CONTEMPORARY PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION

by

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The growth in international trade and the emergence of the international conglomerate has accelerated the need for a uniform world wide system of resolution of international commercial disputes. Daily, we witness steps by the EEC, the socialist countries and, in this region, by Australia and New Zealand for closer economic links. In 1992 the EEC will take a further leap towards integration of markets into one harmonious whole. It must surely be unacceptable to the commercial community to continue to suffer the idiosyncrasies

of individual, national dispute resolution systems whilst, in most other respects, uniformity reigns.

Business has looked to arbitration as the preferred solution for achieving uniformity. Desirably, a multinational commercial organisation should be able to monitor intelligibly arbitration proceedings involving one of its subsidiaries and held anywhere in the world. As well, arbitration should not be a replication, out of court, of the curial process.

The purpose of this paper is to examine to what extent these goals have been, or are being, realised. There have been significant changes in the last decade in both the procedural and substantive law applicable to international commercial arbitrations calculated to achieve uniformity in decision making.

The importance of procedure in international commercial dispute resolution is well recognised. A respected commentator in the field, (Laurence Craig), recently wrote "there is substantive evidence, moreover, that ICC arbitration practices are also normative in character in that they both create and respond to the expectations of the international commercial community. In this sense arbitration <u>practice</u> becomes an important part of the system of justice rendered and administered by arbitral tribunals".

In procedural law, without a doubt, the outstanding development has been the emergence of the Model Law of International Commercial Arbitration. Under the auspices of the United Nations Committee on International Trade Law (UNCITRAL), delegates from the principal trading nations participated in the work of drafting. The Model Law was adopted on 21 June 1985. As its name indicates, the law is designed to serve as a model, for enactment by national legislatures, for the conduct of international commercial arbitrations held within the national boundaries. Were a sufficient number of nations to adopt the Model Law, one would be tempted to think that we would be well on the way towards achieving, at least in the field of procedure, the goal of unification. Unfortunately, there is reason to question this assessment even if the optimistic assumption upon which it is predicated were to be realised.

The first reason for scepticism lies in the fact that it is a Model Law and not a Convention that has been approved. Thus, even a nation willing to accept the principle of a uniform world wide arbitration regime, may make such changes in the model as it considers appropriate to its national interest or its existing legal culture and philosophy. Such departures from the model will signal the initial abandonment of uniformity.

The second problem is perhaps a trifle more subtle. We have the advantage of seeing the Model Law in action in a living laboratory in Canada. The Federal Parliament and all but two of the Provinces have adopted the Model Law. In most cases, the Model Law serves only international arbitrations but in Quebec Province it is applicable to all arbitrations. I should notice in passing that the Federal Act, (Statutes of Canada 1986 Chapt 22) by s 4(2), specifically permits, in the interpretation of the Act, recourse to be had to the Report of UNCITRAL on the work of its 18th Session in June 1985 and to the Analytical Commentary in the Report of the Secretary General. This is a precedent which calls for adoption by all legislatures enacting the Model Law.

Not surprisingly, the first curial decision to emerge, based on the provisions of the Model Law, is from Canada. The decision is, itself, unremarkable but for the fact that, in my view, it is illustrative of an underlying problem in the struggle for uniformity. The decision is of the Superior Court in Montreal in Navigation Sonamar Inc c. Algoma Steamships Limited.[1]

The applicant applied to have set aside an arbitral award. It

[1][1987] RJQ 1346

relied on the limited grounds provided by Cl 34 of the Model Law. Sub-clause 2 provides:

"(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

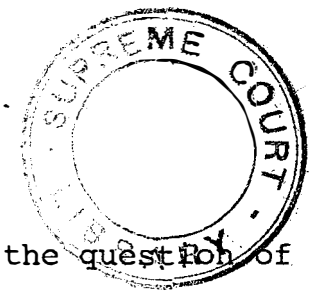
(ii) the award is in conflict with the public policy of this State."

The applicant contended that the award was bad because of the absence of coherent and comprehensible reasons and/or because it was contrary to public policy. Reasons are required by Art 31(2). Accordingly an award would be contrary to the Model Law and susceptible to being set aside under Sub-clause (2)(iv) if, without agreement of the parties, reasons are absent. Mr Justice Gonthier relied exclusively upon English and Canadian decisions in determining that the award covered the essential matters and that it drew conclusions as to the justice of the claims made and, accordingly, satisfied the requirement for reasons. In other words, in giving effect to Art 31(2), which requires that "the award shall state the reasoning upon which it is based", he drew on common law decisions as to the extent of reasoning required. The judge cited the decision of Megaw J in Poyser & Mills' Arbitration[2] and the words of Lord Lane in R. v Immigration Appeal Tribunal.[3] One is left to wonder whether the same guidelines would have been applied by a court with a different legal culture and whether the result would have been the same.

