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International Commercial Disputes: The Alternative of Arbitration

The lack of a simple and effective dispute-resolving mechanism can be a severe handicap to international trade and investment. Traditionally, only states have been considered to be the subjects of, and have rights under, international law. In other words, individuals lack standing before any international judicial tribunal. Companies involved in international business therefore have limited alternatives available in the event a commercial dispute should arise.

One option available to the individual involved in an international commercial dispute is to request the appropriate governmental authorities (in the United States, the Department of State) to espouse his claim, either in the appropriate international tribunal or through diplomatic channels.¹ However, the State Department is under no compulsion to assert the claim, and may decide against taking any action for reasons of foreign policy which are totally unrelated to the validity or amount of the claim. Further, the government generally will require a business to exhaust all local remedies before it will consider espousing a claim on behalf of its national.²

The second alternative available to the individual involved in a transnational business dispute is to bring suit in the domestic courts of a foreign country. There are obvious disadvantages of unfamiliar legal systems and procedures and these problems are supplemented by the possibility of discrimination, either blatant or covert. The expense and inconvenience likely to be incurred in suing abroad render this alternative even less desirable. A claim against a governmental agency may be completely defeated in its own domestic courts by the defense of sovereign immunity.

The final option for the claimant is arbitration. Although not a panacea, it is a practical alternative for the settlement of commercial disputes. Hearings can be arranged at a locale and date convenient to both parties to the controversy. Variances of local law can be avoided, and decisions are based on the merits of the case rather than on procedural anomalies. As most commercial disputes are based on questions of fact (e.g., contract interpretation), the technical expertise of a qualified arbitrator is likely to prove more valuable than the legal training of a judge. Furthermore, courts are inclined to follow their own legal precedents and are less likely to consider the changing conditions of international trade and economic situations which neces-

¹*State Responsibility to Espouse Claims of Nationals Based on Contracts with Foreign Nations*, 2 N.C.J. INT'L L. & COMM. REG. 38 (1976).

² AM. SOC'Y OF INT'L L., *Arbitration Between Governments and Foreign Private Firms*, 55th Annual Meeting, Washington, D.C. 70 (1961) [hereinafter cited as ASIL].

sitate flexibility and adjustments.³ Arbitral awards are generally rendered promptly, causing less interruption of business activity than would result from lengthy litigation. The expense to the parties, in terms of both time and money, is minimized.

This comment will discuss the process of implementing a decision to arbitrate and the various arbitration facilities which may be selected by individuals engaged in international business. This is followed by a discussion of the enforcement of arbitral agreements and awards and the problems likely to be encountered in this area.

Implementation of the Decision to Arbitrate

Contracting parties in international transactions may provide by agreement that disputes arising from the transaction will be settled by arbitration. The parties may decide to refer a dispute to any of the established arbitration organizations, or they may choose to institute an ad hoc tribunal for their purposes. It is important to specify, at an early point in the business relationship, the applicable law, situs and procedures of the arbitration. Once a dispute arises, the parties are less likely to reach agreement on these issues, especially if a climate of distrust exists or if time has become an important factor in negotiations.

Where an ad hoc tribunal is selected, the choice of law is one of the most important questions to be resolved. The parties may specify that the municipal law of a state should apply. If this option is selected, it should be specified as the law in force at some particular date in order to prevent a dispute over whether past or present law is controlling.⁴ International law is another available choice, but because there is no body of international commercial law, this may result in some degree of uncertainty. The "general principles of law recognized by civilized nations" is probably the best choice of applicable law for most situations. It is easier to prove than foreign law and gives neither party an unfair advantage. Although more definite than "international law," it allows the tribunal some latitude in making an equitable award.⁵

There are various arbitration facilities and institutions available to parties who desire established forums that are free from private or governmental control and interests. The Permanent Court of Arbitration was founded in 1899 to establish ad hoc tribunals for interstate disputes.⁶ The Administrative Council of the Court made the facilities, although not the arbitral machinery, available for disputes between foreign governments and private parties under new rules promulgated

³ Domke & Glossner, *The Present State of the Law Regarding International Commercial Arbitration*, in *THE PRESENT STATE OF INTERNATIONAL LAW* 327 (M. Box ed. 1973).

