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DISPUTE SETTLEMENT

INTERNATIONAL COMMERCIAL ARBITRATION

5.1 International Commercial Arbitration

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NOTE

The **Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty-one modules.

This module has been prepared by Mr. Eric E. Bergsten at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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WHAT YOU WILL LEARN

Section 1 of this module raises the question as to what is international commercial arbitration. You will see that it is one of many possible procedures for the settlement of disputes in regard to economic transactions. You will learn about the essential features of arbitration; that it is for the settlement of a dispute, consensual based on the agreement of the parties, private and not part of the State system of justice and leads to a final and binding decision that will be given execution by the courts. You will also learn that there are other dispute settlement procedures that generically are called ADR, Alternative Dispute Resolution or, as some would have it, Amicable Dispute Resolution.

International commercial arbitration is defined not only by whether arbitration is involved, but also whether the arbitration is "commercial". Therefore, Part 1 continues by discussing the development of "commerce" in the context of international commercial arbitration and why the concept of commerce is important in investment arbitrations. You will then learn what makes arbitration international, particularly in the context of the UNCITRAL Model Law on International Commercial Arbitration.

Section 1 closes with a discussion of why parties choose international commercial arbitration to settle their disputes. You will learn that some of the reasons are common to domestic and international arbitration and that some are especially relevant to international commercial disputes.

In Section 2 you will learn about the history of international commercial arbitration from its modern beginnings in the early 1920s to the present time. You will learn that there are current efforts to improve the legal regime by amendments to the Model Law. You will also learn that the recent rapid growth in investment arbitration is having an impact on ordinary commercial arbitration, but that the nature of that impact is not yet clear.

In Section 3 you will learn about the legal structure of international commercial arbitration. You will learn that it consists of four levels,

1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

2) the national law of arbitration (which may consist of one statute governing all arbitrations or one statute for domestic arbitrations and a second statute for international arbitrations),

3) the procedural rules adopted by the parties (usually by agreeing to have the arbitration conducted by a particular arbitration institution or by adopting the UNCITRAL Arbitration Rules and

4) arbitral practice.

1. WHAT IS "INTERNATIONAL COMMERCIAL ARBITRATION"?

1.1 Dispute Settlement

Chapter 5 in the Course on Dispute Settlement is entitled "International Commercial Arbitration". It discusses a particular means of settling disputes, i.e. by "arbitration" that is "commercial" in nature and has some international element to it. Such an explanation explains very little. This introduction to Chapter 5 is intended to give background and history so as to set the term "international commercial arbitration" and its significance into context.

Chapters 1, 2, 3, 4 and 6 of the Course on Dispute Settlement discuss specific institutions that have as their purpose, or at least one of their purposes, the conduct of procedures for the settlement of specific types of disputes of an economic nature. That is not true of this chapter. To be sure, there are specific institutions that organize such procedures, and a number of them will be mentioned in the various modules that comprise this chapter. However, this chapter is not about the conduct of arbitration in any particular one of them. Nor is it about the settlement of specific types of disputes. It is about a process for the settlement of a wide range of disputes of an economic ("commercial") nature that is carried out by many institutions, and sometimes in the absence of any institution.

The following eight modules in this Chapter will go into more detail about the legal rules governing international commercial arbitration. Module 5.2 discusses the arbitration agreement and the consequences of entering into one. Module 5.3 considers the mechanism by which the arbitral tribunal comes into existence and the requirements to be an arbitrator. Module 5.4 is concerned with the procedure by which the arbitration is conducted and how agreement is reached as to that procedure. Module 5.5 deals with one of the more difficult and important questions in international commercial arbitration – what law governs the arbitration. As will become clear, the law of different countries may govern the conclusion of the arbitration agreement, the arbitration procedure and the substance of the dispute. The requirements for the making of the award are described in Module 5.6, while Module 5.7 discusses the recognition and enforcement of the award under the New York Convention. Although arbitration is a means to settle a dispute without resort to the courts, the courts have certain responsibilities in regard to arbitration. Those responsibilities are discussed in Module 5.8. Finally, one of the new developments in arbitration is the ability to conduct the procedures completely by electronic means. That development is considered in Module 5.9.

1.1.1 Third party involvement in dispute settlement

Why third party involvement

Whenever two or more parties have a dispute, it would be preferable if they were able to discuss it between themselves and to arrive at a peaceful solution. That is true whether the parties are members of a family, States or commercial entities. Only the parties themselves can achieve a solution that will not only resolve the dispute, but will facilitate a useful future relationship. However, sometimes the parties are not interested in any future relationship and only want the dispute to be settled, preferably on their own terms. That may lead to war or its private equivalents. Even when they are interested in a peaceful settlement of the dispute, it is not infrequent that the parties are not able to discuss – or negotiate – a mutually agreeable solution. In such a situation the aid of a third party must be sought.

Litigation

The State offers one form of third party settlement of private disputes by maintaining a court system in which they can be litigated. Most private disputes that require the services of a third party are settled by litigation, though many of them are settled directly between the parties once the litigation has begun.

Private third parties

It is also possible for the parties to involve third persons in a private capacity to solve, or to help them solve, the dispute. Arbitration is the most prominent of the private dispute settlement mechanisms, both domestically and for international commercial relations, though it is not the only one. Others will be briefly mentioned below after the basic characteristics of international commercial arbitration have been discussed.

1.2 Arbitration as a dispute settlement mechanism

1.2.1 Definition of "arbitration"

No official definition

As will be seen throughout this chapter, it is often of great importance to know whether a given procedure amounts to "arbitration". For example, Article II, paragraph 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, generally known as the New York Convention, provides "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration …." Nevertheless, the Convention does not define what an arbitration is. The term is rarely defined in national laws on arbitration as well. It is not defined in the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law) as being "unnecessary", although a definition had been proposed by the Secretariat.[1] It is not so clear that the UNCITRAL Working Group really believed that a definition of arbitration was unnecessary so much as that it would have been difficult to formulate. For example, if a tribunal were given the authority to adapt or supplement a contract in the light of changed circumstances, would that procedure be "arbitration"? By leaving the term

[1] *Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216, paras. 15-18, 17; Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, A/CN.9/207, paras. 29-30.*

undefined, just as it was undefined in the New York Convention, the borders could adjust over time to changed perspectives as to what was the proper domain of arbitration.

Elements of definition

Nevertheless, some content must be given to the term. Its principal characteristics are:

- arbitration is a mechanism for the settlement of disputes;
- arbitration is consensual;
- arbitration is a private procedure;
- arbitration leads to a final and binding determination of the rights and obligations of the parties.

1.2.1.1 Arbitration is a mechanism for the settlement of disputes

If there is no dispute, there can be no arbitration. The issue arises most often when one party fails to pay a sum of money owed to the other, perhaps in the form of a negotiable instrument, and the debtor does not dispute the obligation. If there is an existing arbitration clause, the question arises whether the creditor can or must invoke the arbitration clause or, there being no dispute as to the existence of the obligation, the creditor can or must seek enforcement of the obligation by court action. This theoretical question can be of great practical importance if the debtor wishes to impede enforcement of the obligation and contests the appointment of the arbitral tribunal, if that is the route chosen by the claimant, or insists upon the arbitration clause, if the creditor chooses to enforce the obligation directly in the courts. The question might also arise if it appears that the parties agreed to arbitration in order to secure an enforceable award that would permit payment in the face of exchange controls that would not have permitted payment of the amount in question, absent the award.

Settlement

While neither of the two examples cited above are such a problem as to have given rise to any general agreement as to how they should be handled, there is one common situation that has led to a generally agreed solution. In arbitration as in litigation it is common for the parties to settle their dispute after the arbitration has commenced. Once the parties have reached an agreement to settle the dispute, there is no longer any dispute for the arbitral tribunal to consider. Nevertheless, as provided in Article 30 of the Model Law,

> *"(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.*
>
> *(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case."*

It will be noted that the arbitral tribunal may object to recording the settlement as an award. That is a form of protection to the tribunal and to the arbitral process if the tribunal believes that an award would be improper under the circumstances. Some arbitration laws do not specifically permit the tribunal to object to recording the settlement of the parties in the form of an award, though there may be other tools available to the tribunal in an appropriate case.[2]

1.2.1.2 An arbitration is consensual

Settles only disputes submitted to it

An arbitration must be founded on the agreement of the parties. Not only does this mean that they must have consented to arbitrate the dispute that has arisen between them, it also means that the authority of the arbitral tribunal is limited to that which the parties have agreed. Consequently, the award rendered by the tribunal must settle the dispute that was submitted to it and must not pronounce on any issues or other disputes that may have arisen between the parties. As provided in Article V of the New York Convention,

> *"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, . . . if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that :*
>
> *...*
>
> *(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, ..."*

Semi-consensual

In most cases arbitration is only semi-consensual. Most arbitration agreements are in the form of an arbitral clause in the principal contract. The arbitral clause will provide for the settlement of disputes that may arise in the future. If a dispute does arise, the parties may no longer be in agreement that the dispute should be submitted to arbitration. Two consequences follow.

- The claimant in the dispute may wish to turn to the courts. However, it can be precluded by the respondent from doing so and forced to proceed in arbitration. As stated in Article II of the New York Convention

> *"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

- Conversely, the claimant may commence the arbitration in accord with the arbitration agreement, but the respondent may refuse to participate.

