

# TOWARDS A TRANSNATIONAL DISPUTE RESOLUTION

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## I. Introduction

Arbitration has been developed in order to provide a worldwide means of a justice system, which can provide a neutral and impartial process based on the intention of the parties from different geographic, social, business and legal backgrounds. It is believed that arbitration can assist in the resolution of complex conflicts both at national and transnational levels, which may include parties from various backgrounds, including not only private parties and corporations, but also non-governmental international organisations, international organisations, states and state agencies, which are increasingly participating in many international trade and investment contracts. Moreover, bilateral, multilateral and free trade agreements accommodate arbitration agreements for neutral, efficient, international and fair means of dispute resolution. Arbitration may become more preferred mechanism for cross border disputes parallel to the

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gradual increase and transformation of foreign trade and investment<sup>1</sup>, and with recognition of its independence and the principle of party autonomy.

### **A. Approaches in relation to the role of national law in arbitration**

In relation to the role of national law in arbitration, there are two different views, namely traditional and delocalised approaches. The former view accepts that the parties' agreement is a secondary source for law of arbitration, particularly considering the fundamental or mandatory provisions of national law.<sup>2</sup> The traditionalists base their argument to '*Lex Facit Arbitrum*' that states "In the legal sense no international commercial arbitration exists... every system of so-called private international law is in fact a system of national law; in the same way, 'every arbitration is a national arbitration, that is to say, subject to a specific system of national law.'<sup>3</sup> The territorialist approach is followed by English law<sup>4</sup> and states that arbitration can only have legal basis of the country at the seat of arbitration.<sup>5</sup>

The principle of party autonomy has become an established and acknowledged concept for international arbitration, which puts the agreement of the parties to the centre of arbitration. The internationalist (delocalised) approach aims to have a truly international arbitration system that is relieved from any national procedural law, including the law of the

<sup>1</sup> Böckstiegel K H, 'The Internationalisation of International Arbitration: Looking ahead to the Next Ten Years' 11 (2) Arb Int 117

<sup>2</sup> This view has been adopted by English law: *Bank Mellat v Helliniki Techniki* [1983] 3 WLR 783 (Kerr LJ)

<sup>3</sup> Mann F, 'Lex Facit Arbitrum' in Sanders (edn), *International Arbitration: Liber Amicorum for Martin Domke* (Martinus Nijhoff, The Hague 1967) p 157

<sup>4</sup> Lord Justice Rix stated that opposite to French approach, arbitrators cannot derive their authority from a transnational legal order under England law. *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755

<sup>5</sup> Paulsson J, 'Arbitration in Three Dimensions' available at: [www.lse.ac.uk/collections/law/wps/wps.htm](http://www.lse.ac.uk/collections/law/wps/wps.htm)

seat of arbitration and the place of enforcement. This view argues that parties may eliminate the application of national law and select or create a set of procedural rules for arbitration proceeding.<sup>6</sup> Thus, the agreements of the parties should prevail over national law, contrary to the traditional approach.

## B. Current international business prerequisite

The international business practice requires an efficient and dynamic dispute settlement mechanism that is adaptable to fast changing technology, international trade and business practice. It was argued “the tendency to keep transnational commercial disputes out of the courts, and thereby beyond the reach of local laws, is nearly universal.”<sup>7</sup>

The harmonisation is of paramount importance in private international law.<sup>8</sup> There are significant instruments that have made major contributions to the goal of harmonisation of arbitration law, such as UNCITRAL Model Law on International Commercial Arbitration, the New York Convention of 1958<sup>9</sup>, institutional arbitration rules, international associations’ guidelines such as of International Bar Association<sup>10</sup>, customary law and practice, and the liberalisation of national legislations. The global trend on decreasing the role of domestic courts on transnational commercial disputes has been brought more autonomous arbitration system.<sup>11</sup>

<sup>6</sup> This approach has been adopted in Belgium Code Judiciaire Art 1717 and French Nouveau Code de Procedure Civile Art 1494

<sup>7</sup> Juenger F K, ‘The Lex Mercatoria and the Conflict of Laws’ in T.E. Carbonneau (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (Juris, Yonkers 1998) p 266

