
Kluwer Arbitration Blog

Interviews with Our Editors: Perspectives on Judicial and Arbitral Decision-making from The Hon. Charles N. Brower

Kiran Nasir Gore (Associate Editor), Daniela Dyer Melhado (The George Washington University Law School) · Thursday, September 26th, 2019



The full breadth and depth of Judge Charles N. Brower's 55-year career in the law cannot be summed up in a few sentences.

His private practice experience is extensive: Judge Brower spent eight years as a commercial trial and appellate attorney and as criminal defense counsel with White & Case LLP in New York. Later, he co-founded the firm's Washington, DC office, where he concentrated on administrative and public law cases before specializing in international arbitration. Today he is a member of Twenty Essex.

Separately, Judge Brower has provided more than 35 years of distinguished public service to the United States and international community. From 1969 to 1973 he was at the U.S. Department of State, concluding his time there as Acting Legal Adviser (the principal international lawyer for the U.S. Government). Since 1983, he has served continuously as a Judge of the Iran-United States Claims Tribunal in The Hague. He has served as Deputy Special Counsellor to the President of the United States (with sub-Cabinet rank as Deputy Assistant to the President). Since 2014 he serves as Judge ad hoc of the International Court of Justice in multiple cases. He also has been Judge ad hoc of the Inter-American Court of Human Rights, a member of the Register of Experts of the United Nations Compensation Commission in Geneva (UNCC), a member of the Panels of Conciliators and Arbitrators of ICSID, and is a member of the panels of arbitrators of a number of arbitral institutions around the world.

We are beyond honored to have this opportunity to speak with him about his career and glean some wisdom from his experience in judicial and arbitral decision-making.

1. *Your career has taken you from defending front page criminal cases to sitting as an international arbitrator in multi-million dollar investment and commercial disputes. Through this range of experiences, more than once, you have held an individual's "life in your hands". What is your approach to managing the pressures and burdens that these responsibilities carry?*

It is true that I have held a defendant's life in my hands. Early in my career I worked on an appellate case in which the defendant had been convicted after trial and sentenced to life in prison. I always approached these types of cases as a personal challenge to see if I could win. We are all competitive and my sole objective was always to do a beneficial and creditable job.

In some ways, in investment arbitrations the arbitrators also hold lives in their hands, but compared to these prior criminal litigation experiences, I do not feel the same kind of pressure. The lovely part of being an international arbitrator and Judge, after years of practice, is that your only job is to do what you think is right considering the facts and the law. International arbitrators and Judges are independent, in the same way as U.S. federal court judges, who hold lifetime appointments. This is very different from having clients and representing their interests.

2. *How have you personally negotiated the challenges of sitting as a judge or arbitrator in cases where your fellow arbitrators and judges come from different legal traditions, cultures, and backgrounds?*

Fortunately, before I went into this business I had international experiences under my belt. This has helped particularly when I have sat as arbitrator or Judge with lawyers trained in the civil law tradition. Indeed, sometimes I have been on the short end of decisions because of this distinction. I

once sat with two arbitrators who were both civil law trained Europeans. The agreement between the parties was for New York law to apply and both sides had New York lawyers representing them. The differences in legal understanding and approach between my civil law trained co-arbitrators and me unnecessarily prolonged the case. But in this regard, I do not see myself as an advocate. My only duty is to ensure that the tribunal has fully understood the arguments presented by the parties and deliberated.

3. *What are your thoughts about the value of concurring and dissenting opinions, whether in judicial or arbitral proceedings?*

There is always a desire to be unanimous because unanimity allows the decision to have stronger force. In one particular case, the tribunal chairperson was determined to have as much harmony as possible. So I did not write a separate opinion, but I did voice my disagreement with the majority view in a few footnotes in which I identified my differing perspectives.

Sometimes, there are differences in understanding and cultural gaps that cannot be overcome through persuasion. In this regard, I am really a common law lawyer. Concurring and dissenting opinions are extremely valuable, and I am known to write colorful opinions. I aim for my concurring, dissenting, and concurring/ dissenting opinions to be useful for two purposes. First, I write these opinions if I feel strongly about the situation. Second, I hope that my opinion is considered by others in future cases and that they will be convinced by what I have said.

As can be seen in its opinions, one of the challenges with the European Court of Justice is the need for everyone to agree. These opinions look like they were drafted by committee. The work of committees often lacks the desired level of coherence and completeness. It is not easy to come up with something with which everybody agrees. After all, they say a camel was produced by committee.

