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# Arbitration as a Peaceful Means of Settlement of International Disputes: An Overview

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**Abstract:**

Arbitration is a quasi-judicial method of settlement of international disputes between the parties. It is a voluntary method of pacific settlement of disputes in international law. A state is not required to submit a dispute to arbitration. States, therefore, cannot be compelled to submit a dispute to the procedure of arbitration, in the absence of their consent. But, when a dispute is submitted for adjudication by an arbitral tribunal which gives its decision in the form of an award that finally settles the dispute, then the decision becomes binding on the parties. It is one of the recognized principles of international law that the award given by the arbitrators is final and binding upon the parties to the proceedings. Therefore, arbitration is a useful process and an appropriate mechanism to settle the dispute through amicable procedure. So, it has become a popular method of settling disputes in international, national and commercial spheres. The aim of this article is to highlight the usefulness of arbitration in settling international disputes so that states may feel encouraged to take recourse to this method.

## 1. Introduction

Arbitration is the most important method of settling international disputes by peaceful means. Arbitration occupies central position in most of the international treaties concluded between sovereign

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States. It would not be an exaggeration to remark that arbitration is most preferred mode for settling international disputes. By arbitration, we mean the method through which a dispute is referred to certain persons called arbitrators. Their decision is known as the award. These arbitrators are selected by the parties to the dispute. Although they are selected or appointed on the basis of the consent of the parties to a dispute, their decision or award is binding upon the parties. States are, however, under no obligation to submit their dispute to arbitration, unless they have bound themselves beforehand by a treaty. But once they have referred the matter to arbitration, the disregard of the award means a breach of promise and the award is final, unless it is vitiated by fraud, collusion and the like, or the arbitrator has exceeded his powers.

## 2. Conceptual Aspects of Arbitration

Arbitration is a term derived from the nomenclature of the Roman law. It is applied to an arrangement for taking, and abiding by the judgment of a selected person in some disputed matter instead of carrying it to the established courts of justice.[1]

According to Encyclopedia of Public International Law, Arbitration is termed as:

> "the process of resolving disputes between parties by means of an arbitral tribunal appointed by the parties."[2]

In Halsbury's Laws of England, Arbitration has been defined in the following terms:

> "An arbitration is the reference of dispute or difference

[1] Salil K. Roy Chowdhury & H. K. Saharay, *Arbitration Law*, Calcutta: Eastern Law House Private Ltd, 3rd Edition, (1991) p. 3.

[2] Encyclopedia of Public International Law, Vol. I, *Settlement of Disputes*, published under the auspices of Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt, (1981) p. 14.

> between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction."[3]

According to J. G. Starke, ordinarily, arbitration denotes exactly the same procedure as in municipal law, namely the reference of a dispute to certain persons called arbitrators, freely chosen by the parties, who make an award without being bound to pay strict regard to legal considerations. Experience of international practice has shown, however, that many disputes involving purely legal issues are referred to arbitrators for settlement on a legal basis.[4]

The International Law Commission has defined arbitration as "a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted."[5] According to Oppenheim, arbitration means "the determination of a difference between States through a legal decision of one or more umpires or of a tribunal, other than the International Court of Justice, chosen by the parties."[6]

Therefore**,** arbitration is a process by which the disputing States refer their dispute to an *ad hoc* tribunal consisting of one, three or more umpires. When States fail to settle their dispute through diplomatic channels like negotiations and mediation has not been possible or successful, States may refer the matter to an arbitral tribunal either on their own or through the good offices of some third party.

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[3] Halsbury's *Laws of England*, 4th edition Vol. 2, para. 501.
[4] J. G. Starke QC, *Introduction to International Law*, New Delhi: Aditya Books Private Limited, 10th Edition, (1994) p. 486.
[5] Report of the International Law Commission concerning the work of its Tenth Session, 1958, General Assembly Official Records, Thirteenth Session, Suppl. No. 9 (A/3859).
[6] L. Oppenheim, *International Law*, Seventh Edition, Vol. II, p. 22.

## 3. Nature of Arbitration

Arbitration is a quasi-judicial mode of settlement of disputes between the states in which by the agreement of the parties concerned, one or more arbitrators are selected for the decision of the dispute.[7] Normally, 3 (three) or 5 (five) arbitrators are selected—two from each side and one (the chairman) from a neutral country with the agreement of the concerned parties. Arbitration was originally purely voluntary or facultative in character but it became in a sense obligatory when States began to insert the arbitral clauses into agreements or treaties.[8]

Arbitration may arise out of an arbitration clause in a particular treaty or through a treaty of arbitration referring a particular dispute, which has already arisen, to a given arbitral tribunal. This was the case between India and Pakistan when they referred the Kutch dispute to an arbitral tribunal. Such an arrangement is called *compromis*. There may also be a general arbitration treaty providing for reference of all disputes, or some types of disputes, which may arise between the parties, to the panel of arbitrators to be appointed for the purpose. This type of general treaty of arbitration is a twentieth century development, following the recommendations of The Hague Peace Conferences of 1899 and 1907.[9]

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[7] Harun ur Rashid, *International Relations and Bangladesh*, Dhaka: The University Press Limited, (2004) p. 174.

[8] B. Harun Rashid, *International Law*, Dhaka: Anupam Gyan Bhandar, Revised Edition, (1998) pp. 224-5.

[9] R. C. Hingorani, *Modern International Law*, New Delhi: Oxford & IBH Publishing Co. Pvt. Ltd, 3rd Edition, (1993) p. 293.

