

INTERNATIONAL ARBITRATION LAW: PROGRESS TOWARDS HARMONISATION

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CONTENTS

- I Introduction
- II Arbitration: Nature and Themes
- III Legal Convergence in the Enforcement of Arbitral Agreements and Awards
- IV Convergence in Arbitral Procedure
- V Convergence in Substantive Law
- VI Conclusion

I INTRODUCTION

International commercial arbitration is becoming an increasingly popular method for resolving disputes between traders from different countries. Arbitration comes in a variety of forms and its relationship with mediation and conciliation is becoming increasingly relevant. This paper will focus on an important theme in international arbitration law: the trend toward harmonisation of national laws and the movement towards a single, unified legal system.

The term 'international' in describing arbitration is used throughout this paper in a broad sense, namely to refer to any arbitration with a foreign element. For example, the parties may have their places of business in different countries and choose to arbitrate in one of those countries or a third state, or they may reside in the same country but choose to arbitrate elsewhere.¹

It is clear that in recent times a strong trend has emerged toward the reduction of differences in national arbitration laws. This process of harmonisation has largely occurred due to a growing consensus as to the proper underlying philosophy of arbitration: namely, as a method of dispute resolution, the content and form of which should be primarily left in the hands of the parties.

Before discussing examples of harmonisation of laws in the arbitration context, a brief explanation of the concept of harmonisation is required. In legal literature harmonisation has been defined as a mechanism for making the regulatory requirements or government policies of independent nation states with no shared political or economic authority identical or similar.² The process of harmonisation is often justified on the ground that it creates stability and

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¹ *United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (1985), annex I, art 1(3) ('*Model Law*') takes a similarly broad approach to the definition of 'international'. Article 1(3) is enacted in Australia in the *International Arbitration Act 1974* (Cth) s 16. The *Model Law* is included in full in the *International Arbitration Act 1974* (Cth) sch 2.

² David Leebron, 'Claims for Harmonisation: A Theoretical Framework' (1996) 27 *Canadian Business Law Journal* 72.

certainty in international trade by enabling parties to predict in advance the rules that are likely to apply to them.

The goal of harmonisation has been pursued with some success in a number of areas of international trade law, including general principles of contract law,³ international sale of goods,⁴ finance,⁵ transport⁶ and intellectual property,⁷ as well as arbitration. While the process of harmonisation has been challenged by some scholars on the ground that it is insensitive to cultural and economic diversity,⁸ such concerns have had little impact in the area of international commercial arbitration where, as will be seen, the philosophy of party autonomy is deeply entrenched.

II ARBITRATION: NATURE AND THEMES

Arbitration has a long history, dating back to medieval Europe and the emergence of a merchant class that engaged in commercial activity across borders. Rather than making use of the court systems in their own countries — which were undeveloped, procedurally backward and cumbersome — traders preferred to set up their own tribunals, consisting of their own representatives who were familiar with the types of disputes that arose. In this way, areas of recognised expertise could be developed without excessive legal formality.

The tribunals themselves were also uniquely transnational in the sense that they existed independently of any national legal system and applied a type of uniform commercial law that was based on the understandings and practices of the traders themselves rather than any particular domestic law. Today there is considerable debate among arbitration lawyers as to whether a modern form of this ‘law of merchants’ or *lex mercatoria* has survived. As will be discussed below, advocates of a modern *lex mercatoria* take the view that it is still possible to identify and construct a legal system out of the commercial practices of traders.⁹ On the other hand, sceptics contend that the emergence of more highly developed systems of national law has effectively supplanted any such transnational legal order.¹⁰

However, the important point to note is that international arbitration has survived and prospered for hundreds of years despite the emergence of strong

³ See *UNIDROIT Principles of International Commercial Contracts* (1994).

⁴ See *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

⁵ See *International Chamber of Commerce Uniform Customs and Practice for Documentary Credits* (1993).

⁶ See *International Convention for the Unification of Certain Rules Relating to Bills of Lading*, opened for signature 25 August 1924, 120 LNTS 155 (entered into force 2 June 1931).

⁷ See *Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886*, opened for signature 9 September 1886, [1901] ATS 126 (entered into force 5 December 1887).

⁸ See generally Jagdish Bhagwati and Robert Hudec (eds), *Fair Trade and Harmonisation: Prerequisites for Free Trade?* (1996).

⁹ See, eg, Berthold Goldman, ‘La Lex Mercatoria dans les contrats d’arbitrage internationaux: Réalité et perspectives’ (1979) 106 *Journal du Droit International* 475 and Andreas Lowenfeld, ‘Lex Mercatoria: An Arbitrator’s View’ (1990) 6 *Arbitration International* 133.

