CHAPTER - 14

INTERNATIONAL COMMERCIAL ARBITRATION: IT'S TIME TO EASE THE LEGAL TANGLE BY AUTHORIZING *AMIABLE COMPOSITEUR* FOR THE ABRITRAL TRIBUNAL

Tan Chiang Huat Edward*

I INTRODUCTION

In the World Trade Organization Press Release 7 April 2016, it was reported that trade volume for 2015 stood at USD16.5 trillion and goods related services, which is the subject of our discussion in this paper was reported at USD870 billion.[1] The global supply chain is therefore still an important and relevant factor in world trade due to open borders in many major economies.

With the recent international political developments, the new world order of open trade could however become an issue for the global supply chain. When the United Kingdom (UK) voted to exit the European Union (Brexit), it stirred some level of discomfort internationally. Brexit became a lingering bitter separation with many issues to be settled between the UK and EU members that will ultimately affect trade. The EU has a 16.3% share of world trade in goods and services.[2] When the US recently voted in a new president for the next four years, the incoming administration announced that the Trans-Pacific Partnership Agreement (TPP)[3] will be trashed in its originally negotiated and agreed form. The US has a 14.8% share in the world

---

* Director and Consultant, Third March International Pte Ltd, Singapore.

1 WTO "Trade growth to remain subdued in 2016 as uncertainties weigh on global demand" WTO 2016 Press Release No: 768 <www.wto.org/english/news_e/pres16_e/pr768_e.htm>.

2 European Commission *DG Trade Statistical Guide 2016* p 24 <http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151348.pdf>.

3 For more detailed explanation on the TPP <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>.

trade in goods and services[4] and so together with Brexit, major issues could develop in the days ahead.

A crucial part facilitating the global supply chain in world trade is the ancient system of contracts and agreements for the global supply chain to move goods and services. Among others, these contracts and agreements incorporated the principle of resolving claims and disputes arising from the contracts of carriage in cross border trades and recoveries through the courts system and through international arbitration under the established rules contained in the New York Convention. In this paper, I propose to deal with the issue of arbitration and in particular, the principle relating to "*amiable Compositeur*" under the UNCITRAL Model Law on International Commercial Arbitration[5] ("Model Law") Article 28(3) only.

In an article to the University of Pennsylvania Law Review (December 1934), the late Professor Earl S. Wolaver wrote, "The origin of arbitration is lost in obscurity… [during the time of *Heraldus Animadversiones* (circa 320BC)] It was common among the Romans to put an end to litigation by means of arbitration".[6] Arbitration, as we all know it today, is and supposed to be a cost-effective speedy alternative dispute resolution channel running parallel to the courts system. However, by and large, over the years, this channel developed to became somewhat expensive and complex by mirroring the courts system and processes when the Model Law came into existence and was adopted as international law by member states which signed their accession to the New York Convention of 1958.[7]

Among others, we find the Model Law laid out several provisions and procedures to curate the adoption of this convention by member states through national legislation. It is therefore recognized that there will be differences in practice by members states due to the territorial jurisdictions, diverse political environmental status and cultures, subjects and interests. However, so as not to take on too wide a scope, the focus of this paper will be generally confined to legal obstacles in the resolution of disputes arising from management of claims arising from the carriage of goods in the supply chain and as more than 85% of the goods and services are handled through the maritime and shipping channel.

---

4 European Commission (n 2).

5 UNCITRAL Model Law on International Commercial Arbitration (adopted by the General Assembly on 11 December 1985 with amendments as adopted in 2006).

6 Earl S. Wolaver "The Historical Background of Commercial Arbitration" (1934) 12 University of Pennsylvania Law Review 132.

7 As at May 2015, the Convention has 156 member states parties.

II DISPUTE RESOLUTION MECHANISM

As discussed above, there are now 156 countries who are signatory members to the New York Convention where the Model Law is recognized as international law, where member states agree to enforce arbitration award by enacting national legislation. Therefore, theoretically, any disputes arising from the carriage of goods trade can be resolved by arbitration since there are national laws giving force to the New York Convention as well as the Model Law. "This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States."[8]

In Article 2(d), parties are free to determine the issues and manner in arbitration and this is a principle established in "party autonomy". In practice, there are two types of arbitration; administered and non-administered. Where the arbitration is administered, there is an institution involved, for example the London Court of International Arbitration (LCIA)[9] whose staff will follow through from the time of filing the case, the appointment of arbitrators, the interlocutory matters, the oral hearings and until the final award. All these are based on the LCIA Arbitration Rules. Other arbitral institutions where arbitrations are administered include, Singapore International Arbitration Centre,[10] the Singapore Chamber of Maritime Arbitration[11] and the International Centre for Dispute Resolutions[12] which is an American arbitration institution.

