1929

Equity as a Concept of International Law

Lester Bernhardt Orfield

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the International Law Commons

Click here to let us know how access to this document benefits you.

Recommended Citation

Orfield, Lester Bernhardt (1929) "Equity as a Concept of International Law," Kentucky Law Journal: Vol. 18 : Iss. 1 , Article 3.
Available at: https://uknowledge.uky.edu/klj/vol18/iss1/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
EQUITY AS A CONCEPT OF INTERNATIONAL LAW

I. THE JURIDICAL CHARACTER OF ARBITRATION

One of the most important problems which can engage the attention of the student of international arbitration and adjudication is that of the juridical basis of the arbitral process. Is it the duty of an arbitrator to decide according to law? Or may he decide according to equity? Are there any limits on his discretion in the decision of international controversies?

The problem of the legal character of arbitral awards was perhaps most vividly in the public eye during the period of agitation for a permanent international court of justice. The proponents of the proposed court outdid themselves in picturing the weaknesses of settlement by arbitration, by way of creating a demand for the court. They properly emphasized the value of a court sitting permanently, made up of the representatives of the whole world. But they also frequently asserted that its decisions were to be based on law, in favorable contrast to the awards of arbitral tribunals. James Brown Scott was perhaps the leading protagonist of the view that arbitral awards are non-judicial in character.1 Wehberg, who had previously held an opposite opinion, after an examination of the cases became a proponent of Scott’s view.2 Baldwin asserts that while adjudication is necessarily based on law, arbitration is based on law only in the discretion of the arbitrators.3 In his instructions to the American delegates to the Second Hague Conference, Elihu Root, then Secretary of State, pointed out the tendencies of arbitrators to negotiate like diplomats.4 Marburg states that the aim of arbitration is to compose differences and that the

1 "It is equally elemental that the judge is bound by his oath to administer the law of the land, whereas the arbitrator is free to decide the controversy according to the terms of the submission, the equity of the case or the dictates of his own conscience. The distinction between the award of an arbitrator and a judgment of a court is thus sufficiently clear, the arbitrator looks to what is fair, the judge to what is law." Peace Conference, I, 189. See also, Schlief, 14 Archiv des Öffentlichen Rechts 269, 364, (1899), "Die Petersburger Kundgebungen und die Volkerrechtswissenschaft;" Philip Marshall Brown, 51 Revue de Droit International et de Legislation Comparee 317, (1924), "Arbitrage et Justice."

2 Problem of a Permanent Court of International Justice, 14.

3 Judicial Settlement of International Disputes, No. 5, 34.

4 Scott, Hague Conferences of 1899 and 1907, I, 440.
spirit of compromise which prevails as a result is opposed to the development of permanent rules of law. Politis contends that arbitration is of a dual nature, being both judicial and pacific in purpose. The Hague Court of Arbitration has inclined more to the pacific function, as shown in the Casablanca, Venezuela Preference, Boutres of Muscat, Atlantic Fisheries, and Savarkar cases. Dennis maintains that in actual practice, arbitral tribunals tend to compromise. Alpheus H. Snow contends that Article 37 of the Hague Convention providing for decisions "on the basis of respect for law" is indefinite and binds the tribunal to nothing. He urged that the next Hague Conference should consider the matter of limiting arbitral tribunals.

Lieber was of the view that arbitrators have a broad power, especially when the arbitral agreement is not definite. He asserts that there is no tacit understanding of the legal profession as to the nature of the arbitrator's discretion. "The extent of the authority and consequent duty of umpires varies under different circumstances. In some cases he must strictly limit himself to a decision according to law and equity of those points in which the parties differ. . . . At times, however, and especially when nothing distinct has been expressed by the appointing parties, the authority and duty of the umpire includes the conciliatory arbitrament. . . . I shall give my decision in the present case as an umpire possessed of full authority, including that of the conciliatory arbitrament, as I have called it."

The better view, however, seems to be that arbitration is based on law. The leading authorities seem generally to have

---

6 Judicial Settlement of International Disputes, No. 1, 30.
8 60 University of Pennsylvania Law Review 153, 158. "Legal Limitations of Arbitral Tribunals."
9 2 Moore, International Arbitrations, 1300, note 2, Case of Marcos Schaben v. Mexico.
10 The arbitrator in the Walfisch arbitration between Great Britain and Germany says: "Considering that both questions must be solved in conformity with the principles and positive rules of public international law, and, where they fail, in conformity with the general principles of law, since neither the said Agreement of 1890 nor the supplementary Declaration of Berlin the 30th of January, 1909, in any ways authorize the arbitrator to base his decision on other rules, and it is notorious, according to constant theory and practice, that such authority cannot be presumed . . . ." Martens N. R. G., 3rd Ser., VI, 429.
taken this view. At the present time the trend is unmistakably toward this attitude. John Bassett Moore emphatically repudiates the view that arbitration is based on compromise.11 Ralston believes that the chief distinction between courts of arbitration and the Permanent Court of International Justice lies not in the rules controlling the court, but in the manner of selection of the Judges, their fixity in office, and their independence of the parties. The arbitrators may have compromised in certain cases where there was no applicable law, but this was unavoidable.12 Edwin D. Dickinson is of the view that it is the duty of the arbitrators to apply the law, and also that arbitrators have generally done so.13 Borchard after analyzing hundreds of arbitrations in the reports of Moore, Ralston, and La Fontaine, adopts the views of Moore.14 Hudson argues that arbitration is not inherently less judicial than is adjudication.15 Hyde also regards arbitration as a judicial process.16 Garner says that "arbitration tribunals have in fact generally shown as great respect for the well-settled rules of international law as national courts have shown."17

Almost innumerable other authorities have arrived at the same conclusion. Writing in 1874, Goldschmidt pointed out that arbitrators generally decide according to international law.18 Lammensch states that where positive rules of law exist, the arbitrator must turn to them.19 States may agree that a tribunal shall decide exclusively according to equity, but such a decision does not follow of itself, where there is no such agreement. Nippold believes that the arbitrator should apply law, but that he may resort to equity in doubtful cases.20 Castberg says that generally "international tribunals are bound to found their de-

---

11 See the chapter by Moore at pp. 165-167 in Walsh, The History of International Relations.
12 The Law and Procedure of International Tribunals, pp. XXXVI-XXXVII.
13 As expressed in conversation.
15 The Permanent Court of International Justice, 113.
16 International Law, II, 112, note 2; see also, sec. 559.
17 Recent Developments in International Law, 524-5.
18 6 Revue de Droit International et de Legislation compare, 421, 443, "Projet de Reglement Pour Tribunaux Arbitraux Internationaux."
19 Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange, II, 175-177.
20 Die Fortbildung des Verfahrens in Volkerrechtlichen Streitigkeiten, 190-195.
cisions on positive international law.’’21 In the absence of positive international law they may apply the general principles drawn from the rules of international law, as established by the science of international law, or may seek a just solution in the spirit of international law. Magyary points out that the formerly asserted opinion that the arbitrator is called upon for a decision according to equity by the inherent nature of his functions is now commonly rejected.22 Like Ralston he believes that the distinguishing character of the World Court is its permanence and its independence of the will of the parties, and not the character of its decisions. In fact the World Court may itself be compelled to render decisions based on equity and expediency in the absence of law, and must therefore not be prized too highly.