¹⁰ See, eg, Michael Mustill, ‘The New Lex Mercatoria: The First Twenty-Five Years’ (1988) 4 *Arbitration International* 86.

national legal and political systems in the 19th century. It is useful to consider a few of the basic features of arbitration and why it has remained attractive.

The key aspect of arbitration has always been that it is based on agreement between persons. Unlike national court systems, which are provided by the state, no arbitration panel exists unless two parties contractually undertake to create one. The result is that the arbitration agreement becomes the primary source of the rights, powers and duties of the arbitral tribunal.

Accordingly, the parties retain considerable freedom over issues such as the place of arbitration, the applicable law, the language of the arbitration, the composition of the bench, and the confidentiality of proceedings. There is, in short, great scope for flexibility and neutrality, which are attractive features for parties from commercial backgrounds, particularly when they come from different countries and fear being subjected to an unfamiliar and foreign judicial system. Arbitration thus provides an opportunity for bridging the gap between common and civil lawyers.

The centrality of the parties' agreement to arbitration has also been an important factor in encouraging uniformity in international arbitration law. Most nation states now realise that there are substantial benefits in providing a legal regime that facilitates and encourages international arbitration and respects the parties' agreement as much as possible. Not only does a country benefit economically from becoming a host site for international arbitration business, but also those citizens who engage in trade and commerce benefit generally from having a flexible and neutral system of dispute resolution. This development in turn encourages the flow of international business on a global level as increased certainty exists at the dispute resolution stage.

Instead of placing procedural barriers in the way of parties proceeding to arbitration or allowing excessive intrusion by national laws and courts in the process, the principle of 'party autonomy' is now firmly established as the benchmark for international arbitration law worldwide. Until recently, English arbitration law was based on a different approach, namely arbitration under judicial supervision. To some extent the English view reflected a greater wariness of arbitrators and a fear of rogue and unruly decision making.

However, with the passing of the *Arbitration Act 1996* (UK), English law has now firmly embraced the 'party autonomy' view. This is best evidenced by the new restrictions on the right to appeal on a question of law from an arbitration award. Under section 69(2) of the *Arbitration Act 1996* (UK), an appeal may only be brought '(a) with the agreement of all the other parties to the proceedings; or (b) with the leave of the court.' Under section 69(3), it is clearly intended that leave should only be granted in special cases.

It seems that there is arguably now a single prevailing philosophy in international arbitration based on giving effect to the parties' agreement and reducing the control of national law. Particular aspects of arbitration law will now be identified in which the movement towards harmonisation is evident.

III LEGAL CONVERGENCE IN THE ENFORCEMENT OF ARBITRAL AGREEMENTS AND AWARDS

The influence of ‘party autonomy’ and the movement away from national regulation of the arbitral process can be seen in the range of international codifications and agreements that exists in the field of international arbitration. Perhaps the most spectacular example is the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (‘*New York Convention*’)¹¹ that has now been adopted by 125 countries and clearly represents a form of customary international law on the subject.¹²

As its name suggests, the main focus of the *New York Convention* is the enforcement of arbitration agreements and awards. Hence, its scope of operation is at the beginning and end of the arbitral process. First, it contains provisions that compel parties to go to arbitration pursuant to their agreement, and second, it lays down rules for enforcement of the award. The provisions of the *New York Convention* strongly embody the ethic of party autonomy and a resistance to intervention by national courts. For example, article II of the *New York Convention*, which deals with the enforcement of arbitration agreements, provides that:

- 1 Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them
- ...
- 3 The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement ... shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

What is notable about this provision is that it provides for a *mandatory* enforcement procedure for arbitration agreements subject to a narrow exception. That is, where an agreement falls within the scope of article II, a national court must enforce it unless the agreement is invalid or inoperative. No other defence is provided and no residual discretion not to enforce exists under the enforcing country’s domestic law. Clearly, the intent of the drafters was to reinforce the arbitral process by minimising the scope for the intrusion of national law to prevent enforcement of such agreements. It is generally fair to say that, in interpreting article II, most national courts have respected and given effect to the intent of the drafters.

For example, in Australia, where court proceedings have been brought by a party to an arbitration agreement that falls within the terms of the *New York Convention*, courts have interpreted the agreement broadly, to encompass as many of the party’s claims as possible.¹³ In this way, the bulk of the case will be

¹¹ Opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

¹² UNCITRAL, *Status of Conventions and Model Laws* (2001) <<http://www.uncitral.org/english/status/Status.pdf>> at 23 September 2002.

