Chapter I
The Arbitration Agreement and Arbitrability

9783214007744
Austrian Yearbook on International Arbitration 2014
Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz
Jenny Power, Irene Welser, Gerold Zeiler
Stämpfli Verlag, C.H.Beck, MANZ Verlag Wien

9783214007744
Austrian Yearbook on International Arbitration 2014
Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz
Jenny Power, Irene Welser, Gerold Zeiler
Stämpfli Verlag, C.H.Beck, MANZ Verlag Wien

Arbitration in the West – The Birth of an Institution

Christian W. Konrad

I can imagine no society which does not embody some method of arbitration.
Herbert Read, English Poet and Philosopher

I. The Origins: Set in Stone

2,500 years before Christ. The world population has reached 30 million individuals. The Hypogeum is being excavated in Malta, the Great Pyramid is beginning to rise above Giza, and the existing foundations of Stonehenge will gain two concentric semi-circles in the following century. The East of Austria is the heartland of the Baden culture, most known for its anthropomorphic large-breasted ceramic vases and the oldest model wagons in the world. The Celtic founding of the settlement, known today as Vienna, on the banks of the Danube is still 2000 years away.

At the same time, a little over 3000 kilometers south-east, ancient Sumer was thriving – the cradle of civilization was, at that time, a forefront of civilization as well. Sumer was composed of a number of city-states, amongst which was Lagash and Umma, two city states in the present-day Iraq. These two cities, lying merely 20 miles apart, shared a lengthy border demarcated by the Shatt el-Hai, a natural stream joining the Tigris and Euphrates. The cities had argued at length about the usage of water from the stream for irrigation, an argument which eventually evolved into warfare. Mesilim, the emperor of neighboring Kish, was called in to resolve the dispute and, after receiving divine guidance from the god Sataran (the "resolver of complaints") and being commanded by the god Enlil (the "king of countries"), Mesilim established the border between the warring city-states. His final decision was carved onto a stele which he placed on the new border. This is not only one of the oldest documents[1]) but the oldest recorded arbitration award in history, literally etched in stone.

All at once we have what is clearly the oldest and likely the second oldest means of dispute resolution – bloodshed and arbitration, respectively. The desire

[1]) Adda B. Bozeman, Politics And Culture In International History: From the Ancient Near East to the Opening of the Modern Age 21, 22 (2nd ed., 1994).

9783214007744
Austrian Yearbook on International Arbitration 2014
Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz
Jenny Power, Irene Welser, Gerold Zeiler
Stämpfli Verlag, C.H.Beck, MANZ Verlag Wien

for justice (more likely, vengeance) is as old as human interaction itself – much older than any organized judicial system could ever hope to be. At some point our ancestors began to realize that the risks of violence – injury, disability, death – outweigh the benefits (at least in some instances), and thus they must have begun to look for alternatives.

Before the age of laws and courts, dispute resolution evolved from physical altercations to submission to an impartial third party. Like the modern-day arbitrator, this impartial third party was given jurisdiction over the dispute voluntarily, and its decision was only as binding as the commitment of the parties to abide by it. This is the core of arbitration.

Arbitration has become an indispensable component of modern commercial dispute resolution as its meteoric rise has been attested to by its ubiquity as a first choice for commercial entities around the globe. While a true "history" of arbitration would fill volumes (commenting on the relative dearth of any kind of complete chronology of arbitration, Lord Mustill mused, "Arbitration has a long Past, but scarcely any History"[2])), this article aims to provide a highlight reel of its most important features, a small taste of the vastness of arbitration's history up until the modernization of arbitration in the 19th century.

II. Religion and Arbitration

While Mesilim's stele is the oldest physical evidence we have of the use of arbitration, we can trace it back much further through the stories of our ancestors where narratives of arbitration can be found in the annals of virtually every world religion.

In Ancient Egypt, the pantheon included a divine arbitrator, the god Thoth (often depicted with the head of an ibis). Thoth was considered the wisest of the gods and was called upon to settle a number of disputes and battles between the other gods. The three most important, between Ra and Apep, between Heru-Bekhutet and Set, and between Horus and Set, were all allegories of good versus evil, order versus chaos.

