

THE PLACE OF COMMERCIAL ARBITRATION IN MULTI-NATIONAL AND INTERNATIONAL ORGANIZATIONS

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This second half of the twentieth century is evolving as the era of regional organizations throughout the world in that the trend begun at the Hague Conference in 1948 has spread to other portions of the globe, such as the Asian nations, the Communist Block, Arab States, the new African nations are examining the possibility of establishing a limited form of common market, and the Latin American states are considering the establishment of both a Latin American Common Market and a Latin American Commission of Human Rights. Undoubtedly, the force of commercial arbitration, already penetrating these areas on a voluntary basis, will be felt in the future, because in all of these regional markets private arbitration associations, governmental tribunals, and even limited inter-governmental systems of arbitration have enjoyed a rapid growth and an increasing degree of respect from all parties concerned.¹ However, these established arbitration systems cannot ignore the rapidly changing economic and political climate in which national sovereignty is being surrendered to supra-national organizations.² Although originally established by treaty, such regional organizations as the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EURATOM), the European Economic Community (EEC), and the Council of Europe have an independent existence apart from the member states. Specifically, the important organs that will have a direct impact on commercial arbitration are the judicial tribunals of the regional organizations for the reason that exclusive jurisdiction is often vested in these courts.

Previously, the development of voluntary arbitration systems has

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¹ Domke, "The Settlement of Trade Disputes In Regional Markets," in: *Legal Problems in International Trade and Investment* (The World Community Association of the Yale Law School) p. 131 (1962).

² For the purpose of this study the test of a supra-national organization—as contrasted with a mere conference containing permanent organs—is defined as one possessing (1) a permanent organizational structure comprising an executive and legislative branch as a bare minimum and a judicial organ at the more advanced stage; and (2) a legal existence separate from that of the member states—in effect a limited type of sovereignty—including the power to bind the member states. The existence of the organization is superior to and beyond the jurisdiction of the member states, though originally established by treaty.

taken place at an accelerated pace in regional markets;³ and, in particular, the Latin American area as represented by the Organization of American States can be cited as an example of a regional security system functioning alongside private arbitration bodies. Thus, the first regional organization with which the United States has had extensive experience encourages the development of voluntary arbitration systems under which disputes of a multi-national character could be adjudicated.⁴ For instance, the Inter-American Council of Jurists has attempted to secure the necessary uniformity of legislation.⁵ Such efforts under the guidance of the Organization of American States (OAS) has helped to fill the gap that could not be resolved by the United Nations. So important were the few regional bodies surviving World War II, the United Nations Charter in Article 33 expressly provided for the continued existence of regional groups.⁶

Indeed, previous to the establishment of regional courts—an advanced step yet to be taken by the OAS—the only effective “judicial” remedy available to private litigants was the voluntary arbitration tribunal; moreover, the same conclusion seems valid at the present time because:

[T]here is no presently known alternative to arbitration. Without arbitration there is no other remedy. The phenomenon of the shrinking world in which we live . . . is making its impact on every order of our civilization Today business can be transacted all over the world in much the same way as it previously had been possible within the confines of one country. Latin America cannot afford to lag behind the rest of the world in this important field.⁷

This lack of international judicial machinery is evidenced by the fact that the great international tribunals have been available

³ Domke, *op. cit. supra* note 1.

⁴ Domke & Kellor, “Western Hemisphere Systems of Arbitration,” 6 U. Toronto L.J. 307 (1946).

⁵ Murdock & Gobbi, “Inter-American Juridical Committee,” 9 Am. J. Comp. L. 596 (1960).

⁶ Article 33(1) of the United Nations Charter provides: “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, *resort to regional agencies or arrangements*. . . .” [Emphasis added.]

Lleras, “The American Regional System,” 2 Arb. J. (n.s.) 307 at 307 (1947) states: “We have a complete system, susceptible of continued improvement, for the pacific settlement of conflicts that arise in America.”

See also Chapter VIII of the United Nations Charter noting Articles 52(2), (3), and (4). Article 53 deals with the enforcement under regional agreements.

⁷ Mihm, “International Commercial Arbitration In Latin America,” 15 Arb. J. (n.s.) 17 at 25-26 (1960). See also Domke, “Inter-American Commercial Arbitration,” 4 Miami L.Q. 425 (1949).

only to sovereign states;⁸ furthermore, the International Court of Justice has not been available to solve the disputes of private litigants, but such restrictions are not to be found in the judicial organs of the Common Market or the Council of Europe.⁹ International tribunals, namely, the Permanent Court of Arbitration established at the Hague in 1899, the old Permanent Court of International Justice, and its successor the present International Court of Justice are concerned with resolving disputes between sovereign states and giving advisory opinions to aid the work of the United Nations. Tragically, these great international tribunals have not been able—or willing—to deal with the problems of individuals, private corporations, business associations, commercial enterprises, etc.¹⁰ This rigid standard of restricted legal personality has only been modified by the supra-national organs in Europe and the private arbitration associations.

