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## A View from the Mountain Top: A Challenge to International Arbitral Practice in Thomas Mann's Magic Mountain

Maxi Scherer (WilmerHale & Queen Mary University of London) · Friday, July 16th, 2010

Switzerland may be one of the world's most important arbitral seats, even so one would scarcely expect arbitration to hold much interest for the tubercular residents of Davos in Mann's novel *Der Zauberberg* or *The Magic Mountain*. Yet aficionados of arbitration who persevere to the sixth chapter of his lengthy book are treated to a little exchange on the subject. In a usually overlooked passage, the Italian Ludovico Settembrini, purporting to speak as the voice of progress, and the conservative Jesuit Leo Naphta cross swords over the merits of arbitration during an afternoon of tea and chocolate "Baumkuchen" cake in the company of the main character Hans Castorp and his cousin Joachim Ziemßen.

Mann began *The Magic Mountain* in 1912 only to interrupt its composition during the First World War. The novel, which first appeared in 1924, tells of the adventures of Hans Castorp, an otherwise prosaic young German of heightened sensibilities, in the fictional Berghof sanatorium in Davos during the seven years leading up to the First World War. The routine of sanatorium life, the medical minutiae of early twentieth-century treatment of tuberculosis and the motley constellation of its sufferers in Davos become the vehicle for the hero's coming of age and an exploration of pre-First World War culture. The novel is not rich in external action and reflections on the arbitral process and much else remain confined to the drawing-room.

Settembrini and Naphta do not shirk difficult subjects. Indeed the complexity of their topics is proportionate to the impotence of two sick men trapped on a mountain top. In a series of virtuoso rhetorical exchanges, they debate illness, the nation state, education, penal reform, free trade and the progress of human history. Settembrini adopts the view that mankind is not only capable of progress but that the previous century has brought great progress already, while Naphta sees the human condition as unrelievedly bleak, miserable and entirely dependent on divine grace for salvation.

Unsurprisingly given these basic positions, it is Settembrini who comes out in favour of arbitration as an effective means for solving international disputes and Naphta who condemns it as one of the vain hopes of a deluded bourgeoisie. Settembrini looks to arbitration as a way of resolving disputes, in particular those which will inevitably arise between nation states, in a rational and peaceful fashion. To Settembrini arbitration is a forum whose jurisprudence can transcend the constraints of national, positive law and can be derived from natural law or international law, which he conflates in a speech to Naphta:

“What I venerate as natural law or the law of nations, you are free to call *ius divinum*. The main thing is that there is a higher general law that transcends the positive rights of nation states and that allows for the resolution of disputed interests through arbitral tribunals.”

Naphta’s reaction is skittishly dismissive: “Arbitral tribunals, indeed! The very idea of them! A bourgeois arbitral tribunal that rules on questions of life and death, divines God’s will and determines the course of history!” Writing in the aftermath of the First World War, Mann had an easy time showing up the hopelessness of Settembrini’s belief in international arbitration. The nation states of Europe had succumbed to war and carnage rather than appointing tribunals to resolve their disputes. This will not have been lost on his readers.

Settembrini’s project challenges the latterday arbitral practitioner with its unanswered questions rather than its grim historical ironies. Almost a century after the novel was published, controversy surrounds the powers that Settembrini attributes to arbitral tribunals. Although arbitration is widely accepted as the preferred means of resolving international commercial disputes, its legitimacy in relation to investment and interstate disputes is sometimes put in doubt. Some jurists question whether private tribunals should decide over the interests of sovereign states at all as Settembrini envisages.

To Settembrini arbitration is superior to other forms of dispute resolution by virtue of transcending the constraints of positive law and deriving its principles directly from reason rather than statute. Such principles are supranational since they originate in universal rationality as opposed to a given national legal tradition. Settembrini’s bold claim foreshadows the impassioned debate surrounding the *lex mercatoria* as a supranational legal set of commercial principles applicable to international arbitration. Sceptics would say the content of such principles is as obscure now as it is in Mann’s novel.

Naphta’s cavalier dismissal of Settembrini’s “bourgeois” arbitral tribunals formulates the greatest continuous challenge to all arbitration practitioners, to show that parties, their counsel and their tribunals are able to agree to arbitrate, generate meaningful awards and implement them. Only then can arbitration offer an alternative to the constraints of national courts and indeed change the course of history. Whatever the challenges of arbitrating disputes successfully, arbitration is preferable to Naphta’s alternatives. At the end of the novel, after a succession of heated arguments, Naphta challenges Settembrini to a duel, who then deliberately shoots past him. Infuriated Naphta thereupon turns his gun on himself. One wonders if they might not have tried ADR instead.

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By Dr. Maxi Scherer and Daniel Greineder


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