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[2] *For example, Bolivia, Law No. 1770, Art. 51 (enacted 11 March 1997).*

Nevertheless, "the arbitral tribunal may continue the proceedings and make the award on the evidence before it."[3]

Compulsory arbitration

When the New York Convention was negotiated in 1958 the Soviet Union and other countries with a State-trading system had a system of compulsory arbitration. It was a serious question as to whether this was really arbitration or whether it was a special system of State adjudication. In order to encourage their adherence to the New York Convention the term "arbitral award" was defined in Article 1(2) to include "not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted." This is now a historical relic, but the law of arbitration in a few of the affected countries continues to show signs of the administrative nature out of which the current arbitral regimes developed.[4]

1.2.1.3 Arbitration is a private procedure.

Not part of State system of dispute settlement

Arbitration is not part of the State system of courts. As already noted, it is a consensual procedure based on the agreement of the parties. Nevertheless, it fulfills the same function as litigation in the State court system. The end result is an award that is enforceable by the courts, usually following the same or similar procedure as the enforcement of a court judgment. Consequently, the State has an interest in the conduct of arbitration beyond the interest it has in the settlement of disputes by other procedures that are also alternatives to litigation. In the past this led some countries to exercise strict control over arbitration. In many countries the close connection between arbitration and litigation is illustrated by the fact that the law of arbitration is found in the Code of Civil Procedure.[5] The current trend is to allow the parties and the arbitral tribunal full autonomy in the conduct of the proceedings subject only to the obligation found in Article 18 of the Model Law that

> *"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."*

The courts are able to assure that the proper procedure has been followed in the arbitration by their power to set aside an award or to refuse to recognize or enforce it.[6]

Confidentiality

Since international commercial arbitration was traditionally between two commercial companies that could have settled their dispute by negotiation or

[3] *Model Law, Article 25(c).*

[4] *One source of confusion in regard to the law in Russia and a number of other Slavic-speaking countries is that the commercial courts are referred to as "Arbitrazh" tribunals. It is not helped by the fact that the Code of Arbitrazh Procedure of the Russian Federation, No. 95-FZ, July 24, 2002, governs judicial proceedings in respect of arbitration. See, for example, Chapter 30 (articles 230 to 240), Procedure in Case to Challenge Arbitral Award or Obtain Writ of Execution of Arbitral Award, and Chapter 31 (articles 241 to 246), Procedure in Case for Enforcement of Foreign Judgment or Foreign Arbitral Award.*

[5] *By way of example, the German arbitration law, based on the Model Law and in force since 1998, is found in Book 10 of the Code of Civil Procedure (Zivilprozeßordnung).*

[6] *New York Convention, Article V; Model Law, Articles 34 – 36.*

other private and confidential means, it became something of an article of faith that the private nature of arbitration also led to confidentiality. It was understood that neither the parties, arbitrators, witnesses, experts nor any supporting personnel would reveal anything about the arbitration, including its existence. There was an obvious exception if one of the parties had to invoke the aid of a court in regard to the arbitration or to set aside or enforce an arbitral award. An example of this understanding is found in Article 30 of the LCIA Arbitration Rules.

> *"Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."*

Changing attitudes

This understanding of confidentiality has been brought into question in recent years. The impetus for change has been largely that an increasing number of arbitrations involve the State or a State entity. The issues raised in such arbitrations are often of public interest.[7] Although it is particularly true of investment arbitrations, it may also be true of other arbitrations involving the State. A second impetus for change has been the very popularity of international commercial arbitration. Even though arbitral awards do not establish precedent in any conventional sense, there is a strong desire to know the legal determinations of arbitral tribunals in respect both of arbitral law and procedure and the substantive law governing international commercial relations.

1.2.1.4 *Arbitration leads to a final and binding determination of the rights and obligations of the parties.*

Many arbitration rules, such as ICC Arbitration Rule 28(6), specifically provide that

> *"Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay ... ."*

It is not necessary for the arbitration rules governing the arbitration to say so. A procedure that does not lead to a final and binding determination of the rights and obligations of the parties is not arbitration. One example arose in a case in Austria.

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[7] *OECD, Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures, Working Papers on International Investment, Number 2005/1, April 2005, available at http://www.oecd.org/dataoecd/25/3/34786913.pdf (visited on 9 May 2005).*

The WIPO Uniform Domain Name Dispute Resolution Policy Article 4 provides that the institution of procedures under the policy does not preclude a party from submitting the dispute to a court of competent jurisdiction for resolution. Since the Domain Name Dispute Resolution Procedure does not lead to a final and binding decision, it is not an arbitral proceeding and the costs involved could not be recovered from the losing party as "procedural costs", as could the costs of arbitration.[8]

New York Convention, Art. III

Most importantly, Article III of the New York Convention requires the currently 135 Contracting States to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…" It is upon this foundation stone that the entire edifice of international commercial arbitration is built.

1.2.2 Other dispute settlement mechanisms under the rubric ADR.

In recent years it has become common to speak of ADR, Alternative Dispute Resolution or Amicable Dispute Resolution as the ICC refers to it.[9] The term Alternative Dispute Resolution raises the question as to what it is an alternative. If it is litigation in the State courts, arbitration should be included as an ADR procedure. However, most commentators would extend to ADR in general the statement in the Guide to ICC ADR that "ICC ADR thus differs from arbitration and judicial proceedings in that ICC ADR does not lead to a decision or award which can be enforced at law". Instead, ADR procedures are intended to lead to an agreement between the parties that would settle the dispute. The agreement resulting from ADR procedures is in the nature of a contract. Enforcement of the agreement, should there be subsequent non-fulfillment of its terms, would be by litigation or arbitration, assuming a suitable arbitration clause, as would non-fulfillment of any other contract provision.

Pros and cons of ADR

Advocates of a more frequent use of ADR point out that both litigation and arbitration are backward looking and have as their principal function to allocate the responsibility and the cost for something that went wrong in the past. ADR techniques in general are said to be forward looking and to have as their principal goal the resolution of the dispute in such a way that the parties can continue their relationship in harmony. While this difference is largely true, ADR often serves as well as a means of allocating the cost of what went wrong in the past. Critics of ADR point out that when the procedures do not lead to a solution that is satisfactory to the parties, they still have to resort to litigation or arbitration and the ADR procedures will have only increased costs and delay in the final resolution of the dispute.

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[8] *Newsletter der Österreichischen Vereinigen für Schiedsgerichtsbarkeit, January 2005, citing OGH 16.3.2004, 4 Ob 42/04m (Austria, Supreme Court).*

[9] *Guide to ICC ADR, p. 3 (2001).*

There are a number of different procedures that go under the rubric ADR. Some of the more prominent are:

- Conciliation
- Mediation
- Mini-trial
- Expert evaluation
- Dispute Board

Increased interest in conciliation and mediation led UNCITRAL in 2002 to adopt the UNCITRAL Model Law on International Commercial Conciliation. It is built in large measure on the 1980 UNCITRAL Conciliation Rules.[10]

1.3 "Commercial"

1923 Protocol

It has become common to speak of international "commercial" arbitration, but there is no clear concept of what is meant by "commercial". As early as the 1923 Protocol on Arbitration Clauses, Contracting States recognized the validity of an arbitration clause "by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, … ." The Protocol then went on to say that

> *"Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law."*

The actions of the several States that used the opportunity to limit the application of the Protocol to contracts which are considered as commercial under its national law were carried forward to the 1927 Convention for the Execution of Foreign Arbitral Awards, since only arbitration agreements subject to the Protocol were covered by the Convention. The 1958 New York Convention essentially repeated the provision originally found in the 1923 Protocol.[11]

New York Convention

The New York Convention is not by itself limited to arbitration in respect of commercial disputes. The limitation applies only if a State makes the necessary declaration, and only 44 of the current 135 Contracting States have done so.[12] However, in those 44 States the application of the Convention is dependent on what is considered as commercial under the national law. This is a potentially serious problem for anyone wishing to invoke the Convention in one of those

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[10] *Both the UNCITRAL Model Law on International Commercial Conciliation and the UNCITRAL Conciliation Rules can be found on the UNCITRAL website, http://www.uncitral.org.*

[11] *Article I(3)*

[12] *The official list of Contracting States to the New York Convention with any declarations or reservations they may have made can be found on the web site of the United Nations Treaty Section, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp.*

States. In some legal systems the word "commercial" is a technical term of great legal significance. In other legal systems the word has no particular legal connotation. In spite of those differences, reference to the national law does not seem to have become the problem for application of the New York Convention that it might.

1961 European Convention

The 1961 European Convention on International Commercial Arbitration was the first international instrument to refer to international commercial arbitration by name. Although "commercial" was not defined, the Convention was limited in application "to arbitration agreements concluded for the purpose of settling disputes arising from international trade between … ." No matter how broad the interpretation of "international trade", many forms of economic activity would seem not to have been included.

Model Law

The question of what was to be included in "commercial" was squarely faced for the first time during the preparation of the Model Law, adopted in 1985. Since it was envisaged that the Model Law, once adopted by a State, would co-exist with a national arbitration law for all other arbitrations (both domestic and international non-commercial), it was necessary to specify its scope of application. While there was little disagreement as to the types of transactions to which it should apply, there was great hesitation on the part of some delegations to expand the definition of "commercial" beyond what was envisaged in their national law for other purposes. The solution was to relegate the matter to a footnote the first time the word "commercial" appeared in the text. The footnote reads as follows:[13]

> *"The term 'commercial' should be given a wide interpretation so 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."*

Investment as commerce

As will be seen below, consideration of investment as a commercial transaction has significant consequences in regard to investment arbitrations that are conducted under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or other rules of international commercial arbitration.[14]

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[13] *This inelegant legislative drafting technique was nevertheless followed by a number of States when they adopted the Model Law. For example, Singapore, International Arbitration Act, Schedule 1.*

[14] *Section 2.4, infra.*

1.4 International

1.4.1 Foreign arbitration and international arbitration are not the same

An arbitration that takes place in State A is a foreign arbitration in State B. It does not matter whether the arbitration is commercial or non-commercial or whether the parties are from the same country, from different countries or that one or all are from State A. Since even a domestic arbitration in State A is a foreign arbitration in State B, the courts of State B would be called upon to apply the New York Convention to enforcement of a clause calling for arbitration in State A and to the enforcement of any award that would result.

Aiding foreign arbitration

In some legal systems the courts will not come to the aid of a "foreign" arbitration by way of aiding in the procurement of evidence, granting interim orders of protection or the like. However, many modern arbitration laws provide that the courts will aid arbitrations taking place in a foreign State.[15]

1.4.2 Difference between a domestic arbitration and an "international" arbitration

Domestic/international arbitration

The modern view is that arbitration is governed by the law of the place in which it takes place.[16] Therefore, in that sense every arbitration taking place within a State is a domestic arbitration in that State. However, many States draw a distinction between arbitrations that are considered to be domestic and those that are considered to be international. One of the consequences may be that the types of disputes that may be submitted to arbitration are different in an international arbitration. For example, in some States claims of anti-trust violation may be submitted in an international arbitration but not in a domestic arbitration.[17] Similarly, some States permit the State or State entities to enter into valid arbitration agreements only if the arbitration would be international. Finally, following the lead of the Model Law, many States have different laws governing domestic and international arbitrations.

It follows that the distinction between domestic and international arbitrations is a matter of national law. There is no generally accepted distinction and there does not need to be since the New York Convention applies to "foreign" awards.

[15] For example, Spain, Arbitration Act 2003, provides in its articles1(2) and 23 that the courts will enforce interim orders of protection ordered by the arbitral tribunal even when the tribunal has its seat outside Spain.

