

ANCIENT GREEK ARBITRATION: PRACTICES,
FAILURES, AND THE DECLINE OF THE GREEK
WORLD

GABRIEL SHOEMAKER

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I. INTRODUCTION

Before Athens and Sparta went to war in 431 BCE, the Ancient Greek world was thriving. The Greek city states had routed the Persians in two separate engagements. Greek traders plied the waters of the Mediterranean and Black Seas and even further afield, bringing immense wealth to the Greek world. Greek states continued their movement towards democracy, led by the Athenians. They had developed a nascent form of international law, illustrated by their rules of war and, more tellingly, by a willingness to submit intercity disputes to arbitration by a third, neutral *poleis*.¹ Yet, by the end of the Peloponnesian War in 404 BCE, the Greek world was militarily weak. The regional hegemon Sparta was dependent on Persian support, impoverished by three decades of conflict, while across the *poleis* the tendency towards democracy declined, leaving oligarchies on the ascent.² Mechanisms for arbitration in both 446/445 BCE's Thirty Years' Peace and in 421 BCE's Peace of Nicias were ignored in favor of conflict, leading to the devastation of the Greek world and its eventual supplanting by other, more powerful neighbors.

1. The English transliteration of the Greek word for "city."

2. See generally DONALD KAGAN, *THE PELOPONNESIAN WAR* (Penguin Books 2003) (discussing the Greek world before, during, and after the Peloponnesian War).

This annotation focuses on the Greek practice of intercity arbitration as a means of dispute resolution and, in particular, on the role that the failure of arbitration to either prevent the outbreak of the Peloponnesian War in 431 BCE or permanently end it in 421 BCE contributed to the decline of the Greek world. It begins with an examination of Greek intercity arbitration as it generally existed prior to the Peloponnesian War, and then turns to the ‘Thirty Years’ Peace and Peace of Nicias and their arbitration clauses. Finally, it examines why these arbitration clauses failed to prevent armed conflict between Athens and Sparta, arguing that the Greeks likely did not see the practice as constituting an analogue to customary international law and certainly did not see it as *opinio juris*. This treatment of arbitration fueled the outbreak and continuation of the Peloponnesian War and ultimately the decline of the Greek city states.

II. INTERNATIONAL ARBITRATION IN ANCIENT GREECE: AN OVERVIEW

“By 500 B.C., arbitration had near universal acceptance among Greek states,”³ and by the time of the Peloponnesian War, the procedure was broadly understood and centuries old, with one particularly ancient appeal to arbitration dating back to roughly 750 BCE.⁴ There were two main avenues through which Greek arbitration generally occurred.⁵ The first was through a *compromissum*, or arbitration clause, in an agreement between two states.⁶ For example, the 418 BCE peace between the cities of Sparta and Argos included as its first clause: “They shall submit to arbitration on fair and equal terms, according to their ancestral customs.”⁷ This form of *compromissum* was also found both in the ‘Thirty Years’ Peace and in the Peace of Nicias. The second main avenue through which arbitration could occur was through “the intervention of a third party,” such as a city state intervening in an armed conflict between two other states and forcing mediation.⁸

3. Henry T. King, Jr. & Marc A. LeForestier, *Arbitration in Ancient Greece*, 49 DIS. RES. J. 38 at 38 (Sept. 1994); see also MARCUS NIEBUHR TOD, *INTERNATIONAL ARBITRATION AMONGST THE GREEKS* 7-52 (1913) (providing an impressive list of eighty-two arbitral decisions and treaties in Ancient Greece).

4. W.L. Westermann, *Interstate Arbitration in Antiquity*, 2 CLASSICAL J. 197, 199 (Mar. 1907).

5. King & LeForestier, *supra* note 3, at 40.

6. *Id.* at 40.

7. *Id.* at 41 quoting (THUCYDIDES v. 77 (Benjamin Jowett, trans., 1900)).

8. *Id.* at 41.

If a *compromissum* was the basis for the arbitration, the text of the treaty would sometimes include a procedure for choosing an arbitrator, but this was uncommon, especially around the time of the Peloponnesian War.⁹ If no specific procedure was delineated, the city states would come to an ad hoc agreement for selecting an arbitrator, sometimes resorting to lots to choose the arbitrating city.¹⁰ Much like in contemporary arbitration, the Greek cities valued factors such as a “lack of jealousy or prejudice; friendship or kinship; reputation for good faith and moral excellence; and geographical proximity” when selecting their arbitrating city.¹¹ Once the arbitrating city was chosen, it usually appointed the arbiters, who were then required to take oaths.¹² The arbiters were only permitted to address the specific dispute for which they were summoned.¹³ After a hearing, complete with counsels, advocates, and witnesses, the arbitral tribunal would issue its final, unappealable ruling.¹⁴ This is the context in which the arbitral clauses were included in the “Thirty Years” Peace and the Peace of Nicias.

