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International Arbitration

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Commercial arbitration has long been a popular method for resolving disputes, both in this country and abroad. Before the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] [hereinafter referred to as the 1958 Convention] became effective, the development of transnational or international arbitration was held back, partly due to the uncertainties involved in the international arbitration process and partly due to the limited acceptance of arbitration domestically. During its first year of operation, after World War I, the Court of Arbitration of the International Chamber of Commerce (ICC) heard four cases. In 1956 it heard 32 cases; in 1976, 188 cases were heard; and during the last few years the average has hovered around 250 cases annually.[2]

The amounts involved have increased substantially over the years also. In 1975, only 21 percent of the cases before the ICC involved amounts in excess of one million dollars. In 1980, 43 percent exceeded that amount.[3] The geographic distribution of those using the ICC has widened as well. In 1977, 67 percent of those using the process were Western European, 9 percent were American, 6 percent were Arabian, 3 percent were African, and 4 percent were Asian. In 1980, the breakdown was as follows: 59 percent Western European, 15 percent American, 13 percent Arabian, 2 percent African, and 4 percent Asian.[4]

In recent years the record of foreign arbitral award enforcement has been impressive.[5] In this country, the public policy and non-arbitrability defenses to enforcement have been narrowed by the Supreme Court deci-

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. This entered into force for the United States on December 29, 1970.

[2] International Chamber of Commerce, Document No. 825-25/3 (1981).

[3] *Id.*

[4] *Id.*

[5] See cases collected in Pavlis, *International Arbitration and the Inapplicability of the Act of State Doctrine*, 14. N.Y.U.J. INT'L L. & POL. 65, 110-111 (1981) at n. 194.

sion in *Scherk vs. Alberto-Culver Co.*[6] By emphasizing the U.S. public policy favoring the facilitation of international commerce, this and numerous other decisions have given broad effect to the 1958 Convention. A similar development has occurred abroad.[7]

International commercial arbitration has thus come into its own as a workable method of settling disputes between entities located in different countries. The reasons for this have often been stated.[8] While lawyers might generally prefer domestic litigation in the courts of their own countries to the uncertainties of domestic arbitration, when it comes to litigation with foreign parties, they usually prefer a "neutral" arbitration process over litigation in unfamiliar foreign courts.[9] Frequently, arbitral procedures established by the rules of an international institution, such as the ICC, are preferred over the *ad hoc* approach.[10]

As the volume of international litigation increases, so does the competition for the administration of what has become a substantial business. Both France and England have recently altered legislation relating to commercial arbitration to simplify and increase its effectiveness with respect to international transactions.[11] Arbitration centers have sprung up in Africa, Asia, Latin America, the Arab States, and elsewhere. In addition, the facilities of the World Bank's International Centre for Settlement of Investment Disputes (ICSID)[12] and the Permanent Court of Arbitration at the Hague (PCA) are available.[13]

A neutral method for settling disputes is particularly important in cases of contracts between investors and foreign governments. These con-

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[6] 417 U.S. 506, 49 S.Ct. 2449 (1974).

[7] *See* Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L L. 269 (1979).

[8] *See, e.g.*, McLaughlin, *Arbitration and Developing Countries*, 13 INT'L L. 211 (1979); Comment, *International Commercial Arbitration: The Nonarbitrable Subject Matter Defense*, 9 DENVER J. INT'L L. & POL'Y 119 (1980).

[9] *See* Straus, *The Growing Consensus on International Commercial Arbitration*, 68 AM. J. INT'L L. 709 (1974).

[10] *Cf.* Higgins, Brown and Roach, *Pitfalls in International Commercial Arbitration*, 35 BUS. L. 1035 (1980).

[11] *See* Park, *Judicial Supervision of Transnational Commercial Arbitration*, 21 HARV. J. INT'L L. 87 (1980); Shenton and Toland, *London as Venue for International Arbitration*, 12 L. & POL'Y INT'L BUS. 643 (1980); Smedresman, *The Arbitration Act, 1979*, 11 J. MARITIME L. & COMMERCE 319 (1980).

[12] *See* Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development through the Multi-national Corporation*, 9 VAN. J. TRANSNAT'L L. 793 (1976); Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 330 (1972).