[16] At the same time the parties are free to choose the place of arbitration, thereby choosing the applicable law of arbitration.
The New York Convention recognizes the possibility that the law of arbitration might be other than that of the place of arbitration. New York Convention, Article V(1)(e). Recognition and enforcement of the award may be refused if: "The award ... 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." (Emphasis added.) Modern arbitration laws do not accept that possibility.

[17] E.g. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (U.S. Supreme Court 1985) in which the Supreme Court of the United States held that anti-trust claims could be submitted to arbitration when they arose in an international dispute, "even assuming that a contrary result would be forthcoming in a domestic context."

1.4.3 Definition of an international arbitration

There are two basic methods of defining an international arbitration for the above-mentioned purposes. One is to consider the transaction; does it involve a transaction that is either in a State other than the place of arbitration or that takes place in two or more States. The other method is to consider the parties; do they come from different States.

Natural persons

It is usually the case that two natural persons who are citizens of different States will be considered to be from different States. However, a long-term resident of a State might be considered to be from that State for the purposes of determining whether an arbitration is international even though he is a citizen of a different State.

Juridical persons

Similarly, a juridical person would often be considered to be from the State under the law of which it was organized. However, if the juridical person in question is a wholly or substantially owned subsidiary of a foreign natural or juridical person, the subsidiary might be considered to have the nationality of its parent.[18]

Model Law

In the Model Law an arbitration is international if any one of four different situations is present:[19]

1) The parties to the arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States.

This rule is then modified to provide that "[I]f a party has more than one place of business, the place of business [for determining whether the arbitration is international] is that which has the closest relationship to the arbitration agreement."[20] Therefore, under this provision, if the local office in State A of a multinational company from State B enters into a contract with a company from State A calling for arbitration in State A, the arbitration would not be international in State A.

2) The place of arbitration, if determined in or pursuant to, the arbitration agreement, is situated outside the State in which the parties have their places of business.

Under this provision two parties from State A might agree to arbitrate in State B. If State B had adopted the Model Law, the arbitration would be international in State B.

[18] *This is a particularly difficult matter in investment arbitrations. It is not uncommon for Bilateral Investment Treaties to provide that a company incorporated in the host State that is a subsidiary of an investor from the other State party to the treaty will be considered to be an entity of the host State and not, therefore, protected by the provisions of the treaty. However, that still leaves open the possibility that the investment in the stock of the subsidiary will be an investment covered by the treaty. No generalized statement can be made since the language of each treaty must be considered separately.*

[19] *Article 1(3).*

[20] *Article 1(4).*

3) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is situated outside the State in which the parties have their places of business.

Under this provision arbitration in State A between two parties from State A in regard to a construction project situated in State B would be an international arbitration.

4) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

While this latter ground for considering an arbitration to be international may appear at first glance to be excessive, it must be remembered that the modern doctrine is that the parties are free to choose the place of arbitration and that would itself effectively be a choice of the applicable arbitration law.

The Model Law is very broad in its definition as to what makes arbitration international. However, the definition in the Model Law should be taken in context. It is relevant only if a State adopts the Model Law with a scope of application restricted to international commercial arbitration. In such a State characterizing an arbitral proceeding as international means that the national law based on the Model Law, rather than the national law for domestic arbitrations, would apply to it. It was anticipated that many States when adopting the Model Law would make it applicable to both domestic and international arbitrations, and that has turned out to be the case. A State that adopts the Model Law for all arbitrations would delete the definition of "international" since it would serve no purpose.

1.5 Why parties choose international commercial arbitration

The reasons why parties choose international commercial arbitration to solve their disputes can be separated into reasons that are applicable to arbitration in general and those that are applicable specifically to international arbitrations.

1.5.1 Arbitration in general

Arbitration permits the parties to choose persons with specialized knowledge to judge their dispute. Judges in State courts are less likely to acquire the same degree of expertise in the technical aspects of the transactions that come before them as are the lawyers who represent the parties and who may later serve as arbitrators in similar transactions. In a construction arbitration there may be engineers or architects as well as lawyers serving as arbitrator. In many trades where arbitrations are conducted by a trade association, it is a requirement that the arbitrators have a minimum period of experience in the

trade concerned. The freedom to choose arbitrators with specialized knowledge is not available in those States that have restrictive arbitration laws that permit only lawyers to serve as arbitrators.

Specific dispute

Arbitrators are chosen for a specific dispute. Whether the arbitral tribunal is composed of a sole arbitrator or a panel of three, the tribunal remains with the arbitration from its commencement until its conclusion. The resulting continuity in the procedure permits the arbitrators to become thoroughly familiar with the matter in dispute. By way of contrast, in many legal systems different aspects of the dispute will be handled by different judges who may never become familiar with the entire dispute.

Procedure in arbitration is flexible and can be adapted to the needs of the particular dispute. In agreement with the Model Law, most modern arbitration laws leave the details of the procedure to be followed to the agreement of the parties or to the arbitral tribunal, with the single requirement that the parties must be treated with equality and each party must be given a full opportunity of presenting his case.[21] Although flexibility of procedure is of particular importance in international commercial arbitration where the parties and their advocates may have strikingly different expectations as to the procedure to be followed, it is also an advantage in domestic arbitrations. An arbitration in respect of the quality of grain delivered in a sales contract does not call for the same procedures as would an arbitration in regard to the construction of a factory.

No appeal

Arbitration is not subject to appeal on the merits. What the parties lose in legal security, because errors made by the tribunal in the application of the law cannot be corrected, they gain in the reduced amount of time required to reach a final decision and reduced costs.[22]

Faster and cheaper

Faster decisions and lower costs as compared to litigation in the courts has been one of the traditional arguments in favor of arbitration. More recently, doubts have been raised as to whether arbitration is really faster or less expensive than litigation. There is no empirical evidence that can prove the case one way or the other. There are too many variables to be considered. What can be said is that the parties can have a relatively speedy arbitration at lower costs if that is what they want. Many arbitration rules provide for an expedited procedure for smaller claims (which in the case of the Swiss Rules of International Arbitration means claims for less than 1,000,000 Swiss francs).[23]

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[21] *Articles 18 and 19.*

[22] *Appeal within arbitration institutions is not unknown but is largely confined to certain trade association arbitration organizations. Since trade association arbitrations often involve standard form contracts or the trade association rules, the value of arbitral decisions as precedent are of great importance to the trade concerned. The Rules of Arbitration, European Court of Arbitration, Article 28, provide for an appeal to a second instance. In a discussion paper "Possible Improvements of the Framework for ICSID Arbitration", 22 October 2004, the ICSID Secretariat suggests the possibility of creating an ICSID appeal facility for investment arbitrations. The discussion paper is available at http://www.worldbank.org/icsid/improve-arb.pdf (visited on 9 May 2005). This is a highly contentious issue that promises to be vigorously debated.*

[23] *Swiss Rules, Article 42. The expedited procedure calls for a shortened time period, one-arbitrator tribunal and no more than one hearing for the examination of witnesses and oral argument.*

On the other hand, if the parties wish to use every procedural means possible to fight the case, the costs will be as high in arbitration as they would be in litigation.

1.5.2 International commercial arbitration

The most favorable situation for a party to a dispute in an international commercial transaction is to litigate in one's own courts. Even if the courts are scrupulously unbiased, that party is litigating at home using its regular lawyers, following a familiar procedure and in its own language.

Litigating in foreign court

While that is good for one party to the transaction, it is not so good for the other party who faces all the difficulties of litigating in an unfamiliar procedure, in a language that may be foreign and may not be the language of the contract, and not being able to use its lawyers who are familiar with the company. It is also not irrelevant that the one party is staying at home while the other party is staying in a foreign country with all the inconvenience and expense that entails.

Arbitration reduces inequalities

Arbitration of such disputes is a means to reduce the inequalities. While it is possible for the arbitration to take place in an arbitration organization located in the home country of one or the other party, it is also possible for the arbitration to be administered by an arbitration organization located in a third country. Furthermore, many arbitration organizations will administer arbitrations throughout the world. There is active competition among leading arbitration organizations to offer their services worldwide. An interesting example is provided by the American Arbitration Association. It has a long and distinguished history as a provider of domestic arbitration services. In order to reduce any image of partiality that might be conveyed by its name, it offers its services as a provider of arbitration services for international disputes through its International Center for Dispute Resolution, which has a European office in Dublin, Ireland.

When State is party

There are special concerns about the partiality of the courts when the State is a party to the dispute. The State has too many means to influence decisions in its own courts for foreigners to feel comfortable litigating against it there. The same might be said about arbitrating against the State in an arbitration organization located in that State. This factor is the major reason for the extraordinary increase in the number of bilateral investment treaties in recent years in which foreign investors have the option of instituting arbitration in one of several arbitration forums outside the host State.

Ease of enforcement

A final reason for the current popularity of international commercial arbitration is the comparative ease of enforcement of an award as compared to the enforcement of a judgment of a foreign court. Unless there is a treaty between the State in which the judgment was issued and the State in which enforcement is sought, the requested court is under no international obligation to enforce the judgment. While there a number of bilateral treaties for the enforcement of

judgments, the only significant multilateral treaty exists only between the member States of the European Union.[24] By way of contrast, 135 States are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While there are lingering problems with implementation of the Convention by the courts in some States, they are on the whole relatively minor ones.[25]

1.6 Summary

The term "international commercial arbitration" has never been defined. However, there is fairly clear agreement on its constituent elements. The most important of the three words is arbitration itself. It is a dispute settlement procedure that, like litigation in the State courts, leads to a final and binding result that will be given execution by the courts. The primary difference between arbitration and litigation is that arbitration is consensual and the final award may treat only those matters that were referred to arbitration by the parties.

The New York Convention permits a State to declare that it will apply the Convention only in regard to matters that it considers commercial under its own law. The resulting uncertainty as to what might be considered commercial under the law of a given State is a potentially serious problem, but it has not given rise to significant difficulties to date. The Model Law goes a long way to overcoming the matter by the long and non-inclusive list of activities that are to be considered as commercial.

The question as to whether an arbitration is international may be important for determining the matters that can be considered by the arbitral tribunal. In some countries anti-trust issues can be submitted to an international arbitration even though they might not be permitted in a domestic arbitration. Similarly, some States permit the State or State entities to submit to arbitration only if the arbitration is international. The question as to whether an arbitration would be international is relevant in the Model Law to determine whether arbitration would be governed by the Model Law or a different law for domestic arbitrations. The Model Law uses a very broad test of internationality to determine its scope of application.

