

1974

Establishing an International Commercial Arbitration Council: A Preliminary Proposal

Martin Domke

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Commercial Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Martin Domke, Establishing an International Commercial Arbitration Council: A Preliminary Proposal, 5 *Vanderbilt Law Review* 174 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol5/iss1/4>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

ESTABLISHING AN INTERNATIONAL COMMERCIAL ARBITRATION COUNCIL: A PRELIMINARY PROPOSAL

*Martin Domke**

There has been, in recent years, a substantial growth of international trade. This phenomenon has not confined itself to the more economically developed nations of the world. The developing countries, with different economic and social structures, have also participated in the increased trade activity. Moreover, it can be expected that this trend will continue in the coming years, steadily forging more and more links between countries in all parts of the world.

Growth of trade activity is necessarily accompanied by a corresponding increase in the number of disputes between parties to commercial agreements. The business community is in general accord that, in the majority of cases, the most expedient way to settle commercial disputes is by means of arbitration. Recourse to arbitration, however, is often impeded by a lack of understanding between the parties regarding the selection or composition of the arbitral tribunal, its location, rules of procedure and the law the tribunal is to apply. The difficulties in reaching agreement on arbitration may often occur irrespective of whether the parties wish to submit their dispute to an ad hoc tribunal or whether they prefer institutional arbitration. In the case of ad hoc arbitration, difficulties are sometimes encountered in determining the place of arbitration and the manner of designating a third arbitrator.¹ On the other hand, where the parties intend to submit their dispute to institutional arbitration, the difficulty usually arises from the attempt to select an agency which both parties consider impartial.

Institutions providing facilities for the settlement of disputes between parties to commercial arrangements can be separated into two distinct categories. First, there are those institutions which are attached to organizations of buyers and sellers of specific types of commodities, such as food, grain, cotton, wool, hides and rubber. These exist especially in England, the Netherlands, Germany, Italy and the United States, where such arbitrations are administered by trade

* Adjunct Professor of Law, New York University. Editor-in-Chief, THE ARBITRATION JOURNAL.

1. The third arbitrator is normally appointed by the two party-selected arbitrators and serves as chairman of the arbitration board.

associations.² The second group of organizations usually administers arbitration for all types of commercial disputes. Examples of this latter category are the American Arbitration Association, the Associazione Italiana per l'Arbitrato, the Japanese Commercial Arbitration Association and the Korean Commercial Arbitration Association. Also included in this group are arbitration agencies which administer commercial controversies of an international character, such as the International Chamber of Commerce, headquartered in Paris,³ and the Inter-American Commercial Arbitration Commission, with its headquarters in Rio de Janeiro, Brazil.⁴ Further arbitration facilities are attached as special commissions or courts to the central chambers of commerce, such as the Foreign Trade Arbitration Commission in Moscow.⁵ Similar arbitration committees are affiliated with many local chambers of commerce, as in New York, Stockholm or Zurich.⁶

Several of these institutions have concluded bilateral agreements of cooperation for the use of their facilities. Under these agreements, the administration of arbitrations is undertaken by the arbitral organization within the host country or region. The determination of where such arbitration will take place is made by a special committee composed of a representative of each arbitral institution and a chairman who is a national of a third country. These agreements have been concluded primarily by the International Chamber of Commerce, the American Arbitration Association, the Indian Council of Arbitra-

2. See Schoonmaker, *International Arbitration and the Association of Food Distributors* in INTERNATIONAL TRADE ARBITRATION, A ROAD TO WORLD-WIDE COOPERATION 259 (M. Domke ed. 1958); Schottelius, *Arbitration Activities of the Bremen Cotton Exchange* in *id.* at 271.

3. See generally Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 INT'L & COMP. L.Q. 132 (1965); Guide to ICC Arbitration, brochure no. 1963-1 (published by the International Chamber of Commerce).

4. See generally Norberg, *Inter-American Commercial Arbitration*, 1 LAWYER OF THE AMERICAS 1 (1969); Report of the Third Inter-American Conference on Commercial Arbitration, November 15, 1970.

5. Similar arbitration facilities are attached to the central chambers of commerce of the member states of the Council for Mutual Economic Assistance. See Katona, *The International Sale of Goods Among Member States of the Council for Mutual Economic Assistance*, 9 COLUM. J. TRANSNAT'L L. 226 (1970); Reichard, *Die Allgemeinen Bedingungen fuer den Warenverkehr zwischen den Mitgliedslaendern des Rates fuer gegenseitige Wirtschaftschilfe (COMECON)*, 17 AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 317 (1971).