<sup>8</sup> Mayer P, ‘The Trends towards Delocalisation in the Next 100 Years’ in Hunter, Marriott and Veeder (eds), *Internationalisation of International Arbitration: The LCIA Centenary Conference* (Graham & Trotman/M. Nijhoff, London 1995) p 37

<sup>9</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

<sup>10</sup> International Bar Association (IBA) Rules on the Taking of Evidence, Guidelines on Conflicts of Interest in International Arbitration, Guidelines for Drafting International Arbitration Clauses

<sup>11</sup> The New York Convention Art 1.1 does not only refers to the recognition and enforcement of foreign arbitration awards, but also to “arbitral awards not considered as domes-

### C. Transnationalisation of Substantive Law

The harmonization of the rule of law has increased the discussion on full recognition of the principle of party autonomy and detachment of arbitration from national legal system. It is argued that the developments at fundamental principles of law, customary law and party autonomy have required a reform of international private law.<sup>12</sup> The discussion included the elimination of the impact of national law to arbitration and allowance of the parties to choose the substantive law on trade usage, custom and anational substantive law such as *lex mercatoria*, general principles of law or transnational law, with the encouragement from the successes of international instruments such as Incoterms, ICC Uniform Customs and Practice for Documentary Credits, UNIDROIT Principles of International Commercial Contracts and European Contract Principles and so forth.

## II. Search For a Universal and True Internationalization of Arbitration

There have been debates on the issues of quality, finality and predictability of arbitration awards. The diverse practice and interpretation of arbitration terms, institutional rules, international conventions and grounds for challenge of arbitration awards, might threaten the future of arbitration. In addition, arbitrators become *ex officio* when they render the award and the assistance of local courts is required at the post award process, particularly when the award is not complied with voluntarily by the losing party. As a result, international commercial arbitration requires assistance from designated authority, currently the domestic courts.

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<sup>12</sup> Dalhuisen J H, 'International Arbitrators as Equity Judges' in Peter H. F. Bekker, Rudolf Dolzer, Michael Waibel (eds) *Making Transnational Law Work in the Global Economy* (CUP, Cambridge 2010) "Like public law, private law may move forward independently in a similar manner, at least at the international level. This is the modern idea of its transnationalisation and, in international commerce and finance, of the modern *lex mercatoria*, which is then perceived as depending on these various sources of law and maintaining a hierarchy of rules emanating from them. It may even accept in this context everevolving pressing moral, social, and economic values."

Apart from procedural grounds, the narrative and conservative approaches to arbitrability and public policy issues by the local courts have caused inconsistent court decisions. The effectiveness of the New York Convention to some extent depends on national laws, since the procedure on enforcement of awards should be in accordance with the rules of the country where the award is relied upon. The Convention is further criticized to lack efficient and universal enforcement procedures.<sup>13</sup> Consequently, there is a lack of consistency at the challenge and enforcement process due to the impact of national laws and courts.

The rising criticisms on diverse local approaches at the post award stage of arbitration have led new discussions. It is argued that internationalisation that “disrupts and transforms the boundaries and hierarchies”<sup>14</sup> is crucial in international trade, commercial and finance law. Therefore, the internationalization of arbitration law is believed to be an exclusive solution to the issue of lack of harmonization.

### **A. International Arbitration Court for Appeal and Enforcement**

There has been a search for more fair, efficient, predictable and harmonized mechanisms at international arbitration. The harmonization of the challenge process and enforcement of international arbitration awards is particularly important in order to have a more secure legal environment. These questions lead to a search for a universal system of international commercial arbitration and an alternative solution for true internationalization of the arbitration process. It was held that “making international arbitration a wholly autonomous dispute resolution mechanism is certainly a noble aim”<sup>15</sup>

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tic awards in the State where their recognition and enforcement are sought.”

