

# ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES

HERBERT BURSTEIN\*

## I

There is a consensus among all businessmen and lawyers concerned with foreign trade that a reliable system of settling international commercial disputes expeditiously and economically is urgently needed. As the volume of transactions rises, the number, magnitude and complexity of disputes must, inevitably, increase.

America's participation in the contemporary world-wide industrial revolution calls for constant re-evaluation and analysis of the varieties of legal principles applicable to, and judicial and quasi-judicial techniques for resolving, conflicts of rights and interests. Even more, it points up the need for a uniform, if not universal, system of legal and quasi-legal procedures which will promise security and stability to those who do business in foreign countries.

## II

Between 1947 and 1963, the annual value of American exports rose from 15.3 billion dollars to 23.2 billions and the comparable figures for imports were 5.6 billions and 17.0 billions. During the same period, the book value of foreign investments made by American citizens and companies reached a high of approximately 926 million dollars. Western Europe encouraged and obtained the bulk of the new foreign investments (and now challenges America's economic supremacy). In the Common Market alone, investments reached a high of 4.6 billion dollars in 1964. In 1963, the per capita purchasing power of the 315 million residents of the eighteen Western European countries was two-thirds greater than that of the 260 million in 1938. Western Europe's share of world exports is now more than twice that of the United States and its share of world imports is three times greater.<sup>1</sup> Year after year, steel and aluminum production, construction, shipbuilding, auto production, natural gas and crude oil output reach new levels and the rate of growth continues at an accelerated rate so that by 1975, the gross national product of Western Europe will be twice as great as it was in 1960.<sup>2</sup>

---

\* Member of the New York and Massachusetts bars. Mr. Burstein has contributed articles to various law journals and is the author of "Financing Foreign Operations" and "Foreign Labor Problems" in the two volume study *Doing Business Abroad* published by the Practising Law Institute in 1962.

<sup>1</sup> U.S. Dep't of Commerce Overseas Business Reports, OBR 64-102, 64-103 (Oct. 1964).

<sup>2</sup> Barach, *The New Europe and Its Economic Future* (1964).

The competitive force of expanding foreign economies, with a capacity for a real measure of self-sufficiency plus exportable surpluses, suggests that American business must search out and capture a larger share of the world market. Indeed, thousands of American companies are becoming increasingly dependent upon foreign markets for growth, if not survival, and as the perimeters of business expand, an efficient legal framework must be designed. Whether an American company establishes a branch or agency, a foreign or domestic subsidiary, affiliate or holding company; or engages in a partnership or joint venture; or limits its activities to the export and import of goods; or to the licensing of patents or know-how; or enters into technical assistance agreements, there is neither assurance of fair reward nor protection of investments and earnings in the absence of efficient procedures for implementing and enforcing legal rights.<sup>3</sup> This means more than the employment of foreign lawyers and accountants. It means, rather, a responsible program of quickly and equitably adjusting and resolving controversies. Certainly, litigation in a traditional sense does not answer this need in Western Europe, Latin America, the Far East or other significant areas of international trade. A conglomerate of sovereign nations each attached to a distinctive jurisprudence (despite the apparent similarity of civil law codes) poses grave problems and serious risks for the American businessman and investor and their American lawyers.

### III

To begin with, the structure of a foreign business activity and the way one does business abroad depends, in a major way, upon systems of foreign law which are rarely, if ever, within the grasp of the American lawyer (and all too frequently beyond the competence of a foreign correspondent). Add to this the labyrinth of special statutes, decisional precedents (but not the doctrines of *stare decisis*), treaties (both bi-lateral and multi-lateral), intricate currency and exchange regulations, and the true dimensions of the problems begin to emerge.

A law action in a foreign court governed by civil codes involves unique questions of jurisdiction, unfamiliar rules of evidence, complex conflict of laws principles and cumbersome, costly and time-consuming procedures for the enforcement of judgments. For that reason, among

<sup>3</sup> For a brief review of the legal problems a foreign investor faces see Smit, *Some Civil Law Concepts*, in 1 *Doing Business Abroad* 334-56 (Landau ed. 1962). For an analysis of the problems involved in resolving disputes between a State and a foreign private investor (which is beyond the scope of this article) see Snyder, *Foreign Investment Protection: A Proposed Arbitration Convention*, 11 *J. Pub. L.* 191 (1962); Sarojini, *Arbitration of Trade Controversies between Governments and Foreign Firms*, 1 *Indian J. Int'l Law* 443 (1961).