In the Old Testament we have what is perhaps the most famous of arbitrations, the Judgment of Solomon (a story which would make an interesting first chapter to any review of alternative remedies in arbitration) – where the wise King Solomon, in deciding between two disputing mothers regarding "ownership" of a child, offered to split the baby and let them each possess half. Only the woman who was not the mother was satisfied with this solution, and thus Solomon then knew the other woman to be the true mother of the child.[3])

[2]) M. J. Mustill, *Foreword – Sources for the History of Arbitration,* 3 Arb. Int'l, at 235, 236.

[3]) 1 Kings 3: 16–28.

Similarly in the New Testament, we have the admonition of Paul to the Corinthians that their disputes should only be submitted to Christian arbitrators, not the (roman) judges of the era – *"Is it possible that there is nobody among you wise enough to judge a dispute between believers? But instead, one brother goes to law against another-and this in front of unbelievers! … Why not rather be wronged? Why not rather be cheated?"*

In the great Hindu epic *Mahabharata,* Lord Krishna attempts to resolve the dispute between the Pandavas and Kauravas before their disagreement evolves into warfare. "*The wise do not consider a friend who uses not every effort to act as a mediator in a rupture between kinsmen*", Krishna declares, urging the Kaurava king to accept a settlement agreement.

The lessons and messages of these tales are as relevant as the day they were first recorded (in the form of writings on papyrus, stone carvings, etc). Especially, the importance of selecting an impartial arbitrator – whether it be a giant in a dispute amongst gods or a king in a dispute amongst common women – is paramount.

Oracles in Greek Antiquity were arguably the first arbitral institutions as their divine nature meant disputing parties presumed their disputes would be decided by the wisdom of the gods. One academic has described this religious arbitration as follows:

> "*The Oracle [at Delphi] was, however, an abominable arbitrator. Difficult questions were often evaded … when awards were rendered they typically lacked the clarity and precision needed to settle the matter authoritatively. For example, Clazomenae and Cyme disputed the ownership of a temple located in a territory nearly equidistant between the two cities. The Pythia gave possession to that city 'which should be first to sacrifice at [the temple]: but each must start from their own territory at sunrise on the same day, which should be fixed by common agreement'. The Oracle's solution was to invite the disputants to make a mad dash to the temple steps.*"[4])

III. Greeks and Arbitration

Ancient Greece, the foundation of Western Civilization, is also regarded by many as the wellspring of modern arbitration.[5]) The Greek habit of inscribing arbitral decisions on the walls of temples and other important buildings has subsequently left us a wealth of information regarding the Greek view and method of conducting arbitration. The Greek myths which involved arbitrations between

[4]) Bederman, *supra* note 7, at 82.

[5]) W. L. Westermann, *Interstate Arbitration in Antiquity,* 2 The Classical Journal 197, 198 (1907).

their gods, may have served as parables for the resolution of disputes between sovereign entities – the many Greek states.[6])

A. Mythology and Arbitration

In Greek mythology, the importance of selecting impartial arbitrators was ever present. Poseidon, the God of the Sea, has, at various times, quarreled with virtually every other member of the Pantheon. Poseidon questioned the role of Helios', titan rules of the sun, as patron of Corinth. To resolve this dispute, the god and the titan appointed Briareus, the hundred-handed fifty-headed storm giant who guarded the gates of Tartarus, as arbitrator. Briareus, after hearing the facts, awarded Poseidon the Isthmus of Corinth and Helios the fortified acropolis, rising high above the city.[7]) Poseidon and Athena vied bitterly for stewardship of Athens. A contest was held to decide the dispute – Poseidon slammed his trident into the ground, creating a great spring flowing with salt water. Not to be outdone, Athena struck her spear into the ground and created a magnificent olive tree – the most important tree of the Greeks. Because the contest did not provide for a clear winner, Zeus ordered the dispute be assigned to the Pantheon for arbitration and, in a commendable gesture, Zeus recused himself for bias. The male gods having voted sided with Poseidon, while all the females with Athena and thus, given that Zeus refused to cast a vote, Athens went to Athena. In another version of the same tale, it was left to Athens' king (and a human), Cecrops, to decide between the gods, and Athena was again found to have won.[8])

