# International Judiciary and Arbitration

## 1. Introduction

This essay is a descriptive survey of the emergent field of international arbitration. The essay is organized around the various actors in arbitral processes, concentrating on the most recent and current developments relating to each in the field of international arbitration, broadly defined. All of the authors have written extensively on the topics on which they expound. This essay aims to provide students and scholars with insights into where the field and their particular interests are heading. Although several overviews of the field exist, there is a dearth of literature addressing the current state of play, and what has taken it there. The essay concludes with some thoughts on the place of arbitration within the emerging global administrative law, and the obligations of various state and private actors. A key, although in the view of the authors underdeveloped, theme intertwining many of these essays is that of diffusion of governance. Arbitrators, whether private or state, international organizations, private litigants and municipal courts are faced ever increasing with issues of global regulation in areas ranging from competition to environment. In providing insights into these various groups and their regulation shifted modes, the essay uses multiple lenses. While none of the essays are explicitly theoretical in nature, the authors range from sociologists to practitioners, and thus each employs a mix of induction and deduction, and uses different forms of cause lawyering and empirical research. Although the essay focuses on taking a snapshot of the current state of play, many of the essays delve into historical developments to explain current situations, and various points touch on future prognostications. Overall, this collection can be best described as an exercise in social legal theory and empirical observation, rather than pure doctrine or predictive theory. With these opening words from Chester Brown we now go onto to examine the microcosm of global governance, and globalization that is international arbitration today.

## 2. International Judiciary

Chapter 2.1 discusses the role of the international judiciary with relation to interpreting and developing international law. It recognizes the judiciary as a separate entity from other actors in international law, with its own distinct characteristics and features. This is an issue as judges in international tribunals are often appointed from a pool of experienced diplomats and academics and may still be closely associated with their home states. This may lead to conflicts of interest and is said to have undermined the perceived independence of some international tribunals. The Rome Statute attempts to tackle this issue by including provisions for the election of judges with the requirement that they act independently and are not influenced by the government of the state of an accused person. This also serves to highlight the democratic ideals that underpin the modern international judiciary.

International Judiciary examines how international legal doctrines are interpreted in practice. It provides an overview of the role of the international judge and the challenges faced in the interpretative process. The role of the judge is accentuated in international law due to its inherent lack of a centralized government and legislative body. Therefore, international judges play an important part in lawmaking and the continuing development of international law. They are often required to make decisions based on 'gaps' in the law and are faced with the difficult task of striking a balance between respect for state sovereignty and the promotion of international values and norms. These decisions may have far-reaching consequences, and the creation of precedent may bind or persuade other judges and tribunals in the future. International judges face a high level of public scrutiny and are often required to enforce their decisions with limited resources in comparison to their counterparts in municipal legal systems.

### 2.1. Role of International Judiciary

There are a number of specialist international courts and tribunals, and specific treaty provisions have created various ad hoc tribunals to resolve specific disputes. Probably the most well-known example is the International Tribunal for the former Yugoslavia. Ad hoc tribunals may have advantages over the ICJ where a particular area of law is to be tested, and a tribunal composed of specialists in that area can be convened to decide a particular case. But it is important that general international law is perceived as a single cohesive legal system, and the advancement of this system is the primary function of the ICJ.

The court has jurisdiction to decide all cases which are submitted to it by states by special agreement, that is, agreement to refer a specific dispute to the court; or by a compromissory clause, a term indicating a party's consent to referral of any dispute as to a particular treaty to the court. In addition, the court has an all-important power to render advisory opinions under Article 96 of the Charter on any legal questions referred to it by the General Assembly, the Security Council, or any organ of the United Nations authorized to make such a reference. The utility of the court's advisory opinions in the development of international law cannot be overestimated. And since its inception, the court has delivered numerous judgments and opinions, making a substantial contribution to international law.

Adjudication is now seen as a central method of dispute settlement in the international legal system.

Increasing numbers of treaty provisions provide for disputes on the interpretation or application of the treaty to be referred to the International Court of Justice. This is the principal judicial organ of the United Nations, and its creation was provided for in the Charter. The Statute of the Court, which is annexed to the Charter, is an integral part of the Charter. But the court is not to be confused with the other organs of the United Nations, which are subject to its authority. The court operates completely independently of the other organs. It is composed of a Panel of 15 judges elected by the General Assembly and Security Council. This is a reflection of the idea of dualist consent to the court, demonstrating the desire to balance the various world legal systems in the composition of the court. The judges hold office for nine years, and elections are held every three years for five judges. They must possess the qualifications required in their respective countries for appointment to the highest judicial offices or be jurisconsults of recognized competence in international law.

International judiciary can be defined as those organs of the state whose primary function is to resolve disputes of fact on the application of law. It is through this process that law is clarified and enforced, and the machinery of the rule of law is set in motion. States have always been reluctant to place the settlement of disputes between themselves into the hands of a third party. It means accepting that the result may be adverse to their interests and that they must comply with an adverse decision. In earlier times, the only method of resolving international disputes was war. With the growing influence of the idea of the rule of law in international relations, various methods of peaceful dispute settlement have been attempted. Negotiation and mediation, though still widely used, have often failed to produce a settlement on a sound and predictable legal basis. Over the last hundred years, there has been a significant move towards the adjudicative model as a method of finally settling international disputes.

