UNIVERSITY OF OXFORD · FACULTY OF LAW

INTERNATIONAL DISPUTE SETTLEMENT 2003-2004

(4) THE HAGUE PEACE SYSTEM AND INTERNATIONAL ARBITRATION

General Reading:-
* Merrills, *International Dispute Settlement*, (3rd ed., 1998), ch. 5.
Simpson & Fox, *International Arbitration*, (1959).
Wetter, *The International Arbitral Process*, vol. V p. 187.
Mangoldt, "Development of Arbitration...Since the Hague Conferences", ibid., p. 243.
*Schwarzenberger, *International Law*, vol. III (1986), Parts One, Two.
David Davies Memorial Institute, *International Disputes: The Legal Aspects*, (1972), pp. 101- 127.
For reference: Stuyt, *Survey of International Arbitrations*: 1794-1989, (1990).

HISTORY AND DEVELOPMENT

1. Early international arbitrations were essentially unreasoned dispositions of cases by a Sovereign or the Sovereign's representative: e.g., *Portendick* (1843 - Simpson & Fox, p.4, Moore, Int. Arb., vol. 5, p. 4937); Washington Treaty, 1871, 61 BFSP 40, *San Juan de Fuca*, Moore, Int. Arb., vol. 1, p. 229.

2. In the later 19th century there occurred a shift towards reasoned awards and a more clearly 'judicial' procedure: *Bulama Island*, (1870) Moore, Int. Arb., 2, 1920; *Croft* (1856) - Simpson & Fox, p. 5, Moore, Int. Arb., vol. 5, p. 4979.

3. In parallel, there were Mixed Commissions, as formalised extensions of diplomacy: Jay Treaty 1794, < http://www.yale.edu/lawweb/avalon/diplomacy/britian/jay.htm > 1 BFSP 784 (commissions had equal representation, with extra members chosen by agreement or lot); the Washington Treaty, 1871, 61 BFSP 40 –(equal representation and umpires chosen by agreement or by a third party). The approach taken by Commissions became increasingly juridical: see, e.g., *Bolivar Railway Co. claim*, (1903), 9 RIAA 445.

4. Some Commissions operated by way of the negotiation and administration of Lump Sum settlements: Jay Treaty settlement, US-GB Convention of 8 Jan. 1802.: see text at < http://www.yale.edu/lawweb/avalon/diplomacy/britian/jayconv.htm >

5. Lump Sum Settlements and national Claims Commissions remain common today: see further, Lillich, *International Claims: Their Adjudication by National Commissions*, (1962); Weston, Lillich and Bederman, *International Claims:*

Their Settlement by Lump Sum Agreements 1975-1995 (1999). Magnus, "The Foreign Compensation Commission", 37 ICLQ 975 (1988).

6. The shift towards identifiably judicial collegiate arbitral tribunals occurred most clearly in the *Alabama Claims* arbitrations, (1871), Moore, Int. Arb., 1, 496*; Behring Sea Fur Seal* arbitration, (1893), Moore, Int. Arb., vol. 1, p. 935, and 12 AJIL 233. The tribunals had a predominance of neutral members and a plainly juridical approach to the dispute.

THE 1899 HAGUE PEACE CONFERENCE

7. The 19th century developments were brought together in the 1899 Hague Peace Conference. Background to Conference; the Russian Draft Proposal; the 1899 Convention for the Pacific Settlement of International Disputes, 91 BFSP 970, (1901) UKTS No. 9 (Cd. 798), (1971) UKTS No. 6 (Cmnd. 4575) -at present, c. 74 Parties. For papers relating to the conference, see < http://www.yale.edu/lawweb/avalon/lawofwar/hague99/haguemen.htm >

8. The 1899 Hague Convention was based upon several techniques for dispute settlement: good offices and mediation; International Commissions of Inquiry; and International Arbitration, under the Permanent Court of International Arbitration (PCA) with its International Bureau and Panel of Arbitrators. The Hague Convention laid down the basic rules of arbitral procedure, requiring a *compromis*, the examination of evidence and holding of hearings. The tribunal was to settle its own competence, and particular provisions governed the finality and revision of arbitral awards and matters such as intervention.

