III. Albert Jan van den Berg*

The editors of this work on international arbitration have asked me to make some concluding remarks, from the perspective of a practising business lawyer about the articles published in this issue. Initially, this would limit these concluding remarks to arbitration involving a state as a party in which commercial interests are at stake. That type of arbitration will virtually always be between a state and a non-state entity (usually a foreign corporation). However, as a fairly large number of the articles in this Issue deal with the field of inter-state arbitration, I will venture to comment on that type of arbitration as well.

J.L. Bleich provides a thorough article on the efforts of the Expert Group on Revision of Some Aspects of the Permanent Court of Arbitration. The efforts are most laudable and impressive. In the final analysis, however, I believe that it is the international political climate that will determine whether the improved arbitration services of the PCA will be effectively used by the states.

Characteristically for Judge Howard Holtzmann, the title of his article is understated: "Some Reflections on the Nature of Arbitration". In fact, it is an in depth reflection on the arbitral process. The following statement by Judge Holtzmann merits quotation as it confirms the current thinking of many international business lawyers:

> The adoption by the PCA of the UNCITRAL Arbitration Rules as the basis for its new procedures for arbitration of disputes between states is a milestone in the steady decline of the old perception that there are fundamental differences between the procedural aspects of international public law arbitration and international commercial arbitration.

The article by Professor Rosenne on the attitude of the International Court of Justice towards questions concerning different aspects of the international arbitration process should be compulsory reading for members of any *ad hoc* ICSID Committee deciding on an annulment of an ICSID award. Professor Rosenne concludes that:

> [I]n no case has either the Permanent Court, in relation to decisions of the Mixed Arbitral Tribunals, or the present Court in relation to formal appeals, done anything other than to uphold the impugned decision.

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That is somewhat different for some of the *ad hoc* ICSID Committees in the past. They undertook, in an extensive fashion, to educate arbitral tribunals constituted under the Washington Convention on the manner in which reasons should be given for their awards.[1]

Mr. Pinto's article on the 'essence' of international arbitration examines whether there is a distinction between arbitration in international law and dispute settlement by a court. I submit that currently there is, basically, no such distinction. Two matters should be distinguished clearly: on the one hand, the procedure to be followed by the arbitrators; and the other, the law to be applied by the arbitrators. In my opinion, it is incorrect to assume that because the proceedings are more flexible in arbitration, the application of the law is also more relaxed.

Judge Lachs addresses a similar question by inquiring about equity in arbitration and in judicial settlement of disputes. He reaches the conclusion that equity is acquiring an even greater role both in arbitral and judicial settlement. In this connection, equity decisions are to be distinguished from *ex aequo et bono* decisions. Equity is an inherent legal notion, whereas *ex aequo et bono* is a yardstick with which the parties can entrust arbitrators or international judges.[2]

Both articles quietly do away with the myth apparently existing among international public lawyers that international arbitration is something akin to 'free justice' as opposed to the legal decision making by international judicial tribunals.

In his article on "The Perspectives of African Countries on International Commercial Arbitration", Mr. Asante addresses the rising awareness of the African states concerning international arbitration. It is true that African states have historically exhibited reservations regarding arbitration as method of settlement of international disputes. Recent practice, however, has shown that African states need not worry so much. I am aware of a number of cases in which African states were rather successful. These cases concerned commercial transactions to which an African state was a party. It appears logical that this success on the international commercial level will, with time, translate into a more positive perception of international public law arbitration.

Mr. van Blankenstein focuses on a subject that is frequently underestimated in practice: immunity of execution. A large number of states are proud of the application by their courts of the doctrine of restrictive immunity. "No immunity for a state in commercial transactions", is the slogan. The stated intention, unfortunately, is not in line with reality in a fairly large number of cases. When it comes to actual execution, the doctrine suddenly disappears and immunity becomes absolute. Why? "Oh, that

1. One of the arbitrators even being a former President of the ICJ, *see* Klöckner *v.* Cameroon, decision of May 3, 1985, reported *in* XI Yearbook Commercial Arbitration 162-184 (1986).
2. *See, e.g.*, UNCITRAL Arbitration Rules, Article 33(2); Statute of the International Court of Justice, Article 38(2).

is political", is the answer. Only a few states have taken the logical step that the waiver of immunity from jurisdiction also means a waiver of immunity from execution.

Finally, I believe that one of the most prominent future roles of the PCA is that of an alternative for administered arbitration between states and foreign private parties. There is no need to repeat my views here;[3] suffice it to mention that, once more, I agree with Pieter Sanders' suggestions, put forward in his article on "Private Parties and the Permanent Court of Arbitration", as to how to awaken this "sleeping beauty".

3. *See* my article *The Permanent Court of Arbitration at the Peace Palace, The Hague - A New Role for International Commercial Arbitration?, in* Law and Reality - Essays on National and International Procedural Law, Liber Amicorum A. Voskuil 19-25 (1992).