<sup>13</sup> Briner R, ‘Philosophy and Objectives of the Convention’ in ‘Enforcing Arbitration Awards under the New York Convention Experience and Prospects’ UN Publication Sales No E99V2, 9

<sup>14</sup> Dezaley Y, Garth B, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago Series in Law and Society, Chicago and London 1998)

<sup>15</sup> Horvath GJ ‘The Judicialization of International Arbitration: Does the Increasing Intro-

There is a challenging proposal to promote and enhance harmonisation of arbitration law by some eminent authors including Mauro Rubino Sammartano, Judge Holtzman, Judge Schwebel, and Professor Dalhuisen.<sup>16</sup> The proposal was raised more than two decades ago by Sammartano<sup>17</sup> who suggested “to institutionalize the appellate instance by entrusting the appointment and supervision of appellate proceedings to a new body, an International Arbitral Court of Appeal”<sup>18</sup>. Judge Howard M Holtzman and Stephen Schwebel, expressed their similar “dream” on the creation of a new court for resolving of problems at international commercial arbitration at the LCIA conference in 1993.<sup>19</sup> This is the establishment of a permanent international arbitration court, which deals with setting aside and recognition and enforcement of international arbitration awards. Judge Holtzman held “that would take place of municipal court in resolving disputes concerning the enforceability of international commercial arbitration awards.” Judge Schwebel held “Accordingly, as things now stand, there is no international court with an effective capacity or jurisdiction whose processes can be directly activated by a private party which seeks the recognition or enforcement of a foreign arbitral award.”<sup>20</sup> Professor Dalhuisen went one step further

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duction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?’ in Kroll S, Perales Viscasillas P, Mistelis L, Rogers V (eds) *International Arbitration and International Commercial Law Synergy Convergence and Evolution* (Kluwer Law International, The Hague 2011)

<sup>16</sup> Dalhuisen J.H ‘The Case for an International Commercial Court’ in Berger KP (ed) *Private an*

*Commercial law in a European and Global Context* (Festschrift Norbert Horn, Berlin; de Gruyter 2006)

<sup>17</sup> Sammartano Mauro Rubino, *International Arbitration Law* (Kluwer, Deventer 1990) p 508

<sup>18</sup> Sammartano Mauro Rubino, *International Arbitration Law And Practice* (2nd ed Kluwer Law Int, Boston 2001) ch 35.9

<sup>19</sup> Holtzmann H, ‘A Task for the 21st Century: Creating a New International Court of Resolving Disputes on the Enforceability of Arbitral Awards’ 109; Schwebel S, ‘The Creation and Operation of the International Court of Arbitral Awards’, both in Hunter M., Marriott A., Veeder V. V. (eds), *The Internationalisation of International Arbitration* p 115

<sup>20</sup> Schwebel S, ‘The Creation and Operation of an International Court of Arbitral Awards’ p 115

and proposed the establishment of the International Commercial Court (ICC), which would act as an international arbitration court for appeal and enforcement.<sup>21</sup>

The idea behind the proposal of a new court was referred as follows: “International arbitration is not truly international because it continues to rely on local courts to determine the matters such as enforceability under the New York Convention. It currently requires the winning party to go before the courts of the losing party’s country in order to seek enforcement of the award. Thus the winning party is potentially exposed to all the problems associated with court systems which it attempted to avoid by engaging in international arbitration in the first place. For example, it may face potential bias by the court, difficulties conducting proceedings under and unfamiliar legal system and potentially in a foreign language, as well as the general problems associated with courts such as high costs and long waiting times. By creating an international arbitration court of appeal, it is argued, these problems would be avoided and in the process, international arbitration would become a truly *sui juris* dispute resolution mechanism, wholly autonomous and separate from local legal systems ad courts.”<sup>22</sup>

## B. Determination of Substantive Law Issues

The new international appellate court is proposed to substitute for national courts with respect to applications for setting aside, enforcement of international awards, the grounds for refusal under Article V of the New York Convention, as well as determination of arbitrability, public policy principles and mandatory rules at the international level. The new establishment would assist on improvement of the quality of the arbitration process; provide predictability and clarification in regards to the post award procedure. Furthermore, the excessive two staged in-

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<sup>21</sup> Dalhuisen J H, ‘The Case for an International Commercial Court’ p 931

<sup>22</sup> Horvath GJ ‘The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?’