In one of the best recent discussions of the subject, Hedges maintains that the only real difference between arbitration and adjudication is that ‘‘in arbitration the arbitrators are appointed ad hoc by the parties, whereas in pure judicial settlement there must be a permanent court. In both the process is essentially a legal one.’’23 He concludes ‘‘that plans for the further development of international arbitration should proceed on the assumption that in its modern application at least it rests on a juridical basis.’’ Within the last two years Lauterpacht has strongly reiterated the view that arbitration is strictly legal.24 Balch points out that there has been an unfortunate tendency in recent years ‘‘to confound International Arbitration with Municipal Arbitration and to minimize if not to deny entirely the judicial quality of arbitration as a component part of the Law of Nations.’’25 He quotes Pufendorf, Kluber, Rolin-Jaequemyns, Renault, and Westlake as upholding the view that arbitration is not based on compromise. The decisions of national courts often contain elements of compromise, but this is not a defect, since decision according to strict law is impossible in many cases. L. H. Woolsey believes that the differences between arbi-

22 Die Internationale Schiedsgerichtsbarkeit im Völkerbunde, 87-89.
23 British Yearbook of International Law, (1926), 110, 119.
24 Private Law Sources and Analogies of International Law, sec. 28.
EQUITY AS A CONCEPT OF INTERNATIONAL LAW 35

...tration and judicial settlement have been overstated. Writing in 1927, he concludes that on the whole "there would seem to be little, if any, valid objection to, or any real disadvantages in, arbitration as a method of settling differences between nations as compared with a strictly judicial proceeding." When the United States submitted the Orinoco Steamship Company case to the Hague Tribunal, Secretary of State Knox asserted that arbitration is a strictly legal process. "Indeed the United States has taken even more advanced ground and has said that, inasmuch as arbitration is thus, as stated, a judicial rather than a diplomatic procedure, the judgment of the arbitration court must conform to the principles of law and equity involved and controlling, and that where, in its opinion, it is wholly clear and evident that a decision essentially fails so to conform, such decision should be open to an international judicial revision."

The discussions of the Advisory Committee of Jurists who drew up the Statute of the World Court also throw light on the subject. Descamps asserted that there are three fundamental differences between arbitration and adjudication: first, in arbitration temporary judges are elected, while in adjudication a permanent judge is provided; second, in arbitration the rules to be followed depend more or less on the choice of the parties, while in adjudication more or less stable and universally recognized principles are followed; third, arbitration is voluntary, while adjudication is compulsory. But, he pointed out, the power to render a conciliatory award was exceptional, and not an essential characteristic of arbitration. Moreover, equity is used to fill in the gaps in adjudication as well as in arbitration. Ricci-Busatti said that it was impossible to define precisely the difference between arbitration and adjudication. In many instances the arbitrator and the judge have the same functions and the same origin. The court could not therefore be founded on such distinctions. There could be no fundamental difference between arbitration and adjudication since it was theoretically

21 A. J. J. L. 113.
24 Ibid., 106-107.
and practically impossible to create a court similar to the national courts of the countries, since this presupposed a superior authority from which it derives its authority, and since in the present status of international relations this authority does not exist.30

Descamps supported the views of Ricci-Busatti. With reference to potential competence there was little to choose between the old and the new courts. Questions of law were considered by both tribunals; but questions not so strictly legal could be submitted to them. In most cases both courts decided according to law. The real difference was in the organization and method of operation, and not in the material law to be applied. Moreover, he called the committee's attention to the fact that Article 12 of the Covenant (before amended distinguished only between disputes capable of settlement by arbitration, and cases not submitted for arbitration, the latter of which were to go to the League Council. Construing Articles 12 and 14 of the Covenant, the latter of which provides for the establishment of a world court, he argued that if they were reconciled according to the common rules of legislative interpretation, the result would be that the two courts would have the same jurisdiction and would differ only in their organization. It is perhaps proper to say in criticism of Descamps' view that he fails to distinguish between the questions of jurisdiction and the material law applicable in the decision of disputes. Loder, later the first president of the Court, submitted a memorandum pointing out that the difference between arbitration and adjudication is not to be found in the nature of the decision rendered.31 In both, law and equity may be protected. The real distinction is that in arbitration the agreement of the opposing party is necessary before the case can be heard; he must concur both in defining the point at issue as well as in the choice of judges. Graphically speaking, arbitration "means combat before a combat."

II. The Compromise of Arbitration

The discussion up to this point has indicated that it is the duty of arbitrators to decide in accordance with law. This

30 Ibid., 177-187.
31 Ibid., 247. See also, 9 Bulletin De L'Institut Intermediaire International 257 (1923), La Difference Entre L'Arbitrage International et La Justice Internationale."
would seem to be a rule of international law based on custom and practice. The question then becomes: according to what law? The rules of law governing an arbitral tribunal are sometimes set out in a general arbitration treaty negotiated between two nations. As a rule, however, a special agreement is drawn for the concrete case or series of cases to be adjusted at a given period. This is true where there is no general treaty of arbitration, or where the case is of such nature as to demand other rules than those provided in such a treaty. This special agreement is generally known as a compromis. The compromis is always written and is generally established in the form of a regular treaty, though sometimes by exchange of notes. Besides setting out the rules to be applied, the compromis generally provides for the arbitral settlement of a concrete case, the recognition and carrying out of the award, the arbitral procedure or process, the method of selecting the arbitrators, the time, place and award of the tribunal, and the period of revision of the sentence. The compromis in short is the legal instrument which gives life to the tribunal and governs the legal basis of its award.