6. See generally International and National Institutions Acting in the Field of Arbitration, November 16, 1970 (published by Associazione Italiana per l'Arbitrato).

tion and the Japanese Commercial Arbitration Association; most have been with European arbitration bodies.⁷ However, the use of these bilateral agreements has been infrequent.

Multilateral arbitration agreements have been reached between the governments of a particular region. The most noted examples include those concluded under the auspices of the United Nations Economic Commission for Europe. They include the 1961 European Convention on International Commercial Arbitration⁸ and the 1962 Agreement relating to its application,⁹ the 1966 Arbitration Rules of the United Nations Economic Commission for Europe,¹⁰ and the Agreement of the United Nations Economic Commission for Asia and the Far East, which promulgated the 1966 Rules for International Commercial Arbitration and Standards for Conciliation.¹¹ Although these regional set-ups are available also to parties outside the region when disputes arise with parties residing within the region,¹² the utility of a widespread use of regional arrangements is uncertain when compared to the arbitration facilities of the International Chamber of Commerce or of national organizations such as the American Arbitration Association¹³ or the Japanese Commercial Arbitration Association.¹⁴

In the absence of bilateral or multilateral agreements concluded by their national governments or by arbitration organizations within their countries, disputing parties often are uncertain as to which arbitration tribunal they should choose or which set of arbitration rules they should seek to apply. Often parties are apprehensive about the institutional arbitration facilities in the country of the opposing party, and such mistrust frequently prevents inclusion of an efficient

7. See H. FELLHAUER & H. STROHBACH, *INTERNATIONALE HANDELSSCHIEDSGERICHTSBARKEIT HANDBUCH* 213 (1969); *INTERNATIONAL COMMERCIAL ARBITRATION* 371 (Indian Society of International Law, 1964).

8. 484 U.N.T.S. 349.

9. 523 U.N.T.S. 93.

10. U.N. Doc. E/ECE/Trade 81; see Cohn, *The Rules of Arbitration of the United Nations Economic Commission for Europe*, 16 *INT'L & COMP. L.Q.* 946 (1967).

11. See Sanders, *ECAFE Rules for International Commercial Arbitration in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE* 252 (P. Sanders ed. 1967).

12. E.g., ECAFE Rules for International Commercial Arbitration § I (c) (iii), provides for application to "disputes arising out of contracts between residents of different countries outside the region in cases where the contract involved performance in the region or where other factors were related to the region."

13. See *DISPUTE SETTLEMENT IN THE 70's* (AAA) 4 (1971).

14. See 40 *JAPANESE COMMERCIAL ARBITRATION Q.* 6 (1971).

arbitration clause. In these instances, agreements usually provide simply for arbitration—the so-called blank arbitration clause—thereby causing uncertainty when a dispute erupts between the parties. This problem is particularly acute in some developing countries of Asia and Africa, where no institutional arbitration facilities are in existence and, consequently, ad hoc arbitration must be provided.¹⁵

It is worthwhile, therefore, to consider whether a system could be designed that would provide the means for determining the prerequisites to the establishment and effective functioning of an arbitral tribunal in those cases where the parties to a commercial agreement have failed to agree on these prerequisites, or where there is no applicable international convention. The formulation of such a system, tentatively called an International Commercial Arbitration Council, should be based on existing agreements and understandings among national and international arbitration institutions in order to gain the approval of governments and arbitral organizations. Such a system should also be responsive to the needs of parties to commercial agreements both at the time when they entered into an agreement for arbitration and at the time when a dispute arises. In addition, the rules of the proposed International Commercial Arbitration Council could provide that parties who, previously, had not made a specific designation could seek advice concerning the most appropriate institutional arbitration tribunal to decide their particular dispute. In cases where ad hoc arbitration is desired, the system would assure a means for deciding which institution should designate the third arbitrator, the place of arbitration, the rules of procedure, or any other prerequisite for the establishment and effective functioning of the arbitration tribunal where the parties or arbitrators originally designated fail to do so.

It is important to note at the outset that the proposal for an international commercial arbitration system is based on the concept of full representation of and participation by the principal arbitration agencies of the various countries. The proposed Council should exist only to assist the parties to a dispute as outlined above and should not in any way concern itself with the actual administration of commercial arbitration. Properly, this function should be left entirely to the respective arbitration organizations.