¹³ *International Arbitration Act 1974* (Cth) s 7, enacting *New York Convention*, above n 11, art II. See generally Richard Garnett, ‘The Current Status of International Arbitration Agreements in Australia’ (1999) 15 *Journal of Contract Law* 29.

referred to arbitration. This approach reinforces both party autonomy and the integrity of arbitration as a dispute resolution process.

Similarly, in the case of awards, the provisions of the *New York Convention* were drafted with a view to reinforcing the enforcement process. The basic position under the *New York Convention* is that an award may be enforced in any country apart from the nation state where the award was made,¹⁴ although member states may limit the enforcement obligation to awards made in the territory of States Parties.¹⁵ However, given the broad scope of article I and the large number of signatories to the *New York Convention*, the effect has been to make, at least in theory, awards enforceable on a virtually global basis. This view is confirmed by article V,¹⁶ which lists the grounds under which a defendant may resist enforcement:

- 1 Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the [court] where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement ... were ... under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or ... under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not ... falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ... or
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties ... or
 - (e) The award has not yet become binding on the parties[.]
- 2 Recognition and enforcement of an arbitral award may also be refused if the [court] in the country where recognition and enforcement is sought finds that:
 - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
 - (b) The recognition or enforcement of the award would be contrary to ... public policy.

Again what is notable about these defences is that they are narrowly drawn and tend to relate to procedural defects in the arbitral process, rather than to errors of substantive law or to the merits of the case. Also, there exists no residual discretion not to enforce an award — enforcement is mandatory — unless one of the above grounds applies.¹⁷ It is well established that the drafters of the *New York Convention* intended to ensure that enforcing courts approach these grounds with a pro-enforcement bias and, in particular, that they would not have the power to reopen cases on the merits.¹⁸

¹⁴ *New York Convention*, above n 11, art I(1).

¹⁵ *Ibid* art I(3).

¹⁶ This provision has been enacted in Australia: *International Arbitration Act 1974* (Cth) s 8.

¹⁷ *Rosseel NV v Oriental Commercial Shipping (UK) Ltd* [1991] 2 Lloyd's Rep 625 (QB Com Ct).

¹⁸ Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981) 358.

Once again the historical record appears to show that national courts have generally respected the wishes of the drafters and have not sought to obstruct enforcement of awards. The treatment of the public policy exception is a good example, where the distinction between ‘international’ and domestic public policy has been drawn, with only breaches in the first category applying to enforcement proceedings under the *New York Convention*. The idea here is that although an arbitration panel’s decision may be inconsistent with the law and practice of the forum country, it is only where the award violates internationally accepted standards of justice that enforcement will be refused.¹⁹

Clearly then, what was foremost in the minds of the drafters and signatories to the *New York Convention* was that the enhancement of the international arbitral process as a whole depended upon agreements and awards being generally enforced without the intervention of national law. While it is acknowledged that individual national courts have at times adopted differing interpretations of the provisions of the *New York Convention*, its widespread membership can, in itself, be considered to have created an effective uniform law or code on these areas of international arbitration law. Hence, the *New York Convention* may be regarded as the first pillar in the harmonisation of arbitration law.

IV CONVERGENCE IN ARBITRAL PROCEDURE

In the context of the arbitral process as a whole, the *New York Convention* has only limited coverage. That is, it only deals with agreements and awards. It was therefore recognised soon after the enactment of the *New York Convention* that, to maintain the momentum toward unification of international arbitration law, the issue of harmonising and standardising arbitral procedural law would also have to be addressed.

A brief word of explanation is required about the meaning of the concept ‘arbitral procedural law’. Generally speaking, in the context of an international arbitration, a number of different laws can be involved.²⁰ For example, where enforcement of an arbitral agreement or award is sought, the law of the enforcing country is applied (which, as was discussed above, will almost certainly be the *New York Convention*). However, during the currency of the arbitration itself, other laws will be relevant.

For example, the tribunal will be asked to resolve the substance or merits of the dispute by application of the *lex causae*. This law will resolve the rights and liabilities of the parties and determine what remedies (if any) are available. Normally the parties will choose this law but if not, the tribunal will have to determine the applicable law. The substantive law of the arbitration and its relevance to the issue of harmonisation will be considered later in this paper.