## 4. Special Features of Arbitration

Some special features of arbitration are as follows:

i. The essential feature of the arbitration is its entirely voluntary character. Disputing parties are not obliged to submit their disputes to arbitration.[10]

ii. The selection of the arbitrator is made by the parties themselves, thus distinguishing arbitration from judicial settlement.

iii. There is an implied duty on the parties to abide by the award that is made, unlike, for example, mediation or conciliation, which usually have no binding force upon the parties.

iv. Arbitration tribunals are usually created to deal with a particular dispute or class of dispute.

v. The arbitration tribunal may consist of a single arbitrator or be a collegiate body, comprising two or more arbitrators appointed in equal numbers by each of the parties separately, plus an umpire appointed jointly by the parties or by the arbitrators appointed by them.[11]

vi. An arbitral tribunal makes its award in accordance with the rules adopted for that purpose by the parties or by rules otherwise binding the tribunal which are primarily the rules of International Law.[12]

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[10] Nagendra Singh, *The Role and Record of the International Court of Justice*, Eastern Law House Private Ltd. Calcutta/ New Delhi, (1989) p. 7.

[11] Robert M. MacLean, *Public International Law Textbook*, London: HLT Publications, 16th Edition, (1994) p. 321.

[12] H. O. Agarwal, *International Law & Human Rights*, Allahabad: Central Law Publications, Thirteenth Edition, (2006) p. 502.

vii. The parties have control over the procedure to be followed and the tribunal's award is, in principle, final, since the object is to settle the dispute.[13]

## 5. Composition of Arbitration Tribunals

The composition of international arbitral tribunals is based on the principle that the arbitrators are chosen by the parties to the dispute, either by an agreement between them or by a procedure laid down in the arbitration agreement.[14] Thus, arbitration tribunals may be composed in different ways.[15] The disputing parties may appoint a single arbitrator who is *persona grata* to both the disputing parties and who has adjudicated the dispute. However, appointment of a single arbitrator is not a common practice. The general practice is that each party to the dispute nominates his own arbitrator and the two arbitrators, so appointed, nominate the third arbitrator who is neutral in the right sense and who becomes the Chairman of the arbitral tribunal.[16]

In many cases, a head of state will be suggested as a single arbitrator and he will then nominate an expert or experts in the field of international law or other relevant disciplines to act for him.[17] Under the Permanent Court of Arbitration system and in the absence of agreement to the contrary, each party selects two arbitrators from the panel, only one of whom may be a national of the state. These arbitrators then choose an umpire, but if they fail

[13] Ibid, p. 503.
[14] Gurdip Singh, *International Law*, New Delhi: Aditya Books Private Limited, (1992) p. 317.
[15] J. G. Merrills, *International Dispute Settlement*, 2nd Edition, Cambridge, (1991) pp. 83-6.
[16] R.C. Hingorani, *op. cit.*, p. 294.
[17] The Argentina-Chile case, 38 ILR, p. 10 and the Beagle Channel case, HMSO, 1977; 52 ILR, p. 93. Note also the Interpretation of Peace Treaties case, ICJ Report, 1950, p. 221; 17 ILR, p. 318.

to do so, this task will be left to a third party nominated by agreement. If this also fails to produce a result, a complicated process then ensues culminating in the drawing of lots.[18]

It may also be provided in such arbitration treaty that in case of failure of two nominated arbitrators to appoint the third arbitrator, the President of the International Court of Justice or Secretary-General of the United Nations may appoint the third arbitrator. This happened in the case of Indo-Pakistan arbitration. India nominated a Yugoslav and Pakistan nominated a diplomat from Iran. Since they could not agree on the third arbitrator, the U.N. Secretary-General had to appoint the third arbitrator from Sweden as Chairman of the tribunal.[19]

## 6. Failure to Appoint an Arbitrator in Accordance with the Arbitration Agreement

The appointment of the arbitrators, and in particular the appointment of neutral members of the arbitral tribunal or commission, is the key issue in any arbitration agreement. Such appointment was usually dependent on the good faith of the parties. It was possible, therefore, for arbitration agreements to become inoperative if one side resiled from its obligation to arbitrate, and deliberately failed to appoint its own member or members to the tribunal. For example, the arbitral provisions of the Allies' peace treaties with the former enemy States of Bulgaria, Hungary and Romania of 1947 failed because the former enemy States deliberately failed to appoint their members of the arbitral tribunal, thereby rendering the arbitral provisions of the treaties inoperative.[20]

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[18] Malcolm N. Shaw, *International Law*, Cambridge University Press, 4th Edition, (1998) pp. 738-9.
[19] R.C. Hingorani, *op. cit.*, pp. 294.
[20] Robert M MacLean, *op. cit.*, p. 323.