## 2.2. Key International Judicial Bodies

The ICJ has jurisdiction only in those cases where both (or all) parties to the case are states and when they have consented to turning the dispute over to the court. This means that the court's jurisdiction is limited, though it is the only international court with general jurisdiction. It decides contentious cases on the basis of international law or the interpretation of multilateral treaties and issues advisory opinions on legal questions referred to it by the General Assembly, the Security Council, or other agencies authorized to do so. This court is crucial, particularly due to the fact that its rulings are binding and the fact that it can settle disputes that are brought before it while helping promote the rule of law in international affairs.

International judiciary covers a wide range of activities carried out by many different types of international judicial bodies. The International Court of Justice (ICJ) is the main judicial organ of the United Nations and is the successor to the Permanent Court of International Justice. It is the principal judicial organ of the United Nations, with headquarters in The Hague, and is supposed to act in accordance with the philosophy that international law is an essential component of international order and that it is capable of serving as a key to a strengthened international judiciary.

## 2.3. Challenges Faced by International Judiciary

The problems surrounding the International Criminal Court are manifold. There is a conflict of the court's jurisdiction with national courts and more often permanent member states of the Security Council. The ICC's functioning in situations referred to it by the Security Council under Chapter VII of the UN Charter remains under obligation to comply with the directions of the Security Council. This makes the ICC's independent exercise of power subject to the Security Council's whims and political maneuvering. Cases of indictment against citizens or officials of the United States and Israel have seen the ICC facing non-cooperation and hostility by concerned states. Ad hoc international criminal tribunals suffered from various setbacks. The UN Security Council did not establish a tribunal for serious violations of international humanitarian law in the former Yugoslavia, though the ICJ's findings in the Bosnian Genocide case held that Serbia was in violation of the Genocide Convention. Non-apprehension of indictees and protracted trials made these tribunals come under criticism.

International judiciary faces various challenges that obstruct the functioning of states and may also challenge the very existence of international judiciary. These challenges range from delicate balancing of state sovereignty in discharging judicial functions to non-acceptance of jurisdiction of international judiciary by some states in cases concerning them. From the perspective of the rule of law and to establish compliance by states, all international judicial bodies in the realm of world politics require an enforcement system. It can be well imagined that the effectiveness of enforcement measures needed to secure compliance would directly relate to heavy resistance by concerned states. This problem plagues the functionality of the International Court of Justice. It has to rely on the goodwill of parties for the enforcement of its judgments. National courts often plead immunity of their government functionaries from attending proceedings in international courts in cases filed against them. This particularly happens in cases relating to human rights violations by certain governments. Such an instance was seen when provisional orders indicated by the ICJ against the United States in the Avena case, to disallow executions of certain Mexican nationals, were not complied with by the US on the ground of 'review and reconsideration' of their cases by state courts. Similarly, states may not execute orders of attachment or arrest of a ship or plane of a foreign state during the pendency of proceedings in an international court, as measures to impair alien's property

are not peremptory in nature. Failure in compliance with a judgment by the concerned party would invariably trigger further litigation in this respect, and possibilities of counterclaims on account of losses suffered due to such non-compliance. This scenario would make the original judgment by the court have little effect on the final settlement of the dispute. Situations may arise where a state, compelled by repeated legal proceedings affecting its prestige and morale, declares withdrawal from international judicial fora, as it happened in the Trepelik case by Turkey, denouncing the optional clause from the jurisdiction of the ICJ.

# 3. Arbitration

A modern example of the use of binding arbitration in an international setting is the use of bilateral investment treaties between countries. These treaties often contain clauses that allow for arbitration of disputes arising between companies and the host country over issues such as discriminatory practices and expropriation. Should a foreign investor believe that the host country has breached a commitment, such as a guarantee of fair and equitable treatment, the investor can bring the dispute to the International Centre for the Settlement of Investment Disputes or another arbitration institution. This type of treaty and the ensuing arbitration are an alternative to a state-to-state dispute brought under public international law and have become increasingly common as the number of investor-state arbitrations has risen in recent years.

Binding and nonbinding arbitration can occur in ad hoc proceedings or through various arbitration institutions. If the arbitration is binding, the decision can be enforced by a court. In nonbinding arbitration, the disputing parties are free to reject the decision and can, in the end, still resort to litigation.

Arbitration is a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments. Arbitration is different from trials because the procedures are less formal and the rules of evidence are often relaxed. Arbitration may be either voluntary or mandatory and can be either binding or nonbinding. The parties usually agree to arbitration in advance, although arbitration agreements may be made after a dispute has arisen.