terference and delays in the challenge and enforcement processes will be eliminated.<sup>23</sup>

The new court is proposed to be a supranational appellate body to deal with not only procedural but also substantive issues of international commercial arbitration.<sup>24</sup> The new court should also be able to base its decisions on transnational or international principles and practice.<sup>25</sup> In addition, the new Court may issue binding opinions on the application of “*lex mercatoria*, its various sources of law and its hierarchy of norms in international commercial and financial cases, including issues of modern contract and personal property law. A similar facility could be envisaged in matters of procedure and evidence, where any domestic *legas arbitrari* would thus be proceeded by other rules, especially by the evolving practices and customs of international arbitration.”<sup>26</sup>

### C. Ideas on Creation and Structure of the New Court

It is commonly accepted that the United Nations (UN) is the basis on the resolution of international disputes and UNCITRAL is “the core legal body of the United Nations system in the field of international trade law”<sup>27</sup>. Consequently, UNCITRAL can have the critical supervisory or supportive role on establishment of the new international arbitration court, which may have the official seat in an international location, such as The Hague or Brussels.

It is important that the international arbitration court for appeal and enforcement should be established by way of an international treaty like

<sup>23</sup> Holtzmann H, ‘A Task for the 21st Century: Creating a New International Court of Resolving Disputes on the Enforceability of Arbitral Awards’ p 109

<sup>24</sup> Naon H G, ‘The Role of International Commercial Arbitration’ (1999) *Arb Int* 266: “With the economic globalization and increased interdependencies of national economics worldwide, the establishment of an international method for review of the merits of international arbitration awards on a principle and unified basis has been proposed in order to promote quality and predictability of arbitral awards.”

<sup>25</sup> Dalhuisen J H, ‘The Case for an International Commercial Court’ p 931

<sup>26</sup> Dalhuisen J H, ‘International Arbitrators as Equity Judges’ p 510

<sup>27</sup> [http://www.uncitral.org/uncitral/en/about\\_us.htm](http://www.uncitral.org/uncitral/en/about_us.htm)



a UN Convention, which would bind the signatory states and ensure the respect of its decisions of by domestic courts. However, the New York Convention of 1958 will remain as a significant instrument for international commercial arbitration.<sup>28</sup>

The ICSID Convention can be an example that provides an autonomous and self-contained system for the resolution of disputes between host States and foreign investors. The convention neither allows an appeal of final award to national court nor entails any review of the merits of facts or law, which is limited to the grounds under Article 52(1). The Court of Arbitration for Sport (CAS), whose awards are given full and immediate effect, is another remarkable example for a modern, efficient and quick method of international dispute resolution. CAS has an exclusive jurisdiction in terms of appeal and the disputes are resolved by ad hoc tribunals in a quick manner which is critical for sport disputes. The author argues that contrary to the ICSID and CAS systems, international arbitration appeal and enforcement court might better have a permanent body like the International Court of Justice<sup>29</sup> for more consistency and predictability.

#### **D. Review of the Arbitration Award**

It is argued that the principle of party autonomy should prevail on accepting the jurisdiction of the international court, the limitation of the new court's authority and the grounds for challenge. Therefore, the appeal or review of the award at the new international court might be allowed if only agreed by the parties and under the rules of the proposed convention.<sup>30</sup>

<sup>28</sup> Veeder VV, 'Is There a Need to Revise the New York Convention' in Gaillard E (edn), *The Review of International Arbitral Awards* (Juris Pub, Dijon 2008)

<sup>29</sup> Statute of the International Court of Justice annexed to the Charter of the United Nations

<sup>30</sup> Cornell University made research in 1998 that %54 of Fortune 1000 US corporations do not prefer international arbitration for the resolution of their disputes because of concerns about restrictions on the rights of appeal of the award. Lipsky D.B, Seeber R.L, 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations' p26, available at <http://digitalcommons.ilr.connell.edu/icr-pubs/4/>

It is essential that the decisions of the international court should be final, binding and automatically enforceable like the ICSID system, which obliges the member states to recognize and enforce the awards as if they are final judgments of national courts<sup>31</sup> and states “the award shall not be subject to any appeal or to any other remedy except those provided for in this Convention”, thereby exclude any review of the award by domestic courts.