I should also mention, with no disrespect intended, but merely because it makes the point, that the judge was apparently not

[2][1963] 1 AER 612

[3][1983] 2 AER 520



referred to decisions much more in point on the question of reasoning required from arbitrators.[4] If a Canadian judge is unaware of these decisions, no civil law judge is likely to know of them.

Fortunately, it was a Quebec Court that had to grapple with the argument based on alleged conflict between the award and the "public policy" referred to in Cl 34(2)(b)(ii). The appeal is obviously to the civil law concept of "l'ordre public". In treating the argument the Court referred to the Code Napoleon and to the work of civil law commentators. Its familiarity with this field of learning would be absent in most common law countries. I realise that "public policy" is a term used in Art V of the New York Convention but that does not necessarily engender confidence in the prospects of uniformity of interpretation.

I suppose to an extent, at any rate, it is inevitable that national tribunals charged with the task of applying the Model Law will interpret its provisions with the background of the only established body of jurisprudence with which they are

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[4]cf. Bremer Handelgesellschaft m.b.h. v Westzucker G.m.b.h. (No.2) [1981] 2 Lloyd's Rep 130 @ 132; J.H.Rayner (Mincing Lane) Ltd v Shaker Trading Co [1982] 1 Lloyd's Rep 632 @ 636; Hayn Roman & Co S.A. v Cominter (U.K.) Ltd [1982] 2 Lloyd's Rep 458 @ 464; Universal Petroleum Co Ltd (in liq) v Handels und Transportgesellschaft m.b.h. [1987] 2 AER 737.

familiar. That is their own national arbitral law. Yet, it may be thought that this could lead to dangerous results. Thus the ability of common law courts to deal appropriately with the concept of "l'ordre public" remains a matter of speculation.[5] In the result, the room for differing interpretations of the model provisions seems to be dangerously present. It is not difficult to envisage a situation where the same provisions of the Model Law may obtain one interpretation in a common law country, with its wealth of arbitral decisions, and a completely different one in a civil law country. The benefits of uniformity could disappear in a thrice.

Thirdly, a pivotal provision in the Model Law is Art 5 which provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law". There are, of course, many matters not governed by the Model Law. As well, Art 9 preserves the powers of the court to grant interim measures of protection. There are no guidelines prescribed by the Model Law and, obviously, once again, each national court will act in accordance with its own jurisprudence. The

[5]In Luke v Lyde 2 Burr 882; 97 ER 614 Lord Mansfield referred to the Roman Pandects, the Consolato del Mare, Laws of Wisberry and Oleron and the French Ordonnances in a dispute concerning freight for goods lost at sea. Of course, Lord Mansfield was educated in Scotland with its tradition of Roman and common law.

resultant room for divergence is not difficult to imagine. An example may be seen in the judgment of Kerr LJ in Babanaft International Co SA v Bassatne (unreported, 29 June 1988). The plaintiff obtained a judgment for a sum exceeding $15m. Then it obtained Mareva injunctions in respect of all the defendant's assets both in England and abroad. The Court held that, in respect of foreign assets, the order required to be restricted. Kerr LJ mentioned that a foreign court might approach the question of the appropriate order in a manner different from that which the Court thought appropriate. In other words even if the Model Law were adopted in full in England there would remain a substantial field for the operation of established common law with principles different from the civil law.

Finally, the same problem could arise for another reason altogether. A judge in country A may well give a decision on a provision of the Model Law in conflict with that given by a judge in country B, completely unaware of the other decision. I should point out that this problem is not confined to arbitrations and to the Model Law and will be even more acute as international commercial Conventions, such as the Vienna International Sale of Goods Convention, proliferate and increasing numbers of countries incorporate them in their domestic law. I will come back to the trend towards uniformity in substantive law shortly.

The Secretariat of UNCITRAL is aware of the problem and, at its most recent meeting in May 1988, the Commission considered the need and means for collecting and disseminating court decisions and arbitral awards relating to legal texts emanating from its work. It was agreed on all hands that information on the application and interpretation of the international texts would help to further the desired uniformity in application but the difficulty in collecting and disseminating the information is forbidding. Nonetheless, it was agreed that the Secretariat of the Commission should function as the focal point for the work. Success will depend, in the first instance, on the national correspondents gathering and forwarding the appropriate decisions. It is hoped that this would extend to arbitral awards as well so long as they could be made sufficiently anonymous and thereby safeguard the requirements of confidentiality. The next difficulty, even accepting the efficiency of the national correspondents, is the translation of the decisions into the six official languages of the United Nations.

