Chapter 7

International trade dispute settlement mechanism

CHAPTER 7

INTERNATIONAL TRADE DISPUTE SETTLEMENT MECHANISM 314-347

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7.1 Development of International Commercial Arbitration

7.1.1 Introduction

International commercial arbitration is growing at an accelerating pace, as there has been a concomitant rise in international disputes by way of a rapid interaction in international commerce in the past few decades. The reasons for the steadily growing practice of submitting these disputes to arbitration may vary from case to case. One of the most common explanations for such a practice is that rather than permit international disputes to be settled in national courts, many parties often prefer to submit them to a tribunal that is not part of the governmental structure of a particular state. Although nationalistic favoritism may also be avoided by selecting a forum in a neutral state, arbitration offers many advantages in addition to judicial neutrality. The difficulty of finding a neutral adjudicator is particularly acute when a state is a party to a dispute with a private person. Private persons want to avoid being tried in the courts of their sovereign opponent[1], and foreign states are reluctant to have the courts of another foreign state sit in judgment of their conduct. The reason being that private parties may fear either that the courts may favour their own

[1] Kerr, *International Arbitration vs. Litigation*, 1980 J. BUS. L. 164.

sovereign or that the foreign sovereign may change the law to suit its purposes. International contracts often contain 'stabilisation clauses', which preclude sovereign reliance on legislation favouring the sovereign adopted after the conclusion of the contract. The validity of such clauses is more likely to be sustained by international arbitral tribunals than by the courts of the sovereign, which seeks to disregard them, for instance, ***Kuwait vs. Aminoil.***[2]

Arbitration avoids not only the unduly nationalistic decision-maker, it also offers the advantage of a tribunal composed of decision makers from different countries which are likely to apply rules of decision that will be acceptable on a transnational level. International arbitration awards, based as they are on consent to submit to the authority of the arbitral tribunal, are likely to receive a greater measure of enforcement and recognition on the international level than are judgments rendered by national courts. Recent international conventions have enhanced international recognition and enforcement of such awards[3].

The relative efficiency and inexpensiveness of international arbitration, as compared with litigation in national courts, are two significant factors, which have contributed to its rapid growth. Resort to international commercial arbitration has been more fruitful as there exists:

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[2] 21 I.L.M. 976 (1982).

[3] L. Henkin, R. Pugh, O. Schachter & H. Smit, *International Law: Cases and Materials*, p.490-555 (1980)

(1) an opportunity to select decision-makers who have the appropriate degree of ability and expertise necessary to adjudicate the particular dispute;
(2) An ability to adjust the procedure to meet the exigencies of the case presented; and
(3) efficiency and speed of the process.

International commercial arbitration possesses several positive aspects. Because business transactions may not take place without a functional system of adjudication, international commercial arbitration has enabled parties to engage in and pursue international commerce. As a result, it has had an enormous impact upon the international practice of law, the structuring of a de facto international legal system, and the development of a substantive world law of commerce. In a word, international commercial arbitration has been a vital engine in the creation of a transborder rule of law. Furthering this design, this arbitral method has even been applied to the unruly political problems that attend international trade and the implementation of international trade policy.

7.1.2 Historical Pathways to International Commercial Arbitration

By the mid 1980s, at least, it had become recognised that arbitration was the normal way of settlement of international commercial disputes. States needed to be persuaded to delegate the public function of adjudication to a group of anonymous forces of the marketplace. Moreover, the delegation of sovereign authority had to be unequivocal

and unqualified. Once undertaken, the deregulation of transborder adjudication might not be altered or abandoned. It needed to be continuous to avoid profound disruptions of commerce and the marketplace. The transborder arbitral process has to operate on its own and serve exclusively commercial objectives. In addition, a variety of professionals ranging from judges & lawyers to prospective arbitrators and the commercial users of the process, needed to become unflinchingly loyal to the system of adjudication to which they owed neither political nor social allegiance[4]. The inclusion of an arbitration clause to govern future disputes has thus become a routine step during modern times, and draftsmen are required to have a working knowledge of the various international arbitration institutions and options.