The other law of importance to the arbitral proceedings is the law governing the arbitral procedure or the *lex arbitri*. This law is important in international commercial arbitration because it determines all matters relating to the conduct and procedure of the arbitration. For example, questions such as how arbitrators

¹⁹ Ibid 360; *Parsons & Whittemore Overseas Co Inc v Société Générale de L’Industrie du Papier*, 508 F 2d 969 (2nd Cir, 1974).

²⁰ See generally Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994).

are appointed, how they can be challenged, what their powers are with regard to the admission of evidence, and other related issues, are all referable to this law.

According to the conflict of laws rules of most countries, the law governing the procedure of the arbitration is, in the absence of an express choice by the parties, the law of the place where the arbitration has its 'seat', most commonly the place where the proceedings are held.²¹ However, to complicate the picture, as was noted above, parties may choose their own rules of procedure to govern their arbitration or adopt the rules of an arbitral institution, such as the International Chamber of Commerce ('ICC') or the London Court of International Arbitration ('LCIA').

The potential problem then raised is that a term of the parties' arbitration agreement may conflict with a provision of the arbitral procedural law. There are two views on how this question should be resolved. The first, which may be described as the common law, territorialist model, is that the parties' agreement is subordinate to the *lex arbitri* and must give way in the event of a conflict, at least in respect of fundamental or mandatory provisions of local law.²² The second approach, which may be described as the civil law, delocalised or anational model, holds that parties, by selection of a set of arbitral rules, may choose to 'opt out' of the national procedural law at the seat of arbitration.²³ This 'delocalisation' approach takes party autonomy to an extreme in suggesting that the parties' agreement may prevail over national legislation. In effect, the parties can create their own procedural law without regard to local statutory rules.

The difference between these two views is likely to be significant where the *lex arbitri* is unsympathetic to arbitration and provides ample scope for intervention by local law, despite contrary provisions in the parties' arbitration agreement. In this situation, there will be a clear difference in the nature of the law applied by the arbitral panel, with the local national law in the place of arbitration being all but excluded under the delocalised model and the arbitration largely proceeding according to the rules in the parties' agreement. By contrast, under the territorial approach, the parties' agreed rules may be rendered largely ineffectual by application of the local mandatory rules.

Certainly, it must be said that the adoption of delocalisation by all countries would be more conducive to the goal of unification of arbitral procedural law, as the scope for the intrusion of peculiar domestic laws would be diminished.²⁴

²¹ However the choice of a seat of arbitration does not preclude the tribunal from conducting hearings during the proceedings in another location for convenience: *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48. In such a case the procedural law of the seat continues to govern the arbitration.

²² This view has been adopted in England: *Bank Mellat v Helliniki Techniki* [1983] 3 WLR 783, 789 (Kerr LJ). It is left unchanged by the 1996 legislation: see Michael Merkin, *Arbitration Act 1996: An Annotated Guide* (2nd ed, 2000) 21–2. The territorialist approach has also recently been accepted in Australia: see *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312. See generally Richard Garnett, "'International' Arbitration But Subject to "National" Law: The Rejection of Delocalisation in Australia' (2000) 28 *Australian Business Law Review* 351.

²³ This approach has been adopted in Belgium: *Code Judiciaire: Sixième Partie (L'arbitrage)*, art 1717. It has also been adopted in France: *Nouveau Code de Procedure Civile*, Livre IV (L'arbitrage), Titre V: L'arbitrage international, art 1494.

²⁴ Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 *International and Comparative Law Quarterly* 358.

Uniformity is also assisted by delocalisation because in most cases where the doctrine has been applied, the parties have chosen a set of well established institutional rules. Since these rules, despite emanating from different institutions, are largely similar in content, the degree of disparity between procedural rules applied in international arbitrations is relatively limited.

On the other hand, proponents of the territorial model argue that an arbitral tribunal cannot function effectively without there being a right of access to the local courts in specific situations. Arbitrators, as creations of the parties' agreement, do not have the power to make determinations on all matters arising during the conduct of an arbitration such as the issuing of an injunction against a third party. Inevitably, therefore, a party may require the assistance of the courts at the seat of arbitration.²⁵

It is suggested, however, that the distinction between the delocalised and territorial schools has become less significant because of the widespread adoption of the principle of party autonomy in national arbitration statutes. The influence of this principle can be seen in national laws which seek to give great weight to parties' choices about arbitral procedure, for example, in the appointment of arbitrators, the degree of formality of the process, and similar matters. Typically, such national statutes contain few mandatory principles that apply to the proceedings regardless of the parties' choice. If the true position is that under most countries' arbitration laws parties can have an arbitration as near as possible to that provided for in their agreement, then a significant point has been reached in terms of harmonisation of arbitral procedure.