What then are the prospects for the adoption of the Model Law by the members of the United Nations? It is understood that there are recommendations for appropriate legislative endorsement in Australia and Hong Kong. One of the reasons which informed the recommendations is the perception that party

autonomy and the absence from judicial supervision, to be found in the Model Law, will be considered attractive by business. As well, it is hoped that international commercial arbitration will be attracted to the Arbitration Centres recently established in these two countries.

The principal point of contention in the Model Law which may cause its rejection in some common law countries, particularly in England, is the further relaxation it achieves in judicial control over arbitrations and arbitrators. The Model Law resolved the clash in philosophy on this point between the civil law countries and the United States, on the one hand, and the common law countries, on the other, in favour of the former. The question which arises is whether the trend, which is present even in the staunchest of common law countries, towards relaxation of judicial control, should now be taken to the length prescribed by the Model Law.

On the one hand, stands the self-evident proposition that a business man, having the choice of court or arbitration and having opted for arbitration, should have his choice respected. The award, right or wrong, should be final. A signal embodiment of this intention is in Art 24 of the ICC Rules which provides not only that an award shall be final but that, by submitting their dispute to arbitration, the parties "shall be deemed to have undertaken to carry out the resulting

award without delay and to have waived their right to any form of appeal in so far as such waiver can validly be made". In Arab African Energy Corp Ltd v Olieprodukten Nederland B.U. [6] the English Court of Appeal held that the incorporation of the ICC Rules in the arbitration clause was a sufficient "agreement in writing" excluding the right of appeal for the purposes of s 3 of the Arbitration Act, 1979. The Court said "True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency".

On the other hand, there is the long standing rule of the common law that there should not be two systems of law, one applied in the courts and one by arbitrators. As well, stands the related concept that the right of all persons should be determined in accordance with law. At the outset, it must be recognised that even absent the provisions of the Model Law, these rules have been substantially eroded, partly by the courts and partly by legislation.

There is a recent, but developing, tendency of common law

[6][1983] 2 Lloyd's Rep 419

courts to accept that, instead of decisions strictly in accordance with law, the parties should be left to choose either the system of law that most appeals to them or, indeed, have the matter determined in accordance with "equity".

This sea change was heralded by the decision of the English Court of Appeal in Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd.[7] The clause of the treaty of reinsurance calling for arbitration included the following provision:

> "The Arbitrator and Umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of this Agreement"

It had long been settled principle, both in England and in Australia, that arbitrators were required to apply strict rules of law in the same way as the courts. As a consequence, in relation to a provision much the same as the one before the Court of Appeal, Mr Justice Megaw held in Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Alge mene Verzekgringen[8] that it was invalid as being contrary to public policy. This view was rejected by Lord Denning MR in the Eagle Star (ib p 362). The other two members of the Court

[7][1978] 1 Lloyd's Rep 357

[8][1962] 2 Lloyd's Rep 257

agreed. It must be noted, however, that Denning MR gave the clause a narrow construction. He said, "It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this". The Privy Council gave an even more narrow scope for the amicable compositeur clause in Rolland v Cassidy[9] when it said:

> "Their Lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as amiable compositeurs to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity."

It is interesting to contrast this view with that of the Cour d'Appel de Paris I will mention later.

As the high water mark of the change in attitude by the courts, stands the decision of the English Court of Appeal in Deutsche Schatbau-Und Tiefbohrgesellschaft m.b.h. v The R'as Al Khaimah National Oil Company.[10] An oil exploration agreement between the parties provided for ICC arbitration of disputes. Under the ICC rules, [Art 13(3)], in the absence of any indication by the parties as to the applicable law, the arbitrator is directed to apply the proper law determined by

[9][1888] 13 App Cas 770 @ 772

[10][1987] 2 Lloyd's Rep 246

the rule of conflict which he deems appropriate. The arbitrators determined that the proper law governing the substantial obligations of the parties was "internationally accepted principles of law governing contractual relations". The appellant submitted that it would be contrary to English public policy to enforce an award which determined the rights of the parties "not on the basis of any particular national law, but upon some unspecified, and possibly ill-defined, internationally accepted principles of law". Sir John Donaldson MR, in whose judgment Woolff and Russell LJJ agreed, said:

> "I can see no basis for concluding that the arbitrators' choice of proper law - a common denominator of principles underlying the laws of the various nations governing contractual relations - is outwith the scope of the choice which the parties left to the arbitrators."