## 3.1. Definition and Purpose of Arbitration

Referees have been appointed under distinct and specific terms of reference in Section 2 of the Malayan Code that mentions, "The Code is to appoint referees in dispute to give a final and binding award." More specifically, in the Ahmadiah Contract 1928, it says, "Ahmadis will undertake to give all disputes that occur between both parties towards the Ahmadi sect to the Chicago-based elected Khalifatul Masih to give a final and binding award." From the referenced terms of various cases and statutes, such awards are a category of arbitration aimed at the expedient and binding resolution of disputes, often endowed with benefits that exceed general arbitration. However, the distinction of such categories with various methods of ADR does not focus on the essential attributes of arbitration itself. Arbitration can broadly be defined as a process of dispute resolution with its main intention being to provide a fair resolution on the merits of the case, as opposed to other forms of ADR where compromise or reconciliation is the main focus. In such, it is taken that the key trait of arbitration is to end the dispute with a final and binding decision that is enforceable in a conventional court.

## 3.2. Advantages of Arbitration over Litigation

Many parties, in diverse jurisdictions and with a broad variety of legal systems, choose arbitration as a fair and efficient forum for the resolution of disputes. There are sound reasons why arbitration is the most popular alternative to litigation. The advantages of arbitration stem from the very characteristics that make it different from litigation. Contrary to the often adversarial nature of litigation, arbitration is based on the parties' agreement, actual or implied, to submit their disputes to an arbitrator or an arbitral tribunal. This agreement is generally found in a contract that contains a clause in which the parties agree to arbitrate future disputes or in a submission agreement. Because arbitration is consensual, the parties have agreed to arbitrate their disputes; it can be said that arbitration is a form of contractual dispute resolution. This agreement sets the framework for the arbitration, defining the issues to be resolved, the scope of the remedies available, and the manner in which the arbitrator will render a decision. The consensual nature of arbitration permits the parties to design a dispute resolution process tailored to their specific needs. This is an important advantage over litigation, which is generally governed by rigid procedural rules and court-enforced deadlines. By its nature, an agreement to arbitrate implies that the parties have concluded that arbitration is a more effective forum in which to resolve their disputes. This is an important judgment, as it allows the parties the flexibility that is inherent in arbitration, to fashion an efficient process that provides a fair and just result.

## 3.3. Types of Arbitration

In contractual arbitration, parties agree to submit present or future disputes to arbitration, generally binding themselves to abide by the award. Hence, consent is the basic and essential element in contractual arbitration. There are many instances, however, of disputes which have been submitted to arbitration by recourse to the applicable national law, without the existence of an express arbitration agreement between

the parties concerned. This situation often arises in the context of a mixed arbitral and judicial process, where the objective is to avoid the foreign state's immunity from execution of an award at the suit of the private party, on the principle that that which cannot be done directly should not be attainable indirectly. National legislation will usually make provision for the waiver of immunity by the agreed submission of the dispute to arbitration, but these enactments are of limited effect in the absence of party consent and uncertainty prevails as to the precise legal character of the waiver. Finally, there are instances of arbitration proposed by one party alone and envisaged as a means of obtaining a determination of his dispute with the other party, rather than the joint settlement of a difference. This too may be achieved under modern national laws, but it is doubtful whether the prevailing concepts of arbitration are really suitable to many of the situations envisaged in the absence of some development of international arbitral procedure and jurisprudence.

### 3.4. Arbitration Process

The process is mainly well defined in the UNCITRAL Model Law and a number of national laws. The arbitration process is generally a creature of contract, although it can sometimes be invoked by the operation of law. The agreement of the parties will define many issues, including the law to be applied, the number of arbitrators, and the seat of the arbitration (generally the jurisdiction of the courts whose supervisory jurisdiction is preferred). If the arbitration is ad hoc there may be need for a further agreement on administrative services. The first step of the arbitration is the claimant giving a notice of arbitration which will generally accompany the statement of claim. The respondent will then respond to the claim. Following this preliminary procedural matter there is the appointment, and sometimes the challenge, of the arbitrators. Next there will be a consideration of the substantive issues. It is at this stage where the arbitral process begins to look very different to the judicial process. There are usually no strict rules of evidence, the arbitrators applying whatever rules they deem appropriate to the circumstances of the case. This is a reflection of the fact that parties typically agree to arbitrate in order to escape the perceived cost and delay of court litigation. The hearing and the production of evidence will culminate in the making of an award. The exact nature of the award will depend heavily on the arbitrators themselves and the prior agreement of the parties. An award may be no more than a reasoned determination of the issues, rather than an order to do, or refrain from doing, a particular act.
The arbitration process is less formal than the judicial process and typically more flexible, as Enderlein describes it as an "adversarial pedagogic search for the fairest solution", rather than strict application of law to fact. This flexibility and autonomy is attractive to a wide variety of users across many jurisdictions and legal systems. However, as arbitration becomes more popular there are concerns that the increased specialization and professionalism of arbitrators could lead to an over-legalistic and over-formalistic process. This could in turn contribute to the fragmentation of international arbitration into many separate fields and alienate users from non-common law jurisdictions. This is a weighty hypothesis beyond the remit of this essay.