What has inspired this movement to embrace party autonomy? Undoubtedly, the enactment of the *Model Law* has contributed greatly. The drafting of the *Model Law* took place over a number of years and was specifically designed as a benchmark for an international arbitral procedural law. Taking as its starting point the very successful *UNCITRAL Arbitration Rules*,²⁶ the *Model Law* strongly embraces the concept of party autonomy.

For example, article 19 provides that '[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.' Further, the parties may choose to have oral hearings or a 'documents only' arbitration,²⁷ and include their own rules regarding the use of experts.²⁸ The parties are also given the freedom to determine the language of the proceedings,²⁹ the law governing the substance of the dispute,³⁰ the appointment procedure³¹ and the place of arbitration.³²

Most significantly, article 5 provides that '[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.' This provision is crucial because it operates to prevent national courts from relying on any

²⁵ Alan Redfern and Martin Hunter, *The Law and Practice of International Commercial Arbitration* (3rd ed, 1999) 90–1.

²⁶ UN GAOR, 31st sess, Supp No 17, UN Doc A/31/17 (1976).

²⁷ *Model Law*, above n 1, art 24.

²⁸ *Ibid* art 26.

²⁹ *Ibid* art 22.

³⁰ *Ibid* art 28.

³¹ *Ibid* art 11(2).

³² *Ibid* art 20.

residual bases under local law to intervene in the arbitral process, which would seriously compromise party autonomy.

Not surprisingly, there are very few mandatory rules in the *Model Law* from which the parties cannot contract out. Article 18 is the most important, providing that '[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.' This provision emphasises the importance of natural justice and equal treatment, principles that would lie at the heart of any reputable mode of dispute resolution.

The growing influence of the *Model Law* on national arbitration statutes can best be seen in the fact that almost 40 countries have now adopted its provisions, including Australia, Canada, Singapore, Hong Kong and Germany as well as four states of the United States of America.³³ However, what these statistics do not reveal is the number of recent national arbitration laws in which the drafters, although not expressly adopting the *Model Law* provisions, have nevertheless been strongly influenced by them.

For example, the recently enacted arbitration laws of Brazil,³⁴ Finland,³⁵ Italy³⁶ and The Netherlands³⁷ have been described as 'inspired by' or 'compatible with' the *Model Law*, while for other arbitration statutes, such as those found in Sweden³⁸ and China,³⁹ the *Model Law* has served as a guide.

The *Arbitration Act 1996* (UK) is a particularly good example of the influence of the *Model Law*. In this case, what is particularly remarkable is that in 1989 Lord Mustill argued that the *Model Law* contained a number of flaws and that English law would not be enhanced by its adoption.⁴⁰ However, when the final version of the legislation was enacted in 1996, it bore much closer resemblance to the *Model Law* than had originally been envisaged. In particular, the drafters of the *Arbitration Act 1996* (UK) included provisions from the *Model Law* allowing the tribunal to rule on its own jurisdiction,⁴¹ to appoint experts⁴² and to apply business principles rather than law in resolving a dispute,⁴³ all of which represented changes to English law.

³³ UNCITRAL, *Status of Conventions and Model Laws* (2002) [10] <<http://www.uncitral.org/en-index.htm>> at 23 September 2002. Those states of the US are California, Connecticut, Oregon and Texas.

³⁴ Carlos Nehring Netto, 'Brazil' in Pieter Sanders and Jan Paulsson (eds), *International Handbook on Commercial Arbitration* (1998) vol 1, 1.

³⁵ Judge Gustaf Möller, 'Finland' in Pieter Sanders and Jan Paulsson (eds), *International Handbook on Commercial Arbitration* (1995) vol 2, 1.

³⁶ Piero Bernardini, 'Italy' in Pieter Sanders and Jan Paulsson (eds), *International Handbook on Commercial Arbitration* (2000) vol 2, 2.

³⁷ Albert Jan van den Berg, 'The Netherlands' in Albert Jan van den Berg and Jan Paulsson (eds), *International Handbook on Commercial Arbitration* (1987) vol 3, 2.

³⁸ Ulf Franke, 'Sweden' in Albert Jan van den Berg and Jan Paulsson (eds), *International Handbook on Commercial Arbitration* (2000) vol 3, 1.

³⁹ Tang Houzhi and Wang Shengchang, 'China' in Pieter Sanders and Jan Paulsson (eds), *International Handbook on Commercial Arbitration* (1998) vol 1, 3.

