CHAPTER 1

INTRODUCTION

In the contemporary international trade and commerce an individual, a private firm or an incorporated firm - national or multi-national - extensively participates in transnational commercial activities. A State influenced by the philosophy of a welfare state is also not an exception. It, itself or through its agencies or instrumentalities, not only actively participates in international trade but also frequently undertakes commercial activities having transnational effects. Such a transnational commercial transaction, which obviously does have an international element, may be either with another sovereign state, its agencies or instrumentalities or a national, natural or juristic, of another state.

During the past few decades the international trade and commerce is culminating in internationalisation of the market. Internationalisation of the market coupled with the rapid increase in international commerce obviously, not only involves greater potentialities for generating international trade disputes, but is actually accompanied by a concomitant growth of such disputes.
International business community, like any other trader, desires to have a prompt, economical and fair conflict resolution mechanism. Direct negotiations and conciliation may lead to an agreement and, therefore, the conflict may thereby be resolved. A party to an international commercial dispute, howsoever strongly it be convinced of its rights, however, may be reluctant to resort to litigation due to a number inhibiting factors and the chance of getting undesirable results through the conventional litigation process. A claimant, who, in the absence of any agreed submission to the jurisdiction of a particular court, has to have recourse to the courts of the defendant’s home country, place of business or residence, with which he is likely to be unfamiliar. To the claimant such a court will be foreign, in the full sense of that word, in nature, character and origin. It’s substantive as well as procedural rules may be different from those prevailing in the claimant’s own country, with which he is familiar and accustomed. A claimant may, therefore, be naturally hesitant to adjudicate his claims before a judge in a far away country, obliged and guided by a set of substantive and procedural rules unfamiliar to the claimant and alien to his own national system of law.

Further, International trade dispute, which not only contains a foreign element or involves a dispute of international character but also involves one or more
foreign parties and national legal systems, may have equally effective and justifiable 'jurisdictional links' with more than one state. In the absence of internationally accepted rules or procedures governing exercise of jurisdiction by national courts, a given international trade dispute, which falls within the competency of the courts of more than one country, obviously allows forum shopping. Assuming that jurisdictional requirements are met or 'jurisdictional links' are decisively ascertained, the courts of most of the countries are open to disputes involving one or more foreign parties and legal systems necessitating knowledge of the legal framework of more than one country, of differing bases of jurisdiction, and of procedures for determination of facts, choice of law, proof of foreign law and enforcement of decisions. In such a situation each party to a dispute will obviously attempt to perceive relative advantages and disadvantages in the selection of one of the available judicial forums for conflict resolution and will accordingly opt for one of the most favourable forums, leading to the possibility of simultaneous litigations before the courts of two or more countries in respect of the same dispute.

Even where litigation is confined to a single jurisdiction the involvement of nationals of other jurisdictions tends to create a few prominent
procedural complications and pragmatic problems such as inordinate delay in disposal of cases; difficulty in enforcement of judgments and sovereign immunity which may divert the time and resources of the litigants from the central issues involved in the disputes, and thus may make the conventional judicial adjudication of international commercial disputes less satisfactory and attractive.

Inordinate delay in disposal of international commercial disputes and exorbitant litigation cost is further contributed by court proceedings conducted in a country other than that of the claimant and concomitant expenses required for travel, service of process and taking of evidence in foreign countries. Procedural variance in various legal systems and their compliance with in transnational litigation not only add to confusion and involve additional expenses but also cause delay in conflict resolution. Further, in settlement of international trade dispute, an eventual judgment delivered by a national court, owing to the principle of territorial sovereignty, in the absence of international agreement, can either have a direct operation of its own force or is entitled to automatic recognition and enforcement in another forum. Enforcement of a foreign judgment may generally be resisted on the grounds of lack of jurisdiction of the foreign arbitral tribunal, denial of procedural due
process and contravention of the public policy of the forum in which enforcement is sought. The invocation of such or identical defences by a recalcitrant party not only creates difficulty and causes unreasonable delay, but also provides another opportunity to prolong rather than to resolve the underlying international commercial disputes.