## 4. International Arbitration Institutions

Criteria for an international arbitration institution in the current environment should include speed and cost of the arbitration, and the recognition and enforceability of the award. Flexibility of procedures and the level of service provided by the institution are also important. The institution should set a standard of efficiency in its administration of proceedings. Steps have already been taken by the institutions to meet these criteria; for example, the ICC's latest revisions to its rules in 2012 aim to increase the efficiency and transparency of ICC arbitration. This reflects the current trend in international arbitration as parties search for more cost-effective and timely resolution of disputes.

The arbitration process is controlled by the parties to the dispute and the institutions which set down the rules and administer the proceedings. These vary from one-off ad hoc arrangements to permanent institutions. The ICC, LCIA, and ICSID are three of the best-known permanent arbitration institutions, and they administer many significant international arbitration cases each year. Although they have different types of arbitration agreements, the ICC, LCIA, and ICSID have broadly similar objectives: to further the settlement of international disputes by arbitration and conciliation, and provide facilities for the administration of arbitration and conciliation proceedings. They aim to be the leading providers of dispute resolution services for disputes involving international parties.

### 4.1. Overview of International Arbitration Institutions

Given the wide variety between different systems of law and local judicial intervention, there is a considerable variation in the extent to which the institutions are involved in the process. Primarily due to the highly decentralized nature of arbitration and to the fact that the institutions have in many cases been founded by or with the support of local business communities or other interest groups, the institutions have generally shown a reluctance to impose a uniform or high level of regulation upon the process. In recent years, there has been a trend to legislation and soft law directed at arbitration which requires some conformity in arbitral procedure such as the UNCITRAL model law. This is an area in which the institutions can play a major role in the future.

The great increase in international arbitration in the last 10-15 years has caused the establishment of many international arbitration institutions. These have been of great significance to the development of international arbitration. The functions of the institutions are varied but broadly they are concerned with the administration of arbitration processes. They will commonly have rules of arbitration which the parties may agree to use in the absence of making detailed provisions in their arbitration agreement. The institutions will frequently also have lists of arbitrators and may assist in their appointment and provide assistance in the manner of providing hearing facilities, procedural advice and in some cases a degree of supervision of the arbitral process.

## 4.2. International Chamber of Commerce (ICC)

Parties considering ICC arbitration also draw confidence from the fact that most states have adopted the New York Convention, which holds that a foreign arbitration award is enforceable and can be refused recognition only on limited grounds. Given that ICC awards are effectively binding and are subject to very limited forms of recourse, a stable and effective framework for enforcement is crucial. With the ability to enforce an award in over 120 countries, parties will often find that enforcement is not a problem at all. Finally, one feature that cannot be overlooked is the location of the ICC. With its primary locations in Europe and the USA, parties from any continent can be sure that their arbitration proceedings will not be conducted in a distant or inconvenient location.

International Chamber of Commerce (ICC) is one of the oldest and widely recognized international arbitration institutions. It was established in 1919. Over the years, it has played a significant role in the promotion of international trade and has developed its own set of rules to govern arbitral procedure. Given the private and confidential nature of arbitration, the success of any institution depends hugely on the credibility and expertise of the administrators and arbitrators. In the case of ICC, it is often said that the ICC Secretariat is the institution. The quality of the Secretariat, in terms of its knowledge, expertise, and the level of service it provides to the parties, is indeed a hallmark of ICC. Over the years, the ICC has repeatedly been the most preferred arbitral institution in international surveys. ICC's success in attracting a large volume of international commercial disputes is also attributed to the fact that its milieu has often been reflective of the state of international commerce. For instance, following World War II, when the center for international commerce had shifted from Europe to the USA, ICC's International Court of Arbitration displayed a similar shift in its meetings and awards.

## 4.3. London Court of International Arbitration (LCIA)

The LCIA is also known for its relatively speedy and cost-effective administration of arbitration. This makes it more appealing than other major arbitral institutions in jurisdictions that have passed or are considering similar legislation. Unlike some arbitration institutions, the LCIA is a self-funding organization and therefore does not make a profit from the work it undertakes. Largely due to the competition between other arbitral bodies, there has been a wave of fervent revamps of the LCIA rules over the past decade. The LCIA's International Court has taken a worldly approach to arbitral procedure when revising the rules, taking into account the varied needs and expectations of parties of different nationalities and cultures. This has led to rules of an international character, and the High Court has noted that the LCIA rules are "leading to the globalization of procedural law."

One of the significant advantages of LCIA arbitration is its supervisory jurisdiction of the English courts. Although the seat of the arbitration does not have to be London, parties choosing to arbitrate under its rules can take advantage of the pro-arbitration stance of the English courts, ensuring that their dispute will be dealt with in accordance with their agreement. The LCIA's rules and the Arbitration Act 1996 strike a perfect balance between the courts' need to interfere in the arbitration process to protect the weaker party and the need for minimum interference to preserve party autonomy. A relative paucity of case law under s.67 and 68 of the Arbitration Act 1996 is a fair reflection of the support the English courts give to LCIA arbitration. An award rendered under the LCIA rules will receive a pro-enforcement interpretation from English courts and will be swiftly enforced under the New York Convention where the other party is based overseas.