It must be borne in mind that most regional activity—and for that matter diplomatic negotiations—have been concerned with the settlement of disputes between sovereign nations in order to avoid armed conflict and military sanctions, now outlawed by the United Nations Charter.¹¹ Such devices as (1) diplomatic negotiations, (2) good offices, (3) mediation, (4) commissions of inquiry, (5) conciliation, (6) international organizations, (7) arbitration, and (8) judicial settlement are the traditional methods of resolving conflicts between sovereigns.¹²

The United Nations has attempted to implement the existing machinery so as to prevent conflicts between states;¹³ nevertheless, it

⁸ Gormley, "An Analysis of the Future Procedural Status of the Individual Before International Tribunals," 39 U. Det. L.J. (1961).

⁹ Notes 14, 34-36 *infra*.

¹⁰ Rosenthal, "Voluntary Arbitration Tribunals," 6 Arb. J. (n.s.) 21 (1951). He maintains: "The Permanent Court of Arbitration at The Hague has been inactive for many years. The International Court of Justice is concerned primarily with the application of law and deals only with matters between governments as does the United Nations. Where can individuals of diverse citizenship take their economic disputes or their differences in trading with governments and government-controlled agencies?" *Id.* at 22.

¹¹ See Article 2(4) of the United Nations Charter. July, "Arbitration and Judicial Settlement—Recent Trends," 48 Am. J. Int'l L. 380 (1954).

¹² *Cf.* Article 33(1) of the United Nations Charter, *supra* note 6.

¹³ European Convention for the Peaceful Settlement of Disputes, April 29, 1957, E.T.S. No. 23, 1958-1959, I.C.J.Y.B. 228. According to Sohn, it "provides for the submission to the International Court of Justice of all legal disputes between the parties, and for conciliation and arbitration of other disputes. With respect to the applicable rules, the convention provides, rather ingeniously, that the arbitral tribunal 'shall decide *ex aequo et bono*, having regard to the general principles of international law, while respecting the contractual obligations and final decisions of international tribunals which are binding on the parties." Treaty Article 26 as evaluated by Sohn, "The Role of International Institutions As Conflict-Adjusting Agencies," 28 U. Chi. L. Rev. 205, 211 (1961).

has remained for the private arbitration association to afford relief to the individual litigant,¹⁴ especially in the enforcement of awards granted by the tribunals of foreign jurisdictions. It appears that both the public and private regional groups have been concerned with the problem of enforcement.¹⁵

Such efforts to resolve controversies between nations will continue in the future as the East-West struggle grows in intensity; nonetheless, the private efforts to resolve the disputes between commercial traders, corporations, shippers, producers, etc., will also continue to increase at an accelerated pace for the reason that the rise of great economic regional organizations will necessitate greater commercial intercourse. As the economic activity between nations and regions assumes greater proportions, enlarged settlement machinery will be required. Expanded systems of commercial arbitration have been the solution sought in the past. It is submitted that the informal techniques of the arbitrator, the speed of the "trial," the simplicity of the procedure, and the effectiveness of the verdict will provide the desired result in the future.¹⁶

TREND TOWARD UNIFICATION IN EUROPE

At the present time little data exists concerning the role of voluntary commercial arbitration in the Common Market—comprising the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community—with the result that it is necessary to speculate concerning the future developments of the complementary, but also opposing, forces. Unfortunately, a large body of judicial experience does not exist; consequently, unlike Justinian's codifiers who had over a millennium of legal experience to draw upon, the present examinations must, of necessity, be largely anticipatory. On the other hand, it is felt desirable

¹⁴ For an excellent work describing the technical elements of arbitration see Carlston, "The Process of International Arbitration" (1946); note in particular chapter 3, "Jurisdiction," in which numerous disputes involving sovereign States are discussed. Throughout the work repeated reference is made to actual cases and international conventions. See also Rabel, "International Tribunals For Private Matters," 3 *Arb. J.* 209 (1943); Murdock, "International Law For Individuals Through Arbitration," 11 *Arb. J. (n.s.)* 40 (1956); Murdock, "International Judicial Organization," 6 *Fed. B.J.* 125 (1945); Murdock, "Law and Lawyers For One World in the Making," 17 *Geo. Wash. L. Rev.* 97 (1948).

¹⁵ Sloan, "Enforcement of Arbitral Awards in International Agencies," 3 *Arb. J. (n.s.)* 134 (1948). The article deals with the role of regional and international organizations in keeping the peace and particularly with the enforcement of awards.

¹⁶ Sturges, "Arbitration—What Is It?" 35 *N.Y.U.L. Rev.* 1031 (1960). At 1033 he states: "It should be noted, if not emphasized, . . . the substitute (arbitration) bears little resemblance to the litigation process."

to begin examining this major area, which grows in importance as the Common Market develops and expands.

Prior to the beginning of the Second World War a number of proposals were offered for the unification of Europe,¹⁷ and even a few attempts at economic integration were made, particularly by the BENELUX countries; however, the all powerful sovereign state dominated the pre-war scene in Europe. It was not until the post World War II period that it became evident to the Europeans that the old system of sovereignty had to give way to larger political and economic units if the Continent was to be able to maintain its economic position between the opposing forces of the United States and the Soviet block. In effect, not only the Soviet pressure but the increased commercial activity following World Wars I and II led to the rise of additional judicial and arbitral machinery, since the old national systems could not deal effectively with increased demands of trade.¹⁸

Military Unification

To be sure the post war period witnessed the revival and expansion of voluntary systems of arbitration,¹⁹ but an additional force began to make itself felt as the reaction against Communist expansion became evident. Precisely, major military alliances were formed by the Western Powers beginning with NATO, the Brussels Treaty of March 17, 1948, the ill-fated European Defense Community, which was "vetoed" by the French Parliament in 1954, and SATO. These great military alliances are of importance to the present study only in so far as they represent a part of the total trend toward European unification and world wide coordination of national power.²⁰

Political Unification

In 1949 the second great force toward European integration began with the founding of the Council of Europe, the first great supra-national organization on the Continent, which contained an executive arm (the Committee of Ministers), the European Assembly, and the two judicial bodies—the Commission of Human Rights

¹⁷ Robertson, *The Law of International Institutions In Europe*, 1961; note pages 1-10.