If I may be permitted to say so, to me, there is difficulty in reconciling this comment with the approach of Lord Diplock in Amin Rasheed Shipping Corporation v Kuwait Insurance Co.[11] Lord Diplock said that contracts are incapable of existing in a legal vacuum and are mere pieces of paper devoid of all legal effect unless made by reference to some system of private law. The view taken by Lord Donaldson is, of course, pregnant with the assumption that there is some commonly accepted body

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[11] [1984] AC 50 @ 65

of principles governing international contracts. This is a question to be addressed later in this paper.

In the view of some academic commentators a major prop in the development of party autonomy in choice of law is the theory of delocalised, or floating, or denationalised arbitration. According to this theory, which finds its strongest supporters in France, parties should be permitted to choose the procedural rules of any place they like and the substantive rules of another country or just simply general principles of law or the lex mercatoria. This theory has totally failed to obtain judicial support in England. It was rejected by the Court of Appeal in Bank Mellart v Helliniki Techniki S.A.[12] and more recently Lord Justice Kerr cited that decision with approval. (cf Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru).[13] By English law, foreign arbitration is subject to the procedure of the foreign seat. In Bank Mellart, the Court of Appeal said (p 301) English law "does not recognise the concept of arbitral procedures floating in the trans-national firmament unconnected with any municipal system of law". Proponents of delocalised arbitrations, such as Jan Paulsson, decline to accept that such was the effect of the

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[12] [1984] QB 291

[13] [1988] 1 Lloyd's Rep 116

decision in Bank Mellart.[14] Writers continue to argue vigorously for and against the concept and the outcome cannot be predicted with confidence.

So far as legislation is concerned, the uniform arbitration laws in Australia serve as illustrations of the change in attitude. The agreement of the parties may permit the arbitrator to depart from strict law and to act as an amiable compositeur.[15] Such provisions also appear in Art 28(3) of the Model Law and Art 13(4) of the ICC Rules. Notwithstanding an ingenious argument by the editors of Mustill and Boyd "The Law and Practice of Commercial Arbitration in England", I find it impossible to accept that any meaningful role is left to any right to appeal from a resulting award for alleged error of law.[16]

In this context the decision of Cour d'Appel de Paris in Societe Intrafor Color et Subtec Middle East Co c. M.M. Gagnant Guilbert et al[17] is instructive. The Court held that the

[14]"Arbitration Unbound" 30 ICLQ 358 (1981); "Delocalisation of International Commercial Arbitration; When & Why it Matters" 32 ICLQ (1983) but see Mann "England Rejects Delocalised Contracts and Arbitration" 33 ICLQ 193 (1984).

[15]The Victorian Act abandoned the use of this traditional term in authorising a determination by reference to "considerations of general justice and fairness".

[16]cf Hunter "Lex Mercatoria" [1987] LMCQ 277 @ 280

[17]Revue de l'Arbitrage 1985 No 2 p 300

arbitrators had the power to decide as amiables compositeurs. Further it held that they were entitled to avoid the strict application, not only of provisions of law, but also of the contractual clauses, so long as they did not infringe the rules of ordre public.[18] They had the power to amend or moderate the consequences of certain contractual clauses having regard to reasons of equity. Interestingly from the point of view of the Model Law the Court also rejected the appeal against the Swiss award on the ground of infringement of ordre public because of alleged violations of certain Declarations and Conventions adopted into French internal law. The Court held that a breach of internal ordre public was not a matter for complaint under Art 1502 of the New Code of Civil Procedure which referred only to international ordre public.

The erosions in the principle of strict adherence to law received further legislative endorsement in England, Australia and Hong Kong. The Arbitration Acts now permit appeals only

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[18]This approach accords with the views of Craig Park and Paulsson "International Chamber of Commerce Arbitration " (p 97):

> "While amiable compositeur arbitrator has very broad powers, his authority is not unlimited. It is said that the arbitrators power is coextensive with the parties capacity to settle a dispute by negotiation. Hence, in the proper exercise of his powers, the amiable compositeur will be loathe to disregard mandatory provisions of law applicable in the place of contractual performance; nor can he dismiss fundamental requirements of public policy...."

on questions of law and only by leave of the court. Even this opportunity may be excluded by agreement of the parties although, in England, in certain classes of dispute, the right is denied. By Art 34 of the Model Law, even this limited right of challenge to an award on the basis of error of law is unavailable. It is primarily this provision that has lead to determined opposition in England to the adoption of the Model Law without substantial modification.

Probably the leading critics in England of the Model Law in its present form are Lord Justice Kerr, Mr Justice Steyn and Mr F.A.Mann. In his Alexander Lecture in 1984 Kerr LJ explained in detail the basis of his objections. It is probably fair to say that the focus of his criticism is the effect of the Model Law on the relationship between arbitrations and arbitrators on the one hand and courts on the other. In his view the power of judicial review is an essential safeguard against error due to ultimate sheer incompetence by the arbitrator. More generally, he said:

> "No one having the power to make legally binding decisions in this country should in my view be altogether outside and immune from this system. No one below the highest tribunal should have unreviewable legal powers over others."

