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Review Essay

Economic Globalization: The Challenge for Arbitrators

By Dr. Ranee K.L. Panjabi*

CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION
By Okezie Chukwumerije. Westport, Connecticut:
Quorum Books, 1994. Pp. 219.

Arbitration at the municipal level is becoming more frequently used because it is regarded as a more expeditious process for resolving disputes. In the realm of labor relations, for instance, arbitration is often the dispute resolution method of choice and is incorporated in numerous collective agreements. In an arbitration the two parties usually select an arbitrator and jointly pay the costs of the process. In the collective agreement or contract, the parties stipulate the terms of the procedure that generally bind the arbitrator, provided they are not in contravention of any laws. The arbitrator usually adheres to generally accepted rules of evidence in hearing the case, but the atmosphere is not as formal as in a court. In the realm of labor relations, union and management personnel act very effectively to present cases, the consequent lower costs being shared equally by both parties. The success of arbitration as an alternative system of dispute resolution can be gauged by the extensive arbitral jurisprudence that has developed in countries like the United States and Canada.

The consensual nature of the arbitration process and the relative privacy within which cases are heard make this method desirable in the commercial field as well. The prevailing tendency in this complex age is toward economic globalization and this trend has affected the development and scope of numerous companies throughout the world. The fact that a company based in the United States can produce goods in Mexico, market them in

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Asia, and conduct research in Europe with a view to improving the product ensures that national boundaries have little significance in the international marketplace, which is rapidly becoming the norm in the world of the 1990s. However, although the businessmen of the world are leaping toward twenty-first century internationalism, they still operate within a political framework limited by twentieth century concepts of national sovereignty, domestic commercial systems, and frequently, strong nationalistic emotions.

When disputes that are transnational in character occur, certain problems emerge despite the existence of free trade agreements and economic unions. The resolution of the problem must accommodate the political realities of the various countries involved via a recognition of, if not an adherence to, the diverse legal and commercial systems involved in any international situation. Should the parties agree to resolve their dispute via the arbitration process, they are still challenged by the necessity to define various norms for the process. These norms must be mutually acceptable to the parties, generally in harmony with fundamental legal principles, and practically applicable with respect to the implementation of the arbitrator's eventual award.

This series of challenges forms the core of the book by Okezie Chukwumerije, who lectures at the University of Sydney Law School, specializing in international commercial and trade law. He presents a detailed view of the process of international arbitration; discusses the law governing arbitration proceedings; explores various theories of arbitration; suggests possible choices in the law governing substantive issues; points out the importance of mandatory rules of law in international commercial arbitration; and highlights issues in the law applicable to state contracts, including the particular problems that can ensue when a private company has a dispute with a state. The book is well-researched and documented, although one would have preferred more inclusion of case law to illustrate the author's very important points. The book is recommended for international lawyers, students of international commercial law, and for arbitrators who practice in the field of international commercial arbitration. His handling of the material is thorough and the order of presentation is logical. There can be little doubt that this subject is very relevant given the increasing economic complexity that prevails on this planet.

International arbitration has developed extensively in the course of the twentieth century via the passage of a series of international conventions that have sought to provide a framework within which this system can operate effectively. The Montevideo Convention of 1889 "provided for the recognition and

enforcement of arbitration agreements between certain Latin American countries."¹ In 1923, the Geneva Protocol on Arbitration Clauses provided for international enforcement of such agreements and for enforcement of the award in the state where it was made.² The Geneva Protocol lacked the capacity of international enforcement, a shortcoming that was partially addressed in the subsequent Geneva Convention on the Execution of Foreign Arbitral Awards (1927). This convention ensured recognition and enforcement of awards in the territory of any of the contracting parties.³

It was increasingly recognized that the main problem confronting the process of international arbitration was that it was being hampered by the obligations of municipal legal systems. The International Chamber of Commerce "identified as the most fundamental defect of the old conventions the requirement that the award must conform with the rules of the place of arbitration."⁴ The next logical step was to free the arbitration process from the hindrances created by national legal systems. The result was the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), drafted in 1958.⁵ According to Chukwumerije, the New York Convention "represents one of the boldest attempts to enhance the practice of arbitration and to achieve unification in state practice with respect to the recognition and enforcement of arbitration agreements and awards."⁶ The New York Convention recognizes the validity of awards made in another state and eases the process of enforcement.

Further progress was made with respect to investment problems with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), in 1966. The World Bank sought to formulate a mechanism for the settlement of investment disputes involving governments and private foreign parties, largely because the existence of adequate dispute resolution measures could facilitate

1. OKEZIE CHUKWUMERJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 15 (1994).

2. *Id.*

3. *Id.* at 16.