[13] Established by the Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1799, T.S. 392; revised October 18, 1907, 36 Stat. 2199, T.S. 536. See Rules of Arbitration and Conciliation, 57 AM. J. INT'L L. 500 (April 1963); Sanders, 497 ARBITRALE RECHTSPRAAK 129 (May 1962).

tracts have increased in volume and significance as private investors, engineering and construction firms, and suppliers have extended the use and scope of such arrangements with governments, particularly in developing countries. While governments are usually the parties contracting with foreign investors, this situation may change as infrastructures improve and economic development generates more indigenous private enterprise. For some time, foreign contractors, however, are likely to find the domestic courts in such countries unacceptable.[14] Therein lies the importance of the ICC and other dispute settlement facilities. Despite the unwillingness of Latin American countries to accept ICSID, it is undoubtedly widely used in contracts with foreign governments, although few controversies have so far been referred to the Centre for settlement.[15] As recently pointed out, a significant attraction of ICSID is the ready enforceability of its awards, particularly against States.[16]

The rapid growth in international arbitration has not, however, proceeded without creating problems. The change in attitude of parties and their lawyers toward the process is noteworthy. In the case of disputes with foreign governments, the unequal status of the parties may induce a more intense adversary approach. When faced with foreign arbitral proceedings, governments of developing countries frequently take strong ideological positions, such as those expressed in the U.N. General Assembly resolutions on Permanent Sovereignty over Natural Resources[17] and the Charter of Economic Rights and Duties.[18]

Another reason for greater intensity in international arbitral proceedings may well be the apparently growing magnitude of claims and counterclaims.[19] When the stakes are high, arbitrations become professional contests attracting highly skilled practitioners, often from many different countries. For example, a recent ICC Memorandum, noting "a change in the mentality of the parties and especially their counsel. . .", adds:

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[14] McLaughlin, *supra* note 8.

[15] The Fifteenth Annual Report of the International Centre for the Settlement of Investment Disputes [hereinafter refered to as ICSID] (1980/1981) lists 85 States as having signed the Convention as of August 1, 1981, including Barbados, which signed on May 13, 1981, and Paraguay, which signed on July 27, 1981. As of August 1, 1981, 79 States were parties. The Report lists two pending cases and nine previously disposed.

[16] Coff, *United States Enforcement of Arbitral Awards Against Sovereign States: Implications of the ICSID Convention*, 17 HARV. J. INT'L L. 401 (1976).

[17] Laing, *International Economic Law and Public Order in the Age of Equality*, 12 L. & POL'Y INT'L BUS. 727 (1980); Brower, *The Future for Foreign Investment*, 1975 Symposium on Private Investors Abroad, S.W. Legal Foundation, 93, 100-113; MacCrate, *International Arbitration in a New Climate of Foreign Investment, id.* at 1; O'Brien, *The Diagnosis and Treatment of the Multinational Phenomenon, id.* at 141.

[18] Charter of Economic Rights and Duties, G.A. Res. 3281 (XXIX) 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

[19] International Chamber of Commerce, *supra* note 2.

> Whereas 10 years ago those resorting to arbitration were still basically seeking a peaceful means of settling disputes that would enable them to go on doing business together, practitioners increasingly view it as a forum like any other, and consider that only its neutrality justifies its international jurisdiction. So they are less hesitant than before to raise procedural issues, and their disposition requires increasingly complex thinking on the part of the arbitrators, the Court of Arbitration and its Secretariat.

This process will no doubt lead to greater efficiency on the part of arbitral institutions. It may also lead to more frequent resort to *ad hoc* arrangements, particularly as the Rules issued by the United Nations Commission on International Trade Law (UNCITRAL) are available for that purpose.[20] These Rules are useful in negotiating dispute settlement provisions for contracts with the governments of developing countries, as they were adopted unanimously by a General Assembly resolution and thus have the support of all governments.[21] Of interest to private parties to such contracts is the provision for the selection of an appointing authority where the parties fail to agree. Article 6 provides that in such cases either party may request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate an appointing authority.[22]

An indication that these Rules are acceptable to governments of both developed and developing countries in the settlement of disputes between governmental authorities and private entities can be found in the fact that they were referred to in Article 188, paragraph 2(c), and Article 5, paragraph 4, of Annex III of the draft Convention on the Law of the Sea.[23] The former provides for the arbitration of disputes concerning the interpretation or application of a contract between the Authority to be established by the Convention and a State enterprise or a natural or juridical person. The latter refers to disputes concerning the undertakings required in contracts with the Authority to make available to the Enterprise "on fair and reasonable commercial terms and conditions" the technology to be used in carrying out activities under the contract.

Despite the attractions of *ad hoc* arbitral arrangements, the absence of services rendered by institutions may result in considerable delays in their use. Institutions are particularly useful in giving notices, maintaining schedules, providing facilities for hearings, making transcripts and other documents available, and providing a central place for the administration of proceedings.

As the use of both institutional and *ad hoc* international arbitration is likely to grow, issues such as this one undertaken by the *Case Western Reserve Journal of International Law* provide an important service in

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[20] United Nations Commission on International Trade Law Sales No. E.77.V.6.

[21] G.A. Res. 31/98, 31 U.N. GAOR Supp. (No.__) U.N. Doc. No.__ (1976).

[22] *Id.* at Art. 6, para. 2.

[23] U.N. Doc. A/CONF.62/L.78, dated 28 August 1982, at 79, 80, 132, 133.

promoting a better understanding of international dispute settlement proceedings and in predicting the problems likely to arise therein.