¹⁸ Rosenthal, "The Promotion of International Commercial Arbitration," 6 *Arb. J.* (n.s.) 223 (1951). "The development of the last thirty years was due in some degree to the change in the nature of international trade that came about after World War I." at 226.

¹⁹ See note 38 *infra*.

²⁰ *Cf.* the position of Sohn, *op. cit. supra* note 13 at 256-257, who has advocated that the NATO alliance be expanded so as to include judicial organs. A similar proposal is made in Sohn, "International Tribunals: Past, Present and Future," 46 *A.B.A.J.* 23 (1960).

created in 1950 and the Court of Human Rights established in 1958.²¹ The Council, in addition to advancing the integration on a political level through its parliamentary activity and the promulgation of regional conventions, has served as the parent organization of the great economic groupings that were to follow.²²

Economic Unification

The third great post-war force drawing the Continent together was exemplified by the OEEC and its numerous off-shoots such as the ECSC, EURATOM, EEC, GATT, and EFTA, and the new Organization for Economic Co-operation and Development (ECDC),²³ which will have the United States and Canada as full members, transforming a European organization into an international agency. *The United States is being drawn into the scope of these regional organizations in spite of its hesitancy to accept even voluntary arbitration conventions*, the League Codifications,²⁴ or the United Nations Arbitration Convention of 1958.²⁵ It appears certain that the United States will in time have to alter its policies. Such a trend has already begun on a piecemeal basis in which the enforcement of foreign awards has been facilitated by numerous provisions in treaties of Friendship, Commerce and Navigation.²⁶

Thus, the movement toward European integration takes place at four levels: (1) the military, (2) the political, (3) the economic, and (4) the voluntary, which is represented primarily by the international systems of arbitration. Hence, the significant area under investigation here is the relationship of the new Common Market with the existing systems of commercial arbitration, for the Communities of Europe (ECSC, EURATOM, EEC) possess a combined judicial system that will of necessity compete with existing systems of arbitration. Indeed, it is necessary to re-evaluate the place of international

²¹ Robertson, "The European Court of Human Rights," 9 Am. J. Comp. L. 596 (1960); Robertson, "The European Convention on Human Rights," 28 Brit. Yb. Int'l L. 145 (1950) and 29 Brit. Yb. Int'l L. 359 (1951).

²² Robertson, *op. cit. supra* note 17; Robertson, *The Council of Europe* (2d ed. 1961); Robertson, "Legal Problems of European Integration," 91 (I) *Recueil des Cours*, 1957, at 104.

²³ Convention on the Organization For Economic Co-operation and Development, signed in Paris 14 December 1960.

²⁴ Notes 42-43 *infra*.

²⁵ Note 47 *infra*. See also Sultan, "The United Nations Arbitration Convention and United States Policy," 53 Am. J. Int'l L. 807 (1959); Hynning & Haight, "International Commercial Arbitration," 48 A.B.A.J. 236 (1962).

²⁶ Domke, "Enforcement of Foreign Awards in the U.S.A.," 13 Arb. J. (n.s.) 91, 96 (1958).

commercial arbitration in light of growing multi-national law and judicial machinery.

PURPOSE OF THE STUDY

The general aim of this study is to consider the impact of the increasing number of supra-national regional organizations on the development of international commercial arbitration at both regional and international levels, and to briefly examine the place of the United Nations in these expanding systems of voluntary arbitration systems and arbitration conventions, promulgated by the United Nations and the increasing number of regional economic organizations.

The specific purpose of the study will be to analyze and evaluate the influence—both positive and negative—of the supra-national organs of the European Continent, namely the Council of Europe and the combined Communities of the Common Market on the developing systems of commercial arbitration. Furthermore, the implications to the United States can not be overlooked, especially with the rise of the ECDC.

EUROPEAN COMMUNITIES

By way of preliminary analysis it appears that significant conflicts could arise over the hierarchy of the "rule of law"²⁷ as "exclusive remedies" are proclaimed by (1) the United Nations, (2) the EEC, (3) possibly the Council of Europe, (4) voluntary (private) regional agreements—embracing arbitration conventions, and (5) national tribunals, both arbitral and judicial. In other words, what constitutes the legitimate spheres of each of the "systems" of multi-national and international law, and what is their effect on commercial arbitration? By way of hypothesis, the writer suggests that the very existence of arbitration systems, both national and international, will feel the impact of these supra-national organizations, especially the Council of Europe and the Common Market, including its successors.

The question now becomes: is there a place for private initiative and private tribunals in the Common Market? To answer this question it is necessary to examine the three treaties of the Common Market, since no judicial precedent exists as to the role of commercial arbitration in relation to the Court of Justice of the Communities.

