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Brower power: a father-and-son interview

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An event in Houston saw US arbitrator **Charles N Brower** interviewed by his son about his long career in international arbitration, his response to critics of the system, and his legacy. **Benjamin Jones**, an associate at Jones Day in San Francisco, reports.

Chip and Charlie Brower

Brower, a judge at the Iran-US Claims Tribunal in The Hague who also works from 20 Essex Street in London, was interviewed as part of the Institute of Transnational Arbitration's Oral History project. The interview was conducted by his son, **Charles "Chip" Brower II**, professor at Wayne State University and of counsel at Miller Canfield in Detroit.

Your legal career spans 50 years but it's only in the past 30 years that you have focused on international disputes, suggesting you were a late bloomer. Did you take more than a single course on international law while you were at Harvard Law School?

No. At that point I was planning to join the US Foreign Service. I was persuaded that it wouldn't be bad if I went to law school and have a degree in law or a PhD so that, if it didn't work out at the State Department, I might have an alternative profession. So I took all the courses that you need to be effective in a law firm: evidence, antitrust, securities law. We were forced to take commercial law and all these horribly boring things.

Tell us about the early years of your career at White & Case.

Before I went to the State Department, I was a "real lawyer" in New York. I tried jury cases, non-jury cases, I had appeals, I did a tremendous amount of criminal defence work, including front-page cases involving the then-biggest securities fraud artist in history. I also defended a black American yeoman first class, with 17 years' service, who – before we got into the case – had been convicted of conspiracy to commit espionage for the Soviet Union.

I handled all of the exploding beer-bottle cases in the New York metropolitan area for Budweiser. I was asked to defend all of the defamation cases against [credit rating agency] Dun & Bradstreet. This was before federal credit reporting restrictions.

I did the 5 per cent of litigations that would come through a big law firm that nobody in their right mind wanted to handle because they didn't normally lead to partnership. It was great training. People of my generation knew how to cross-examine and try a case. There are too many people, now that it's such a big field, who only do international arbitration and haven't been out to the woodshed to do real law practice.

What helped you to make the transition to international practice?

The four years I spent at the State Department were, in a sense, the real beginning of my professional life, because that's where I learned a lot of international law, learned or re-learned constitutional law and, to some extent, administrative law. It was that experience and the profile I acquired that laid the basis for my work in international arbitration.

When and how did you become involved in international arbitration?

I like to say it was through determination, but it's always about getting the first case. When I left the State Department, one of my colleagues there had become general counsel of New England Petroleum Corporation, and they thought they had a potential arbitration against British Petroleum. I spent two weeks in London working on that, and I realised that we needed English counsel. The partner in charge of our London office recommended Sir Edward Singleton, who had recently left his post as president of the Law Society of England and Wales and was back at MacFarlanes as a consultant. We worked together. Unfortunately, I had to inform the client that it had no case to make.

One or two years later, I was called by Singleton, who said that he had a case for his Swedish client, Skanska – the biggest construction company operating in New York – against Saudi Arabia. That was an ICC arbitration, so off I went. It was a wonderful experience. As soon as we got a few preliminary issues resolved, the other side caved. I figured "Okay, now I'm an expert."

How old were you at the time?

Forty-five. I was a late bloomer, but of course the field of international arbitration was a late bloomer as well, by my time scale.

Within four years of starting your first arbitration, you became a full-time judge on the Iran-US Claims Tribunal. How did that happen?

Politics. Up to about the 2000 election, I was a certified, registered Republican. I had seriously good liberal Republican credentials from New Jersey so that all cleared the way for me to be hired at the State Department. By the time there was an opening at the tribunal, everybody in a position of authority in Washington to check it off was rooting for me and I got there.

Fifteen years ago, a very popular book described the rise of an elite of arbitrators known for their professional reputation and integrity. More recently, there's been a report that portrays them in a very different light. How did we get from *Dealing in Virtue* to *Profiting from Injustice*?

I was only number two of the 15 most wanted people in international arbitration in that report, but you can't always get to the absolute top. The problem is bilateral investment treaties

and NAFTA. Basically, even the US, in a sense, did not know what it was signing. [The US said:] "Oh my god, you mean this isn't all about Mexico, and that the US or Canada can be a respondent in a case?" And then you get this opposition to the system – the non-governmental organisations that say this is all unjust and I and others are profiting from injustice. In Europe, you would say these are a "leftish" group of people.