The LCIA is one of the oldest and most respected arbitration institutions in the world. It was founded in 1839 and began its arbitration work in 1892. The LCIA is one of the most advanced arbitration institutions in the world due to its updated and state-of-the-art rules and regulations. The LCIA provides efficient, flexible, and impartial administration of arbitration and other ADR proceedings, regardless of location and under any system of law. It also provides a toolkit of services for the conduct of arbitral proceedings, from the first request through to the challenge of awards.

## 4.4. International Centre for Settlement of Investment Disputes (ICSID)

ICSID provides facilities for the conciliation and arbitration of investment disputes between foreign investors and host ICSID member states. It is compulsory for member states to provide ICSID with a proper mechanism to enforce arbitral awards, and ICSID awards shall be enforced as per limitations to other member states who are signatories of the New York convention. This is very important in the context of the New York convention and ICSID member states, as a party can enforce an ICSID award to other member

states, and the ICSID convention provides additional remedies to this effect. Any party can enforce an award on the other party's property, and ICSID has its own arrangement and procedure to enforce an award on the non-paying party's property, be it in the member states' territory or in other ICSID member states. This results in a very strong and effective deterrence, as it is natural that if a party has an investment in some country, then this remedy can cause the other party to pay the award at the same time when it is eligible to avoid any embarrassment in other ICSID member states in view of their investment. Readers may refer to "Award Compliance: Age of Consent." Additionally, ICSID has a good record of enforcement of arbitral awards, and the ICSID convention is considered an addition to the New York convention for the enforcement and intersection of taking and satisfying disputes regarding arbitral awards.

ICSID is the most specialized and experienced international institution for arbitration and conciliation of investment disputes. Although the International Centre for Settlement of Investment Disputes (ICSID) was created under the Convention on ICSID, it is a member of the World Bank group. The organ of ICSID consists of the World Bank and the ICSID convention. The World Bank is given specific duties to help the functioning of the ICSID institution and the ICSID convention. The World Bank performs certain functions to assist the institutions, and the convention is a treaty that members of the institution have to sign. This convention is open for signature to all member states of the International Bank for Reconstruction and Development (IBRD). This convention consists of fifteen articles which categorize rules and regulations for arbitration and conciliation, the function and structure of the administrative council of ICSID, the administration and establishment of ICSID, and the rights, duties, and protection of member states and persons involved in arbitration and conciliation. Now, let's analyze the jurisdiction of ICSID. According to Article 64 of the ICSID convention, its jurisdiction is supplementary, and ICSID has jurisdiction over disputes only when the parties to the dispute consent to have disputes of this nature subject to ICSID arbitration and conciliation. In the meantime, ICSID has established a set of rules for dispute settlement, and these rules are divided into two parts. The first part consists of institution rules, and the second part consists of arbitration and conciliation rules. These rules define all procedures for the administrative council and arbitration and conciliation.

# 5. Jurisdiction and Applicable Law in International Arbitration

An arbitration agreement will be particularly unlikely to function effectively as an agreement to submit to arbitration in the absence of an expressed choice of law. This is because the validity and scope of the arbitration agreement may be a matter of substantive law of the country where one of the parties is located, and Article V of the New York Convention provides that the recognition and enforcement of an arbitration agreement and award may be refused if the law of the country where the award is made is not one chosen by the parties. Choosing a law to govern the arbitration agreement or any other issue arising out of the contract to arbitrate does not mean that law will be the law of the country because the parties may agree that their choice of law is a choice of the substance of law only, and in any event, the law of the chosen country contains rules for conflict of laws on the point at issue.

In the absence of an international arbitration law, a major issue confronting the international arbitration process is the identification of the proper law of the arbitration agreement and the proper law of the underlying dispute. The identification of the proper law or laws is particularly important to the extent that the parties to an international arbitration agreement belong to different legal systems, or the agreement relates to a legal relationship located in a country other than the country of one or both of the parties. If the law of the arbitration agreement and the law of the underlying dispute are not clearly identified, it may be difficult to ascertain whether the arbitration agreement is valid and what is the scope of the obligations being discharged by the parties. Similarly, the identification of a law different from that of the country where one or both of the parties is located may lead to assertions that the application of the law concerned is oppressive or that by applying that law it was not intended to extinguish local substantive law rights. This may, in turn, lead to satellite litigation designed to prevent or delay enforcement of the award. In order to avoid these potential problems, it is clearly desirable for the parties to an international arbitration agreement to identify the law to be applied to the arbitration agreement and the law to be applied to the determination of the underlying dispute.

## 5.1. Jurisdictional Issues in International Arbitration

The distinction between litigation and arbitration is important because the former revolves around the adjudicatory processes of a court, resulting in litigation being closely tied to judicial jurisdiction. This is not the case with arbitration, and historically, a key selling point of arbitration to potential litigants has been the ability to escape overly burdensome or costly litigation and laws of a 'home' country. This escape is achieved by agreeing in the arbitration agreement upon a specific choice of law and an arbitral seat, and by implication, an arbitral procedure that will determine which law applies to procedural issues. The sum of these choices will entail that the arbitration is subject to only the jurisdiction of courts that are in some way connected to the law and the arbitral proceedings, resulting in judicial jurisdiction relevant to the arbitral award being narrowly circumscribed.