The part of the compromis of chief importance in connection with this discussion is of course that providing the governing rules of law. Examination of the compromis of arbitral awards reveals that their contents fall roughly speaking into four classes: first, those providing that certain specially designated rules shall govern; second, those providing that the award shall be according to international law, or the principles of international law; third, those which make no provision as to the governing law; and fourth, those providing that international law and equity, or simply equity or absolute equity shall govern.

---

2Lammensch, op. cit., 97; Merignac, L'Arbitrage International, sec. 148-149.
3More says that it is the compromis which "forms the judicial basis of the jurisdiction of the arbitrator, which fixes the limits of his powers in his character of judge." Consequently the arbitrator should always "heed the rule of Roman law: arbiter nil extra compromissum fac-repotest." 17 Revue Generale de droit international publique 225 240, "La Sentence Arbitrale de President de la Republique Dans Le Conflic De Limites Entre La Bolivie et Le Perou." See also, Nipold, op. cit. 191.
4A detailed analysis of the contents of compromis is to be found in the award of the Cayuga Indians Case. Report of Fred K. Nielsen, Agent and Counsel for the United States. American and British Claims Arbitration under the Special Agreement concluded between the United
Compromis laying down specific rules of law to govern the award have been relatively infrequent. Perhaps the most notable example of such an agreement is that of the Alabama Claims case, in which three rules were laid down governing the liability of Great Britain for violations of her neutrality during the Civil War. Great Britain expressly stated that she did not thereby recognize these rules as rules of international law, and that they were to govern that case alone. The statement of the rules practically settled the case and very nearly reduced the Geneva Tribunal to a board for the assessment of damages. As a matter of fact, the rules eventually were embodied in accepted international law, thus demonstrating the importance of arbitral agreement. In the Venezuela Preferential Claims arbitration before the old Hague Court Venezuela expressly recognized the justice of the claims of the blockading powers. Likewise in the British Guiana dispute between Great Britain and Venezuela in 1897 a fifty year period was laid down as the rule of prescription. Several of the Mixed Claims Commissions set up under the Treaties of Peace after the late war are bound under the treaties to decide according to rules which impose a much greater liability on the losers than would the ordinary principles of international law. There is no rule of international law against treaty provisions which ignore or disregard the general principles of international law as between contracting states. Third states, however, would not be bound, and the decisions of such commissions would not build up a body of case-law applicable

States and Great Britain. August 18, 1920, p. 307, et seq. Kamarowsky asserts that one must recognize among the "less satisfactory provisions of treaties those as to the principles which should guide commissions in the examination of cases and in their settlement." Le Tribunal International, 178.

In case the rules provided are not adequate or are obscure, the tribunal may fill the gap by applying the rules of international law. Merignhac says that a certain measure of equity also may be applied. Op. cit., sec. 294. In the Alabama case the rules provided left open the question of indirect damages, and failed to clarify the meaning of "due diligence."

"The terms of the treaty fix and limit Germany's obligation to pay, and the Commission is not concerned with enquiring whether the act for which she has accepted responsibility was legal or illegal as measured by rules of international law. It is probable that a large percentage of the financial obligations imposed by said paragraph 9 would not arise under the rules of international law, but are terms imposed by the victors as one of the conditions of peace." Umpire Parker, Opinions of the Mixed Claims Commission, United States and Germany, 79.
to later cases. At the most they may possibly furnish a starting point in the development of customary law.

One not especially familiar with arbitral practice might readily suppose that most arbitral agreements would provide for settlement according to international law, or in somewhat broader terms, according to the "principles of international law." Surprisingly few agreements rest on so simple a basis, however. Several explanations are possible. The nations may not desire a strictly legal settlement. Or they may consider international law as being too incomplete a legal system to afford a determination of all cases submitted. Or it may simply be a case of legal surplusage. Perhaps a true explanation at the present date is the long continued practice in using additional bases.

In some cases the parties provide that the tribunal shall apply the rules of international law existing at the time the transactions complained of arose. Such a principle would generally be implied without an express provision on the subject. Where there has been a sweeping moral change, such as the abolition of slavery, after the transaction occurred, perhaps the tribunal would not apply the old law. In the case of treaties, the clause *rebus sic stantibus* may be implied. In one case, the parties in their eagerness to secure a strictly legal decision provided that the award must be made in "strict obedience to the principles of international law." The Central American Court of Justice Convention provided for the settlement of questions of law in cases arising, by the application of international law. Where the *compromis* is of this class it would seem that little question could arise as to what law is to govern. Non-judicial considerations such as compromise, expediency, and general justice could not enter in as dominant factors. Under the term "international law" would be included, as a minimum, the two large categories of custom and treaties. If a rigid interpretation were adopted, it might be argued that when the claimant state cannot find a rule in these sources its claim must be rejected. The better view, however, would seem to be that the court might in the case of clear gaps in the law resort to the common legal principles of the states, to the decisions of international tribunals.

---

27 Haiti-United States (1884), Act IV, 23 St. L. 785.
and to the writings of publicists. Analogy and equity as found in the sources last named might be applied.  

The third type of compromis is that which is silent as to the law to be applied. There is a very large number of such treaties in existence. It is perhaps with this type of agreement in mind that most of the writers have expressed their opinions as to the legal bases of arbitral awards. The concensus of opinion seems to be that the arbitrators must look to international law. The Hague Tribunal in the Norwegian Shipping Claims case laid down the rule that the tribunal must apply international law as found in treaties and custom, and the practice of judges in other international tribunals. Ralston, Merignac, and Scott all assert that the decision must be founded on international law. Oppenheim says: "In default of any express provision, it must be presumed that the award is to be given according to principles of International Law, or if there are none applicable, according to rules of equity." Hall says that the arbitrators proceed according to the rules of "civil law" (doubtless meaning by this municipal law), unless, as sometimes happens, they agree to be bound by special rules framed by themselves. Lammasch lays down the rule followed in the Norwegian Shipping Claims case. Politis points out that arbitrators may be given unusual powers as when by the express terms of the compromis they are to act as amiable compositors and compromise the dispute, or when they are empowered not only to settle an existing dispute but

---

39 Merignac suggests that resort is first had to general international law as found in general treaties, custom, the decisions of international and national tribunals on analogous questions, and the writings of publicists. In the absence of these the tribunal will look to special international law as found in particular treaties and the principles of the municipal law. If both of these sources fail, the tribunal must then resort to what it believes is the most equitable. Op. cit., see 297-298.