⁴ E.I. NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* 248 (1965).

⁵ ASIL, *supra* note 2, at 72.

⁶ E.I. NWOGUGU, *supra* note 4, at 242.

on March 26, 1962.⁷ The state involved in the dispute must be a party to the 1907 Hague Convention which established the Court in order for the parties to use the facilities.⁸

The American Arbitration Association [AAA] is a permanent organization with internationally accepted rules of procedure and a secretariat to administer arbitration. Parties may submit to the jurisdiction of the AAA by including a clause to that effect in commercial contracts or by submitting a written agreement to the AAA providing for arbitration of an existing dispute. Where a dispute arises under a contract clause providing for AAA arbitration of future disputes, proceedings are initiated by filing a notice of intent to arbitrate, along with a copy of the contract provision, at any AAA regional office. The AAA will then notify the other party. Arbitrators may be appointed by agreement of the parties. In the absence of agreement, delineated AAA procedures are followed for the appointment of the arbitrator. Similarly, the locale of the proceedings may be agreed upon by the parties, but will be decided by the AAA where no agreement is reached. The AAA will provide stenographers and interpreters when requested. Awards are required to be in writing and made within thirty days of the closing of the hearings. The scope of the award is any remedy which the arbitrator deems equitable and which is within the scope of the agreement, including specific performance and costs of the proceedings. The costs for use of AAA's facilities are set by a published schedule and are relative to the size of the claim.⁹

The International Chamber of Commerce [ICC] is another organization providing rules of procedure and administrative facilities similar to those of the AAA. The ICC serves individuals, corporations and governments involved in business disputes of international character.¹⁰ The ICC and the AAA have recently concluded a new agreement of cooperation. The international facilities of the ICC have been made available for cases under AAA clauses, and the resources of the AAA throughout the United States are now available for ICC cases.¹¹

Other arbitration institutions, established on a regional basis, include the British Institute of Arbitrators, the London Court of Arbitration, the Netherlands Arbitration Institute, the Comité Française de L'Arbitrage, and the Inter-American Commercial Arbitration Commission.¹² Each has published rules and facilities available for parties to business disputes.

⁷ Domke & Glossner, *supra* note 3, at 318.

⁸ E.I. NWOGUGU, *supra* note 4, at 242.

⁹ AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES (Nov. 1, 1973).

¹⁰ A. KRONFOL, PROTECTION OF FOREIGN INVESTMENT 139 (1972).

¹¹ AM. ARB. ASS'N & INT'L CHAMBER OF COMMERCE, ARBITRATION FOR INTERNATIONAL BUSINESS 2 (March, 1973).

¹² A. KRONFOL, *supra* note 10, at 139.

The most recently established international arbitral tribunal, the International Centre for the Settlement of Investment Disputes [ICSID], was created by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.¹³ The objective of the Convention was to encourage private investment in developing countries by providing an impartial, international forum to settle any legal dispute that might arise between a state and a foreign investor.¹⁴

The Convention was formulated by the executive directors of the International Bank for Reconstruction and Development (the World Bank) following requests by governments and investors for assistance in settling investment disputes.¹⁵ The Convention entered into force on October 14, 1966, after ratification by twenty states.¹⁶ As of June 30, 1975, seventy-one states had signed the Convention and sixty-six had ratified it to become Contracting States.¹⁷ The United States ratified the Convention in 1966.¹⁸

The jurisdiction of the Centre is strictly limited. Article 25(1) of the Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Thus ratification of the Convention is merely the first step toward submission to the Centre's jurisdiction. Consent must be given in writing, either in connection with a new investment agreement, with an existing agreement, or with respect to any legal dispute that has already arisen.¹⁹ The consent may be restricted to conciliation or arbitration,²⁰ or to certain types of disputes.²¹ A Contracting State may further condition its consent on the prior exhaustion of local remedies.²² Even with the requisite consent, the parties must be a Contracting State and a national of another Contracting State. Further,

¹³ Mar. 18, 1965, [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

¹⁴ INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, WHAT IT IS, WHAT IT DOES, HOW IT WORKS (May 1, 1973).

¹⁵ A. KRONFOL, *supra* note 10, at 144.

