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I. THE MESSAGE

The New York Convention by its very existence, by its permanent application, by its gaining a singular momentum has established "comity", a concept known to public international law - comity between the trading nations, whether signatories or not. No longer can one escape these definite standards of common practice of private or institutionalized administration of arbitral procedure, of mutual respect, of self-restraint and self-discipline, of growing awareness of an arbitral establishment, of a 30 year old tradition, an effect which could hardly be anticipated when the Convention came into being, designed only to rule on two major aspects of commercial arbitration, namely, the recognition of arbitration agreements and of foreign arbitration awards by the Convention States.

[...]

III. THE PRESENT STAGE

[...]

Among many "deficiencies and infirmities", Krishnamurthi points at the situation when an arbitration award cannot be enforced in the country where it has been rendered for lack of arbitrability.²

Yet, it is an accepted practice that the venue of international arbitration is not a country where one of the parties resides. Therefore, it does not seem overly important that the award cannot be enforced there, but it is essential that it can be enforced in the country where the losing party resides. What may be of the essence is that the country of the venue and the country of the enforcement are parties to the New York Convention.

On this question of the venue of arbitration, Mr. Krishnamurthi suggests further that the venue should not be fixed in the contract, but later, when a dispute arises.
He relates that:

"Indian courts in one or two cases have expressed their strong disapproval of an Indian party being compelled to go to arbitration in a foreign country, in spite of the evidence being in India and other factors also dictating the desirability of arbitration in India. Such a view may be criticised as violating the sanctity of a contract, but it does underlines the unfairness of such compulsion. It is, therefore, eminently desirable to determine the place of arbitration at the time when all the circumstances and facts of the situation are known for a fair decision of the dispute. The parties should desist or be discouraged from prescribing the proper law of contract at the time of writing the contract and it should be determined by the arbitrators after a dispute arises having regard to the facts and circumstances of the case then prevailing and applying to them certain guidelines provided for its determination by recognised and approved organisations."  

This leaves the parties in a very doubtful legal position and omitting to determine the venue at the signing stage of a contract - voluntary or not - may be instrumental in raising controversies over its interpretation which otherwise may not have occurred, particularly when one also requests - as Krishnamurthi does - that the applicable law of the contract should be left to be decided by the arbitrators when a litigation arises.

It does not seem unfair that parties must go to another (third) country for dispute settlement.

Exporters from developed countries complain that in view of thriving competition, their hands are being forced by the importing agencies, mostly state organizations in developing countries, into accepting arbitration there. Exporters in developing countries claim to be in a similar position.

The total picture of trade includes considering the financing of large sums, and controversies and their settlement are part and parcel of a calculated investment venture. It must cover the whole cost of a contract, including dispute settlement. There must be a risk calculation premium for dispute settlement included in every international contract.

Thus, dispute settlement is a calculation problem which is admitted by businessmen. The lack of choice of the venue and of the applicable law implies a grave risk for parties in that they do not know how the provisions of their contract are to be interpreted. This situation may turn out to be unfortunate and even disastrous.

How are provisions on the time limit to be interpreted and those on the transfer of property, the acceptance of goods and the statute of limitations, if there is no applicable law?

IV. CONCLUSIONS

Nothing in this world is failproof and eternal. As a negotiator of the New York Convention in 1958, as a spectator and practitioner of arbitration proceedings, as an arbitrator who has been working within the freedom and the limits of the New York Convention, I can say that we have fared well in creating comity amongst trading nations, stability in the field of international commercial arbitration and unprecedented thriving activities in this broad field of alternative dispute settlement throughout the whole world.

*President, Arbitration Commission of International Chamber of Commerce; President, Deutsches Institut für Schiedsgerichtwesen e.V.; Lawyer; Member of ICCA.
6Ibid., p. 208.

Referring Principles:

VIII.1 - Definition