To avoid this problem provisions have been adopted to provide for the appointment of arbitrators where one of the parties to the dispute fails to co-operate. For example, the European Convention for the Peaceful Settlement of Disputes, 1957 provides:

> "If the nomination of the members of the Arbitral tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an Arbitral Tribunal, the task of making the necessary nomination shall be entrusted to the Government of a third State chosen by agreement between the parties, or, tailing agreement within three months, to the President of the International Court of Justice. Should the latter be a national of one of the parties to the dispute, this task shall be entrusted to the Vice-President of the Court, or to the next senior judge of the Court who is not a national of the parties."[21]

## 7. Arbitration is Voluntary

Like all methods of pacific settlement in international law, arbitration is voluntary.[22] Arbitration presupposes and depends upon the willingness of the states involved to submit to adjudication and their desire to reach a settlement. A state is not required to submit a dispute to arbitration.[23] States must consent beforehand to the exercise of jurisdiction by the arbitrators. This may be done on an *ad hoc* basis[24] or consent may be given in

[21] Article 21, the European Convention for the Peaceful Settlement of Disputes, 1957.
[22] Martin Dixon MA, *Text Book on International Law*, London: Blackstone Press Limited, 2nd Edition, (Reprinted in1995) p. 228.
[23] Rebecca M. M. Wallace, *International Law*, Delhi: Universal Book Traders, 2nd Edition (Indian Reprint in 1995) p. 269.
[24] As with the Guinea, Guinea-Bissau Maritime Delimitation case 77 ILR 636.

advance to a specific procedure, as with the Permanent Court of Arbitration.[25]

The identity of the arbitrators, the formulation of the question to be submitted to the tribunal, the rules of law to be applied and the time limit within which an award must be made must also be mutually agreed upon by the states concerned. Such issues are spelt out in a special agreement between the parties known as the *compromis*. The functioning of the Permanent Court therefore presupposes that the states not only have a desire to reach a settlement, but that they reach agreement on the issues which are the content of the c*ompromis*.[26]

So, an essential feature of the arbitration, which has as its objective the peaceful settlement of inter-State disputes, is its entirely voluntary character. The fact that States were parties to the 1899 and 1907 Conventions did not oblige them to submit their disputes to arbitration.[27] States, therefore, cannot be compelled to submit a dispute to the procedure of arbitration, in the absence of their consent.[28] This consent may be expressed in arbitration treaties, in which the contracting states agree to submit certain kinds of disputes that may arise between them to arbitration or in specific provisions of general treaties, which provide for disputes with regard to the treaty itself to be submitted to arbitration,[29] although

[25] Martin Dixon M A, *op. cit.*, p. 228.
[26] Rebecca M. M. Wallace, *op. cit.*, p. 269.
[27] Nagendra Singh, *op. cit.*, p. 7.
[28] The Eastern Carelia case, PCIJ, Series B, No.5, 1923, p. 27 and the Ambatielos case, ICJ Reports, 1953, p. 19; 20 ILR, p. 547.
[29] See Arbitration and Security: The Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations, 1927, and Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948, 1949.

the number of treaties dealing primarily with the peaceful settlement of disputes has declined since 1945.[30]

## 8. Various Natures of Disputes Submitted to Arbitration

Disputes submitted to arbitration are of the most varied character. Arbitral tribunals have dealt with disputes primarily involving legal issues as well as disputes turning on questions of fact and requiring some appreciation of the merits of the controversy. As a rule such tribunals have not declined to deal with a matter either on the ground that no recognised legal rules were applicable or on the ground that political aspects were involved. For this reason the distinction frequently drawn by writers on international law between 'justiciable' and 'non-justiciable' disputes is a little difficult to understand and does not appear to have much practical value.[31] Inasmuch, however, as by special clauses in their arbitration treaties, states often exclude from arbitration disputes affecting their 'vital interests', or concerning only matters of 'domestic jurisdiction', such reserved disputes may in a sense be 'non-justiciable', and open only to the procedure of conciliation. An illustration is the clause in the Anglo-French Arbitration Treaty of 1903 whereby the two states bound themselves not to arbitrate

[30] L. Sohn, *Report on the Changing Role of Arbitration in the Settlement of International Disputes*, International Law Association, 1966, pp. 325, 334.

[31] Writers seem generally agreed on the point, however, that a dispute in which one of the parties is in effect demanding a change in the rules of international law, is 'non-justiciable'. Other criteria of non-justiciability, which have been relied upon, include the following: (1) the dispute relates to a conflict of interests, as distinct from a conflict between parties as to their respective rights (the test of justiciability in the Locarno Treaties of 1925); (2) application of the rules of international law governing the dispute would lead to inequality or injustice; (3) the dispute, while justiciable in law, is not so in fact, because for political reasons neither of the disputant states could undertake to comply with an unfavourable adjudication, or in other words 'non-justiciability' is governed by the attitude of the parties to the dispute, quoted in J. G. Starke, *op. cit.*, pp. 489-490.

disputes which 'affect the vital interests, the independence, or the honour' of the parties. A more intelligible distinction is that between legal and non-legal disputes.[32]

## 9. Authority of the Arbitral Award

Once an arbitral award has been made, it is final and binding upon the parties,[33] but in certain circumstances the award itself may be regarded as a nullity.[34] There is disagreement amongst lawyers as to the grounds on which such a decision may be taken. It is, however, fairly generally accepted that where a tribunal exceeds its powers under the *compromis*, its award may be treated as a nullity, although this is not a common occurrence. Such excess of power (*exces de pouvoir*) may be involved where the tribunal decides a question not submitted to it, or applies rules it is not authorised to apply. The main example of the former is the *North-Eastern Boundary case*,[35] between Canada and the United States, where the arbitrator, after being asked to decide which of two lines constituted the frontier, in fact chose a third line.