4. *Id.* (citing U.N. Doc. E/C2 372/Add 1, reprinted in 1 GEORGIO GAJA, INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, pt. III, A.1.2. (1978)).

5. *Id.* at 16-17.

6. *Id.* at 17-18.

the international flow of capital.⁷ The resulting International Center for the Settlement of Investment Disputes provides facilities for these arbitrations in an effort to promote economic development.⁸

Of wider application in the realm of dispute resolution is the subsequent Model Law on International Commercial Arbitration, adopted by the United Nations General Assembly on December 11, 1985. This formulation considers both the composition and the jurisdiction of arbitration tribunals. The Model Law deals with the proceedings from the initial stages to the making of awards and covers the vital issue of enforcement and recognition of awards.⁹ As Chukwumerije comments:

The strength and utility of the Model Law lie in the fact that it is designed to refurbish and harmonize national laws dealing with international commercial arbitration, and the fact that it was elaborated by arbitration experts and representatives from various countries and international agencies who strove to reach an acceptable consensus.¹⁰

Despite the existence of these international formulations and other regionally-oriented documents facilitating the arbitration process, there can still be problems facing any arbitrator and parties involved in a transnational dispute. First, it is imperative that the parties agree on the system of law applicable to their particular agreement to proceed to arbitration, as well as the law applicable to the actual process and to the merits of their dispute. Chukwumerije asserts that his perspective is eclectic, stressing the "dynamic interaction between the will of the arbitrating parties and the interest of various national legal systems in ensuring the fairness of the arbitral process and its respect for vital and appropriate national interests."¹¹

Within the confines of the nation state, arbitrators are bound to observe the prevailing legal norms of fairness in procedure and to consider both the articles of the agreement between the parties as well as applicable legislation. The arbitral territory, if frequently challenging, is also fairly familiar and the consensual nature of the process, as well as the affinity bred by national legal

7. *Id.* at 18 (citing International Bank for Reconstruction and Development, Report of the Executive Director on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) 4 I.L.M. 524, 525 (1965)).

8. *Id.* (citing Ibrahim F.J. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1 ICSID REV. 1 (1986)).

9. *Id.* at 19.

10. *Id.* at 20.

11. *Id.* at xi.

traditions, make for a process that functions within defined parameters under the umbrella of the national judicial system. It is almost certain, then, that minimum standards of natural justice or due process will normally be observed and adhered to rigorously.

Once a dispute transcends political boundaries, however, the entire situation changes. Chukwumerije believes that the current trend is in the direction of limiting judicial involvement in the arbitration process.¹² Hence, international arbitrations are generally treated more liberally, an attitude that includes "greater respect for the expressed intentions of the arbitrating parties and far less judicial intrusion in the arbitration process than is the case in domestic arbitrations."¹³ According to the Model Law, the international character of a dispute is defined and determined where 1) the parties have their places of business in different states or 2) either the locale of the arbitration, or the place of performance of the agreement, or the place most closely connected to the subject of the dispute is different from the state where the place of business is located. If the parties agree that the subject matter of the arbitration is relevant to more than one country, the Model Law directs that the dispute become international in character.¹⁴ Given such broad definitions, any number of disputes acquire an international character. This characterization has made arbitration the preferred system in the negotiation of international commercial agreements.¹⁵ Chukwumerije states:

Advocates within the business community believe that arbitration is preferable over litigation because arbitration is thought to be informal, faster, less costly, equitable, a way to avoid unfavourable publicity, relatively conciliatory, absorbs less management time . . . Most importantly, arbitration is seen as providing the best chance to save the underlying business relationship.¹⁶

Chukwumerije also considers the challenges once the arbitration process gets underway. The Kompetenz-Kompetenz rule "empowers arbitral tribunals to determine their

12. *Id.* at 12.

13. *Id.* at 3.

14. *Id.* at 15.

15. *Id.* at 6-7.

16. *Id.* at 7 (citing Janice E. Meason and Allison Smith, *Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 NW J. INT'L L. & BUS. 27, 27-28 (1991)).

jurisdiction."¹⁷ This rule, which conforms with the provisions of the Model Law, enables the arbitrator to determine the scope of his or her jurisdiction without reference to a national court.