4. *Arbitrator challenges are a tricky subject. On the one hand, challenges on the basis of possible partiality protect the parties and also the integrity of the proceedings. On the other hand, challenges often result in delay, thereby prolonging the dispute resolution process. What is your perspective as an arbitrator?*

I find today that there are too many strategic and tactical challenges. The scorched earth approach to challenging arbitrators, in my opinion, does not serve the parties' best interests. Generally, where I am challenged as the party-appointed arbitrator, I will approach the party for guidance on how to respond. I have been criticized for this, but I think that it is the responsible approach. Some parties simply do not want to spend the money to defend against a challenge to their party-appointed arbitrator.

5. *The arbitral tribunal is only one piece of the arbitration puzzle – there are many stakeholders, including parties, witnesses, experts, counsel, even arbitral institutions. Any of these stakeholders could be the source of possible fraud or corruption. What are your thoughts on steps that can be taken to ensure the sanctity of the dispute resolution process?*

I don't think there are any precise rules here. It is important to look at the totality of the circumstances. For example, I would not say that the existence or suspicion of fraud or corruption in the underlying facts necessarily would nullify the jurisdiction of the tribunal. With respect to conduct during the arbitral proceedings themselves, if I suspected any corruption I would confer with my co-arbitrators and we would develop a solution. In this regard, there is also an opportunity, as chairperson of a tribunal, to police the conduct of the international Bar and protect the sanctity of the proceedings.

6. *You have spoken in a prior interview conducted by your son, Prof. Charles H. Brower, II (as part of the ITA Academic Council's "Preserving Perspectives" oral history project), about the "building blocks" of a career – the idea that each career step represents a building block to where you aspire to be as a professional. With this approach in mind, what three pieces of advice would you offer to lawyers beginning their careers?*

First, follow your instincts. Second, have someone to talk to candidly. Third, acquire connections.

On the first, consider what is your interest? What do you want to do? Where do you want to go broadly and how do you get there? Follow your good instincts, good sense, and your dreams and passions. Making your choices along those lines is my advice. Knowing what is right for you and taking risks are important. I always say that if you are lucky you will have a dream. My dream was to go as far as I could in life. I wanted to do something that I loved and something that might make a difference somewhere, somehow.

Indeed, I got to do things that I absolutely love and got paid for them. As Acting Legal Adviser, it was clear to me that my path was going to be international law. If I had not come to Washington around the time that President Nixon got elected, all of the rest that has been my career would not have happened. I approached the senior partners of White & Case LLP who had been mentors of mine, and said, "I am going to Washington". I loved where I worked, but this was my destiny if I could do it, and I did.

On the second and third pieces of advice: I tell young folks that if anybody says, "It is not what you know, it is who you know!", that is incorrect. In reality, you need both. You can go through the first door with connections, but you will not get through the next door if you do not have the goods. Further, you need an eye and a sensitivity to spot who can help you get ahead and who is willing to do so. A lot of people feel threatened by competent people who are junior to them, and I have seen that happen a lot. In my case, Jack Stevenson and David Abshire made a lot of difference in my life when I was working in the State Department; they wanted to help other people. Not everybody is that way. You want to be in a situation where you are working with individuals that become interested in your future and will help you pursue it.

7. *On more than one occasion, The American Lawyer has named you the world's "busiest" arbitrator. Of course to manage this caseload you are routinely aided by law clerks and interns. What qualities and qualifications do you look for when hiring?*

I used to solicit recommendations from 60-70 people I knew who could be sources for a strong pool of young candidates. I judge candidates based in part on who recommends them. If I trust the

person making a recommendation, it reduces the risk factor. Sometimes I might keep a candidate in mind for a long time before the right opportunity comes along to hire that person.

Everyone I consider shares common qualities: they are all smart, ambitious, and hardworking. If I am serious about hiring a candidate, they should expect to have a two-hour or longer discussion with me before I decide. I want to know about their lives and want to share with them what the job involves. I assess their personality and character in order to check whether the chemistry is right.

8. *Final question: We've heard that you once slept in Albert Einstein's bed. Can you tell us the story?*

If I write a memoir one day, I would like to include this story. It so happens that in my youth I went to Germany as a foreign exchange student, alongside approximately 10 other Americans. Years later, I stayed at the house where a German woman with whom I had kept in touch from that program was working as the caregiver of an elderly relative of Albert Einstein who had continued living in his house in Princeton, New Jersey long after his death. So, I was invited to overnight in that house and ended up having Albert Einstein's bedroom to myself, sleeping alone in his single bed. Truly, the most incredible things can happen!

Thank you, Judge Brower, for your perspectives and time! We wish you the best always.

This interview was conducted in Washington, DC in summer 2019 and has been condensed for publication. We are indebted to Dr. Devin Bray for facilitating the opportunity.

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