It is sometimes argued that invalidity of the *compromis* is a ground of nullity,[36] while the corruption of a member of the tribunal or a serious departure from a fundamental rule of procedure is further

[32] Article 36, the United Nations Charter.
[33] Articles 81 and 84, The Hague Convention (I) 0f l907. The principle of res judicata also applies to arbitration awards, see e.g. the Trail Smelter case, 3 RIAA, 1938, p. 1905; 9 ILR, p. 324 and the Orinoco Steamship Co. case, 11 RIAA, 1910, p. 227.
[34] O. Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AJIL, 1960, p. 1.
[35] C. C. Hyde, *International Law*, 2nd edn, 1945, Vol. III, p. 1636.
[36] B. S. Murty, '*Settlement of Dispute' in Manual of Public International Law* (ed. M. Sorensen), London, (1968) pp. 693-64 and A. D. McNair, *The Law of Treaties*, Oxford, 1961, pp. 66-77.

possibilities as grounds of nullity.[37] Article 35 of the Model Rules on Arbitral Procedure drawn up by the International Law Commission, for example, provides for a successful plea of nullity in three cases: excess of power, corruption of a tribunal member or serious departure from a fundamental rule of procedure, including failure to state the reasons of the award.[38] 'Essential error' has also been suggested as a ground of nullity, but the definition of this is far from unambiguous.[39] It would appear not to cover the evaluation of documents and evidence,[40] but may cover manifest errors[41] such as not taking into account a relevant treaty or a clear mistake as to the appropriate municipal law.[42] Of course, once a party recognises the award as valid and binding, it will not be able to challenge the validity of the award at a later stage.[43] In certain circumstances, it may be open to a party to request a revision or reopening of the award in order to provide for rectification of an error or consideration of a fact unknown at the time to the tribunal and the requesting party which is of such a nature as to have a decisive influence on the award.[44]

So, it is one of the recognized principles of international law that the award given by the arbitrators is final and binding upon the parties to the proceedings. The International Court of Justice has also reaffirmed this principle in Arbitral Award made by the King

[37] O. Schachter, *op. cit.*, p. 3.
[38] The British Guiana and Venezuela Boundary case, 92 BFSP, p. 160 and Wetter, *Arbitral Process*, Vol. III, pp. 81 et seq.
[39] B. S. Murty, *op. cit.*, p. 696 and J. G. Merrills, *op. cit.*, p. 100.
[40] Arbitral Award by the King of Spain, ICI Reports, 1960, pp. 188,215-16; 30 ILR, pp. 457, 475.
[41] The Trail Smelter case, 3 RIAA, 1938, pp. 1905, 1957; 9 ILR, p. 331.
[42] The Schreck case, Moore, *International Arbitrations*, Vol. II, p. 1357.
[43] Arbitral Award by the King of Spain, ICI Reports, 1960, pp. 188,213; 30 ILR, p. 473.
[44] Wetter, Arbitral Process, Vol. II, pp. 539 et seq. See also Article 29 of the ILC Model Rules.

of Spain on 23 December, 1906 in *Honduras v. Nicaragua case*.[45] The facts of this case are as follows:

> Honduras and Nicaragua signed a convention on 7 October 1894 for the demarcation of the limits between the countries. One of the Articles of the convention provided that, in certain circumstances, any points of the boundary line which were left unsettled should be submitted to the decision of the Government of Spain. In October 1904, the King of Spain was requested to determine that part of the frontier line on which the Mixed Boundary Commission appointed by the two countries had been unable to reach agreement. The King gave his arbitral award on 23 December 1906. The validity of the award was contested by Nicaragua. Both the countries agreed in July 1957 to refer the matter to the International Court of Justice for its decision. Honduras claimed that failure by Nicaragua to give effect to the arbitral award constituted a breach of an international obligation and requested the court to declare that Nicaragua was under an obligation to give effect to the award... After going through the evidence produced, the Court found that Nicaragua had in fact freely accepted the designation of the King of Spain as arbitrator, had fully participated in the arbitral proceedings, and had thereafter accepted the award. The International Court of Justice, therefore, held that the award was binding and that Nicaragua was under an obligation to give effect to it.[46]

Therefore, arbitration between States is intended to be final and the award binding as a final settlement of a dispute. The general

[45] Judgment of 18, November, 1906.
[46] S. K. Kapoor, *International Law*, Allahabad: Central Law Agency, 10th Edition, (1994) p. 726.

principle is that the decision of the arbitral tribunal should not be disturbed except in the event of a manifest error of law or fact.[47]

The Court, recently in the case *Guinea-Bissau v. Senegal* (1991), has permitted appeal of an arbitral award to the ICJ by a dissatisfied State.[48] There appear to be three separate grounds on which an appeal against the decision of a tribunal panel may be made:

i. ***Exces de pouvoir*:** If an arbitral body exceeds its competence, its decision is null and void. Arbitrators have only such powers as the parties have conferred on them in the document by which they refer the matter to the panel – the *compromis*. If a tribunal fails to respect these limits, it exceeds its own competence and the decision can be declared void.
ii. **Failure to reach a decision by a true majority:** If the vote passing the decision of the tribunal does not amount to a true majority the decision cannot be given legal effect.
iii. **Insufficiency of reasoning:** The decision of the arbitral body must be supported by adequate legal arguments. However, a statement of reasoning, although relatively brief and succinct, if clear and precise, does not amount to an insufficiency of reasoning.

In the event that an arbitral decision is overturned on one of these grounds, the award of the tribunal is null and without binding force on the parties concerned. In some cases the question of nullity will itself be referred to further arbitration.[49]

[47] Robert M MacLean, *op. cit.*, p. 323.
[48] Guinea-Bissau v. Senegal case (1991)
[49] Robert M MacLean, *op. cit.*, pp. 323-324.

