Chapter – IV

International Commercial Arbitration
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INTERNATIONAL COMMERCIAL ARBITRATION

“It would be disingenuous, in fact dangerous, for Africa – indeed for all developing countries – to let themselves lag behind the emergent impetus in international arbitration.”

- Samson L Sempasa.

From Afghanistan to Vatican, the common thing in existence is Dispute and the perpetual quest is not for settlement but for ‘resolution’. Resolution is achieved through Arbitration. Settlement subsides the differences but resolution through arbitration annihilates the differences and disputes. To-day, human relations are not regional but global. Global village yearns for human bondage with peace and prosperity. The nucleus of global human bondage through fair and just trade relations is always entrenched by International Commercial Arbitration.

4.1. UNCITRAL :

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966 "to promote the progressive harmonization and unification of international trade law". UNCITRAL carries out its work at annual sessions held alternately in New York City and Vienna. When world trade began to expand dramatically in the 1960s, national governments began to realize the need for a global set of standards and rules to harmonize national and regional regulations, which until then governed international trade.161

The efforts of the developed nations and some of the developing nations in the western sphere of the globe for nearly 60 years in the 20th Century culminated into the formation of World Trade Organization with eulogized proclamation of global welfare and universal humanity through equitable sharing of benefits through a new order of

161 www.en.wikipedia.org/wiki/united-nations-convention-on-international-trade-law
International economic policy and free flow of trade and commerce across the frontiers of various states. The new economic and trade relations ensured dissolution of differences through resolution of disputes outside the national and conventional court system. The trading partners are exhorted by enabling them to create a “self-generated and self-operated dispute settlement system” resulting in parties-prone justice system. The trade tidal waves, bumping and bouncing since 1966 to the passage of UNCITRAL Rules of 2010 generate hoarse but musical tunes for the globe.

International arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.

Membership: In the beginning, there were 29 states as members of UNCITRAL, which grew to 36 in 1973, and again to 60 in 2002. Member states of UNCITRAL are representing different legal traditions and levels of economic development, as well as different geographic regions. States include 14 African states, 14 Asian states, 8 Eastern European states, 10 Latin American and Caribbean states, and 14 Western European states. The Commission member States are elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the commission are elected for terms of six years, the terms of half the members expiring every three years.¹⁶²

¹⁶² Ibid (Visited on 4-3-2009)

The methods of work are organized at three levels.

The first level is UNCITRAL itself (The Commission), which holds an annual plenary session. The second level is the intergovernmental working groups (which is developing the topics on UNCITRAL’s work program. Texts designed to simplify trade transactions and reduce associated costs are developed by working groups comprising all member States of UNCITRAL, which meet once or twice per year. Non-member States and interested international and regional organizations are also invited and can actively
contribute to the work since decisions are taken by consensus, not by vote. Draft texts completed by these working groups are submitted to UNCITRAL for finalization and adoption at its annual session. The International Trade Law Division of the United Nations Office of Legal Affairs provides substantive secretariat services to UNCITRAL, such as conducting research and preparing studies and drafts. This is the third level, which assists the other two in the preparation and conduct of their work.

4.1.1. FUNCTIONING OF UNCITRAL:

The multi-dimensional functional output of UNCITRAL is directed towards:

- Coordinating the work of organizations active and encouraging cooperation among them.

- Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws.

- Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practice, in collaboration, where appropriate, with the organizations operating in this field.

- Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade.

- Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade.

- Establishing and maintaining a close collaboration with the UN Conference on Trade and development.

- Maintaining liaison with other UN organs and specialized agencies concerned with international trade.\(^{163}\)

**Conventions:** The Convention is an agreement among participating states establishing obligations binding upon those States that ratify or accede to it. A convention is designed

\(^{163}\) Courtesy [www.pea-epa.org/shortpage.asp](http://www.pea-epa.org/shortpage.asp)? Visited on 11-6-2009
to unify law by establishing binding legal obligations. To become a party to a convention, States are required formally to deposit a binding instrument of ratification or accession with the depositary. The entry into force of a convention is usually dependent upon the deposit of a minimum number of instruments of ratification.

Some of the UNCITRAL conventions are given below:


1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006:

The UNCITRAL Model Law of 1985 represents a marvellous technique and strategy carved out under the aegis of International Economic Policy and the determination of the U.N.O to streamline the trade relations amongst various nation states.

Though the title contains ‘Model Law’ in its nomenclature but in fact it exacts the obedience and compliance of the member states in relation to international trade and law. Tersely stated, the UNCITRAL Model Law with 8 Chapters and 35 Articles almost

sweeps all the important states of the globe. The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of International commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernize the form requirement of an arbitration agreement to better conform to international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version.

**Model laws:**

A model law is a legislative text that is recommended to States for enactment as part of their national law. Model laws are generally finalized and adapted by UNCITRAL, at its annual session, while conventions require the convening of a diplomatic conference.

1) **UNCITRAL Model Law on International Commercial Arbitration** (1985)
2) Model Law on International Credit Transfers (1992)
4) **UNCITRAL Model Law on Electronic Commerce** (1996)
6) **UNCITRAL Model Law on Electronic Signatures** (2001)

**UNCITRAL also drafted the:**

UNCITRAL Arbitration Rules (1976) - revised rules will be effective August 15, 2010; pre-released, July 12, 2010
Trade means faster growth, higher living standards, and new opportunities through commerce. In order to increase these opportunities worldwide, UNCITRAL is formulating modern, fair, and harmonized rules on commercial transactions. These include: Conventions, model laws and rules which are acceptable worldwide. Legal and legislative guides and recommendations of great practical value. Updated information on case law and enactments of uniform commercial law. Technical assistance in law reform projects. Regional and national seminars on uniform commercial law.

The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body within the United Nations (UN) to harmonize and unify international trade law. It therefore coordinates the work of organizations active in this field and encourages cooperation across borders in the first place. Secondly, UNCITRAL promotes acceptance of existing as well as new international conventions or model and uniform laws. As a close advisor to the UN, International Chamber of Commerce is presently working with the UNCITRAL working groups (WG) in four areas of expertise:

- **Electronic Commerce** (UNCITRAL WG IV)
- **Arbitration and Conciliation** (UNCITRAL WG II)
- **Transport Law** (UNCITRAL WG III)
- **Procurement** (UNCITRAL WG I)

**Electronic Commerce**: Recently, International Chamber of Commerce has been following the UNCITRAL efforts to regulate companies' use of data messages (e.g. electronic contracting via email). Observing the sessions of UNCITRAL WG IV and providing “ICC E-Terms 2004” as well as the “ICC Guide to Electronic Contracting “, ICC helped to develop the “international draft convention on the Legal Aspects of Electronic Commerce” and offered business expertise. Additionally, International Chamber of Commerce worked closely with UNCITRAL on the “UNCITRAL Model...
Law on Electronic Signatures” and the “UNCITRAL Model Law on Electronic Commerce”. The projects allow for legal certainty regarding the use of electronic signatures and utilization of modern means of communications as well as the storage of information.

**ICC Policy Statements in the field of Electronic Commerce**


**Arbitration and Conciliation:**

Longstanding ICC experience in administering international arbitration has led parties such as UNCITRAL, to seek its assistance in selecting arbitrators for cases not conducted under the “ICC Rules of Arbitration”. Since 1982, ICC has had rules setting out a procedure for the appointment, challenge and replacement of arbitrators conducted
under the rules of arbitration of UNCITRAL. Furthermore, the ICC Commission on
Arbitration attends and observes the sessions of UNCITRAL WG II. From 2000 to
present, the aim of WG II has been to discuss the desirability and feasibility of further
improvement of the laws, rules and practices of international commercial arbitration.

ICC Policy Statements in the field of Arbitration and Conciliation:

Transport Law: With its committees on both, Maritime and Air Transport, the ICC
Commission on Transport and Logistics acts as an advisor to UNCITRAL WG III in the
field of transport law. The work programme goes in line with the UNCITRAL efforts in
the domain of E-Commerce. It is considered as a review of current practices and laws in
the area of the international carriage of goods by sea, with a view to establishing the need
for uniform rules where no such rules existed and with a view to achieving greater
uniformity of laws.

ICC Policy Statements in the field of Transport Law

- The need for investment in port and freight transportation infrastructure, Committee on Maritime Transport, 24 May 2005.
- The need for greater liberalization of international air transport, Commission on Air Transport, 7 December 2000, French Version.

Procurement: The ICC Commission on Trade and Investment Policy serves as an
advisor to UNCITRAL WG I to update the 1994 “UNCITRAL Model Law on
Procurement of Goods, Construction and Services”. The review was decided in 2004 as a
result from the experience gained in the use of the Model Law as a basis for law reform
in general, and the increased use of electronic communications in public procurement in particular. ICC provided its “ICC E-Terms 2004 ” as a major input to UNCITRAL WG I.

**ICC Policy Statements in the field of Procurement**


**PERMANENT COURT OF ARBITRATION:**

Member states of the United Nations Commission on International Trade Law (UNCITRAL) together represent the different legal, economic and social systems, and geographic regions of the world.

The UNCITRAL Arbitration Rules, adopted in 1976 and revised in 2010, entrust the Secretary-General of the Permanent Court of Arbitration with the role of designating an "appointing authority" upon request of a party to arbitration proceedings. This role has taken on increasing significance in recent years as the acceptance and use of the UNCITRAL Rules has increased. In addition to the role of designating appointing authorities, the Secretary-General of the Permanent Court of Arbitration will act as the appointing authority under the UNCITRAL Arbitration Rules when the parties so agree. The PCA also frequently provides full administrative support in arbitrations under the UNCITRAL Arbitration Rules. [168](http://www.pca-cpa.org/showpage.asp?pag_id=1190 visited on 12/3/10)

**4.1.2. WORKING OF THE UNCITRAL:**

The process of international lawmaking is, in part, a function of politics. States assert their interests and values and strive to have them reflected in the resulting substantive law. UNCITRAL develops international norms that affect a variety of trade issues. [169](http://www.pca-cpa.org/showpage.asp?pag_id=1190 visited on 12/3/10) It has had considerable success. As an organ of the United Nations, it operates

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169 u.n. comm’n on int’l trade law, the uncitral guide: basic facts about the united nations commission on international trade law at 1, u.n. sales no. e.07.v.12 (2007) [hereinafter uncitral, guide: basic facts]. (Claire
under the procedures set forth by the General Assembly.\textsuperscript{170} While it has not adopted its own rules of procedure as have some other U.N. organs,\textsuperscript{171} it has, through custom and practice, developed Working Methods that are customarily followed.\textsuperscript{172} Its Working Methods are currently the subject of debate over the necessary degree of agreement to achieve consensus and the participation of non-members. Issues addressed “include dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods.”

4.2. INTERNATIONAL ARBITRATION – CONCEPTUAL CAVALRY.

The international forum of trade and commerce has generated a lot of new ‘trade jurisprudence’ through the cannons of alternative dispute resolution. The exercise of international arbitration is being directed to both microscopic and macroscopic analysis of certain concepts with a view to ensure free flow of trade and commerce dissolving barriers of frontiers. Enterprises, the world over, now conduct business on a dramatically more international scale. The growth of world economies is directly connected with millions of commercial contracts, which are becoming more international in character owing to global integration.
Commercial arbitration has been hailed as the most efficient form of dispute settlement available to participants in international trade. As the purpose of the commercial arbitration is to resolve commercial disputes, often issues have been raised whether a particular dispute is commercial or not. With globalisation and seamless trade the aspirations of global business community, it would be of immense importance to understand the meaning of ‘commercial’ as construed in ‘international commercial arbitration’ in some of the major jurisdictions of the world. International Arbitration is a means by which international disputes can be definitively resolved, pursuant to the parties’ agreement, by independent, non-governmental decision-makers. There are almost as many other definitions of international arbitration as there are commentators on the subject.

**Characteristics of Commercial Arbitration:**

Commercial arbitration is common in both international and domestic contexts. In each, it has several defining characteristics:

First, arbitration is generally CONSENSUAL – in most cases, the parties must agree to arbitrate their differences.

Second, arbitrations are resolved by NON-GOVERNMENTAL DECISION-MAKERS – arbitrators do not act as state judges or government agents, but are private persons ordinarily selected by the parties.

Third, arbitration produces a BINDING AWARD, which is capable of enforcement through national courts – not a mediator’s or conciliator’s ‘non-binding recommendation.’

Finally, arbitration is comparatively flexible, as contrasted to most court procedures.

(1) In many circumstances, national law permits parties to agree upon the arbitral procedures that will govern the resolution of their dispute. As a consequence, the procedural conduct of arbitrations can vary dramatically across industrial sectors.
(2) Arbitral institutions, geographic regions, and categories of disputes. In particular fields or individual cases parties may agree upon procedural rules they are tailor-made for their individual needs.\textsuperscript{173}

Aside from specialized fields, commercial arbitration often bears broad resemblances to commercial litigation in national courts; arbitration will frequently involve the submission of written pleadings and legal argument (often by lawyers), the presentation of documentary evidence and oral testimony, the application ‘law’ (in the form of judicial precedents and statutes) and the rendition of a reasoned, binding award. Nevertheless, in practice, arbitral procedures are usually less formal than litigation, particularly in issues such as pleadings and evidence. Arbitration often lacks various characteristics that are common in national court litigation, including broad discovery, summary disposition procedures, and appellate review. In smaller matters, domestic arbitrations are frequently conducted without the participation of legal advisers, before a lay-arbitrator, according to highly informal procedures.\textsuperscript{174}

**The Role of State Courts in relation to arbitration:** International Arbitrations do not occur within a legal vacuum. Every Arbitration has a legal foundation or juridical “seat in one country. Arbitration must be conducted in accordance with the arbitration law of that state.

However, most modern state arbitration laws, particularly those which follow the Model Law, recognise and apply two basic principles. First that the parties should be free to agree how their disputes are resolved, subject only to certain basic safeguards. Second, which the state courts should intervene in the arbitral process as little as possible. Although the state courts should not intervene in the arbitral process, such courts have an important role in supporting arbitration and are frequently called upon to do so. For example, the courts of most states with modern arbitration laws will.

(a) Recognise a valid arbitration agreement and will stay (i.e. prevent from going forward) any state court proceedings brought in contravention of that arbitration agreement (indeed, the New York Convention requires states to recognise arbitration


agreements and to refer, at the request of one of the parties, a dispute to arbitration unless the court concludes that the arbitration agreement is null and void, inoperative or incapable of being performed);

(b) Assist in the appointment or removal of an arbitrator;

(c) Issue interim orders to protect the subject matter of the dispute;

(d) Assist in the enforcement of an arbitral award.

In none of these examples does the state court make a final decision on the merits of the dispute. However, courts do have powers to review or set aside the award or to refuse enforcement of the award. An unsuccessful party may challenge an award (i.e. attack its validity or effect) in the courts of the juridical seat of the arbitration or in the courts of the state where enforcement is sought. The extent to which a state court may review or set aside an award will depend on the law of the state in question. The arbitration laws of either the juridical seat of the arbitration or the state in which enforcement of an award is sought will permit the state courts to set aside an award or refuse enforcement on limited grounds.

The New York Convention provides that recognition and enforcement of an arbitration award may only be refused, at the request of the party against whom it is invoked, on certain specified grounds (Article-V). These grounds include the following:

(a) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, or

(b) 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.

The arbitration laws of states which are signatories to the New York Convention should reflect its provisions. States whose arbitration laws adopt the UNCITRAL Model Law on arbitration will limit the grounds on which the courts of the juridical seat can set aside an award to the same grounds as are specified in the New York Convention for resisting enforcement of an award. Some states’ arbitration laws give the courts of the juridical seat wider powers to review awards. Some arbitration laws even permit the
unsuccessful party to challenge the award on points of law. In such cases, it is often permissible for the parties to agree to exclude the right to appeal to the courts.  

4.2.1. THE LEGAL INFRASTRUCTURE OF INTERNATIONAL ARBITRATION:

If international arbitration were a physical structure, its two main foundations would be:

(a) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the New York Convention), and

(b) The United Nations Commission for International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules. Its super structure would consist of the laws of the states where arbitrations are conducted; together with the rules and practices of the leading international arbitral institutions.

