amicably such disputes, the utmost consideration must be given to its procedural aspects. Unless the details of the presentation of the case and the pertinent evidence are thoroughly explored and settled in advance, the final disposition of the dispute to be arbitrated may very well be wrecked upon the shoals of a procedural argument. At best, a haphazard course of procedure does not conduce either to a sound award or to satisfaction with arbitration as a means for the settlement of disputes.

To be successful, therefore, an arbitration in the international sphere will have to be undertaken by the parties with full recognition of the fundamental differences existing between their respective national backgrounds and legal systems, and every effort will have to be made to carry the arbitration forward in carefully marked channels.

3. PROCEDURAL PROBLEMS IN ARBITRATIONS LIMITED TO A SINGLE CASE. —Procedural difficulties are necessarily much less likely to arise when the arbitration is confined to the decision of a single dispute instead of many. Generally these difficulties concern the scope of the pleadings and the time and manner of introducing the evidence.

Pleadings, in general, fall into one of two systems of nomenclature. In certain recent multi-claims arbitrations the opening pleading (i.e., the complaint) is termed the "memorial," and it is followed successively by the answer, the reply, and the rejoinder, or the answer to the reply. In the arbitration of single disputes, the opening pleading is often designated the "case" and is followed by the counter-case, or answer, and the reply.

Argument as to the scope of pleadings is not likely to be provoked when the arbitration goes forward under the direction of counsel whose legal experience has been under similar systems of law.[1] But when one of the countries adheres to the civil law, while

[1] American counsel were engaged by both litigants in the Tacna-Arica arbitration, where it happened that the cases and the counter-cases of each were generally similar in scope, though the exposition of facts tended to be presented within the structure of a legal analysis, ARBITRATION BETWEEN PERU AND CHILE UNDER PROTO-