**ARBITRATION IN INTERNAITONAL COMMERCIAL LAW**

**INTRODUCTION**

This was written nearly 200 years ago by economist David Ricardo, which solidified the case for international trade, and yet it remains as influential and controversial today as it was 200 years ago.It involves exchanging goods, services, labor, or capital between entities in different countries. "International trade" is the flow of resources across borders. [[1]](#footnote-1)

It consists of rules and regulations that govern a range of commercial transactions commonly called business or trade law, though it can also be classified as a sub-division of civil law. Both corporate and consumer transactions are governed by this law. A commercial law firm deals primarily with company contracts, credit lines, secured transactions, and commercial banking deals with global commerce, banking, transport, and sales.

A global shift is taking place in commercial activities as contemporary lifestyle undergoes various changes. Businesses are connected through telecommunications and the internet, for example. Globalization is also reshaping commercial law to meet these changing trends. Commercial law trends must also be followed by business organizations. Business transactions must be global to fit in. As global trade policies change, so do the policies of individual countries. Globalization and internationalization of business regulations will have greater implications due to the new social order. With the increasing involvement of industrial corruption in international business, commercial law is becoming increasingly complicated. Money laundering is closely associated with global commercial corruption, as can be seen from reports by some international companies, such as FATF. Money-related corruptions, therefore, have also prompted the need to modify transnational business law in a manner that fits with new business trends.

**HISTORY OF INTERNATIONAL COMMERCIAL LAW**

Trade itself is probably as old as commercial law. A few centuries earlier were Samerian laws, which were derived from Hammurabi's Codes. Many aspects of commercial law remain mysterious from its earlier days. A constant reinvention of the wheel is what has characterized its history. Assyrian clay tablets from Karkhemish, found in the seventh century BC, resemble bills of exchange commonly attributed to the Italians in the Middle Ages. [[2]](#footnote-2) Roman law did not seem so different from English hypotheca, though English law is generally credited with developing floating charges in the nineteenth century. Biblical times saw trade begin, both locally and internationally. A network of roads linking Samarkand in Central Asia with Tunhwang and Changan (Xian) in China was constructed by this time to create the famous Silk Road. Greeks and Romans both accepted the Rhodian Maritime Code in the second or third century BC, one of the most important codifications in maritime law. A general average principle was embodied in the first maritime insurance law. An influential compilation of maritime customs, the Rhodian sea laws, replaced the Code after 1,000 years. A famous 17th-century work by Gerard Malynes noted the connection between maritime law and law merchant.

Sea-Laws were established to settle disputes between merchants and merchant mariners, weren't they? Aren't merchants more inclined to know them if they know them? Since Merchants provide Fishermen with a living, and (through Trade) distribute Sea and Land commodities around the globe? The prerogatives of the Law-Merchant do also apply to him as a proper inherent part of commerce, and all nations and people must observe the same rules as Merchants. Several collections of mercantile customs were compiled between the eleventh and fifteenth centuries, primarily maritime ones.

It evolved due to urbanization, the growth of the merchant class, and the development of merchant and consular courts. In order to increase international trade, European rulers established special laws to protect merchants, recognize their customs, and establish their courts. As part of the constant search for new markets, caravan routes opened between East and West. The success of international trade must, however, be backed up by international rules and practices. Many of the major fairs of the time were highly organized institutions, such as those in Champagne and Flanders. The merchant courts were granted numerous privileges, they operated banks and money exchanges, and even operated their own courier service. Professor Paul Huvelin, a prominent French legal historian, described their importance well.