## 10. Advisory Opinion of the Permanent Court of International Justice Regarding Arbitration

The Permanent Court of International Justice (PCIJ) indicated in its Advisory Opinion on the *Interpretation of the Treaty of Lausanne case*[50] that arbitration in international law has a more specific meaning.

> First, arbitration is a procedure for the settlement of a legal dispute. In other words, arbitration is concerned with the rights and duties of the parties under international law and a settlement is achieved by the application of this law to the facts of the case. This is not to say that political or economic factors are irrelevant, but rather that they, of themselves, cannot affect the outcome. Like the ICJ, arbitration is concerned with questions of international law.[51]
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> Secondly, as a general rule, arbitration awards are legally binding on the parties. Once a state has committed itself to arbitration, it is under a legal obligation to give effect to the result. In fact, despite the absence of enforcement machinery, the majority of arbitral awards are adhered to. Like decisions of the ICJ, they have an inherent force because they deal with binding legal obligations. Of course, some awards will be ignored, as with the *Beagle Channel Arbitration*,[52] which proved unacceptable to Argentina, or the parties can determine in advance that the award should not be binding, although this is rare. Generally, however, arbitration is a formal process leading to a legally binding settlement between the parties.[53]

[50] (1925) PCIJ Ser. B No. 12.
[51] Martin Dixon M A, *op. cit.*, p. 228.
[52] (Chile v Argentina) 17 ILM 638.
[53] Martin Dixon M A, *op. cit.*, p. 228-9.

Thirdly, in arbitration proceedings, the parties may choose the arbitrators or 'judges'. Unlike disputes submitted to the Court, parties to arbitration have direct control over both the composition of the panel and its procedure. This ensures that the panel enjoys the confidence of the parties and adds to the force of its final award. Usually, the panel will comprise an equal number of arbitrators from each disputant, plus one 'neutral umpire' who may act as chairman. However, it is quite possible that a single arbitrator may be appointed, again agreed by the parties, and this may be a foreign sovereign who then delegates the task to an expert, as in the *Clipperton Island Arbitration*.[54] Indeed, there is nothing to stop the parties appointing judges of the International Court, as happened in *Guinea v. Guinea-Bissau*, or a judge of a foreign state, as in the *Tinoco Arbitration.*[55] Again, arbitration panels dealing with specialised matters may include non-legal experts or lawyers with special expertise, as in the *Canada v. France Maritime Delimitation Arbitration*.[56]

Finally, we should also note that the ICJ itself may be used in order to review an arbitration award with which one of the disputant states is unhappy. A recent example is the *Senegal v. Guinea-Bissau Arbitral Award case*[57], where Guinea-Bissau challenged the legitimacy of a previous arbitral award made between itself and Senegal. However, as the ICJ made clear in this case, its function in such circumstances is not to hear an appeal from the arbitral award (unless, of course, such is specifically agreed to), but rather to act in a supervisory function to ensure that matters

[54] (France v Mexico) (1932) 26 AJIL 390.
[55] (1923) 1 RIAA 369.
[56] (1992) 31 ILM 1145.
[57] (1992) 31 ILM 32.

> of procedure and propriety etc. were complied with. Indeed, like proceedings for 'judicial review' in the High Court in the UK, when the ICJ considers the legitimacy of an arbitral award, it is not commenting on the merits of the dispute but on the legality of the award made. It was for this reason, indeed, that the ICJ also refused Guinea-Bissau's application for interim measures of protection.[58]

## 11. Significance of Arbitration

Arbitration is an extremely useful process where some technical expertise is required, or where greater flexibility than is available before the International Court is desired.[59] Speed may also be a relevant consideration. Arbitration may be the appropriate mechanism to utilise as between states and international institutions, since only states may appear before the ICJ in contentious proceedings. The establishment of arbitral tribunals has often been undertaken in order to deal relatively quietly and cheaply with a series of problems within certain categories, for example, the mixed tribunals established after the First World War to settle territorial questions, or the Mexican Claims commissions which handled various claims against Mexico.[60]

## 12. Contribution of Arbitration Awards

Arbitration awards have contributed significantly to the development of many areas of international law and this has not diminished even now that we have the International Court. The decisions of the US Mexican Claims Commission 1926, for example, did much to clarify the law of state responsibility, and the

[58] Martin Dixon M A, *op. cit.*, p. 229.
[59] Note for example that in the Argenuna-Chi1e case of 1966, the tribunal consisted of a lawyer and two geographical experts, 38 ILR, p. 10.
[60] Malcolm N Shaw, *op. cit.*, p. 742.

arbitral award in the *Island of Palmas case*,[61] is the locus classicus on acquisition of territory. Currently, the US-Iran Claims Tribunal is resolving many of the disputes that arose out of the rupture of relations between these two states in 1979 and has made a significant pronouncement on the law relating to expropriation of foreign-owned property.[62]

## 13. Model Rules on Arbitration Procedure

Model rules on arbitration procedure which were adopted by the 1899 Convention were considerably revised in 1907. Arbitration agreements may refer to these, while others may refer to the General Act on the Pacific Settlement of International Disputes adopted under the auspices of the League of Nations in 1928 and revised by the United Nations in 1949.[63] 'Model Rules on Arbitral procedures' were submitted by the International Law Commission to the General Assembly and adopted in 1958. Normally awards of arbitration tribunals are binding and the *compromis* will expressly provide for this.[64]