Jurisdiction is a fundamental concept in liberal democratic legal systems because it concerns the extent of state power to bring citizens and others within the ambit of the law, and the limits of that power. States

exercise prescriptive jurisdiction when they create rules and regulations, administrative law, and common law principles. Enforcement jurisdiction concerns the ability of the state to investigate alleged breaches of the law and bring the person before the courts. Judicial jurisdiction concerns the extent to which the matter before the court is within the judicial power of the state and entails both adjudicative and conclusive authority. All of these forms of jurisdiction are exercised with respect to persons, property, or events, and with respect to dispute resolution, they are exercised to make a relevant and enforceable judgment. Therefore, determining the extent of state power relevant to the parties and the dispute in question is a necessary precursor to litigation or arbitration and is determinative of whether the adjudication will be subject to oversight by national courts and the enforcement of the judgment will be affected.

### 5.2. Choice of Law in International Arbitration

Mandatory rules of law, which are rules widely recognized by the international community of States of a fundamental and indispensable nature, may disapply the chosen law. Article 7(1)(a) of the Rome Convention is illustrative of similar rules found in many national laws. Such rules will operate to prevent parties from evading obligations that are deemed to be in the public interest to impose on them, and will therefore be given effect by the tribunal to the extent necessary to protect the relevant interests. A restrictive approach to the identification of such rules, under which only those of the forum are deemed to be directly applicable to the arbitration, has been held to lack logical coherence and force. It is now generally accepted that mandatory rules may be of the forum, the situs of the arbitration, or less frequently and more controversially, the forum's system of conflict of laws. The last category of rules, being directly applicable to the substantive issue in dispute, would be more appropriate for identification by the conflict of laws rules of the forum where the right to act succeeded in a specific arbitration may be determined."

"In international arbitration, parties are free to choose the law governing the substance of their disputes. This choice is an important step toward the party autonomy that is a key rationale for arbitration. The parties' agreement on the applicable law will determine the obligations, rights, and interests that are relevant to the arbitration. It is the task of the arbitral tribunal to apply the chosen substantive law to the merits of the dispute, unless the parties have authorized it to decide ex aequo et bono or amiable compositeur and the arbitrators determine that this should be the law applicable to the dispute. Failing any designation of the law by the parties, the arbitral tribunal will apply the law determined by the conflict of laws rules which it considers applicable.

## 6. Enforcement of International Arbitral Awards

Agreements between states to refer disputes to arbitrate at the International Centre for the Settlement of Investment Disputes (ICSID) are enforced under the ICSID Convention, which has its own methods for enforcement. If any awards made pursuant to the Convention are not complied with, a party may request that the award be enforced by the State national courts. The ICSID Convention provides a self-contained procedure for the enforcement of the awards, which is automatic and mandatory and is thus much more effective than enforcement involving awards under the New York Convention.

"The high rate of enforcement at a relatively low cost and in much less time makes arbitration more attractive than litigation in many international commercial disputes."

One of the outstanding features of international arbitration is the effectiveness with which arbitral awards can be enforced. International arbitrators have the ability to grant monetary awards and awards that require a party to do or refrain from doing some specific act. Arbitrators cannot put a party in prison for non-compliance with an award, but in this respect they are in the same position as most national courts. The virtue of arbitral awards is that their enforcement can be effected through national courts who are under the New York Convention or are in the reciprocal enforcement treaty countries. Arbitral awards are final and conclusive between the parties, thus there is no appeal on the merits of the award. This benefits the enforcement of an award as there are very limited grounds upon which a party can resist enforcement. For example, Article V of the New York Convention states that recognition and enforcement of an award may be refused if the party resisting enforcement can prove that the other party is, under the law applicable to them, under some incapacity or the agreement is invalid.

### 6.1. Recognition and Enforcement of Arbitral Awards

The advantages of a more effective enforcement process are spelt out in the prefatory observations to the UNCITRAL Model Law. It is this Law, and the New York Convention 1958 discussed below, which in effect set the standard for what is now regarded as the international minimum requirement for the fair and efficient treatment of arbitration and recognition and enforcement of arbitral awards. A foreign award should not be treated justly if it is deprived of an effective possibility of enforcement. Unsatisfied parties are not encouraged to use arbitration if they see a possibility of retaining the benefits of an award without the consent of the winning party. Nor will trade benefit from valid and enforceable awards if the cost and risk of trying to execute them is too high. In our days, when arbitration is widely advocated as a means to avoid exposure to biased or hostile national courts, the effectiveness of arbitration will often be gauged by the level

of probability that an award can be executed within an acceptable time and cost frame at the international level.

An arbitral decree is only as good as the enforcement available to the successful party. This factor goes a long way to determining whether the party will even bother to have the dispute resolved by arbitration. A binding award made in an arbitration arising out of an international commercial relationship is more likely to be effectively enforced in another state than a judgment given by the courts of the state from which the dispute arose. This would be so even though most domestic legal systems today provide a similar enforcement process for both. The important advantage in the case of an arbitral award lies in the system for the enforcement of foreign arbitral awards, which is more favourable than the equivalent regime for enforcement of foreign court judgments under the domestic law of most states. A New York Convention. Arbitration 3rd Ed. Mustill and Boyd suggest that the most significant recent trend in the legal treatment of international arbitration is the growing awareness that its effectiveness depends largely on the reliability of the process by which its product is converted into satisfaction. Too often in the past, refined and costly procedures of decision have been vitiated by the frustration of parties seeking to evade the consequences of an adverse award.