9. The Hague Convention was revised in 1907. Amendments affected the rules on matters such as the choice of arbitrators and the framing of the *compromis*, and established a new summary procedure. For the ****texts of the Hague Conventions** see: < http://www.pca-cpa.org/ENGLISH/BD/ > or http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm and <http://www.yale.edu/lawweb/avalon/lawofwar/pacific.htm >

APPRAISAL OF THE HAGUE SYSTEM.

10. In the Hague system, arbitration is only one element: negotiation, good offices and mediation, and international commission of inquiry all have roles to play.

11. The PCA is not a Court, is not permanent, and does not itself conduct arbitrations. It is merely a framework or set of model rules.

12. There is no single form of arbitration envisaged by the 1899 / 1907 Convention: see, e.g., *Island of Palmas* case, (1928), 2 RIAA 829; *North Atlantic Coast Fisheries*, (1910), 11 RIAA 173.

13. Under the Hague system the parties are free to choose the law applicable to the dispute: *Venezuelan Preferential Claims*, (1904), 9 RIAA 107; *Orinoco*, (1910), 11 RIAA 237; *Seizure of Certain Religious Properties*, (1920), 1 RIAA 7.

14. Conference seen as building on earlier experience; establishing the PCA, with prescribed procedures and final awards.

15. PCA tribunals have made significant contributions to international jurisprudence: *Island of Palmas* case (supra); *Canevaro*, (1912) 11 RIAA 405. But there is no provision for compulsory arbitration, and the PCA was little used for major cases: see *Casablanca*, (1909) 11 RIAA 126; *North Atlantic Coast Fisheries*, (1910), 11 RIAA 173; and the list in Oppenheim, vol. II, 7th ed. (1952), pp.39-41.

16. The PCA was limited to State/State arbitration.

THE CURRENT ROLE OF THE PCA

Schwarzenberger, "Present-day relevance of the Hague Peace System", 34 *YBWA* 329 (1980).
* Soons, *International Arbitration: Past and Prospects* (1990).

17. Attempts were made to revitalise the PCA in the 1962 PCA Rules of Arbitration and Conciliation for the Settlement of International Disputes Between Two Parties of which Only One is a State, Wetter, vol. V, p. 53; 57 AJIL 500-512 (1963), first used in Sudan/Turriff Construction Ltd., (1970), Redfern & Hunter, Law and Practice of International Commercial Arbitration, (1999) pp. 58, 170. **These Rules were replaced by the 1993 Optional Rules For Arbitrating Disputes Between Two Parties Of Which Only One Is A State,

18. Further attempts to encourage use of the PCA were made in the ***1992 Optional Rules for Arbitrating Disputes between Two States. Note also the PCA's Optional Rules For Arbitrating Disputes Between Two Parties of which Only One is a State (1993), Optional Rules for Arbitration involving International Organizations (1996), Optional Rules for Arbitration between International Organizations and Private Parties (1996), Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment (2001)*. ** **Texts** are set out at < http://www.pca-cpa.org/ENGLISH/BD/ > It now hosts *ad hoc* international tribunals established outside the Hague Convention. See < http://www.pca-cpa.org/ >

AD HOC INTER-STATE ARBITRATION

Reading:
* Merrills, *International Dispute Settlement*, (1991), ch. 5.
Carlston, *The Process of International Arbitration*, (1946)
* David Davies Memorial Institute, *International Disputes: The Legal Aspects*, (1972), pp. 101-127.
Ralston, *The Law and Procedure of International Tribunals*, (1926)
---, *International Arbitration from Athens to Locarno*, (1929)
Schwarzenberger, *International Law*, vol. III (1986), Parts One, Two.
Simpson & Fox, *International Arbitration*, (1959).
* Soons, *International Arbitration: Past and Prospects* (1990).
Sohn, "The Function of International Arbitration Today", 108 *Hague Recueil* 11 (1963)
Wetter, *The International Arbitral Process*, (1979).

For survey of international arbitrations and references to primary materials and articles on particular cases, see *Stuyt*, above.