## 14. Law Applicable in Arbitration

The law to be applied in arbitration proceedings is international law,[65] but the parties to the dispute may agree upon certain

[61] (1928) 2 RIAA 829.
[62] Amoco Finance case, 15 Iran-US CTR 189 (1987), quoted in Martin Dixon M A, *op. cit.*, pp. 227-8.
[63] 71 U.N.T.S. 101.
[64] A dispute may be referred to arbitration for an advisory report. In which case the parties to the dispute will normally be charged with putting that report into effect.
[65] The Norwegian Ship owners Claims case, 1 RIAA, 1921, p. 309 and the Dubai v. Sharjah case, 91 ILR, pp. 543, 585-8. Note that Article 28 of the 1928 General Act for the Pacific Settlement of International Disputes as revised in 1949, provides that where nothing is laid down in the arbitration agreement as to the law applicable to the merits of the case, the tribunal should apply the substantive rules as laid down in Article 38 of the Statute of the International

principles to be taken into account by the tribunal and then the parties to the dispute shall determine the rules of law upon which the arbitral tribunal shall base its award. In this case, the tribunal must apply the rules specified in the *compromis*. For example, in the *British Guiana and Venezuela Boundary dispute*,[66] it was emphasised that occupation for fifty years should be accepted as constituting a prescriptive title to territory. Moreover, in the *Trail Smelter case*,[67] the law to be applied was declared to be US law, and practice with regard to such questions as well as international law.[68]

Agreements sometimes specify that the decisions should be reached in accordance with 'law and equity' and this means that the general principles of justice common to legal systems should be taken into account as well as the provisions of international law. Such general principles may also be considered where there are no specific rules covering the situation under discussion.[69] The rules of procedure of the tribunal are often specified in the *compromis* and decided by the parties by agreement as the process commences. The Hague Convention (I) of 1899 as revised in 1907 contains agreed procedure principles, which would apply in the absence of express stipulation.[70]

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Court of Justice (i.e. international treaties, custom and general principles of law).

[66] 92 BFSP, p. 970.

[67] 3 RIAA, 1938, p. 1908; 9 ILR, p. 315.

[68] Note that in international commercial arbitrations, the reference often incorporates municipal law, see e.g. the BP case, 53 ILR, p. 297, where the basic reference was to 'the principles of the Law of Libya common to the principles of international law'.

[69] Re Competence of the Conciliation Commission, 22 ILR, p. 867. See also Article 28 of the 1928 General Act as revised in 1949, Article 10 of the ILC Model Articles and Articles 26 and 28 of the European Convention for the Peaceful Settlement of Disputes.

[70] Malcolm N. Shaw, *op. cit.*, pp. 739-40.

In the case of ad-hoc tribunals, these rules are generally stated in the *compromis*, but are sometimes contained in a separate agreement.[71] If the special agreement implementing the arbitration clause is also silent on this matter, the tribunal has to determine the principles upon which the award is to be based. Hans Jurgan Schlochauer has pointed out that more recent bilateral arbitration treaties between States on the European continent provide that awards are to be based on those sources of international law which the PCIJ and ICJ are directed to apply[72]. He has further rightly remarked that the rendering of decisions *ex aequo et bono* constitutes an important characteristic of international arbitration since arbitral tribunals are supposed to resolve disputes in any case, and, even in the absence of applicable rules of international law, should not resort to a *non liquet*.[73] Decisions *ex aequo et bono* are intended to Fill gaps in the international law.

The arbitral tribunal, therefore, applies international law and general principles recognised by the community of nations. However, it is left to the parties to permit the tribunal to apply principles of equity and decide the case *ex acquo et bono*. In some cases, the tribunal may apply principles of equity even without authorisation provided there is no restriction under the treaty. The Kutch Tribunal applied the principle *ex acquo et bono* in Indo-Pakistan dispute. Parties may also stipulate as to law which the tribunal has to apply. In *British Guiana-Venezuela Boundary*

[71] A classic example is provided by the Washington Rules of 1871 (Article VI of the Treaty of Washington).

[72] (Article 38(1) of the Statutes of Courts)

[73] General Act for the Pacific Settlement of International Disputes (1928 and 1949), after referring to the sources of international law listed the Article 38(1) of the Statutes of PCIJ and ICJ as the basis for arbitral awards, continues: "In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*."

*Dispute*, the *compromis* included a principle that fifty-year occupation may entitle the occupant a prescriptive right.[74]

**15. The Role of Arbitration**

Arbitration has today been largely superseded by the judicial settlement of disputes. However, it does retain several distinct advantages:

i. It is well suited to the disposal of minor cases where the parties in dispute may prefer an informal approach;

ii. Only States may be parties to cases before the ICJ; therefore, if the dispute involves an international organisation, arbitration may be the only judicial proceedings a party may invoke to obtain a binding award;

iii. Arbitration is a convenient method of settling large numbers of outstanding claims between two States; for instance, a number of claims between the USA and Italy arising from the Second World War were settled in accordance with the arbitral provisions laid down in the 1947 Italian Peace Treaty;

iv. It has been argued that arbitration may be a convenient method of deciding those inter-State disputes of a political rather than a legal nature; however, in view of the binding nature of arbitral awards, and the availability of alternative settlement procedure under the United Nations, this proposition seems rather dubious.[75]

[74] R. C. Hingorani, *op. cit.*, p. 294.
[75] Robert M MacLean, *op. cit.*, p. 324.