[4] Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. Miami L. Rev. 773

7.2 International Commercial Arbitration as the Normally Preferred Procedure

The growth of international commercial arbitration is largely a post World War II phenomenon, fueled by the explosive growth of international trade and commerce and foreign investment in both developing and developed countries.
While trade and investment were becoming increasingly transnational, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In many jurisdictions the judiciary was slow to change, ill-informed about modern commercial and financial practices, and hesitant to abandon local traditions and procedures that were often un-business-like to outsiders. Moreover, judicial procedures and formalities built on accepted national traditions have varying impact on foreign persons and entities than they do on their local contracting partners. Finally, there is always the possibility, or at least the perception, that local courts will be biased in favor of domestic parties and less protective of foreign interests.

In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdiction's language and procedures, preferences of the judge, and possibly even national bias. These are the reasons, which frequently motivate parties to choose

international arbitration. There is the additional risk that a national court judgment will be subject to one or more layers of appellate review, causing further delay and uncertainty in the ultimate disposition of the matter. And even if a foreign court's decision is satisfactory, there is often doubt about whether the decision may be enforced in another country.

The absence of any multilateral convention for the recognition of foreign judgments, and the existence of few bilateral treaties with such provisions, makes the arbitral solution not only attractive but compelling. This is due to the existence of an international mechanism for the enforcement of foreign arbitral awards. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which entered into effect in 1958, has put into place a system which assures the recognition in member countries of arbitral awards rendered abroad and which excludes any judicial review of the merits of the arbitral award by the court where enforcement is sought14. In the absence of any international court for the resolution of private international disputes, arbitration has provided the participants in international commerce with a decision-making process which, if not international in the legal sense, is a least internationalised, and which leads to an award which will ordinarily be enforceable internationally. It is for this reason that commercial arbitration is much more common in international dispute resolution than in domestic dispute resolution.

7.3 International Commercial Arbitration as a Self-Contained Process

7.3.1 Roman law

The arbitration of disputes between traders of different nationalities is by no means a recent development. Roman law, for instance, provided for the institution by contract of arbiters and arbitrators as private judges. More generally, private dispute resolution amongst commercial men is as old as commerce itself.

7.3.2 Medieval Europe

An important chapter in the development of private dispute resolution systems may be traced back to medieval Europe, when merchants and traders from different regions would assemble at markets and fairs to do business. The lack of understanding of mercantile matters by ordinary courts led to the development both of special procedures for dealing with mercantile matters and a substantive law of merchants namely the *lex mercatoria*[5]. In England this led to the establishment of courts of fairs and boroughs, also known as pie powder courts, particularly to adjudicate such matters. While these courts were eventually absorbed into the ordinary courts of England, the initial practices, and the needs they responded to, were akin to those that have led to modern arbitration. In England, the first arbitration act dates from 1698, formalising a practice of informal arbitration by members of trade guilds, the need for which

[5] Rene David, *Arbitration in International Trade* 366-72 (1985).

was reinforced by the inefficiency of common law courts in applying mercantile law.[6]

7.3.3 Informal Procedures

Meanwhile, outside England, merchant fairs and markets on the continent led to the establishment of various informal tribunals responding to the same needs. These ancient tribunals were eventually absorbed into a system of commercial courts, as distinguished from ordinary civil courts, which exists to the present day. These commercial courts are marked by the fact that judges are not chosen from career magistrates but rather are elected by those who act as merchants (commerçants) either individually or through participation in companies. These developments were accompanied by a parallel tradition of encouraging or tolerating private contractual justice, and provisions concerning arbitration found their way into the civil codes and the codes for civil procedure of a number of European countries, with varying degrees of success.

[6] Rene David, *Arbitration in International Trade* 366-72 (1985).

7.4 Industrial Revolution and Trade Associations

The development of international commercial arbitration over the last fifty years is also rooted in more recent history. The Industrial Revolution and increasing economic specialisation led to the development of trade and industry associations whose rules provided for and encouraged the use of arbitration by its members. The purpose of these specialised arbitral institutions was to provide for the resolution of disputes by respected members of the same profession who would have extensive personal experience in the subject matter of the dispute. The existence of well-defined customs in the profession or trade, the expertise of the arbitrators, and the pressure on members to respect the rules of the professional or trade association all encouraged respect for the arbitral process and for arbitral awards. Indeed, many of those factors are still at work today in specialized arbitration in maritime, commodities, textile, and insurance matters.