The processes worked out to be something like that in a court of law, where there are deadlines and time-frames to follow strictly failing which there are financial penalties. In reality, the staff at the administrator institution acts like the drill sergeant to monitor the interlocutory matters based on the arbitration rules adopted by the institutions which, among others, called for timely attendance and execution of the procedures. This is a mirror image of the court processes with the exception that the tribunal comprised privately appointed arbitrators as judges who does not have the power to order punishments against witnesses for false evidence and other misdemeanours. The final award is likely vetted by the registrar and filed or registered in the institution records.

---

8 UNCITRAL Model Law on International Commercial Arbitration, art 1(1).

9 The London Court of International Arbitration <www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx>.

10 Singapore International Arbitration Center <www.siac.org.sg/>.

11 Singapore Chamber Of Maritime Arbitration <www.scma.org.sg/>.

12 International Center For Dispute Resolution <www.icdr.org/>.

In the case of *adhoc* arbitration, parties make their own private arrangements for administration and follow through processes. There is no drill sergeant to shout the orders for parties to follow the deadlines and other interlocutory processes to adopt. But the procedures are very much the same and the institutional arbitration rules would be adopted as procedural rules. Similarly, the arbitrators are privately appointed and their powers are confined to resolving the issues in dispute arising and presented for the tribunal to resolve by agreement. The arbitration could be registered by the institution but the differences are that there are no supervisory oversight of the arbitration proceedings and registration of the final award is not required. Parties and their counsels are free to decide on the ways the arbitration is to be conducted.

In both administered and *adhoc* arbitrations, the procedures called for the claims to be served on the other party declaring that based on the agreement, the claimant is asking for the issues in dispute to be arbitrated. Among others, the claimant will have to state the case in brief, the laws and procedural rules and asked for mutual consent to form the tribunal. The respondent will then file the usual denials of the issues in dispute and either agree to the arbitration or ignore the claim altogether. If this is the case, the claimant can seek the courts' intervention to order the respondent to answer. Where parties are amicable to seek resolution, and do not dispute the claims, this situation might not exist. So, if there is no doubt that an agreement to arbitrate the issues in dispute between the parties is validly present, the tribunal is further selected and formed based on the arbitration rules.

The formation of the tribunal vested with judicial responsibilities under the arbitration rules provides the authority, in which the parties can file their papers with. After the claimant has filed the claim, the respondent will then answer in reply and the claimant has the final reply to the respondent's answer in reply to complete the interlocutory procedures. If there is a counter-claim filed in the respondent's reply, then the processes continue to permit the claimant to file answer in response to the counterclaim following which the respondent has the final answer against the claimant's answer in response. The interlocutory process would then end and the tribunal, usually one of the arbitrator or an appointed tribunal secretary, will call for a close to the filings to enter into the next phase. The claim is then set down either for oral arguments by parties presenting their case before the tribunal or set the matter for the tribunal to deliberate based on the papers and the evidence filed without calling for witnesses or set the date for oral arguments.

Where the arbitration enters into the oral arguments phase, each party can cross-examine their respective witnesses or examine and cross-examine the evidence presented. This is again a mirror of the court processes but one of the important point to note is that there is no compulsory set or formal procedure for evaluation or

admission of evidence.[13] There could be a call for discovery processes but in many cases, this would be passed because parties volunteer to present their evidence to support their claims. After parties have presented their case, the tribunal will call for close to the argument and then proceed to deliberate and write the final award which is similar to a court judgement. If there are procedural faults during the process or the tribunal commits any acts of bias during the argument phase, the loser can have the final award reviewed and set aside. However, in most cases, the award is final and no appeal can be laid before the court of law even if the final award is erroneously written by the arbitrators.[14] Appeals and application to set aside any arbitral award which is final can only exists under very limited circumstances.