Unsurprisingly, arbitration by religious figures dropped out of favor and was replaced by a more favorable secular, reason-based arbitration.[9]) Greek mythology provided a foundation allowing for the earliest recorded instance of a proposal of arbitration in 750 BC, involving a Messenian named Polychares who, following the murder of his son (and several other wrongs) committed by a Spartan, sought revenge and subsequently murdered a number of Spartans. Sparta, of course, demanded Polychares be turned over, which the Messenians refused, whereupon the Spartans prepared for war. However, the Messenians were willing either to be tried by their common kinsmen, the Argives, in an assembly of the league, or to refer the case to the Areopagus at Athens.[10])

---

[6]) D. J. Bederman, *International Law in Antiquity* 82 (James Crawford et al. eds., Cambridge Stud. in Int'l and Comparative Law Series No. 16, 2007).

[7]) H. S. Jones, *Description of Greece,* Theoi E-Texts Libr. (2011), www.theoi.com/Text/Pausanias1A.html.

[8]) Nancy Conner, The Everything Classical Mythology Book 81 (2002).

[9]) Bederman, *supra* note 7, at 82.

[10]) 2 Westermann, *supra* note 6, at 199.

B. Selecting an Arbitrator and Clauses

Selecting an arbitrator has proven to be an important but turbulent procedure. One such instance includes an arbitration between Athens and Mytilene, concerning the possession of the strategically important fortress of Sigeum on the Hellespont. The arbitrator, Periander of Corinth, was jointly nominated by the parties and awarded Sigeum to Athens.[11])

Amusingly, both Athens and Sparta created treaties containing arbitration clauses in the latter half of the fifth century BC. These were never applied, since no arbitrator could be found to make a decision between the two powers.[12])

Additionally, this struggle is demonstrated in the tragedy *Seven against Thebes,* where Aeschylus tells the story of the psychic Prince of Argos, Amphiarus, and the great warrior Adarastus, the Ruler of Sicyon. Adarastus had married Amphiarus' sister, Eriphyle, on the condition that, should any dispute arise between the two kings, it would be the sister who would resolve the dispute. Adarastus had been persuaded to partake in a war against Thebes, which the psychic Amphiarus knew would fail and thus refused to become involved in. Knowing that it would be up to Eriphyle to resolve the dispute, those in favor of the war gave her a necklace to swag her decision in favor of her brother Ampharius and against her husband Adarastus. Eriphyle obliged thus sending the armies of Argos to war, which resulted in utter defeat. This may provide an early case of arbitrator corruption thus demonstrating a good reason not to choose arbitrators before a dispute has arisen.

Arbitration, at state level, was a universal practice throughout the Greek empire. It was adopted by the largest to the smallest cities, ans spanned from Athens to the most distant islands and the cities of North Africa, (although it was most common between the smaller states).[13]) In terms of the subject, it was territorial disputes that were most frequently submitted to arbitration, which comes as no surprise given the scarcity of fertile land in Greece, although many land disputes centered on ownership of religious sites.[14])

One of the perhaps best known arbitration clauses in Ancient Greece revolves around the Peloponnesian war. In 445 BC Athens and Sparta agreed not to go to war against a party willing to submit to arbitration on the matter in dispute (similar to 12 and 13 of the Covenant of the League of Nations, many centuries later).[15]) A dispute arose in 432 BC when Sparta accused Athens of multiple treaty violations, however Athens was willing to submit to arbitration hoping to avoid bloodshed. The Spartans rejected this (although there is evidence that the Spartan King Archidamus initially urged his people to accept the Athenian proffer to arbi-

[11]) Isaac Littlebury, The History of Herodotus 427 (2001).

[12]) 5 Rudolf Bernhardt et al, Encyclopedia of Public International Law 15 (2003).