From a lawyer's point of view, the logic of the argument, is, I believe, unassailable. The problem, to my mind, is that being lawyers, we are conditioned to approach questions with a background not necessarily tutored in the aspirations of the

commercial community. Whilst lawyers may consider it inappropriate to have unreviewable powers, a businessman may be willing to accept a bad result, as a consequence of incompetence, or error, in an award so long as he can be satisfied that the dispute will be dealt with expeditiously and that once an award is delivered, that will be the end of the dispute one way or the other.

The other substantial criticism Lord Justice Kerr levelled against the Model Law is directed to the provision which precludes an attack on the arbitrator's exercise of jurisdiction until after delivery of the award. He accepts, rightly, that an arbitrator should be permitted, at least in the first instance, to decide on the limit of his own jurisdiction. I should mention, in parenthesis, that this, of course, is quite a substantial concession on English law as it presently stands. The Model Law, in turn, accepts that the arbitrator's decision on jurisdiction should be subject to review by the courts. However, the arbitrator may decide that he has jurisdiction and continue with a long and expensive arbitration, involving the parties in untold trouble and cost, only to find that, at the end of the day, the court holds that he never did have jurisdiction and that the whole exercise has been abortive. In the recent past, there have been two very long and expensive ICSID arbitrations where, the initial challenge to jurisdiction was rejected, but upheld on review. The rationale for the provision in the Model Law has been the

concern of civil lawyers that arbitrations may be unduly delayed by the need to have hearings on the question of jurisdiction as well as possible appeals from the initial curial ruling. This concern was met by a previous draft provision, which did nor survive into the final formulation, which would have permitted the arbitration to continue whilst the challenge to jurisdiction was proceeding. As well, the challenge to exercise of jurisdiction may be based on claims of bias, unfairness or some other breach of the principles of natural justice. This compounds, it is said, the injustice and inappropriateness of requiring a submission by a party to a arbitral hearing until a challenge can be mounted to the eventual award. I must say that, for myself, I have not been able to understand why the compromise of a simultaneous continuance of the arbitration and hearing in the court should not have been preserved.

The third major criticism by Lord Justice Kerr relates to the limitation of the Model Law to "international commercial" arbitrations. In his view, any adoption of the Model Law should apply across the board as is the case in Quebec. He considers that the definition of "international commercial arbitration" in Art 1 of the Model Law is "confusing, unworkable and unnecessary and will merely give rise to litigation at the outset". It must be admitted that, although a great deal of time was occupied, by delegates to UNCITRAL, in discussing some appropriate definition of "commercial", this

was not able to be achieved. I do not think that I am being rash in suggesting that in those countries that accept that the Model Law should be confined to "international commercial arbitrations", the risk of divergence in the interpretation of "commercial" is extremely likely. The problem was of sufficient concern to the Hong Kong Law Reform Commission that it recommended deletion of the word. This will have the effect of making the law apply to all "international" arbitrations.

Kerr LJ also resisted any suggestion that there be parallel but different systems for international and domestic arbitrations. It should be pointed out that this course has been followed in some countries. France is a particular example. National legislation has adopted different benchmarks to assist in determining whether an arbitration is "international". The French New Code of Civil Procedure looks to the underlying transaction referred to arbitration. Belgium and Switzerland use the residence and nationality of the parties as the test. I am unaware of any difficulties in actual practice in this regard. Even in England and Australia, there are different regimes for the enforcement of awards and the stay of international and domestic disputes.

Some assert that the distinction in the regimes is justified for two reasons. First, parties engaged in international arbitration are less in need of protection. Second, States have

little interest in strictly regulating international arbitrations taking place on their territory as usually the disputes have little or no connection with the place of arbitration.[19]

Interestingly the United States Supreme Court, in a number of recent decisions (eg Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc[20] recognised the special needs of international arbitrations and appeared to make special rules for them only to adopt similar relaxed views in relation to domestic arbitrations a little later (Shearson American Express Inc v McMahon.[21]

Lord Justice Mustill is the Chairman of a Committee which is considering whether the United Kingdom should subscribe to the Model Law with only minor changes, with major changes or, perhaps not at all. Having regard to the strength of opposition, one cannot be very optimistic of ultimate adoption of the Model Law certainly not without major modifications.

However, what is, at least to me, an overwhelmingly persuasive argument for adoption has been put by Lord Wilberforce:

[19]Tschanz, "International Arbitration in the United States; the Need for a New Act" 1987 Arb Intl 309.