Facing a jurisdictional objection, an arbitrator may have to determine the applicable law governing the arbitration agreement. When the parties have previously decided which system of law prevails, the arbitrator respects their choice. When no such selection exists, arbitrators can resort to four methods. First, an arbitrator can rule that the arbitration agreement is governed by the law of the locale of the arbitration. Second, the arbitrator can rely on the law governing the substance of the dispute, or third, rely on the rules of the arbitral institution selected by the parties. The fourth option is to rely on "internationally accepted principles governing contractual relations."¹⁸ Chukwumerije concludes that there is a clear necessity for a "single test in determining the law applicable to arbitration agreements."¹⁹

With respect to the issue of the capacity of the parties to arbitrate, the Model Law proposes resolution under the conflict rules prevailing where the issue arises.²⁰ However, Chukwumerije believes that "in determining the issue of capacity, [arbitrators] should search national rules and international conventions for general trends."²¹ He expresses faith in reliance on the "emerging rules of international arbitral practice."²²

The imperatives guiding international arbitrators vary from those which direct arbitrators, adjudicators and judges operating within the framework of national legislation. As Chukwumerije aptly comments: "[w]hile a national court looks only to its domestic public policy, an international arbitrator has to ensure that domestic public policies have a legitimate claim to application in the international arena."²³ International or transnational public policy is the product of many sources including natural law, *jus cogens*, and the norms of justice universally applied in most nations today.²⁴

Another challenge facing the process of dispute resolution via international arbitration is the issue of authority in determining

17. *Id.* at 32.

18. *Id.* at 37 (citing ICC Case No. 3572, 1982, extracted in 14 U. COMM. ARB. 111 at 116).

19. *Id.* at 37.

20. *Id.* at 39.

21. *Id.* at 40.

22. *Id.*

23. *Id.* at 44.

24. *Id.* at 45 (citing JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 535 (1978)).

the validity of an arbitration agreement. Contracting parties, whether corporations or states, are fictional entities acting through officials. On the related issue of capacity, Chukwumerije strongly endorses the popular position that a "[s]tate or its agency should not be able to rely on its incapacity to arbitrate under its domestic law as grounds for invalidating an arbitration agreement to which it had willingly consented."²⁵ With respect to the issue of authority, it would be up to the arbitrator to determine whether a competent representative of each party had signed the agreement.²⁶ It is also important for private parties to ensure the standing of governmental agents with whom they are dealing.²⁷ Ultimately, a state that attempted to renege on agreements on either the issues of capacity or authority would in effect be cutting off its nose to spite its face. These actions would inevitably result in an absence of good faith and trust—two vital and essential elements of any commercial enterprise. As Chukwumerije comments:

As arbitration continues to gain prominence as a method of resolving international commercial disputes, restrictions on the ability of States and their agencies to consent to arbitration will be gradually dismantled. Foreign investors will no doubt be skeptical about investing in a country that insists on resolving all contractual disputes under its own national legal system.²⁸

A related problem springs from the divergent goals of a state negotiating a contract with a foreign private party, a tension that Chukwumerije believes arises because of the state's "need for contractual flexibility and the private party's insistence on contractual stability."²⁹ He concludes that reliance on national law—not necessarily the law of the state party—provides the best protection for the parties.³⁰

The diverse challenges facing international arbitrators continue in the application of the law. In any international commercial arbitration, four levels of law become involved: 1) the law that applies to the arbitration agreement; 2) the law governing the reference to arbitration; 3) the law that governs the actual proceedings and 4) the law governing the merits or substance of the dispute.³¹ As Chukwumerije points out, it is possible for the

25. *Id.* at 45-46.

26. *Id.* at 50.

27. *Id.* at 52.

28. *Id.* at 52.

29. *Id.* at 165.

30. *Id.*

31. *Id.* at 77.

parties to agree to apply the law of one nation to the proceedings, and the law of another nation to the merits.³² He explains that the:

distinction between substance and procedure is widely recognized as a cardinal element of international commercial arbitration. This segregation of the law applicable to the substantive agreement from the law applicable to the arbitration illuminates the fact that the arbitral process is independent of the system of law that regulates the rights and obligations of the parties in relation to their substantive agreement. The segregation also implicitly acknowledges that the determination of each of the two applicable laws is influenced by different considerations. While the parties may prefer a particular national law to govern their arbitration proceedings, they may consider that law unsuitable in resolving disputes that may arise from their substantive agreement.³³

The challenges in the process of international arbitration do not end with the issue of the award. Enforcement has been a major problem bedeviling the process as it has developed over the twentieth century. Although enforcement mechanisms are now much stronger, the debate on this issue continues. Clearly "[t]he enforceability of an award is the ultimate objective of a claimant in an arbitration. If an award is unenforceable, the time and expense expended on the arbitration are wasted."³⁴ The New York Convention governs the enforcement of arbitration awards.³⁵

With respect to the law governing arbitration proceedings, Chukwumerije suggests that "there is much to be said for setting an international standard by which international arbitrations should be superintended, as opposed to leaving each State to enact its own individual standard, which may run contrary to the aspirations of foreign arbitrating parties."³⁶ He continues:

the present trend inclines toward the harmonization of international arbitral practices through the provision of internationally accepted standards for the conduct, regulation, and enforcement of arbitration proceedings and awards. Significantly, both the New York Convention and the Model Law, which are the two major international projects on arbitration, recognize the doctrine of party autonomy and provide liberal arbitration regimes that respect the will of the parties, while at the same time demanding that arbitrations conform with the international minimum standards they embody.³⁷

32. *Id.* at 77.