7.5 International Chamber of Commerce

The same spirit which motivated the choice of arbitration by close-knit professional groups has also motivated its promotion by broader arbitration associations. In its early attempts to promote arbitration, the International Chamber of Commerce (ICC), which has become the foremost international arbitration association in the world, did not foresee the need to provide for judicial enforcement of awards. The ICC Arbitration Rules of 1923 provided only that the parties were 'honor bound' to carry out the award of the arbitrators. The success of arbitration must, however, not be underestimated as the vast majority of disputes, which go to arbitration, are resolved without any judicial recourse whatsoever. The ICC estimates that more than 90% of its awards are satisfied voluntarily.[7]

[7] Pierre Lalive, *Enforcing Awards*, in Nicholas de B. Katzenbach, Business Executives and Lawyers in International Trade, in Sixty Years of ICC

7.6 Use of Arbitration by Government Entities

Another instance of arbitration as a self-contained process has been the increasingly common use of arbitration in disputes between government entities and private parties. Naturally, the private party will typically be hesitant to accept judicial determination in the courts of its sovereign partner. The government entity, on the other hand, will find it unacceptable to submit to the jurisdiction of the private party's native court system, and indeed is likely to resist suits in foreign courts through the doctrine of sovereign immunity. Arbitration agreements between private parties and the state highlight that the role played by state enterprises in international trade, commerce, and investment has been a fertile source for the expansion of international commercial arbitration.

7.7 Conventions for the Recognition And Enforcement Of Arbitral Awards

7.7.1 Geneva Protocol

Early efforts to assist arbitration by international convention met with partial success in the Geneva Protocol on Arbitration Clauses, initiated by the ICC and adopted under the auspices of the League of Nations. The Geneva Protocol was designed to assure the validity of clauses providing for the arbitration of future disputes. It provided that where parties from contracting states agreed to submit a dispute to arbitration, the courts of those contracting states would decline to adjudicate the merits of that dispute and would refer the parties to arbitration.

The Protocol was ratified by 24 states in Europe, but only a handful outside of Europe[8]. Although the Protocol helped ensure respect of agreements to arbitrate, it did not ensure that resulting arbitral awards would be enforceable.

Consequently, a complementary treaty was required: the Geneva Convention on the Execution of Foreign Arbitral Awards. The Convention, open for ratification by states which had signed the Protocol, was ratified by even fewer states than the Protocol, and suffered from the disability

[8] New York Convention, *supra* no.14, art. I

that an award rendered in a Convention state was required to be recognised in another Convention state only if it had first been judicially recognised where it had been rendered. This double standard requirement greatly limited its utility.

7.7.2 New York Convention

It was only after World War II that a major movement was undertaken to adopt a multilateral arbitration convention, which would remedy the defects of the Geneva Convention and obtain the adherence of the major trading countries. The ICC presented an initial draft of such a convention to the United Nations Economic and Social Council in 1953, and the United Nations Conference on International Arbitration, held in New York, followed in 1958. Interestingly, the ICC draft, consistent with the ICC's role as the principal international arbitration institution, advocated the concept of 'international' or 'stateless' awards, because such awards would have to be recognised in Convention countries without regard to their status under the law of the country where rendered. This concept was not accepted by the Conference, however, and the Convention, as its title suggests, provides for the recognition of foreign arbitral awards. The New York Convention was prepared and entered into force in 1959. As of April 1994, 96 states have ratified the New York Convention, making it the cornerstone upon which the value of international arbitral awards is based. The New York Convention requires both the recognition of

agreements to arbitrate and the recognition and enforcement of arbitral awards. The means for assuring recognition of arbitration agreements is the Convention's requirement that national litigation be stayed in favor of Convention arbitration and that the parties be referred to arbitration[9]. The principal provision concerning enforcement of awards is art. V(1), which provides that a party to the Convention may refuse to recognise and enforce an arbitral award only if the party opposing enforcement may establish one of five procedural defenses:

(1) there was not a valid arbitration agreement;

(2) there was a lack of notice or denial of the opportunity to be heard;

(3) the decision rendered was beyond the jurisdiction of the arbitral tribunal;

(4) the composition of the tribunal, or the arbitral procedure, was contrary to the parties' agreement (or, failing agreement, to the law of the country where the arbitration took place); or

(5) The award lacks binding effect, or has been set aside or suspended by competent authority in the country in which, or under the law of which, that award was made[10].

Art. V(2) provides two additional defenses to recognition of an award which, unlike the defenses set out in art. V(1), may be raised by the recognition and enforcement court itself that the subject matter is not arbitrable or that

[9] Art. II(3)

[10] Art. V

enforcement would violate the forum's public policy. The New York Convention was designed to give international currency to arbitral awards. Any award rendered and binding in a New York Convention country may, under the Convention, be enforced in any other New York Convention signatory. What the Convention did not do, however, was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.

7.8 The Search for Acceptable Arbitral Fora

The ratification of the New York Convention increased the popularity of arbitration as the appropriate remedy for international commercial disputes. At the same time it made more acute the international counsel's mission to determine where the arbitration would be held. In the search for acceptable arbitral fora, it has been emphasised that a neutral arbitration site has three characteristics: equal treatment of the parties (concrete neutrality); non-allegiance to any relevant political 'bloc' (political neutrality); and an appropriate legal environment (judicial neutrality)[11]. Drafters of arbitration agreements must accept that the state where arbitration is held has legislative jurisdiction to dictate procedural rules for arbitral proceedings in that state, and that the state's courts have the power to enforce such provisions. Respect or lack thereof, for any mandatory provisions of procedural law applicable to arbitration at the seat of arbitration might affect the enforceability of the award abroad under the terms of the Convention.

Increasingly, counsel advising clients on the provisions of an arbitration agreement focused on two issues: the neutrality of the arbitration site and the site's laws affecting arbitral proceedings. The importance of the neutrality of the arbitration site depends on the nature of the case. In some cases it may not loom as an important factor. In ordinary cases: sales of goods, determinations of the effects of

[11] Pierre Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, in Swiss Essays on International Arbitration 23 (Claude Reymond & Eugène Bucher eds., 1984).

transport or shipping documents and the like, arbitration may usually be held in the domicile of either party with satisfactory results. Other cases are much more problematic. Parties from capital exporting countries are traditionally uncomfortable holding arbitrations at the domicile of their contract partners in developing countries; by the same token, the developing country partners are suspicious of arbitration in a more developed country. The political controversies that clove East and West also drove parties from those groups to agree to arbitrate in countries not clearly identified with either centrally-controlled economies or Western capitalism. In today's world, political controversies and the possible intervention of state interests may take different forms, but the promise of a neutral site may serve as insurance against biased arbitration forums or resistance to arbitration based on the perception of bias.

In the 1960s and 1970s there was considerable debate about which European country provided the best legislative conditions for international commercial arbitration. During this period, the United States (US) was not a popular site for international arbitration because it did not ratify the New York Convention until 1970. Moreover, US global economic and political interests were so pervasive that it was rarely considered to be a neutral site for arbitration, and foreigners contracting with US parties were reluctant to agree to arbitration in the US. These parties feared the imposition of burdensome US litigation procedures, the intervention of US courts, and the possible complexities of interactions between state and federal law in the US, a subject considered

incomprehensibly difficult by many foreigners. European sites were generally considered acceptable not only in disputes with European parties, but also with parties from Africa or the Middle East, in part because many African and Middle Eastern legal systems were derived from European civil codes.[12] US parties generally found European sites acceptable, at least in comparison with the alternatives that were offered, and developing countries generally shared this feeling. The most logical choice for many was Switzerland. Most of the cantons, except Zurich, were parties to the Intercantonal Arbitration Concordat, which entered into effect in 1969 and provided the framework for any arbitral proceedings taking place in a signatory canton[13]. The Concordat generally permitted the arbitration to be conducted as the parties had agreed, which included, of course, agreements to conduct arbitration according to the rules of an arbitral institution. Many others chose France because French law did not provide any special procedures for international arbitration, but where the parties had not expressly chosen to be governed by French procedural law, the arbitrators were free to apply the arbitration procedures agreed to by the parties, including the procedures of foreign arbitration law if the parties so agreed. In cases where one of the parties came from a civil law jurisdiction, England was generally considered an unattractive arbitration site because parties from civil law jurisdictions felt that English courts were prone to excessive interference. When an English