Such institutions include the International Court of Arbitration of the International Chamber of Commerce (ICC), the LCIA (formerly known as the London Court of International Arbitration) and the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA).

The New York Convention was a landmark in the development of international arbitration. It requires contracting states to enforce valid arbitration agreements and introduced a straightforward procedure for obtaining the recognition or enforcement of arbitral awards internationally. The Convention has been ratified by over 146 states, thus providing the most extensive network for the enforcement of decisions resolving disputes. The regime established by the New York Convention for the enforcement of arbitration awards far exceeds any comparable international regime for enforcing court decisions.

The New York Convention defines the specific grounds upon which recognition and enforcement of an arbitration award may be refused by a state court. One of these grounds is that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case. The New York Convention does not prescribe how arbitration

is to be conducted, but by listing the grounds upon which enforcement may be refused, it effectively defines the basic requirements and establishes a benchmark. The arbitration must be conducted in accordance with the rules that the parties have agreed will apply to the proceedings.

In the last 30 years, significant steps have been taken to ensure that states throughout the world have arbitration laws which satisfy the basic requirements of a modern administration law. UNCITRAL has led the way by promulgating its Model Law on arbitration and its Arbitration Rules. The intention of the Model Law is to provide a precedent for those states that wish to introduce a modern arbitration law. To date, 42 states to date, 42 states have adopted the Model Law, in whole or in part, as the basis for their national law of arbitration. Many more have based their arbitration law on the Model Law. Finally, the legal superstructure of international arbitration includes the rules and practices of the leading arbitral institutions. Partly as a result of the activities of these arbitral institutions, supplemented by the activities of academic institutions, there is a growing body of international law and practice relating to international arbitration which is documented in the many legal journals and texts relating to arbitration. There is also a growing community of lawyers and other professionals who practise arbitration law, either by representing parties in arbitrations or by appointments as arbitrators, and who contribute to the growing culture of international arbitration.\textsuperscript{176}

**LEGAL SIGNIFICANCE – ‘INTERNATIONAL’ CHARACTER.**

The starting point is that the New York Convention applies to the enforcement of awards not considered as domestic awards in the state where their recognition and enforcement is sought. The New York Convention therefore recognises that a different legal regime may apply to domestic awards. A number of states, such as France, Italy, Singapore and Switzerland, impose different legal requirements on domestic arbitrations. It is always necessary to check the relevant state’s arbitration law for the definition of “international arbitration”. Usually this will be the law of the state in which the arbitration to take place. International Arbitration is those –

(a) Which involve parties which have their places of business in different states, or

(b) Which deal with disputes –

1) Arising out of obligations to be performed, or
2) Connected with subject-matter

In a different state from the place of business of at least one of the parties. The international nature of arbitration has a number of practical consequences. For at least one party (and some or all of the members of the tribunal) at least one foreign state and one foreign legal system will be involved. Dealing with a dispute which involves a foreign element, possibly in a foreign territory, is logistically more complicated and expensive than dealing with a domestic dispute. However, the location of the arbitration and the law that will apply to the contract are matters which may be agreed between the parties.\textsuperscript{177}

4.2.2. ‘COMMERCIALITY’– UTILITY IN COMMERCE:

In 1958, 45 countries including India and the U.S., participated in the U.N. conference that culminated in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention). The Convention encourages the recognition and enforcement of international arbitration agreements and awards. Art-1(3) of the Convention provides that a State may declare 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 national law’ of the State. On September 30, 1970, the U.S. signed the New York Convention, with the following ‘declarations and reservations.’

- The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of other contracting parties.

- The United States of America will apply the Convention only to difference arising out of legal relationships, whether contractual or not, which considered as commercial under the national law of the United States.

\textsuperscript{177} Ibid, p.4.
The rationale behind this ‘reservation’ (i.e. states can restrict the applicability of the Convention) probably derives from the recognition of the legal regimes in civil law countries, where a distinction exists between ‘commercial’ and ‘non-commercial’ contracts. A commercial contract can broadly be understood to be a contract made by merchants and traders in the ordinary course of their business. These ‘commercial’ contracts are governed by a special code of commercial law. In many civil law countries, only disputes arising out of commercial contracts can be submitted to arbitration.¹⁷⁸ As of May 2012, 146 of the 193 United Nations Member States have adopted the New York Convention. The Convention has also been ratified by Holy See and the Cook Islands. About fifty of the U.N. Member States have not adopted the Convention. In addition, Taiwan has not adopted the Convention and a number of British Overseas Territories have not had the Convention extended to them by Order in Council. British Overseas Territories to which the New York Convention has not yet been extended by Order in Council are: Anguilla, British Virgin Islands, Falkland Islands, Turks and Caicos Islands, Montserrat, of that particular country. Implemented the New York Convention into domestic law (Arbitration Ordinance 1976), although Britain has never issued an Order in Council legally extending the New York Convention to the British Virgin Islands.

A notable feature is that of the 146 countries only 46 countries adopted the “commercial reservation” with respect to the Convention. Interestingly, many common law countries like India, the USA, and Canada etc. have also adopted this reservation, despite the fact that there is no general distinction between ‘commercial’ and ‘non-commercial’ contracts as understood in civil law countries. One possible reason why these countries kept the ‘commercial reservation’ could be because they were concerned about issues relating sovereign immunity. Thus, the effect of the reservation was that each country could restrict the application of the convention to only those matters which were considered to be commercial under the law of that particular country. Since,

http://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards visited on 5/6/10
different countries defined and interpreted the word ‘commercial’ differently; it gave rise to many problems.

Hence, during the drafting of the UNCITRAL Model Law, when there was a renewed exercise to bring about unification and harmonization of International Court of Arbitration Law across the world, there was an attempt to provide a definition of the word ‘commercial.’ However, this did not prove to be an easy task. Countries like Mexico specifically wanted foreign direct investments and financial transactions entered by the government to be excluded (as they are considered to be part of public debt). On the other hand, countries like Germany and the United States specifically wanted a clause to expressly state that the nature of the transaction i.e. whether it was commercial or not would not depend on the nature and character of the parties to the transaction. Thus, for example the fact that a person who is not a merchant had entered into an otherwise commercial transaction would have no effect on the commerciality of the transaction.\(^{179}\)

These differing viewpoints among various countries were almost irreconcilable and hence as a compromise, it was decided to annex a footnote to Art-1 of the Model Law to aid in the interpretation of the term. As a result, Foot Note No.2 to Art-1(1) of the Model Law reads: “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.”

However, uncertainty remains about the legal effect of such a footnote. Many countries do not adopt this kind of legislative technique. While Foot Note 1 of the Model Law states that Article Headings are to be used for reference purposes only and are not to be used for purposes of interpretation, there is no mention of the use of Footnotes\(^{179}\) Report of the Secretary General, 18\(^{th}\) session of UNCITRAL June 3-21, 1985. U.N.Doc. A/CN.9/263 – para.12.
themselves. A problem also might arise where a national legislation although based on the Model Law specifically makes a requirement of the transaction being ‘commercial’ under the law of that Nation. In such a situation, it is unclear what effect the footnote might have. This is because the Footnote might include certain transactions to be commercial which are not considered as commercial under nation’s legal system. An example of such a national legislation is the India Act. It makes a specific reference to the Model Law and is almost an identical replica of the Model Law. It however contains a requirement that the dispute need to be commercial under the law in force in India. The relevant portion of the Indian Law is as follows: Sec-2(1) (f): “International Commercial Arbitration” means an arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India and….”

Some of the aspects of the Footnote in the Model Law are

1. The list is illustrative and not exhaustive.
2. The legislative intent behind the Footnote is to construe the term ‘commercial’ in a broad manner.
3. Although the Footnote has not referred to it, transactions for supply of electrical energy transport of liquefied gas via pipeline and “non-transactions” such as claims of damages arising out of a commercial context are meant to be covered.
4. Labour or employment disputes and ordinary consumer claims are not meant to be covered despite their relation to business.

It is important to keep these aspects in mind, since some legislation like the International Commercial Arbitration Act, 1990 of Ontario, Canada makes an express provision to the effect that the analytical commentaries accompanying the drafting of the Model Law can be used to interpret the relevant legislation which deal with I.C.A. Even where no express provisions have been made, while interpreting national legislations which are largely based on the Model Law, courts might find it useful to consider these commentaries. It can reasonably be inferred that the Model Law progresses from the Convention, as the Convention had no guidance on this issue whatsoever and left it

completely at each nation’s discretion. However, it should be noted that the interpretation of the word ‘commercial’ still remains important. This is because countries like India have retained the “commercial reservation” even after enacting a new law on the lines of the Model Law. The Convention might still govern a number of cases despite the fact that the countries have enacted the Model Law. Moreover, as compared to the Convention, only 48 states have enacted legislations based on the Model Law.\(^\text{181}\)

**4.2.3. INTERPRETATION ACROSS JURISDICTIONS:**

Different jurisdictions across the globe interpret ‘commerciality’ differently. Some of the important jurisdictions are:

(a) **THE UNITED STATES OF AMERICA.**

Overall, the judiciary in the U.S. has construed the term ‘commercial’ broadly with regard to International Court of Arbitration.\(^\text{182}\) In the case of the *Societe Generate De Surveillance S.A Vs. Draytheon European Management And Systems Co.*\(^\text{183}\) an American company was involved in a dispute with a French company in a contract for the field testing, inspection, and evaluation of missiles.

Even though the contract was strictly one about services, and not about an exchange of commodities, the court held that it was commercial. The court also observed that there is a strong judicial policy favouring the submission of contractual disputes to arbitration particularly under the provisions of the Federal Arbitration Act (FAA) and the term commerce should be broadly construed. “The fact that the employer-employee relationship may include a degree of fiduciary obligation does not deprive it of its commercial character.” This decision is notable because the commentary to the drafting of the Model Law indicates the legislative intent to exclude employment agreements from the scope of the word ‘commercial’. In this case, however the court went ahead and construed the term broadly.\(^\text{184}\)


\(^{182}\) 43F.2d 863 (1^st^ Cir.1981).


The decision in Bautista vs. Star Cruises is important in the context of the scope of the word ‘commercial’ with regard to American arbitration law. The court approved of the use of arbitration provisions with regard to contracts signed by some Filipino seamen. Chapter-1 of Title 9 of the U.S. Code codifies the FAA. Under Chapter-1 seamen agreements are exempt from arbitration. Under Chapter-2 which codified the Convention, “commercial disputes” include the definition under Chapter-1. The court however, held that the definition under Chapter-2 was not limited by the definition under Chapter-1 and the reference in Chapter-2 to Chapter-1 was illustrative. Thus, Chapter-2 was considered to be broader in its application and included crewmember agreements, despite the fact that agreements would not have been “commercial” under the Federal Arbitration Act.

A number of cases have arisen in the U.S. with respect to the concept of commerciality in the context of the Foreign Sovereign Immunities Act, 1976 (FSIA). The main aim of FSIA is to make foreign states immune from suits arising from its “sovereign” or “governmental” acts, but not from its “commercial” acts. It is in this context that courts in the US have needed to interpret what the word “commercial” meant. While most of these cases arose as a direct lawsuit against a foreign state, some of them also arose in the context of arbitration law. Foreign Sovereign Immunities Act, 1976 defines a “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act.” It is obvious that such a definition is tautological and is not really helpful. FSIA however directs a court to determine the “commercial character” of an activity by reference to its nature” and not its “purpose”. It is in the interpretation of these provisions that a number of cases have been decided.

PRIVATE PERSON TEST: (PPT)

Courts have evolved the ‘Private Person Test’ to determine commerciality in such cases. The steps involved in this test are:

1. Identification of Relevant Activity.

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185 396 F3d 1289
While this step seems relatively easy and it may appear that all the court would have to do is identify cases like a “contract for purchase of X good.” However, this is not always the case. In some cases, courts have mixed the definition of the relevant activity with the purpose of the activity or with the some other activities which the state has performed. The famous case in this regard is MOL, Inc. vs. People’s Republic of Bangladesh.\(^\text{187}\) The Bangladesh Ministry of Agriculture had granted MOL a license to capture and export a specified quantity of monkeys at designated prices. MOL undertook to build a breeding farm and agreed that the animals would be used only “for the general benefit of all peoples of the world.” After the market price of monkeys rose, Bangladesh terminated the agreement, claiming that MOL failed to construct the farm and sold monkeys to the US military in violation of the agreement. MOL sought arbitration under the agreement, and Bangladesh refused. MOL then sued Bangladesh in the United States, seeking damages for Bangladesh’s termination of the license agreement.

The court held that the nature of Bangladesh’s acts was the “regulation of its natural resources” which was a sovereign activity and not a commercial one and hence Bangladesh was entitled immunity. The decision is a flawed one. There was a breach of contract. However, the court looked at the policy that the activity advanced rather than the activity itself. Thus, it was clearly against the direction mandated by the FSIA.

2. **Identifying whether a private person can engage in the activity.**

The second step has also created a lot of confusion leading to differing results. Does the step focus on judicial form, by asking whether the legal nature of the activity makes it one in which a private person can or cannot engage (e.g. a contract versus a unilateral administrative act by a state)? Or does this test focus on subject matter, by asking whether the content of the activity, whatever is form, is such that a private person can engage in it (e.g., a contract for sale of cement versus a contract in which a state waives taxation)? Earlier decisions concentrated on the juridical nature. A notable observation was made by the U.S. Supreme Court in Republic Of Argentina Vs. Weltover, Inc.\(^\text{188}\) The Supreme Court defined the ‘nature’ of an activity as the “outward form of conduct that the foreign state performs or agrees to perform. It also stated: “the issue is whether

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\(^{187}\) 7362d 1326 (9th Cir. 1984)  
\(^{188}\) 504 US 607
the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages “in commerce .... Thus, a foreign government’s issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a ‘commercial activity’ because private companies can similarly use sales contracts to acquire goods.”

This approach helped in avoiding examination into the purpose of the activity; it still had a number of flows. Since a private person’s legal capacity to engage in a particular activity varies among legal systems, and it is unclear whether a court is to look to the forum legal system or to that of the foreign state defendant to determine immunity. Also, a strict approach along this line led to a situation in which states never enjoyed immunity. Also, a strict approach along this line led to a situation in which states never enjoyed immunity.

Some cases on the other hand focus on the subject matter of the activity.

Thus, Foreign Sovereign Immunities Act, 1936 has not been very helpful. The distinction between nature and purpose of a particular activity has often resulted in confusion wherein courts have not been able to distinguish between the two. The determination of the relevant activity in question is largely discretionary. The observations in two decisions seem relevant in this context. In De Sanchez vs. Banco Central De Nicaragua the court held that an absolute separation between nature and purpose is not possible and many times the purpose (for example whether it is for profit) determines the nature.

In Segni Vs. Commercial Office, the court significantly observed that taken to its logical conclusion, any governmental action, including the “commercial” purchase of goods can be defined as the execution of some governmental policy or otherwise. Similarly to determine whether a private person can engage in that activity is a troublesome test. Thus for example, it is not clear whether the raising of a private security force would be considered to a sovereign function or not. The difficulty is compounded by the fact that in different countries the level of privatization is different.

\[190\] 770 F.2d 1385
\[191\] 835 F.2d 160.
Hence the extent and scope of sovereign functions would necessarily be different. A question may also arise with regard to an activity which is considered as sovereign in the foreign country but not in the host country where the suit lies and vice versa. In such cases, what is the standard to be adopted remains an open question.

(B) CANADA.

The important case in this regard in Canada has been that of Carter Vs. Mclaughlin\textsuperscript{192} In this case an arbitral award had been made after a dispute involving the condition of a house, which had been subject matter of the sale between the two parties. Seeking to prevent the enforcement of the award, McLaughlin argued that the sale was for personal use and neither of the parties was involved in trade and hence the transaction was not “commercial”. The court however rejected this contention. It observed that the mere fact that the sale was unconnected to the regular business activity of the parties was not sufficient enough to term the transaction as non-commercial. Since, in this case the sale was done in a business-like way, with the assistance of professional realtors and within a legal framework appropriate for a transaction involving a large sum of money, it bore all the characteristics of a commercial transaction. In fact, the court observed that the only relationship between the parties was a commercial one.