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[24] Brussels Convention of 1968, which has been replaced for all Member States of the EU except Denmark by Council Regulation (EC) No. 44/2001, of 22 December 2000, on jurisdiction and the r ecognition and enforcement of judgments in civil and commercial matters [Official Journal L 12 of 16.01.2001].

[25] See Module 5.7, "Recognition and Enforcement of the Award".

2. HISTORY OF INTERNATIONAL COMMERCIAL ARBITRATION

2.1 General background

International commercial arbitration is a work in progress. The first events took place some eighty years ago, in 1923. There are negotiations currently going in the United Nations Commission on International Trade Law (UNCITRAL) that may lead to new developments.[26] The developments that take place at the international level are implemented by States at different times, some sooner, and some not at all. The growth of investment arbitration as a form of international commercial arbitration promises to have a significant impact on the entire field, but the nature of that impact is not yet clear.

Domestic arbitration

Most societies developed at an early date systems of "arbitration" for the settlement of disputes. Disputes between private parties that are settled by arbitration might be of a family nature, concern labor relations or be between two commercial enterprises. In the past such disputes were almost exclusively domestic and the systems of arbitration that developed reflected the nature of the particular society. It is no surprise, therefore, to find vast differences between domestic arbitration in Continental Europe, Latin America, Islamic countries, the United States and China. In some countries, particularly in Latin America and in England, arbitration was traditionally seen as an extension of the State system of litigation. In such an atmosphere the procedure followed in arbitration was necessarily closely modelled on the procedure followed in litigation in the courts. Even where arbitration was not seen as an extension of the State system of litigation, and the law did not require the local court procedure to be followed in arbitration, the habits developed by lawyers in the courts were carried over into arbitration.

Yet another compelling influence on domestic arbitration in the commercial/economic sphere was to be found in countries with a State-trading system. Economic enterprises were by their nature part of the governmental administration. While the dispute settlement mechanisms established to handle disputes between such enterprises were often called arbitration, they were in fact usually a form of administrative adjudication with a high level of political and administrative control over the entities created to settle those disputes.

In this atmosphere there was very little of what could be called international commercial arbitration. It did not matter that the dispute happened to include a foreigner as one of the parties; the arbitration remained a domestic arbitration. Domestic law was applied, both as to the procedure and, more importantly, to the substance of the dispute as well. That was most striking in the case of England until the 1979 Arbitration Act. There was considerable arbitration in

[26] *The most current report as of the time of writing is Report of Working Group II (Arbitration and Conciliation) on the work of its forty-second session, A/CN.9/573 (New York, 10-14 January 2005).*

London involving international trade, shipping and insurance. The parties were often non-English. In fact, it often happened that neither party was English. Nevertheless, the arbitration proceeded as a strictly national arbitration with English procedural and substantive law applied. While that was the most striking example because of the importance of English arbitration to international trade, it has not been unique.

2.2 The growth of international commercial arbitration 1920 to 1950

Major difficulties in 1920

International commercial arbitration as we know it today began in Continental Europe in the 1920s. There were two major difficulties in the then current situation.

The first difficulty was that in many countries an agreement to arbitrate could be validly entered into only in regard to an existing dispute by a so-called *compromis*. (The terms of reference in International Chamber of Commerce arbitration arose out of that history, though the current justification for terms of reference lies elsewhere.)[27] In those countries an agreement to arbitrate all disputes that might arise in the future in connection with a contract was not valid. It was also common that, even in countries in which the agreement to arbitrate was valid, it often did not effectively prohibit a court from taking jurisdiction over the dispute. If one of the parties commenced an action in court in spite of the agreement to arbitrate, there might later be an action for damages for breach of the agreement to submit the dispute to arbitration, but that tended to be an empty remedy.

The difficulties described were not directed at agreements to arbitrate where one of the parties was foreign. Those rules existed in regard to domestic arbitration agreements as well. However, it was only when one or both of the parties were foreign that it was of international concern.

1923 Protocol

The difficulties in regard to the agreement to arbitrate were effectively eliminated for non-domestic arbitration agreements by the 1923 Geneva Protocol on Arbitration Clauses adopted by the League of Nations. The Protocol was an outstanding success both in terms of the number of States that became party to it and in regard to its contents. Its essential provision was that

> *"Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the* →

[27] *Craig, Park & Paulsson, International Chamber of Commerce Arbitration (3rd ed.), Oceana Publications, Inc., Dobbs Ferry, 2000, pp. 273-274.*

arbitration is to take place in a country to whose jurisdiction none of the parties is subject."

The Protocol also provided that the procedure, including the constitution of the arbitral tribunal, was to be governed by the will of the parties and by the law of the country in whose territory the arbitration took place. The content of the Protocol is today incorporated into Articles II and V(d) of the 1958 New York Convention with only minor changes.

1927 Convention

The second widely recognized difficulty was in regard to the recognition and enforcement of foreign arbitral awards. Therefore, four years after the adoption of the Protocol on Arbitral Clauses, in 1927 the League of Nations adopted the Geneva Convention for the Execution of Foreign Arbitral Awards. Contracting States agreed to enforce arbitral awards made in conformity with the 1923 Protocol in the territory of another contracting State. The Convention was, like the Protocol, adopted by a large number of States and was generally a success in regard to its substance.

ICC Arbitration commenced

At the same time a need was felt for an arbitration organization that would be "international". Consequently, in 1922 the International Chamber of Commerce (ICC) adopted its first rules of arbitration and in 1923 established the Court of Arbitration. Although the headquarters of the ICC are in Paris, there has never been any suggestion that the ICC Court of International Arbitration (as it is now known) was a French arbitral organization.

Arbitral procedure

In addition to what had been achieved by the adoption of the Protocol and Convention and the creation of the ICC Court of Arbitration there was a perceived need for agreement on the procedural rules applicable in arbitration. One consequence was that the International Law Association adopted the Amsterdam Rules in its 1938 session, which contained "provisions concerning the constitution of the arbitral tribunal, the power of arbitrators, the role of the Chairman of the Committee on Commercial Arbitration of the International law Association, procedures for the transmission of documentation between parties, administration of evidence, the hearings …, content of the award, fixing of costs, and so forth."[28] While important historically, the Amsterdam Rules had no practical effect.

Furthermore, the International Institute for the Unification of Private Law (UNIDROIT) prepared a draft uniform law on arbitration, but the outbreak of the Second World War in Europe in 1939 brought those efforts to a halt.

Throughout the two decades from 1920 to the outbreak of the Second World War there was a steady development in Europe of arbitration as a recognized means of dispute settlement in international commercial matters. However, in

[28] *Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitrations and related matters: report [to UNCITRAL] by Mr. Ion Nestor, Special Rapporteur, A/CN.9/64, para. 29, UNCITRAL Yearbook (1972), p.193 et seq.*

quantitative terms the amount of arbitration between commercial firms from different countries was still rather small, except for certain commodity trades where arbitration took place within the relevant trade association. Moreover, the development of arbitration for international commercial disputes that existed in Europe did not generally extend to the rest of the world.

2.3 The growth of international commercial arbitration 1950 to the present

New York Convention

It turned out that there was a significant problem with the 1927 Convention in the requirement that the party seeking enforcement of the award had to prove that the conditions for recognition had been fulfilled. The only way to satisfy the requirement was to have the award recognized in the country where the arbitration had taken place. The requirement of "double exequateur" reduced considerably the usefulness of the Convention. The ICC undertook the preparation of a draft revision of the 1927 Convention and submitted it to the United Nations as the successor organization to the League of Nations, which had prepared both the 1923 Protocol and the 1927 Convention. At the ensuing diplomatic conference it was found to be advantageous to combine the provisions of the 1923 Protocol and the 1927 Convention into a single convention. The result was the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Aside from combining the two previous instruments into a single text, the principal change was that the award itself, in the form required by the Convention, accompanied by the arbitration agreement must be considered as *prima facie* worthy of credit. The court (or other authority) must enforce it unless the party resisting enforcement proves that there exists one of the limited number of exceptions in Article V of the Convention. The exceptions to enforcement in Article V (1) are limited to violations of the rules of a procedural nature governing the arbitration and are designed to protect the parties and the integrity of the arbitral process. The enforcing court is thereby restricted from considering whether the award is correct on the merits. Article V (2) is designed to protect the integrity of the law of the enforcing country. It permits the enforcing court to refuse to enforce the award if the "subject matter of the difference is not capable of settlement by arbitration under the law of that country" or if "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." This latter provision was probably necessary, but it was dangerous. It could easily have been seen as an invitation to a court to find that the enforcement of an award against a party from the State where enforcement is sought would be in some way against the public policy of the State. Fortunately, it has seldom been used to refuse to enforce an award.

The obligations the New York Convention places upon the courts are extraordinary. In almost every case in which the court is requested to enforce an award, the party against whom enforcement is sought is local while the party seeking enforcement is a foreigner. It is understandable that many judges in the local courts, who might rarely see a foreign arbitral award, do not appreciate the value of enriching the foreign party at the expense of the local

party just because one or three private persons sitting as an arbitral tribunal in another country so decided. They may not see or care that the Convention permits parties from their country to have awards in their favor enforced in other Convention countries. To overcome the problem many States provide that Convention awards are to be enforced in higher level courts that are more likely to be free from local favouritism and to have a broader view of the policy behind their country's adoption of the Convention.[29]

There is one noteworthy aspect to this short history of the New York Convention that bears mention. The draft prepared by the ICC envisioned an "international" award that would not be subject to the control of any national court. It is easily understood that the source of such an "international" award would have been the ICC itself, though the draft obviously did not say so. During the process of revision of the draft in the United Nations the text returned to the more familiar and acceptable formula of recognition and enforcement of "foreign" arbitral awards. The role of the nation-State in determining the rules to govern arbitration of international commercial matters was affirmed and has not been questioned since.

However, while the internationalists may have lost the battle, they had not lost the war. As becomes obvious when one considers the subsequent developments, the perception that there is such a phenomenon as "international commercial arbitration" with a tendency towards uniform rules has continued to grow.

Following the 1958 diplomatic conference, interest in arbitration continued to develop. Ratification of the New York Convention progressed at a steady pace, averaging two to three ratifications per year, and that pace has not changed radically over the years since its adoption. To date 135 countries have ratified the Convention.[30]

1961 European Convention

In 1961, three years after the adoption of the New York Convention, the European Convention on International Commercial Arbitration was adopted. The Convention is noteworthy as being the first international instrument to have the words "international commercial arbitration" in its title. This was more than a curiosity. It signalled a change in the attitude towards arbitration of international commercial disputes. The nation-State would be in charge of the rules, but those rules should recognize the special requirements of an arbitration which involves international economic matters and in which one or both parties may be foreign.