[12] Mustill, *supra* no. 12, at p.53-54

[13] Ibid

arbitrator was faced with a disputed issue of law, the arbitrator might seek its resolution by the high court in the form of a 'stated case'.

Moreover, an award rendered in England was subject to fairly rigorous standards of judicial review.[14] The Arbitration Act, 1950 provided numerous grounds upon which an award might be annulled or set aside, including error of fact or law on the face of the award and arbitrator misconduct. The 'misconduct' ground was construed very broadly to include procedural mishaps of every kind. In addition, England did not ratify the New York Convention until 1975. Despite these problems, however, England remained an important arbitration center in areas where English law and customs dominated such as shipping, commodities, and insurance and for disputes amongst parties from common law jurisdictions. The growth in international commercial arbitration during the 1960s and 1970s led to the development of preferences about arbitration locales and the recognition of certain cities as international arbitration centers. Statistics from the International Court of Arbitration of the ICC from the years 1980-82 indicate that nearly 30 per cent of arbitrations supervised by that institution were held in Switzerland, and over a third were held in France (Paris being the headquarters of the ICC). During the same period, England hosted fewer than ten per cent of all ICC arbitrations[15]. In addition to the preferred sites for ICC arbitration, other neutral forums gained popularity based on

[14] *Monier vs. Scali Frères,* July 5, 1955

[15] Craig, Park & Paulsson, *supra* no. 28, at p.18

political and geographical preferences. For instance, Vienna, the location of the International Arbitral Centre of the Federal Economic Chamber, became an important center for East-West arbitrations because of its proximity to Eastern European countries. Stockholm, site of the Arbitration Institute of the Stockholm Chamber of Commerce, became an important center for international arbitrations involving Russia and the other states of the Soviet Union, and subsequently China as well. Acceptance of Stockholm and Vienna based arbitration among US traders and investors was fostered by a series of agreements between the American Arbitration Association (AAA) and Soviet and East European arbitration associations which encouraged arbitration at a mutually agreeable neutral site. The first of these agreements was the 1977 U.S.A.-U.S.S.R. Optional Clause Agreement. Under this agreement, the AAA and the Soviet Chamber recommended to their members an arbitration clause calling for arbitration under the UNCITRAL Arbitration Rules in Stockholm. In the event of default or absence of agreement, arbitrators would be appointed by the Arbitration Institute of the Stockholm Chamber from an agreed list of neutral arbitrators. These neutral arbitrators were nationals of third countries agreed upon by the AAA and the arbitration association in the relevant countries. Similar agreements, calling for arbitration in Vienna were concluded by the AAA with arbitration associations in Czechoslovakia, Poland, Hungary, and Bulgaria.[16] While a number of the European

[16] Arbitration and the Law: AAA General Counsel's Annual Report 152.

sites may be characterised, depending on the parties involved, as neutral sites in the international sense, they did not necessarily fill the other criteria for a desirable arbitration site. They did not have modern arbitration statutes clearly setting out those mandatory requirements of local procedural law which had to be followed in an arbitration taking place on the state's territory. Nor did they make a legislative distinction between international arbitrations and domestic arbitrations. Moreover, in the absence of modern legislation providing a reduced role for judicial supervision of international arbitration, the parties find that they are at the instance of the party unwilling to arbitrate or dissatisfied with the arbitration process. Placing the seat of arbitration in a country other than those of the contracting parties avoids the danger of the judge taking side of one party, but does not avoid all the other dangers of judicial intervention in the arbitral process. In addition, it must be remembered that international arbitration is not confined to the well-known arbitration sites. International arbitration is designed to be conducted anywhere in the world, wherever geographically convenient. Indeed, from 1980 to 1988, the ICC supervised arbitrations in 63 countries around the world.[17] Parties attracted to these varied sites by geographical convenience or political acceptability may be completely unfamiliar with the sites' local laws concerning arbitration, and probably did not intend to be subject to them. In all these cases, whether in examining the comparative attractiveness of potential arbitration sites or in examining the consequences of choices

