Monday, 3 November 2014 12:30 – 2:00 pm

Luncheon speaker: **Honorable Judge Charles N. Brower**

Rapporteur: **Angela Regina Garrett**, John Marshall Law School, Atlanta, Georgia

Introduced affectionately as the "Reigning King of International Arbitration," The Honorable Judge Charles N. Brower is a Judge of the Iran-U.S. Claims Tribunal, and member of 20 Essex Street, which hails itself as a leading commercial barristers' chamber. Judge Brower served as Deputy Counselor to President Ronald Reagan until 1988 when he returned to White & Case LLP until joining the 20 Essex Street Chambers. Judge Brower also currently serves as *ad hoc* judge for the World Court.

Judge Brower provided for present and future arbiters some lessons gained over his many years of experience. These are important as commercial arbitration increases on the continent as 10 countries have adopted Bilateral Investment Treaties ("BITS") while ICSID proceedings have tripled over the last three decades. Increasing investment opportunities, as evidenced by President Obama's welcoming of leaders from across the African continent to the nation's capital for a three-day U.S. Africa Leaders Summit, have lead to the expansion of arbitration events, centers and conferences in Africa, and the recent trend of investment opportunities. While these lessons were learned around the world, Judge Brower finds them confirmed by his efforts as an arbitrator in Africa.

Lesson 1: Be Very Careful In Choosing Your Local Partner

Case in Point: Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited

In 1998, ICSID registered commencement of arbitration between claimant, Tanzania Electric Supply Company Limited, ("Tanesco") and respondent, Independent Power Tanzania Limited ("IPTL"). The investment agreement provided for a 3 person international tribunal including Judge Brower. As part of his role as arbitrator, Judge Brower worked with a local partner to facilitate the proceedings. A final award issued in 2001. Seven years later the local partner to the Judge had become an adversary.

The 2001 award was not enforced by courts in Tanzania resulting in return of the proceeding to arbitration for non-payment. This prompted TANESCO and IPTL to seek disqualification of Judge Brower due to his local partner's alleged influence as tainting the Judge's ability to provide an unbiased judgment. Before the challenge to Judge Brower was decided, he respectfully resigned.

Additional complications arose afterwards including a contest over corporate authority and alleged misallocation of $122 million in bond issue proceeds that were to be used to purchase the shares of one of the entities involved. At the end of the day, the international proceeding had to be abandoned. The tribunal issued an order discontinuing the proceeding pursuant to ICSID Arbitration Rule 44 which governs requests to dismiss ICSID proceedings.

Judge Brower, shared that this controversial and highly publicized case taught him that he had to be very careful in choosing his local associates. Making the wrong associations early on could fetter your ability to arbitrate in a number of lucrative matters simply because of that association.

Lesson 2: Sometimes it becomes very difficult to get a host state to settle a dispute even after it has agreed to do so.

Case in Point: Manufacturers Hanover Trust Company v. Arab Republic of Egypt and General Authority for Investment and Free Zones

Background: Plaintiff bank engaged Judge Brower as a Party Representative to pursue an action for loss of its investment after the Egyptian government attached a regulation to banks operating in an area that was to be free of such regulations. The bank faced substantial interest and charges as a result, the bank filed suit, but the government refused to submit to jurisdiction.

Luckily for the bank, a law school classmate of Judge Brower happened to be the American Ambassador for Egypt. The Ambassador was able to use his connections to eliminate resistance to jurisdiction, at least in the first instance. But consent to jurisdiction was then annulled after the government agreed to resolve the matter in an ICSID proceeding.

Judge Brower expressed his frustration in having to argue an issue that was supposed to have been conceded. This case did not result in a published award, yet a number of qualified sources agree that the

fact that arbitral proceedings continued implies that jurisdiction was confirmed, making this a very fundamental case in arbitration history.

Lesson 3: It's hard to determine the prevailing party when a case is settled.

Case in Point: Piero Foresti, Laura de Carli and others v. Republic of South Africa

Background: This controversy attracted NGO's which joined in ICSID proceedings along with the Italian claimant who were mining dimensional stone in South Africa and alleged that the respondent was in breach of BIT prohibitions on expropriation. A favorable settlement offer outside of the ICSID proceeding was made. The claimants then filed an ICSID Rule 44 request to dismiss the proceedings.

ICSID Arbitration Rule 44 provides that a party cannot discontinue a case without agreement of the other parties. The respondents refused agreement to the discontinuing of the case, without payment of its legal fees. The tribunal, including The Honorable Charles Brower, spent 3 days in The Hague arguing over costs and bribes that were reportedly requested. Ultimately, an agreement was made for plaintiffs to pay €400,000.

Lesson 4: Sometimes a host state can be persuaded to sway its hand.

Case in Point: Vacuum Salt Products Ltd. v. Republic of Ghana

Background: On May 28, 1992, Vacuum Salt Products Limited, a company incorporated in Ghana and co-founded by a Greek company, instituted ICSID arbitration proceedings against the Government of the Republic of Ghana. The dispute related to the development of the salt production and mining facility in Ghana. A jurisdictional issue arose as to whether the claimant was a national of a foreign country for purposes of the ICSID convention. The ICSID panel, including Judge Brower, decided that because 80% of claimant's shares had been transferred to foreign control, the convention applied despite the company having been formed under Ghana law.

Ghana was persuaded to abide by the determination of ownership and participate in arbitration. Though the parties stipulated that a senior British jurist was to preside over the arbitration, he was forced to

recuse himself. The matter was later dismissed for want of jurisdiction.

Lesson 5: You just may get lucky when a project falls apart.

Case in Point: Ridgepointe Overseas Developments, Ltd. v. Democratic Republic of the Congo and Générale des Carrières et des Mines

Background: A number of foreign investors, including a claimant, were singled out for criticism in a special UN report on the illegal exploitation of natural resources in the Congo. The companies listed as claimants entered into a contract for mining. Approximately $750 million was spent on acquiring and developing property in the DRC. But the venture had its licensed revoked by the government for refusing to modify the agreement. In response, the claimant commenced action against the DRC government before the ICC. Complications arose when the government established a new regulatory scheme to ensure Congo mines benefit the nation. The government further sought to repeal the authority allowing license for the project(s). Naturally the claimants were unhappy and the value of their investment quickly began to diminish.

In the end, the claimant mining company settled for $1.25 billion (USD) including costs for damage to the company's reputation in the mining world. The driving force: An Iranian natural resources company, which was an adverse party in the suit offered to take over the project in exchange for the settlement award. The claimant received $750 million in cash and the rest was pooled into a settlement fund.

Other Helpful Practice Views from Judge Brower: Having a friend in Africa

- Africa is looking for broad, deep and high level experience in actually handling international arbitration cases
- The Finance Minister does the hiring (looking for the lowest price)
- Don't be penny wise and pound foolish
- Claimant may appoint a "heavyweight" arbitration representative, so the host state may appoint its own "heavyweight" defensively.