others, arbitration is a preferred method for resolving disputes among private individuals involving contract and tort claims, and controversies between private individuals and foreign governments relating to the recovery of investments, payment on bonds and other securities, and the repatriation of earnings and capital.<sup>4</sup> That this is a salutary approach has been recognized in many bi-lateral Treaties of Friendship, Commerce and Navigation to which the United States is a party.<sup>5</sup> In substance, these treaties provide for the enforcement of both awards and agreements to arbitrate, irrespective of the place of arbitration or the nationality of the arbitrators. More recently, Congress granted the President authority under the Foreign Assistance Act of 1962<sup>6</sup> to suspend aid to any country which has nationalized or expropriated the property and business of citizens of the United States or has subjected them to discriminatory taxation, unless within six months thereafter the foreign government invokes appropriate remedial steps or submits the issues in dispute to arbitration or conciliation, conducted in accordance with fair rules which are designed to produce complete and equitable settlement arrangements.<sup>7</sup> Article XXIII of the General Agreement on Tariffs and Trade (GATT) which provides for conciliation as a method for resolving disputes among the contracting governments, points the trend to the broadening role of non-legal procedures for settling controversies. In some countries, a standard arbitration clause is prescribed for certain types of commercial agreements, primarily those relating to imports and exports. Elsewhere, civil codes expressly provide for arbitration.

Simply stated, the sanction for arbitration is to be found in special statutes or decrees, civil codes, bi-lateral and multi-lateral treaties<sup>8</sup> and conventions adopted by various international agencies.<sup>9</sup>

<sup>4</sup> International Trade Arbitration: A Road to World-Wide Cooperation (Domke ed. 1958); Domke, Arbitration Between Governmental Bodies and Foreign Private Firms, 17 *Arb. J.* (n.s.) 129 (1962); Sayre, Development of Commercial Arbitration Law, 37 *Yale L.J.* 595 (1928).

<sup>5</sup> Bourquin, Arbitration and Economic Development Agreements, 15 *Bus. Law* 860 (1960); Nussbaum, Treaties on Commercial Arbitration, 56 *Harv. L. Rev.* 219 (1942); Walker, Commercial Arbitration in United States Treaties, 11 *Arb. J.* (n.s.) 68 (1956).

<sup>6</sup> 76 Stat. 255, as amended, 22 U.S.C. § 2151 (Supp. V, 1959-63).

<sup>7</sup> 77 Stat. 386, 22 U.S.C. § 2370(e) (Supp. V, 1959-63).

<sup>8</sup> See articles, *supra* note 5.

<sup>9</sup> And there is no lack of arbitration agencies. Among these are the Inter-American Commercial Arbitration Commission; the Court of International Commercial Arbitration, established by the International Chamber of Commerce; the Canadian-American Commercial Arbitration Commission, created in 1943 by the American Arbitration Association and the Canadian Chamber of Commerce in Montreal; various trade associations such as the New York Produce Exchange, the London Court of Arbitration, the Japan Commercial Arbitration Association; the Permanent Court of Arbitration for the Pacific Settlement of International Disputes at The Hague, created by the Hague Conventions of 1899 and 1907 which hears disputes between a State and a national of another State.

## IV

To be sure, arbitration of international commercial disputes is easier to defend than to define or describe. There is, as yet, no uniform pattern to which arbitration procedures conform and until a coherent and consistent body of principles, universally applicable, is developed, the present guidelines will continue to be general and, sometimes, amorphous. Nevertheless, an American businessman is well advised to include in his agreements a broad arbitration clause even though agreements to arbitrate future disputes and awards may be unenforceable in some countries.

There has been, fortunately, a persistent and long term trend to uniformity in the treatment of both agreements to arbitrate and awards. By adherence to the 1923 Geneva Protocol on Arbitration Clauses,<sup>10</sup> signatory nations accord recognition to arbitration agreements. In 1927, the Geneva Convention on The Enforcement of Foreign Arbitral Awards<sup>11</sup> (to which the United States is not a party), provided for the enforcement of foreign arbitration awards in the territories of the signatory nations. Later on, the United Nations (with participation by the United States) sponsored the 1958 Convention on The Recognition and Enforcement of Arbitral Awards,<sup>12</sup> which directs the enforcement of an arbitration award, irrespective of where the arbitration was held, so long as it is binding and has legal effect where rendered.

