STATES AND THE UNDERTAKING TO ARBITRATE

HAZEL FOX*

1. INTRODUCTION

THE institution of arbitration, on one view, derives its force from the agreement of the parties; on another view, from the State as supervisor and enforcer of the legal process. The contractual obligation of both parties enables the settlement process to override national differences in law and procedural obstacles which exist in local courts. On the other hand, a State's jurisdiction over its territory and nationals provides an independent supervision of the settlement process and effective enforcement of decisions made according to law: usually this exercise of jurisdiction is direct through the State's own courts, but in arbitration it is carried out through the alternative process of reference to an arbitrator and recognition and execution of the arbitral award.[1]

These two bases, the autonomy of the parties and the judicial supervision of the State as sources of the authority of arbitration are given varying weight in national legal systems in relation to domestic arbitrations.[2] The great expansion of international commercial arbitration

* Director of the British Institute of International and Comparative Law, formerly Fellow of Somerville College, Oxford. This paper is based on the Freshfields lecture given, at the invitation of Professor R. M. Goode, Director, Centre for Commercial Law Studies, at Queen Mary College London on 8 June 1987. I am grateful to Professor Bin Cheng and Lawrence Collins for their comments on an early draft.

1. René David, *Arbitrage dans le commerce international* (1982, Eng. translation 1985), pp.78, 81. "Arbitration and the justice of the courts should not be regarded as competitors doomed to be enemies, but rather as two institutions whose purpose is to co-operate for the sake of better justice: a satisfactory regime for arbitration cannot be imagined without some degree of co-operation with the courts, which are called to give assistance to, and also to exercise control over arbitration . . . It is not clear in the case of international disputes as to which national courts will be called to settle any dispute which may arise. This factor may well justify the desire to be free from the particular constraints of national laws and lead us to analyse the award as being a product of the free will of the parties."

For inter-State arbitration, J. H. Ralston, *Law and Procedure of International Tribunals* (1926); K. S. Carlston, *The Process of International Arbitration* (1946); J. L. Simpson and H. Fox, *International Arbitration, Law and Practice* (1959). For international commercial arbitration, A. Jan van den Berg, *The New York Arbitration Convention of 1958* (1981); Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (1984); Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (1986). See also Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (1982).

2. The Italian *arbitrato irrituale* is an extreme example of the autonomy of the parties; it is a contractual institution not subject to any of the formalities of the Italian Code of Civil Procedure and enforcement cannot be effected by an award but only on the basis of an action on the contract to arbitrate: A. Kiss, *Problèmes de Base de l'Arbitrage*, Vol.I,

tion to the Common Market or to human rights, particularly the right of property in the First Protocol under the European Convention of Human Rights.

But these speculations apart, is it sufficient to leave such an important extension of jurisdiction into the international field to a common law action? It appears from the decision in the *Dallal* case that there is sufficient scope in such procedure to ensure the application of the safeguards relating to rules of natural justice and local public policy which currently apply for the enforcement of foreign judgments and awards.[79] But what of the broader view of public policy? Should the recognition of a treaty conferring international competence be left to individual litigants' resort to a common law action? Are all such bilateral treaties removing claims of nationals from local courts to inter-State arbitration likely to be ones which, in the words of the judge in the *Dallal* case, the English court will "not frustrate"? Should not the decision to endorse or frustrate a treaty arrangement made between other States be with Parliament? Such endorsement has certainly been required in the case of foreign judgments, as the recent entry into force of the Civil Jurisdiction and Judgments Act 1982 illustrates, and also the UK legislation for foreign arbitral awards giving effect to the New York Convention 1958 and the ICSID Convention.

The fusion of international law with local law is an admirable goal but if it is to be done so as to avoid international conflict surely it ought to be done by observance of constitutional procedure, opportunity for parliamentary debate and taking due account of all interests involved.

V. CONCLUSION

To summarise:

1. Commercial arbitration, both domestic and international, depends on two sources of authority, the consensual autonomy of the parties and the power of the State to enforce the legal process.
2. Private litigants as a general rule are subject to compulsory adjudication of their disputes by courts. Resort to arbitration arises from the voluntary choice of a more flexible procedure. States are not generally subject to compulsory adjudication; all forms of arbitration are a restriction on their freedom of action.
3. The undertaking to arbitrate comprises three elements: an immediate irrevocable obligation to refer the dispute to arbitration; an obligation to settle the dispute by arbitration in preference and prior to resort to legal proceedings; and an obligation to honour the award of the arbitrator. In inter-State arbitration the State's undertaking to arbitrate probably does not extend to the second obligation and the first and second obligations are given effect solely by operation of the first basis, the consensual autonomy of the parties. The undertaking of the State does not contain a commitment to respect the power of a third State to enforce the award.
4. In international commercial arbitration the undertaking of the State to arbitrate cannot of itself constitute consent to the award being enforced by court proceedings. Such consent may be construed or imputed as consent to enforcement by English courts where the State in the arbitration agreement consents to the applicable law as English law or to the arbitration being held in England, and identifies the arbitration as relating to commercial matters and commercial property. Section 9 of the State Immunity Act 1978 should be so construed.
5. Reference of private party disputes by States to settlement by mixed claims commissions or arbitral claims tribunals involves no consent by the private party to arbitrate unless he subsequently submits his claim to the commission or tribunal. The second basis, the power of the two States to enforce the award of the commission or tribunal should not extend beyond their own courts. If the award of the arbitral claims tribunal is to receive recognition and enforcement in the courts of a third State, that State must be a party to the treaty setting up the claims commission or tribunal and/or enact legislation requiring its courts to give effect as judgments to the awards of such mixed claims commission or arbitral claims tribunal.

79. Dicey and Morris, *op. cit. supra* n.70, at p.571; *Dallal* v. *Bank Mellat* [1986] 2 W.L.R. 745, 765.