Another significant case has been Borowski Vs. Heinrich Fiedler GmbH\textsuperscript{193} (Borowski). In this case, there was an employer-employee relationship between the parties and an arbitral clause in the contract. The court however held that the relationship was not a ‘commercial one’. The court cited a number of dictionaries like the Shorter Oxford Dictionary, Webster’s Third New International Dictionary etc. All these defined commerce as something which involves trading of goods, especially on a large-scale for profit. Although, the case of Pinebrook Golf 7 Country Club Vs. Alberta (Assessment Appeal Board)\textsuperscript{194} (Pine brook) did not involve arbitration law, the court cited Black’s Law dictionary which has defined commerce as: “The exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of

\textsuperscript{192} (1996) 27).R. (3d) 792, O.J.Bi, 328.Rutherford J.
\textsuperscript{193} (1994) 158 Alberta Reports, 213, Murray J.
\textsuperscript{194} 1984 CarswellAlta 463.
articles.” In the case of **R Vs. Wqah Kee**¹⁹⁵ it was held that every business of profit could not be automatically classified as a commercial one. It would necessarily involve trading in some article of commerce. Both, Pine brook and Wah Kee have been cited in Borowski to support its stand. It is in this regard that some aspects need to be noted:

1. To imply that commerce necessarily connotes trade in some article that too on a large scale, would mean giving an interpretation which is not consistent with the times. Over the years the idea of commerce has evolved to include many other activities like investment, banking etc. The Footnote to the Model Law is illustrative of that change.

2. The U.S. Courts have held that employer-employee relationships are commercial ones while, as Borowski illustrates, in Canada they are not.

A) **FRANCE.**

As has been mentioned above, the idea of a ‘commercial reservation’ becomes significant in civil law countries. It is also possible that the ‘domestic commerce’ and “international commerce” may be interpreted in different ways.¹⁹⁶ European continental law shows that arbitraction should not be used in consumer contracts unless under some specific rules.¹⁹⁷ However such a restriction mainly applies only in case of domestic arbitrations and not with regard to international arbitrations involving consumers and there is no evidence of any country refusing enforcement of consumer arbitration awards in relation to the Conventions.¹⁹⁸ Such a stance is only in line with the decision of the Paris Court of Appeal in the case of **Kuwait Foreign Trading Contracting And Investment Co. Vs. Icori Estero Spa**¹⁹⁹ The court held that the notion of “commercial” in I.C.A. is distinct from the narrow, technical one employed in domestic contexts. The court observed that the ‘commercial’ character of an international arbitration would not be dependent on the nature of the parties, the purpose of the contract or the applicable law. Rather it would

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be commercial when it related to an economic transaction involving the movement of goods or services. It is clear that by this case, the judiciary in France has aligned French law along the lines of common law systems as well as the approach adopted by modern international legal instruments which do not recognise the civil-commercial dichotomy.

(d) INDIA

The Indian Judiciary has mostly interpreted the term “commercial” quite broadly. In Renusagar Power Co. Ltd. Vs General Electric Co.\(^{200}\) the Supreme Court held that the Foreign Awards (Recognition and Enforcement) Act, 1961, (which contained a similar provision with respect to commerciality) was meant to facilitate international trade and hence the expression should receive a liberal construction.\(^{201}\) In the case of R.M.Investments And Trading Co. (P) Ltd. Vs. Boeing Co.\(^{202}\) the Supreme Court held that the term commercial should be considered broadly and the Model Law can be referred to. In this case, the court held that consulting was a commercial activity and commercial need not always imply trade. Many judgments involving arbitration law have cited the famous case of Atiabari Tea Co. Ltd. vs. State of Assam\(^{203}\) despite the fact that the case did not deal with arbitration. The Court held: “Trade and commerce do not mean merely traffic in goods, i.e. exchange of commodities for money or other commodities. In the complexities of modern conditions, in their wide sweep are included carriage of persons and goods by road, rail, air and waterways, building contracts, banking, insurance transactions in the Stock Exchanges and forward markets, communication of information, supply of energy, postal and telegraphic services and many more activities – too numerous to be exhaustively enumerated – which may be called commercial intercourse.”

However, there have been some other decisions which gave narrow interpretation despite such mandates. In Josef Meisaner Gmbr & Co. Vs. Kanaria Chemicals & Industries Ltd.\(^{204}\) And Kamani Engineering Corp.Ltd. Vs. Societe De Traction Et.

\(^{202}\) AIR 1994 SC 1136
\(^{203}\) AIR 1961 SC 232
\(^{204}\) AIR 1985 Cal. 45 at 54.
D’ Electricity Societe Anonyme, the court held that the transactions were non-commercial merely because of the fact that they involved agreements for the supply of technical know-how. In the present time, this narrow interpretation is not desirable at all and if Courts insist on such an interpretation, this would cause a lot of avoidable trouble and anxiety to the business community.

In Indian organic chemicals ltd. vs. chemtex fibres inc (Chemtex), a technology transfer agreement was held to be non-commercial. The Court held that it would not be enough to prove that an agreement was commercial. Rather, it would be necessary to prove that it was commercial by virtue of a provision of law or operative legal principle in force in India. Better sense prevailed land this case was overruled in European Grain & Shipping Ltd. Vs. Extractions (P) Ltd, where the court held that the mere use of the word “under” would not necessarily mean that a statutory provision or provision of law which specifically deals with the subject matter of a particular legal relationship being commercial in nature needs to be proved. Clearly, the decision was a flawed one.

The aforesaid analysis on ‘commerciality’ suggests that given the aims of international commercial arbitration law and the current era of globalization, a broad construction should be adopted. While it is impossible to exhaustively list each and every commercial relationship, an express amendment to the Indian Act in the main body of the statute, similar to Footnote 2 of the Model Law, would help in bringing about clarity and certainty. It would be advantageous for the global business if courts globally give liberal construction to the ‘commercial’. Only then, international commercial arbitration would be able to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration. Otherwise, the world business community would be busy interpreting the word ‘commercial’ and in the process defeating the very purpose of commercial arbitration.

**Doctrine of Fundamental Breach:**

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205 AIR 1965 Bom 114 at 118.
206 AIR 1978 Bom 106.
207 AIR 1983 Bom 36.
The United Nations Convention on Contracts for the International Sale of Goods ("CISG") first came into force on January 1, 1988.\(^{209}\) The CISG governs the sale of goods between private parties whose places of business are in different nations and whose nations are Contracting Parties to the CISG.\(^{210}\) This Convention is a milestone in the movement to codify the private international law of the sale of goods and has achieved strong world-wide approval.\(^{211}\) Unless another source of law is expressly chosen to govern the transaction, parties to contracts involving the international sale of goods will need to consult the CISG to determine their legal rights, duties, and remedies.\(^{212}\) In cases where the parties are of equal bargaining strength and the choice of law either cannot be resolved or is deliberately left out of the contract, the provisions of the CISG will apply.\(^{213}\) The CISG may benefit parties who are of unequal bargaining strength because it is forum neutral, and thus puts neither party at a disadvantage. The Convention will also benefit those parties who fear potential litigation under an unfamiliar foreign law. Perhaps the most important provisions of the CISG are its remedy provisions. The CISG's remedy provisions are divided into sections providing exclusive remedies for the buyer for breach of contract by the seller,\(^{214}\) exclusive remedies for the seller for breach of contract by the buyer,\(^{215}\) and damages provisions for use by any aggrieved contracting party.\(^{216}\) These provisions include monetary damages,\(^{217}\) specific


\(^{210}\)CISG, supra note 1, art. 1, S. TREATY Doc. 98-9 at 22, 19 LL.M. at 672.

\(^{211}\)Sixty-two countries participated in the drafting of the CISG. Alejandro M. Garro, Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods, 23 INT'L LAW. 443,444 (1989). As of February 12, 1992, thirty-four countries have approved, ratified, accepted or acceded to the CISG. UNITED NATIONS, COMMISSION ON INTERNATIONAL TRADE LAW, STATUS OF CONVENTIONS (1992)

\(^{212}\)Id. See also Peter Winship, International Sales Contracts Under the 1980 Vienna Convention, 17 UCC L.J. 55,65 (1984) (acknowledging possible party argument that the CISG is nonoperable by implication and suggesting that parties explicitly exclude the CISG within their contract language should another governing body of law be desired).

\(^{213}\)CISG, supra note 1, arts. 46-52, S. TREATY Doc. No.98-9 at 31-33, 19 LL.M. at 681-85. See in particular id. art. 45 (delineating the rights the buyer may exercise upon a seller's breach).

\(^{214}\)Ibid. arts. 62-65. See in particular id. Art 61 (delineating the rights of the seller upon breach of contract by the buyer).

\(^{215}\)Ibid. arts. 74-77. Article 78 allows parties to recover interest on sums in arrears by a party who fails to pay on time, whether or not the aggrieved party chooses to claim other damages. Id.art. 78. Article 79, however, does provide defences for breach of contract claims. Id. Art 79.

\(^{216}\)Ibid. arts. 74-76.2. CISG, supra note 1, art. 6, S. TREATY Doc. No.98-9 at 23, 19 LL.M. at 673.

\(^{217}\)Ibid. arts. 46(1),62. (providing for the right of both buyer and seller, respectively, to compel performance). See also id. art. 28 (preventing a party from obtaining specific performance in a forum or jurisdiction which does not allow relief in the form of specific performance).
performance,²¹⁸ and contract avoidance.²¹⁹ As can be imagined, contract avoidance is a powerful remedy which "releases both parties from their obligations under [the contract], subject to any damages which may be due."²²⁰ One of the instances in which a party may avoid the contract and be relieved of performance is upon the occurrence of a "fundamental breach." Article²²¹

Article 25 does not provide any examples of events that would constitute a fundamental breach. Instead, it defines fundamental breach in terms of the detriment to the injured party based on the injured party's contractual and other expectation interests. Article 25 defines the term "fundamental breach": "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."²²²

Article 1(1) state: This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. Article 2 excludes particular transactions or sales of particular types of goods from the operation of the CISG. This article provides: This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;

²¹⁸ Ibid. arts. 49,64 (specifying the grounds for contract avoidance for the buyer and seller respectively).
²¹⁹ Ibid. art. 81.
²²⁰ Ibid. arts. 49(1)(a), 64(1)(a). Article 49(1)(a) states: "The buyer may declare the contract avoided: if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. ..." 49(1)(a). Article 64(1)(a) states: "The seller may declare the contract avoided: if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. ..." art. 64(1)(a).
²²¹ Ibid. art. 25.
²²² Ibid
(d) of stocks, shares, investment securities, negotiable instruments or money;
(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity.

Article 6 states: "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."


The rules on construction and interpretation of CISG provisions must first be understood in order to properly define fundamental breach under Article 25. CISG Article 7 provides the rules concerning the Convention's interpretation:

"(1) in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

"(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."\(^{223}\) Article 7(1) basis the rules of interpretation on the "international character" of the CISG, the promotion of uniformity in application, and on "good faith in international trade."\(^{224}\) Article 7(2) is a gap-filling interpretation rule which relies on the general principles upon which the CISG is founded to resolve situations that are not expressly settled within its text.\(^{225}\) Article 7(2) is concerned with issues governed by the CISG that have not been expressly stated.\(^{226}\) By a plain meaning interpretation of Article 7(2), it is possible to conclude that if the CISG's text governs a matter, and it can be settled by resorting to the express provisions of the CISG, then

\(^{223}\) CISG, supra note 1, art. 7, S. TREATY Doc. No.98-9 at 23-24, 19 LL.M. at 673.

\(^{224}\) Ibid.

\(^{225}\) Ibid. The reliance of Article 7(2) on general principles underlying the CISG prevents a judicial or administrative body from resorting to domestic law to fill-gaps; it requires them to look to the CISG's international background and development for answers. BIANCA, supra note 15, at 78.

\(^{226}\) Matters that are not within the scope of the CISG are to be resolved by existing non-unified national laws. BIANCA, supra note 15, at 75. Examples of matters not governed by the CISG include the capacity of the parties to contract, or the authority of a third-party to contract, on behalf of another. Id. at 76. Article 41imits the CISG's overall scope to contract formation and the rights and duties of the parties to the contract. CISG, supra note 1, art. 4, S. TREATY Doc. No.98-9 at 23, 19 LL.M. at 673.
interpretation should be restricted to the rules under Article 7(1). Article 7(1)'s interpretive rules -- "international character," "promotion of uniformity," and "good faith" -- are basic rules which themselves have been interpreted by commentators.\(^{227}\) The "international character" component generally means that judicial, arbitral, or conciliator bodies interpreting the CISG, can resort to its legislative history and cannot base any interpretation on any particular domestic law.\(^{229}\) The terms being interpreted must also be read as they are presented in the Context of the CISG.\(^{230}\)

The principle of uniformity of application supports the notions that interpretations based on domestic law should be avoided and that the CISG's legislative history may provide guidance to assure uniformity of application. Uniformity of application also requires tribunals to take into consideration the decisions and interpretations made by like bodies as well as the analyses provided by scholarly commentary.\(^{231}\)

The last interpretative rule is the requirement that the international trade standard of good faith be observed.\(^{232}\) Again, commentators agree that the good faith element should not be construed using notions of good faith in domestic laws.\(^{233}\) Beyond these basic grounds of agreement there are no other specific conclusions drawn with respect to the good faith standard to be applied notwithstanding the ambiguous nature of Article 7(1)'s good faith element, Article 7 provides clear guidance with respect to the

\(^{227}\) The Vienna Convention on the Law of Treaties, done on May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention") has been regarded as customary international law with respect to treaty construction. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 121 (5th ed. 1984)

\(^{228}\) Within each international state, municipal or local courts may be forums for CISG litigation. However, there has been a growing trend for contracting parties to request commercial arbitration and conciliation to resolve contract disputes. See international chamber of commerce, 3 ICC international court of arbitration bulletin 5 (1992).

\(^{229}\) See BIANCA, (discussing the requirement to avoid interpretation based on domestic law); HONNOLD, supra note 27, at 137 (stating that "international character" refers to legislative history, termed a law's "genetic background").

\(^{230}\) BIANCA, (pointing out that the CISG drafters did not intend to have the terms they compromised over interpreted in the context of any domestic law).


\(^{232}\) Article 7(1)'s good faith element does not specifically impose an obligation of good faith on the parties to the contract. The good faith element of Article 7(1), although not an express duty on parties, may be an implied obligation. See BIANCA.

\(^{233}\) Id. at 86; but see HONNOLD, (stating that although the international convention objects to using local definitions to construe international text, this does not apply to "good faith" principles that reflect a consensus -- a "common core of meaning" -- in domestic law).
interpretation of CISG provisions. Article 7(1) allows for the use of legislative history and scholarly commentary to shed light on the meaning of CISG terms. It requires that case law construing CISG terms be used and uniformly applied. Article 7(1) also may allow the use of international trade standards for guidance in the interpretation of CISG terms.

The Vienna Convention's rules govern the interpretation of treaties which deal with obligations of the signatory states. It is limited, therefore, to interpretation of treaty language which establishes the rights and duties between the signatory states themselves. Articles 1 through 88 of the CISG specify the rights and duties of private parties to a contract which is governed by the CISG, not the rights and duties of the Contracting states themselves. In light of Article 7, which expressly establishes the rules of interpretation for Articles 1 through 88, only Articles 89 through 101 which deal with the rights and duties of the Contracting states may be subject to interpretation under the rules of the Vienna Convention.

A statistical survey compiled by the International Chamber of Commerce ("ICC") in 1991 also showed that of 736 cases before the ICC International Court of Arbitration, 27 percent of them involved the sale of goods. Both the ICC and UNCITRAL have their own rules of conciliation and arbitration. At the UNCITRAL Congress on Uniform Commercial Law in the 21st Century held between May 18-22, 1992 at the United Nations Headquarters in New York, Professor Louis B. Sohn presented a proposal for an international tribunal to handle private international law cases. Professor Sohn argued that an international tribunal could provide a forum for uniform interpretation, prevent forum shopping, and cut the costs of litigation. Good faith is an underlying principle of the CISG and therefore may impose additional positive duties on contracting parties.