In a report<sup>13</sup> made on July 23, 1962, the Secretary General of the United Nations reviewed the proposed methods of arbitrating disputes:

The purpose of preserving the investor's rights, instead of merely assuring redress in cases of violation, is served most effectively, when such a forum provides not only arbitration but also conciliation facilities, through which the mutual adjustment of the rights and requirements of both parties can most readily be adjusted, without actually compelling the investor to become a formal adversary of the government of the host country in which he expects to operate for many years to come.

. . . . .

The effectiveness of the availability of such an arbitral

---

<sup>10</sup> 27 L.N.T.S. 157.

<sup>11</sup> 92 L.N.T.S. 301.

<sup>12</sup> U.N. Doc. No. E/Conf. 26/8/Rev. 1 (1958) in 53 Am. J. Int'l L. 420 (1959); Czyzak and Sullivan, *American Arbitration and The U.N. Convention*, 13 Arb. J. (n.s.) 197 (1958).

<sup>13</sup> U.N. Doc. No. E/3665/Rev. 1 (1962); Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 Am. J. Int'l L. 1 (1960).

facility in overcoming the apprehensions of potential investors will largely depend on the readiness of host governments to undertake advance commitments to submit to its jurisdiction. This, to be sure, need not be done by a blanket undertaking covering all future disputes with foreign investors, but could be effected, e.g., through the inclusion of an arbitration clause in individual investment agreements or general investment laws. In fact, even in the absence of such advance commitment, the record of a government which in fact did accept arbitration, whenever a suitable dispute arose, may provide strong assurance to potential investors. Correspondingly, the record of an arbitration and conciliation facility whose decisions commanded wide respect, would not only hasten the more general acceptance of its jurisdiction, but could, through its emerging jurisprudence, make a major contribution to the development of international law in the investment field.<sup>14</sup>

Despite these hopeful developments, procedures for enforcement of agreements and awards still vary among the signatory nations. And resistance to arbitration continues in some jurisdictions, paralleling early American experience. In the United States today, however, arbitration has achieved virtually complete acceptance. Arbitration statutes were adopted by numerous states and ultimately by the federal government. A brief statement of the federal law suggests the possible outline for the effective administration of an arbitral system.

V

The United States Arbitration Act is a relatively simple statute whose principal provisions are found in sections 1, 2, 3 and 4.<sup>15</sup> In essence, it provides for the enforcement of (a) agreements to arbitrate future controversies arising out of (1) "any maritime transaction or a contract evidencing a transaction involving commerce," or (2) "the refusal to perform the whole or any part" of the transaction or contract, and (b) a written agreement to submit to arbitration an existing controversy arising out of "such a contract, transaction or refusal." Excluded from the ambit of application of the Arbitration Act are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." If the issue involved in any suit or proceeding instituted in a federal

<sup>14</sup> U.N. Doc. No. E/3665/Rev. 1/42-44 (1962).

<sup>15</sup> 9 U.S.C. §§ 1-4 (Supp. V, 1959-63). See also, Kellor, *American Arbitration, Its History, Functions and Achievements* (1948); Burstein, *The United States Arbitration Act—A Reevaluation*, 3 Vill. L. Rev. 125 (1958).

court is "referable to arbitration under an agreement in writing for such arbitration," the suit or proceeding may be stayed pending arbitration by a motion under Section 3 of the Arbitration Act. Furthermore, if one party to the contract or transaction fails, refuses, or neglects to proceed to arbitration, the aggrieved party may petition under Section 4 of the Arbitration Act for an order directing arbitration:

If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.<sup>16</sup>

Arbitration has become a permanent and integral part of the American jurisprudence and the federal act articulates a conviction that arbitration, rather than conventional litigation, is the most efficient way of promoting commercial concord. The American law might well serve as an international model because it provides both the means for compelling arbitration and the means for enforcing awards. A study of the act is useful as a guide to the problems to be solved in the field of international arbitration.

## VI

The legal problems incident to arbitration are two-fold: (a) enforcement of agreements to arbitrate present and future disputes; and (b) enforcement of awards. As a general rule, an agreement to arbitrate an existing dispute which defines the issue, the place of arbitration and the law to be applied, will be enforced in virtually all countries, whether or not there is a treaty of friendship between the States of which the contestants are nationals. If a commercial treaty has been negotiated by the United States with a foreign country which specifically provides for recognition of arbitration clauses relating to present and future controversies, enforcement of the agreement is virtually assured.<sup>17</sup> If the agreement covers enforcement of

<sup>16</sup> 9 U.S.C. § 4 (Supp. V, 1959-63).

