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International Arbitration, Liber Amicorum for Martin Domke. Pieter Sanders ed.

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W. PAUL GORMLEY*

This *Festschrift*, published in honor of the seventy-fifth birthday of Dr. Martin Domke represents, not only a tribute to an outstanding legal scholar but, simultaneously, a major contribution to the growing literature on arbitration. The specific purpose of the *Liber Amicorum* is to present a lasting record by a number of Dr. Domke's closest colleagues. This reviewer, a former student in his memorable course, "International Commercial Arbitration,"¹ given during the Spring of 1962, is pleased to accept the invitation of the *Buffalo Law Review* and use it as the medium for joining the tribute. It is, moreover, fitting that such an acknowledgement be published in a law review, for the reason that during this decade of academic unrest and turmoil it is vital to remember that great teachers influence their student-colleagues. This opinion is shared by Dr. Domke's numerous former law students, especially graduates from foreign countries.

Dr. Domke is well known for his work as Vice President of the American Arbitration Association, Editor of the *Arbitration Journal*, as a prolific writer on many subjects,² a legal educator, and as a frequent participant in academic meetings and international conferences. However, one additional phase of Domke's activities, often overlooked, is his contributions to the United Nations. Oscar Schachter, for many years Legal Advisor of the United Nations and presently Director of Research, United Nations Institute for Training and Research (UNITAR), comments on the contributions made by Dr. Domke during the first two decades of the United Nations existence.

It was, of course, to be expected that Dr. Domke—with his remarkable energy, zeal and dedication to international co-operation—would find in the United Nations an unparalleled opportunity to promote the objectives with which he had long been identified. Nor is it surprising that his collaboration was welcomed by delegates and Secretariat officials in the United Nations. He brought ideas and suggestions of value; he stimulated proposals and indefatigably discussed them with all concerned. When required, he would address conferences and committees in his capacity as a representative of one or another of the non-governmental organizations in which he was active; invariably he spoke with vigour and authority. However, he was wise in the arts of government and well appreciated the advantages of quiet diplomacy and behind-the-scenes consultation. . . . He was a valued—if unoffi-

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1. See, e.g., the reviewer's study completed under Dr. Domke's guidance: *The Place of Commercial Arbitration in Multi-National and International Organizations*, 24 OHIO ST. L.J. 617 (1963).

2. E.g., *Selected Writings of Martin Domke on International Arbitration* at p. 358 ff. See also M. DOMKE, *COMMERCIAL ARBITRATION* (1965); Gormley, Book Review, 43 U. DET. L.J. 138 (1965).

cial—adviser to me throughout the years of preparation which led to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958. . . .

Moreover, Schachter continues:

Beyond arbitration, he had a general interest in the expansion of international trade and consequently in the establishment—after years of effort—of a new organization within the United Nations devoted specially to furthering world trade and development.³

In reviewing the book it is significant, though obvious, that each contributor has used the opportunity to present his best insight into some pressing problem of arbitral proceedings. Generally, they have selected a particular phase of Domke's work, as for example conciliation, international trade, international adjudication, application to a particular business area, or the enforcement of awards. Very frequently, a specific published work is employed as the starting point for analysis. The resultant product is a series of short well documented studies presented in English or French. Regrettably, they often seem a bit too short in view of the importance of the subject matter. Moreover, closely related problems are presented in a fairly unified fashion. But rather than giving a few remarks about each contribution, it seems more desirable to offer some general observations, along with a few selected comments on those portions that are especially significant.

The concept, "International Arbitration," as it is used in the book's title, is not limited to commercial arbitration between private parties and states nor to public law arbitration of an *ad hoc* nature, nor even to procedures undertaken pursuant to an organizational structure. On the contrary, it is employed in its broadest sense for the purpose of including many related subjects, e.g., the proper role plus the present ineffectiveness⁴ of the International Court of Justice,⁵ the procedural status of individuals and non-governmental entities,⁶ and the importance of regional and international organizations.⁷ Thus, a flexible

3. Schachter, *CONCILIATION PROCEDURES IN THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT* at p. 268-69. The omitted portion of the above quotation comments on Domke's interest in Far Eastern arbitration. See also the Introduction, at pp. vii-viii.