[20](1985) 473 US 614

[21](1987) 96 L Ed 2d 185

> "insistence on judicial review, beyond the scope provided by the Model Law, in countries where the courts are trusted and experienced, could encourage a similar modification of the Model Law in countries where the same conditions did not exist. The result would be that international arbitration in those countries would become less, rather than more safe."

So far as I know, there has been no indication from the U.S. or the socialist countries that they intend to adopt the Model Law in the near future. This is so notwithstanding that the U.S. delegates and the delegates from the Socialist countries took a vigorous role in the UNCITRAL debates. In the light of the objections by Kerr LJ, it is not without interest to notice that awards in the USSR, for example, of the Maritime Arbitration Commission may be vacated by the Supreme Court of the USSR on grounds of a "substantial contravention or incorrect application of prevailing laws". This seems to go beyond conflict with public policy.

Assuming a decision to enact the Model Law into national legislation, a further option is then presented. If disputes are to be made subject to the Model Law, should its application be optional? If so, should the option be to opt in, or to opt out? The concept of options accords well with the philosophy of party autonomy. As to which way the option should work is much more open to debate. Yet its importance cannot be overstated. Human nature being what it is, it is unlikely that the option will be exercised due simply to inertia.

In my view, the march towards uniformity in substantive law has been more dramatic. This may have been because the need was more urgent. In international trading transactions, frequently there is great difficulty in identifying the relevant law. A single transaction, involving multiple legal relationships, (sale of goods, finance, insurance, carriage) may be the subject of a number of different legal systems. To meet this difficulty, slowly there has been evolving a uniform code, at least in relation to some aspects.

At this point, a wide gulf arises between those who describe this evolving transnational law as lex mercatoria and those who deny the existence of any such system and concede only that, to the extent that trading countries have accepted various international conventions or, perhaps, trade usages, there is, as between those countries at any rate, uniformity.

The concept of a new lex mercatoria dates back only to the London Conference on the Sources of International Trade held in 1962. Since then the literature has flowered and there are, indeed, many eminent supporters of the concept of a new lex mercatoria. Perhaps the most interesting posture has been adopted by Professor Schmitthoff who, in 1968, while recognising the evolution of the system going under this name thought that it was "unsystematic, complex and multiform". A universal code of international trade law as part of the

national law of all countries he thought unrealistic.[22] A mere twelve years later he said that codification was not a Utopian aim.[23] If I may be permitted to say so, the three reasons he gives for his change of mind are not altogether convincing. One reason was the success of UNCITRAL. However, only time will tell whether national legislatures will follow their delegates in accepting compromise statements as a proper method for the codification of international trade law. I will say something more about this shortly.

According to one view, the international law of commercial transactions (lex mercatoria) is an international body of rules based on an understanding among merchants and the contractual practice of the international community, consisting predominantly of merchants, shipowners, insurers and bankers from all countries of the world. The source of universality is not only comparative law, i.e. the similarity of merchants' concepts and institutions in various legal systems but primarily the contemporary process of interaction on the part of those involved in the international commercial community. Custom is the primary source while the law of international

[22] "The Unification of the Law of International Trade" (1968) JBL 105.

[23] "Commercial Law in a Changing Economic Climate" 2 Ed 1981

trade is a special type of international law.[24] I have taken the foregoing as a representative statement of how this new lex mercatoria is identified. Its supporters harken back to the law merchant which prevailed in the Middle Ages. Professor Goldstajn identified the international character of the old law merchant as a result of four factors "the unifying effect of the law of fairs, the universality of customs of the sea, the activity of notary publics and the use of arbitration as special courts". It seems to me that this approach equates universality with only the European world. This alleged universal law merchant held no sway in India, or China and even less in the less developed or undiscovered parts of the world. Thus, the cry of universality must surely ring hollow. In much the same way, the new lex mercatoria can hardly be said to bear the imprint of universality. Is it seriously suggested that the trade usage of highly sophisticated international conglomerates in the Western world are to be found or accepted in less developed commercial societies? It seems to me that at best, it may be said that there is a new lex mercatoria in the same very confined way that there was one in the Middle Ages. However, even this restricted notion seems to have been exploded in a deeply

[24] "Usages of Trade and Other Autonomous Rules of International Trade According to U.N. (1980) Sales Convention" Professor Goldstajn.

researched article by Sir Michael Mustill.[25]