<sup>17</sup> Domke, *International Commercial Arbitration in the United States*, 19 J. Bus. L. 303 (1959).

awards, there should be no difficulty in obtaining relief in the courts of the foreign State so long as the regularity of the proceedings is established (if the award is challenged) and the award does not offend public policy. If the arbitration proceedings are to be conducted in a foreign State, the prevailing code may enjoin the arbitrators to apply the applicable law unless an arbitrator is named in the contract and the parties have agreed that his award may be based upon "fair" or "equitable" principles rather than upon rules of law.

In the absence of a treaty or statutory or code provision, agreements to arbitrate future disputes may not be enforceable.<sup>18</sup> Even where executory agreements to arbitrate are recognized, the code of the foreign nation may require that a submission agreement be executed defining the issues in dispute.

Assuming that the agreement to arbitrate has been enforced, an attempt to implement the award may be subject to a variety of limitations and restrictions or special procedural rules. The hospitality accorded to domestic arbitration awards does not always extend to foreign awards.<sup>19</sup> Generally, however, if the agreement to arbitrate is valid and subsisting, and neither it nor the award violates the public policy or codes of the enforcing State, and the arbitration proceedings were conducted in a fair manner (with notice and an opportunity to be heard), and the award is valid and enforceable where rendered, it will be enforced in the foreign jurisdiction.

Since no award is self-executing, it must, in some cases, be reduced to judgment in the State where rendered and suit then instituted to enforce the judgment in the foreign nation. This may create jurisdictional and even tax problems. Thus, an award rendered by the American Arbitration Association against a French national in Boston and reduced to judgment in a Massachusetts court may be subject to collateral attack in France even though the award may presumptively establish the claimant's rights. Comity between two nations does not assure that the courts of the foreign nation will accord a judgment rendered elsewhere "full faith and credit." Moreover, conflict of laws principles may foreclose enforcement, although the general practice is to treat the place of contracting as establishing the governing law and, in cases where the parties have agreed upon the applicable law, the determination of the parties will normally be respected.

---

<sup>18</sup> This approach to arbitration is reminiscent of the now rejected common law rule under which agreements to arbitrate future disputes were held unenforceable as attempts to divest courts of their jurisdiction. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956).

<sup>19</sup> Domke, *The American Trader in Foreign Litigation*, in 2 *Doing Business Abroad* 357-67 (Landau ed. 1962); Domke, *On the Enforcement Abroad of American Arbitration Awards*, 17 *Law & Contemp. Prob.* 545 (1952).

Where a judgment has been rendered on an award in Nation A, enforcement proceedings in Nation B may take the form of a simple *ex parte* proceeding (as the *exequatur* proceeding in France)<sup>20</sup> and, assuming reciprocity, the principal issues will be these: Did the court in which the original judgment was entered have jurisdiction? Is the judgment enforceable where entered? Were appropriate procedures followed in the court where judgment was entered? And in a case presenting a conflict of laws, was the correct law applied and will the judgment subvert the laws of Nation B?

Judgments rendered upon awards are frequently appealable and, sometimes, all of the issues are re-tried.

Despite regularity, enforcement may, nevertheless, be denied if there is no reciprocity between A and B. Thus, A may decline to enforce judgments entered in B unless the latter enforces judgments rendered in A. It may be preferable or necessary, in some instances, to sue on the award but, here, too, the award may be resisted on various grounds specified either in the laws of the enforcing nation, or in relevant treaties, or in international conventions.

### CONCLUSION

Reliance upon arbitration as an efficient and effective technique for resolving existing, as well as future, disputes has become the characteristic sign of properly drawn commercial agreements. While arbitration clauses may vary, their text and reach should be as comprehensive as the varieties of problems and disputes which may arise.

A typical clause for insertion in commercial contracts is one recommended by the Inter-American Commercial Arbitration Commission:<sup>21</sup>

Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the Rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction.

The sound development of an interdependent world community can be promoted only if a favorable climate for private business is

<sup>20</sup> Hauser & Hauser, A Guide to Doing Business in the Common Market 140-46 (1960); Domke, Inter-American Commercial Arbitration, 4 U. Miami L. Rev. 425 (1950); Holley, Enforcement of American Awards in France, 14 Arb. J. (n.s.) 83 (1959).

<sup>21</sup> American Arbitration Ass'n, Rules of Procedure of the Inter-American Commercial Arbitration Commission (1951).

#### *INTERNATIONAL ARBITRATION*

created and the sanctity of contracts becomes a cardinal rule of conduct. This objective cannot be achieved unless contract rights and interests are freely and effectively enforced and the vehicle best adopted to reach this goal is a stable and uniform system of arbitration.