In some jurisdictions, where parties are amiable to the final award, the winner in the arbitration can enforce the claim as written by the tribunal. However, in most jurisdictions, there is still a need to have the final award endorse by a court of law before the losing party can be made to pay the winner. China is however an exception in that unless the arbitration is seated in China or that proper notice has been served on the parties in China, which is sanctioned by the courts in China, the foreign award cannot be enforced.[15]

Disputes resolution continue to evolve. There are now variations to arbitrations; parties can now seek mediation as addition to arbitration in a combination of what is known as "med-arb" and it simply means parties will now mediate their disputes, get some of the issues in disputes settled and then arbitrate on those issues that could not be settled by mediation, which is also referred to as "multi-tiered" dispute resolution clauses.[16] There are now many established mediation centres providing the avenues for such disputes resolution with many accredited mediators panel to mediate claims. In practice, parties can still negotiate on their own or appoint accredited mediators to assist disputing parties before a settlement agreement is drawn up. If parties wanted their settlement agreement enforceable as an award, they can agree that an arbitrator be appointed to seal the settlement agreement as an arbitral award under the rules of an arbitration institution. This will enable the award to become enforceable under the New York Convention in what is known as consent award.[17]

---

13 UNCITRAL Arbitration Rules (Revised 2010), art 27(4).

14 *Harris v Sandro* (2002) WL 437957 (Cal App 2 Dist).

15 Xiaohong Xia "Implementation of the New York Convention in China" <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1009&context=ab>.

16 Phillip Caper *International Arbitration: A Handbook* (3rd ed, LLP 2004) 36.

17 Dmitry Davydenko "Enforcement of Settlement Agreements Reached in Arbitration and Mediation" (Kluwer Arbitration Blog, November 25, 2015) <http://kluwerarbitrationblog.com/

But if the settlement agreement was reached before the start of the arbitral proceedings, then it can be argued that such an agreement might not be sealed as an arbitration award by settlement. It will rather be an agreement under normal contract laws.[18]

III THE CASE FOR ARBITRATION

"The shipping and commodity trades of the world are unusual in that **they do not regard… arbitration with abhorrence.**[19] On the contrary, they regard it as a normal incident of commercial life – a civilized way of resolving the many differences of opinion which are bound to arise" per Lord Donaldson of Lymington.[20]

Maritime commerce and trade is ancient with its origin dating back to 1500BC and so maritime law has a long and rich history which is not restricted to just one country but that which crossed borders. It therefore follows that disputes or claims arising from maritime commerce will inevitably involve contracts which are international in nature. Therefore, it will be beneficial to examine the nature which is inherent in the resolution of such disputes in order to appreciate the case for international commercial arbitration.

Arbitration is inherently rooted in the principle of freedom to contract (party autonomy)[21] or "freedom to contract". It is supposed to be flexible and largely *laissez faire* (parties with fair bargaining positions) between contracting parties. Disputes are to be resolved between parties to the contract before a forum which can be a court of law or an arbitral tribunal upon the terms agreed between the parties based on the principle of party autonomy. Whilst parties are free to contract, the general principle of laws may limit certain freedom. So, since there is freedom to contract based on the principle of party autonomy, parties are free to contract on terms based on their bargain and arbitration is one which is meant to oust the jurisdiction of the court.[22] This ultimately makes it neat to resolve issues since there will be an arbitral tribunal where the members of the tribunal are mutually appointed "commercial men" of the

---

2015/11/25/enforcement-of-settlement-agreements-reached-in-arbitration-and-mediation/> 25 November 2015.

18 Ibid.

19 Emphasis in bold italics is mine.

20 *Pando Compania Naivariera SA v Filmo, SAS* [1975] Lloyd's Rep. 560 (QB).

21 Dicey, Morris and Collins *The Conflict of Laws* (14th ed, Sweet and Maxell, 2010) Vol 2, para 32-004.

22 Thomas E Carbonneau "The Exercise of Contract Freedom in Making of Arbitration Agreements" (2003) 36 Vanderbilt Journal of Transnational Law 1189-1196.

trade. They will therefore understand the precepts which is inherent in the shipping business. However, this pretty picture does not always appear so simple in the practical world of resolution of disputes arising from trade and commerce. In order to appreciate this, we will move on to understand arbitration in its broad perspectives.