[17] Craig, Park & Paulsson, *supra* no. 28, at p.10

already made through an arbitration clause, it is pertinent to examine, under the law in effect at the arbitral situation, the status of international arbitrations taking place there as well as the effect of the agreements made by the parties as to the procedures to be followed, including their adoption of rules of arbitration.

7.9 Modernization and Harmonization of Arbitration Legislation

The 1980s brought forth unique legislative developments throughout the world to better serve the needs of the users of international commercial arbitration and to respond to criticisms concerning arbitration laws that were either out of date or unsuited to modern international practice. A principal initiative in the movement to carve out a separate regime for international arbitrations came from the United Nations. In 1985, the General Assembly recommended to its members a model law on international commercial arbitration drafted by the UNCITRAL.[18] The Commission's draft benefited from contributions from many sources. The working group included not only the Commission's thirty-six member states, but also observers from other states, intergovernmental organisations, and international organisations with specific arbitration expertise, such as the International Chamber of Commerce, the International Council for Commercial Arbitration (ICCA) and the Chartered Institute of Arbitrators.

The drafters of the UNCITRAL Model Law recognised that national laws on arbitration were generally unsatisfactory for the resolution of international disputes. Many of these laws were outdated and explicitly or implicitly submitted arbitration to procedures better suited for court litigation. Even modern statutes were drafted primarily to meet the

[18] Howard M. Holtzmann & Joseph E. Neuhaus, A Guide to the UNCITRAL Model Law On International Commercial Arbitration: Legislative History And Commentary 1230-32 (1989)

requirements of domestic arbitration, which naturally made up the bulk of cases. Consequently, the needs of modern international arbitration practice were frequently not met.

While it is possible for a state adopting the Model Law to modify it so as to cover both domestic and international arbitration, the Model Law is specifically designed for the latter. Art. 1(1) explicitly provides that 'this law applies to international commercial arbitration... 42' An arbitration is international if, as provided in art. 1(3)(a), 'the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States...' Arbitration is also considered international if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country, or if the place of arbitration, as determined in or pursuant to the arbitration agreement, is outside the state in which the parties have their place of business. The approach of the Model Law is to clarify and reduce the role of local court supervision over international arbitrations. The Model Law adopts the New York Convention as a statutory norm for the recognition and enforcement of international arbitral awards, wherever they may be rendered. The Model Law limits the judicial powers of supervision over, and assistance to, the arbitral process. It provides quite clearly in Art.5 that 'in matters These articles apply to awards whether rendered in the recognition state which has adopted the Model Law (the sole requirement being that it be international, as defined in art (1) or rendered

abroad.[19] governed by this law, no court will intervene except where so provided in this Law'. The principal provisions relating to the conduct of arbitral proceedings are arts. 18 and 19. Art.18 provides that 'the parties will be treated with equality and each party will be given a full opportunity of presenting his case. Art.19 provides that (1) subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings; (2) failing such agreement, the arbitral tribunal may, subject to the provisions of the law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of the evidence. Other articles deal with specific procedural issues, mostly of a due process nature.

Art. 34 of the Model Law specify only a single mode of judicial recourse, before a court to be specified in Art. 6 thereof at the time of its adoption. This recourse must be taken within three months of the rendering of the award, and the grounds are limited to those spelled out in the New York Convention for refusal of recognition and enforcement of foreign awards. For those countries adopting it, the Model Law will harmonise standards for judicial review of awards rendered in those states with the international standards established by the New York Convention. This automatic limitation of the

[19] The Model Law, *supra* no. 40, art. 1(1).

grounds for judicial recourse eliminates the need for allowing parties to enter exclusion agreements which limit the grounds for judicial recourse or exclude it altogether. The Commission thought it was better to provide a simple, obligatory, and limited standard for review. The UNCITRAL proposed a model law rather than a convention or a uniform law because it knew that obtaining multilateral agreement on a precise text would be difficult due to wide variations in existing national laws. The hope was to encourage progress towards a recognised norm rather than to insist on uniformity. The Commission nevertheless recommended that states adopting the Model Law make as few changes as possible.