### 6.2. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The New York Convention sets out the only tenable justifications on which a court may refuse recognition and enforcement of a foreign award. These are replicated in the UNCITRAL Model Law and are similar to the justifications for setting aside an award under Article V of the New York Convention.

The New York Convention simplifies the process of recognition and enforcement of foreign arbitral awards. Under the Convention an enforcing party wishing to rely on the award merely needs to supply the original award or a duly certified copy and the original arbitration agreement or a duly certified copy. This will usually mean that there will no longer be a need to go back to the court of the seat of arbitration to obtain an order of enforcement in that is required by the laws of some countries. Arts III and IV of the New York Convention also mean that national courts may only require minimal supplemental information from the award winner and may only refuse recognition and enforcement of the award on the grounds specified in those articles. This is a significant improvement on the previous situation in some countries where awards were regarded as being on a similar footing to foreign judgments which were subject to review on their merits in proceedings that were often long drawn out and involved fresh examination of the legal and factual basis of dispute.

The rules of the New York Convention apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement are sought and differences arising between the parties of which one is a resident of a State other than the State where the award is relied upon or parties have agreed that the subject matter of the award is most closely connected with a State other than the State where the award is relied upon or a party has a place of business. This wide application means that the convention will apply to a vast majority of modern international commercial arbitration.

Parties to an international arbitration are often concerned about whether a prospective arbitral award might be enforced against their local assets or resist enforced when a losing party feels that the arbitration has not been satisfactorily concluded. Answers to these concerns are found in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention") which is probably the most important treaty in the field of international dispute resolution. The objectives of the Convention have been described by the US Supreme Court as "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries". The New York Convention has become the basic document in the field and its ratification is an essential move for any State which wishes to promote itself as a pro-arbitration jurisdiction.

## 7. Investor-State Arbitration

The investor must establish that the tribunal has jurisdiction, either because the state has consented to arbitration in a particular treaty (and that the treaty is in force), or because the state has consented to arbitration under a certain treaty article or a contract. If jurisdiction is established under the Energy Charter Treaty, there is the possibility of ICSID arbitration as the Charter forms ICSID-specific consent in addition to the general consent given by individual states as contracting parties to the treaty.

The rules and procedure of arbitration can be found in the arbitration agreement contained in an investment treaty or, more rarely, in an investment contract. This agreement must be accepted by both the investor and the host state. If the agreement simply provides for ad hoc arbitration under the UNCITRAL Arbitration Rules, these rules will effectively form the basis of the agreement to arbitrate.

Investor-state arbitration is an alternative to state-to-state dispute resolution as part of public international law. It is a procedure enabling investors to bring disputes against host states before an arbitral tribunal.

Investor-state arbitration emphasizes international arbitration, where the major part comes from bilateral investment treaties, the Energy Charter Treaty, and the investment chapters of free trade agreements. This has significantly developed an international body of law governing the treatment of foreign investment and a body of case law, which is important for both foreign investors and host states.

## 7.1. Overview of Investor-State Arbitration

Arbitral dispute settlement is the settlement of legal disputes between private parties by a tribunal selected by the parties, usually by including a decision in a contract. In the context of international investment, this usually involves claims by investors against host states. In the vast majority of cases, these disputes are settled by conciliation or arbitration, rather than by resort to local courts in the host state. When local remedies have been exhausted, many investment treaties permit the investors to choose to take disputes to the International Centre for the Settlement of Investment Disputes (ICSID), which is part of the World Bank, or to the arbitration institute of the Stockholm Chamber of Commerce. If both parties to the dispute are from countries that are parties to the New York Convention, they may choose to enforce any award in any other New York Convention country. This gives international arbitral awards a degree of enforceability that is often lacking in litigation in a municipal legal system. Arbitral awards are also final and binding, and provide a greater degree of certainty to the parties. Finally, the neutral venue and the neutral nationality of the decision-makers provide both actual and perceived independence and impartiality, which are often not available in the local courts of the host state.

## 7.2. Investor-State Dispute Settlement (ISDS)

The agreement to arbitrate may be a stand-alone undertaking between the investor and the host state, in which case there is no need for a separate arbitration agreement. However, it is common for the pertinent ISDS provisions to be contained within the investment treaty itself. This was seen in the early BITs which used different formulations of consent to arbitration and hence led to inconsistent interpretations concerning the scope of arbitration agreements, particularly in the context of consent by host states to the arbitral submission.