3.1 Is Arbitration a Bi-lateral Affair?

The contract of carriage in the supply chain comprised many parties in multiple related or mirrored contracts who are free to contract on terms and conditions based on the concept of *laissez faire* which no third party can interfere. One can call this as "bilateral" because the contracting parties' interests are always found on each side; that is, a buyer and the seller or the shipper and consignee and it can also be broker and cargo interest. This created a certain level of complexity in the supply chain and it often includes contracts to another contracts with differing parties in each contract to a multiple line of contracts linking each other to the original transaction. For example, the trader will appoint a logistics operator (often a freight forwarder) to handle his goods. The logistics operator will then contract to book a space on behalf of the trader, often as independent contract, with the ship-owner or carrier (which is the shipping line operator) for that part of carriage by sea but as then still maintaining his position as an agent of the trader.

Between the trader's premises and the wharf, there is a requirement to appoint the trucker and so as logistics operator, they will appoint a trucker if they themselves are not operating the trucking services. This is another contract which is signed for an on behalf of the trader for the trucking services and collateral to the shipping contract. When the goods arrived at destination, the logistics operator will have to contract for their agents at destination to clear the goods from the port after the ship arrived with the goods. This is yet another contract which is collateral to the shipping contract and to that which is the one between trader's premises and the wharf. All the contracts are linked in one way or another. The destination agent is a party that is totally a stranger to the original trader, yet the contracting chain goes on linking transaction which was made by the original trader with the final destination agent by transferring his legal rights and interest to his buyer at destination.

So, if and when, there is a claim resulting from the shipment, it is usually the destination parties with legally vested interest to the goods at the receiving end to look backwards in the contracting chain to find the defaulting party to seek recovery. This is the beginning of a perplexity in any dispute resolution or claim. In *Stolt-Nielson*,[23] the courts in the United States have to deal with many issues of complexity in the supply chain. Whilst the central issue in this case is a class action, the disputes

23 *Stolt-Nielson v Animal Feeds International Corporation*, 130 S Ct 1758 [2010].

centered around the investigation of physical damages to transported goods and the ensuing liability which attached to the carrier including the issues of non-physical damages for delay and demurrage resulting from non-payment of charter fee, involving the charterer, and matters relating to salvage at sea, involving salvors, and also the marine insurance contract.

The argument therefore is how can such linked chain of contractual agreements be resolved as a bi-lateral contract by a tribunal and yet adhering to the principle of party autonomy. Since arbitration is bi-lateral, can the tribunal confine the disputes to just one party on each side? Multi-parties issues added some complexity to disputes resolution. Article 7 of *Model Law*[24] provides that the arbitration agreement shall be in writing. In many typical Bill of Lading (B/L) and in the case of shipping, this is the principal contract of carriage that makes it difficult to find any clause providing for arbitration except that which has reference to certain shipping conventions providing that disputes arising may be arbitrated. Therefore, it can be argued that claims arising from shipping cannot be arbitrated because there is lack of any specific agreement, which is provided for under the laws, for shipping claims to be arbitrated.

However, the trend in following with modern global commerce dispute resolution is to provide for claims to be arbitrated as this is arguably the more equitable mode of resolving claims. Among others, in Articles 75-77 of the Rotterdam Rules,[25] it provides that "… parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration." This Article is a wholesale adoption of the provisions in Article 23 of the Hamburg Rules[26] but the Hague-Visby Rules[27] which is adopted in most B/L is silent on arbitration. Therefore, the position is open for acceptance by the disputants and once the parties agree to have their disputes arbitrated, this will form the agreement to arbitrate in compliance with the provisions contained in the Model Law. Parties still have their option to opt for court action but in these days, the courts have their plate full with many other complex commercial cases such that the queue is long and the disputants are therefore best left to resolve their own disputes and it seems that arbitration is not about to become a stranger in the shipping trade and maritime commerce.

---

24 UNCITRAL Model Law on International Commercial Arbitration.

25 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009.

26 United Nations Convention on the Carriage of Goods by Sea 30 March 1978.

27 International Convention for the Unification of Certain Rules of Laws relating to Bills of Lading 1931.

3.2 Arbitration is an Affordable Means of Resolving Claims

In most arbitrations, there is always the element of costs, that is, the legal expenses involved, between parties to pay their legal counsels. Depending on the issues in dispute to be resolved, the ugly side of arbitration is shown to the losing party who had to pay the winner for costs which is in addition to the award for the loss or damages. This seems to be contradictory to the principle that parties volunteer to resolve their disputes mutually. Shipping claims, especially those arising from carriage of goods, can sometimes be complex but depending on the issues in dispute, the award for the loss or damages can be manageable except those which are catastrophic. So, adding costs, which can sometimes be as large as the amount claimed itself, is something which should be resolved either by procedural rules or this is something where parties can agree that "no costs to be awarded".