33. *Id.* at 78.

34. *Id.* at 94.

35. *Id.* at 98.

36. *Id.* at 97.

37. *Id.* at 98.

With respect to the substance or merits of the dispute, party autonomy prevails in "virtually all international conventions dealing with arbitration and contract law."³⁸ However, mandatory rules of national law that are relevant to the dispute are frequently applied by international arbitrators, regardless of the choice made by the parties. Chukwumerije explains that "the parties' choice of law in no way precludes a tribunal from determining that their contract is so closely connected with a jurisdiction that the mandatory rules of that jurisdiction must be applied to the contract, regardless of the fact that the national law of that jurisdiction is not the law applicable to the contract."³⁹ When parties make a choice, the preference tends to be for the national law of an economically sophisticated state, often the location of a significant financial center.⁴⁰

Occasionally, the parties will resort to the more controversial choice of the *lex mercatoria*, which Chukwumerije defines as "essentially the embodiment of emerging customs and usages of international trade, supplemented in appropriate cases by resort to commonsense notions of justice and fairness."⁴¹ Application of this system is risky when the transaction is complex. The *lex mercatoria* lacks legal standing in some jurisdictions and this could compromise the enforceability of the award.⁴²

Equally controversial is the parties' decision to allow the arbitrator to act as an amiable *compositeur*, freed from the "strict responsibility of applying systemized principles of law."⁴³ Amiable *compositeurs* are, however, bound to observe those mandatory rules that are relevant to the case before them.⁴⁴

It is clear that as a consensual process, arbitration is better suited to resolving international commercial disputes between parties who wish to retain their economic relationship after the dispute has been resolved. Although the costs of international arbitration may be high given the distances to be travelled by all parties, the relative privacy of the proceeding is advantageous when confidential commercial transactions are discussed. The numerous advantages must be evaluated, however, against the various challenges presented by the resort to arbitration. The controversy over the applicability of national law, the issues

38. *Id.* at 108.

39. *Id.* at 109.

40. *Id.* at 110.

41. *Id.* at 111.

42. *Id.* at 130-31.

43. *Id.* at 117.

44. *Id.* at 119.

related to the reliance by arbitrators on mandatory rules of law, and the problems regarding capacity and authority, particularly when one party is a government, all make for a complex process that is best resolved if the parties have taken the trouble to define their agreement in sufficient detail to guide the arbitrator who must tread through this international minefield.

Chukwumerije highlights other modern trends that have resulted in further complexity for arbitrators:

The primacy given to party autonomy in the determination of arbitral procedure and applicable substantive law has given rise to two developments, both aimed at freeing arbitration from the peculiarities of national laws. The first is the movement toward delocalization of arbitral procedure, and the second is the trend toward delocalization of applicable substantive law

In regard to delocalization of arbitral procedure, the objective is to remove arbitration proceedings from the peculiarities of the place of arbitration. The ultimate goal is to prevent the law of the place of arbitration from placing undue burden on the arbitration proceedings

However, the present move toward the modernization and harmonization of national laws on arbitration . . . would make delocalization of arbitration proceedings increasingly unnecessary .

. . .

In regard to delocalization of substantive law, the objective is to subject the parties' contract to nonnational standards, such as the *lex mercatoria* and international law

The attempt to delocalize the law governing State contract disputes poses its own problems. If the parties to a State contract are imprudent enough to select international law-unsupplemented by a particular national law-to govern their agreement, they would soon realize that international law, apart from its proclamations of *pacta sunt servanda* and similar generalities, is incomprehensive for the regulation of complex commercial relations.⁴⁵

Chukwumerije argues in favor of the role that national law can play in sustaining and supporting the international system of dispute resolution through arbitration. He believes that the assistance of national law is important at all stages, including enforcement of the agreement to arbitrate, the process of arbitration itself and the enforcement of the arbitral award.⁴⁶ With regard to the particular national public policy system to be implemented through the arbitral process, Chukwumerije proposes that "the requisite test should be the connection of the jurisdiction (whose policy is at issue) to the dispute and the nature of the policy involved."⁴⁷

45. *Id.* at 200-01.

46. *Id.* at 202.

47. *Id.* at 203.

There can be no doubt about the relevance or timeliness of this book, given the interest in globalization of the economic systems of this planet, the proliferation of free trade agreements, and the necessity for economic partners to resolve disputes in a cost-efficient manner. This book serves as a useful guide for those who wish to study this important topic, and for practitioners who wish to remind themselves of the challenges they must face in dealing with international commercial arbitrations.