## 16. Undermining Factors of International Arbitration

The following elements in the arbitral process have tended to undermine its importance. The first element is the consent of the arbitrating parties to every stage in the arbitration. Selection of judges of their own choice is only one aspect of the very wide powers of supervision and control given to States under the usual arbitration agreement. The unwilling States may call a halt to an arbitration at many stages. A State's consent may be refused to the recognition of any dispute requiring submission to arbitration, to the signing of the *compromis* which defines the terms of reference and powers of the arbitrator, to the constitution of the tribunal either by failure to appoint its own national member or by failure to agree to the neutral members.[76] Even when the arbitration tribunal has been properly constituted and has opened its proceedings, a State may block progress by failure to appear, refusal to afford the tribunal the necessary information or facilities for investigation and, in the event of some change in the membership of the tribunal, refusal to appoint or agree to the appointment of a substitute.[77] There are instances where a national arbitrator has withdrawn before completion of the arbitration proceedings.[78] The consent, not only given at the beginning of the arbitration proceedings, but also continued throughout the proceedings until the tribunal retires to make its award, is, these qualities, the arbitrators must be of proven probity, of evident skill in the art involved and having the least possible bias of personal

[76] Case of the Interpretation of peace treaties. ICJ Rep., 1950, 65.
[77] Lena Goldfields Arbitration. Annual Digest of Public International Law Cases, 1929-30. Case No. 258.
[78] Franco-Tunisian Arbitration Tribunal, United Nations Reports of International Arbitral Awards, XII, 271.

character or judgment, i.e., they should be men of sound and well-balanced minds as distinguished from men of idiosyncratic ideas.[79]

## 17. Evaluation of Arbitration as a Method of Settling International Disputes

Since arbitration is essentially a consensual procedure, it has certain advantages over other pacific methods of settlement of disputes. As pointed out by Starke, "There will always be a place for arbitration in the relations between States. Arbitral procedure is more appropriate than judicial settlement and less expensive, while if necessary, arbitrations can be conducted without publicity, even to the extent that parties can agree that award be not published. Moreover, the general principles governing the practice and powers of arbitral tribunals are fairly well recognised. Lastly, arbitral procedure is flexible enough to be combined with the fact-finding processes which are availed of in the case of negotiation, good offices, mediation, conciliation and enquiry."[80] Moreover, it should not be forgotten that arbitration in its present form offers States the certainty of a binding award. Stripped of its former grandiose pretensions to solve all international disputes, arbitration continues to offer a useful supplement to the International Court of Justice as regards disputes requiring a purely legal solution particularly in connection with minor disputes or issues involving technical matters unsuitable for decision by so large a number of judges as provided by the International Court. As regards other 'mixed' disputes. States should not overlook the advantages of a process, which combines judges of their own choice and respect for the law.[81] Despite these advantages, arbitration now serves as a

[79] Per Umpire Plumley in the French Company of Venezuelan Railroads case. In J. H. Rolston, *The law and procedure of international tribunals*, p. 43.
[80] J G Starke, *op. cit.*, p. 490.
[81] Hazel Fox, *Arbitration*, p. 127.

residual procedure, where other procedures for settlement are lacking.[82]

Moreover, one of its creators hailed the Permanent Court of Arbitration (PCA) as the 'greatest achievement' of the first Hague Conference.[83] It was confidently predicted that the "nations will, with greater frequency, carry their differences to The Hague; and the Temple, for construction of which the generous American citizen, Mr. Carnegie, has provided the means, bids fair to be thronged with suitors appealing to reason and international justice for the protection of their national rights."[84]

It has been pointed out by some critics that the award given by the Court of Arbitration cannot be said to be legal decisions because they are generally the mixture of law and politics. Judge Lauterpacht points out in his book 'The development of International Law by the International Court, 1958': "One of the reasons usually given for its (i.e., Permanent Court of Arbitration) inadequacy was that the awards rendered by its tribunals were not legal in form and substance and that they tended to confuse law with a diplomatic solution aiming at pleasing both parties. It may be difficult to substantiate that charge. An analysis of the awards given by tribunals under the aegis of the Permanent Court of Arbitration before and after the First World War must reveal that their decisions were legal awards in form and substance."[85]

J. G. Starke has rightly pointed out that arbitration is essentially a consensual process. States cannot be compelled for it unless and until they consent to it. Even the nature of the Court to be

[82] Ibid, p. 103.

[83] J. H. Choate, *The Two Hague Conferences 31-32* (1913).

[84] J. W. Foster, *Arbitration and The Hague Court 76* (1904). Mr. Carnegie's 'Temple' is the Peace Palace, presently the home of the International Court of Justice.