[13]) Shelia L. Ager, Interstate Arbitrations in the Greek World: 337–390 B.C. 887 (1996).

[14]) *Id.* at 894, 895.

[15]) William R. Solomanson, *Historical Development of Arbitration and Adjudication,* 1 Miskolc J. of Int'l L. 238 (2004).

trate[16])), invaded Athens and were thoroughly defeated (this was said to have been Sparta's punishment by the Gods for violating its solemn oath) after a decade of warfare.[17]) The Peace of Nicias, which the parties executed in 421 BC, contained the following provision:

> *"It shall not be permissible for the Lacedaemonians and their allies to make war upon the Athenians and their Allies or to inflict upon them damage in any manner or any pretext whatsoever. The same prohibition is made to the Athenians and their allies as to the Lacedaemonians and their allies, but if there should arise a difference between them they will remit its solution to a procedure according to a method upon which they will come to an agreement."*[18])

When Sparta again alleged violations of their treaty by the Athenians, these refused arbitration and therefore forced Sparta to attack. Sparta's success in this second war was blamed on Athens' refusal to initiate arbitral proceedings, whereupon Athens lost the protection of the Gods.[19])

Three years later, Sparta signed an even more specific agreement with Argos providing that *"if there should arise a difference between any of the towns of the Peloponnesus or beyond, either as to frontiers or any other object, there shall be an arbitration. If among the allied towns they are not able to come to an agreement, the dispute will be brought before a neutral town chosen by common agreement."*[20])

C. Roots of Modernization

Greek arbitration records provide glimpses into a number of "modern" innovations to standard dispute resolution procedures. For example, a multi-tier (two step) resolution process was implemented in a treaty from Lesbos envisioning first conciliation then binding arbitration.[21])

The treaty between Sardis and Ephesus, written similar to modern arbitration laws, held that if one party complained of a violation of the treaty, the other party had thirty days time to appear before a special envoy. The envoy in turn had five days time from the appearance to select an arbitrator for the dispute. The parties then were given 60 days to present their case, at which point the arbitrator was to reach a decision however, a party who failed to appear lost by default.

Greek arbitrations, at least the recorded ones, focus primarily on interstate disputes – border issues, attacks, etc. The judges in such disputes were almost al-

---

[16]) W. L. Westermann, *Interstate Arbitration in Antiquity,* 2 The Classical Journal 197, 198 (1907).

[17]) L. B. Sohns, *International Arbitration in Historical Perspective, in* International Arbitration: Past and Prospects 9, 10 (A. H. A Soons ed., 1990).

[18]) A. Raeder, *L'Arbitrage International Chez Les Hellenes,* 15 J. of Pol. Econ. 166 (1913).

[19]) Sohns, *supra* note 17, at 10.

[20]) B. Sax, Histoire de L'Arbitrage International Permanent Par 5 (2009).

[21]) Jackson R. Halston, International Arbitration from Athens to Locarno 157 (1929).

ways appointed from "third parties" *i.e.,* towns that were not affiliated or related with either of the parties, and in several instances, members of arbitral tribunals were selected from different states. However, the method in which the judges were selected depended on the parties and the contract in question.

Most commonly, tribunals consisted of three or five members. However, there are records of a tribunal of 600 deciding a dispute between Sparta and Mycene and several other records of tribunals numbering in the hundreds. In a dispute between the cities of Melos and Cimolos the entire population of a neutral town was called up to decide.

Just as in modern arbitrations, the arbitrators were often accompanied by secretaries, and were sworn in to adjudicate honestly. One major difference between Greek and modern arbitrations were how the Greeks viewed the arbitrators' role. In the Greek system, the arbitrators were, at least during the first stages of the trial, conciliators, attempting to bring the parties together, and only if this failed did the arbitrators assume the more traditional judicial functions.

The procedure of Greek arbitrations appears to have been regulated by the tribunals in consultation with the parties. Generally, after the judges took their oath, they examined witnesses, who were also put under oath, as well as the matter in dispute – *i.e.,* for boundary disputes the judges went to the disputed border to investigate. Final decisions were reasoned, recorded and made publicly available – often in temples.