Let's talk about the environmental movement, for example, which I do not regard as "leftish" necessarily. They're good people, but they rail against the fact that the policy space of sovereigns is limited by these treaties, that they're prevented from being able to do things that they want to do. The present director of the Center for International Environmental Law in Washington has testified before Congress against the whole system of investor-state arbitration. However, the same people support limitations of sovereignty and fight for the ratification of treaties that limit the state's policy space to the extent of prohibiting the use of certain substances. It's a question of what you are fighting for substantively. But there are an awful lot of people who are not well-informed and don't understand the problems of governance in international investment and politics.

You've also criticised the profession for what you call "rampant inventiveness." What do you mean?

This is a competitive field at all levels. Firms and lawyers compete to get and keep the clients, compete against each other in the arbitrations, and want to be at the top of the list of biggest arbitration practices. Arbitrators are quietly competitive because they are subject to appointment by the parties. Arbitral institutions are competing with each other like mad too.

So how do you profile yourself as an institution or an individual? You come up with a really smart idea that gets the headline, like "let's do away with party appointments," or "let's never have dissenting opinions in international arbitration." The regulations and protocols of arbitral organisations proliferate. Somebody else is popping off with another "great idea" that will revolutionise the profession, most of which sink to the bottom of the sea of their own weight, even without being given a push. And I spend a lot of time giving pushes.

What is the classical model of arbitration that we shouldn't be tinkering with?

It is possessed by the parties. They make the choice as to who they want to judge their case, under what rules or limitations, and they own the creation of it. It is like having children. They create this thing, and pretty soon it is way beyond their reach, but it is their child, they believe in it. Tinkering with the basics is just a loser.

Last July, I was invited to speak to a closed group of in-house counsel for major German corporations about this subject. I was surprised by the extent of pessimism about what the arbitral system produces. If you depend on, for example, the application of a most-favoured nation (MFN) clause to get you to the dispute settlement provision of another treaty, it is a crap-shoot, because certain people are known to feel differently, and you might not wind up with the people you want [on the tribunal].

You just gave a lecture to the Chartered Institute of Arbitrators in which you invented the term "investomercial" arbitration to describe an emerging, hybrid species of international arbitration. Does this reflect the good or the bad inventiveness in arbitration?

I admit to inventing a term but it was simply an effort to get people away from thinking in terms of commercial arbitration versus investment arbitration. The term refers to arbitra-

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tion involving a private party on one side and a sovereign on the other. There's not much difference between doing this under ICC rules or under a treaty, because if you look at the past 60 years of non-treaty-based international disputes between an investor and a host state, they have been made by one means or another to involve application of international law, in addition to local law. By the same token, treaty disputes inevitably will get you into some issues of national law, whether it is because that's the law of the contract that gave rise to the problem or through a broad arbitration clause that includes disputes other than violations of the treaty or through an umbrella clause.

There's investomercial arbitration on the one hand and then arbitration involving only private parties on the other. That is the real distinction, and as for this debate that *GAR* held about whether investment treaty arbitration and commercial arbitration are like apples and oranges: if you examine apples and oranges scientifically, they are practically the same.

How do you assess the health of investment treaty arbitration? In 2012, we had the largest number of new cases filed (58) but also a dramatic, 18 per cent decline in cross-border investment. What do these numbers suggest about the security and predictability of investment treaties?

If anyone happens to pick up the Spring issue of this year's *Columbia Journal of Transnational Law*, you will see a long article by myself and a colleague mounting a comprehensive defence of the system in general. It certainly is under attack, and we'll see what happens. Mark Kantor has said that if the Trans-Pacific Partnership and the EU-US trade agreements actually materialise, whatever they provide with respect to international arbitration will in a sense make the model for 70 per cent of the world's gross domestic product, so those should be watched carefully. I don't think the drop in international investment has to do with the status of the system, that's just a lack of confidence despite the system and of course the overall world economic situation.

Turning from the state of practice to your legacy –

You're my legacy. [*Applause*]

I had always thought of you as a consummate diplomat who cautions against the use of adjectives in legal arguments, but a profile in *GAR* describes you as "a controversial figure," known for outspokenness in deliberations, and recently inclined towards "scathing" dissents. Did I miss something or are you a true Gemini?

[*Laughing*] I am a Gemini, and I'm happy being a Gemini. I think it's the best thing that can happen to one, as it allows you to play all kinds of roles. I was having a conversation the other evening over my dissenting opinion in the *DaimlerChrysler v Argentina* case, and somebody said "You must have been very angry." I don't think I expressed myself in angry words, but I think the facts can scathe. If the buildup of the legal argument is just plain unsound and you point it out, then that's a scathing dissent.