European Coal and Steel Community (ECSC)

The European Coal and Steel Community that grew out of the Schuman Plan is an example of vertical economic integration in that two basic industries of the six member states, namely coal and steel, are completely controlled by the regional organization. The power of

²⁷ Domke, *op. cit. supra* note 1. See note 38 *infra*.

the High Authority is considerable; in fact, the ECSC has stronger sanctions and enforcement machinery than the EEC. In particular, private arbitration associations have had large portions of their jurisdiction removed by the provisions of Article 87, which confers *exclusive jurisdiction* on the Court of Justice as to all questions involving an interpretation of the Treaty. Article 87 provides: "The High Contracting Parties agree not to avail themselves of any treaties, conventions or agreements existing among them to submit any controversy arising out of the interpretation or application of this Treaty to a method of settlement other than those provided for herein." This language is further strengthened by provisions contained in Article 41. "When the validity of resolutions of the High Authority or the Council is contested in litigation before a national court, such issue shall be certified to the Court, which shall have exclusive competence to rule thereupon."

In short, all questions involving the interpretation of the Treaty must be submitted—or transferred—to the Court of Justice. The reason for such provisions is sound; the national arbitral and judicial tribunals of the six member states could arrive at numerous interpretations concerning the exact meaning of the Treaty thereby defeating any possibility of achieving uniformity of the law regulating coal and steel. On the other hand, as jurisdiction has been surrendered to the supra-national organization, the jurisdiction of the national tribunals has been limited because if any interpretation or question involving the Treaty is raised the issue must be transferred to the High Court of the ECSC. The only way, therefore, to avoid losing jurisdiction over the case is for the national tribunal to decide the controversy without applying or even referring to the Treaty. Such "maneuvering" has been accomplished successfully by the courts of Germany and the Netherlands.²⁸

Furthermore, it must be stressed that the actual regulatory provisions are incapable of being invoked in any tribunal of a member state, since the Court of Justice has sole jurisdiction over determinations of conformity with the rules of the High Authority and the interpretation of Articles 65 and 66.²⁹

²⁸ Judgment of October 21, 1958 of the Court of Appeals (Oberlandesgericht) Dusseldorf in which it was held that the issue of treaty interpretation was only incidental to the main question and would not influence the decision. See also decision of the Court of Zutphen, Netherlands (No. 26, September 20, 1958); cited by I Stein, "American Enterprise in the Common Market" (1961), note 94, at p. 480.

"An enterprise may not seek the annulment of a Community act in national courts. The Treaty vests exclusive jurisdiction in the Community Court to review the validity of and strike down the administrative acts of the Community institutions. It bars any assertion of similar jurisdiction by national courts." *Id.* at 479.

²⁹ Article 65(1) of the ECSC Treaty is incapable of being invoked in any municipal

The single reference to arbitration is to be found in Article 89:

Any dispute among member States concerning the application of this Treaty, which cannot be settled by another procedure provided for in this Treaty, may be submitted to the Court at the request of one of the parties to the dispute.

The Court shall also have jurisdiction to settle any dispute among member States related to the purpose of this Treaty, if such a dispute is submitted to it by virtue of an arbitration clause.

Unfortunately, little explanation is provided, but it seems valid to conclude that arbitration agreements may invoke the aid of the Court. A reverse procedure, however, seems unlikely because of the exclusive articles discussed above. At any rate, the co-existence of arbitration systems seems to have been provided for in the Treaty; indeed, the private arbitration groups will be able to seek the advice of the Court. May it be suggested, therefore, that the arbitrator may at times welcome the availability of such a tribunal in the event that an interpretation of the Treaty is required.

European Atomic Energy Community (Euratom)

This successor Community of the ECSC has a treaty that differs significantly from the prior provisions largely because of its work in a field involving a considerable number of security regulations. In reality, the treaty articles relative to the problem of the exclusive jurisdiction of the Court of EURATOM [Article 150 (c)] contains the exact language of the corresponding provision in the EEC Treaty [Article 177 (c)]; the EURATOM Articles relative to arbitration [153 and 155] correspond exactly to the provisions in the EEC Treaty [181 and 183]. Consequently, it is felt desirable to render a single comparison between the provisions of the ECSC Treaty and the EEC, particularly in view of the fact that the three communities are now merged into a single entity in so far as the legislative and judicial branches are concerned. That is to say, under the combined Common Market a single Parliamentary Assembly and common Court of Justice serves the three Communities, since only separate executive branches remain disunited.

European Economic Community (EEC)

As previously implied, the Common Market represents the

court of a member state, for the Court of Justice has sole jurisdiction over determinations of the conformity of agreements and decision with rules made under Article 65. This Article deals with illegal agreements; ". . . it has been held that national courts are barred from issuing temporary injunctions." 1 Stein, *op. cit. supra* note 28, at 310.

See *City of Stuttgart v. Oberrheinische Kohlenunion*, judgment of Landgericht Stuttgart, August 10, 1953. Under this decision it was held that no relief could be given by a national court until the High Authority had reached a decision on the merits.

greatest advance in the history of regional organizations for the reason that it constitutes a truly supra-national entity superior to and free from the control of the member states. Particularly, the EEC presents an example of horizontal integration for the reason that many areas of the economy of the member states are controlled to varying degrees, rather than the complete regulation of only two basic industries as had been done by the ECSC. Of importance to the present study is the fact that significant changes have been made in the statutes of the two later Communities, although the spirit and intent are similar in the areas under investigation here.³⁰

Thus, Article 177(c) of the EEC, which is the same as 150 (c) of EURATOM, corresponds in intent to Articles 41 and 87 of the ECSC Treaty cited above. Article 177 provides:

The Court of Justice shall be competent to make a preliminary decision concerning:

- (a) The interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

*Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.*³¹ [Emphasis added.]