It would be safe to say that most of the goods shipped in the course of maritime commerce are insured by a marine cargo insurance policy and hence, the cargo interest or the final party interested in the cargo would have recourse for compensation in the event of any loss or damages arising during the carriage process. This is an important feature in the supply chain. The crux of the shipping claims or disputes arise from the parties involved in the carriage, that is, the logistics operator, freight forwarding agent or even the modern-day supply chain manager whose involvements in the supply chain starts from the moment the seller or the trader wanted the goods shipped to the final buyer. The question often asked is "Who is liable for the loss or damage for the shipment?", that is where the complexity in the recovery process for loss or damages arising from carriage of goods begins.

As stated above, the contract used in the carriage of goods is the B/L and where there are no specific provisions for arbitration to begin with, this becomes the centre of complications. So, the starting point will be to establish an arbitration agreement and then to get it agreed in writing. In a recent Singapore High Court decision, disputants found that they could not be bound by an unexecuted contract even when there is an arbitration clause.[28] This seems to depart from an earlier English Court of Appeal case, where the court agree that there was an agreement to arbitrate because the tribunal found that there was mutual consent to arbitrate.[29]

In many cases, the first port of call for parties would be the courts but in these days, it is common for the courts to order mediation or mutual settlement by negotiation which is the most equitable commercial mode of settlement because legal costs in litigation is now rising to record levels. Legal costs in arbitration is taking a

28 *BCY v BCZ* [2016] SGHC 249.

29 *Sulamerica Cia Nacional de Seguros SA v Enesa Egenharia SA* [2012] EWCA 638.

similar rising trend. "Is arbitration an equitable and affordable solution?" In the UK Arbitration Act, it provides that; "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal *without unnecessary delay or expense*";[30] and "The tribunal shall … adopt procedures suitable to the circumstances of the particular case, *avoiding unnecessary delay or expense*, so as to provide a fair means for the resolution of the matters falling to be determined."[31] However, in the recent report on costs in international arbitration, the picture seems to be different. Arbitration as a means of dispute resolution is getting more costly.[32] There are many reasons behind the delay and rise in costs. Expensive lawyers seem to be one cause but then again, it takes two hands to clap and so, the blame could fall equally on the disputant unwilling to resolve the disputes without putting up a good fight. Therefore, arbitration might not be an affordable means of resolving claims.

3.3 Can Arbitration be Simpler and Cost Effective?

The case for a simpler and cost effective arbitration can be a myth. In many instances, there are complaints that because of the high stakes in commercial arbitrations, parties are resorting to guerrilla tactics to deliberately impede or obstruct the arbitral processes.[33] However, it must be recognized that there are no compulsory requirements for parties to be represented by legal counsel, or at least by a licensed and practicing lawyers, in arbitration. Parties may be represented any person of their choice in any arbitration and such representatives need not be lawyers.[34] Even foreign qualified and non-practicing lawyers are permitted to represent parties in arbitration.[35]

So, perhaps doing away with expensive lawyers could be an answer. But unless the non-lawyer counsel is trained in arbitration, the appointing party could be handicapped if the opposing party has a good legal team. In these days, it is common for many multinational companies to hire legally trained and qualified staff as general counsels and among many other duties, they will handle matters relating to

---

30 Emphasis in italics is mine.

31 Arbitration Act 1996 (UK), Sections 1 and 33. Emphasis in italics added is mine.

32 Joseph R Profaizer "International Arbitration: Now Getting Longer and More Costly" (28 July 2008) The National Law Journal <www.paulhastings.com/docs/default-source/PDFs/9833309df6923346428811cff00004cbded.pdf>.

33 Margaret Moses "The Growth of Arbitrator Power to Control Counsel Conduct" (Kluwer Arbitration Blog, 12 November 2014) <http://arbitrationblog.kluwerarbitration.com/2014/11/12/the-growth-of-arbitrator-power-to-control-counsel-conduct/>.

34 Lawrence Boo "The Law and Practice of Arbitration in Singapore" ASEAN Law Association <www.aseanlawassociation.org/docs/w4_sing1.pdf> [Emphasis added is mine].