The increasing involvement of states or their agencies or instrumentalities in commercial activities, which were once left to individuals and private corporations lead to some practical problems. One of such significant problems is that of sovereign immunity and act of state doctrine. If one of the parties to the contract is a State, or state entity or instrumentality the private party may be reluctant to submit its dispute to the national courts of the State party, which ostensibly does have little or no knowledge of the law and practice of that court. It may probably be afraid of encountering with judges predisposed to their law, with which they are familiar, and, to find in favour of the government to which they owe their appointments. The state or its entity or instrumentality, on the other hand, may not be willing to submit itself to the national courts of the private party and may probably object to submitting to jurisdiction of a foreign Court. It may rely upon the doctrine of sovereign immunity premised on the principle
of the independence, the equality, and the dignity of states and the consequential maxim *par in parem non habet imperium* to disallow national courts to assert jurisdiction over it or its agencies or instrumentalities. Though the state immunity rules in vogue accord sovereign immunity to *acta jure imperii* and not to *acta jure gestionis*, national statutes dealing with, or having bearing on, state immunity are not uniform and clear regarding decisive criteria to be employed for differentiating a commercial or *acta jure gestionis* from governmental or *acta jure imperii* state activity. Such different approaches and perceptions of national legislations and domestic courts to *acta jure imperii* and *acta jure gestionis* and consequential uncertain implications provide additional opportunities to parties for forum shopping and legal maneuvering. Similarly, the act of state doctrine, which precludes adjudication of disputes in respect of acts of foreign governments done in their sovereign capacity and not in respect of commercial activities, and thereby enables national courts to peep into sovereign or non-sovereign acts of a foreign State, does offer unclear distinction between activities of governmental nature and of commercial character of a State. It, therefore, affords substantial opportunity for delaying tactics even if such a doctrine, in the ultimate analysis, is inapplicable.
Such situations have not only dissatisfied international business community but also made parties reluctant to go to a court for adjudication of an international commercial dispute. They began to concentrate on a better alternative third party conflict resolution mechanism. They, keeping in view, and influenced by, the relative efficacy and cheapness of arbitration as compared to litigation in national courts, have increasingly turned to international commercial arbitration as an alternative conflict resolution device.

International commercial arbitration\textsuperscript{3}, which is a consensual conflict education mechanism, \textit{inter alia}, offering informal, cheaper and quicker settlement of international trade disputes\textsuperscript{4}, minimises the opportunity for forum shopping; ensures easy and effective enforcement of arbitral awards and eliminates the relevance of the doctrine of sovereign immunity from arbitral process.

The practice in vogue of incorporating arbitration clauses or choice of law clauses in international contracts minimises uncertainty of conflicting bases of jurisdiction in settlement of international trade disputes and consequential forum shopping. Absence of opportunity for `forum-shopping' coupled with compliance not with the well defined and complex rules
regulating pre-hearing and hearing proceedings, submission of documents to the tribunal, use of expert witness, proof of foreign law and other necessary preliminary issues ultimately make the arbitration cheaper and speedier compared to litigation.

International arbitral awards based, as they are, on consent the parties to submit their disputes to the agreed arbitral tribunal, generally do receive a greater measure of enforcement than judgments rendered by national courts. Enforcement of an arbitral award generally requires the enforcing court only to pass a judgment on an award properly rendered.

International commercial arbitration, being a consensual adjudicatory mechanism, avoids not only the unduly nationalistic decision-maker but also constitutes a neutral forum for settlement of disputes arising out of transnational commercial transactions. It, accordingly, does not afford justifiable opportunity to a State, which has agreed for the arbitration, to avoid its arbitral obligation on the ground that submission to the arbitration either injures its prestige, causes dishonour or affects its dignity. One of the well accepted principles in the international arbitral process is that a State by submitting itself to arbitration waives its defence of immunity and thereby it is precluded to invoke jurisdictional immunity before the agreed arbitral tribunal. Similarly, the policy
considerations underlying the doctrine of act of state are not applicable to proceedings before arbitrators.

A comparative evaluation of judicial settlement of international trade disputes in national courts and of international commercial arbitration as a conflict resolution device for settlement of international trade disputes undoubtedly makes the international commercial arbitral process not only preferable to litigation but also acts as a viable substitute for national courts. The effectiveness of international arbitration lies in the fact that it does not associate itself with procedural and, other complications and uncertainties concommitment to litigation. It gives a very high degree of binding character to agreements to arbitrate commercial disputes and ensures effective and smooth enforcement of the resultant arbitral awards.

