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The Arbitrator as Diplomat

Roger Alford (General Editor) (Notre Dame Law School) · Friday, May 29th, 2009

In submitting his instructions to the American delegation attending the 1907 Second Hague Conference, Secretary of State Elihu Root argued that the Permanent Court of Arbitration system needed radical improvement. In his instructions he wrote:

> There can be no doubt that the principal objection to arbitration rests, not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions … of diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results.

The arbitrator as diplomat. What an interesting concept, and one that appears utterly lost in history. One of the best examples of the "arbitrator as diplomat" is in the so-called Casablanca Case. In 1908, the PCA was presented with a claim by Germany that French soldiers had used excessive force against German nationals who deserted the French Foreign Legion in Morocco. The German Dr. M. Kriege and the Frenchman Louis Renault, both prominent international lawyers in their day, drafted the terms of arbitration on behalf of their respective governments. They then promptly turned around and became members of the tribunal. Five days after the hearing, the five-member panel of arbitrators decided the case by rendering a most perfunctory opinion that was palatable to both France and Germany but devoid of legal reasoning. The arbitrators ruled that "the circumstances did not warrant, on the part of the French soldiers, either the threat made with a revolver or the prolongation of the shots fired at the Moroccan soldiers of the consulate."

An editorial published in the *American Journal of International Law* remarked that the decision was inoffensive, obscure, inadequate and artificial. "We should not close our eyes to the fact that … the decision is a compromise, a triumph of diplomacy transferred from the foreign office to the permanent court of arbitration at The Hague. It is not a judgment such as one would expect from a court of justice."

The use of arbitration to resolve matters applying the traditions of diplomacy is in complete and utter disuse. But one wonders whether certain disputes that are so politically sensitive might profit

from recourse to diplomatic arbitration. Using today's standards, almost certainly it would require the parties to request an unreasoned award using principles of *ex aequo et bono*. Presumably it also would be useful only in those circumstances when the parties needed political cover by transferring the dispute to third party decisionmakers. I have difficulty imagining a scenario where this would be appropriate. But I am sure there are instances when we could profit from its use.

Roger Alford

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