As indicated in connection with the Coal and Steel Community,

³⁰ Considerable changes have been made in the sanctions that may be applied by the Community, the parties entitled to bring a dispute before the Court of Justice, and the subject matter over which the Court has jurisdiction. Donner, the President of the Court, presents an excellent elaboration of these problems in "The Court of Justice of the European Communities," *Legal Problems of the European Economic Community and the European Free Trade Association*, Int'l Comp. L.Q., Supp. Pub. No. 1., at 66 (1961).

Articles 91 and 92 of the ECSC have no counterparts in the EEC Treaty. Article 33 of the ECSC, 146 of EURATOM, and 173 of the EEC allow appeals by individuals. "This right does not depend on any specific legal status, nationality, or type of activity of the plaintiff enterprise. Thus, *the Court will be open to American citizens or companies organized in the United States or to foreign companies controlled by American capital* if the rights or interests of such citizens or companies are affected in any manner specified in the Treaty. There is reason to assume that the Court will interpret liberally the provisions governing access to the Court." [Emphasis added.] Stein and Hay are relying on the broad language contained in Article 164. Stein and Hay, *supra* note 28 at 466.

³¹ *Cf.* the statement of Stein, *supra* note 28.

the only way for the municipal tribunal to avoid losing jurisdiction is to decide the case without making reference to the Treaty.³²

Similarly, the Court of the EEC has been given exclusive jurisdiction to interpret the Treaty, as had been true in the old Coal and Steel Community discussed above. But, note should also be made of Article 183 of the EEC Treaty, containing the same language as 155 of EURATOM, since a significant area of local jurisdiction is protected. The text is as follows: "Subject to the powers conferred on the Court of Justice by this Treaty, cases to which the Community is a party shall not for that reason alone be excluded from the competence of domestic courts or tribunals."

It seems reasonable to assume that the arbitral tribunals will be able to avail themselves of this provision in order to protect their jurisdiction in arbitration disputes involving the Community. Of course, the problem as to whether Article 177(c) or 183 will prevail in an actual dispute is, fortunately, beyond the scope of this paper; such an issue has yet to arise in actual practice.

The arbitration clause—Article 181 in the EEC Treaty and 153 in that of EURATOM—corresponds in intent and purpose to Article 89(2) of the ECSC draft. Article 181 states: "The Court of Justice shall be competent to make a decision pursuant to any arbitration clause contained in a contract concluded, under public or private law, by or on behalf of the Community."

In answer to the question posed at the beginning of this section, the writer is of the opinion that there is still a place for private initiative and tribunals in the Common Market in spite of the exclusive jurisdiction of the Court of Justice of the Communities. The ancient institution of arbitration must keep pace with the rise of regionalism throughout the world in order not to be squeezed out by the increasing number of supra-national tribunals.

The great contribution that commercial arbitration can make to regional organizations—and regional markets—is by providing for uniformity of the law, especially as to the enforcement of agreements to arbitrate and the enforcement of awards.³³ Furthermore, arbitration

³² *Supra* note 28.

³³ Wortley, "The Need For More Uniformity In the Law Relating to the International Sale of Goods In Europe," *Legal Problems of the European Economic Community and the European Free Trade Association*, Int'l Comp. L.Q., Supp. Pub. No. 1, at 45 (1961). Wortley points out that in spite of the Common Market ". . . there are still some radical differences in the law relating to the sale of goods in some of the principal European legal systems. . . if these could be eliminated, the number of conflicts of law could be lessened and unnecessary misunderstandings removed. I think no one would deny that litigation, and I include arbitration in the term, often leads to delay in the fulfillment of obligations. . ." at p. 45.

associations of an international character, or at least of an area greater than the six member states of the Common Market (and even the countries of the outer seven) can help to create a degree of harmony between and among regional organizations. While regional high courts will claim an area of exclusive jurisdiction, the arbitration association, both public and private (along with national courts), will of necessity have to handle the great bulk of the litigation, since major disputes involving the treaties and the agencies of the Communities will be decided by the regional courts; the great mass of international and domestic commercial litigation will continue to be decided by the normal arbitration tribunals.

COUNCIL OF EUROPE

The Council of Europe, in the opinion of Christol, is a complementary body to the Common Market, since one organization deals strictly with the protection of economic and property interests, while the other is concerned with the protection of human rights.³⁴ The significant achievements made by the two judicial organs—the Commission of Human Rights and the Court of Human Rights—are receiving considerable attention.³⁵

In addition, the Council of Ministers has succeeded in obtaining the acceptance of fifteen regional conventions by the member states, and the Council is in the process of working for the adoption of an arbitration convention that could have effect on: (1) the fifteen member states, (2) such overseas territories of these fifteen nations as extend its provisions beyond the European boundaries, and (3) third states that adhere to the convention.³⁶

He indicates, further, the need for uniformity not only among the six but the outer seven; therefore, he advocates that the six as well as the other states accept the Rome draft. The Rome Institute is now associated with the United Nations. For the text see 7 Int'l Comp. L.Q. 1 (1958). Likewise, he indicates that "the law of sale in international matters needs to be refurbished, and more uniformity is desirable, not only in the six nations of the Common Market but also among the seven." *Id.* at 46.