The problems confronting the new nations are considered by several of the participants. See the very fine work by Benjamin, *The Developing Nations and Certain Legislative Obstacles in the Field of Commercial Arbitration* at pp. 1-11. The topic of arbitration in the developing world is so extensive it could only be dealt with summarily in this review. Mr. Benjamin has provided an excellent introduction to the book.

4. Gormley, *Elimination of the Interstate Complaint: South-West Africa Cases and Resulting Procedural Deficiencies in the International Court of Justice*, 3 TEXAS INT'L. L. F. 43 (1967).

5. Rosenne, *Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice*, p. 240. See Gormley, *infra* note 32.

6. See note 5 *supra*.

7. Carabiber, *L'immunité de juridiction et d'exécution des Etats collectivities et établissements publics au regard de l'obligation assumée par une clause compromissoire insérée dans les contrats internationaux de droit privé*, p. 23; Carlston, *Psychological and Sociological Aspects of the Judicial and Arbitration Processes*, p. 44. See also Wortley, *infra* note 12. Sanders, *ECAFE Rules for International Commercial Arbitration*, p. 252.

approach has resulted, perhaps intentionally, producing a book on such pressing problems as the administration of international justice. Within this context a number of recurrent themes emerges, although not to the extent of being repetitious—a fact testifying to the skill of the Editor, Professor Pieter Sanders of the University of Rotterdam.

As might be anticipated, great stress is placed on the superiority of arbitration as opposed to domestic and international judicial proceedings, especially as to particular classes of commercial, non-legal, and political controversies. Accordingly, Professor Seidl-Hohenveldern follows Domke's classification and "allots to arbitration a place between conciliation and court proceedings."⁸ The important distinction is that arbitration—although not always following strict legal rules because of its application of equity and law in addition to *ex aequo et bono*⁹ concepts—results in a final and binding verdict. On the other hand, conciliation, a remedy presently being used with much greater frequency, merely produces informal findings of fact, resulting in the parties being left to resolve their own issues and find their own solutions. "[I]n contrast to courts, arbitration tribunals are not generally bound to apply principles of law (*jus strictum*) and enjoy a large measure of liberty in matters of procedure."¹⁰

Other advantages of arbitration are indicated throughout the book, for example, expert opinions rather than legalistic holdings, low cost to the parties, and rapid end to controversy. Nonetheless, the series of writers must be congratulated not only for conceiving the concept of arbitration in its broadest sense but also for devoting considerable attention to techniques of conflict resolution, i.e., full scale litigation before the International Court of Justice¹¹ and the European Court of Human Rights,¹² good offices,¹³ and lesser known tribunals, such as the Permanent Court of Arbitration at The Hague. Secondly, the duty of domestic courts to compel the fulfillment of an arbitral agreement or the enforcement of an award from a commercial arbitrator¹⁴ is stressed, in order to illustrate the place of arbitration within the total "world rule of law."¹⁵ Thirdly, several of the experts explore the very fundamental realm of arbitration in national systems; consequently, very informative essays deal with arbitra-

8. Seidl-Hohenveldern, *Arbitration by Organs of International Organizations*, p. 322.

9. I.C.J. Stat. art. 38, para. 2 provides that the sources of law listed in para. 1 "... shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

10. Seidl-Hohenveldern, *supra* note 8, at p. 322. See Francois, *La liberté des parties de choisir les arbitres dans les conflits entre les États*, p. 89.

11. Rosenne, *supra* note 5.

12. *Id.* at p. 249. See *infra* note 36. Wortley, *Quelques développements modernes qui touchent les controverses entre les particuliers et les États et les entités étatiques*, p. 384.

13. Sucharitkul, *Good Offices as a Peaceful Means of Settling Regional Differences*, p. 338.

14. Benjamin, *supra* note 3, at p. 6-7. Schmitthoff, *The Supervisory Jurisdiction of the English Courts*, p. 289. Minoli, *L'Italie et la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères*, p. 199.