Eventhough, the international commercial arbitral process, compared to litigation in a court of law of a country, is being recognised by the international business community as one of the effective mechanisms for resolution of international commercial disputes, it cannot function effectively without the assistance of national courts and municipal laws. International arbitral process, unlike domestic arbitral process which is governed by a single system of law, does not have its own precise legal arbitral framework. Procedural
uncertainties (resulting from the absence of precise legal arbitral framework applicable to international commercial arbitral process); law applicable (lex loci situs, or lex loci performer or lex loci arbitri or lex loci mercatoria or equitable principles); role and relevance of the plea of sovereign immunity in any action to compel a State or its agencies to arbitral forum, or in enforcement of the resultant award against a foreign government, are a few basic problems associated with international commercial arbitration.6

International commercial arbitration, unlike a national court, does not derive its authority from a state authority but from an agreement to arbitrate. It is, therefore, difficult in international commercial arbitration to ascertain the applicable law, substantive and procedural. The rule prominent in a national legal system that the conflict of laws rules of the forum determine the applicable law may not be of a great help in international commercial arbitration. Could an international arbitrator, if he chooses the applicable law through a private international law rule, apply the conflict of laws rules? What conflict of laws system could he apply? Has he to take into account lex loci situs, or lex loci performer, or lex loci arbitri or any other system of law to ascertain the conflict of law rules to ascertain the applicable law? or could there be any other methods for determining the applicable
substantive rules other than of applying a particular system of conflict of law? are a few significant issues relating to the problem of law applicable to international commercial arbitration. The problem becomes more acute and pertinent when place of arbitration bears no connection with the parties or the subject of the dispute. In such a situation another significant question as to authority of an arbitral tribunal to decide the question of applicable law on the ground of a non-national system of law, namely, *lex mercatoria*, which is devoid of precise contents and is still in evolutionary process, emerges. Further, even if these issues are settled and an arbitral tribunal decides to ascertain the law applicable to the transnational disputes before it, the arbitral tribunal may find it difficult as arbitrators, who belong to different nations and with different legal training and traditions, may not be unanimous on the conflict of law rules that should be applied. That difficulty may further be compounded by the unsettled state of conflict of laws rules in many legal systems.

It is generally said that arbitration, being autonomous process, recognises autonomy of the parties to select, through arbitration clause, the law applicable to their mutual contractual rights and obligations. But it is not clear as to whether such an autonomy is unrestricted enabling the parties to select
any law unconnected either with the subject matter or the parties of the contract. It is generally believed that choice of law by the parties should be legal, bona-fide and not contrary to public policy of the forum which applies the selected choice of law rules. Even in this situation, a set of questions of worth noting, emerge: does an arbitrator have an authority to test the autonomy of the parties and thereby propriety of the law selected by the parties? If yes, should he rely upon the conflict of laws system and of which party or should he recognise that freedom without relying on any conflict of laws rule? None of these approaches solve the problems satisfactorily from the perspective of the either party. The problem is not seized off even if the parties to an arbitration have not selected applicable law. In the situation the arbitrator has to make a search for implied inclination of the parties or to determine an appropriate applicable law which he deems applicable. Keeping in view the varied national laws and conflict laws rules of different states connected with the issue before the arbitrator, it is not easy for the arbitrator to rely on either on national or private international law rules of either of the parties or international conflict of laws system or lex mercatoria. Resort to either of the approaches therefore, simply resurfaces the problems associated with determination of applicable law relying upon conflict of law rules.
The involvement of a State in trade and commerce having transnational effects also adds particular dimension to international arbitral process and raises a number of pertinent issues. One of such pertinent issues is the plea of sovereign immunity. The notion of sovereign immunity connotes that a sovereign State is not subject to a suit in its own courts or in the courts of other nations unless it consents. However, most of the states, doubting the propriety of the maxim *par in pares non habet imperium* in the extended commercial activities of a State and believing in rule of law and ideals of justice, do accept the restrictive theory of sovereign immunity premised on the distinction between *acta jure imperii* and *acta jure gestionis* by according immunity only to the former. However, the theory of restrictive sovereign immunity at operational level suffers from two basic central problems, namely, identification of a state party and characterization and categorization of state activities into *acta jure imperii* and *acta jure gestionis*.