III. ARBITRATION CLAUSES IN THE “THIRTY YEARS” PEACE AND THE PEACE OF NICIAS

At the end of the “First Peloponnesian War” in 446/445 BCE, the “Thirty Years” Peace treaty was signed between Athens and Sparta.¹⁵ The events of the First Peloponnesian War are beyond the scope of this paper, but the terms of the agreement ending the conflict lie at its heart. The “Thirty Years” Peace divided the Greek world in two, between the Spartan-led Peloponnesian League and the Athenian-led Delian League.¹⁶ The most important clause in the agreement for the purpose of this annotation was a *compromissum* that “required both sides to submit future grievances to binding arbitration.”¹⁷

The respect both the Athenians and the Spartans held for the *compromissum* became clear fifteen years later in 432/431 BCE, when disputes broke out once again between Athens and Sparta. With tensions flaring, the Athenians appealed to the Spartans “not to dissolve the

9. *Id.*

10. *Id.*

11. *Id.* (citing MARCUS NIEBUHR TOD, INTERNATIONAL ARBITRATION AMONGST THE GREEKS 86-87 (1913)).

12. *Id.* at 41-42.

13. *Id.* at 42.

14. *Id.* at 42-43.

15. KAGAN, *supra* note 2, at 17-18.

16. *Id.* at 18.

17. *Id.*

treaty, or to break your oaths, but to have our differences settled by arbitration according to our agreement.”¹⁸ The Spartans also held respect for the *compromissum*, with one of their kings, Archidamus, urging in response to the Athenian offer that the Spartans “send envoys to Athens...this must be done because the Athenians have offered arbitration, and it is against our laws to make an immediate attack against someone offering arbitration.”¹⁹ After the subsequent breakdown of the Thirty Years’ Peace saw both states hurtle into the conflagration that would become known as the famous Peloponnesian War, the Spartans, a famously superstitious people, blamed in part their own refusal to abide by arbitration as the cause of “their misfortune...and took to heart seriously...whatever else had befallen them.”²⁰

In 421 BCE, Athens and Sparta once again agreed to a truce and signed the Peace of Nicias, marking the end of the first half of the Peloponnesian War.²¹ It contained a similar, if undetailed, *compromissum* mandating arbitration, which read:

IV. They shall not be allowed to bear arms to the hurt of one another in any way or manner; neither the [Spartans] and their allies against the Athenians and their allies, nor the Athenians and their allies against the [Spartans] and their allies; and they shall determine any controversy which may arise between them by oaths and other legal means in such sort as they shall agree.²²

It is important to note that the inclusion of the *compromissum* clauses in the Thirty Years’ Peace and the Peace of Nicias should not be understood as groundbreaking additions to treaties as means of avoiding armed conflict, but rather as representative of treaty clauses steeped in longstanding practice in the Greek world. However, despite the respect shown for the arbitration clauses by both states, their entrenched interests ultimately rendered the clauses inoperable such that they were never activated.

IV. THE FAILURES OF THE THIRTY YEARS’ PEACE

18. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 49 (Richard Crawley trans.) (2003).

19. DONALD KAGAN, THE OUTBREAK OF THE PELOPONNESIAN WAR 303-304 (Cornell University Press 2013).

20. THUCYDIDES, *supra* note 18, at 381.

21. King & LeForestier, *supra* note 3, at 40, 45.

22. *Id.* at 45 (quoting THUCYDIDES v. 18 (Benjamin Jowett, trans., 1900)).

COMPROMISSUM

The factors leading to the failure of the Thirty Years' Peace *compromissum*, despite the mutual weight both the Athenians and the Spartans assigned to it, are best exemplified by two episodes, one involving the Greek states of Corinth and Corcyra and the other involving Sparta and Athens.

The first of these episodes, the dispute between Corinth and Corcyra, was not an isolated conflict between two lone city states. While Corcyra was not a member of either the Delian or the Peloponnesian Leagues, Corinth was a leading member of the Peloponnesian League.²³ The dispute, taking place between 436 and 433 BCE, involved a struggle for influence over the city of Epidamnus, located in what is now modern day Albania and not far from Corcyra itself.²⁴ In the course of the crisis, Corinth found itself garrisoning Epidamnus as the Corcyraeans besieged the city.²⁵ When word reached Corcyra that the Corinthians were preparing a substantial relief force, Corcyra, while not bound by the Thirty Years' Peace and its *compromissum* as a neutral state, appealed to the Corinthians for arbitration and offered to submit the matter to a mutually agreeable city in the Peloponnese.²⁶ After haggling over who should depart the city first, the besiegers or the besieged, and in spite of Spartan support for a mediated settlement, the Corinthians refused the offer and declared war.²⁷