⁴⁰ See Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) [1], reprinted in Merkin, above n 22, 244.

⁴¹ *Arbitration Act 1996* (UK) c 23, s 30 (see *Model Law*, above n 1, art 16).

⁴² *Arbitration Act 1996* (UK) c 23, s 37(1) (see *Model Law*, above n 1, art 26).

⁴³ *Arbitration Act 1996* (UK) c 23, s 46(1)(b) (see *Model Law*, above n 1, art 28(4)).

It seems, therefore, that drafters worldwide, even if not expressly incorporating the *Model Law*, still consider its terms to be a reflection of contemporary thinking on the subject and thus worthy of recognition.

Further evidence of this trend towards harmonisation in arbitral procedure can be seen in the growth of institutions engaged in the administration and supervision of international arbitrations. The important point to note here is that while each institution has its own set of rules, the provisions of the major institutions (for example, the American Arbitration Association ('AAA'), the ICC and the LCIA) are becoming remarkably similar in content.

For example, in all three sets of rules there are broadly similar provisions dealing with the appointment of arbitrators and providing a default mechanism in the event of a failure in the process.⁴⁴ A second common feature of these institutional rules is the clauses dealing with the independence and impartiality of arbitrators⁴⁵ and governing challenges to the tribunal.⁴⁶ There are also broadly similar provisions covering matters such as the grant of interim or provisional measures⁴⁷ and the use of expert and other evidence.⁴⁸

So, it is argued that the process of harmonisation in the area of arbitral procedural law is moving apace. Countries now recognise that it is in their interest to have flexible and hospitable regimes for arbitration so that their territories become attractive as venues for arbitration. Courts, particularly from the common law tradition, have also relinquished their earlier suspicions towards arbitration, realising that commercial parties should be entitled to choose their method of dispute resolution. The volume of cases in the court lists has also no doubt prompted this change of heart, as courts no longer see arbitrators as competitors but as fellow partners in dispute resolution.

However, one final point should be made regarding the issue of harmonisation in the context of international arbitration. It has so far been assumed that the pursuit of harmonisation is an absolute objective as far as arbitration law is concerned. While harmonisation does carry with it the benefits of increased simplicity and certainty in a traditionally disparate private international legal context, it may not be completely achievable given the overriding goal of party autonomy. If it is accepted that the heart of arbitration is the parties' agreement, then ultimately it should be a matter for each set of individual parties as to what law they choose to govern their procedure. If different sets of parties choose different laws then this diversity should be welcomed in principle. However, for the reasons mentioned above, such individual choices are unlikely to produce widely differing outcomes in terms of the law actually applied, given the

⁴⁴ *Rules of Arbitration of the International Chamber of Commerce* ('ICC Rules'), art 8(3)–(4); *London Court of International Arbitration Rules* ('LCIA Rules'), art 7.2; *American Arbitration Association International Arbitration Rules* ('AAA International Arbitration Rules'), art 6(3).

⁴⁵ *ICC Rules*, above n 44, art 7(2); *LCIA Rules*, above n 44, art 5.3; *AAA International Arbitration Rules*, above n 44, art 7(1).

⁴⁶ *ICC Rules*, above n 44, art 11; *LCIA Rules*, above n 44, art 10; *AAA International Arbitration Rules*, above n 44, art 8.

⁴⁷ *ICC Rules*, above n 44, art 23; *LCIA Rules*, above n 44, art 25; *AAA International Arbitration Rules*, above n 44, art 21.

⁴⁸ *ICC Rules*, above n 44, art 20(4); *LCIA Rules*, above n 44, art 21.1; *AAA International Arbitration Rules*, above n 44, art 22.

increasingly similar content of most national arbitral procedural laws and the growing role of institutional arbitration. In a sense then, party autonomy will rarely conflict with harmonisation as a principle in the arbitration context.

V CONVERGENCE IN SUBSTANTIVE LAW

The final issue concerning unification of laws in the context of international arbitration involves the law applicable to the substance of the dispute (or the *lex causae*). The first point to note is that, today, most national conflict of laws rules accept that parties to a contract enjoy almost complete freedom of choice in respect of the substantive law governing their agreement, provided this does not conflict with public policy or ‘mandatory’ rules of the place of adjudication.⁴⁹ An example of a mandatory rule would be a statutory provision requiring local law to be applied to a contract regardless of an express choice of law of the parties. Mandatory provisions are often enacted in the areas of consumer protection and labour relations in order to protect local residents with limited bargaining power from being exposed to the law of a foreign country. For example, in Australia, section 11(1) of the *Carriage of Goods by Sea Act 1991* (Cth) provides that all parties to a bill of lading relating to a carriage of goods from a place in Australia to a place outside shall be taken to have intended to contract according to the laws in force at the place of shipment.