An ISDS mechanism most commonly found in bilateral investment treaties (BITs) and multilateral investment treaties (MITs) usually provides that disputes between an investor and a host state concerning the investor's treatment can be submitted to international arbitration. This entails an agreement between the parties to submit the disputes to arbitration, which is an independent and private form of adjudication. The investor is given an option to avoid the host state's courts and resolve the dispute on a global platform. This is an important feature of ISDS. The investor may be concerned about the partiality of the host state's courts, potential political interference, and the enforcement of an adverse judgment.

As explained in the last section, the peculiarity of investor-state arbitration as a method of international dispute settlement lies not so much in the nature of the disputes as in the parties to them, which consist of an investor from one contracting state and the state party to the relevant treaty. It is not unusual for disputes to arise between an investor and a host state. These disputes can cover a wide range of disagreements over the investor's treatment, which may be interrelated to various provisions of the treaty. This might involve revoking a license or an approval, a tax audit or demand for payment, the alleged expropriation of an investment and in some cases the mere threat of measures by the state, which the investor perceives would be to its disadvantage. The investor's natural instinct might be to resolve the dispute in municipal courts of the host state. However, there are various reasons why litigating in the host state's national courts may not be an adequate or acceptable means of resolving the dispute.

## 7.3. Challenges and Criticisms of Investor-State Arbitration

Coming back to CSID, and other arbitral institutions in Southeast Asia, and there is a pressing need for future research on the impact of arbitration upon developing states and their ability to regulate. But the final word is that investor-state arbitration is now a firmly established and distinct practice area, and evidence of an international arbitration 'boom' in the last five years is indicative of its continued growth.

Enforcement is in fact a pertinent issue with all forms of arbitral award against state respondents, and one which directly affects the ability of investors to obtain effective relief. Due to the general immunity of state assets from execution or arrest an award is unlikely to result in immediate payment, and the award creditors will often be forced to resort to diplomatic pressure or second wave arbitrations aimed at attachments against specific instrumentalities. This can in turn lead to claims of retaliatory action by the state and destruct.

A related concern is that awards which annul regulatory measures in the public interest will lead to 'regulatory chill' or discourage inward investment in certain sectors by states fearing further claims. Whether or not this is desirable depends on one's views on the impact of the relevant measures and the extent to

which it amounts to 'awarding by the back door' in cases of expropriation. But it is certainly true that States and investors will often not have considered the full long-term implications of the Concession or BIT upon the state's freedom to regulate, and it is arguable that arbitral decisions on the issue will often provide de facto amendments to the original agreement. Overall, it is felt that arbitrators are ill-equipped to make decisions on highly complex issues of public policy, and have insufficient accountability or means to construct a truly internationalist point of view. This becomes clearer when one contrasts the prevalence of arbitrator appointments from the developed (and investor home) states, and the difficulty of enforcement against investor party.

One of the aspects that arises from international commercial arbitration concerns the so-called 'regulatory functions' of arbitral awards. Despite the clear ruling in Article 21(5) of the ICC Arbitration Rules that the award shall decide the dispute in compliance with the rules of law chosen by the parties, and qualified lawyers have published guidelines as to how tribunals can best ascertain the content of the rules, some doubt remains as to the arbitrators' ability to apply regulatory law. This issue is particularly controversial in disputes involving Eastern European or Asian states and counterclaims by investors that changes to the regulatory framework for a specific sector have resulted in breaches of the Fair and Equitable Treatment standard. The state concerned will in practice view this standard as an almost unqualified right to all changes on the part of investors, and a ruling against the investor is likely to result in a claim that the tribunal has misapplied the relevant law or has shifted the burden of proof, rather than there being a genuine finding that a breach has occurred. This has led to fears that arbitral tribunals will make 'negative integration' decisions substituting their own judgement on what is best for a developing state in place of the investors' assessments, or will act as 'a court of cassation for [host] states' policies in that sector'.

# 8. Conclusion

Development and change in any field of law occurs because the surrounding society says that change is required. In the area of international law, development and change occur through various ways: socialization, role and pattern identification, learning, external pressures, etc. Anything just needs a little motivation. Global society and states will use the various methods of pressure to motivate the international law community to this change to more specific legal methods of dispute resolution. This could be most simply explained through giving more detailed written works concerning international dispute resolution. With Hague and tribunals interpreting and making decisions, it has been seen as a good idea to even provide a draft statute for arbitral decisions. All this is confirming the community to change. The historians of future international legal methods may define this as the 'international law courts' equivalent of the 13th-century shift from the old assize methods of proof to trial by jury.

This essay has thus far analyzed the links between the world judiciary and arbitral methods evolving to solve international disputes and the 'new' or 'modernized' school of thought relating to these methods. The initial question asked was whether the traditional methods are being supplemented or replaced. It was answered in the context of the ICJ where they are taking on complementary status and ad hoc tribunals, although rare, are replacing methods with something more specific and they may come to supplement. In the context of arbitration, it was argued that the traditional method was being replaced by a more specific form of contractual arbitration. The more traditional methods were now deemed to be less preferable than the modern methods. An evaluation of the 'new' school of thought and methods showed that what is now preferred is legal resolution, which is more specific and in the interests of justice between the disputing parties. This is contrary to the traditional 'diplomatic' methods. The methods must be spread and used effectively, and this would be achieved eventually through various prods and pokes.