As the crisis escalated, Corcyra sought an alliance with Athens and, upon traveling to the city in 433, the Corcyraean delegates were met by a party of Corinthians who also sought to make their case to the Athenians.²⁸ Both parties relayed arguments for and against arbitration. The Corcyraeans first denounced the Corinthians for their refusal to agree to arbitration: "[The Corinthians] chose to prosecute their complaints [by] war rather than by a fair trial. And let their conduct towards us... be a warning to you not to be misled by their deceit, nor to yield to their direct requests."²⁹ The Corcyraeans grounded their argument both in a moral condemnation of the Corinthians as deceitful for their refusal to engage in arbitration, and in a practical consideration for the Athenians. That is, if the Corinthians could not be trusted to

23. KAGAN, *supra* note 2, at 25-28.

24. THUCYDIDES, *supra* note 18, at 24; KAGAN, *supra* note 2, at 25-28.

25. THUCYDIDES, *supra* note 18, at 24.

26. *Id.*

27. *Id.* at 25; KAGAN, *supra* note 2, at 28-29.

28. KAGAN, *supra* note 2, at 30-31.

29. THUCYDIDES, *supra* note 18, at 28.

submit to arbitration in place of war, what could they be trusted to do? The Corcyraeans' lofty argument notwithstanding, the Corinthian retort exposes more clearly how both parties viewed arbitration:

As to [Corcyra's] allegation that they wished the question to be first submitted to arbitration, it is obvious that a challenge coming from the party who is safe in a commanding position cannot gain the credit due only to him who, before appealing to arms, in deeds as well as words, places himself on a level with his adversary. In their case, it was not before they laid siege to the place, but after they at length understood that we should not tamely suffer it, that they thought of the specious word arbitration.³⁰

The Corinthians made clear that they viewed arbitration not as a practice which they were legally bound to follow, but rather as just one of many diplomatic and military tools available to them as a leading Greek city. As such, arbitration for Corinth could not be accepted while Corcyra was in the commanding position of besieging Corinthian forces in Epidamnus. This point is further demonstrated by the historian Donald Kagan, who suggests that Corcyra's offer for arbitration was itself poisoned.³¹ The Spartans were eager to take part in an arbitration where they might force their Corinthian allies to withdraw.³² Allowing a Peloponnesian city, likely under Spartan influence, to arbitrate would guarantee this result.³³ With Corinthian interests so threatened, they could not possibly accede to the agreement proposed by Corcyra.

The second episode exemplifying the factors leading to the failure of the Thirty Years' Peace agreement's *compromissum* involved Athens and Sparta directly and is also illustrative of how the opportunity for arbitration was often ignored when the key interests of Greek cities were threatened. In Sparta, the question of whether to submit to Athenian arbitration in 432/431 BCE as the two states and their alliances began their march to war was fraught. Begun by a dispute over the city of Potidaea, a Corinthian colony and former Athenian ally, this crisis would eventually lead to the outbreak of the Peloponnesian War.³⁴ Both the Corinthians and Athenians appealed to the Spartans; the

30. *Id.* at 31.

31. Kagan, *supra* note 2, at 28.

32. *Id.*

33. *Id.*

34. THUCYDIDES, *supra* note 18, at 42.

Corinthians for war and the Athenians for peace.³⁵ The question split Sparta. One of Sparta's two kings argued for arbitration:

As for the Athenians, send to them on the matter of Potidaea, send on the matter of the alleged wrongs of the allies, particularly as they are prepared with legal satisfaction; and to proceed against one who offers arbitration as against a wrongdoer, law forbids. Meanwhile do not omit preparation for war. This decision will be the best for yourselves, the most terrible to your opponents.³⁶

The response of one of Sparta's ephors,³⁷ however, won the day and is instructive of Spartan logic:

Others have much money and ships and horses, but we have good allies whom we must not give up to the Athenians, nor by lawsuits and words decide the matter, as it is anything but in word that we are harmed, but render instant and powerful help. And let us not be told that it is fitting for us to deliberate under injustice; long deliberation is rather fitting for those who have injustice in contemplation. Vote therefore, [Spartans], for war.³⁸

The ephor's response makes clear Sparta's position. Sparta had already sided against its ally Corinth in its prior dispute with Corcyra. If it did so again, the sanctity of the Peloponnesian League would be threatened and, through this, Sparta's leading role in Greece.³⁹ Once again, self-interest trumped commitment to intercity arbitration.