Rules of procedure

There was also progress in regard to the rules of procedure that governed the arbitration. In 1966 the Arbitration Rules for *ad hoc* arbitrations were adopted by both the United Nations Economic Commission for Europe (ECE) and the United Nations Economic Commission for Asia and the Far East (ECAFE). The same year the European Convention Providing a Uniform Law on Arbitration was adopted by the Council of Europe.

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[29] For example, in Egypt in regard to all matters having to do with "international commercial arbitration, whether conducted in Egypt or abroad, jurisdiction lies with the Cairo Court of Appeal ...." Law Concerning Arbitration in Civil and Commercial Matters, Article 9. See also Article 56.

[30] The list of parties to the New York Convention as of 1 July 2005 is given in Annex A.

These three texts are significant primarily because they demonstrated the strong desire in the 1960s for uniform internationally acceptable rules of procedure. Only the ECE Rules could be said to have been a success. They have been widely used in Continental Europe for *ad hoc* arbitrations, but they were considered to be unsuitable for arbitrations between common law and civil law countries. The ECAFE Rules on the other hand seem to have been used rarely, if at all, and the Uniform Law has never come into force, the Convention having been ratified only by Belgium.

UNCITRAL Arbitration Rules

The strength of the desire for internationally acceptable rules of procedure was demonstrated by the rapid and overwhelming reception of the UNCITRAL Arbitration Rules after they were adopted by the United Nations Commission on International Trade Law in April 1976. The Rules, which were specifically designed for use in *ad hoc* common law/civil law arbitrations, received the endorsement of the Asian-African Legal Consultative Committee (AALCC) in July of that year.[31] Six months later an agreement was reached to recommend that trade contracts between the Soviet Union and the United States should call for arbitration of any disputes that might arise with the arbitrations to take place in Stockholm under the UNCITRAL Arbitration Rules.[32] The endorsement of the Rules by the AALCC, representing a large number of developing countries, the Soviet Union and the United States meant that the Rules were politically acceptable in a large segment of the world. Although prepared for use in *ad hoc* arbitrations, they were increasingly used as well by arbitral organizations as their institutional rules with suitable changes. By 1982 UNCITRAL found it desirable to issue its Guidelines for Administering Arbitrations under the UNCITRAL Arbitration Rules, which included a description of the changes that might be made in the Rules when adapting them for use as institutional rules.[33]

Because the UNCITRAL Arbitration Rules were written for *ad hoc* arbitrations, they necessarily allowed the parties complete freedom as to how to proceed with the arbitration. Nevertheless, the Rules recognized that the law governing the arbitration might contain a "provision of law from which the parties cannot derogate", in which case that provision would prevail.[34]

Model Law

The UNCITRAL Arbitration Rules were followed in the Model Law in 1985. What is striking about the Model Law is the extent to which it not only gives support to the arbitral process, but the extent to which it permits the parties to conduct the arbitration as they wish. The arbitration may be institutional or it may be *ad hoc*. Subject to the binding rule in Article 18 that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of

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[31] *The resolution of the AALCC (now known as the Asian-African Legal Consultative Organization) is reproduced by UNCITRAL in A/CN.9/127.*

[32] *Agreement between the American Arbitration Association, the USSR Chamber of Commerce and Industry and the Stockholm Chamber of Commerce concerning the optional arbitration clause for use in contracts in USSR-USA Trade - 1977. January 12, 1977.*

[33] *Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules adopted at the fifteenth session of the Commission, UNCITRAL Yearbook (1982), p. 420.*

[34] *Article 1(2).*

presenting his case", "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."[35]

It was thought by many that the Model Law would be useful for developing countries that did not already have a modern law of arbitration, and it has been widely used by them. However, the first country to adopt the Model Law was Canada. To date the Model Law has been adopted by 39 countries, several of the individual States in the United States, Hong Kong and Macau. In addition to Canada, developed countries that have adopted the Model Law are Australia, Germany, Japan, New Zealand, Singapore and Spain.

It is important to note that the Model Law was drafted to govern only international commercial arbitration with the expectation that a State that enacted it might have a separate law governing domestic arbitrations. Even if a State wished to limit the freedom of the parties, arbitral institutions and arbitral tribunals in respect of domestic arbitrations, adoption of the Model Law would permit the State to offer a law of arbitration that met the prevailing consensus on the procedures that should govern international commercial arbitration.

The Model Law is not complete. It must be supplemented by additional provisions at the time of enactment and it has by most States that have adopted it. That was anticipated at the time the Model Law was adopted by UNCITRAL in 1985. The Commission is currently considering several measures that are expected to enhance its effectiveness.[36]

2.4 Development of investment arbitration [37]

Investment arbitration has a history of its own that intertwines with that of general international commercial arbitration.

Disputes in regard to foreign investment raise particularly sensitive issues. On the one hand the foreign investor commits a significant amount of money for a long period of time in a country in which it may not have complete confidence in the system of government, including the courts, or in its political stability. It is understandable that the investor may wish guarantees of one form or another that it would not consider necessary in its home country. On the other hand the investment may have important consequences for the host country of an economic, social or even political nature. The investment will often be in the form of a company organized under the laws of the host country. It is understandable that the host country may not wish the foreign investment to be treated any differently than a domestic investment.

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[35] *Model Law, Article 19(1).*

[36] *The most recent developments are to be found in Report of the Working Group on Arbitration and Conciliation on the work of its forty-second session (New York, 10-14 January 2005), A/CN.9/573.*

[37] *Investment arbitration is covered in depth in this course in Chapter 2, Dispute Settlement at ICSID, and Module 6.1, NAFTA. See also, Dispute Settlement: Investor-State, UNCTAD/ITE/IIT/30.*

Diplomatic protection

In the nineteenth and early twentieth centuries the only form of protection for the foreign investor was for it to call upon its home government to offer it diplomatic protection against any alleged abuses of the host government. Diplomatic protection, if provided by the investor's home government, might result in satisfaction from the host government or in a mixed arbitration. There developed a significant body of international law as to when diplomatic protection might be offered and its consequences. Nevertheless, the system did not work well from any perspective. The investor had no right to diplomatic protection from its home government. If the diplomatic protection resulted in arbitration, the two parties to the arbitration were the two States. It was the doctrine that private parties had no standing before any international tribunal, including an arbitral tribunal considering the private investment, even though the private party was the real party in interest. The raising of the dispute between the investor and the host State to one between the two States threatened other relationships between the two States. Finally, the assertion of diplomatic protection was usually considered by the host State to be a serious infringement of its sovereignty. The situation was not desirable from anyone's point of view.

Washington Convention

The World Bank introduced an alternative in 1965 when the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter Washington Convention) was adopted. From then on investment disputes could be submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). The potential effects on sovereignty were still very high on the list of concerns of many States, so there were very strict jurisdictional requirements, both in regard to which non-State parties could initiate an arbitration and the consent of the State-party to such arbitration. The possibility of ICSID arbitration was of great symbolic value, but of little practical value for the first 30 years or so of its existence. Very few cases were brought to it.

BITs

Commencing in the 1950s a number of countries began programs of negotiating bilateral investment treaties (BIT) with other countries. Both ICSID[38] and UNCTAD[39] have a large number of such treaties on-line, over 1,800 in the case of UNCTAD, and neither list is complete. Each of the several thousand conventions is unique, but most of them contain provisions permitting an investor from one of the two contracting States who has invested in the other contracting State to initiate arbitration in regard to a dispute that may have arisen between it and the host State in regard to the investment.

Typically BITs between two States that are party to the Washington Convention provide that the investor can choose ICSID arbitration and that the BIT itself is considered to fulfil the requirement in ICSID Article 25 of consent to arbitration by the host State. Such provisions have been accepted by ICSID as a valid expression of consent. ICSID lists on its web site 91 pending cases as of 29 June 2005, of which the vast majority arose under a bilateral investment

[38] *http://www.worldbank.org/icsid/treaties/treaties.htm, lasted visited 1 May 2005.*
[39] *http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1, last visited 1 May 2005.*

treaty.[40] Whether ICSID can take jurisdiction over a dispute depends on several additional factors, of which the definition of "investment" and "investor" in the BIT are among the more important.

An arbitration conducted under the Washington Convention, is enforceable under the provisions of the Washington Convention itself.[41]

Non-ICSID arbitration

If one of the States that enter into a BIT is not a party to the Washington Convention, the foreign investor cannot be offered the possibility of ICSID arbitration. A possibility offered by many such BITs is that the arbitration be conducted under the ICSID Additional Facility Rules.[42] Arbitration under the UNCITRAL Arbitration Rules is also a common option for the foreign investor. The BITs often also provide that the arbitration under the ICSID Additional Facility Rules, UNCITRAL Arbitration Rules or the rules of other arbitral institutions should be held in a third country that is a party to the New York Convention. This implies that investment arbitration between a foreign investor and a host country is considered to be "commercial" under the New York Convention.[43]

2.5 Summary

The modern law governing international commercial arbitration began only in the decade of the 1920s with the adoption of the Protocol on Arbitration Clauses, the Convention for the Execution of Foreign Arbitral Awards and the organization of the ICC Court of International Arbitration. There was no substantial further development until the adoption of the New York Convention in 1958. The subsequent years have been ones of rapid progress. 135 States have become party to the New York Convention. The harmonization of arbitration procedure followed in quick succession. The UNCITRAL Arbitration Rules of 1976 have been widely used and have become the model on which many institutional arbitration rules are based. The Model Law of 1985 has been the basis of most arbitration statutes adopted since then.

Investment arbitration began as a special form of arbitration under the Washington Convention of 1965. Although a theoretical breakthrough at the time, for the next several decades it had little practical importance. However, in the past ten years or so it has grown in importance, largely

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[40] *http://www.worldbank.org/icsid/cases/pending.htm, last visited 29 June 2005.*

[41] *Articles 53-55.*

[42] *"The Administrative Council of [ICSID] has adopted Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the [Washington] Convention." ICSID, Additional Facility Rules, Introduction, available at http://www.worldbank.org/icsid/facility/facility-en.htm (last visited 30 June 2005).*

[43] *In United Mexican States v. Metalclad Corporation, 2001 BCSC 664 (British Columbia, Supreme Court) the court held that an investment was "commercial" as the term was used in the Model Law as adopted by British Columbia in its International Commercial Arbitration Act. Therefore, that Act was the basis for the set aside procedures brought against the award rendered by a NAFTA arbitral tribunal under the ICSID Additional Facility Rules.*

as an outgrowth of the vast number of bilateral investment treaties that provide for arbitration of investment disputes. Investment arbitrations take place in two different types of forum. One is ICSID arbitration under the Washington Convention. The other is "commercial" arbitration using the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or the rules of other arbitral organizations with the awards falling under the enforcement provisions of the New York Convention. Even though falling under the rubric of "commercial" arbitration, the public policy issues raised by investment arbitrations can be expected to have an important impact on ordinary international commercial arbitration in the coming years.