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234 see international chamber of commerce, icc rules of conciliation and arbitration (1991); united nations commission on international trade law, uncitral arbitration rules (1977); united nations commission on international trade law, uncitral conciliation rules (1981).

235 Louis B. Sohn, Proposals for an International Tribunal to Interpret Uniform Legal Texts, in UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, SUMMARY OF STATEMENTS OF THE UNCITRAL CONGRESS 124 (1992)
E. Claiming Damages in Cases of Fundamental Breach

With respect to damages, there are two types of parties injured by fundamental breaches -- those who have declared their contracts avoided and those who have not. Parties injured by fundamental breach that have not declared the contract avoided are entitled to damages under Article 74.\textsuperscript{236} Article 74 allows an injured party to recover damages equal to the loss suffered as a consequence of the breach plus lost profit.\textsuperscript{237} These damages, however, are limited to the extent that the loss suffered was reasonably foreseeable to the breaching party at the time of the conclusion of the contract.\textsuperscript{238} What was actually foreseeable or reasonably foreseeable will depend on the actual knowledge of the breaching party and what objective merchants in the breaching party's position would have known. In cases where the contract has been avoided there are three possible formulas for calculating damages: (1) substitute transaction damages ("cover" damages); (2) "current" or market-based damages; and (3) "unique" goods damages.

In order for an injured party to recover substitute transaction damages after the contract has been avoided, the resale or replacement purchase of the goods must have occurred in a reasonable manner and within a reasonable time after avoidance.\textsuperscript{239} Whether the injured seller's resale or the injured buyer's replacement purchase occurred in a reasonable manner and within a reasonable time after avoidance will depend on the particular facts and circumstances of the individual case. The object for the injured party to maintain the commercial reasonability of the substitute transaction is for the buyer to obtain the lowest priced comparable good and for the seller to obtain the highest sale price for his goods.\textsuperscript{240} The substitute transaction damages will equal the difference

\textsuperscript{236} CISG, \textit{supra} note 1, art. 74, S. TREATY Doc. No.98-9 at 37, 19 LL.M. at 688.
\textsuperscript{238} CISG, \textit{supra} note 1, art. 74, S. TREATY Doc. No.98-9 at 37, 19 LL.M. at 688.
\textsuperscript{239} \textit{Id.} art. 75.
\textsuperscript{240} "For the substitute transaction to have been made in a reasonable manner within the Context of Article 75, it must have been made in such a manner as would be likely to bring the highest price on resale reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible." BIANCA, \textit{supra} note 15, at 550.
between the contract price and the substitute transaction price plus incidental and consequential damages, including lost profit less any expenses saved.\textsuperscript{241} An injured party who has not engaged in a substitute transaction after the contract has been avoided and has not "taken over the goods" after declaring the contract avoided, may recover the difference between the contract price and the "current" price of the goods at the time of avoidance plus incidental and consequential damages, including lost profit less any expenses saved.\textsuperscript{242} If an injured party (usually the buyer) has "taken over the goods," i.e., taken physical possession of them or has control over them, and thereafter declares the contract avoided, that party may recover the difference between the contract price and the current price of the goods at the time they took possession of them plus incidental and consequential damages, including lost profit less any expenses saved.\textsuperscript{243} The current price of the goods is equal to the "price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for difference in the cost of transporting the goods."\textsuperscript{244} Therefore, in most cases, the current price will be the market place of the goods at the place of delivery. If there is no market for the goods at the place of delivery then the current price will be based on the market price in a substitute market less excess delivery expenses. The last measure of damages in cases of avoidance involves sales of unique or specially manufactured goods for which there is no market and therefore no current price. Article 76 does not address this problem. In cases where the buyer has sought to buy specialized or unique goods and the seller commits a fundamental breach of contract, the buyer may wish to sue for specific performance under Article 28.\textsuperscript{245} However, the injured buyer may wish to resort to damages instead. The problem is how to measure the buyer's damages where there is no market for the goods, and therefore, no possible substitute transaction for the buyer to enter into. One way of measuring the buyer's damages is suggested by Article 74. Under Article 74, the damages a party normally receives are

\textsuperscript{241} CISG, supra note 1, art. 75, S. TREATY Doc. No.98-9 at 37, 19 LL.M. at 689. The substitute transactions damages formula presupposes that an injured buyer had to buy goods at a price higher than those under the contract and that an injured seller sold the goods for a price less than the contract price. See BIANCA; supra note 15, at 550.

\textsuperscript{242} See CISG, supra note 1, art. 76(1), S. TREATY DOC. No.98-9 at 37, 19 LL.M. at 689.

\textsuperscript{243} Ibid.

\textsuperscript{244} Ibid, art. 76 (2).

\textsuperscript{245} Ibid, Art. 28.
equal to the difference between the market price and the contract price plus incidental and consequential damages less expenses saved. In these circumstances, arguably, the market price and the contract price are the same; therefore, the buyer will only be able to recover his incidental and consequential damages. There will be no expenses saved because the buyer cannot engage in an alternative transaction. Article 76 also fails to address the damages for a seller who has produced, or is contracted to produce, a special or unique good for which there is no current price, where the buyer commits a fundamental breach, and where after the seller avoids the contract. Again, one may resort to Article 74. Under Article 74, a seller who has not yet manufactured the good would be entitled to recover any incidental and consequential damages under the analysis provided above for an injured buyer. On the other hand, a seller who has completed manufacturing the good is entitled not only to lost profits, and incidental and consequential damages, but the seller should also be entitled to the price for the good. A seller who has manufactured the good prior to the buyer's breach should be allowed to recover the price for the goods because they have expended time, effort, and costs in the manufacturing process for which they would not otherwise be compensated. The only way to place such a seller in the position he would have been in if the contract was performed is to allow for recovery of the contract price.

From these examples the following calculation can be drawn: damages = market price or cover price - contract price + incidental damages + lost profit + consequential damages - expenses saved. (allowing seller to make resale if done in good faith and in a commercially reasonable manner; and allowing seller to recover the difference between resale price and the contract price plus incidental damages less expenses saved), 2-708(1) (allowing seller to recover damages for buyer's repudiation or non-acceptance equal to difference between market price at the time and place for tender and the unpaid contract price plus incidental damages less expenses saved), 2-712(2) (allowing buyer to "cover" and recover damages equal to the difference between the cost of cover and the contract price plus incidental or consequential damages less expenses saved), 2-713 (allowing

246 Ibid, Art. 74.

buyer to recover on seller's repudiation or non-delivery damages equal to difference between the market price at the time when buyer learned of the breach and the contract price plus incidental and consequential damages less expenses saved). In cases where a buyer injured by a fundamental breach has accepted the goods, his damages will be equal to the difference between the value of the goods had they been as contracted for and the value of the goods accepted plus any incidental damages. There is no calculation given to determine lost profit.

4.3 TRANSNATIONAL LAW ON ARBITRATION – CONSTITUENT ELEMENTS:

“The essence of the theory of ‘transnational arbitration’ is that the institution of international commercial arbitration is an autonomous juristic entity which is independent of all national courts and all national systems of law.” One of the primary purposes of trans-nationalist movement is to break the links between the arbitral process and the courts of the country in which the arbitration takes place.

4.3.1. INTERNATIONAL COMMERCIAL LAW AND CONTRACTS:

Is the body of law that governs international sale transactions? A transaction will qualify to be international if elements of more than one country are involved.

Lex mercatoria refers to that part of international commercial law which is unwritten, including customary commercial law; customary rules of evidence and procedure; and general principles of commercial law.

International commercial contracts:

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249 See BIANCA; supra note 15, at 544 (discussing possible calculations of lost profits)


251 Ibid at p.35.


International commercial contracts are sale transaction agreements made between parties from different countries. The methods of entering the foreign market, with choice made balancing costs, control and risk, include: Export directly.

1. Use of foreign agent to sell and distribute. Use of foreign distributor to on-sell to local customers. Manufacture products in the foreign country by either setting up business or by acquiring a foreign subsidiary
2. Licence to a local producer.
3. Enter into a joint venture with a foreign entity.
4. Appoint a franchisee in the foreign country.

I. Used where inadequate knowledge of the foreign market.
II. Used where adequate knowledge of the foreign market.


The United Nations Convention on Contracts for the International Sale of Goods (CISG) also known as the Vienna Convention is the main convention for international sale of goods. Established by UNCITRAL, the Convention governs the conclusion of the sale contract; and buyer and seller obligations, including respective remedies. It is not concerned with the validity or provisions of the contract nor its effect on the property sold. However, the Convention has been in force since 1 January 1988, and by September 2005 had been ratified by 65 parties, which include the United States, most of the European Union Member States and almost all of the U.K’s main Trading partners. The Convention is divided into four parts:

(a) Part-I (Arts 1-13) contains the Convention’s general provisions, including its sphere of application and rules of interpretation.
(b) Part-II (Art-14 to 24) contains provisions on the formation of the contract (but not validity)
(c) Part-III (Art-25 – 88) deals with the sale of goods, in particular with the parties’ rights and duties, the passing of risk and remedies (but not property),

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(d) Part-IV (Art 89 – 101) sets out the final provisions, including rules regarding ratification and entry into force of the convention.

Scope and Application of the Vienna Convention:

According to Art-1 of the Convention, it is applicable –

(a) If there is a contract of sale of goods;

(b) If that contract is between parties who have their place of business in different States, and

(c) If one of the following situations is fulfilled:

(i) When the States are contracting States to the Convention; or

(ii) When the conflict rules lead to the application of the law of a Contracting State.

Conflict rules, also called rules of private international law or conflict of laws, are rules that are applied to cases with an international element, in order to identify which country’s law needs to be applied to the case. This is then known as the ‘applicable law or proper law of the contract’. If this ‘applicable law’ of the contract is the law of a Contracting state, then the Convention will apply, providing the other criteria are met. However, the parties can expressly exclude or vary the Convention’s application (Art-6).

Most of the standard term contract are based on English Law specifically exclude the application of the Vienna Convention.

If the parties want to use a choice of law clause to make the laws of a particular State applicable, it is essential that they are aware of all the conventions ratified by this State. Otherwise, the law applicable may not turn out to be what the parties had intended. As the rights and duties of the parties differ from one legal system to another, it is crucial for the parties to know the rules of any particular legal system they select.

Notable Features of the Vienna Convention:

The obligations of the parties under the Vienna Convention are largely similar to those under domestic law; however, there are some major difference regarding the formation of the contract and the remedies. It must be noted that the Convention does not cover the validity of the contract or the effect of the contract on the property in the goods. (Art-4)
i) Formation of Contract:

An offer is usually revocable. However, it will not be revocable and will therefore be irrevocable in accordance with Art-16(2) where

a) The offer indicates this by stating it or by giving a fixed time for acceptance; or

b) The offeree could reasonably rely on the offer being irrevocable and if he has also acted in reliance on the offer.

An acceptance becomes effective once it reaches the offeror and not before (Art-18(2)). The offeree can withdraw the acceptance if the withdrawal reaches the offeror before or at the same time as the acceptance (Art-22 together with Art-18(2)).

According to Art-19(2) the acceptance of an offer on slightly different terms, which does not materially alter the terms of the offer, still constitutes an acceptance, unless the offeror objects. Art-19 gives further guidance as to what is considered a material alteration.

2) Breach of Contract and Remedies:

There are neither conditions nor warranties. However, the Convention uses a test similar to the one for innominate terms (Art-25). Only in case of a fundamental breach, which substantially deprives the innocent party of what he is entitled to expect, can the innocent party avoid the contract (Art-49, 51(1) (2).

- If certain conditions are met, the seller may have a right to remedy the defective performance (Art-34, 37 and 48).

- Under certain circumstances the buyer has a right to demand performance of the seller’s obligation, ask for substitute goods or repair. (Art-46)

- In case of defective delivery of the goods, the buyer may be available to reduce the price proportionally if the seller does not cure the defect. (Art-50)

According to Art-39(2) there is a finite time limit for rejection of the goods for non-conformity, which is two years from physical delivery. Art-75 states that the damages due for avoidance of the contract are measured on the basis of a substitute transaction, if the innocent party undertook this transaction in a reasonable manner within a reasonable time after the avoidance. This does not prejudice a claim for any further damages according to Art-74.
**Passing of risk:** The passing of risk, unlike in English Law (SoGA 1979, Sec-20), is not connected to the passing of property, but to the control over the goods. (Art-67-69)\(^{256}\)

The importance of CISG is its interpretation. International context, uniformity and observance of good faith must be regarded when interpreting the Convention. Matters not expressly settled by CISG are to be determined according to the general principles of CISG; or in such absence, according to rules of private international law. The UNIDROIT Principles on International Commercial Contracts also provide a ‘gap-filling’ role to supplement CISG, so long as it supports a principle deduced from the Convention.

**Incoterms 2000**

Incoterms 2000 refers to the collection of essential international commercial and trade terms. The terms were devised in recognition of non-uniform standard trade usages between various States. When incorporated into a sale contract, the Incoterm code provides a detailed interpretation of rights and obligations between parties. Incoterms do not possess legal status. They are standardised and published, available for incorporation into international sale contracts at the parties’ discretion. Parties should specifically refer to the Incoterms in the sale contract to indicate incorporation. The International Chamber of Commerce (ICC) is responsible for revising Incoterms periodically to reflect changing practices in international trade.

**Contract of carriage of goods**

In the carriage of goods by sea, air or land, goods may be lost, damaged or deteriorated. The bill of lading (transport document used almost exclusively for carriage of goods by sea) is a contract of carriage between the consignor, the carrier and consignee that acts as a receipt of transfer of goods and as a negotiable instrument. The bill of lading also determines rights and liabilities agreed between parties to an international sale contract. Also reservations as to the quality and quantity of the goods are marked on the bill when accepting goods so as to stifle any accusations from the consignee of damage in transit. The consignor retains ownership of the goods until the bill of lading is transferred to the consignee. Most bills of lading today are governed by international conventions

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\(^{256}\) Simone Schnitzer, Understanding the International Trade Law, Universal Law Publishing Co. (First Indian Reprint-2007) pp.56-58
such as the Hague Rules, Hague-Visby Rules and Hamburg Rules. These rules impose minimum responsibilities and liabilities that cannot be softened by contract.

**Title to sue**

Where loss or damage to goods is incurred by a party to the contract of carriage, that person may sue directly on that contract. A seller under a CIF (‘cost, insurance, freight’) sale contract will have entered into the contract of carriage directly with the carrier, and can sue as principal. Where loss or damage occurs when risk has passed to the buyer, the buyer may benefit under the contract of carriage with the seller, depending on contract terms between buyer and seller. Under an FOB (‘free on board’) sale contract the bill of lading determines if either the seller or the buyer is named as the shipper. This will ascertain who has contracted as principal to bring action against the carrier. Where loss or damage occurs before risk passes to the buyer, the seller may benefit under the contract of carriage made with the buyer.

**Who to sue**

The party to be sued on a contract of carriage may vary from the ship owner, the charterer or the freight forwarder. A distinction is made between the physical carrier and the legal carrier, the person contractually responsible for the carriage. If the consignee is suing on an implied contract of carriage or there is negligent carriage of goods, it is the physical carrier against whom action is brought.

**Insurance in international trade**

Insurance against perils is an important aspect of international commercial transactions. In the event of loss or damage to cargo due to hazards during voyage, an insured party will be able to recover losses from the insurer. The type of insurance required depends on the mode of transport agreed between parties to transport the cargo. Such insurance forms include marine, aviation and land. The type of insurance contract depends on the Incoterm adopted by the parties in a sale contract. A CIF sale contract requires the seller to obtain insurance cover for the voyage. An FOB contract however places no obligation on the buyer or seller to obtain insurance, although it is prudent for the buyer to protect against potential losses. It is not uncommon for the buyer in a FOB
contract to request the seller to arrange insurance on an understanding that they will reimburse the insurance costs incurred.