Wahle, "International Aspects of Arbitration Reform," 10 Arb. J. (n.s.) 140 at 140 (1955) states: "The problems existing in international commercial arbitration are primarily those of the recognition and enforcement of foreign arbitral agreements and awards."

³⁴ Christol, "Remedies For Individuals Under World Law," 56 Nw. U.L. Rev. 65 (1961).

³⁵ See *supra* notes 21 and 22. *Lawless v. Ireland*, European Court of Human Rights, No. A 63.550, (1961); 56 Am. J. Int'l L. 171 (1962).

³⁶ Robertson, *op. cit. supra* note 17, at 61-67. See Council of Europe, Recommendation 156 (1958) on Arbitration in Respect of International Relations of Private Law; Report of the Committee of Ministers, November 20, 1958, CM (58) 136. Cited by Domke, *op. cit. supra* note 1.

One problem is immediately presented in that under Article 45 of the *European Convention of Human Rights* the jurisdiction of the Court of Justice is strictly limited to "cases concerning the interpretation and application of the present Convention." Consequently, municipal, other regional, or international tribunals will be required to interpret its provisions, with the effect that numerous conflicting interpretations may result because each national or multi-national court can conceivably render a different interpretation. Hence, the Court of Human Rights will not be able to interpret any arbitration conventions that may be adopted by the member states of the Council of Europe. Obviously, this situation is quite the reverse of the position enjoyed by the High Court of the Common Market, possessing exclusive jurisdiction over Community activities. It must be borne in mind that the Council of Europe operates on the basis of agreement on the part of the member states, whereas the Common Market has supra-national legislative power.³⁷ Moreover, there is always the possibility of conflict between the Council's Arbitration Convention and the exclusive jurisdiction of the Common Market, but such disputes should not arise in the near future.

UNITED NATIONS

In considering the place of commercial arbitration in the Common Market it is necessary not to lose sight of the fact that the United Nations has also accomplished a great deal in this area. A problem, nonetheless, at once arises concerning the priority to be enjoyed in the hierarchy of the various arbitral criteria. Which arbitration law will prevail, the regional standard, the United Nations Draft, or the codes of private arbitral associations?

At the present time a system of voluntary arbitration exists that can be termed to be international in character.³⁸ Furthermore, a number

³⁷ See Chapter VIII, Local and Regional Co-operation, Council of Europe, *European Co-Operation in 1960* (Strasbourg, April, 1961). See prior volume (Strasbourg, April, 1960).

³⁸ Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 8 *Am. J. Comp. L.* 283, 284 (1959): "[T]here are more than 120 trade associations and commodity exchanges offering facilities for the arbitration of commercial disputes relating to specific commodities. Arbitration facilities for any commercial dispute are provided in about forty countries by chambers of commerce and national and international bodies."

In 1954 the International Institute for the Unification of Private Law prepared a Draft Uniform Law on Arbitration; Draft Uniform Law on Arbitration in Respect of International Relations of Private Law, UDP, 1954, Project III.

An indication of the extent of arbitral associations can be seen from the following: the International Chamber of Commerce in Paris; the London Court of Arbitration; the Manchester Chamber of Commerce and other Chambers of Commerce in Australia and

of the major arbitration associations have entered into mutual "compacts"³⁹ for the purpose of giving effect to the arbitration agreements of other groups. The utilization of a joint arbitration clause by the private parties can result in the machinery of more than one association being available. Of course, such "joint arbitration clauses would appear to be but a piecemeal method of dealing with questions that impede on an agreement clause. . . ."⁴⁰ But, on the other hand, such joint clauses are a first step and can fill a significant gap until such time as a comprehensive international agreement can be reached by all of the interested parties. Pending such world wide accord, a great deal can be accomplished by international commercial arbitration for the reason that this device is acceptable in all legal systems—even totalitarian.⁴¹

The first major attempts to aid the existing systems were taken by the League of Nations in its *Geneva Protocol on Arbitration of 1923*,⁴² and the *Convention on the Execution of Foreign Arbitral Awards of 1927*.⁴³ These early efforts to secure the recognition of

in the Union of South Africa; the Netherlands Arbitration Institute; Arbitration Chamber of the Milan Chamber of Commerce, Industry and Agriculture in Italy; the Chamber of Commerce in Spain; the Commission for Arbitration of Chambers of Commerce and Industry in Western Germany; the Chamber of Commerce and Industry of Istanbul; the Bengal and Calcutta Chambers of Commerce; the Japan Chamber of Commerce and Industry, located in Tokyo; the Chamber of Commerce of the Philippines in Manila; the Inter-American Arbitration Association; and the American Arbitration Association. See the excellent discussion by Rosenthal, "Voluntary International Arbitration Tribunals," 6 *Arb. J.* (n.s.) 21 (1951), especially pp. 23-24.