3. LEGAL REGIME GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION

3.1 New York Convention

It has already been pointed out that the New York Convention is the foundation stone on which the entire edifice of international commercial arbitration is built. The 135 States that have ratified the Convention have committed themselves to recognizing arbitral agreements and, when one of the parties requests it, referring the parties to arbitration, even when the arbitration is to take place in a foreign country. By making such a commitment they have also agreed that their courts will not exercise jurisdiction over the substance of the dispute so long as either party insists upon the arbitration clause.

Similarly, the 135 current parties to the New York Convention have agreed that they will "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure" in force in the State. Those rules may not contain "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[44] The requirements for the enforcement of an award are limited to (a) the duly authenticated original award or a duly certified copy thereof and (b) the original agreement referred to or a duly certified copy thereof. If either the award or the agreement is not in an official language of the State where the award is relied upon, a certified translation into the appropriate language must be submitted.

3.2 National law

Older arbitration laws

Although there was an attempt in the 1950s to create a law of international commercial arbitration that was free of all national constraints, that effort was not successful. The history of the New York Convention showed that the State would remain the source of arbitration law. In the past the law of arbitration varied widely from State to State. Although arbitration statutes usually are restricted to designating the authority of arbitral tribunals and the powers of the court to act either in aid of arbitration or to control it, some older laws govern in more detail the manner in which the arbitration should take place. One of the practical consequences was that it was difficult for arbitration practitioners to represent clients or to serve as arbitrators in States where they were not already familiar with the local law of arbitration. For that reason, it was also common that lawyers representing clients in the negotiation of contracts were hesitant to agree to arbitration in unfamiliar locations. The heterogeneity of the law was a serious obstacle to the development of international commercial arbitration.

[44] *Article III.*

Model Law

The situation has changed significantly during the twenty years since the Model Law was promulgated by UNCITRAL in 1985. The Model Law is broad in its grant of authority to the parties and to the arbitral tribunal to fashion the procedure as they wish, so long as they adhere to the rule of Article 18 that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." Another important feature of the Model Law is in Article 5 that "In matters governed by this Law, no court shall intervene except where so provided in this Law." Of course, not everything is governed by the provisions of the Model Law, so there can still be surprises. However, the number of possible surprises is radically reduced.

As of 1 July 2005 UNCITRAL lists 41 States and 9 other jurisdictions as having adopted the Model Law for either international commercial arbitration or for all arbitrations conducted within the State.[45] While each of those statutes has its own special features, the core provisions remain uniform. Court decisions interpreting and applying the Model Law are abstracted by UNCITRAL in CLOUT (Case Law on UNCITRAL Texts), which is available on the UNCITRAL website in the six languages of the United Nations, Arabic, Chinese, English, French, Russian and Spanish. Even those new arbitration laws that are not based on the language of the Model Law have often been heavily influenced by it.[46] The consequence is that there is a growing harmonization of the law governing international commercial arbitration with all the positive consequences for parties, their representatives and the arbitrators that follows.

3.3 Arbitration rules

3.3.1 Institutional arbitration rules

It was noted above that all modern arbitration laws allow the parties to decide on the procedure to be followed in the arbitration. In most cases the parties exercise that right by choosing an arbitration institution in which the arbitration will take place. Any arbitration that takes place in the context of an institution will be conducted in accordance with the rules of that organization.[47] Therefore, the rules of the various arbitration institutions constitute the third level of legal rule governing international commercial arbitration. The rules set forth the procedures for the commencement of the arbitration, the appointment of the arbitrators, the conduct of the proceedings and the issuance of the award. Although all of these matters may be in the arbitration law as well, the institutional rules may reflect the particular needs of the type of arbitrations that take place at that institution. Rules for arbitrations in the commodity trades need not be, and probably should not be, the same as those in the

[45] The list can be seen on the UNCITRAL web site, www.uncitral.org. The jurisdictions that are not States in international law include Hong Kong, Macau, Scotland, Bermuda, and the five states within the United States of California, Connecticut, Illinois, Oregon and Texas.

[46] The English law of 1996 is a prominent example.

[47] Many arbitration organizations have indicated that they are willing to administer arbitrations where the parties have agreed on the use of the UNCITRAL Arbitration Rules. This an exception to the statement in the text.

construction industry. Most arbitration organizations have only one set of arbitration rules. Differentiation in procedure arises out of the specialization of the organizations. However, some arbitration organizations have multiple rules for different types of disputes.[48]

3.3.2 Ad hoc *arbitration rules*

Why* ad hoc *arbitration

Some arbitrations take place without any reference to an arbitration institution. They are referred to as *ad hoc* arbitrations. There are many reasons why two parties may decide to have an *ad hoc* arbitration rather than one in the context of an arbitration institution. One of the more prominent is that arbitration involving a limited amount of money and two parties in agreement that they wish to arbitrate their dispute may be less expensive and cumbersome as an *ad hoc* arbitration than one in an institution. The parties may also choose *ad hoc* arbitration because they were not able to agree on an institution.

Disadvantage of* ad hoc *arbitration

The major disadvantage of *ad hoc* arbitration is that, while at the time of concluding the contract the parties may expect any dispute they might have to be settled in a friendly manner; at the time the dispute ripens they may be less inclined to cooperate. In particular, since any particular procedural rule may favour one or the other party in the dispute that now exists, they are unlikely to be able to settle upon the rules of procedure for their arbitration. Without the rules of an arbitration institution as well as the impetus that a permanent structure can give, they may well find it difficult even to commence the arbitration.

ECE and UNCITRAL Rules

The difficulties inherent in an *ad hoc* arbitration have been largely overcome by the preparation of two sets of rules for *ad hoc* arbitrations, the ECE Arbitration Rules and the UNCITRAL Arbitration Rules. The parties can provide in the arbitration clause in their contract that any dispute they may have will be settled by arbitration in accordance with the Rules. If a dispute does arise that must be settled by arbitration, the rules of procedure have already been agreed upon and the arbitration can commence. While the ECE Arbitration Rules have been widely used on the continent of Europe, they have been eclipsed by far by the UNCITRAL Arbitration Rules.

The UNCITRAL Arbitration Rules were adopted in 1976 and were quickly accepted throughout the world. It is unknown how many arbitrations take place using the Rules, since there is no tabulation of *ad hoc* arbitrations, and by the nature of such arbitrations there cannot be. An *ad hoc* arbitration under the Rules can take place in two different ways. One is purely *ad hoc*, *i.e.* no institution plays any role in the arbitration. The other is that an arbitration institution takes on some administrative tasks at the request of the parties.

Appointing authority

The least involvement of the institution comes from being named as the "appointing authority". If the parties are unable to appoint the arbitrator or

[48] *The American Arbitration Association lists on its web site 44 different sets of rules for use in particular types of disputes. http://www.adr.org/RulesProcedures (last visited 1 July 2005). Some of the rules are specific to particular states within the United States.*

one or more of the arbitrators in a three member tribunal, the Rules authorize the appointing authority to do so.[49] If a challenge is made to an arbitrator, the challenge will be heard by the appointing authority.[50]

Many arbitration organizations have indicated that they are willing to be appointing authority under the UNCITRAL Arbitration Rules. The parties may also request the arbitration institution to undertake the secretariat functions that will be necessary during the arbitration and many arbitration institutions have indicated how they would administer such arbitrations, if requested.

At its 1982 session in recognition that a number of arbitration institutions had used the Rules as the basis for their own institutional rules, UNCITRAL adopted "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules".[51] UNCITRAL welcomed the development as one leading towards the desirable unification of arbitral procedure.

The Rules have also been used extensively outside the ambit of traditional international commercial arbitration. They were used with some modifications in the highly contentious Iran – United States arbitrations in The Hague, and were found to work well. It may be on the basis of that experience that many Bilateral Investment Treaties offer *ad hoc* arbitration under the UNCITRAL Arbitration Rules as one of the means of dispute settlement between a foreign investor and the host State.

3.4 Arbitration practice

No set of rules can or should specify every aspect of the procedure that might arise. Much depends on the background of the parties, their representatives and the arbitrators. This is particularly true of arbitrations that take place within a particular industry setting or within a particular trade association. Over time there develop ways of doing things that are known to all the participants in such arbitrations. Similarly, procedures in domestic arbitrations tend to be influenced by procedure in the courts of that country. In an international commercial arbitration that is not within an industry with a specialized arbitration organization, there can be great difficulties. The parties and their representatives may come from countries with different ways of conducting litigation and the arbitrators may come from yet other legal systems. It is not strange that they may have radically different ideas as to how the arbitration should be conducted. Although consensus is developing among arbitration practitioners about certain issues,[52] significant cultural differences remain. These cultural differences have given rise to an abundant literature in the specialized periodicals.

[49] *UNCITRAL Arbitration Rules, arts. 6 – 9.*
[50] *Ibid. arts. 10 – 12.*
[51] *The Recommendations are available on the UNCITRAL web site, www.uncitral.org.*
[52] *It has been suggested that the 1999 "IBA Rules on the Taking of Evidence in International Commercial Arbitration" and the 2004 "IBA Guidelines on Conflicts of Interest in International Arbitration", both products of the Arbitration Committee of the International Bar Association, represent such a developing consensus in their respective areas.*

UNCITRAL Notes

One effort to minimize the misunderstandings that might arise has been the publication of the "UNCITRAL Notes on Organizing Arbitral Proceedings". The Notes raise a number of procedural issues that might be considered at the commencement of the arbitration. While this may not eliminate dispute about the proper way to proceed, it will at least reduce the extent to which one or the other party will be caught by surprise.

4. DISPUTE SETTLEMENT ON THE EDGE OF INTERNATIONAL COMMERCIAL ARBITRATION

The borderline between international commercial arbitration and a number of other dispute settlement procedures is sometimes very hazy. By way of illustration there are set out below several of the current dispute settlement procedures that are on the edge of international commercial arbitration.