40 Out of 228 arbitration treaties between the American nations listed by Manning about 140 of them are silent as to the applicable law.

1 A. J. I. L., 384.
4 Hague Court Reports, XXI.
5 International Law, 4th ed. II, sec. 15.
6 A Treatise on International Law, 373.
7 Die Rechskraft Internationaler Schiedsspruche, 41.
to regulate the future interests of the parties. But in the absence of such provisions the arbitrator must decide according to international law. If the law is insufficient, the arbitrator should refuse to decide, or should ask for the powers of an amiable compositeur.

The fourth class of compromis is that in which equity is made a basis of decision. This category both now and in the past has always included an exceedingly large proportion of arbitral agreements. The common formula is decision according to "international law and equity," or "justice and equity." Provision is also sometimes made for settlement "according to international law, equity, and treaty provisions." A more limited group of Latin-American agreements direct judgment "upon a basis of absolute equity, without regard to objections of a technical character or of the provisions of local legislation." Some compromis in effect make the arbitrator little more than an amiable compositeur by providing that his award shall be "just and expedient," while some specifically provide that he shall act "as an amiable compositeur." It was asserted in the Cayuga Indians case that some discrimination has been shown in employing or not employing equity as a basis for decision. It is used quite regularly in general claims arbitration agreements, but less frequently where specific questions are referred. The writer must confess to considerable doubt, however, as to whether the framers of compromis have in most cases actually contemplated any essential distinctions in the juridical bases of awards.

III. EQUITY AS A CONCEPT OF MUNICIPAL LAW

The purpose of this discussion is to analyze the meaning of the term "equity" in a compromis of the class just discussed. The word was used as far back as 1794, in the Jay Treaty.

"La Justice internationale, 80-85. In 1875 the Institute of International Law adopted in its proposed arbitral code of procedure Article 18 providing: "The arbitral tribunal shall judge according to the rules of international law, unless the compromis imposes on it different rules, or submits the decision to the free appreciation of the arbitrators." Annuaire de L'Institut de Droit International, 1877, p. 131.

"A large number of treaties containing equity clauses are set out in the case of the Cayuga Indians in Nielsen's Report, 307. Nielsen's Report, p. 307. In illustration the tribunal cites the treaty of Ghent as to the Northeastern Boundary of Maine, the Fur Seal Arbitration Convention of 1892, the Alaskan Boundary Convention of 1903, and the North Atlantic Coast Fisheries Arbitration, none of which permits the application of equity."
"Absolute equity" was the ground for decision in the Venezuelan arbitration cases of 1903. The provision for equity as a basis of the decisions by the Prize Court in Article VII was one of the chief causes of the failure of the Prize Court Convention. The Hague Court passed on the meaning of the term in the Orinoco case. The notable arbitration treaties of 1911 proposed by President Taft covering disputes justiciable at law or equity were attacked partly on the ground of the indefiniteness of the meaning of the latter word. The Hague Tribunal gave some attention to the notion of equity in the Norwegian Shipping Claims case. An extensive discussion by both the arbitration commission and the agents appears in the recent Cayuga Indians case.

The concept of equity is not a new one. Like so many other ideas it harks back to Aristotle. "The justice which supplements the written law is equity." If the point has escaped the notice of the lawmaker, it is contrary to his intention; on the other hand if the rule cannot possibly be stated so as to cover all cases, it is consistent with his intention. Apparently Aristotle regards both methods of supplementing the law as altogether proper and as embraced within the one term "equity." "Equity consists too in making allowance for human infirmities, in regarding the legislator rather than the law, the intention of the legislator rather than his language, the purpose of an act rather than the act itself and the whole rather than the part, in considering not so much what is a person's character at a particular moment as what it has invariably or usually been, in remembering benefits more than injuries, and benefits received more than benefits conferred, in suffering injustice patiently, in consenting to settle disputes by agreement rather than by a trial of strength, in wishing to resort to arbitration rather than law; an arbitrator always takes the equitable, whereas the juror takes the legal view of a case, and indeed the object with which arbitration was devised was to ensure the triumph of equity."

Aristotle is rather cynical as to the use of equity in the settlement of a dispute. If the written law is adverse to one's case, appeal must be made "to the universal law and principles

---

1 Rhetoric, Book I; ch. 13.
2 Ibid, Book I, ch. 15, see also, Aristotle's Ethics, Book X, ch. 14 (Welldon).
of equity as expressing justice of a higher order.” It must be argued that the oath taken by the ‘‘juror” to decide ‘‘according to the best of my judgment” does not bind him to the letter of the law. It must be claimed that equity and universal law, since they conform to nature, are eternal, while written laws often are altered. Finally, it must be alleged that the rigid construction of the law is sham justice, and not genuine and beneficent like real justice. On the other hand, if the written law is in one’s favor, one must allege that the oath does not permit deviation from the law, and is worded as it is merely to exonerate the judge if he honestly mistakes the law, or that the absolute good is not to be sought, but merely the good of the individual; or that the law is futile if it is not to be followed. Last of all, it must be urged that confidence should be put in the law-maker as knowing what he is about and what is best for the case.

The two great legal systems with which equity is generally associated are the Roman law and the law of England and the United States. It seems extremely doubtful, however, that there was a definite body of law in the Roman system known as equity.\textsuperscript{53} "Aequitas” seems rather to have been a quality of reasonableness and fair dealing not confined to any given branch of the law. The Roman law was divided into the \textit{jus civile} based on the Twelve Tables and the praetorian law based on the edicts of the praetors. The \textit{jus gentium} was equitable in nature and was found chiefly in the edicts of the praetor peregrinus, who had jurisdiction of cases involving aliens. But the praetor urbano on many occasions applied rules which were equitable in their nature, so that equity was not confined merely