15. Carlston, *supra* note 7.

tion as it exists within such diverse legal orders, as Japan,¹⁶ U.S.S.R.,¹⁷ Great Britain,¹⁸ Germany,¹⁹ and particular regional groupings.

This reviewer was especially interested in the several articles dealing with the function of arbitration within the U.N.,²⁰ U.N. entities,²¹ specialized organizational commissions,²² and regional organizations.²³ It can be concluded from the several specific topics that arbitration can render a significant contribution to the effective development of numerous multinational institutions,²⁴ primarily those of an economic nature such as EFTA, GATT, EEC, United Nations Commission for Europe, and the United Nations Commission for Asia.

An additional recurrent theme of the book is the desired reexamination of the whole notion of arbitration, stressing such topics as the role of the arbitrator, and the enforcement of arbitral awards.

The most significant disagreement raised in the book concerns the flexibility of the arbitrator to deviate from the strict legal norms by applying equitable concepts. Some authors, namely Professor Louis B. Sohn²⁵ and Ulrich Scheuner,²⁶ go even one step further and explore the use of *ex aequo et bono*, a procedure by which litigants can stipulate in advance that the judgment may be based on more flexible notions of equity and justice, not merely legal principles. Although the International Court of Justice has never been able to utilize this device²⁷ because the states involved have not been willing to give their consent, the position taken, and quite properly, is that its potential use is significant. This is true because of the abrogation of numerous unjust or illegal treaties originally imposed on colonial peoples. Henceforth, the new nations will seek arbitration based on the more just *ex aequo et bono*.

Clive M. Schmitthoff takes issue with these liberal viewpoints when he states that arbitrators are bound to apply strict law in the same manner as a court, at least insofar as the English Legal System is concerned. He concludes:

It is desirable that in the future, as it was the case in the past, the judicial element should prevail over the contractual element in the English system of arbitration. The supervisory jurisdiction of the

16. Doi, *International Commercial Arbitration in Japan*, p. 65; and Kitagawa, *Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective*, p. 133.

17. Hazard, *Flexibility of Law in Soviet State Arbitration*, p. 120.

18. Schmitthoff, *supra* note 14.

19. Schwab, *The Legal Foundations and Limitations of Arbitral Procedures in the U.S. and Germany*, p. 301.

20. Seidl-Hohenveldern, *supra* note 8.

21. Schachter, *supra* note 3.

22. Sanders, *supra* note 7.

23. Wortley, *supra* note 12.

24. See, e.g., Gormley, *The Future Role of Arbitration Within the EEC: The Right of an Arbitrator to Request a Preliminary Ruling Pursuant to Article 177*, 12 *St. Louis L.J.* 550 (1968). Gormley, *supra* note 1.

25. *Arbitration of International Disputes Ex Aequo et Bono*, p. 330.

26. *Decisions Ex Aequo et Bono by International Courts and Arbitral Tribunals*, p. 275.

27. See *supra* note 9 and accompanying text.

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Courts, founded on the doctrine of ouster, should be retained but the procedure by which that jurisdiction is exercised calls for thorough modernization. Judicial arbitration and amicable composition should be admitted and it should be provided that henceforth a special case shall be stated for the opinion of the Court of Appeal.²⁸

In its most obvious form, courts exercise control and supervision over arbitral proceedings and awards; this conclusion is, likewise, applicable to the more liberal civil law systems of France, Belgium, and Portugal. The same conclusion applies to the United States. Therefore, arbitrators, Schmitthoff argues, must resolve cases according to law. "[T]hey are not conciliators; they are likewise arbitrators but they may decide *ex aequo et bono*, according to their concept of fairness and justice and need not decide strictly according to the law. However, *amiables compositeurs*, like arbitrators who are bound to decide strictly according to the law, cannot decide contrary to the public policy of the law applicable to the arbitration."²⁹