Insurance obtained must cover only those goods that are being sold and stipulated in shipping documents. The insurance must also cover the entire voyage of the sale contract. Where it covers only party of the transit, the buyer will be able to reject the documents upon tender. Marine insurance contracts may be divided into hull insurance or cargo insurance. There is no uniform law or convention for international marine insurance. However commercial customs, usage and practices in international marine insurance have played a significant role in regulating marine insurance internationally. Thus the marine insurance contract is subject to both general principles of contract law and relevant domestic marine insurance law.

Aviation Insurance contracts may be divided into hull insurance; cargo insurance; airport owners and operators liability; hovercraft insurance; spacecraft insurance; and commercial aircraft insurance. International Conventions applying to the carriage of goods by air include the Warsaw Convention, Rome Convention, Hague Protocol and Montreal Protocol. These conventions together provide guidance to domestic air insurance law.

Payment in international trade

Two broad methods of financing international transactions are direct payment between seller and buyer; or finance through banks. Practically, payment is effected by the following methods:

Cash in Advance: buyer transfers funds to the seller’s account in advance pursuant to the sale contract.

Open Account: arrangement for the buyer to advance funds to an ‘open account’ of the seller on a fixed date or upon the occurrence of a specified event, such as delivery of the goods.

Bills of Exchange: negotiable instrument representing an order to the bank in writing to pay a certain sum of money to the bearer (or specified person) on demand, or at a fixed or determinable future time.
**Documentary Bill:** seller (drawer) draws a bill of exchange on the buyer (drawee) and attaches it to the bill of lading. The idea is to secure acceptance of the bill of exchange by the buyer; and the buyer is bound to return the bill of lading if he does not honour the bill of exchange.

Documentary Credits: the bank, on behalf of buyer, issues a letter of credit undertaking to pay the price of the sale contract on condition that the seller complies with credit terms. Upon presentation of necessary commercial documents verifying shipment of goods, the bank collects payment for goods on behalf of the seller. In the collection process, the buyer pays for goods in exchange for title documents. Under this method the bank guarantees the buyer’s title to the goods and guarantees payment to the seller.

**World Trade Organization (WTO)**

The World Trade Organization supersedes the General Agreement on Tariffs and Trade (GATT) as the organisation dealing with international trade; and provides a common institutional framework for trade relations between contracting parties. It represents a crucial aspect of international commercial law through its objectives of facilitating global trade flow; liberalising trade barriers; and providing an effective dispute settlement mechanism.

**Major functions of the WTO include to:**

Implement and administer the WTO and its annexes.

Provide a forum for negotiating trade-related issues; and issues arising from the WTO Agreement.

Provide a dispute settlement mechanism pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Administer the Trade Policy Review Mechanism (TPRM) which examines the trade policies of members.

Cooperate with the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD).

GATT 1994 is incorporated into the WTO Agreement, and contains three important basic principles in the context of international commercial law:
**Most-favoured nation principle (MFN):**

Expresses that any advantage to a product originating or destined for another country shall be treated in accordance with a like product originating in or destined for the contracting country. Each GATT member must treat all trading partners as well as its most favoured trading partner. *National treatment principle*: prohibits discrimination between imported and like domestic products, other than through the imposition of tariffs. The WTO panels consider tariff classifications, product nature, intended use, commercial value, price and sustainability.

**Reciprocity principle:** encourages negotiations between contracting parties on a reciprocal and mutually advantageous basis, directed towards the reduction of tariffs and other charges on imports and exports.

**Regional trade blocs**

Regional trade blocs are arrangements between States to enable parties to benefit from greater access to each other’s markets. Regional trade initiatives and economic integration is integral to international commercial law through its impact on commercial transactions. In particular, by the creation of free-trade and preferential trading areas; economic and monetary unions; and common markets. Some examples include the European Union, North American Free Trade Agreement and Mercosur.

GATT allows the creation of customs unions and free trade areas as an exception to the MFN principle if it facilitates trade and does not raise barriers to trade of other contracting parties. Anti-dumping and countervailing measures.

**Anti-dumping measures**

Dumping refers to the unfair trading practice of exporting products at a cost below market price. Regulated by GATT, parties cannot introduce products into a foreign country to cause material injury to an established industry or to slow the establishment of a domestic industry. Anti-dumping regimes involve imposing duties that represent the price difference between goods sold on the exporter’s domestic market and goods sold on the import market. Such measures protect against anti-competitive behaviour but are not a means of trade protection. The regimes are not entirely consistent with WTO-GATT aims to liberalise trade barriers and are declining in use in the international trading arena.
However the Committee on Anti-Dumping Practices provides a forum for consultation and exchange of information. Anti-dumping measures can only operate where enacted by domestic legislation since is enforced by the importing country.

**Countervailing measures**

A countervailing duty is imposed for the purpose of offsetting a subsidy. Subsidies are not prohibited under WTO unless there is evidence of injury or damage to the importing country. The Agreement on Subsidies and Countervailing Measures forms the current regime for imposing countervailing duties on subsidised goods to conform to GATT principles. The Committee on Subsidies and Countervailing Measures exists to carry out tasks assigned under the Agreement.

International contracts relating to intellectual property (IP) Developments in international trade through e-commerce have seen an increased emphasis on IP protection. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which replaces earlier international IP agreements, outlines rules to control anti-competitive practices in international licences relating to IP. TRIPS enable compliance disputes to be brought to attention of the WTO. Further it applies basic WTO principles to IP rights, such as the national treatment principle and the MFN principle.

**4.3.2. INTERNATIONAL COMMERCIAL LITIGATION AND CONFLICT OF LAWS:**

The resolution of disputes arising from private international commercial transactions may be conducted through international commercial mediation, litigation or arbitration. Some inherent difficulties of international litigation include the reluctance to litigate in a foreign court due to unfamiliarity or potential bias; and issues of enforcement of a foreign judgment. To overcome this, international commercial arbitration (‘arbitration’) has become a widespread means of solving international commercial disputes. Like mediation, arbitration is a private dispute resolution process pursuant to an agreement between parties. The arbitrator or arbitral panel derives their authority and jurisdiction from the commercial agreement; and their decision is prima facie binding. Arbitration is divided into institutional and ad hoc arbitration. Institutional Arbitration is conducted through an organisation, such as the ICC. The organisation governs the arbitral
process through a set of rules and administrative structures. Resorting to the institution is typically determined by terms of the commercial contract between parties.

Ad-hoc Arbitration occurs where parties have not specifically made reference to arbitral institution in the contract but agree to submit their dispute to arbitration. Parties can agree to arbitrate according to a statute governing arbitration in the State of one contracting party; or according to an independent set of arbitral rules, such as the UNCITRAL Model Law on International Commercial Arbitration. These rules provide coverage of international commercial arbitration and parties do not need to settle on the arbitration rules.

Recognition and enforcement of an international commercial arbitral award will be according to the laws of State seeking enforcement. Where the State has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforcement will be according to the terms of the Convention. The Convention provides a simple, uniform and effective means of enforcing arbitral awards and processes. In practice, the Convention is the chief means of recognition and enforcement of arbitral awards globally. Conflict of laws rules in relation to private commercial disputes International conventions or customs govern international sale of goods contracts, depending on the terms of the sale contract. In the absence of an international convention, domestic law applies. The ‘conflict of laws’ governs which domestic law applies under the principles of private international law. This refers to a situation where the application of respective domestic laws in a commercial dispute can produce very different outcomes. Private law is crucial to international commercial transactions by establishing whether a contract exists; rights and obligations between parties; and the extent of liability if the contract is not performed. Disputes between governments in relation to the design and implementation of trade measures: A key role of the WTO in international commercial law is the dispute settlement mechanism for trade disputes. The DSU provides a comprehensive set of rules and procedures to implement each party’s obligations under the WTO Agreement, either in isolation or in combination with an agreement between parties. Another important feature is the WTO TPRM which examines a member’s trading policies to determine whether they have potential adverse effects on other member states.
International trade fraud

International trade fraud is an incident of international commercial transactions. It affects traders through loss of cargo, increased insurance premiums and shipping expenses, as well as the cost to final consumers. The types of fraud vary from documentary fraud; charter-party fraud; fraudulent insurance claims; scuttling; diversion of cargo; counterfeiting, and money laundering.

A notable case in international trade fraud is the Salem Case. This case involved the scuttling of a ship carrying more than 200,000 tons of crude oil. Millions of pounds were lost by the cargo owners, being the highest value conspicuously lost in history. Although US$56 million was claimed from rights assigned under the insured cargo, little has been recovered from the fraud. The case alerted governments and multinational corporations of the inherent risks involved in international operations. It further highlights that complications of international jurisdiction make it difficult to successfully prosecute fraudsters.

Harmonisation of international commercial law

This predominantly occurs through legal instruments governing commercial contracts is limited in its scope since it depends upon incorporation into contracts. For any pragmatic effect there must be a degree of uniformity in commercial practice between the contracting parties.

Model Laws promote the unification of international commercial law. Some examples are the UNCITRAL Model Laws on International Commercial Arbitration.

- International Credit Transfers 1992 (largely adopted by the EU).
- Electronic Signatures.
- Electronic Commerce 1996.
- International organisations that attempt to harmonise international commercial law include:
  - UNCITRAL: Important in the areas of international carriage of goods, international bills of exchange and promissory notes, and international arbitration.
- UNIDROIT: Important in the area of international financial leasing and sale of goods. Notably UNIDROIT has created the ‘Principles of International Commercial Contracts’ which in the future could provide the source of Lex mercatoria.
- ICC: Influential in harmonising international contract terms and global arbitration practices.

International Conventions relevant to international sale of goods include:
- UN Convention on International Bills of Exchange and International Promissory Notes 1988
- UN Convention on Independent Guarantees and Stand-By Letters of Credit 1995

4.3.3. TYPES OF INTERNATIONAL COMMERCIAL DISPUTES AND POSSIBLE REMEDIES:

When the contract concerns the sale of goods, a dispute may arise with respect to, among other things, the quality of the goods, their price and payment, transportation, and conditions of delivery. Disputes could be avoided by providing clear stipulations on these matters in the contract itself. Parties may refer to:

- The I.T.C. Model Contract for the International Sale of Perishable Goods
- The ICC Model International Sale Contract: Manufactured Goods Intended for Resale
- The ITC Juris International Website, where several other model sales contracts can be found.

It is also useful to note that Incoterms are a basic reference for avoiding disputes in sales contracts. They define clearly the responsibilities of buyers and sellers with regard to delivery, insurance, customs procedures, etc. and they are recognized as the international

258 (available, free of charge to developing countries, from the International Trade Centre, Palais des Nations, 1211 Geneva 10, Switzerland http://www.intracen.org visited on 2/4/09
259 (available from ICC Publishing SA, 38 Courts Albert 1 er 75008 Paris, France http//www.iccwbo.org visited on 13/8/10
260 http://www.jurisint.org visited on 14/8/10
standard by customs authorities and courts in most trading nations. The purpose of Incoterms, which have been compiled by the International Chamber of Commerce, (ICC), is to provide a set of international rules for the interpretation of the most commonly used terms in international trade. Thus, the uncertainties arising out of different interpretations in different countries can be avoided, or at least reduced to a considerable degree. There are 13 valid Incoterms in the latest set, which came into effect in January 2000 (the previous version was from 1990). When an Incoterm is included in a contract, in order to avoid any ambiguity, ICC recommends that the words “Incoterms 2000” should always follow it, e.g. ‘…FOB Kuala Lumpur, Incoterms 2000’.

Disputes may also arise with respect to the opening of a letter of credit, the conditions of the transfer of the payment, the time of payment, etc. Letter of Credit disputes can now be settled through a process called Documentary Credit Dispute Expertise (DOCDEX) on the basis of documents only, administered by the International Chamber of Commerce. In the commodities sector, sales are often made on a consignment basis, without reference to any contract. Unless parties have developed a long term relationship, the absence of a contract will place the seller at a disadvantage in case a dispute arises over the quality, quantity or price of the goods. It is likely then that the case will have to be brought before the State courts of the buyer’s place of business.

In specialized commodity trades, such as coffee, cereals, cocoa, oils and fats, the relevant trade associations have developed standard model contracts containing clauses which usually refer to their own set of arbitration rules. These summary expert arbitrations deal mainly with the quality of a commodity and are usually run on the basis of expediency. Distributorship, agency and intermediary contracts: With a distributorship agreement, disputes may arise, again, over many different aspects. For Example:

- The manufacturer/vendor fails to supply the goods to the distributor/agent in conformity with the contract or at the time provided in the contract;

- The manufacturer/vendor supplies the goods to competitors of the distributor/agent, in a situation where the distributorship contract clearly stipulates exclusivity for the distributor/agent;
- The distributor/agent fails to purchase from the manufacturer/vendor the quantities that are contractually stipulated, or fails to purchase at the time agreed;

- The distributor/agent distributes the goods outside the territory licensed to it by the manufacturer/vendor;

- The distributor/agent appoints a sub-distributor/sub-agent, in a situation where this is not allowed by the manufacturer/vendor;

The distributor/agent starts producing products which are similar to those made by the manufacturer/vendor, in a situation where such parallel production is not permitted;

- The distributor/agent refused to pay the manufacturer/vendor for the products.

Parties may turn to various methods of resolving such disputes. In certain instances it may be sufficient to call upon an expert to establish, for example, the quality of the goods, or the number of sales made by the agent. For other disputes, such as those relating to termination of the contract, the case may need to be brought before a judge or an arbitrator. As these contracts may involve sensitive, confidential commercial information, some business partners may wish to provide for arbitration in their contracts.

Construction, engineering and infrastructure contracts: Performance of international construction and engineering contracts is often spread over several years and frequently involves considerable sums of money.

Disputes may arise, for example, because:

- The work constructed or engineered does not comply with the contractual stipulations;

- The work is not completed within the contractually stipulated time;

- The construction necessitates new, more or different materials or structures (variations) which were not provided for in the contract or in the agreed price:

- Authorities in the country where the construction is under way impose new requirements, which have an influence on the scope and the cost of the works;
- Subcontractors called in to carry out a part of the contract do not perform in accordance with the contractual stipulations agreed between the main contractor and the owner of the works;

- The owner refuses to provide a payment guarantee, or refuses to pay the price of the performed work, or of part of it; or

- The contractor fails to provide a performance guarantee, or any other guarantee.

It is not unusual for several disputes to have to be settled during the various phases of a construction contract. What is of particular concern, though, is that the construction schedule is not interrupted while these disputes are being addressed. Because of the length, scope and high costs of operations carried out under construction contracts, some elaborate dispute resolution clauses are often developed, either on an ad hoc basis or in accordance with established standards. In the past, if a dispute arose, the employer’s engineer, acting impartially, had the authority to make decisions—which could eventually be revised by arbitration. Since the mid-1990s, most of the relevant clauses in major contracts have combined the intervention of a dispute adjudication board, or dispute review board, with arbitration.

In the well-known FIDIC (International Federation of Consulting Engineers) Conditions of Contracts, appropriate procedures for claims by either party against the other are set out. These include provision for disputes to be heard by a dispute adjudication board (DAB) consisting of either one or three persons, eventually to be followed by arbitration. The World Bank’s Standard Bidding Document for Procurement of Works (1995) stipulates the use of dispute review boards for all contracts with a value in excess of US 50 million dollars.

In other situations, the contract may have to be interpreted or adapted by a third party, or a declaratory relief may have to be given by a judge or an arbitrator.

Intellectual Property Contracts: It is likely that an international business contract also involves aspects of Intellectual Property (IP) rights, such as patent licensing, trademarks, technical assistance and transfer of technology or know-how. Disputes arising from IP licenses come in a wide variety of forms. They may be about:
- Whether royalties are payable;
- The amount of royalties due;
- Whether new product developments are covered by the licence;
- The circumstances under which a party is entitled to terminate the licence;
- The compensation which should be granted for breach of the licence;
- Whether a contractual restriction on the use of the intellectual property right may violate competition rules; and
- Whether an employee may have the ownership of an intellectual property right.