19. *Ad hoc* arbitration between States remains common. See, e.g.,
Trail Smelter (Canada/US, 1935): 162 LNTS 73; 3 RIAA 1907, 1938.
Lac Lanoux (France/Spain, 1956): 12 RIAA 285; (1957) ILR 101.
Rann of Kutch (India/Pakistan, 1968): 7 ILM 633 (1968); *Untawale, "The Kutch-Sind Dispute: A Case Study in International Arbitration", 23 ICLQ 818 (1974).
Beagle Channel (Argentina/Chile, 1978): 17 ILM 634 (1978).
Western Approaches (France/UK, 1977, 1978): 18 ILM 397 (1979); Cmnd 7438);
Aviation Dispute (France/USA, 1978): 54 ILR 304 (1979), Damrosch, "Retaliation or Arbitration...", 74 AJIL 785 (1980).
Boundary Dispute Concerning the Taba Area (Egypt/Israel, 1988), 27 ILM 1421 (1988).
Guinea-Bissau/Senegal Maritime Frontier (1989), (1990) RGDIP 204, 83 ILR 1. Award challenged in ICJ by Guinea-Bissau, August 1989: (1992) ICJ Rep 53, 31 ILM 32 (1992).

20. Compromissory clauses exist in many bilateral treaties: e.g.,
1951 Treaty of Peace (Japan), 136 UNTS 45; 14 RIAA 451, 465, 501.
1975 Iran-Iraq Treaty on International Border and Good Neighbourly Relations, 14 ILM 1133 (1975).
1979 PRC-USA Agreement on the Settlement of Claims, 18 ILM 551 (1979), *Digest of US Practice in Int'l Law 1979*, 1213-1215.
1976 Singapore-UK Agreement for the Protection and Promotion of Investments, 15 ILM 591 (1976).

21. Some multilateral treaties set out compromissory clauses providing for the arbitration of disputes: e.g., the *General Act for the Pacific Settlement of International Disputes, Geneva, 1928*, 93 LNTS 343; Brierly, "The General Act of Geneva, 1928", 11 BYIL 119 (1930); Merrills, "The International Court of Justice and the General Act of 1928", [1980] CLJ 137. The Bogotá Charter, 1948 119 UNTS 3; the Bogotá Pact, 1948, 30 UNTS 55; Turlington, "The Pact of Bogotá", 42 AJIL 608 (1948); Fenwick, "Revision of the Pact of Bogotá", 48 AJIL 123 (1954).

22. The ILC addressed the question of arbitral procedure in the ILC Draft Articles on Arbitral Procedure, *Yearbook ILC*, 1958 ii, p. 80. See Carlston, Draft Convention on Arbitral procedure of the ILC", 48 AJIL 296 (1954); Bos, "The ILC's Draft Convention on Arbitral Procedure in the General Assembly of the UN", 3 *Neth. Tid. I. L.* 234 (1959); and compare the *Interpretation of Peace Treaties* case, [1950] ICJ Rep. 65, 221; Carlston, 44 AJIL 728 (1950).

23. Further attempts to establish multilateral obligations to resort to arbitration have met with little success: see, e.g., the **European Convention for the Peaceful Settlement of Disputes, 1957*, < http://conventions.coe.int/Treaty/EN/Treaties/Html/023.htm>, 320 UNTS 243; Kiss, "Le Conseil de l'Europe et le règlement pacifique des différends", 11 AFDI 668 (1965); Salmon, "La convention européene pour le règlement pacifique des différends", 63 RGDIP 21 (1959).

24. There have been attempts at the regional level to introduce arbitration as a component of more general and disparate dispute settlement mechanisms: see, e.g., the Organization of African Unity, Protocol of the Commission of Mediation, Conciliation and Arbitration, 1964, 3 ILM 1116 (1964); Bedjaoui, "Le règlement pacifique des différends africains", *AFDI* 85 (1972); Shaw, "Dispute Settlement in Africa", *YBWA 1983*, 149-167; Maluwa, "The Peaceful Settlement of African Disputes, 1963-1983: Some Conceptual Issues and Practical Trends", 38 *ICLQ* 299-320 (1989). And in Europe see the OSCE (Stockholm) system: Convention on Conciliation and Arbitration within the CSCE, 1992, < http://www.ejil.org/journal/Vol4/No1/art3.html >, 32 ILM 551 (1993).

25. Arbitration has found greater favour in treaties with narrower, functional fields of application: see, e.g., the European Energy Charter Treaty, 1994, Part V, 33 ILM 360 (1995), and < http://www.encharter.org/index.jsp > and < http://www.encharter.org/upload/1/TreatyBook-en.pdf >

QUESTIONS TO CONSIDER:-

1) What advantages and disadvantages does arbitration have over non-judicial means of dispute settlement?

2) What difficulties may impede the effective operation of (a) systems providing for the arbitration of disputes and (b) actual arbitrations themselves?