While not necessarily a recurrent theme, several authors, as already implied, devote their attention to a single unique problem. In this regard, the use of equity and *ex aequo et bono*, the future role of the International Court of Justice, and the function of arbitration and conciliation within regional spheres has already been mentioned. Furthermore, because of its vital relationship to the work of Dr. Domke, the reviewer has selected one problem for special comment, namely the status of the individual as a procedural subject of international law. Shabtai Rosenne in "Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice,"³⁰ indicates that even though individuals cannot be accorded direct *locus standi* before the I.C.J. because of limitations contained in the Court's Statute,³¹ the Court by means of its own actions—if it should choose to emulate the European Court of Human Rights—could afford a hearing to private persons as an incident to a public proceeding. In this regard, the reviewer, while a student in Domke's course, had occasion to discuss a recent article advocating that individuals be accorded procedural status before the I.C.J. and other international tribunals.³² At that time Professor Domke remarked that he had devoted his life's work to improving the procedural rights of individuals! Regrettably, his continuing interest in individual human rights was not brought out in the book. Yet, in

28. Schmitthoff, *supra* note 14, at p. 298.

29. *Id.* at 290.

30. Pp. 240-51. See also Broches, *The Convention of the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure*, p. 12.

31. I.C.J. Stat. art. 34 para. 1 provides: "Only states may be parties in cases before the Court."

32. Gormley, *An Analysis of the Future Procedural Status of the Individual Before International Tribunals*, 39 U. DET. L.J. 38 (1961). The same proposal advocating that article 34 be liberalized so as to accord *locus standi* to private persons and groups is advanced in W. GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* 191-92 (1966).

connection with the indirect participation of individual witnesses before the I.C.J.—as observed by the reviewer, during the 1965 oral hearings, in the recent *South West Africa Case*³³—private persons can be accorded the opportunity to present their views to the World Court. Rosenne, citing the precedent created by means of judicial interpretation by the European Court of Human Rights, Council of Europe, in the case of *Lawless v. Ireland*,³⁴ maintains:

[I]t is in the interests of the proper administration of international justice that in appropriate cases the International Court of Justice should take advantage of all the powers which it already possesses, and permit an individual directly concerned to present himself before the Court, or before some appropriate body (such as the Chamber for Summary Jurisdiction) and give his own version of the facts and his own construction of the law. It is not believed that this is inevitably excluded, either by the language of Article 34 of the Statute, or by the essential judicial character of the contentious jurisdiction as a jurisdiction applicable only between States. It is quite obvious that the Court possesses ample powers to prevent any abuse of such procedures by an obdurate individual. Such a development, it is submitted, would increase the appearance of justice being done in the International Court in the type of case we have in mind, and in the long run would serve to increase the general standing and prestige of the Court.³⁵

A number of the authors seek new solutions in order to arrive at a more efficient system of international justice. In addition to the topics already discussed, it seems desirable to note the approach being taken by the United States Government in obtaining lump sum settlements through diplomatic negotiations. Professor Edward D. Re, former Chairman of the Foreign Claims Settlement Commission and Assistant Secretary of State, describes "The Presettlement Adjudication of International Claims." The value of *en bloc* settlement techniques, through which individuals and companies are aided by their own government, is that they avoid litigation. Indeed, the old remedy, diplomatic protection of nationals is being refined to solve contemporary issues. Hence, this use of political remedies by governmental entities to avoid lengthy judicial and arbitral action before an international tribunal, such as can be seen from an examination of the pending *Barcelona Traction Case*,³⁶ which has yet to be decided after ten years of proceedings, "represents a marked departure from the traditional method of redress available to a claimant."³⁷ Not only are

33. (Ethiopia v. South Africa; Liberia v. South Africa) Second Phase, [1966] I.C.J. 6. See Gormley *supra* note 4, at 43-44 & n.3.

34. "Lawless" Case, [1962] Eur. Conv. on Human Rights Y.B. 438 (Merits). See also art. 44 Eur. Conv. on Human Rights, ETS No. 5, 213 U.N.T.S. 221 (1955).

35. Rosenne, *supra* note 5, at p. 250.

36. Case Concerning the Barcelona Traction, Light and Power Company, Limited, (New Application, 1962; Belgium v. Spain) (Preliminary Objections), [1964] I.C.J. 6; reprinted 59 AM. J. INT'L L. 131 (1965).