[85] S. K. Kapoor, *International Law [A Nutshell]*, Allahabad: Central Law Agency, 10th Edition, (1998) P. 198.

established depends upon the consent of the parties to a dispute.[86] Consequently, it must be admitted that the Court of Arbitration has many weakness and limitations, but at the same time it cannot be denied that despite these weakness and limitations the Court of Arbitration performed commendable work for a long time. It developed the modern law and procedure regarding the settlement of disputes though arbitration.[87]

Professor Holland of Oxford complained that the "substantive provisions contained in the Arbitration Convention amount really to nothing, since everything in them which savoured of an obligatory character was omitted, in deference to the arguments of which the German delegation was the mouthpiece."[88] With a little less discouragement, President Low of Columbia reported: "No one supposes that this Convention, even if universally signed, will prevent all war,... but it will compel the nations, in a new way to justify war to the public opinion of mankind."[89]

Although the Court of Arbitration still exists and is situated in The Hague, but the States do not made frequent use of this Court. As pointed out by Fawcett, "But despite attempts in the General Act for the Pacific Settlement of International Disputes (1928) to rationalize and systematize further the recourse to arbitration, the permanent Court of Arbitration has largely fallen into disuse, and only one case is recorded since the Second World War."[90]

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[86] J G Starke, *op. cit.*, p. 489.
[87] Ibid.
[88] C. D. Davis, *The United States and the First Hague Peace Conference*, (1962) p. 188.
[89] Mark W. Janis, *An Introduction to International Law*, New Delhi: Aditya Books Private Limited, 1st Indian Edition, (1989) p. 95.
[90] S. K. Kapoor, *International Law [A Nutshell]*, *op. cit.*, p. 198.

From the above discussion it is evident that in view of the present international politics, arbitration as a means of settlement of international disputes is more appropriate because in it an attempt is made to settle the disputes by the arbitrators selected by the States who are parties to a dispute. The Hague Convention of 1907 for the Specific Settlement of International Dispute defined the international arbitration as "settlement of disputes between the States by judges of their own choice." But the Court of Arbitration fell into disuse because of the establishment of the Permanent Court of International Justice under the League of Nations. In modern period, the Permanent Court of International Justice has been replaced by the International Court of Justice and the states very seldom make use of the Permanent Court of Arbitration.

## 18. Future Prospects of International Arbitration

The settlement of disputes between States through arbitration comprises the only means for the elimination of international controversy through resort of law and judicial procedures. In a world which has too long and too often had recourse to force to-settle conflicts, it furnishes the avenue whereby the States may bring themselves under a region of law in the solution of their disputes. Not political persuasion or coercion through the use of power in whatever form, but the application of legal principles in a judicial manner is the strength of international arbitration. Not negotiation and compromise but reason and justice constitute its appeal to States.[91]

Arbitration has proved to be an effective means of settling disputes between States which cannot be resolved by diplomatic means. After World War I, arbitration experienced a decline as a result of the creation of PCIJ. Since 1945, the frequency to resort to

[91] Gurdip Singh, *op. cit.*, pp.323-324.

arbitration has once again, at least temporarily, increased. The lesser authority enjoyed by the ICJ, in comparison to the repute of PCIJ, is one of the factors producing a tendency for States to prefer the submission of disputes to a tribunal whose composition they control, instead of to the court. Arbitration can also benefit from the fact that it has been placed on an equal footing with judicial settlement as a peaceful means of resolving disputes both in Charter of the United Nations[92] and in the General Act for the Peaceful Settlement of International disputes.[93]

The popularity of International Commercial Arbitration has grown considerably after the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 became effective.[94] International Chamber of Commerce (ICC) World Bank's International Centre for the Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) provided momentum to the growing popularity of international commercial arbitration. The world-wide applicability of the UNCITRAL Rules has made significant contribution to gear up the popularity of international commercial arbitration. These Rules are useful in negotiating dispute settlement provisions for contracts with the State Governments as they were adopted unanimously by General Assembly resolution and thus have the support of all the governments.[95] An indication that these Rules are acceptable to governments of both developed and developing countries in the settlement of disputes between governmental authorities and private entities can be found in the fact that they are referred to in Article 188, Paragraph 2(c), and

[92] Article 33, The Charter of United Nations.
[93] The General Act for the Peaceful Settlement of International Disputes (1928 and 1949).
[94] Convention on the Recognition of Foreign Arbitral Awards, June 10,1958,21 U.S.T. 2517, T.I.A.S. No 6997, 330 U.N.T.S. 38.
[95] General Assembly Res. 31/98, 31 U.N. GAOR.

Article 5, Paragraph 5, of Annex III of the Law of the Sea Convention. The former provides for the arbitration of disputes concerning the interpretation or application of a contract between the International Seabed Authority and a State enterprise or a natural or juridical person. The latter refers to disputes concerning undertaking required in contracts with the Authority to make available to the Enterprise 'on fair and reasonable commercial terms and conditions' the technology to be used in carrying out activities under the contract.[96]

## 19. Conclusion

From the above discussion and analysis it is revealed that arbitration as a method of settling disputes combines elements of both diplomatic and judicial procedures. It depesssssnds for its success on a certain amount of goodwill between the parties in drawing up the *compromis* and constituting the tribunal, as well as actually enforcing the award subsequently made. A large part depends upon negotiating processes. On the other hand, arbitration is an adjudicative technique in that the award is final and binding and the arbitrators are required to base their decision on law. As Lawrence points out, "Its value resides in its judicial or quasi-judicial character. It signifies the reference of the dispute to an individual, or small group of individuals, to whom the parties state their respective cases, and whose decision they are in honour bound to obey, and in fact have always obeyed, the only instance to the contrary being due to the fact that the arbitrator had exceeded his powers....When a dispute is submitted to arbitration the matter takes on the semblance of a trial before a court."[97] Arbitration, therefore, as an extra-judicial organ has advantages of cheapness of procedural costs, speediness in disposal of matters

[96] Gurdip Singh, *op. cit.*, p. 324.
[97] Lawrence, *The Principles of International Law*, pp. 566-567.

and non-technical application of legal procedures. So, it has become a popular method of settling disputes in international, national and commercial spheres.