4.1 Investment disputes

It has been noted on a number of occasions above that the legal instruments of international commercial arbitration are being used for investment disputes, or at least some of them. ICSID arbitration under the Washington Convention has not traditionally been thought of as international commercial arbitration. It has been in a category of its own. However, investment arbitrations conducted under the ICSID Additional Facility Rules or under the UNCITRAL Arbitration Rules are subject to set aside procedures in the State where the arbitration has taken place. In jurisdictions that have one law for international commercial arbitration and another for all other arbitrations the set aside procedure invoked is that in the law for international commercial arbitration. Furthermore, the award in such an arbitration is enforceable under the New York Convention.

An often discussed decision is United Mexican States v. Metalclad Corporation, 2001 BCSC 664, supplemental opinion 2001 BCSC 1529 (British Columbia, Supreme Court), in which the court held, inter alia*, that the request to set aside the decision of the NAFTA arbitral tribunal proceeding under the ICSID Additional Facility Rules was governed by the British Columbia International Commercial Arbitration Act and not by its Commercial Arbitration Act. The International Commercial Arbitration Act is based on the Model Law.*

It is evident that investment arbitrations raise issues that are not present in ordinary international commercial arbitration. At this point of time it is not clear what impact they will have on the development of the law governing international commercial arbitration in general.

4.2 Iran-United States Claims Tribunal

The Tribunal was established in 1981 by a declaration of the government of Algeria, agreed to by Iran and the United States, as part of the settlement of the "hostage crisis". It has used the UNCITRAL Arbitration Rules, modified for the purposes of arbitrating several thousands of claims of United States' parties against Iran and Iranian parties against the United States. Although the private claimants are the "arbitrating parties", the two State parties also maintain "agents". The procedure is a mixture of public international law arbitration

between two States and arbitration between a State and a national of another State. In this regard, article 2(2) of the Tribunal's Rules of Procedure provides:

> *"2. All documents filed in a particular case shall be served upon all arbitrating parties in that case through the Agents."*

4.3 Domain name dispute resolution procedures

In the past ten years the Internet has become commercially very valuable. Companies that wish to maintain a presence on the Internet normally wish to have a domain name that reflects the corporate name or the product for which they are known. Conflicts soon developed between holders of domain names and parties who claimed that the domain name constituted an infringement of their trade mark. In 1999 the Internet Corporation for Assigned Names and Numbers (ICANN) established a "Uniform Domain Name Dispute Resolution Policy".[53] The policy provides for a mandatory administrative proceeding for certain types of disputes between the holder of a domain name and a party who claims that the domain name is being used improperly. The administrative proceedings are carried out by dispute-resolution service providers, of which there are five at present. What is striking about the Policy is that, although it is mandatory and the procedure followed resembles an arbitration, the Policy specifically disclaims any authority to make a final and binding decision. Only a court or arbitral tribunal can make such a decision. Therefore, a decision by a dispute-resolution service provider that a domain name registration should be canceled is held for ten days before it is implemented to allow the domain name holder to institute court action.

4.4 Summary

International commercial arbitration is the most prominent of the procedures for resolving commercial disputes in international commerce. Although it is a voluntary procedure that depends on the agreement of the parties, once such agreement has been reached neither party can withdraw from the agreement unilaterally. Arbitration performs much the same function as does litigation in the State courts, i.e. it leads to a final and binding decision in the form of an award. An arbitral award can in general be more easily enforced in a foreign country than can the decision of a State court. The 135 States that have become party to the New York Convention have committed themselves to enforcing foreign arbitral awards with limited exceptions. There is no similar world-wide convention by which States have promised to enforce the judgments of foreign State courts.

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[53] *The Policy can be found at http://www.icann.org/udrp/udrp.htm (last visited 30 June 2005). WIPO was the first domain name dispute resolution service provider accredited by ICANN to administer the Domain Name Dispute Resolution Policy. Module 4.2 describes the procedures followed by WIPO in administering the Policy.*

Although arbitration performs much the same function as does litigation in the State courts, under modern arbitration laws the parties are free to decide upon the procedure that will be followed in the arbitration, subject to the single rule, as expressed in Article 18 of the Model Law that

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

In recent years there has been a significant increase in investment arbitrations. Many of these arbitrations are carried out under the special arbitration regime in ICSID as provided by the Washington Convention. However, many of them are carried out using the institutions of ordinary international commercial arbitration. It is evident that investment arbitrations raise issues that are not present in ordinary international commercial arbitration. At this point of time it is not clear what impact they will have on the development of the law governing international commercial arbitration in general.

5. TEST YOUR UNDERSTANDING

Are these statements true or false? In some cases neither answer would be completely correct. In other cases the correct answer may be "it depends".

1. There are significant consequences whether a dispute resolution procedure can be properly qualified as "arbitration.
2. The UNCITRAL Model Law on International Commercial Arbitration has a definition of "arbitration".
3. Arbitration is always for the settlement of a dispute.
4. An arbitral tribunal can refuse to issue an award on agreed terms.
5. A party to an arbitral agreement can always withdraw its consent to arbitrate.
6. If the respondent fails to answer the claim the arbitration must be terminated.
7. It is easier to procure the enforcement of the decision of a foreign court than to procure the enforcement of a foreign arbitral award.
8. The principle of confidentiality is a fundamental aspect of international commercial arbitration.
9. The courts have the right and the duty to assure themselves that every arbitration conducted within their jurisdiction follows the procedural rules agreed upon by the parties.
10. The awards of arbitral tribunals are important as precedent in respect of the matters they discuss.
11. Arbitral awards are subject to appeal to the courts on the same grounds as the decisions of courts are subject to appeal.
12. Arbitration is one form of ADR.
13. The New York Convention is applicable only to international commercial arbitrations.
14. The Model Law contains a definition of "commercial".
15. Investment arbitrations are commercial arbitrations.
16. Some issues can be submitted to international arbitration that cannot be submitted to domestic arbitration.
17. In some States the State itself or State entities can submit to arbitration only if it is an international arbitration.
18. Arbitration in State A between two corporations organized under the law of State A is domestic arbitration.
19. Arbitration may take place in a State that has no relationship to the dispute or to the parties.
20. It is not necessary to be a lawyer to serve as an arbitrator.
21. The same arbitrators serve throughout the entire arbitration.

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22. The same procedure must be followed in an arbitration concerning the quality of grain as in an arbitration concerning a construction contract.

23. One reason for international commercial arbitration is not to have to litigate in the other party's court.

24. The modern history of international commercial arbitration commences with the New York Convention of 1958.

25. The Model Law was the first international effort to adopt uniform procedures for international commercial arbitration.

26. A State that adopts the Model Law must have a separate law for domestic arbitration.

27. The UNCITRAL Arbitration Rules are for arbitrations administered by UNCITRAL.

28. The Model Law has been adopted only by developing countries that did not have a modern arbitration law.

29. *Ad hoc* arbitration is less expensive than institutional arbitration since there is no need to pay a fee to the arbitration institution.

30. There are negotiations currently in progress to amend the Model Law.

6. FURTHER READING

There is an abundant literature about international commercial arbitration in both monographs and legal periodicals. Most of the literature relates to specific problems. Below are listed some of the major books on international commercial arbitration in general and the major legal periodicals devoted to the subject.

Books

- **Klaus Peter Berger**, *Arbitration Interactive* (Peter Lang 2002).
- **Gary Born**, *International Commercial Arbitration Commentary and Materials* (2d ed. Transnational Publishers/Kluwer Law International 2001).
- **W Lawrence Craig, William W Park, Jan Paulsson**, *Annotated Guide to the 1998 ICC Arbitration Rules with Commentary* (Oceana 1998)
- **W Lawrence Craig, William W Park, Jan Paulsson**, *International Chamber of Commerce Arbitration* (3rd ed. Oceana 2000).
- **Matthieu de Boisséon**, *Le droit français de l'arbitrage interne et international* (2d ed. JLN Joly 1990).
- **Yves Derains, Eric A Schwartz**, *A Guide to the New ICC Rules of Arbitration* (Kluwer 1998).
- **Yves Dezalay, Bryant Garth**, *Dealing in Virtue – International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).
- **Howard Holtzmann, Joseph Neuhaus**, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (Kluwer 1989).
- **International Trade Centre**, *Arbitration and alternative dispute resolution* (2001).
- **Julian D M Lew**, *Applicable Law in International Commercial Arbitration* (Oceana 1978).
- **Julian D M Lew, Loukas A Mistelis and Stefan M Kröll**, *Comparative International Commercial Arbitration* (Kluwer Law International 2003).
- **Michael J Mustill, Stewart C Boyd**, *Commercial Arbitration* (2d ed. Butterworths 1989).
- **Michael J Mustill, Stewart C Boyd**, *Commercial Arbitration 2001 Companion* (2d ed. Butterworths 2001).
- **Alan Redfern, Martin Hunter with Nigel Blackaby, Constantine Partasides**, *Law and Practice of International Commercial Arbitration* (4th ed. Sweet & Maxwell 2004).
- **Jean Robert**, *L'arbitrage – droit interne, droit international privé* (6th ed. Dalloz 1993).

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- **Mauro Rubino – Sammartano**, *International Arbitration Law* (2d ed. Kluwer 2001)

Major periodicals devoted to international commercial arbitration

- American Review of International Arbitration
- Arbitration International
- Arbitration, Journal of the Chartered Institute of Arbitrators
- ASA Bulletin (Swiss Arbitration Association Bulletin)
- Croatian Arbitration Yearbook
- Dispute Resolution Journal
- International Arbitration Law Review
- International Chamber of Commerce, International Court of Arbitration Bulletin
- Journal of International Arbitration
- Journal of International Dispute Resolution
- Mealey's International Arbitration Reports
- Revue de l'arbitrage
- Rivista dell' Arbitrato
- Recht und Praxis der Schiedsgerichtsbarkeit
- World Arbitration and Mediation Report
- World Trade and Arbitration Materials
- Yearbook of Commercial Arbitration
- Zeitschrift für Schiedsverfahren