The Model Law occupies an interesting place in the chronology of the recent international commercial arbitration law reforms. Its provisions have been able to serve either as a model, or at least as points of comparison, for the many states which have embarked on arbitration law reform since 1985. It was never expected that the Model Law would be enacted in all the principal arbitration centers in the world. Where states have long-established arbitration laws and practices, the tendency has been to modify those laws while remaining within the original statutory framework. States with less developed arbitration laws have tended to adopt entirely new legislation based on the UNCITRAL Model Law, usually with relatively few modifications.

7.10 International Commercial Arbitration in Indian Context

In the present globalised and decentralised world, India may not afford to keep its economy closed and secluded. Thus, an interaction between Indian economy and world's economy is inevitable53. The Arbitration and Conciliation Act, 1996 (Act) provides for certain aspects of international commercial arbitration. The term 'international commercial arbitration' has been defined in s. (2)(1)(f).

7.10.1 Commercial

The term 'commercial' has not been defined in the Act. This term is explained in a footnote of UNCITRAL Model Law on International Commercial Arbitration, 1985, and may be used for guidance since Model Law has been referred to in the Preamble of the Act. The explanation says: 'the term 'commercial' must be given a wide interpretation as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring, leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co -operation; carriage of goods., or passengers by air, sea, rail or road'.

7.10.2 Choice of Place and Proper Law of Arbitration

Arbitration and Conciliation Act, 1996, s. 28 provides that in international commercial arbitration:

(1) the dispute has to be decided in accordance with the rules of law designated by the parties as applicable to the substance of the dispute; considered as commercial under the law in force in India and where at least one of the parties is

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is a body corporate in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

(2) the designation by the parties of the law or legal system of a given country would have to be construed as directly referring to the substantive law of that country and not to its conflict of laws rules; and

(3) where the parties fail to designate any such applicable law, the Arbitral Tribunal would have to apply the rules of law it considers to be appropriate keeping in mind all the circumstances surrounding the dispute.

As to the choice of law, the Supreme Court in its decision in ***NTPC vs. Singer Company,***[20] cited a passage from the speech of Lord Herschell '... in this case, as in all such cases, the whole of the contract must be looked at, and the contract must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract, and to the determination of the rights arising out of the contract'.

Where the intention of the parties is not clear either through their clauses inferences, the courts endeavor to impute an intention by identifying the system with which the transaction has its closest and most real connection. In reference to the parties intention the only limitation is that their intention must show a bona fide choice and must not be opposed to public policy. The judge has to determine the intention of the parties by asking himself 'how a just and reasonable person would have regarded the problem.[21]

The position in this respect was summarised by the Privy Council in ***Mount Albert Borough Council vs. Australasian Temperance and General Mutual Life Assurance Society Limited:*** 'the proper law of the contract means that law which the English or other court is to apply

[20] AIR 1993 SC 998

[21] *Mount Albert Borough Council vs. Australasian Temperance and General Mutual Life Assurance Society Ltd.*, 1938 AC 224 at p 240

in determining the obligations under the contract.... It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie the court will effectuate their intention. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract'.

7.10.3 Governing Law of Arbitration

As regards the governing law of arbitration, the Supreme Court cited Dicey as saying[22]:

'Rule 58 –

(1) the validity, effect and interpretation of arbitration agreement are governed by its proper law;

(2) the law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held'.