Let's focus on that case, in which the majority decided that claimant could not use an MFN provision in a BIT to avoid a requirement to pursue 18 months of domestic litigation in Argentina. You described the majority's reasoning as "profoundly wrong" and you expressed the hope that your dissent would "dispel for others the award's substantial confusion". What triggered your intense language?

One of my pet peeves is the improper application of articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). A similar mistake was made in the *Plama v Bulgaria* case. Pierre-Marie Dupuy, a very distinguished European international lawyer, insisted that

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if you are going to interpret an MFN clause as permitting you to gain access to the dispute settlement provision of another treaty, there must be "affirmative evidence." The VCLT does not talk about evidence, let alone affirmative evidence. It says you look at the text in its natural meaning in context – it's not loaded one way or the other, and it shouldn't be loaded. The only way that he and his co-arbitrator could get to that result was by requiring affirmative evidence, and finding that no such evidence existed. I thought that was wrong and, yes, I wanted to spell it out – not just to explain to the people who appointed me that I wasn't asleep at the switch, but also because these decisions are all published, and I feel very strongly about properly applying the VCLT, which is not always done. Hopefully others will be able to make use of it in other cases.

Have dissents in fact been effective in clarifying the scope of the MFN provision?

Obviously, there's still a dispute over that, and there are other people who don't think like I do about those things. That, of course, is the principal defect of the whole framework, and it is inevitable.

Should users be satisfied with these consistently inconsistent results?

Of course not, unless they win. That's a real problem.

Looking back, what is the one decision that you would most like to have your name associated with?

I think from the memorials that I read and the submissions made to tribunals of which I am member, the one most referred to is my separate opinion in *Amoco v Iran* at the Iran-US Claims Tribunal in 1987, because both the award and my separate opinion seem to have been landmark statements on the law of expropriation. Since 1987, I don't seem to have done anything better. [*Chuckling*]

Your father once wrote that no one succeeds unless a lot of other people want that person to succeed. What mentors, friends and communities have contributed to your career?

I often refer to four people as having been most influential on me. One was your grandfather, who was a great man and great figure in his field. Another was Jack Stevenson, later presiding partner of Sullivan & Cromwell, who was Legal Adviser at the State Department and with whom I worked. We just hit it off beautifully, and he did many things to advance my career.

Then there was David Abshire. I met him when he showed up at the State Department as Assistant Secretary of State for Congressional Relations. He had wonderful networks all over town and still does – he must be about 90 by now. If it weren't for him, I wouldn't have been invited to be part of President Ford's political strategy team for the 1976 Republican convention. If it weren't for him, I wouldn't have been invited to the White House to be his deputy when his cabinet rank was Special Counsel to President Reagan to try and dig him out, politically, from the Iran-Contra problem.

And another was somebody that nobody ever heard of except you, and that was George Jaeger, one of my tutors in the honours programme at Harvard College many years ago.

Your grandfather was right. If you can't inspire other people who will be in a position to support you, you're not going to go anywhere.

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Even at 78 years old, you keep up an intensive pace. What are some of the secrets to longevity at the top of a competitive field?

People have to think that you are honest, knowledgeable in the field, intelligent, that you make good decisions, that you have good judgement, and that your only prejudice is in favour of the law. I'm frequently asked about my opinion of different arbitrators and often I will say: "Look, this person has achieved so much, and he or she has nothing to lose but his or her reputation. And to us, reputation is everything."

What is the most unusual professional honour that has ever been bestowed on you?

The name of it is *barylypa broweri*, and for those entomologists of you, it is a rare insect found in the Guanacaste province of Costa Rica. When I represented Costa Rica for a number of years in practice, and notably in the *Santa Elena* arbitration at ICSID, I worked very closely with Daniel Jansen, an American professor of biology who most lived in Costa Rica, and really is the genius behind conservation there, and has won every Nobel-type prize in the world for conservation. So we did a good job on the case and it was a good result for Costa Rica, and he said "Well, I will see to it that we name a newly discovered species after you."

Daniel also has a terrific sense of humour, so he named for me, as he put it, a parasitic wasp. [*Laughter*] Certainly, I'm a WASP. But the other thing was that in the caterpillar form, before it becomes a wasp, he said it's dressed like a lawyer, in a striped suit – yellow with black stripes. I've always treasured that very much.

This is a condensed version of the interview, which took place on 21 February at the Joint Winter Forum on International Energy Arbitration, an event organised by the Institute for Transnational Arbitration and the Institute for Energy Law, both of which are divisions of the Center for American and International Law in Dallas, Texas.