\textsuperscript{53} "I doubt whether \textit{aequitas} is ever clearly used by the Roman jurists to indicate simply a \textit{department} of law. It is a mode or quality of administration of justice, by the Praetor, but was not confined even within the letter of the edict for the time being.” Clark, \textit{Practical Jurisprudence}, 367. "It was not a fixed single notion. It was a complex of new ideas by which law was changed as conditions changed. Its affinity with the notion of \textit{jus naturale} tends to an identification. Paul says that \textit{aequitas} is a characteristic of \textit{jus naturale} and the expression \textit{naturalis aequitas} is not uncommon.” Buckland, \textit{A Text-book of Roman Law}, 55. See also Krueger, \textit{Geschichte der Quellen und Literatur des Romischen Rechts}, (1888), 123-126. The most detailed discussion is to be found in the monumental four volume work of Voigt, \textit{Die Lehre vom \textit{jus naturale}, aequum et bonum und \textit{jus gentium} der Romer} (1856). See also, Buckland, \textit{Equity in Roman Law}; Maine, \textit{Ancient Law}, ch. 2, 3; Pound, 27 \textit{Harvard Law Review}, 195, "The End of Law as Developed in Legal Rules and Doctrines."
to the *jus gentium* as applied by the praetor peregrinus. The *jus civile* and the pretorian law were ultimately fused into one. Today in Italy there is only one body of law, and similarly the other countries of the world which have adopted the Roman law, have no separate system of equity. To a Continental lawyer equity is therefore synonymous with reasonableness, fair dealing, morality, or a mitigation of the strict letter of the law.\(^5\)

Thus it seems that the only legal system in the world having a highly developed group of more or less crystallized rules known by the term "equity" is that of England and the United States. Equity at first in that system seems not to have been separated from the general body of the law, and some writers assert that equity is as old as the common law.\(^5\) The early character of English equity is well summed up in the oft quoted remarks of Selden: "Equity is a roguish thing; for law we have a measure, know what to trust to. Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure we call a foot a chancellor's foot, what an uncertain measure this would be. One chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the chancellor's conscience."\(^5\)

Gradually the cases began to pile up and it was seen that many of them involved similar principles. The chancellors

---

5 Kantorowics in an elaborate classification of a complete legal system regards equity as "nascent implicit law." 28 Columbia Law Review 679, 696. "Legal Science—A Summary of Its Methodology." Under his classification law is divided into two large classes: formal, that is, law which has undergone and completed a definite process of formulation or integration; and "free law", or law that has not completed these processes. Free law in turn is divided into explicit and implicit law, the former being explicitly declared to be law, and the latter "a rule which is recognizable as law by significant actions." "Nascent law" is law that would be formal law, if it had undergone and completed the process, instead of having only entered into it, as contrasted with desired law, which is law which those who apply it desire to become formal law.

Nascent implicit law includes the "rules to which statutes and judicial decisions allude, if they speak of 'boni mores', the habits of a *bonus pater familias*, 'good faith and trust,' 'nature of things,' 'exigencies of life', 'equity', (if not recognized as a part of the formal law), 'justice', 'public convenience', etc. These concepts are mere 'standards' (Blanketsbegriffe), which cannot be applied before having been filled up by substantive rules." 31 Harvard Law Review 534, Barbour, "Some Aspects of Fifteenth Century Chancery."

50 Table Talk, 46.
began to examine the precedents. Lord Eldon gave a strong impetus to the synthesis of the principles previously laid down. "The doctrines of this court ought to be well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with each succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor’s foot." Since Lord Eldon the principles of equity have taken on a greater rigidity, but an historical examination will show that there have been many considerable changes in the rules. In the United States there was in the nineteenth century a strong tendency to limit the discretion of the courts in applying equity. Pomeroy says: "It is very certain that no court of chancery jurisdiction would at the present day consciously and intentionally attempt to correct the rigor of the law or to supply its defects by deciding contrary to its settled rules, in any manner, to any extent, or under any circumstances beyond the already settled principles of equity jurisprudence." During recent years it is perhaps true to say that there has been some relaxation in the rigidity of the system. But that there is a real core of underlying principles cannot successfully be controverted. Decisions are not made simply on the basis of the views of the individual judge as to reasonableness and morality. The term "equity" as understood by English and American lawyers has a comparatively definite and technical connotation.

IV Equity in International Law

A. Views of the Publicists.

Many of the concepts of international law are derived from the municipal law of the nations of the world. Having examined the meaning of equity in the various legal systems, one is now prepared to analyze it as a term of international law. The method employed will be first a comparison of the views of the

1Gee v. Pritchard (1818), Swanton's Reports, 402, 414.

2Equity Jurisprudence, sec. 46, 4th ed.
leading publicists and then a study of the awards of arbitral tribunals.

The long usage of the term "equity" in international relations is shown by the fact that it was employed by Grotius. In considering the subject of arbitration, he says, we must first find out whether the arbitrator is to act as a judge or as an umpire. He refers to the view of Seneca that the judge is confined to the application of the rules of law, while the arbitrator "can soften law and justice by kindness and mercy." He also quotes Aristotle's opinion that "the arbiter looks to equity, the judge to law." It should be noted, however, that Seneca and Aristotle had reference to arbitrators in private law, and that from a modern point of view, Grotius is confusing the arbitrator at international law, who must apply law, with the arbitrator at private law, who is not so bound. "In this case equity does not mean, as elsewhere, that part of justice which interprets the law by its general tendency and real purpose, (for this part is also committed to the judge); but it means everything which is better done than not done, even extraneous to the rules of justice properly so called." This sort of arbitration is common in private law, and was recommended by Saint Paul to the Christians. But in a doubtful case, there is no presumption of such authority. This is particularly true in a dispute between sovereign states, since the latter having no common judge, are presumed to have bound the arbitrator by the same rules as govern the office of a judge.

The views of modern publicists are more valuable than those of Grotius inasmuch as arbitration since his time has assumed an increasingly juridical character. In 1911 President Taft submitted to the Senate arbitration treaties with Great Britain and France providing for the arbitration of all international differences "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." Mr. Taft pointed out that since the term is used in the treaty with France as well as in that with England it cannot be given

---

60 The judicial discretion of the arbitrators of the Middle Ages was very broad. The instances of compromis providing legal principles to govern the arbitrators in the decision of cases were very rare. Novacovitch, Les Compromis et les Arbitrages Internationaux Du XII au XV Siecle, 28-29, 76, 83-84.
the technical meaning of Anglo-American law. Yet much the same meaning has been ascribed to the term by many nations. "Equity has ameliorated and mitigated the severity of the law. The two words used together, therefore, were intended to comprehend all the rules of international law affecting the rights and duties of nations towards each other which are not merely rules of comity, but are positive and may be enforced by judicial action." Knox, Secretary of State at the time these treaties were drawn up, maintained that disputes were justiciable "where a rule or decision may be found in accepted principles of law," or could be decided "by the accepted principles of justice."