Not only is there vigorous controversy between learned writers as to the existence of the new lex mercatoria but to the very limited extent that the question has been the subject of judicial comment, the gulf seems to be equally wide. The subject of the litigation in Pabalk Ticaret Sirketi v Soc. Anon. Norsolor was an award delivered in Austria. It was the subject of an application to have it set aside in Austria and to have it enforced in France. The arbitrators had purported to apply the lex mercatoria rather than the national laws of either of either of the two countries involved. The Tribunale de Grande Instance in Paris was willing to recognise and enforce the award.[26]That decision was appealed and ultimately the Cour de Cassation confirmed the award. As Mustill recognises (ib p 170) this decision does lend support to supporters of the theory to the extent that the court did not repudiate the notion of the lex mercatoria. In Austria, the Court of Appeal of Vienna in setting aside parts of the award, considered lex mercatoria as "world law of doubtful validity". Although the decision itself was reversed by the

[25]"The New Lex Mercatoria; The First 25 Years" Liber Amicorum for Lord Wilberforce (hereafter referred to as "Mustill"). The reference to the vast bibliography on the topic assembled in the article is invaluable to a scholar in this field.

[26]108 Clunet 386 (1981)

Austrian Supreme Court[27] it did not disagree with this comment.

The French Cour de Cassation was required to consider the award in Soc. Fougerolle v Banque de Proche Orient.[28] The arbitrators had decided the dispute according to what was said to be the principles generally applicable in international commerce. Attack on the award was rejected but there was no clear endorsement of the existence of lex mercatoria.

Perhaps the clearest endorsement of the concept is to be found in the decision of the Supreme Court of Italy[29] where it says:

> "The law in which such arbitration operates is transnational, being independent of the laws of the individual States. Since 'mercantile' law comes into existence through the adhesion of merchants to the values of their milieu, merchants comply with those values, which the majority of them considers binding, because of necessity ... to the extent that it is established that merchants ... independently of their belonging to a State ... agree upon the basic values inherent to their trade ... a lex mercatoria exists ... accordingly 'mercantile' law comes into existence when binding values are recognised and complied with, and merchants co-ordinate their conduct on the ground of common rules."

To me, the most difficult judicial pronouncement in this field is what fell from Lord Donaldson MR in the decision earlier cited (supra p 15). Not only is it inconsistent with the

[27] 1984 IPRax 97

[28] Rev. Arb. (1982) 183

[29] Corte Casse 1982 Foro It. 1 2285 (1982)

statement of Lord Diplock, but it was delivered as though stating a self-evident truth. Mustill offers (ib p 172) certain observations on this decision. However, it seems to me, that there is no getting away from the basic fact that three members of the English Court of Appeal were content to proceed on the basis that there are some generally accepted principles common to "various nations" which are capable of governing contractual relations. The question still awaits final resolution. Apparently, there is to be no appeal from the decision of the English Court of Appeal. The question does require full argument in some appropriate tribunal. In any such contest it seems to me that at the present time the view espoused by Mustill that there is no universally accepted lex mercatoria should prevail.

Even if the foregoing be a correct anticipation of the outcome of the argument concerning the present existence of lex mercatoria it does not necessarily return a wholly negative answer to the question to which this paper is addressed. It cannot be denied that there are great strides being made in the substantive law towards the goal of uniformity. The United Nations and associated organisations have been successful in bringing into existence a number of international conventions to govern international trade. The Vienna Convention for the International Sale of Goods is an excellent example. It is instructive on a number of counts. First, it is a revision of the Uniform Law on the International Sale of Goods (ULIS) and

the Uniform Law on Formation of Contracts for International Sale of Goods (ULF) which were adopted at the Hague Convention in 1964. They came to be regarded as European formulations of trade law and failed to gain international acceptance. Instead, regional formulations of international sales law were used in the ECE conditions (broadly, the European Economic Community), the COMEDON conditions (the Socialist countries) and the UCC (United States Uniform Commercial Code) as well as ULIS and ULF. These various formulations did have similarities in important features. It was on these similarities that UNCITRAL attempted to build. Where there were wide divergencies, the Convention adopted a course which is the second of the matters I wish to draw to attention. There was a wide gulf in relation to the requirement for writing. The Convention provides (Article 96) that a Contracting State may, by declaration, protect its requirements as to form. This is but one example of the way that differences capable of resolution were accommodated. Of course, it is the signal for possible wide divergence from uniformity. The third aspect in which the Convention is illustrative is that it does not seek to address a considerable number of matters essential to the law for the sale of goods. Thus misrepresentation, fraud and good faith are not dealt with and are left to the national law. Finally, the parties are permitted to exclude or vary any or all of the provisions of the Convention holders. All this having been said, the Convention is a signal achievement in providing for

uniformity. It has already been adopted by the United States and Australia.