**PURPOSE AND WORKING OF INTERNATIONAL COMMERCIAL LAW**

The combination of business principles and basic diplomatic principles is the basis of international commercial law. The law lays the groundwork for a better understanding of economics by addressing fine points such as entering foreign markets ethically, shipping goods, and ensuring the right to sue. The purpose of international commercial law is to establish rules for fair trade and such ethical business dealings. [[3]](#footnote-3)

**ARBITRATION AS A MODE OF DISPUTE RESOLUTION:**

**Lex Mercatoria**

The body of commercial legislation utilised by merchants throughout mediaeval Europe is known as Lex mercatoria (from the Latin for "merchant law"), also referred to as "the Law Merchant" in English. It developed as a body of custom and accepted practises, much like English common law, and was upheld by a network of merchant courts situated along the major trade routes. It evolved into a comprehensive body of law that was created, decided, and upheld voluntarily[citation needed], reducing conflict resulting from the members' various backgrounds and regional traditions. Local state law was not always applicable due to the international context, and merchant law provided a flat framework to conduct transactions, lowering the requirement of a trusted third party. Lex mercatoria is as ancient as the trade itself. These are the customs and traditions followed by the merchants of the early ages. These are the rules and principles set by the merchants to resolve the disputes arising between them .

Parties have the power to select the great regulation relevant are supplied with inside the arbitration legal guidelines of the bulk of the jurisdictions. For instance, below the English regulation the power to select the relevant great regulation may be observed below Section forty six of the[[4]](#footnote-4) English Arbitration Act, 1996, below [[5]](#footnote-5)Article 17(1) of the ICC Arbitration Rules and withinside the Indian regulation it may be observed below Section 28 of the Arbitration and the Conciliation Act, 1996. The regulation handling the power to select the great regulation, each below the English regulation and the Indian regulation, has been modeled on [[6]](#footnote-6)Article 28 of the UNCITRAL Model regulation.

Section 28(1) (b) of the act presents that during instances of global business arbitration the great regulation unique through the events will be relevant. However, with inside the absence of any such designation the arbitral tribunal shall observe the policies of regulation it considers to be suitable given all of the situations surrounding the dispute through attempting to deduce the aim of the events or through selecting that machine of regulation which the transaction has its closest and maximum actual connection.

This phase has been modeled on Article 28 of the version regulation. However, Section 28(1) which offers with the regulation relevant in instances of home arbitration has been enacted through the Indian legislature and changed into now no longer gift below the Model regulation. Section 28(1)(b)(i) and (ii) correspond to the Article 28(2) of the Model regulation albeit the content material and the cause of the 2 provisions being appreciably different. Article 28(2) of the Model regulation mandates that during case of absence of designation of regulation through the events the arbitral tribunal shall observe the regulation decided through the warfare of regulation policies which it considers relevant. But phase 28(1)(b)(iii) is a notch liberal and presents for a freedom of preference to the arbitral tribunal and permits the tribunal to use the policies of regulation it considers to be suitable given all of the situations surrounding the dispute.

**PURPOSE, SCOPE AND FUNCTION GOVERNING ARBITRATION**

When parties agree to arbitrate their disputes, they give up the right to have those disputes decided by a national court. Instead, they agree that their disputes will be resolved privately, outside of any court system. The arbitration agreement thus constitutes the relinquishment of an important right to have the dispute resolved judicially and creates other rights. The rights it creates are the rights to establish the process for resolving the dispute. In their arbitration agreement, the parties can select the rules that will govern the procedure, the location of the arbitration, the language of arbitration, the law governing the arbitration, and frequently, the decision makers, whom the parties may choose because of their expertise in the subject matter of the parties’ dispute. The parties’ arbitration agreement gives the arbitrator the power to decide the dispute and defines the scope of that power. In essence, the parties create their own private system of justice.[[7]](#footnote-7)

**THE RECOGNITION OF ARBITRATION AGREEMENTS**

The consent to arbitrate lies at the heart of arbitration proceedings. Without the consent to arbitrate1 as expressed in an arbitration agreement, arbitral tribunals could not exercise their adjudicatory power to decide on the merits of a dispute.However, this does not mean that parties enjoy unlimited autonomy to decide whether and how they wish to confer adjudicatory authority on an arbitral tribunal.

**LEGAL FRAMEWORK GOVERNING ARBITRATION**

As a matter of fact, the legal framework governing arbitration proceedings sets forth requirements that must be met for an arbitration agreement to be given effect.[[8]](#footnote-8) The key provision governing the recognition of arbitration agreements at the pre-award stage is Article II of the New York Convention which reads.