V. GREEK ARBITRATION'S FAILURE IN THE CONTEXT OF MODERN CUSTOMARY INTERNATIONAL LAW

These two episodes show the key failure of Ancient Greek arbitration. In both conflicts, the cities involved implicitly or explicitly treated intercity arbitration, even one in which they were treaty-bound to participate, as a strategic option and not an ancient analogue to customary international law.

³⁵ *Id.* at 42-49.

³⁶ *Id.* at 52.

³⁷ Sparta elected five ephors annually who "received foreign envoys, negotiated treaties, and ordered expeditions once war had been declared." KAGAN, *supra* note 2, at 7.

³⁸ THUCYDIDES, *supra* note 18, at 52.

³⁹ See KAGAN, *supra* note 2, at 46 (discussing Sparta's fraught diplomatic situation in the Peloponnese).

Modern customary international law requires both a general practice by states and *opinio juris*.⁴⁰ To satisfy the general practice element, a “large share of the affected states [must] have engaged in” a particular practice, the practice must be fairly consistent, and the practice must have taken place over a substantial enough amount of time to give rise to a norm.⁴¹ As discussed above, international arbitration amongst the Greek city states possessed this kind of general practice. An exhaustive historical record exists pointing to the widespread use of arbitration in the Greek world for centuries, and the existence of general arbitral procedures is well known.⁴²

Opinio juris, on the other hand, requires that the states engage in a practice out of a belief of “international legal obligation.”⁴³ The Greek view of arbitration as just one of many strategic options, exemplified by these conflicts, is frequently testified to in the historical record, and precludes an understanding of Greek arbitration as a legal obligation.⁴⁴ Even before the dissolution of the Thirty Years’ Peace and the Peace of Nicias, there were numerous instances in which states either opted to decline an appeal to arbitration or otherwise refused to be bound by an arbitral decision, particularly when emotions ran high or cities’ critical interests were at stake.⁴⁵ The failure of one the first appeals to arbitration from the city of Messenia to the city of Sparta in 750 BCE is especially telling.⁴⁶ This particular appeal ended not just with a Spartan refusal of the Messenian offer for arbitration but with the outbreak of a war between the two states.⁴⁷ In a similar manner, after the disastrous Spartan defeat at Leuctra in 371 BCE by the Thebans, the Spartans nevertheless refused the Theban offer for mediation by the neutral Achaeans.⁴⁸ As the noted historian of Ancient Greece, William Westerman, commented, this defeat, which shattered Spartan hegemony over the Greek world, left too many bitter feelings for the Spartans to

40. See, e.g., Ryan Scoville, *Finding Customary International Law*, 101 IOWA L. R. 1893, 1895 (2016) (laying out the basic components of modern customary international law).

41. *Id.* at 1895-1896 (quoting Andrew Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 150, 155 (2005)).

42. For a discussion of the widespread use of arbitration in Ancient Greece and common arbitral procedures, see generally the sources discussed *supra* note 3.

43. Scoville, *supra* note 40, at 1895.

44. Westermann, *supra* note 4, at 200.

45. *Id.* at 201.

46. *Id.* at 199-200.

47. *Id.* at 199.

48. *Id.*; POLYBIUS, THE HISTORIES 340 (William Paton trans.) (1922).

possibly accede to a request for arbitration.⁴⁹ The conduct of the Spartans here, and of Greeks elsewhere through their history, demonstrates that they never regarded arbitration as *opinio juris*. Hard feelings, state interest, or plain stubbornness were all used to justify states disregarding arbitration. There was, simply put, no feeling of international obligation on the part of the Ancient Greeks to engage in arbitration when their interests or pride might be impinged.

VI. CONCLUSION

With the weight of the Spartan and Corinthian interests at stake, it is unsurprising that the cities refused offers of arbitration before the outbreak of the Peloponnesian War. For these powers, intractable interests were at stake which they were not willing to risk before a third party. Thus, their commitment to arbitration did not extend to a form of nascent, ancient *opinio juris*. Rather, they treated arbitration as a tool, the utility of which could only extend so far. Such logic also explains why the *compromissum* in the Peace of Nicias never proved viable; competing interests and distrust ensured that the peace was nothing more than a stopgap measure, destined to fail.⁵⁰

It was this unwillingness by the Greek states to treat arbitration as legally binding which helped to guarantee the practice's failure at critical moments in 432/431 BCE and in 421 BCE, thereby leading the Greek states to opt for war instead of arbitration. Had arbitration proved successful in averting the Peloponnesian War, perhaps the Greeks would not have ended their Golden Age, and Greek preeminence would have continued uninterrupted. As it stands, the Greek failure to arbitrate contributed to their eventual subjugation, first by the Macedonians and then the Romans, relegating the Greeks to centuries of foreign domination.

49. Westerman, *supra* note 4, at 201.

50. King & LeForestier, *supra* note 3, at 45.