The method of settling IP disputes must be carefully considered. Under the laws of some countries, such disputes may be settled by arbitration – but not under the laws of all countries. For example, in most countries, an arbitrator’s ruling on the validity of a certain patent will be binding only on the parties in dispute – not on third parties. This is because such a decision may be deemed to be under the exclusive jurisdiction of the State court of the country where the patent was issued.

In certain situations, injunctive relief may be necessary, and is sometimes sufficient to stop the violation of the intellectual property right. This can be obtained through State courts. Intellectual property disputes do not arise solely from pure intellectual property contracts. They can arise out of many different types of agreement. For example:

- Licensing agreements (including agreements where licensing is only part of a wider commercial venture, such as in franchising or agency contracts);
- Agreements for the transfer of IP, such as in the case of a company acquisition or a joint venture; and
- Agreements in connection with IP (for example, research and employment contracts).

The scope of a contractual dispute is generally narrower than that of the contract from which it originates. Thus, in selecting a particular dispute resolution process, it helps if parties can anticipate the types of disputes that they are likely to encounter. This will assist them in their choice between litigation and arbitration – both of which are legally binding – or between the above processes and conciliation, mediation, technical
expertise and other varieties of ‘soft’ dispute resolution. Furthermore, if they opt for arbitration as the agreed method of dispute resolution, their anticipation of the type of dispute that may arise will help them select a suitable arbitration institution.

On this last point, where an international contract is mainly or exclusively concerned with IP, the parties may wish to select a dispute resolution system run by an institution that is respected and experienced in the field. Examples of these include the World Intellectual Property Organization (WIPO), which administers various IP dispute resolution mechanisms and the International Chamber of Commerce.261

4.4. INTERNATIONAL CONVENTIONS AND TREATIES:

The reference to the New York Convention leads into the important topic of the conventions which are relevant to international commercial arbitration. The most important conventions are the multilateral conventions (i.e. entered into between three or more states) designed to ensure the international enforceability of arbitration agreements and awards and which become incorporated into the law of the contracting states to such conventions.

4.4.1. INTERNATIONAL CONVENTIONS:

i) The Geneva Protocol of 1923:

The first significant international convention was the Geneva Protocol of 1923, prepared under the auspices of the League of Nations. Its primary objective was to secure the international enforcement of arbitration agreements. It was also intended to ensure that arbitration awards would be enforced in the states in which they were made.

ii) The Geneva Convention of 1927:

The principal purpose of the Geneva Convention was to extend the scope of the Geneva Protocol so that an award made in one contracting state would be enforced in any of the other contracting state, and not only in the state in which it was made.

iii) The New York Convention of 1958:

261 Arbitration and Alternative Dispute Resolution – How to settle international business disputes with supplement on Indian Arbitration Law, International Trade Centre, 2005, P.7-11)
One of the major drawbacks of the Geneva Protocol and Convention was that they put the onus on the party seeking enforcement to prove that the conditions required for enforcement had been fulfilled. This could be burdensome. It sometimes required making an application to the courts of the state in which the award was made and it was not effective to promote the use of arbitration as an efficient means of settling international commercial disputes. The New York Convention, drawn up under the auspices of the United Nations, has changed that, becoming in the process the most important international convention relating to international commercial arbitration.

The New York Convention replaces the Geneva Protocol and Convention for all states. It requires contracting states to enforce valid arbitration agreements, introduced a much more straightforward procedure for obtaining the recognition or enforcement of arbitral awards and it reverses the burden of the Geneva Protocol and Convention by placing the principal burden on the party resisting recognition or enforcement of an award to establish the reasons why the award should not be recognised or enforced.

iv) **The European Convention on International Commercial Arbitration of 1961:**

One of the main purposes of this convention was to facilitate East and West trade, though it was open for signature by states which were not European. Unlike the New York Convention, the European Convention only applies when the parties to the arbitration reside in contracting states. The European Convention has been ratified by only 26 states and lacks the significance of the New York Convention.

v) **The Washington Convention of 1965:**

This convention provides for the establishment of the International Centre for the Settlement of Investment Disputes (ICSID). It is often referred to as “ICSID Convention”. ICSID arbitration is designed to deal with disputes arising out of investments made in a contracting state (under an agreement with the state itself, or a designated state agency) by a national of another contracting state. The Washington convention is important because, at the time of writing, 140 states have ratified it and provision for ICSID arbitration is included in a large number of international contracts. This convention was sponsored by the World Bank, and the authority of the bank may be available to assist in the enforcement of an ICSID award.
Prior to the ICSID Convention, cross-border investment was hindered by the absence of a neutral and effective mechanism for the resolution of investment disputes between investors and the host state in which they had invested. With the aim of eradicating this obstacle to investor confidence, the ICSID Convention established a mechanism whereby non-state entities – nationals of one party to the Convention directly to arbitration, under the neutral auspices of the Centre. The concept proved popular and membership of the Convention grew quickly from the time of its inception. Submission of disputes to the Centre was, however, rare in the early years. While ICSID arbitration clauses became common in large scale government contracts the trend did not extend to foreign investment contracts generally.

vi) **The Moscow Convention of 1972:**

The Moscow Convention was concluded as part of the process for the implementation of the “socialist economic integration” of the countries belonging to the Council of Mutual Economic Assistance (CMEA). It required “economic organisations” in the states which were parties to the Convention to resolve their disputes by arbitration by the courts of arbitration at designated chambers of commerce in such states. It gave awards made in such arbitration the same effect as final judgments and made provision for their reciprocal enforcement. With the breakup of the CMEA, the status of the Moscow Convention has been thrown into doubt. It has been denounced by a number of the states which were party to it and others are considering denunciation. It has, in effect, become largely obsolete.

vii) **The Panama Convention of 1975:**

Latin American countries had to a degree mistrusted US and European business interests, and the arbitration organisations regarded as under the latter’s influence, though Latin America has come to recognise the benefits of international arbitration. These states were slow to ratify the New York Convention, preferring their own convention, the Panama Convention, which nevertheless adopts many of the principles of the New York Convention. There are two particularly significant aspects of Panama Convention. First it does not contain provision for the enforcement of arbitration agreements. Secondly, if
the parties fail to agree upon the procedure for the arbitration, the Inter-American Commercial Arbitration Commission (IACAC) Rules of Procedure will apply. There are now the UNCITRAL Arbitration Rules.

4.4.2. INTERNATIONAL TREATIES:

viii) The OHADA Treaty of 1993:  
OHADA is the French acronym for the Organisation for the Harmonisation of Business Law in Africa. The OHADA Treaty was signed by 16 Francophone African countries (the Treaty is also open for signature by the countries which are members of the Organisation for African Unity) in 1993. Its main objectives include the modernisation and harmonisation of business law in Africa in order to re-establish investor confidence and to facilitate trade between the contracting states and the promotion of arbitration to settle commercial disputes.

Arbitration proceedings which are conducted in OHADA area are governed by:

(a) The OHADA Treaty, which establishes the constitutional framework and confirms the enforcement of arbitration agreements;

(b) The Uniform Arbitration Act, which sets out the law applicable to arbitrations conducted in the OHADA signatory states (and is in some respects similar to the UNCITRAL Model Law);

(c) The Arbitration Rules of the Common Court of Justice and Arbitration (which have much in common with the ICC Arbitration Rules) which set out the procedures pursuant to which the arbitration is to be conducted.

ix) THE NORTH AMERICAN FREE TRADE AGREEMENT OF 1994 (NAFTA):
The NAFTA was signed by Canada, the United States and Mexico in 1992 and came into force on 1 January 1994. It was established to promote, amongst other things, free trade and the protection and enforcement of rights among its signatory countries based on the principles of non-discrimination, transparency, co-operation and due process.

The NAFTA provides a mechanism for the settlement of disputes arising out of investments between a NAFTA party and an investor of another NAFTA party that assures both equal treatments among investors of the NAFTA parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.
Private parties who have a dispute with a NAFTA party other than their own state may commence an arbitration which will be subject to one of three applicable sets of arbitration rules. These are the ICSID Arbitration Rules, the Additional Facility Rules of ICSID or the UNCITRAL Arbitration Rules.262

x) BILATERAL INVESTMENT TREATIES OR INVESTMENT PROTECTION AGREEMENTS:

Bilateral Investment Treaties (BITs) or investment protection agreements (IPAs) became common during the 1980s and 1990s, as a means of encouraging capital investment in developing markets. Capital-exporting states (including the United States, most Western European states, and Japan) have entered into numerous BITs or IPAs with countries in developing regions. A recent tally indicated that more than 1300 BITs are operative by 1999.263

Many BITs contain provisions dealing with the enforceability of international arbitration agreements and awards. In addition, some BITs contain provisions which permit foreign investors to require international arbitration of certain categories of disputes – including in the absence of an arbitration agreement in the contracts(s) giving rise to the dispute. The possibility of “arbitration without privet” is an important option in some international commercial disputes, which counsels careful attention to applicable BITs.264

Some of the leading Arbitral Institutions:

1. International Chamber of Commerce/ International Court of Arbitration.
2. London Court of International Arbitration.
4. International Centre for Settlement of Investment Disputes.
5. Stockholm Chamber of Commerce Arbitration Institute.
7. Hong Kong International Arbitration Centre.
9. German Institution of Arbitration.

263 The Role of ICSID in the Settlement of Investment Disputes, 16 ICSIDNews (1999).
4.5. MARITIME ARBITRATION – BLEND OF UNITY AND DIVERSITY:

In a recent speech, the President of the International Court of Justice noted that the proliferation of courts presents us with risks, the seriousness of which it would be unwise to underestimate. In my view, to leave it to the common sense of the judges to deal with these consequences may well prove insufficient. What needs to be done is to determine the relative positions of the new judicial bodies within the modern international framework and, to this end, to establish new links between these bodies.\(^\text{265}\)

The proliferation of international courts mentioned here is not confined solely to the area of interstate relations.\(^\text{266}\) Guillaume, President of the International Court of Justice, added that over the last two decades this process has quickened and taken on a global aspect. In 1982, the United Nations Convention on the Law of the Sea gave birth to the International Tribunal for the Law of the Sea, which became operational in 1996. Meanwhile, in 1994 we had the Marrakesh Agreement, out of which was to come the quasi-judicial dispute settlement mechanism of the World Trade Organization (WTO). I should also mention at this point the agreements currently undergoing ratification which could in due course lead to the creation of an African Court of Human Rights and the International Criminal Court. In parallel with these developments, the last 20 years have seen the establishment of a number of ad hoc tribunals, such as the Iran-United States Claims Tribunal, or the International Criminal Tribunals for the former Yugoslavia and Rwanda. Thus we are now seeing a multiplication, not to say a proliferation, of international judicial bodies. This development has to be viewed in the context of more far-reaching changes in international relations. Thus the second half of the twentieth century has witnessed an expansion and diversification in the ways in which States relate to one another.

The areas in which they co-operate have undergone a substantial expansion: security, education, economics, the environment, scientific research, communications,


\(^{266}\) See ibid.
transport, etc. Nowadays there seems to be no area which is not covered. At the same
time, the non-State players-commercial companies, non-governmental organizations

4.5.1. MARITIME ARBITRATION:

Complex phenomenon that interweaves with the parallel diversification of
tribunals set up to resolve disputes on a transnational level; maritime arbitration is an
important example of this phenomenon. Maritime arbitration has developed on both an
interstate and a transnational relations level. With regard to the former, that is, the law
of the sea, arbitration provides one of the means for peaceful settlement of disputes
provided by international law and, more significantly, by the Convention on the Law of
the Sea of December 10, 1982 ("Montego Bay Convention"). As for the transnational
aspect-the main subject of this article-it is said that maritime arbitration has ancient
origins, and furthermore, just as maritime law preceded "terrestrial" commercial law,
maritime arbitration preceded international commercial arbitration, with its roots dating
back to the times of the ancient lex mercatoria.

One of the first legal (NGOs), private individuals-engage increasingly in
transnational activities, thus demonstrating how permeable frontiers are. Moreover, these
cross frontier transactions-in the wide sense of the word-have themselves become more
diverse. This trend will undoubtedly intensify with new technological advances, for
example in the field of telecommunications. This dual expansion in inter-State relations
and cross-frontier transactions, in terms both of subject-matter and of frequency, has
inevitably rendered it necessary, if not essential, to make all these relationships subject to
the rule of law. As a result, new areas have been opened up to international law, whilst

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267 See generally Jonathan I. Charney, Is International Law Threatened by Multiple International
268 See TULLIO TREVES, NUOVE TENDENZE, Nuovi TRIBUNALI, LE CONTROVERSIE
INTERNAZIONALI 35 (Milan, Italy, 1999) ("The experience of the so-called transnational arbitration ...
evidences that borderlines between the law of intergovernmental relationships and that regulating
international relationships amongst individuals are uncertain. Moreover, dispute resolution mechanisms
used by private actors may present strong analogies with jurisdictional or arbitral proceedings used for
intergovernmental dispute resolution.") (translation by author).
270 Undoubtedly the lex maritima was an essential component of ancient lex mercatoria. See William
Tetley, The General Maritime Law-The Lex Maritima (With a Brief Reference to the Ius Commune in
was actually found in Venice, in the Capitolare navium of the Repubblica Serenissima (Maritime Code of
the Republic of Venice), in a document dating back to 1229.
new players have entered the arena. The proliferation of courts may be perceived as a process of adaptation to these fundamental changes. Constant element of “species” of maritime arbitration. Typically, issues centred around: the investigation of damage to transported goods and ensuing liability attached to the maritime carrier; damages to the ship caused by the nature of the carried goods; issues of lay days and demurrage including damages resulting from late entry to port or late access to the operative quay; damages suffered by the carrier as a result of force majeure; issues relating to non-execution of charter parties (for example, non-payment of the charter fee, late return of the vessel or early collection of the ship); sale, construction and ship repairs; matters relating to salvage at sea; and maritime Insurance. Given that maritime arbitration is a species belonging to the "genus" of international commercial arbitration, what are its distinctive characteristics? Or, on the other hand, is the specificity of maritime arbitration not so marked as to require a different regulation? Moreover, is the advent of arbitration through electronic means going to have a serious effect in the world of maritime arbitration?

In order to answer these questions, this article will first examine the process of diversification of the types and sources of arbitration law relating to maritime matters. This will highlight how widespread maritime arbitration has emerged, as well as the operators' perception of maritime arbitration. The final part of this article considers the emerging problems related to arbitration clauses that exist in electronic format, such as those contained in dematerialised bills of lading.