Private arbitration in Greece followed a standard procedure not unlike modern-day commercial arbitration: two opposing parties agreed upon one or more arbitrators *(diaitetai hairetoi),* conditions upon which the decision was to be based were agreed upon in advance and may have been set down in writing. The arbitrator rendered a verdict under oath that was legally binding upon the two parties in the same way a courtroom verdict would have been. The decision would be given *res judicata* effect – it could not be subject of another hearing and if it were, a plea to bar action (*diamarturia* or, later *paragraphe*) could be made, claiming that the suit was not admissible *(eisagogimos).* If the verdict or settlement involved the surrender of money or property, it was (indirectly) enforceable by a suit for ejectment *(dike exoules).*[22])

IV. Roman Arbitration Milestones

From its beginnings in the sixth century before Christ, to the Sack of its namesake city in 410 AD (and again in 455 AD) and beyond, Roman civilization had a long and well-developed tradition of commercial arbitration. Whereas Greek civilization, composed of many small states and kingdoms, provided fertile

[22]) Adele Scafuro, The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy 119 (1997).

soil for the development of inter-state arbitration, Roman stability and international trade provided the same for commercial arbitration.

The foundation of Roman Law and the centerpiece of the constitution of the Roman Republic was the law of the XII Tables, adopted in 449 BC. These contain the first known mention of the word *arbiter* – an italo-semitic compound of the words for dealer or third party (similar to the *arrabo,* a token to bind a deal, which came originally from Hebrew)[23]).

Roman arbitration sprang from humble beginnings. *Ad hoc* arbitrations officiated by a *bonus vir* – a good man, bound by honor to adjudicate a dispute with integrity and in good faith. A purely private affair (the state did not regulate such arbitrations), *boni viri* rendered awards which were not officially enforceable and often did not lead to an "award" in the modern sense at all. The duty of the *bonus vir* was to bring the dispute to a satisfactory conclusion and thus their role was as much that of mediator as it was arbitrator.

In the era of the Roman Monarchy, society was based on the *familia* as a social unit, with each *familia* headed by a *pater familias,* a citizen who owned the *familia's* property and was granted authority and responsibility over his dependents (wife and children, relatives, clients, servants and slaves). The *pater familias* was obligated to raise proper Roman citizens, to uphold the well-being of his household and the honor of his family as well as to serve the gods and society. It was also the *pater familias* who were expected to mediate disputes within his *familia* – members of the extended family, freedmen, slaves, and other dependents *(clientes),* as Rome had no judges, professional lawyers, advocates, or notaries until at least the early part of the common era.

If disputing Romans were unable or unwilling to choose a *bonus vir* to settle their conflict, they were able to go to their *praetor,* a high standing public officer. The *praetor* would, after the parties identified their dispute, appoint a *judex* (judge) to adjudicate their matter. This *judex* was selected from a publicly displayed list and could be agreed upon between the parties as well. While *boni viri* were often of the same social class as the parties, the *judex* were men with social standing – initially only senators. The important difference between the *judex* and the *bonus vir* was that the *judex* could order the parties to act – he was appointed by the praetor and thus had the authority of the state behind him; this sufficed to render his award enforceable.

Since arbitration agreements were not recognized under Roman law, the Romans invented the *compromissum,* whereby the parties promised each other *(com promissum)* that, should either party fail to honor the arbitration agreement or arbitral award *(pronuntiatio arbitri),* it would pay the others a specific sum *(stipulatio poena)* for doing so.[24]) This *poena* was recognized by the law and payment of the penalty could be enforced by legal action.[25]) In their *compromissum,*

[23]) Derek Roebuck and Bruno de Loynes de Fumichon, Roman Arbitration 18 (2004).
[24]) Yasunabo Sato, Commerical Dispute Processing and Japan 188 (2001).
[25]) Peter Stein, Arbitration under Roman Law 41 Arb. 203, 203–204 (1974).