39. Benjamin, "Inter-Institutional Agreements Designed To Extend Existing Facilities for International Commercial Arbitration," 8 *Int'l Comp. L.Q.* 289 (1959). This article discusses the agreements between organizations, such as the agreements by the American Arbitration Association and the Inter-American Commercial Arbitration Commission. The former has concluded agreements with the London Court of Arbitration, the Manchester Chamber of Commerce, the Netherlands Arbitration Institute, the Associated Chambers of Commerce of Australia, the Japan Commercial Arbitration Association, and the International Chamber of Commerce. The Inter-American Commercial Arbitration Commission has concluded an agreement with the International Chamber of Commerce.

⁴⁰ *Id.* at 297.

⁴¹ Roetter, "Arbitration Under Totalitarian Systems," 2 *Arb. J.* (n.s.) 218 (1947). The Soviets maintain the Maritime Arbitration Commission of the All-Union Chamber of Commerce established in 1930 and the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce established in 1932. Likewise, Nazi Germany did not abolish its systems of arbitration. Roetter, points out that totalitarian systems favor arbitration in order to strengthen their economic systems. See also Benjamin, "Soviet Treaty Practice on Commercial Arbitration Since 1940," *Am. J. Int'l L.* 882 (1959).

⁴² *Geneva Protocol on Arbitration Clauses of 1923*, September 24, 1923; 27 *L.N.T.S.* 157 (1924).

⁴³ *Convention on the Execution of Foreign Arbitral Awards of 1927*, concluded September 26, 1927; 92 *L.N.T.S.* 301 (1928).

arbitral agreements and the enforcement of awards enjoyed some limited success, but they were not universally accepted. For instance, the United States never became a party to these documents.

As previously implied, the great need confronting regional and international organizations is for uniformity of procedure, a factor more important than even the law to be applied. To illustrate, Carb maintains: "Uniformity on the subject is far more important than that the law include any particular provision either substantive or procedural."⁴⁴ While the preceding statements are very broad, the importance of uniformity must not be overlooked.

In the opinion of the writer, the major contribution that can be made by the United Nations is to work toward a unification of the means of resolving disputes; unfortunately, no arbitration machinery exists within the United Nations,⁴⁵ the Permanent Court of Arbitration at the Hague is completely ineffective, and the International Court of Justice is limited as to its jurisdiction.

In addition to holding a number of major arbitration conferences,⁴⁶ the United Nations has attempted to further the work begun by the League of Nations in adopting the *Convention On the Recognition and Enforcement of Foreign Arbitral Awards*.⁴⁷ Actually, no attempt has been made to unify all of the national laws; rather, its purpose was to facilitate the recognition and enforcement of arbitral agreements and awards. This United Nations Convention, superseding the older Geneva Drafts,⁴⁸ covers both the recognition of agreements and the enforcement of the ensuing awards. Unlike the League Arbitration Conventions, both areas are now covered by a single document—a step toward unification.⁴⁹

The aim of the United Nations is well summarized in the Resolution of the United Nations Conference on International Commercial Arbitration of June 10, 1958.

⁴⁴ Carb, "The Need For Uniform Laws of Arbitration," 15 Arb. J. (n.s.) 65 (1960).

⁴⁵ Domke, "The International Trade Organization Settlement of Disputes—Provisions of the Draft Charter," 2 Arb. J. (n.s.) 222 (1947).

⁴⁶ Domke, "A Report of the 1961 Paris Arbitration Conference," 16 Arb. J. (n.s.) 131 (1961).

⁴⁷ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/Conf. 26/8/Rev. (1958); text contained in 13 Arb. J. (n.s.) 107 (1958).

⁴⁸ *Id.* Article 7(2) states: "The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."

⁴⁹ For an analysis of the U.N. Convention in relation to the two earlier Geneva efforts see Czyzak & Sullivan, "American Arbitration Law and the U.N. Convention," 13 Arb. J. (n.s.) 197 (1958). The modifications made by the 1958 U.N. Convention are discussed.

It considers that wider information on arbitration laws, practices, and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations [for example, the Economic Commission for Europe and the Inter-American Council of Jurists], and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to co-ordinating their respective efforts.

It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade. . . .⁵⁰

Indeed, the United Nations in Article 7(1) of the Arbitral Covenant specifically provided for the recognition of regional arbitral agreements.

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.⁵¹

Such provision will enable the regional and national arbitration systems to continue unhampered. In addition, new agreements can be negotiated, if necessary, to continue the trend toward greater coordination. A hopeful sign is the similarity in principle among the various national systems.⁵²

Tragically, a few nations, notably the United States, have not adhered to this 1958 Convention,⁵³ with the effect that it will not have the desired universal application.

The latest achievement of the United Nations on a regional basis

⁵⁰ Resolution of the United Nations Conference on International Commercial Arbitration, June 10, 1958; reprinted in 13 Arb. J. (n.s.) 113 (1958).

⁵¹ U.N. Arbitration Convention, *supra* note 47.

⁵² Pisar, "The United Nations Convention on Foreign Arbitral Awards," 33 So. Cal. L. Rev. 14 (1959). He maintains: "Studies undertaken by various intergovernmental and nongovernmental organizations with a view to the improvement of arbitration through unification of domestic laws and standardization of procedures indicate that, although marked national diversities still persist, there is a fundamental similarity of principle. Moreover, the cumulative effect of scattered attempts at bilateral and regional co-ordination, as well as of isolated instances of unilateral change and adoption, is also indicative of a gradual trend towards the eventual harmonization of practice required by the international business community." Pisar, *supra* at 29-30.