1. Each Contracting State [shall recognize](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#633) an [agreement](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#634) in writing under which the parties undertake to submit to arbitration all or any [differences](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#636) which have arisen or which may arise between them in respect of a [defined legal relationship](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#637), whether contractual or not, concerning a [subject matter capable of settlement by arbitration](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#638).
2. The term “[agreement in writing](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#639)” shall include an [arbitral clause in a contract or an arbitration agreement](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#640), [signed by the parties](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#641) or
3. The court of a Contracting State, when seized of an action in a [matter in respect of which the parties have made an agreement](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#650) within the meaning of this article, [shall, at the request of one of the parties](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#649), [refer the parties to arbitration](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#648), unless it finds that the said agreement is [null and void](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#655), [inoperative](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#656) or [incapable of being performed](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#657).

**CASE LAW**

**FIRST PAKISTANI JUDGEMENT ON THE NEW YORK CONVENTION 1958**

**M/s Travel Automation (Pvt.) Ltd v Abacus International (Pvt.) Ltd. 2006 CLD 497**

The Court held that Section 4(2) of the REA Act 2011 has taken away the decretion of the court to stay the proceedings in terms of the Arbitration Agreement, even on the ground of inconvenience etc. Except where the arbitration agreement by itself null and void, inoperative or incapable of being performed.[[9]](#footnote-9)

**OTHER ARBITRATION CONVENTION**

**THE EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION 1961**

This Convention, concluded during the cold war period, was aimed at promoting east-west trade. It was developed by the United Nations Economic Commission for Europe. It covers general issues of parties’ rights to submit to arbitration, who can be an arbitrator, how arbitration proceedings should be organized, how to determine the applicable law, and the setting aside and challenge of awards. Although it is still in operations it never really achieved real international recognition. In fact, the number of countries which have acceded to the convention has recently been increased.[[10]](#footnote-10)

**THE WASHINGTON CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES WAS PROMOTED BY THE WORLD BANK 1965**

In the late 1950s and 1960s many of the former colonial countries achieved their independence and were looking to take over ownership and control of major concessions owned by foreign companies. This Convention created the International Centre for the Settlement of Investment Disputes (ICSID) which has jurisdiction over legal disputes arising from investments between a contracting state and a national of another contracting state. It was hoped that by developing countries accepting ICSID jurisdiction this would give investors confidence to continue with and make further investments in such countries. The Washington Convention has been ratified by over 130 countries.[[11]](#footnote-11)

**SAUR International SA v. Republic of Argentina**

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| In a decision rendered on May 22, 2014, the International Center for Settlement of Investment  Disputes addressed an original issue: the determination of the value of the Claimant’s investment,  corresponding to the compensation amount that the Claimant is entitled to receive, because of the  violation by the Republic of Argentina of several principles established by the Agreement between  France and Argentina for the mutual promotion and protection of investments.[[12]](#footnote-12) |

**EFFECT OF ARBITRATION AGREEMENTS**

An arbitration clause is a lawfully enforceable contract that provides an alternative method for resolving disputes between two or more parties. Arbitration agreements are a substitute for civil court action. If a dispute emerges, the parties consent an arbitration clause and engage a procedure known as arbitration. The goal of such an arbitral proceeding is to make the resolution of disputes quicker and less expensive than litigation. Cases are presented less formally than legal processes.[[13]](#footnote-13)

Arbitration agreements offer a number of different benefits. One may utilize these benefits by incorporating an arbitration process in your contracts, regardless of your sector. Both the ICC as well as the LCIA propose adding the following four components in usual arbitration proceedings: the location of the arbitration, the number of arbitrators, the languages of the arbitration, and the applicable legislation.[[14]](#footnote-14)