A helpful paradigm for the establishment of such an international arbitration system may be found in the committee which was

15. Benjamin, *The Developing Nations and Certain Legislative Obstacles in the Field of International Commercial Arbitration* in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 1 (P. Sanders ed. 1967).

appointed by the Third International Arbitration Congress in Venice, Italy in October, 1969, which was devoted to the topic of cooperation among arbitration organizations.¹⁶ In a symposium on *Ethics of the Arbitrator* held in November, 1970, this committee gave special attention to the development of arbitration between industrial and developing countries and to "appropriate means of communication between arbitral organizations."¹⁷ At present, this committee is concerned with the preparation of the Fourth International Arbitration Congress,¹⁸ which is scheduled for October, 1972, in Moscow. The committee may also consider the inclusion of additional members from Asian and African trading countries in order to insure participation by arbitration experts from countries with differing social and economic structures.

The question arises whether the United Nations should be involved in the establishment and operation of the proposed International Commercial Arbitration Council.¹⁹ The U.N. convened the 1958 Conference on International Arbitration, which not only promoted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,²⁰ but also recommended in its Final Act of June 10, 1958,²¹ various measures to promote the expansion of commercial arbitration by governments and private organizations.²² These recommendations were adopted by the United Nations Social and Economic Council at its Mexico City session on April 17, 1959.²³ Furthermore, the United Nations Economic Commissions for Europe, and for Asia

16. The proceedings of this Congress have been published by the Associazione Italiana per l'Arbitrato in 2 *COLLANA DI STUDI SUL L'ARBITRATO* (1970).

17. 2 *COLLANA DI STUDI SUL L'ARBITRATO* 164 (1970). The proceedings of the symposium, including the papers presented, have been published in *REVUE DE L'ARBITRAGE* 195-264 (1971).

18. See *REVUE DE L'ARBITRAGE* 38-161 (1961) (report on the First Congress in Paris in 1961); *REVUE DE L'ARBITRAGE* 31-157 (1966) (report on the Second Congress in Rotterdam in 1966).

19. It is noteworthy that the U.N.'s predecessor, the League of Nations, initiated the two important Geneva arbitral instruments, the 1923 Protocol on Arbitration Clauses, 27 L.N.T.S. 157, and the 1927 Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301.

20. 330 U.N.T.S. 37.

21. U.N. Doc. E/Conf.29/9/Rev.1 at para. 16.

22. Domke, *Possible Means for Increasing the Effectiveness of International Commercial Arbitration* in 2 *INTERNATIONAL COMMERCIAL ARBITRATION, A WORLD HANDBOOK* 392 (P. Sanders ed. 1960).

23. Resolution 708, U.N. Doc. E/3262, reprinted in 14 *ARBITRATION J.* 144 (1959).

and the Far East were engaged in conferences which led to the adoption of various arbitral instruments.²⁴

Other United Nations agencies have also taken an interest in the machinery for the settlement of disputes.²⁵ The International Bank for Reconstruction and Development promoted the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States²⁶ and established an International Centre for the Settlement of Investment Disputes.²⁷ Of more recent date are the activities of the United Nations Commission on International Trade Law, which resolved at its First Session in New York in 1968 to consider "steps that might be taken with a view for promoting the harmonization and unification [of the law of international commercial arbitration]."²⁸ Further problems of international commercial arbitration were considered by the Commission at its Second and Third Sessions in 1969 and 1970.²⁹

On the basis of this information, it is submitted that the establishment of an International Commercial Arbitration Council under the auspices of the United Nations, whose concern and effectiveness in this area has been amply demonstrated, would be of substantial assistance in increasing the efficiency of commercial arbitration. Moreover, by seeking the assistance of existing arbitration organizations and the Arbitration Committee of the 1969 Venice Arbitration Congress,³⁰ the proposed Council could be used by parties from all regions of the world.

24. Notes 8-11 *supra*.

25. See Baxter, *Settlement of Disputes in INTERNATIONAL LAW ASSOCIATION REPORT OF THE FIFTY-THIRD CONFERENCE—BUENOS AIRES 399* (1969); Schachter, *Conciliation Procedures in the United Nations Conference on Trade and Development in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 268* (P. Sanders ed. 1967).

26. 575 U.N.T.S. 159.

27. See its Fourth Annual Report 1969/1970 at 3.

28. 23 U.N. GAOR Supp. 16, at 23, U.N. Doc. A/7216 (1968). The law of international commercial arbitration is dealt with in a detailed report of the Secretary-General, U.N. Doc. A/CN.9/21, and Corr.1, *reprinted in 1 UNCITRAL Y.B. 1968-1970*, at 260 (1971). Another report of the Secretary-General includes a bibliography of international commercial arbitration, U.N. Doc. A/CN.9/24/Add.1 (1969).

29. 1 UNCITRAL Y.B. 1968-1970, at § II paras. 101-13, § III paras. 146-56 (1971).

30. Notes 16-17 and accompanying text *supra*.