A slightly more expansive approach to mandatory rules is found in the *Convention on the Law Applicable to Contractual Obligations* (‘*Rome Convention*’),⁵⁰ which forms part of the law of the European Union and the European Economic Area. While the *Rome Convention* contains a provision recognising party autonomy in choice of law,⁵¹ this principle is subject to exceptions in the case of consumer and employment contracts, where the mandatory rules of the consumer’s habitual residence⁵² and the employee’s place of habitual work⁵³ must be applied. The *Rome Convention* also contains a provision requiring the general application of mandatory rules of the forum of adjudication.⁵⁴

Yet the general principle of respect for party autonomy in substantive law remains a strong one in national laws and, in the specific context of international arbitration, has also been recognised in international model laws and institutional rules.⁵⁵

Another issue that has arisen in relation to substantive law is whether parties may choose an international commercial law or *lex mercatoria* to resolve the substance of their dispute. Resolution of this question not only has implications for party autonomy but also for unification of laws. The relevance to

⁴⁹ See in Anglo-Australian law, *Akai Pty Ltd v The People’s Insurance Co Ltd* (1996) 188 CLR 418 and *Vita Food Products Inc v Unus Shipping Co* [1939] AC 277 and in the US, *Restatement of the Law Second, Conflict of Laws*, §187.

⁵⁰ [1980] OJ L 266/1.

⁵¹ *Ibid* art 3.

⁵² *Ibid* art 5.

⁵³ *Ibid* art 6.

⁵⁴ *Ibid* art 7(2).

⁵⁵ See, eg, *Model Law*, above n 1, art 28(1); *AAA International Arbitration Rules*, above n 44, art 28(1); *ICC Rules*, above n 44, art 17(1); *LCIA Rules*, above n 44, art 22.3.

harmonisation is demonstrated by the fact that if a substantive, international commercial law were recognised and universally accepted, conflicts between national laws would disappear; all tribunals would, in theory at least, apply the same law.

However, the attainability of this outcome depends upon first, acceptance that such a *lex mercatoria* exists and second, agreement on its content. Unfortunately, both of these objectives seem unlikely to be achieved in the near future. While in the European civil law systems the concept of *lex mercatoria* has support,⁵⁶ in the common law world, particularly England, it has been treated with some caution.⁵⁷

Most writers from the common law tradition have argued that it is impossible to construct a system of law based on the customs and usages of trade because there is no agreement as to what such practices are, nor how to identify them. It would therefore be difficult for an arbitral tribunal to apply such a law in any objective and precise way.⁵⁸

Other writers have, however, argued that *lex mercatoria* does not purport to be a self-contained or autonomous legal system independent of national laws, but rather a source of law like international customary law that draws on a variety of sources such as practices, judicial precedents, treaties and national laws.⁵⁹ According to its proponents, a great virtue of *lex mercatoria* is that it enables parties and arbitrators to avoid applying particularly local or parochial rules of national law that are unsuited to transnational commerce.⁶⁰ In essence then, the advocates of *lex mercatoria* are not seeking to establish a universal theory of law but rather the freedom for tribunals and parties to find appropriate rules to resolve a specific dispute.

Moreover, it may be argued that if party autonomy is accepted as the benchmark of international arbitration law, and parties grant to a tribunal the power to determine a dispute by reference to generally accepted commercial practices, why should the tribunal not do so? Surely there can be no objection on the ground of fairness to such a course, as the tribunal will simply be implementing the parties' mandate. Significantly, the provisions of the *Model Law* give some support to this view by providing that the tribunal 'shall take into account the usages of the trade applicable to the transaction.'⁶¹

Interestingly, despite the earlier misgivings of English lawyers, section 46(1)(b) of the *Arbitration Act 1996* (UK) does provide for resolution of a dispute 'in accordance with such other considerations as are agreed by [the parties]'. Given that such a provision did not exist in the earlier UK arbitration legislation, an argument could be made that this wording implicitly allows a tribunal to apply the *lex mercatoria* in an English arbitration, provided that the

⁵⁶ See generally Goldman, above n 9.

⁵⁷ See generally Mustill, above n 10; cf the views of US commentator, Lowenfeld, above n 9.