This is, however, a rebuttable presumption.[23]

The proper law of arbitration will also decide whether the arbitration clause would equally apply to a different contract between the same parties or between one of

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[22] Pp. 534-535, Vol 1

[23] Citing Dicey, Vol 1, p. 539 and the observation in *Whitworth Street Estates (Manchester) Ltd. vs. James Miller & Partners Limited.*, 1970 AC 583 at p.607, 612 and 616: [1970] 1 All ER 796; *Heyman vs. Darwins Limited.*, [1942] 1 All ER 337 HL.

those parties and a third party. The parties have the freedom to choose the law, which applies to their international commercial arbitration agreement. They may choose the procedural law and also the substantive law.

7.10.4 Foreign Award

To qualify as a foreign award under the Act, the award must have been made in pursuance of an agreement in writing for arbitration to be governed by the New York Convention on the recognition and enforcement of Foreign Arbitral Awards, 1958, and not to be governed by the law of India. Furthermore, such an award must have been made outside India in the territory of a foreign State notified by the Government of India as having made reciprocal provisions for enforcement of the Convention. These are the conditions which must be satisfied to qualify an award as a 'foreign award'. An award is 'foreign' not merely because it is made in the territory of a foreign State, but because it is made in such a territory on an arbitration agreement not governed by the law of India. An award made on an arbitration. The parties are free almost without limit to choose whatever procedure they want however anomalous that procedure might appear by comparison with the orthodox methods of judicial decision. The doctrine of 'party autonomy' is subject to overall controls brought about by considerations such as those of public policy.[24]

[24] Sir Michael John Mustill, Transnational Arbitration in English Law in CURRENT LEGAL PROBLEMS, 1984 at p 134

A 'foreign award', as defined under the Foreign Awards Act, 1961 (repealed) (now Arbitration and Conciliation Act, 1996, s. 44) means an award made on or after October 11, 1960 on differences arising between persons out of legal relationships, whether contractual or not, which are considered to be commercial under the law in force in India. S. 2 read with S. 9 of the 1961 Act, now Arbitration and Conciliation Act, 1996, s. 44., "agreement governed by the law of India, though rendered outside India, is attracted by the saving clause in s.9 of the Foreign Awards Act and is, therefore, not treated in India as a 'foreign award'."

7.10.5 International Arbitration

In ***Sumitomo Heavy Industries Limited vs. ONGC Limited***[25], the parties belonged to two different countries. The agreement provided for application of Indian Law to the substance of the matter, but provided for a foreign seat of arbitration. The court observed that the procedural law was to be that of the country where the seat of arbitration was after deciding the matter in accordance with Indian laws, the enforcement would have to be in India and also according to Indian laws. At the time when this case was decided, the 1940 Act was applicable. The award had to be filed in the court for making it a rule of the court. The jurisdiction for this purpose was held to be that of the relevant courts in India.

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[25] 1998 (1) SCC 305

7.11 CONCLUSION

Since arbitration is fast becoming the preferred method of dispute settlement, consideration must be given to whether existing institutional arrangements for conducting international arbitrations are adequate. The pioneering, and still leading, institution in the area of international arbitration is the Court of Arbitration of the ICC, headquartered in Paris, France. It is under the auspices of this institution that the largest number of international commercial arbitrations has been conducted. Particularly active in recent years have been the London Court of Arbitration (the London Court) and the American Arbitration Association (AAA) which have made vigorous attempts to promote their facilities and environments. Also attractive to parties from socialist countries has been arbitration conducted under the auspices of the Stockholm Chamber of Commerce. There are many new institutions coming up like the Hong Kong International Arbitration Centre, the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, and such regional institutions as the Regional Centre for Arbitration in Kuala Lumpur and the Regional Centre for Commercial Arbitration in Cairo.

Responding to the perceived requirements of international commerce, most industrialised nations have enacted legislation that encourages recourse to international commercial arbitration. Legislative support for arbitration,

however, has not been unconditional. International commercial arbitration is also a creature of contract and therefore implicates the public policy of the country where it takes place. The call for autonomy and uniformity in international commercial arbitration reflects a desire to liberate this process from the shackles of local curial norms. Modern national arbitration laws differ in the extent to which they separate international arbitration from domestic public policy; but all laws protect at a minimum those interests deemed vital to basic notions of morality and justice because these are the ties that bind.