THE DIVERSIFICATION OF ARBITRATION IN MARITIME MATTERS AND THE RISK OF INTERNATIONAL CONFLICTS OF JURISDICTION:
As mentioned earlier, international disputes relating to maritime issues can be resolved either through intergovernmental arbitration or through transnational commercial arbitration. Undoubtedly, the classic method for settlement of international disputes practiced on an intergovernmental level is arbitration as provided, for example, in REV. Article 2, paragraphs 3 and 33 of the United Nations Charter, referred to in the Montego Bay Convention.” In this context, the arbitration mechanism interweaves with

271 See U.N. CHARTER, art. 2, para. 3 (“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”). The
the role entrusted to the International Tribunal for the Law of the Sea ("ITLOS"). This
court, based in Hamburg, Germany, has jurisdiction over disputes concerning the
interpretation and application of the Montego Bay Convention as well as other
international agreements relating to the law of the sea.272 The ITLOS hears cases, inter-
alia, on issues concerning the nationality of ships; the freedom to navigate in the
exclusive economic zone; the prompt release of ships and equipment detained due to
suspected violation of the Montego Bay Convention; the prevention of marine pollution
resulting from the disposal of waste; and, more generally, on the conservation and
management of marine resources.273 It has exclusive jurisdiction, through its Seabed
Disputes Chamber, over disputes relating to activities in the international seabed area. It
should also be noted that the International Court of Justice may hold concurrent
jurisdiction over a maritime dispute with the International Tribunal for the Law of the Sea
and arbitrators.274 Each contracting State can, at the time of signing, with the ratification
or with adhesion to the Montego Bay Convention, elect to resolve its dispute under the
auspices of the court it chooses.275 In the absence of such a choice, however, the
acceptance of "ordinary" (intergovernmental) arbitration is nevertheless assumed-as
provided for in Annex VII-and this same solution is imposed if contracting States have
selected different methods by which to resolve disputes.276 Therefore, the Montego Bay
Convention, as well as providing for judicial settlement, also leaves ample room for
international arbitration, regulated by Articles 279-299 and Annexes VII-VIII.16 In full,
Article 287 provides that:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a
State shall be free to choose, by means of a written declaration, one or more of the

Charter also states that "parties to any dispute, the continuance of which is likely to endanger the
maintenance of international peace and security, shall first seek a solution through negotiation, enquiry,
mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other
peaceful means of their own choice." Id. art. 33. For a general overview on the subject, see JOHN
COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 19-
58,84-92 (1999).
272 See UNCLOS, supra note 5, art. 279. UNCLOS entered into force on an international level on
273 For sources to which reference on the subject has been made, see Tullio Treves, Codification du droit
international et pratique des etats dans le droit de la mer, 223 RECUEIL DES COURS 25 (1990); Tullio
274 See UNCLOS, supra note 5, art. 287, 1.1060 [20:1055
275 See id.
276 See id. 5.
following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) The International Tribunal for the Law of the Sea established in accordance with Annex VI;
(b) The International Court of Justice;
(c) An arbitral tribunal constituted in accordance with Annex VII;
(d) A special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

Generally, these articles call for ad hoc intergovernmental arbitration, but Article 188, paragraph 2 also refers to transnational commercial arbitration _tout court_, for disputes concerning the interpretation or execution of international contracts in compliance with
Articles 187(c)(i) and 153. All these rules in favour of arbitration are not enough to prevent serious conflicts of international jurisdiction; conflicts that, in theory, could put interstate and transnational arbitration bodies at odds with each other. A first sign of this may be seen in the dispute between Ireland and Great Britain over the construction of a nuclear fuel MOX facility. The arbitration tribunal, formed under Annex VII of the Montego Bay Convention, first ordered provisional measures, but later suspended the proceedings as it waited to see whether the Court of Justice of the European Communities had jurisdiction to resolve this matter and within what boundaries. In this complex case, Article 282 of the Montego Bay Convention has regulated the

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties."

Conflict of international jurisdictions, even though the resolution of this case seems to have been reached through comity it is also clear that, with reference to the discipline of "special arbitration" of Annex VIII to the Montego Bay Convention, Article 5, paragraph 2 introduces a rule clearly derogating from the general principle of international law that the reports resulting from a fact finding panel are not per se binding. Here, the result of the fact finding activity is automatically obligatory between the parties unless they have agreed to the contrary. Therefore, even fact finding activities and decisions may potentially "conflict" with those of arbitrators and other international organisms in proceedings that in one way or another concern the same facts. On the other hand, under Article 290 of the Montego Bay Convention, ITLOS (functioning

277 Id. art. 188, 2 ("Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree.").

278 In this case, Ireland accused the British plant of violating UNCLOS, since the plant causes high levels of unacceptable environmental risks for Ireland. Erik Martiniussen, Britain Must Consult Ireland Over Sellafield, BELLONA FOUNDATION, July 1, 2003 (discussing the dispute between Ireland and Great Britain arising out of Britain’s new MOX production facility at Sellafield, which has been in operations since December 2001), at http://www.bellona.no/en/energy/nuclear/sellafield/30287.html (last visited Aug. 16, 2005). Ireland cites both the radioactive discharges from the plant and the transportation of MOX as problematic.

279 The arbitration tribunal was composed of Judge Thomas A. Mensah (President), Professors James Crawford and Gerhard Hafner, L. Yves Fortier and Sir Arthur Watts.


282 See UNCLOS, supra note 5, Annex VIII, art. 5, para. 2 ("Unless the parties otherwise agree, the findings of fact of the special arbitral tribunal acting in accordance with paragraph 1, shall be considered as conclusive as between the parties.").
similar to the Sea Bed Disputes Chamber regarding disputes affecting the international seabed area)\textsuperscript{283} can issue provisional measures during the "set up phase" of the arbitration board.\textsuperscript{284} ITLOS must first, however, find prima facie that the arbitration tribunal has jurisdiction to review the adopted measures. Once the arbitration tribunal is in place, the same arbitrators can modify, revoke or confirm the measures adopted by ITLOS.\textsuperscript{285} In addition to the intergovernmental arbitral provisions of the Montego Bay Convention discussed above, States can also bring certain maritime claims before other bodies operating in the area of international trade, the most prominent being the World Trade Organisation ("WTO"). Decisions in both the GATT Dispute Panel providing for the revocation of provisional measures as soon as the circumstances justifying the provisional measures have "changed or ceased to exist") However, parties may only prescribe, modify, or revoke measures at the request of a party to the dispute.\textsuperscript{286} The \textit{Tuna/Dolphin} case involved the U.S. ban on Mexican tuna imports put in place to discourage the use of certain fishing methods to catch tuna, as these methods led to the death of dolphins and other species caught during the fishing process." Here, the panel interpreted GATT Articles III and XX to conclude that the protection of the maritime environment, in compliance with Article XX, constituted an exception to the rule of national treatment.\textsuperscript{287}

Article XX of GATT 1994, (as well as Article XIV of GATS and 8 of TRIPs) provides that: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,
nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) Necessary to protect public morals;
(b) Necessary to protect human, animal or plant life or health;
(c) Relating to the importations or exportations of gold or silver;
(d) Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under 1064.
Government measures that aimed to conserve natural resources, or were rather designed for the protection of non-trade interests, were therefore admissible within WTO rules.3" In the case at hand, this happened by virtue of the fact that the Agreement, on technical paragraph 4 of Article II and Article XVII, the protection of Patents, trademarks and copyrights, and the prevention of deceptive practices;
(e) Relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
(i) Involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have
ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960. In order to reach such conclusions; the panel extended the sphere of application of WTO rules beyond the notion of "product" to embrace that of "production process." This method of "constructive" interpretation has been criticized by some scholars and it has finally been abandoned in the Tuna/Dolphins H case. Conversely, issues of WTO law can be dealt with by the bodies created by the Montego Bay Convention to resolve issues relating to the law of the sea. 288 For instance, the July 28, 1994 agreement on Part XI of the Montego Bay Convention refers in Section 6 to the norms of GATT 1947 or "to other later agreements." 289 The awkward reference to GATT '47 is thus interpreted as an implicit general referral to the law of the WTO. This intertwining of "maritime" issues with those relating to "international trade" as highlighted on an interstate level, becomes an inextricable problem when one looks at another legal dimension of "international" arbitration, namely transnational commercial arbitration. 290

4.5.2. SOURCES OF CONTEMPORARY INTERNATIONAL MARITIME ARBITRATION LAW:

To truly understand the nature of international maritime arbitration, one needs to consider the sources of arbitration law. In the following section, I will highlight relevant rules stemming from different formal sources that relate to maritime arbitration. Particularly relevant among the international multilateral agreements on international commercial arbitration are the European Convention on International Commercial Arbitration of

288 See Francesco Francioni, Environment, Human Rights and the Limits of Free Trade, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 19 (Francesco Francioni ed., 2001); see also Douglas A. Kysar, Preferences from Processes: The Process/Products Distinction and the Regulation of Consumer Choice, 118 HARV. L. REV. 525, 535 (2004) (discussing a theoretical distinction between product-related information, including a good's harm to the user, versus process-related information, namely whether a production process harms workers, animals, or the environment). See generally EDITH WEISS & JOHN H. JACKSON, RECONCILING ENVIRONMENT AND TRADE 161-85, 407-97 (2001). AM. U. INT'L L. REV. barriers to trade and that on sanitary and phyto-sanitary measures, fell under the material law of the WTO. The final decision in the case of Shrimp/Turtle I followed this approach, demonstrating that there are new ways to litigate on environmental-including maritimematters through the WTO Dispute Settlement Body ("DSB").


290 For further discussion, see Dominique Carreau, Droit de la mer et droit international du commerce, in MLANGES LUCCHINI ET QUENEUDEC 118 (Paris, 2003), 1066 [20:1055]

A. INTERNATIONAL CONVENTIONS:

Awards of June 10, 1958 ("New York Convention"). Yet neither of these treaties contain specific rules regarding maritime issues. The general viewpoint is that maritime arbitration is covered within, the "general" conventions on commercial arbitration.

Furthermore, even where States have formulated the "commercial reservation" provided for by the New York Convention, courts have treated "maritime" issues as "commercial" matters, thereby placing these disputes within the scope of the New York Convention. If, therefore, the genus of international commercial arbitration incorporates maritime arbitration, it is necessary to verify whether, among the main international conventions of uniform maritime law, there are specific rules on matters of arbitration. Even a perfunctory examination of the main agreements highlights the presence of a few, albeit short, rules on matters of arbitration. However, these norms illustrate the emergence of a trend towards proliferation of maritime arbitration rules. The earliest international agreements, such as the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of August 25, 1924 ("Brussels Convention of 1924"), later modified by the Protocols of February 23, 1968 and of December 2, 1979 (the so-called "Hague-Visby Rules"), do not contain specific rules either on matters of maritime arbitration or forum selection despite the relatively frequent presence of arbitration agreements and forum prorogatum clauses within bills of lading.

The wise "old" approach consisted of regulating substantive matters and procedural matters, including arbitration, in separate international agreements for the sake of consistency of the two sets of rules. However, this approach did not account for the difficulties of intergovernmental negotiations and treaty-making that result between States with differing political agendas. More recent international agreements apply another approach: combining rules of substantive maritime law with jurisdictional and

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291 New York Convention, supra note 33, art. 1,3
arbitral norms. The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, adopted at Brussels on May 10, 1952 and in force as of September 14, 1955, provides an example, where civil jurisdictional norms are combined with the maritime concept of collisions. Under Article 2 of this convention, the parties can mutually agree to repeal, in part, the jurisdiction of the court or resort to arbitration rather than subjecting themselves to jurisdiction in one of three different courts:

1. The tribunal of the defendant's domicile;
2. The tribunal at the point of the ship's arrest or point of arrest had the defendant not offered security or other guarantee; or
3. The tribunal where the collision took place (if the collision occurs in a port or harbour, rather than on high seas).

Article 7, paragraph 3 states that if the court of the State where the ship has been seized does not have jurisdiction to decide on the merits and if the parties have agreed on arbitration, the same tribunal may set a date to start arbitration. A new treaty on arrest of ships was signed in Geneva on March 12, 1999, adopting a similar solution to that highlighted above with regard to Article 7; this treaty, however, has not yet entered into force and may not for some time. The United Nations Convention on the Carriage of Goods by Sea of March 30, 1978 ("Hamburg Rules") also provides for recourse to arbitration. Specific rules concern the validity of the arbitration Article 7, paragraph 3 parallels the language of the Brussels Convention of 1952: In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:

(a) Does not have jurisdiction to determine the case upon its merits; or
(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, such Court may, and upon request shall, order a period of time within which the claimant shall ring proceedings before a competent Court or arbitral tribunal.

295 Ibid. art. 22, 2.
1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising hereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
   (a) A place in a State within whose territory is situated:
      (i) The principal place of business of the defendant or, in the absence thereof, The habitual residence of the defendant; or agreement, which must be "evidenced in writing" and that, when dealing with an arbitration clause par reference, "special annotation" should be made in the bill of lading. However, the Hamburg Rules have no legally binding force in the majority of the most economically advanced countries, and so, possible conflicts of international arbitration rules are rare in current practice. The United Nations Convention on International Multimodal Transport of Goods ("IMTG") of May 23, 1980-not yet in force confirms the need, in the wake of the Hamburg Rules, for the will of the parties to be "evidenced in writing" in order to arbitrate matters of multimodal transportation. This treaty, however, contains mandatory uniform rules from which private parties cannot
      (ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
      (iii) The port of loading or the port of discharge; or
   (b) Any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 2 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.
6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen. "International multimodal transport" is defined as "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country." Derogate The IMTG sets a deadline of two years within which arbitration must begin before parties may resort to relevant domestic courts. Furthermore, the five jurisdictions indicated in the Hamburg Rules become obligatory in the IMTG. The parties, however, are free to turn to arbitration through a submission agreement in cases where they had not included an arbitration clause in the contract. In cases of salvage, the International Convention on Salvage of April 28 1989 ("London Convention") partially regulates arbitration. According to this treaty, in cases of contractual salvage, a time-bar for litigation (including via arbitration) is set up to a maximum of two years from the day on which assistance ceased. In addition, the London Convention provides for an interesting exhortatory rule based on which the contracting States shall "encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases." All in all, beyond the classic problem of relations of international and municipal law, one needs to be aware of possible conflicts between intergovernmental rules on (private) maritime arbitration. The relevant treaties may conflict in regard to the time-bar of arbitral proceedings or may involve the choice of situs arbitri (the seat of the arbitration).

297 Ibid. art. 27(4) (declaring null and void any contracts that fall under the IMTG and include an arbitration clause, but do not follow the provisions of Article 27).
298 Ibid. art. 25(1) (giving the complaining party six months after the offending party fails to fulfill the contract to state, in writing, the nature of the claim).
299 Hamburg Rules, supra note 41, art. 22(2) (explaining the locations named in the Hamburg Rules in Article 22(3) are either a place within the State which is the principle place of business of the defendant, the principle habitation of the defendant, place of contract creation, the port of loading or discharge, or any other place named in the contract between the parties).
300 IMTG, supra note 43, art. 27(2).
301 Ibid. art. 27(5).
303 Ibid. art. 23(2)-(3).
304 Ibid. art. 27. 2005] 1071 AM. U. INTL. L. REV.
arbitration) with respect to those rules of international conventions (multilateral, but perhaps also bilateral) that discipline "general" arbitration, most significantly the Geneva Convention and the New York Convention.  

In a different context, concerning the conflict between the rules on jurisdiction of the Brussels Convention of 195252 and the corresponding regulations of the Brussels Convention of September 27, 1968 on jurisdiction and enforcement of judgements on civil and commercial matters, the Italian Court of Cassation, using the lex specialis criterion, correctly established the prevalence of the special discipline-that which regards arrest issues-over the general discipline on jurisdiction of the 1968 Brussels Convention. 306 But what happens if one faces a conflict of rules on time-bars or on the selection of the seat of arbitration? The "old" approach of entrusting treaties on "general" arbitration with the discipline of specific questions of maritime arbitration seems to me the best way to avoid the proliferation of fragmented regulations, scattered throughout different conventions of uniform transport law, as well as on jurisdiction. As a matter of fact, proliferation of such rules increases the chances of conflict between conventions, reducing predictability in the business arena.

A. NATIONAL SOURCES

Recent statutory reforms of domestic arbitration law have provided an opportunity to regroup, within the "general" arbitration discipline, special rules on maritime arbitration. For example, the very recent reform of arbitration in Germany allows for the introduction of a special rule on maritime arbitration, stating that in order to validate the arbitration agreement contained in the bill of lading, an express reference to the arbitration clause must be made.

4.6. INDIAN LEGISLATION RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION:

Relevance of National Arbitration Legislation – International Arbitration is facilitated by the New York Convention and other international conventions and treaties.

305 Brussels Convention of 1952, supra note 39, arts. 7-8.
Equally important are national arbitration statutes and national judicial precedents interpreting these statutes. This legislation typically both implements the Convention (where it applies) and addresses the numerous issues not touched by it. National arbitration legislation often has vitally important impacts on the successful resolution of disputes by international arbitration.