¹⁶ *Id.*

¹⁷ INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, [1974/75] NINTH ANN. REP.

¹⁸ *Id.* at 9.

¹⁹ INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 14.

²⁰ Mar. 18, 1965, art. 26 [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

²¹ *Id.* art. 25(4).

²² *Id.* art. 26.

the dispute must arise directly out of an "investment" (a term which is not defined by the Convention), although consent of the parties may fulfill the "investment" requirement by implication.²³

The Convention establishes facilities for conciliation and arbitration to be carried out according to rules known and accepted in advance of submission to its jurisdiction. The method of constituting the tribunal, the procedural rules, and the substantive law to be followed are optional with the parties.²⁴ However, where the parties fail to agree, rules promulgated by the Centre will be applied.²⁵

There are currently five disputes pending at the Centre; none has reached final determination as of yet.²⁶ Despite its limited jurisdiction, there is growing interest and enthusiasm for ICSID.²⁷ The large number of Contracting States and increasing investment in developing countries indicate that ICSID may have growing importance for private investors who provide for submission of disputes to the Centre, and thus by-pass the cumbersome diplomatic channels of recourse.

Enforcement of Arbitral Agreements and Awards

The value of arbitration to the businessman is necessarily dependent upon his ability to enforce both the agreement and the award. Businessmen are aware of the advantages of stable business relations and, for this reason, most arbitration agreements and awards are complied with voluntarily as an exercise of sound business judgment.²⁸

The legal status of arbitration, domestic and international, is definitive of its utility to the international business community. The English common law rule that arbitration agreements were revocable until the award was granted was changed by statute in England in 1889.²⁹ This common law view is still in force in a minority of United States jurisdictions. Modern arbitration statutes have been adopted in many jurisdictions with the result that agreements to arbitrate future disputes are valid, irrevocable, and enforceable. These statutes generally specify the grounds on which arbitral awards may be attacked for procedural defects and set time limits for challenges or motions to confirm awards.³⁰ The Federal Arbitration Act, 9 U.S.C. §§ 1-14,

²³ See INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, REPORT OF THE EXECUTIVE DIRECTORS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES ¶27 (March 18, 1965).

²⁴ INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 14.

²⁵ *Id.*

²⁶ INT'L CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, *supra* note 17.

²⁷ *Id.*

²⁸ AM. ARB. ASS'N & INT'L CHAMBER OF COMMERCE, ARBITRATION FOR INTERNATIONAL BUSINESS (March, 1973).

²⁹ Hyning & Haight, *International Commercial Arbitration*, 48 A.B.A.J. 236, 237 (1962).

³⁰ AM. ARB. ASS'N, THE LAWYER AND ARBITRATION 10 (1968). See N.C. 146 GEN STAT. § 1-567.1 to 567.20 (adopted 1973).

applies only to commercial transactions affecting interstate or foreign commerce which meet the other jurisdictional requirements of federal courts (e.g., diversity, jurisdictional amount). The Act provides that agreements to arbitrate future disputes are irrevocable and enforceable, but it contained no enforcement provision until 1970, when it was amended to implement the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³¹

Sovereign immunity poses the largest obstacle to the enforcement of international arbitration agreements and awards. Latin American nations have not signed the World Bank Convention as it allows a foreign investor the right to "sue" a sovereign state outside its national territory and domestic courts.³² Furthermore, arbitration awards against the governments of Saudi Arabia, Algeria and Iran have resulted in the refusal of these countries to agree to subsequent arbitration.³³

Despite the problems posed by the issue of sovereign immunity, capital-importing states will frequently submit to arbitration as an encouragement and showing of good faith to private foreign investors.³⁴ Disputes with foreign investors are required to be submitted to arbitration by the municipal laws of many developing countries.³⁵ There is some authority that an agreement to arbitrate waives any claim of sovereign immunity.³⁶ In the 1955 dispute between Aramco and Saudi Arabia, the latter agreed to submit to arbitration because the binding force of the contract was considered to outweigh the claim of sovereignty.³⁷

In those cases where there is no voluntary compliance or controlling treaty, the enforcement of arbitral awards (including those won by default) is not a question of customary international law, but a function of the domestic law of the country whose national or government is liable for the award or in whose territory the subject matter of arbitration is located.³⁸ The complainant must reduce the award to judgment and sue abroad on the judgment, petition the appropriate foreign court for an order of execution, or request a foreign Chamber of Commerce or consular authority to apply social pressure relating to the payment of the award.³⁹

³¹ Domke & Glossner, *supra* note 3, at 316 n.75.