The case of **Enka v. Chubb** before the Supreme Court of the United Kingdom demonstrates that litigants would be well to include another element to their arbitration agreement checklist, which might possibly spare them years of unnecessary remote civil suits: the law regulating the arbitration clause altogether. This was recently underlined in the case **Enka v. Chubb** before the Supreme Court of the United Kingdom.  In the case of **Enka v. Chubb**, the parties were negligent while structuring their agreement with arbitration provision: neither the contract nor the arbitration clause specified the law controlling the arbitration agreement.[[15]](#footnote-15)

**ARBITRAL INSTITUTION AND SEAT OF ARBITRATION / FORUM**

There are various international arbitration institutions who are tasked with the duty to deal with international arbitration and to resolve international disputes between parties. The notable institutions among them includes International Chamber of Commerce (ICC), International Court of Arbitration (ICA), London Court of International Arbitration (LCIA) and International Center for Dispute Resolution (ICDR). These arbitral institutions are among the most prominent international bodies dealing with arbitration.

The seat and forum of arbitration is equally important. It is to be decided by the parties to the agreement / contract to specify the forum and seat of arbitration as well as the specific international and national legislation which the particular contract will be subject to. As far as the domain of international commercial law in concerned, it is expedient to elaborate the seat of arbitration in case of dispute between the parties involved in a commercial transaction or commitment.[[16]](#footnote-16)

**ARBITRATION TREATIES / RELEVANT STATE LAWS**

Two types of treaties are pertinent to the study of international commercial arbitration. The 1980 Convention on Contracts for the International Sale of Goods is an example of a treaty that governs the underlying economic transactions from which conflicts originate (CISG).

The 1958 Convention on the Recognition and Execution of Foreign Arbitral Judgements, colloquially known as the New York Convention, governs the enforcement of arbitral awards.

The United Nations Commission on International Trade Law (UNCITRAL) is a crucial participant in the formulation of treaties to enable the harmonization of commercial law. Its website is a valuable resource for information on treaties and model legislation dealing to, among other topics, which includes:

* the international sale of commodities
* security interests on internationally sold items
* international payments, and
* the international conveyance of goods.

Additionally, UNCITRAL includes explanatory comments and ratification status information for each treaty.

**JUS MUNDI**

The database of Jus Mundi contains approximately 4,500 bilateral and multilateral treaties covering international arbitration, global trade, and several other subjects. All the relevant laws (international and domestic) can be found through operating the database of Jus Mundi.

**KLUWER ARBITRATION**

The Kluwer Arbitration repository contains a multitude of international and regional treaties pertaining to international arbitration and global commerce.

Therefore, the arbitration treaties are essentially relevant when it comes to dealing with international commercial transactions and commercial contracts of which such arbitration clauses form a part. These arbitration clauses are regulated as per the laws specified in the contract, and the parties resort to the application of those specific treaties / international agreements and global trade / commercial laws.[[17]](#footnote-17)

**CONCLUSION**

In the light of above mentioned facts, arguments and circumstances, it can be reasonably inferred that international commercial law is majorly involved in disputes referred to International Arbitral Forums. International Commercial Law has developed vastly in the recent years and litigation has increase in the same manner. There are disputes as to choice of forum or choice of law. In any case, arbitration is the most important mode of alternate dispute resolution as can be utilized so through referring the matter to Arbitral Forums or through involving persons well-equipped with the modes of Arbitration. However, inserting an arbitration clause is recommended for the parties to international agreements and contracts especially if they fall within the ambit of international commercial law.

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Margaret L. Moses ‘The Principles and Practice of International Commercial Arbitration’

*Remy* *Amerique, Inc. v Touzet Distribution. S.A.R.L and others* United States District Court, Southern District of New York, 16 March 1993 in A.J. van den Berg(ed) *Yearbook* *Commercial* *Arbitration* 1994 (nothing that arbitration ‘is and must be consensual’)

As will be explained in chapter 3, arbitral tribunals may possess adjudicatory authority to decide on jurisdiction even in the absence of consent to arbitrate

George A. Bermann, ‘International Arbitration and Private International Law’ (2015) Receuil Cours 41, 57

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