ANNEX A

1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - 1 July 2005

State	Signature	Ratification, Accession (a), Succession (d)	Entry into force
Afghanistan 1/ 2/		30 November 2004 (a)	28 February 2005
Albania		27 June 2001 (a)	25 September 2001
Algeria 1/ 2/		7 February 1989 (a)	8 May 1989
Antigua and Barbuda 1/ 2/		2 February 1989 (a)	3 May 1989
Argentina 1/ 2/ 7/	26 August 1958	14 March 1989	12 June 1989
Armenia 1/ 2/		29 December 1997 (a)	29 March 1998
Australia		26 March 1975 (a)	24 June 1975
Austria		2 May 1961 (a)	31 July 1961
Azerbaijan		29 February 2000 (a)	29 May 2000
Bahrain 1/ 2/		6 April 1988 (a)	5 July 1988
Bangladesh		6 May 1992 (a)	4 August 1992
Barbados 1/ 2/		16 March 1993 (a)	14 June 1993
Belarus 3/	29 December 1958	15 November 1960	13 February 1961
Belgium 1/	10 June 1958	18 August 1975	16 November 1975
Benin		16 May 1974 (a)	14 August 1974
Bolivia		28 April 1995 (a)	27 July 1995
Bosnia and Herzegovina e/ 1/ 2/ 6/		1 September 1993 (d)	6 March 1992
Botswana 1/ 2/		20 December 1971 (a)	19 March 1972
Brazil		7 June 2002 (a)	5 September 2002
Brunei Darussalam 1/		25 July 1996 (a)	23 October 1996
Bulgaria 1/ 3/	17 December 1958	10 October 1961	8 January 1962
Burkina Faso		23 March 1987 (a)	21 June 1987
Cambodia		5 January 1960 (a)	4 April 1960
Cameroon		19 February 1988 (a)	19 May 1988
Canada 4/		12 May 1986 (a)	10 August 1986
Central African Republic 1/ 2/		15 October 1962 (a)	13 January 1963
Chile		4 September 1975 (a)	3 December 1975

China 1/ 2/		22 January 1987 (a)	22 April 1987
Colombia		25 September 1979 (a)	24 December 1979
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d' Ivoire		1 February 1991 (a)	2 May 1991
Croatia e/ 1/ 2/ 6/		26 July 1993 (d)	8 October 1991
Cuba 1/ 2/ 3/		30 December 1974 (a)	30 March 1975
Cyprus 1/ 2/		29 December 1980 (a)	29 March 1981
Czech Republic a/ e/		30 September 1993 (d)	1 January 1993
Denmark 1/ 2/		22 December 1972 (a)	22 March 1973
Djibouti e/		14 June 1983 (d)	27 June 1977
Dominica		28 October 1988 (a)	26 January 1989
Dominican Republic		11 April 2002 (a)	10 July 2002
Ecuador 1/ 2/	17 December 1958	3 January 1962	3 April 1962
Egypt		9 March 1959 (a)	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia		30 August 1993 (a)	28 November 1993
Finland	29 December 1958	19 January 1962	19 April 1962
France 1/	25 November 1958	26 June 1959	24 September 1959
Georgia		2 June 1994 (a)	31 August 1994
Germany b/ 1/ 10/	10 June 1958	30 June 1961	28 September 1961
Ghana		9 April 1968 (a)	8 July 1968
Greece 1/ 2/		16 July 1962 (a)	14 October 1962
Guatemala 1/ 2/		21 March 1984 (a)	19 June 1984
Guinea		23 January 1991 (a)	23 April 1991
Haiti		5 December 1983 (a)	4 March 1984
Holy See 1/ 2/		14 May 1975 (a)	12 August 1975
Honduras		3 October 2000 (a)	1 January 2001
Hungary 1/ 2/		5 March 1962 (a)	3 June 1962
Iceland		24 January 2002 (a)	24 April 2002
India 1/ 2/	10 June 1958	13 July 1960	11 October 1960
Indonesia 1/ 2/		7 October 1981 (a)	5 January 1982
Iran (Islamic Rep. of) 1/ 2/		15 October 2001 (a)	13 January 2002
Ireland 1/		12 May 1981 (a)	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959

Italy		31 January 1969 (a)	1 May 1969
Jamaica 1/ 2/		10 July 2002 (a)	8 October 2002
Japan 1/		20 June 1961 (a)	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan		20 November 1995 (a)	18 February 1996
Kenya 1/		10 February 1989 (a)	11 May 1989
Kuwait 1/		28 April 1978 (a)	27 July 1978
Kyrgyzstan		18 December 1996 (a)	18 March 1997
Lao People's Democratic Republic		17 June 1998 (a)	15 September 1998
Latvia		14 April 1992 (a)	13 July 1992
Lebanon 1/		11 August 1998 (a)	9 November 1998
Lesotho		13 June 1989 (a)	11 September 1989
Lithuania 3/		14 March 1995 (a)	12 June 1995
Luxembourg 1/	11 November 1958	9 September 1983	8 December 1983
Madagascar 1/ 2/		16 July 1962 (a)	14 October 1962
Malaysia 1/ 2/		5 November 1985 (a)	3 February 1986
Mali		8 September 1994 (a)	7 December 1994
Malta 1/ 11/		22 June 2000 (a)	20 September 2000
Mauritania		30 January 1997 (a)	30 April 1997
Mauritius 1/		19 June 1996 (a)	17 September 1996
Mexico		14 April 1971 (a)	13 July 1971
Monaco 1/ 2/	31 December 1958	2 June 1982	31 August 1982
Mongolia 1/ 2/		24 October 1994 (a)	22 January 1995
Morocco 1/		12 February 1959 (a)	7 June 1959
Mozambique 1/		11 June 1998 (a)	9 September 1998
Nepal 1/ 2/		4 March 1998 (a)	2 June 1998
Netherlands 1/	10 June 1958	24 April 1964	23 July 1964
New Zealand 1/		6 January 1983 (a)	6 April 1983
Nicaragua		24 September 2003 (a)	23 December 2003
Niger		14 October 1964 (a)	12 January 1965
Nigeria 1/ 2/		17 March 1970 (a)	15 June 1970
Norway 1/ 5/		14 March 1961 (a)	12 June 1961
Oman		25 February 1999 (a)	26 May 1999

Pakistan	30 December 1958		
Panama		10 October 1984 (a)	8 January 1985
Paraguay		8 October 1997 (a)	6 January 1998
Peru		7 July 1988 (a)	5 October 1988
Philippines 1/ 2/	10 June 1958	6 July 1967	4 October 1967
Poland 1/ 2/	10 June 1958	3 October 1961	1 January 1962
Portugal c/ 1/		18 October 1994 (a)	16 January 1995
Qatar		30 December 2002 (a)	30 March 2003
Republic of Korea 1/ 2/		8 February 1973 (a)	9 May 1973
Republic of Moldova 1/ 6/		18 September 1998 (a)	17 December 1998
Romania 1/ 2/ 3/		13 September 1961 (a)	12 December 1961
Russian Federation d/ 3/	29 December 1958	24 August 1960	22 November 1960
Saint Vincent and the Grenadines 1/ 2/		12 September 2000 (a)	11 December 2000
San Marino		17 May 1979 (a)	15 August 1979
Saudi Arabia 1/		19 April 1994 (a)	18 July 1994
Senegal		17 October 1994 (a)	15 January 1995
Serbia and Montenegro f/ 1/ 2/ 6/		12 March 2001 (d)	27 April 1992
Singapore 1/		21 August 1986 (a)	19 November 1986
Slovakia a/ e/		28 May 1993 (d)	1 January 1993
Slovenia e/ 1/ 2/ 6/		6 July 1992 (d)	25 June 1991
South Africa		3 May 1976 (a)	1 August 1976
Spain		12 May 1977 (a)	10 August 1977
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
Sweden	23 December 1958	28 January 1972	27 April 1972
Switzerland 8/	29 December 1958	1 June 1965	30 August 1965
Syrian Arab Republic		9 March 1959 (a)	7 June 1959
Thailand		21 December 1959 (a)	20 March 1960
The former Yugoslav Republic of Macedonia e/ 1/ 2/ 6/		10 March 1994 (d)	17 September 1991
Trinidad and Tobago 1/ 2/		14 February 1966 (a)	15 May 1966
Tunisia 1/ 2/		17 July 1967 (a)	15 October 1967
Turkey 1/ 2/		2 July 1992 (a)	30 September 1992

Uganda 1/		12 February 1992 (a)	12 May 1992
Ukraine 3/	29 December 1958	10 October 1960	8 January 1961
United Kingdom of Great Britain and Northern Ireland 1/		24 September 1975 (a)	23 December 1975
United Republic of Tanzania 1/		13 October 1964 (a)	12 January 1965
United States of America 1/ 2/		30 September 1970 (a)	29 December 1970
Uruguay		30 March 1983 (a)	28 June 1983
Uzbekistan		7 February 1996 (a)	7 May 1996
Venezuela 1/ 2/		8 February 1995 (a)	9 May 1995
Vietnam 1/ 2/ 3/ 9/		12 September 1995 (a)	11 December 1995
Zambia		14 March 2002 (a)	12 June 2002
Zimbabwe		29 September 1994 (a)	28 December 1994

Parties: 135

a/ The Convention was signed by the former Czechoslovakia on 3 October 1958 and an instrument of ratification was deposited on 10 July 1959. On 28 May 1993, Slovakia and, on 30 September 1993, the Czech Republic deposited instruments of succession.

b/ The Convention was acceded to by the former German Democratic Republic on 20 February 1975 with reservations 1/, 2/ and 3/.

c/ On 12 November 1999, Portugal presented a declaration of territorial application of the Convention in respect of Macau. The notification has taken effect for Macau on 10 February 2000, in accordance with article X(2).

d/ The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

e/ The date of effect of the succession is as follows: for Bosnia and Herzegovina, 6 March 1992; for Croatia, 8 October 1991; for Czech Republic, 1 January 1993; for Djibouti, 27 June 1977; for Slovakia, 1 January 1993; for Slovenia, 25 June 1991; and for The former Yugoslav Republic of Macedonia, 17 September 1991.

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f/ The former Yugoslavia had acceded to the Convention on 26 February 1982. On 12 March 2001, the Secretary-General received from the Government of Yugoslavia a notification of succession, confirming the declaration dated 28 June 1982 by the Socialist Federal Republic of Yugoslavia. (see footnotes 1/, 2/ and 6/ below)

Declarations and reservations

(Excludes territorial declarations and certain other reservations and declarations of a political nature)

1/ State will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

2/ State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

3/ With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

4/ Canada declared that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.

5/ State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

6/ State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

7/ Argentina declared that the present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.

8/ On 23 April 1993, Switzerland notified the Secretary-General of its decision to withdraw the reciprocity declaration it had made upon ratification.

9/ Viet Nam declared that interpretation of the Convention before the Vietnamese Courts or competent authorities should be made in accordance with the Constitution and the law of Viet Nam.

10/ On 31 August 1998, Germany withdrew the reservation made upon ratification mentioned in footnote 1.

11/ The Convention only applies in regard to Malta with respect to arbitration agreements concluded after the date of Malta's accession to the Convention.