37. *The Presettlement Adjudication of International Claims*, p. 215.

Although international adjudication is not employed, the lump sum agreement is the product of negotiation between the governments involved and precedes the function of the national claims commission authorized to adjudicate the claims.

governments able to gain redress on behalf of their nationals, but major disputes of an economic nature, which could lead to open hostilities between states, are brought to an end. Such administrative steps avoid the burdens of international adjudication and help to achieve stability in the International Community.

The concluding paper by Professor B. A. Wortley, dealing with some of the modern developments concerning private parties, states, and state entities,³⁸ stresses the emerging organizational structures that are in a position to afford relief to litigants. The Permanent Court of Arbitration at The Hague, the Court of Arbitration of the International Chamber of Commerce, the International Center For the Resolution of Investment Disputes, the European Convention on International Commercial Arbitration, and the procedures created pursuant to the European Convention on Human Rights, are systematically reviewed in relation to their techniques of conflict-adjudication available to interested parties, particularly as to controversies involving expropriation and illegal nationalization of foreign property. Thus, for example, the European Convention on Human Rights permits three distinct remedies: "Ils sont trois: la conciliation, l'avis et le Judgment."³⁹ Each of these procedures is examined in terms of appropriate treaty articles, with emphasis on applicable procedural elements. Nevertheless, although advocating the more extensive use of such organs as the European Court of Human Rights at Strasbourg, Professor Wortley recognizes that international organizations cannot, in themselves, assure compliance with their decisions. Rather, defaulting parties will be subjected to pressure and boycott of the needed facilities for transport and sale if they fail to comply with their obligations. He maintains: it is the parties (states, state entities, and private persons) that fail to conform to their commitments; not the multinational institutions, themselves. Consequently, a recognition of the doctrines of Good Faith and *pacta sunt servanda*,⁴⁰ plus a minimum of good will are needed to end disputes quickly.⁴¹

It should be noted, therefore, that the lump sum settlement technique includes two essential phases—the diplomatic phase which culminates in a settlement, and the subsequent domestic adjudication of the individual claims.

38. Wortley, *supra* note 12, at p. 348. See also Schwarzenberger, *The Arbitration Pattern and the Protection of Property Abroad*, p. 313.

39. Wortley, *supra* note 12, at p. 352.

40. Good Faith and *pacta sunt servanda* as these terms are employed in traditional treaty law and now codified in 1966 Draft Articles on the Law of Treaties, Report of the International Law Commission, 18th sess. 4 May-19 July 1966; [1966] 2 Y.B. Int'l L. Comm'n 7, U.N. Doc. A/CN.4/Ser. A/1966/Add. 1. (1966); reprinted 61 Am. J. Int'l L. 248 (1967). *Pacta sunt servanda*, as originally codified by the ILC, constitutes the text of article 26, Vienna Convention on the Law of Treaties. Adopted May 22, 1969, opened for signature May 23, 1969. UNGA, United Nations Conference on the Law of Treaties, A/CONF. 39/27, 33 May 1969; reprinted 8 INT'L LEGAL MATERIALS 679 (1969). Within this context Professor Wortley maintains:

[L]e principe *pacta sunt servanda* s'applique non seulement aux contrats entre Etats mais aussi aux contrats entre les Etats et les entreprises privées.

Wortley, *supra* note 12, at 349, citing la Cour d'Appel a Paris; reprinted 59 Am. J. Int'l L. 582, 584 (1965).

41. The conclusion of the book as presented by Wortley reads as follows:

Remarquons finalement que le boycottage, le refus d'accorder des facilités de transport ou de vente, constitueraient peut-être un moyen de pression effectif à l'encontre d'une partie qui manquerait à ses obligations, conformément aux règles de conduite acceptées par les deux parties.

Ce ne sont pas les institutions internationales qui manquent! Il faut surtout la bonne volonté pour terminer les disputes avec célérité et avec justice. Comme l'a bien dit Lord Wilberforce: ". . . We should struggle against our endemic conservatism and recognize that the timing of changes in legal institutions can, if it is right, affect, radically and beneficially, the character of economic progress." (Pp. 355-56).