³² A. KRONFOL, *supra* note 10, at 149.

³³ Domke & Glossner, *supra* note 3, at 320-21.

³⁴ A. KRONFOL, *supra* note 10, at 160.

³⁵ E.I. NWOGUGU, *supra* note 4, at 844; see, e.g., Afghan Investment Law, U.N. Doc. E/3325, ¶201 (1960).

³⁶ E.I. NWOGUGU, *supra* note 4, at 254.

³⁷ A. KRONFOL, *supra* note 10, at 161.

³⁸ Wright, *Arbitration as a Symbol of Internationalism*, in INTERNATIONAL TRADE ARBITRATION 10 (M. Domke ed. 1958).

³⁹ INTERNATIONAL TRADE ARBITRATION CONFERENCE, PROCEEDINGS 51 (1955).

Since 1946, bilateral commercial treaties have included provisions for the mutual enforcement of arbitration agreements and awards.⁴⁰ The United States has included such provisions in treaties with European countries and some Latin American states.⁴¹ Where these commercial treaties are in force, it remains necessary to reduce an award to judgment in the courts of the rendering state and seek enforcement of the judgment in the state of the judgment debtor.⁴²

The difficulty of enforcing arbitral agreements and awards in foreign states led to early attempts at multilateral agreements on the recognition and enforcement of foreign arbitration clauses and awards. The Geneva Protocol on Arbitration Clauses of 1923⁴³ provided that arbitration agreements would be valid and irrevocable among the nationals of the contracting states.⁴⁴ The Protocol was supplemented by the 1927 Convention on the Execution of Foreign Arbitral Awards,⁴⁵ which required contracting states to recognize and enforce arbitral awards rendered in foreign contracting states.⁴⁶ These treaties were not widely accepted, and the United States never became a contracting party. Furthermore, the basic provisions of the treaties refer to the municipal law of the state in which enforcement is sought.⁴⁷ Thus, uncertainty in application and lack of general acceptance resulted in nearly total failure of these early attempts at international reciprocal enforcement of arbitration provisions.

The World Bank Convention establishing ICSID did not make any significant improvement on the earlier approach toward enforcement agreements. Under the Convention, each Contracting State is bound to enforce an award within its territory "as if it were a final judgment of a court in that State."⁴⁸ Execution of the award is to be governed by the laws of the State where execution is sought,⁴⁹ not to exclude laws relating to sovereign immunity.⁵⁰

The lack of effective enforcement of arbitration agreements and awards in the international sphere led the International Chamber of Commerce to encourage the United Nations to act on this issue. The

⁴⁰ Domke & Glossner, *supra* note 3, at 309.

⁴¹ Ireland, Greece, Iran, Israel, Japan, W. Germany, The Netherlands, Korea, Nicaragua, Italy, Denmark, Haiti.

⁴² Hynning & Haight, *supra* note 29, at 237.

⁴³ Sept. 24, 1923, 27 L.N.T.S. 157, [1925] Gr. Brit. T.S. No. 4.

⁴⁴ Contini, *International Commercial Arbitration—The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 288 (1959) [hereinafter cited as Contini].

⁴⁵ Sept. 26, 1927, 92 L.N.T.S. 301, [1930] Gr. Brit. T.S. No. 28 (Cmd. 3655).

⁴⁶ Contini, *supra* note 44, at 288.

⁴⁷ Domke & Glossner, *supra* note 3, at 310.

⁴⁸ Mar. 18, 1965, art. 54(1), [1966] 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

⁴⁹ *Id.* art. 54(3).

⁵⁰ *Id.* art. 55.

ICC's initiative finally resulted in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.⁵¹ As of September 1976, there were fifty-three parties to the Convention, including the United States.