It is important to note that the Convention was adopted in these countries notwithstanding that basic principles of common law were abandoned in the process. It is not necessary that there be consideration in order for a contract to be created. Nor, therefore, need there be consideration for a promise to keep an offer open for a certain period to be binding (see Art 16). As I understand it, both the United States and Australia accepted the Convention in this regard without reservation and manifested therefore an apparent readiness to jettison a long-held principle for the sake of compromise.

There is a marked divergence between common law concepts of the scope of an agent's power to contract on behalf of a principal and the principles of the civil law systems. The Geneva Convention on Agency is the product of compromise. There are many other contract related areas where international harmonisation is proceeding. Thus, UNCITRAL is working on an International Convention on Negotiable Instruments and on rules detailing circumstances when a penalty be lawful in international contracts.

As well, there are other international organisations which have brought into existence rules which found universal acceptance such as the International Chamber of Commerce, Uniform Customs

and Practice for Documentary Credits and Uniform Rules for the Collection of Commercial Paper. It has been pointed out that an inevitable concomitant of this method of law making has been compromise. In other words, the international agreements do not embody accepted international trading practice but, rather, what the various delegations have been able to agree on by way of compromise. Furthermore, because many of the crucial provisions are the product of compromise, they are often ambiguous. I may say in passing that a recognition that international trade law has been evolving in this fashion makes it overwhelmingly difficult to accept the existence of a lex mercatoria.

Supporters of the new lex mercatoria rely on international arbitrations themselves as a source of the law. Even if this contention be rejected, it is possible to regard them as vehicles for harmonisation. Undoubtedly, rules have been laid down in awards which have found broad acceptance in the international trading community. Professor Sanders, sitting as an arbitrator[30] said that previous awards "create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated

[30] 1984 Y.B. Com.Arb. 131 at 136

should respond". Some commentators take a more tentative view that "the critical question regarding the future development of international arbitration adjudication ... is whether it can produce substantive legal principles and, in effect, stimulate and foster the development of the common law in international transactions".[31]Indeed, it has been suggested that "arbitral awards rendered by way of published decisions, with reasons, remains the more viable (than Conventions) source of an emerging common law of international contracts.[32]The authors demonstrate, with citations from awards, that arbitrators, rightly or wrongly, based their decisions on what they perceive to be lex mercatoria.[33]It has been suggested that if there is no such body as lex mercatoria, then many awards have been based on error. On the other hand, Lando is frank (ibid p 752) in acknowledging that an arbitrator:

> "faced with the restricted legal material which the law merchant offers, must often seek guidance elsewhere. His main source is the various legal systems. When they conflict he must make a choice or find a new solution. The lex mercatoria often becomes a creative process by this means."

One may question how far a rule determined in this fashion may

[31]Carbonnneau "Rendering Arbitral Awards With Reasons. The Elaboration of the Common Law of International Transactions." 23 Colum J Trans L 579 @ 585 (1985)

[32]Carbonneau and Firestone "Transnational Law Making, Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjustment" Emory Journal of International Dispute Resolution (1986) 51 @ 57.

[33]Also see Lando "The Lex Mercatoria in the International Commercial Arbitration" 34 ICLQ 747

be considered to be transnational law. At best, it is one arbitrator's determination of what transnational law ought to be.

Nonetheless, to the extent that an arbitrator enunciates a concept of transnational law and it finds subsequent acceptance, it certainly does add to the body of law. There is nothing to stop a subsequent arbitrator from disagreeing with one or more earlier arbitral awards. To that extent, this so called law will always remain in a somewhat perilous state. Nonetheless, the precedent does have a supportive effect in the search for uniformity.

Professor Goldstajn has identified international trade usage as the most fruitful source of transnational trade law. He has pointed out that, subject only to the requirements of ordre public, municipal laws give the parties free choice in their selection of the applicable law. That freedom of contract allows the creation of new types of contracts. In relation to these, there have grown up international commercial customs made up of commercial usages, standard contract forms, standard clauses and general conditions of trade. Trade usages have received international recognition in the Vienna Sale of Goods Convention [Art 9(2)]. In other words, to some extent at any rate, actual international trade has created its own rules. At the same time, as pointed out by Mustill, (ibid p 156), it is difficult to accept that in today's varied commercial

community there is a universally accepted trade usage or that it is possible to survey the whole field of international practice to find out what the usage is. This supports, once again, the notion that this so called transnational trade law will be confined to principles found to be acceptable or to prevail in the principal trading countries, the practices of which are readily to be ascertained.

In conclusion, I suggest that whilst the landscape of uniformity in international trading transactions is nowhere as definitive or as clearly defined as the staunchest adherents of lex mercatoria and international commercial arbitration would have one accept, nonetheless, the pressures which drive uniformity are too strong to resist and gradually will prevail.