35 *Turner (East Asia) Pte Ltd v Builders Federal (HK) Ltd & Another* (1988) 2 MLJ 280.

claims and disputes. It is therefore easier and cost effective for these hired staff, who may have undergone some form of training, to take on arbitration cases but again, where there are complex issues involved, the hired counsel may not be equipped especially where midway through the arbitration, there are needs to file court proceedings and that is where licensed and practicing lawyers are required. Although this is remote because the tribunal formed could have the power and jurisdiction under the law to conduct and make all the orders that is required.

But, as what we have discussed above, the tribunal does not have the same judicial powers of a court judge granted by national laws to make orders outside of the agreement. What the tribunal could order is confined to the arbitration regimes and the ambit of the arbitration agreement. The next consideration would then be the procedural rules in arbitration. Many arbitration institutions have their own rules and these are somewhat similarly drafted and fashioned in accordance with the UNCITRAL Arbitration Rules. So, if we examine the perimeters, there could be possible ways to achieve the end result. In the Model Law, it provides that "The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so."[36] So, the position for this to happen is that there must be an express authorization (in writing) by the parties for the tribunal to do so.

IV LET'S GET TO THE POINT: AMIABLE COMPOSITEUR

As discussed above, maritime trade and commerce, especially the carriage of goods trade, which is an important element in the supply chain, is ancient and the practices founded on customs and principles developed long ago. It can be said that many of the broadly termed shipping practices are somewhat archaic and unclear. The modern logistics trade made it even more complex with the mirroring of the "non-vessel" owner bill of lading and then the "door to door" delivery processes in multimodal transport operators bill of lading on top and above the performing carrier's bill of lading. In addition to this complexity, there is e-commerce trades in which there is no brick and mortar shop where the goods sold are capable of being examined before being bought and sold and shipped to the destination. The trades and sales contracts are done virtually over the internet. At the end of the day, in the event of any claim disputes, we are left to consider who is the final party liable and where is the effective territorial jurisdiction.

36 UNCITRAL Model Law on International Commercial Arbitration, art 28(3).

4.1 What does it mean and what is involved?

Permitting *amiable compositeur* means allowing parties to choose acceptable "commercial men" to form the tribunal at the inception of the contract to adjudicate and try disputes in accordance with common practices and norms acceptable in the respective trades.[37] In fact, there are no laws and procedures to be adopted and the appointed "commercial men", given private judicial powers are to arrive and decide in accordance with the principle of equity. The tribunal is therefore empowered to decide based on the evidence presented and based on their intimate knowledge of that particular industry or trade and not in accordance with any applicable laws.[38]

The parties have therefore got to get this correct at inception, that is, to contractually agree and specifically authorize the tribunal to decide any claim dispute accordingly without the need to give reasons or apply any laws to arrive at their final decision to make the arbitral award.[39] This is different from arbitration by settlement where parties submit their issues in dispute before a tribunal where the procedural rules of disputes resolution are followed and the tribunal writes the award based on applicable laws. Under the principle of a*miable compositeur* the tribunal is permitted to decide in accordance with the powers vested in them by the parties to decide as a judge would in the court of law without the need to follow legal principles, trusting that the tribunal will decide in accordance with the principle of equity. This reinforces the principle of "party autonomy" in contract laws where parties are free to agree to terms in any way they deemed fit and so the resolution of the disputes would follow that same principle.[40]

However, in effect, this is an "honour agreement", which is legally non-binding mutual understanding between the parties, meant to release the tribunal from judicial formalities.[41] For those with systematic legal minds, it is easy to argue the disadvantages and the flaws of such a scheme which give grounds for setting aside the final award. However, for traders, it seems to dispose sticky issues that would craw out of any good trading relationship. In fact, during the days of guild houses

37 Ralph Amissah "The Autonomous Contract" <www.cisg.law.pace.edu/cisg/bilblio/amisah2.html>.

38 Phillip Caper (n 16) 37.

39 *Food Services of America Inc v Pan Pacific Specialties Ltd* (1997) 32 BCLR (3d) 225.