The Convention applies to the recognition and enforcement of written arbitral agreements, including those contained in a contract or established by an exchange of letters or telegrams.⁵² The agreement may concern present or future disputes "in respect of a defined legal relationship" whether contractual or not, provided the subject matter is capable of settlement by arbitration.⁵³ The scope of the Convention extends to the recognition and enforcement of foreign arbitral awards, whether made by permanent arbitral bodies or by ad hoc arbitral tribunals, which arise out of "differences between persons, whether physical or legal."⁵⁴ It is unclear whether "legal persons" is intended to include governmental agencies, or is restricted to corporate entities. At least one author on the subject believes that governmental agencies are not included as the inclusion is not express.⁵⁵

Contracting states may condition their adherence to the Convention on a reciprocal agreement by other contracting states.⁵⁶ Adherence may be further restricted to commercial conflicts as defined by the domestic law of the state making such restriction.⁵⁷

The procedure for the enforcement of an arbitral award is simple and standardized. The requesting party must file a certified copy (or the original) of the initial agreement and of the award.⁵⁸ Unlike the Geneva Convention, which required the plaintiff to show that the conditions necessary for enforcing the award had been fulfilled, the United Nations Convention provides that enforcement is to follow the filing of the appropriate documents unless the defendant can establish one of five specific defenses. Article V(1) of the Convention provides:

Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

⁵¹ U.N. Doc. E/CONF. 26/9/Rev. 1 (1958).

⁵² *Id.* art. II.

⁵³ *Id.* art. II(1).

⁵⁴ *Id.* art. I.

⁵⁵ E.I. NWOGUGU, *supra* note 4, at 254.

⁵⁶ U.N. Doc. E/CONF. 26/9/Rev. 1 (1958), art. I(3).

⁵⁷ *Id.*

⁵⁸ *Id.* art. IV.

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The court may refuse to enforce an award on its own initiative only when domestic law holds the subject matter incapable of settlement by arbitration, or when recognition or enforcement would be contrary to domestic public policy.⁵⁹ Under the Geneva Treaties, the court had further authority to question the validity of the award under relevant domestic law as well as under the multilateral agreement.⁶⁰

The United Nations Convention provides that contracting states who were parties to the Geneva Protocol and Geneva Convention shall cease to be bound by the earlier agreements to the extent that they are bound by the United Nations Convention.⁶¹ The validity of other multilateral or bilateral agreements on the recognition and enforcement of arbitral awards is not to be affected by the United Nations Convention.⁶²

The utility of the United Nations Convention to current signatories will increase as even more nations adhere to it. The simplified enforcement mechanisms and standardized procedures provide security for individuals engaging in foreign trade. International trade will be facilitated by the Convention as more businesses become aware of assurance of enforcement of the available remedies in the realm of arbitration.

Conclusion

Despite the early obstacles, there has been growing interest in and acceptance of international arbitration. At least four multilateral conventions on the subject have come into force since 1960. The United Nations Convention of 1958 and the World Bank Convention of 1965 are of primary importance to United States businesses, and have been

⁵⁹ *Id.* art. V(2).

⁶⁰ Contini, *supra* note 44, at 299.

⁶¹ U.N. Doc. E/CONF. 26/9/Rev. 1 (1958), art. VII (2).

⁶² *Id.* art. VII(1).

discussed above. In addition, the European Convention on International Commercial Arbitration of April 21, 1961⁶³ and the agreement relating to this Convention of December 17, 1962⁶⁴ were ratified by fifteen states. The Council of Europe has also promoted draft conventions on uniform arbitration laws and on the recognition and enforcement of arbitral awards.⁶⁵ Rules for International Commercial Arbitration of the Economic Commission for Asia and the Far East were adopted on April 4, 1966, and apply to international trade in the ECAFE region.⁶⁶

At present, arbitration stands as the most practical dispute-resolving device available for international commercial activity. As its legal status and reputation improve, arbitration will benefit both international trade and the individual or corporation engaging in international business. This trend will continue to grow as interest in prompt and efficient settlement of international commercial disputes spreads concomitantly with the growth of international trade.

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⁶³ 484 U.N.T.S. 364, U.N. Doc. E/ECE/423.

⁶⁴ 523 U.N.T.S. 94, Europ.T.S. 42.

⁶⁵ Domke & Glossner, *supra* note 3, at 308.

⁶⁶ A. KRONFOL, *supra* note 10, at 143.