The majority report of the Senate Committee which considered the treaties says: "We are obliged, therefore, to construe 'equity' in its broad and universal acceptance as that which is equally right and just to all concerned; as the application of the dictates of good conscience to the settlement of controversies." Senator Rayner asserted that the term meant simply the whole of the principles of the legal system of both nations. It did not cover such subjects as immigration, state debts, and the Monroe Doctrine. Senator McCumber contended that it meant the equity of the Anglo-American law. Senator Lodge argued that there was no authoritative definition of the phrase "law or equity" in international law.

William C. Dennis, agent for the United States in several arbitration cases, points out that the phrase "law and equity" by its long dating back to Jay's treaty has acquired in international law a meaning similar in kind to that of "due process of law" in American Constitutional law. The phrase does not give a court unlimited discretion. Like "due process" the phrase has been defined as to certain basic concepts, and at the same time it permits of a broad treatment by exclusion and in-
clusion. Reinsch maintains that international equity is much broader in scope than English equity. "It involves the application of general standards of justice, and the determination of what in good faith ought to be performed." In international arbitration the principles of legality have a tendency to widen out "into interpretations which are based upon ideas of equity, justice, and fair dealing." As international law is still in its infancy, the tribunal must be permitted to resort to equity to advance its development. "Legality is the center, the core, the ultimate criterion of judicature: to establish it in the wisest and broadest manner there will be necessary a constant resort to principles of equity."

Scott, in criticism of the equity clause in Article VII of the Prize Court Convention alleges that it makes the court a legislative body and allows it to develop and modify international law. He also uses the term to cover a blending of the private law principles of the various systems of law. "For the purpose of the Permanent Court of Arbitration municipal law must be internationalized. In this case, and in this case only, can the judgment be equitable in any international sense, and the judgment so formed will be based upon international equity as well as international law." Scott also uses the term in a very generic sense to cover the principles governing the decision of arbitral bodies. "With the Permanent Court of Arbitration at the Hague to decide political questions according to the dictates of political equity, with an international Court of Justice at the Hague to decide according to law, and with conferences meeting at regular intervals elsewhere, there would be a court of justice, a court of equity, and a lawmaking body adequate to the needs of the nations as they present themselves from time to time." Philip Marshall Brown, referring to the treaties of 1911, says: "Equity may mean anything that judges deem just." Potter asserts that when the arbitral agreement provides for an award "according to the principles of international law and

---

70 Conference of 1907, II, 323-324.
71 Sovereign States and Suits before Arbitral Tribunals and Courts of Justice, 247.
72 International Society, 87. See also, 51 Revue de Droit International et de Legislation Comparee, 317, 326.
equity,” the arbitrator may do “very much as he pleases.” Garner says that the broad interpretation of equity as meaning general principles of justice “is in accord with the opinion of the authorities.” John Bassett Moore appears to reject the view that equity is equivalent to morality. Lieber says: “Nations have often practiced, heaven be thanked, international charity, but it hardly appears in the law of nations or international justice and equity.” Baldwin points out that equity in the 1911 arbitration treaties does not mean English equity. “France, and the world generally, know equity, as that which is fair and just, though perhaps not sanctioned or required by strict and technical rules of ordinary law. It is the _jus aequi et boni_ of the Roman law.”

Most of the English authorities have expressed their opinions on the meaning of equity in connection with the Prize Court Convention. The Convention was severely criticized on the ground that equity is wholly indeterminate and rests on the individual, subjective views of the judges. The late Lord Finlay, a member of the World Court, stated in a speech in the British Parliament that the proposed Prize Court “is at liberty to decide according to its own pleasure, according to its views of the general principles of justice and equity, without any guidance from any code of law agreed upon between the nations affected, on one matter which is vital to this country. Can there be imagined any point in which we are more vitally interested than the question of the conversion of merchantmen on the high seas into armed cruisers of a hostile power? The most elementary principles of international law require that such conversion shall take place only within the territorial waters of the powers which

---


74 British Yearbook of International Law, 1923-1924, p. 159, at 160.

75 Umpire Lieber, as a member of the Mexican Claims Commission, once recommended a decision awarding damages to a widow who had no legal claim, on charitable grounds. He took oath to decide “according to public law, justice and equity.” Moore suggests that such an award would have been improper. 2 Moore, International Arbitrations, 1300, note 2. Moore was also of the view that the 1911 arbitration treaties intended to settle questions justiciable at law or equity did not cover political questions. 71 Independent 344, (1911), The Peace Treaties.

76 Leses case, 2 Moore, International Arbitrations, 1300, note 2.

77 International Conciliation, No. 48, p. 33.
the vessel will represent on the high seas. We endeavored to arrive at an agreement on this point. We found that our views were hopelessly divergent and no agreement whatever as to the conditions under which conversion might take place was arrived at, and yet we rush into this convention leaving it to this court, composed without any guidance on this point, to decide at its pleasure whether such conversion is lawful or not. This is an act of madness."

Ernest Jelf, an English judge, is inclined to agree with Taft's view of the meaning of equity. "I am not sure what he means by 'equity.' I do not think he means what the judges of our Chancery Division would mean by the word. Perhaps he means what Aristotle meant. . . . Aristotle says: . . . 'And this is the nature of the equitable—it is a correction of the law where it fails through generality! In other words 'equity' is that which the parties who framed the law would have included had they foreseen the exact case. If this is what Mr. Taft means, we can agree with him for 'equity' is merely the interpreting what is still a consentement des nations (as Vattel would say) according to the intention of the parties. But if by 'equity' Mr. Taft means morality, I should like to enter a caveat against the argument thereby suggested."

The French publicists have given the term a very broad meaning, going further than most writers. Renault, who presented the Prize Court Convention to the Second Hague Conference, said that the equity clause meant that the court was to "create the law." The situation would be like that in the early private law when the courts made the law at the very time they were called upon to apply and construe it. The judges would fill up the gaps in international law until the governments undertook to codify it. The court would develop the law of evidence and procedure as well as the substantive law.

---

88 Hansard, Parliamentary Debates for 1911, Vol. 32, pp. 1694-1695. Atherley-Jones says that the court "is a legislative body; because one of the provisions of the treaty is that if there is no provision in the treaty which provides for a case brought before it, the court has to deal with the question according to general principles of justice and equity. What does that mean? It means nothing less than this, that the court is able to legislate itself. . . . This court has no restraint upon it except its own sense of right and wrong." Ibid, p. 1603.