Commentators generally agree that the plea of sovereign immunity in international commercial arbitral process is not applicable for the agreed arbitral tribunal which is a consensual forum applying *lex consensualis* or *lex mercatoria*, cannot justifiably be linked with any state authority. And therefore appearance of a State before an arbitral tribunal does
not either amount to violation of equality or offends dignity of that state. However, in the settlement of international trade disputes through commercial arbitration the doctrine of sovereign immunity has been invoked to thwart international commercial arbitration. Relevance and role of the doctrine of sovereign immunity in international commercial arbitration assumes significance because of extensive state trading in the contemporary world trade and unclarity about the waiver of immunity by agreement to arbitrate.

Another basic problem in the area of settlement of transnational trade disputes through arbitration, which has plagued international commercial arbitration, is the problem of the recognition and enforcement of arbitral awards. Legal systems of almost all countries, which do provide ample legal remedies for the enforcement of domestic awards, reveal wide disparities and remarkable differences in law and practice regarding recognition and enforcement of foreign arbitral awards. The difference is particularly pertinent in the area of law applicable, substantive as well as procedural; conditions to be satisfied with; grounds for refusal of the requested arbitral awards; nature of remedies available; methods of recognition and enforcement to be adopted and other allied matters pertaining to recognition and enforcement of foreign arbitral awards. These differences, which are obvious consequences of
the wide variety of theoretical and political approaches adapted in the national legislations, obviously led to ununiform and unpredictable results and tempted parties to international trade for 'forum shopping' in enforcement of foreign arbitral awards.

The sole reliance on the diverse national arbitration laws of the place of arbitration and the place where enforcement of arbitral award is sought; lack of familiarity with such laws; non-availability and inadequacy of the assets of the reluctant party in a country (or countries) to meet the award; attitude of the prospective court, international or parochial, to the recognition and enforcement of the international arbitral award have not only hampered the administration of arbitral justice but have also proved detrimental to the development of international commercial arbitration in particular and international trade in general.

However, the Convention on the Execution of Foreign Awards of 1958 intends to ensure effective and smooth enforcement of foreign commercial awards. But it also exhibits a few problems.

In addition to these problems there are a number of other pertinent issues associated with international commercial arbitration. An arbitrator's competence to adjudicate upon his own jurisdiction and sources of, and limits, if any, on on the arbitrator's powers and
authority in determining his competence; the extent of independence of international arbitration from the law of situs, rules governing the presentation and reception of evidence in international commercial arbitration; the nature and extent of interim or provisional measures in international commercial arbitration, stay of concurrent proceedings in court and the extent of judicial review of arbitral process and the eventual arbitral award, are a few other prominent contemporary problems in the area of international commercial arbitration.

Keeping in view the comparative significance of the above mentioned basic problems in contemporary international commercial arbitration as an alternative conflict resolution mechanism, two of these basic problems, which generally have been offering greatest deterrence to the more general use of international arbitration to resolve disputes arising out of transnational trade and commerce, are thoroughly analysed and examined in this dissertation. They are: role and relevance of the problem of sovereign immunity in transnational commercial arbitration and the recognition and enforcement of arbitral awards rendered in transnational arbitration. Commentators generally agree that the plea of sovereign immunity in transnational commercial transactions and difficulties in obtaining recognition and enforcement of foreign
arbitral awards have been and are discouragements protracting the arbitral proceedings and making international arbitration impracticable. The effectiveness of international commercial arbitration, it is needless to mention, is based on recognition of agreements to arbitrate commercial disputes and on enforcement of the consequential foreign arbitral awards.

It is important to note that international commercial arbitration cannot function effectively without the assistance of national laws and domestic courts. Unless there is voluntary compliance national courts cannot be completely eliminated by the agreement to arbitrate. Similarly, the effectiveness of arbitration in providing a final and binding resolution of international commercial disputes depends upon a legal framework for court enforcement if a party defaults. Arbitration, in the international context contemplates a binding decision with the legal effect of a final judgment of a court. Thus, influences and prejudices of national laws and attitude of domestic courts cannot be completely eliminated from these two selected problems of international commercial arbitral process. Accordingly, the problems of sovereign immunity in transnational arbitration and of the recognition and enforcement of foreign arbitral awards are examined in international as well as Indian perspectives. Wherever possible important parallel
developments in the law in the UK, USA and other countries are also considered.