⁵³ Quigley, "Accession by the United States Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 70 Yale L.J. 1049 (1961). The article discusses the desirability of the United States adhering to the 1958 U.N. Convention. Both the advantages and disadvantages are discussed.

has been the adoption of the *European Convention on International Commercial Arbitration* of the Economic Commission for Europe on 21 April 1961.⁵⁴ This regional group has, since its first meeting in 1955, worked regularly to improve arbitration on the Continent⁵⁵ in a series of preparatory drafts.⁵⁶

Twenty-two states attended the final meeting⁵⁷ as well as members from the Secretariat of the Council of the EEC. The scope of the Convention is to apply

(a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding their agreement, their habitual place of residence or their seat in different Contracting States;

(b) to arbitral procedures and awards based on agreements referred to in paragraph 1(a) above.⁵⁸

As indicated in the Preamble,⁵⁹ a regional effort has been made

⁵⁴ United Nations, Economic Commission For Europe, *European Convention on International Commercial Arbitration*, Geneva, 21 April 1961, E/ECE 423, E/ECE/Trade/48. The Preamble, at 1:

HAVING NOTED that on 10th June 1958 at the United Nations Conference on International Commercial Arbitration has been signed in New York a Convention on the Recognition and Enforcement of Foreign Arbitral Awards, DESIROUS of promoting the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries. . . .

⁵⁵ Benjamin, "The Work of the Economic Commission For Europe in the Field of International Commercial Arbitration," 7 *Int'l Comp. L.Q.* 289 (1958). The Economic Commission has conducted work in four areas: (1) existing arbitral facilities in the field of international trade; (2) international conventions relating to commercial arbitration; (3) national laws on commercial arbitration; and (4) problems concerning the settlement of commercial disputes by arbitration.

⁵⁶ "On the basis of the draft Convention drawn up by the *Ad hoc* Working Group on Arbitration (document TRADE/96, Annex I) as well as the text prepared by the Special Meeting on Article IV (document TRADE/WP.1/Conf. Room Doc. No. 27) and of the draft set of final clauses submitted by the Secretariat (document TRADE/WP.1/38), the Meeting prepared and opened for signature on 21 April 1961 the European Convention on International Commercial Arbitration." *Supra* note 54, at 2.

⁵⁷ "The Governments of the following twenty-two States were represented at the Meeting: Austria, Belgium, Bulgaria, Byelorussian Soviet Socialistic Republic, Czechoslovakia, Denmark, Federal Republic of Germany, Finland, France, Hungary, Italy, Luxembourg, Netherlands, Poland, Romania, Spain, Sweden, Switzerland, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Yugoslavia." *Id.* at 1.

"The following nongovernmental organizations had observers at the Meeting: the International Chamber of Commerce and the International Bar Association. Also present, at the invitation of the Secretariat, were members of the Secretariat of the Council of the European Economic Community." *Id.* at 2.

⁵⁸ *Id.* at 1.

⁵⁹ *Supra* note 54.

to remove some of the difficulties that usually arise in the employment of commercial arbitration in the settlement of disputes.⁶⁰ It can only be hoped that such constructive efforts by the United Nations will continue in the future, since this type of coordination among existing arbitral systems can best be accomplished by an international organization.

CONCLUSIONS

The future role of commercial arbitration in regional organizations seems assured because of the rising acceleration in international trade and commerce. The same economic and commercial pressures fostering the rise of arbitration in regional markets will necessitate its continued expansion in the great supra-national regional organizations. Consequently, *it is submitted that enlarged systems of private commercial arbitration will be able to function effectively, and render a significant contribution, to the growing Common Market.* The main contribution that can be made by voluntary associations, multi-national organizations, and the United Nations is to create a world wide system for the recognition of arbitral agreements and the enforcement of awards. The universal recognition of foreign judgments constitutes the major step that can be taken by the United Nations, for the International Organization is in the best position to coordinate a world wide system of arbitration. It can only be hoped, therefore, that the United Nations, and the supra-national organizations in Europe, will exert even greater leadership in this direction.

So significant has been the rise of the multi-national organizations abroad, the United States is already feeling the economic competition and is preparing, at least as regards the EEC and the OECD, to abandon some of its traditional isolation. *It can only be hoped that the United States will, likewise, abandon its provincialism concerning arbitration and join in a global system in which individuals can secure rapid and effective justice.* Precisely, the great need today on the international scene is to resolve conflicts, and such need is being met by arbitration at all levels—national, regional, and international—both public and private. In other words, the “every day conflicts” of industry, trade, and commerce must be decided quickly and fairly.

Against this rising background of increased activity across national boundaries, regional courts, with their exclusive jurisdiction in limited areas, will exist side by side with the conventional private associations. Further, their statutes, treaties, and conventions will coexist with international standards. It seems obvious that a significant place exists for all of these conflict resolving agencies and systems.

⁶⁰ See in particular, Article 6 relating to the jurisdiction of the national courts of law. *Id.* at 6.

Although many of the issues involving clashes of jurisdiction can not be solved until actual disputes have been litigated, it seems valid to conclude that there is a place for private initiative and tribunals within regional and international systems for the reason that *unique advantages can be found in each*. May it, consequently, be suggested that the United States will assume its rightful place in such a universal system of commercial arbitration in order to facilitate the universal acceptance of the "world rule of law" at the level of the individual litigant.