89 Grotius Society 59, 65. "Justiciable Disputes."

90 2 A. J. I. L. 831.
One of the most frequently cited publicists on this question is Merignhac. "The formula which seems really precise, is that which leads us to say that international law is applied with equity." A compromis providing for a decision according to justice and equity is a "vague formula," leaving the arbitrator "an absolute liberty." "Nothing is broader than the field of equity." He may decide "according to his personal conscience." He ought, however, conform as much as possible to the principles of international law, "mitige, le cas echeant, par l'equite." Otherwise he will go astray, since his personal experience could not lead to as certain consequences as those approved by a long international practice and custom.

Weiss, a late member of the World Court, appears to follow Merignhac. He asserts that an arbitrator, who is authorized to decide according to law and equity, is thereby appointed an amiable compositeur. Where express rules are provided for the arbitrator, he cannot decide "according to the promptings of his conscience, that is to say, according to equity." Politis maintains that international law is made up of three categories: conventional law, customary law, and general principles. These general principles are those of justice and equity. Arbitrators should not apply equity unless they are authorized to do so, on the ground that the parties would have directed its application if they so desired. When, however, the compromis authorizes equity as a basis of decision, the arbitrator may resort to it even when positive rules of law exist. On the other hand, where the compromis does not contain such a clause, equity can be employed only to fill a clear gap in the law. When the law does not exist or is obscure, the arbitrator "must refer the case back to the parties, to ask them to allow him to decide according to equity or as an amiable compositeur." Otherwise the award is in danger of not being carried out.

One of the most careful students of the law applied by arbitral tribunals was the Austrian Lammash. He is of the opin-

---

81 L'Arbitrage International, sec. 303.
82 Ibid, sec. 305.
83 Ibid, sec. 304.
84 Revue generale de droit international public (1910), 114, "L'Arbitrage De 1909 Entre La Bolivie et le Perou."
85 Ibid, 120.
86 La Justice Internationale, 82.
87 Ibid, 84-85.
ion that where the *compromis* makes equity one of the grounds of decision, the arbitrator must, unless he is authorized to act as an *amiable compositeur*, decide according to legal rules. "He may not unquestionably correct the law governing between the parties according to his subjective views of equity, but he may and should fill up the gaps of the law according to equity, that is in the spirit of the law, according to legal analogy." It is one of the tasks of legal science to develop this legal analogy. But this science must be in unity with positive law and its spirit, and not based on the personal inclinations of the authors. The admission of legal analogy will cause many subjective moments, but this is unavoidable in the present incomplete state of international law. Judgments based on too subjective considerations may be guarded against by having a group of arbitrators, this group preferably to represent different legal systems. Lammasch suggests that in the 1911 treaty between United States and Great Britain equity may be understood in its technical chancery meaning. He rejects the view of Merignhae that the phrase "justice and equity" results in only a moral obligation to apply international law. Where a positive rule exists, the arbitrator is legally as well as morally bound to follow it. There is a distinction between the use of equity to fill up the gaps and as a means of changing the existing law. The arbitrator acts judicially since he uses equity only as a subsidiary source of the law. The Peace Congress which met at Antwerp in 1894 went too far in the recognition of equity when it proposed that "arbitrators should make a constant appeal to equity as well in the interpretation as in the application of principles and statutes." Under such a plan, equity would be recognized as a factor in the correction of fixed rules of law, and at the same time the permanent character of the award would be

---

88 *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzem Umfang*, 180-181.
89 *Die Rechtskraft Internationaler Schiedsspruche*, 49-51. Lammasch also says: "States by agreeing that the arbitrator shall decide according to law and equity empower him in the meaning of Kant, to consider those imponderabilities which the ordinary judge of a court existing within a State would not be permitted to consider." *Op. cit.* 50. "Consequently the subjectivity, the discretion of the judge, which are more and more prevailing in modern criminal cases, and even in civil cases, has in international relations a very special meaning." *Op-cit.*, 50-51.
taken away and the judgment placed wholly in the discretion of the judge.

The Hungarian Magyary emphasizes the conciliatory aspects of equity. The old Hague Court has been criticized, he says, for proceeding "more according to equity and to settle the dispute." The former opinion that an arbitrator is called upon only for a decision "according to equity or for an adjustment of the dispute" is now commonly rejected. On account of the gaps in international law many cases must be decided according to "equity and expediency." Erich rejects the limited scope allowed to equity by Lammasch. Against this consideration of Lammasch it may be objected that according to it no difference would appear between the finding of the law and the application of equity; the reference to equity as basis of the decision would if it were to be understood in this way have no particular meaning, since it follows from the nature of international law, that the judge in many cases is compelled to "find" the law. Although there may be no sharp boundaries between this function of the arbitrator and the decision according to equity, yet the two conceptions are, as above remarked, to be distinguished, and it must be admitted that the above indicated reference to equity gives him an increased potentiality to mitigate the severities of the *jus strictum*, and to extend his free examination somewhat further; it would be impossible to set down here the boundaries by distinct limits." The view of Kohler, that a *compromis* making equity a basis of decision has no significance, is criticized as hardly intelligible.

Fiore, eminent Italian publicist, makes equity equivalent to conscience. He points out that if an arbitrator has been invested with jurisdiction to decide a dispute according to equity, he cannot be reproached if he decides "d'apres sa conscience eclairée." Alvarez, a leading South American publicist, points out that arbitrators frequently state in their decisions that they are proceeding according to equity without explaining what they mean by that term. It is applied where general