### **E. The Question of Compromise by States on Judicial Rights**

There is an argument that states would not be willing to abandon their sovereign rights in respect to its sovereign rights on jurisdiction, even related to international arbitration.<sup>32</sup> It was further argued that although there is a trend on internationalization of arbitration, the efforts at harmonization may produce new difficulties, like providing more complicated mechanisms.<sup>33</sup>

#### ***Trend on internationalization of arbitration***

Globalization requires a quick and efficient response to conflicts between the business parties. State courts might lack flexibility when applying procedural and substantive rules or principles, or may cause hesitation on neutrality and independence due to national interests. Globalisation and the advancement in technology have developed an interconnected world which has eliminated the national boundaries and has awakened the interest in a global legal system.

<sup>31</sup> ICSID Convention Article 53 (1) “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

<sup>32</sup> Naon H G ‘The Role of International Commercial Arbitration’ p 273: “such developments have not lead so far to a reduction in nationalistic currents in the world or to rendering new and old nations more inclined to give up what they consider as their sovereign rights”.

<sup>33</sup> Lalive P ‘Absolute Finality of Arbitral Awards?’ available at [http://www.arbitration-icca.org/media/0/12641359550680/lalive\\_absolute\\_finality.pdf](http://www.arbitration-icca.org/media/0/12641359550680/lalive_absolute_finality.pdf)

### ***Experience of international tribunals, institutionals and treaties***

Moreover, states have already experienced international tribunals and treaties related to their sovereign rights.<sup>34</sup> There are a number of regional and international judicial courts and institutions having jurisdiction on international cases. These include International Court of Justice, International Tribunal for the Law of the Sea, European Court of Justice and the European Court of Human Rights. There have been other supra-national bodies such as the Iran-United States Claims Tribunal in The Hague, the United Nations Compensation Commission in Geneva and the Dispute Settlement Body of the World Trade Organisation.<sup>35</sup> Holtzmann held that “many of the developments in international arbitration that seem ordinary today would have been thought to be impossible dreams 100 years ago”. In fact, the establishment of International Tribunals for Crimes and International Criminal Court would not have been imaginable before WW II.

### **III. Conclusion**

The internationalisation of arbitration requires a cost effective, flexible, quick, final, enforceable and predictable way of dispute resolution. It is necessary to explore the ways for advancement of international arbitration, parallel to the global developments and trends in technology, trade, finance and business practice.

This research aims to highlight the proposal on the creation of an International Arbitration Court for Appeal and Enforcement, which is a challenging way of solving the problem of harmonisation of arbitration. The new court may not only have jurisdiction over recognition and enforcement of arbitration awards, but also deal with setting aside applications of the awards in a neutral place. This proposal intends to diminish the existing two stages of post award court proceedings, which are namely the challenge at the seat of arbitration and the enforcement of the award

<sup>34</sup> For instance, Brussels Convention on Jurisdiction and Recognition of Foreign Judgments and the Rome Convention on the Law Applicable to Contractual Obligations.

<sup>35</sup> Understanding on Rules and Procedures Governing The Settlement of Disputes, Annex 2 to the WTO Agreement Art 17.1

at the forum state. Consequently, the reduction on the stages of judicial control could lessen delay, cost and uncertainty. The International Appellate Arbitration Court would provide a true internationalisation of not only arbitration law, but also international commercial and financial law by way of its binding decisions and advisory opinions. This new court will likely have a significant positive impact on harmonisation at the enforcement proceedings and predictability of arbitration process, and consequently on the promotion of international trade and foreign investment.

Although the various international courts and institutions demonstrate the possibility of the constitution of a new court, the new court may not be easily and rapidly occur. The successful examples of ICSID and CAS arbitration systems, international instruments and harmonisation at the EU law may encourage on the emergence of a new international court.<sup>36</sup> The trend on harmonisation and the success of international courts and tribunals seems to inspire and guide new progresses for the future.

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<sup>36</sup> Paulsson J, 'International Arbitration Is Not Arbitration' 2008 SIAR 2