⁵⁸ Mustill, above n 10; Redfern and Hunter, above n 25, 120–1.

⁵⁹ See, eg, Christoph Stoecker, 'Lex Mercatoria: To What Extent Does it Exist?' (1990) 7 *Journal of International Arbitration* 101.

⁶⁰ Lowenfeld, above n 9, 144–5. Traditional sceptics such as Redfern and Hunter also acknowledge this point, see above n 25, 121.

⁶¹ *Model Law*, above n 1, art 28(4).

parties have conferred such jurisdiction on the panel. Commentators have certainly taken this view.⁶²

However, it has been argued that even if the doctrine of *lex mercatoria* achieves widespread acceptance, considerable uncertainty remains as to which principles fall within its scope and whether they are capable of ready application in a given case. For example, it has been suggested that principles such as *pacta sunt servanda* (contracts should be performed), *rebus sic stantibus* (fundamental change of circumstances may alter obligations) and good faith in performance of contracts would form part of such a law. The problem is that these concepts are pitched at such a high level of generality as to be difficult to apply in a given fact situation.

In response to this view it may be said that there are today many examples of harmonised laws in international trade which provide ready sources of *lex mercatoria*, such as the *Incoterms* of the ICC,⁶³ the *ICC Uniform Customs and Practice for Documentary Credits* and the *UNIDROIT Principles of International Commercial Contracts*. All of these sources are comprehensive in their coverage and may go some way to resolving the problem of having to apply broad principles to a given case. It seems likely, therefore, that the debate surrounding the *lex mercatoria* will continue.

Another alternative to choosing a national system of law (or laws), which has also aroused much debate, is known as ‘amiable composition’. This principle involves parties directing an arbitrator to decide the dispute on the basis of principles of equity and good conscience. This principle is derived from civil law systems and also exists in public international law, where the International Court of Justice has the power to resolve disputes on this basis, but only when jurisdiction to do so is conferred upon it by the parties.⁶⁴

The early approach of the common law was to reject the concept of amiable composition and to require arbitrators to ‘apply a fixed and recognisable system of law’.⁶⁵ More recently though, both in the *Model Law*⁶⁶ (which has been adopted in common law systems such as Australia, Canada, Hong Kong and New Zealand) and in the Australian uniform domestic arbitration legislation,⁶⁷ there is express recognition of the concept. However, a tribunal can only act as an amiable compositeur where the parties have expressly authorised it to do so.

The English legislation, as mentioned above, in providing for the tribunal to decide the dispute, ‘if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal’,⁶⁸ also arguably now supports the use of amiable composition.⁶⁹

However, as with *lex mercatoria*, even if it is accepted that an arbitrator may apply such principles, the problem again lies in identifying their content and, in

⁶² Redfern and Hunter, above n 25, 128.

⁶³ *Incoterms 2000: ICC Official Rules for the Interpretation of Trade Terms* (2000).

⁶⁴ *Statute of the International Court of Justice*, art 38(2).

⁶⁵ *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekeringen* [1962] 2 Lloyd’s Rep 257, 264 (Megaw J).

⁶⁶ *Model Law*, above n 1, art 28(3).

⁶⁷ See, eg, *Commercial Arbitration Act 1984* (Vic) s 22(2).

⁶⁸ *Arbitration Act 1996* (UK) c 23, s 46(1)(b).

⁶⁹ Redfern and Hunter, above n 25, 128; Merkin, above n 22, 76.

particular, the degree to which a tribunal may depart from legal principles. Most commentators have taken the view that the doctrine of amiable composition does not allow an arbitrator to dispense with legal rules completely but, more likely, enables him or her to modify the effect of such rules where they work harshly or unjustly in a given case.⁷⁰

Once again, though, the increasing recognition of amiable composition in both the civil and common law worlds represents yet another example of convergence or harmonisation of legal principles in the field of arbitration.

VI CONCLUSION

Overall, the developments in arbitration law can be seen as part of a trend towards unification and harmonisation of international trade law generally, given that tribunals are applying increasingly similar legal principles. While arbitration is fundamentally a process for resolving a dispute between individual parties and must accommodate their needs and wishes, the goal of party autonomy has proven to be surprisingly consistent with harmonisation: first, because most national laws have adopted the party autonomy approach, and have therefore rendered it a ‘harmonised’ principle, and secondly, because of the growing use of institutional arbitration. The time may not be too far away when one will be able to speak of a single law of international commercial arbitration.

⁷⁰ Chukwumerije, above n 20, 118.