---

90 Die internationale Schiedsgerichtsbarkeit in Völkerbünde.
91 Probleme der internationalen Organisation, 7, note 1.
92 Revue Générale de droit international public, 225, 245.
93 Anzilotti appears to regard equity as based on compromise, Corso Di Diritto Internazionale, 64.
94 La Codification Du Droit International, 118.
principles of law and justice are lacking. "Today, equity may be regarded as the solution which good sense indicates as the most fitting for each specific case; it is of a special nature not subject to general rules." Consequently no legal doctrines as to the subject involved may be extracted from the sentences of tribunals which apply equity. Equity is ancient, its conception and role varying according to the epoch. Kamarowsky asserts that the use of "equity" as a term of the compromis clearly shows the inadequacy of the nomenclature of the principles which govern tribunals. 94 "The conceptions of justice, of aequitas often vary not only among different peoples, but even among the individuals of the same nation." Strisower says with reference to the 1911 arbitration treaties providing for arbitration of suits justiciable at "law or equity, that one can hardly find a boundary from the objective nature of the disputes raised from this wording." 95 The Norwegian Castberg is of the view that where the compromis provides for a decision according to "justice and equity," the tribunal should apply existing international law, and supply the gaps in it by the application of the principles of equity in the spirit of international law. 96 But where "absolute equity" is the sole basis, it may disregard the law. Pohl asserts that the equity clause of the Prize Court Convention gives the proposed court the power to make law more or less at its discretion. 97 Schucking says concerning the clause: "The existence of a modern natural law for international law has thereby found an official international recognition. This 'modern natural law' is obviously no longer in the meaning of Hugo Grotius a 'Normalrecht' which has significance for all times and all peoples, but contains principles which are drawn from the concrete needs." 98 Nippold endorses the views of Merignhac, thus accepting the broad meaning of equity. 99

---

95 Die Krieg und die Volkerrechtsordnung, 63, note.
96 52 Revue de Droit International et de Legislation Comparee, 155, 169.
97 Deutsche Prisengerichtsbarkeit. A very valuable discussion of the objections to the equity clause is found at pp. 163-192.
98 Die Organisation der Welt in den Staatsrechtlichen Abhandlungen, 538.
The German Bulmerineq points out that equity must be resort to in three types of situations. On some occasions disputes not of an international law nature are submitted. In the second place, although the dispute is of a juridical character, the necessary legal principles may be lacking. Equity is also used to establish the amount of damages due to the claimant state. The principles of equity are principles of international law in the view of Bulmerineq, despite their non-recognition by the writers of such countries as the United States and England. On any other view many disputes would have to go unsettled. Kohler maintains that a provision for equity as one of the bases of settlement of a dispute has no significance.

"It has been said that when the arbitral award is not based on the sources of law indicated in the arbitral agreement, that excess results in nullity; but this view must be entirely rejected. It may happen, that it is stated in the arbitral agreements, that the arbitrator should decide more according to equity than according to law; or that he must base his decision on the latter or the former source of law. But such agreements have no meaning. It is obvious that every tribunal, including the arbitral body must decide according to law, and must decide what the law is, considering all the sources of law, which are revelant, in a complete manner."

One of the most recently expressed views on the subject is that of Lauterpacht. "It would be a grave mistake to assume that in all those cases in which, in contradistinction to rules of international law proper, rules of 'justice,' of 'equity'; and of 'general principles of law' are resorted to, the field of judicial settlement is abandoned and a settlement on a non-judicial basis adopted. . . . Rules of equity are rules of law both in municipal law and in international arbitration."

Such rules generally turn out to be rules of private law of the nations. The rules of customary and conventional international law being regarded as inadequate, the parties to arbitral agreements stipulate for equity as an additional basis of decision.

---

100 Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg, sec. 11; Holtzendorff, Handbuch des Volkerrechts, IV, 42.
102 Private Law Sources and Analogies of International Law, sec. 28.
103 Ibid, 298-299. The discussions of the Advisory Committee of Jurists who drew up the World Court Statute throw some light on the
There exists a customary rule of international law to the effect that 'general principles of law,' 'justice,' and 'equity' should, in addition to and apart from customs and treaties, be treated as binding upon international tribunals. These sources, which are shown by the practice of international tribunals to connote legal rules proper and not precepts *ex aequo et bono*, are for the most part identical with generally recognized principles of private law."

A comparative analysis of the views of the leading publicists of the nations of the world clearly indicates that the preponderant view is that equity when used as a basis of international arbitration permits the tribunal to exercise a very broad discretion. Equity is not confined to mere analogy or interpretation, but is made identical with morality, conscience, and the subjective views of the arbitral body. Taft and Dennis are almost the only American jurists who have given the word a narrow meaning. Scott, Garner, and almost all other publicists who have expressed an opinion adopt the broader meaning. The leading English publicists almost unanimously take a similar matter. Descamps pointed out that while it may be the "duty of the judge to apply the law where it exists, we must not forget that equity is, in international as well as in national law, a necessary complement of positive law. The first duty of a judge is to render a sentence and he is often obliged by the circumstances to render a sentence based on equity and to use the suggestions of his own conscience and of his reason in order to supply the deficiency of positive law, and the many gaps and imperfections in the law of nations are not of a nature to lessen the difficulties of the task."

Advisory Committee of Jurists. Permanent Court of International Justice. Proces Verbaux, 44-45. Ricci-Busatti remarks: "Equity is the very essence of law, which is merely its form." *Ibid.*, 106-107. Root pointed out that the vagueness of the term "equity" had resulted in the failure of the Prize Court Convention. *Ibid.*, 285, 308-324. Hagerup proposed that the Court could only resort to equity when authorized to do so by the parties. Equity "was a very vague conception and was not always in harmony with justice." Descamps proposed that the court should decide according to "objective justice", a justice not identical with the subjective opinions of the judges but one accepted by the civilized nations. "I should say equity, if I did not fear that a misunderstanding might occur, owing to the various meanings put upon that word." Ricci-Busatti asserted that the proposed third clause of the sources of law to be applied referring to "the general principles of law recognized by civilized nations" did not have the effect of making equity a basis of decision. *Ibid.*, 331-346. Lord Phillimore called attention to the technical English meaning of equity, and asserted that the judge would be given too much liberty if the broader meaning was adopted. De Lapadelle "did not know these principles; equity varied from case to case; generally speaking, care must be taken not to employ words with a special meaning; justice includes equity."
view. The French authorities, notably Merignhae, who has been much quoted, and Weiss and Politis maintain that an equity clause not only permits the tribunal to fill gaps in the law, but to ignore positive rules of international law. The German publicists in practically all instances assert that the broad meaning is the correct one. Virtually the only Continental jurist who maintains the strict view is Lammasch, who confines equity to filling the gaps and rejects all departures from positive rules. But even his view is rather ambiguous, as there is no agreement as to what a gap is. The rationale of the views of the majority appears to be that unless a comparatively broad meaning be given to the term "equity" its use in the compromis is mere surplusage.

(To be concluded in January issue).

LESTER BERNHARDT ORFIELD

Lincoln, Nebraska