Among other things, national arbitration (or related) statutes typically address each of the topics identified below:

a) The Arbitration Agreement:
- Whether an arbitration agreement is valid and whether this question is for resolution by a national court or the arbitral tribunal.
- What law will apply to the parties’ agreement,
- The interpretation of an arbitration agreement and the interpretation of the arbitration agreement, and whether this question is for resolution by a national court or the arbitral tribunal;
- How an arbitration agreement will be enforced and what impact it will have on judicial proceedings in national courts;
- Whether certain claims or disputes are “non-arbitrable” and therefore subject to resolution only in national courts; and
- Specialized issues arising in connection with international arbitration agreements in U.S. courts.

b) The Arbitration Proceedings
- How arbitral proceedings will be conducted, including whether national courts will order evidence-taking or discovery in aid of arbitration;
- What law will apply to the parties’ substantive claims and the arbitration proceedings;
- The selection and removal of arbitrators
- The selection of an arbitral suits will be selected; and
- Multi-party issues, including joinder, consolidation, and intervention.

c) The Arbitral Award
- The presumptive enforceability of international arbitral awards;
- When an international arbitral award can be denied recognition
- The differences between vacating an arbitral award and refusing to recognise an award;
- Whether and how a foreign arbitral award will be enforced in U.S. courts;
- The availability of provisional relief.

Less supportive National Arbitration Legislation:

Many nations historically regarded international commercial arbitration with a mixture of suspicion and hostility. That was particularly true of various parts of Latin America and the Middle East, as well as developing countries elsewhere.\textsuperscript{307} The hostility arose from reluctance to compromise principles of national sovereignty and from perceptions concerning the fairness, neutrality, and efficacy of contemporary international commercial arbitration. Although historic distrust for international arbitration has waned, it continues to influence legislation, judicial decisions, and other actions in many states. Against this background, contemporary arbitration legislation in many foreign states does not provide effective enforcement of arbitration agreements; such provisions are either revocable at will or unenforceable in broad categories of disputes. Similarly in a number of states, international arbitral awards are subject to either de novo judicial review or to similarly rigorous scrutiny on other grounds. Finally, some national courts have been prepared to interfere in the international arbitral process – for example by purporting to remove arbitrators, to resolve “preliminary” issues, to bar foreign lawyers from appearing, or to enjoin arbitrations.

During the last decade, a number of states which historically distrusted international arbitration have ratified the New York Convention and/or enacted legislation Supportive of the arbitral process. These include Russia, India, China, Saudi Arabia, Argentina, Algeria, Bahrain, Tunisia, Nigeria, Peru, and Venezuela. Although there is often little practical experience with the application of arbitration statutes in such states, these statutes have the potential for providing a more stable, predictable frame-work for international arbitration. Unfortunately, even where national law is superficially supportive of the international arbitral process, many national courts have

displayed a readiness to hold arbitration agreements or awards invalid, particularly when requested to do so by local individuals, companies, or state entities.

Supportive National Arbitration Legislation

Despite the hostility to international arbitration in some parts of the world, most states in Europe, North America, and parts of Asia have adopted legislation that provides effective and stable support for the arbitral process. In particular, England, Switzerland, the United States, Canada, France, Sweden, Belgium, the Netherlands, Austria, Germany, and Italy have enacted arbitration statutes that ensure the basic enforceability of arbitration agreements an award with minimal judicial interference in the arbitral process.\textsuperscript{308}

4.6.1. INDIAN LAW ON ARBITRATION – FOREIGN AWARDS AND ENFORCEMENT:

Sections 44 to 60 of Part II of the Arbitration and Conciliation Act, 1996 deals with enforcement of certain foreign awards. It incorporates provisions of the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 except in one material respect. Section 9(b) in both, the 1937 Act and the 1961 Act, which provides that the said Acts shall not apply to any award made on an arbitration agreement covered by the law of India, has been omitted. The implication is that any award given outside India, whether or not made in an arbitration agreement covered by the law of India, will henceforth be treated as a foreign award. Chapter I of Part II of the Act of 1996 deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards.

Sec-44 of the Arbitration and Conciliation Act, 1996 defines a “Foreign Award” as an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered a commercial under the law in force in India, made on or after the 11\textsuperscript{th} Day of October, 1960.

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made May, by notification in the Official Gazette, declare to be territories to which the said convention applies.

The said definition of ‘Foreign Award’ is applicable for the purposes of Chapter-I and Chapter-II of Part-II of the Act of 1996. In Bhatia International Vs. Bulk Trading,\textsuperscript{309} the aspect of determination of Domestic award and foreign award had been dealt with. In Gold Crest Exports Vs. Swissoen N.V.\textsuperscript{310} it was held, that – “Sec-47, 48 and 49 deal specifically and exclusively with foreign awards. In particular Sec-48 deals with the refusal by the Court to enforce a foreign award at the request of the party against whom it is invoked. The section also contains limitations on the part of the Court in refusing to enforce a foreign award. It is pertinent to note that the sub-section (1) specifically states that enforcement of the award is to be refused at the request of the party against whom it is invoked implying thereby, if not expressly stating, that a party against whom a foreign award is sought to be enforced is entitled to make an application to the concerned Court for refusal by that Court to enforce the foreign award. Under Sec-49 it is the award shall be deemed to be a decree of that court.

It is thus clear that Part-II specifically provided a separate provision not merely for the enforcement of foreign awards but even for the challenge thereto by the party against whom it is sought to be enforced. In Force Shipping Ltd. Vs. Ashapura Minechem Ltd.\textsuperscript{311} F.I.Rebello J., held that ‘From the portion reproduced above, it is clear that the law on the subject may be summarized thus”

“(a) When there are general provisions under the statute unless statute expressly states that they are not to apply then in that event, the general provisions would apply.

(b). When the statute provides special provisions for enforcement it is the special provisions which would apply and not the general provisions. In the instant case there are special provisions for enforcement of foreign awards. Once, therefore, there are special provisions for enforcement of foreign awards then the general provisions including provisions of challenge to the award considering the special provisions would...

\textsuperscript{309} AIR 2002 SC 1432
\textsuperscript{310} 2005 (4) Bom CR 225
\textsuperscript{311} (2003 (7) LJ Soft 58.),
be excluded. That would mean application of Part-II, once that be so, Part-I would not apply. Under Part-I a decree can be executed only if the challenge under Sec-34 fails if made. Under Sec-48, the foreign award become enforceable and is to be executed as a decree.

(c) on the consideration of the law set out in para-28 in so far as application of Sec-9 is concerned. It holds that Sec-9 would not apply in so far as foreign wards are concerned after the award is made.

From the judgment in Bhatia, therefore, these are three major propositions which can be culled out. Once that is the case, the first contention advanced on behalf of the respondent opposing enforcement of the foreign award must be rejected.” We are in respectful agreement with the judgment. In the circumstances in the respect of foreign awards the remedy of a party against whom the award is sought to be enforced lies only under Sec-48 of the 1996 Act and not by way of an application under Sec-34. It is true that in some cases, including in the impugned judgment, it has been held that the grounds for challenging a domestic award and of a foreign award under sections-34 and 48 of the Act respectively are identical. There is however certain nuances, albeit minor, which indicate quite clearly the provisions of Sec-34 do not and cannot apply to a foreign award.

The scheme of Sec-48 and the language used therein clearly establishes that the provisions thereof pertain to a foreign award. This is not so in the case of Sec-34. For instance under Sec-48(1) (a) the incapacity of a party against whom an award is made is to be determined under the law applicable to them. This provision is inapplicable to a similar challenge under Sec-34. Further under Sec-48(1)(a) the enforcement of a foreign award may be refused if the party against whom it is made furnishes proof to the Court that the agreement is not valid under the law to which parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. The corresponding provision in Sec-34 does not provide the latter qualification viz. “under the law of the country where the award was made.”

Thus even assuming that the grounds of challenge to an award under Sec-34 and 48 are identical the circumstances in which and the manner in which the defence is applicable are different. Sec-34 therefore by necessary implication does not apply to
foreign awards. The judgment of the Supreme Court in **Bhatia International Vs. Bulk Trading**\(^{312}\) is therefore inapplicable. “To hold to the contrary would lead to absurd results. It would lead to absurd results. It would permit a party aggrieved by a foreign award a right to challenge the same both under Sec-34 and 48 of the Act. The applicable law on the basis whereof an award is challenged would be different under the two sections. This is clearly not the intention of the legislature it would involve legislation, an exercise not open to this Court.” In **Investa Fischer GmbH & Co. Vs. Polygenta Technologies Ltd**\(^{313}\) it was held by Deshmukh, J. & Rebello, J: “Hence, We conclude that the decisions of this Court are binding. That apart, for reasons set out above, we respectfully concur with the same. It is also brought to our notice that Letters Patent Appeals are pending against these judgments. However, they are not set aside and hence continue to hold the field. In these decisions, identical objections have been upheld. Therefore we are bound by them. After holding that we are bound by them, naturally, we have to hold that present petition filed under Sec-34 of the 1996 Act challenging a foreign award is not maintainable. Considering the conclusion reached, it is not necessary to decide the wider issue posed for our consideration by Sri Chinoy. The propositions in that behalf are culled out by us above. Sri Chinoy contends that the cases where the arbitration has one governing law, the underlying contract has another and procedural law of a third country is applied, are held to be very rare and once in blue moon situations. Reliance in that behalf is placed on the decision of the Supreme Court in the case of **ONGC vs. Western**\(^{314}\) However, we need not decide this issue in the facts and circumstances of the present case. We leave it open for decision in an appropriate case. More so, then in the case before me it is not disputed that although Indian Law governs underlying contract, the law of arbitration and the procedural law is Swiss Law. Hence, a challenge to the Arbitral Award dated 21\(^{st}\) October 2003 can only be raised in terms of Sec-48(1)”

(e) In Switzerland.” In **M/S.Centrotrade Minerals & Metal Inc. Vs. Hindustan Copper Ltd.**\(^{315}\) it was held: -

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\(^{312}\) AIR 2002 SC 1432

\(^{313}\) (1987 (1) SCC 496).

\(^{314}\) (5) (1987 (1) SCC 496

\(^{315}\) (2006(4) SCJ 217)
“From a bare perusal of Sec-44 of the Act, it appears that in order to come to a conclusion that a particular award is a foreign award, the following conditions have be satisfied: The legal relationship between the parties must be commercial.

1. The award must be made in pursuance of an agreement in writing.
2. The award must be made in a convention country.

In the present case, it cannot be disputed that the aforesaid three conditions were satisfied, that is to say, there exists a commercial relationship between the parties, the ICC award was made in pursuance of an agreement in writing between the parties and the award was made in a Convention Country (London, U.K)

Therefore, under the present Act, an award in pursuance of an arbitration agreement governed by Indian Law, if the conditions under Sec-44 are satisfied, will not cease to be a foreign award, merely because the arbitration agreement is governed by the law of India. From a bare reading of this Section, it is evident that Sec-48(1) (e) deals with the grounds for refusal of the enforcement of a Foreign Award. Production of proof that such an 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, cannot change a foreign award to a domestic award, but merely makes it a foreign award which may not be enforced. In Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.,\textsuperscript{316} it was however held, in substance, by this Court, where the contract is governed by Indian law and the seat of the arbitration is elsewhere, wherein arbitrability of the dispute is established, procedural law of the country of seat of arbitration governs the conduct of the arbitration proceedings till the award is delivered. Therefore, the phrase “or under the law of which that award was made” used in Sec-48(1) (e) refers to the law of the country in which the arbitration had its seat rather than the country whose law governs the substantive contract. It is true that the contract and the agreement clause is governed by the substantial law of India. It is an admitted position that the seat of the second arbitration was in U.K. Therefore, relying on Sumitomo Heavy Industries vs. Ongc Ltd.\textsuperscript{317} The relevant country was U.K. under the procedural law of which the award was made. Thus Sec-48(1) (e) does not by itself contemplate attracting first part of Sec-44 of the Act. In

\textsuperscript{316} AIR 1998 SC 825  
\textsuperscript{317} Ibid
this connection, the next question is whether the expression “unless the context otherwise requires” as used in Sec-44 of the Act ever comes into play. This question can be looked into by the following illustration where the expression takes relevance.

Let us consider a contract, including the arbitration agreement, governed by Indian Law and under it the seat of arbitration is mentioned as U.K. However, before the commencement of the arbitration proceeding, the parties agree that though the physical seat of arbitration is in U.K. for all purposes the seat of arbitration shall be deemed to be India and the arbitral proceedings shall be conducted under the curial law of India. In this situation, though all the conditions under Sec-44 were satisfied the award by the arbitrator cannot be said to be a foreign award. In such a situation, the expression “unless the context otherwise requires” in Sec-44 takes meaning and becomes applicable and relevant.318

4.6.2. IMPACT ON NATIONAL AND INTERNATIONAL TRADE:

International Arbitration is essentially a private, comparative and international mechanism. No two arbitrations are the same. There are few absolutes. There are no fixed rules or procedures. Any factual variation will invariably result in a significant change in the context and structure of the arbitration. The matrix which affects every arbitration varies depending upon the arbitration agreement, the procedure agreed by the parties, the nationality of the parties, the make-up of the tribunal, the applicable arbitration rules, the substantive applicable law or rules, the subject-matter of the dispute, the mandatory law of the place of arbitration and the permissive law where everything else is silent.

All of these factors are directly controlled by party autonomy. The choice of arbitration by the parties and their decision as to how, where and what the Procedure should be is the decisive factor in every case. The simple agreement of the parties to refer disputes to arbitration is a positive rejection of the national courts and in many cases strict national law procedure. The right of parties to determine all aspects of the

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arbitration is unquestioned. Accordingly, party autonomy has the greatest control on international commercial arbitration.

The effect of the party autonomy is a major reason why arbitration has achieved world-wide acceptance as the favoured and principal mechanism for resolving disputes arising out of international commercial transactions. Party autonomy also has been the main influence on the development of truly transnational rules and practices for international arbitration. These rules and practices have crossed the barriers of legal systems and national laws. There are accordingly few determinative answers in arbitration. The principal factor outside party autonomy that has directly influenced international arbitration practice and law has been the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This Convention is the backbone to the acceptance of international arbitration by the business world. It sets down simply the obligation of states to recognise and give effect to the agreement of parties to refer their disputes to arbitration in preference to a national court jurisdiction. If one party commences court proceedings in defiance of a valid arbitration agreement the national court should stay its proceedings and send the parties to arbitration.

The New York Convention also established the system to ensure the maximum possibility for the simple enforceability of arbitration awards. Over 146 countries are presently party to the New York Convention. The most significant effect of the New York Convention has been the harmonisation of the approach to enforcement of awards through the application of the New York Convention principles in national laws and courts. Whilst there remain countries whose courts do not always follow the spirit and letter of the New York Convention, they are rare exceptions. In the main arbitration awards made in one country will be recognised and enforced in any other state party to the New York Convention. International arbitration has become independent from national laws and courts in practice and legally. Parties and arbitrators do, in the main, conduct proceedings in a rarefied non-national legal environment. Whilst there may, in some cases, be influences from national law on the procedure, this can be controlled by the parties, the arbitrators and international practice. Experienced arbitration lawyers and the major international arbitration institutions have recognised national procedural laws are generally irrelevant and inapplicable. These international practices are acknowledged
and upheld by arbitration awards being recognised and enforced under the New York Convention.

The plethora of other international instruments, such as the Algiers Accords, bilateral investment treaties, North American Free Trade Association and the Energy Charter Treaty, further evidence the recognition of arbitration as an autonomous process. The lex mercatoria, as evidenced in part in the UNIDROIT Principles of International Commercial Contracts and the Vienna Convention on International Sale of Goods, is naturally applicable by international arbitration tribunals. This again is testament to the autonomous character of the international arbitration process.

The UNCITRAL Model Law on International Commercial Arbitration has reduced to legal formality much that transpires in practice. It reflects a common denominator of laws applicable to international arbitration. It is a compromise which has stripped out national characteristics and contains provisions acceptable to most systems. Many of its provisions are general and it is left to arbitration tribunals and national courts to interpret them. The Model Law has been adopted in over 30 jurisdictions. Decisions of an international tribunal or national court concerning the terms of the Model Law will influence how other tribunals or courts will interpret and apply the same provisions.319

In conclusion, this chapter enables a terse account of the historical background of UNCITRAL Model Law, its conceptual cavalry like ‘international’ character, ‘commerciality’ etc. and the jurisdictional exposition with a comparative outlook, constituent elements of Transnational Law on arbitration, and some details of international conventions and treaties etc. And finally a brief sketch of Indian Legislation relating to International Commercial Arbitration.