40 Mo Zhang "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law" (2006) 20 Emory International Law Review 511.

41 *Liberty Reinsurance Canada v QBE Insurance and Reinsurance (Europe) Ltd* (2002) Can LII 6636.

and trade associations, the "elders" would resolve disputes internally and among themselves amicably based on ethical guidelines and harmonious relationship.[42]

4.2 What is the rationale?

In resolving the disputes, the *amiable compositeur* tribunal has to decide in accordance with unique trade usage. The term "trade usage" was held to include norms contained in published instruments representing the best practices and acceptable norms of the industry or trade.[43] This again reinforced the needs for "commercial men" to form the tribunal and because of the principle of good faith and performance of the trade is involved, no one can rewrite the contract.[44] It can be argued that the rationale behind this is for the tribunal to adjudicate the case based on its own merit[45] which is the original principle of arbitration in the first place. Thus, it is for the tribunal to become its own assessor of parties' case merits presented before them and then act as adjudicator to form the basis of their decision to write the award. This mode of arbitration under 28(3) is relatively unknown or used.[46]

V ENFORCEMENT ISSUES

Will the final award written by the tribunal under Article 28(3) be enforceable under the New York Convention? This position is already considered above; where the losing party is amiable, there will be no issue as the New York Convention has already provided for this.[47] Then again, if the losing party is in another jurisdiction, there is a need to enforce the award in that jurisdiction. The problem arises only when there is a challenge as to the validity of the award. There are no statistics available on enforcement of foreign arbitration awards presented to UNCITRAL or published on this subject. Perhaps it is time to do this as part of the promotion of international trade.

It can be argued that member states have to comply under their accession to the New York Convention. The People's Republic of China is however an exception; they recognised only awards where the tribunal is seated in China itself or where the

---

42 DF Henderson and PM Torbert "Traditional Contract Law in Japan and China" <www.lfip.org/lawe506/documents/torbert.pdf>.

43 Decision 4A_240/2009, Federal Supreme Court of Switzerland, 16 Dec 2009.

44 *Louis Dreyfus SAS v Holding Tusculum BV* (2008) QCCS 5903, Supreme Court of Quebec.

45 Alexander J Belolavek, Czech (& Central Europe) *Yearbook of Arbitration* 2.08 (2013).

46 UNCITRAL "Explanatory Notes UNCITRAL Model Law on International Commercial Arbitration" para 40 p 34, 18th Session UNCITRAL Report, June 1985, Vienna.

47 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art v.

legal system is involved in the arbitration.[48] In theory, since there are elements of an enforceable contract from inception of the agreement, including the arbitration, the arbitral award that follows should be enforceable and recognized. So, just what are the parties agreeing to? Phillip Caper argued that a properly appointed arbitral tribunal is for "Unity and purity of essence in international arbitration and preservation of peace on earth".[49] If arbitration by an *amiable compositeur* tribunal is relatively unknown or used and there are no statistics available, how is international commercial arbitration to proceed in a way that is affordable and as originally intended to be an amicable and equitable proposition for "preservation of peace on earth"?

There is a need to publicize and promote this mode holistically because as argued above, this was what happened to commercial trades in the early days. International trade is an important element in the development of economies and claims dispute is part and parcel of commerce. Therefore, it follows that resolution of disputes should follow and evolve accordingly. Article 28(3) is an "unused and dusty tool" that is present in the Model Law and it is necessary to promote this as a possible option in addition to the other methods of disputes resolution.

VI CONCLUSION

The objective of this paper is meant to stimulate further discussions on reducing legal obstacles to enhance the development of the global supply chain management so as to promote trades. Cross-border trades will form the central position in the global economy when countries seek to grow their gross domestic product. However, due to political and economic changes, there will be uncertainties ahead and so it becomes necessary to establish arbitration as a mode of resolving disputes arising from the global supply chain. Resolution of disputes have to evolve to resolve.[50] The principle of a*miable compositeur* existed since the Model Law was enacted and so as international trades developed and aggressively promoted, it could be time for UNCITRAL to reuse this "dusty" tool. Is this a "blind spot" in the current arbitration regime?[51]

---

48 Xiaohong Xia, 'Implementation of the New York Convention in China, ' (2011) International Commercial Arbitration Brief 1, no 1 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1009&context=ab>.

49 Philip Caper "Arbitration: Just What are the Parties Agreeing to?" The Master Lecture (2009) Worshipful Company of Arbitrators.

50 "Evolve to Resolve" is the motto of the Chartered Institute of Arbitrator <www.ciarb.org>.

51 Robert D Argen "Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration" (2014) 40 (1) Brooklyn Journal of International Law 207.

When the turbulence of international trade is experienced in the political and economic uncertainties ahead, will this "dusty" tool become useful? We not only need confidentiality and affordability in international commercial arbitration but we also need flexibility and eliminating of rising costs to implement and the boldness to promote old rules into the arbitration regimes.