The study has been divided into six chapters. In the first chapter relevance and significance of the international commercial arbitration as an alternative conflict resolution mechanism to national courts for the settlement of transnational trade disputes is attempted. A few basic problems associated with international commercial arbitration such as, law applicable, role and relevance of the plea of sovereign immunity in transnational commercial arbitration and recognition and enforcement of foreign awards and other problems are identified and highlighted. Justifications for thorough examination in this study of the last two basic problems, namely, sovereign immunity in transnational commercial arbitration and the recognition and enforcement of foreign awards rendered in international commercial arbitration, are also given.

An attempt is made in the second chapter to examine relevance and scope of the doctrine of sovereign immunity when a State itself, or through its instrumentalities, undertakes transnational commercial activities or involves in non-governmental or acts jure gestionis and agrees with a private party to settle a dispute, present or future, arising out of international trade activities through arbitration. The chapter, along with the discussion on general theories of
sovereign immunity, delves into two central problems of the restrictive theory of immunity, viz., identification of a State party and distinction between acta jure imperii and acta jure gestionis for immunity purposes and a few important issues relating thereto; a survey of criteria embodied in various national laws, and reflected in regional and international instruments on sovereign immunity employed (or proposed) for distinguishing acta jure gestionis and acta jure imperii. It also surveys and examines the provisions of different domestic laws to commercial activity as an exception to sovereign immunity, and discusses waiver of sovereign immunity by agreement to arbitrate. It also endeavours to search for answers to a few pertinent questions associated with the problem of sovereign immunity vis-a-vis transnational commercial arbitration.

The problem of sovereign immunity in state commercial transactions in India constitutes subject-matter of the third chapter of the dissertation. In the absence of a comprehensive immunity Act in India, unlike its counterparts in the Commonwealth and the American hemisphere, discussion on the law and practice in the area of sovereign immunity in state commercial transactions carries a special significance. Section 96 of the Code of Civil Procedure of 1908, (CPC), which inter-alia, stipulates that a foreign State cannot be
sued in India except with the consent of the Central Government of India, as interpreted by the Supreme Court, constitutes a complete code of immunity of a foreign State in India, is thoroughly examined against the background and contents of the prevailing statutory enactments and state practices in the UK, USA and other common law countries, and the principles of contemporary international law. At the end, conclusions are drawn and a few suggestions to bring the Indian law at par with the overseas immunity Acts are made.

In the fourth chapter, which is devoted to enforcement of arbitral awards in international trade transactions, a survey of efforts for unification made within the framework of the League of Nations, United Nations as well as at the regional level has been attempted. Workability and contribution of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which is widely accepted and adapted, is intensively examined and issues and problems minimising its efficacy as an international instrument in the area of recognition and enforcement of foreign arbitral awards are identified and appropriate suggestions are also offered.

Recognition and enforcement of foreign arbitral awards in India, in the light of the statutory enactments and judicial pronouncements, is discussed in
the fifth chapter. India has given effect to the Geneva Protocol on Arbitration Clauses of 1923; the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 by enacting the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) act, 1961. These two statutes, which have been enacted by the Indian Parliament with a view to enjoining parties to arbitration to abide by their undertaking to arbitrate and to ensuring enforcement of foreign arbitral awards in India, are examined and their efficacy is evaluated against the background of their respective legislative goals and of the Geneva and the New York Conventions on which they are modeled. A comparative study of these two statutes and of the schemes envisaged thereunder for smooth and effective recognition and enforcement of foreign arbitral award is also attempted.

In the last chapter, important conclusions from the study of the two basic selected problems of the international commercial arbitration are summarised and appropriate measures are suggested for the establishment of a better model for the settlement of international trade disputes.
Footnotes


2. For example, section 13 of the Code of Civil Procedure of 1908, in India, recognises a foreign judgment adjudicated upon between the parties conclusive except:
(a) where it has not been pronounced by a court of competent jurisdiction, (b) where it has not been given on the merits of the case, (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable, (d) where the proceedings in which the judgment was obtained are opposed to natural justice, (e) when it has been obtained by fraud, and (f) where it sustains a claim founded on a breach of any law in force in India.

3. International commercial arbitration, which has no sharply defined contents, may be described as a third party private adjudication of commercial disputes with international aspects or a foreign element, based on agreement between two (or more) parties to such a transnational commercial transaction, who have agreed to settle dispute, present or future, arising out of such a transaction through arbitration and to abide by the decision of the agreed arbitral tribunal.


5. For details see chapter II, infra.


9. For example, see Restatement (Second) of Conflict of Laws §§ 8-10 (1971) of the USA

