The Settlement of Commercial Disputes within the Context of International Law

The Rt Hon Lord Wilberforce, PC, CMG, OBE*

The Legal and Commercial Framework

The effective resolution of commercial disputes is becoming more and more important as international trade itself becomes more complex. Inevitable though disputes are (and there are very many of them) I would nevertheless suggest that the settlement of disputes is only a part, albeit an important part, of the general and much larger framework of commercial law. Indeed the law dealing with commerce is itself only a part of the actual practical business of trading. Within that larger framework, every country and every system of law has its own individual approach, based on its own individual culture. Such an approach is easy to accept, to understand, and—so far as the settlement of disputes is concerned—to put into practice, so long as the disputes themselves are domestic, that is, are confined to one particular state or one particular system. But in the modern world very few human relations, or legal relations, are purely domestic. Trade relations, disputes and contracts are becoming increasingly internationalised and globalised. There are now over 160 nations whose subjects may engage in international trade, involving a large diversity of legal systems. There are divergencies within systems—as for example is the case with the Anglo-American common law system, the civil law system, and the Islamic system. There remains a very broad divide between common law and civil law. In addition there is now the emergence of strongly assertive and competitive systems, of which the most important are Islamic Law (with a number of internal variations), socialist legal systems, the law of mainland China, and the law of Latin America.

Against this background, trade in itself is becoming increasingly complex. The major development contracts between developed countries and less developed countries, which have become an important part of international trade, involve very large sums. They also importantly involve long periods of time (often 10 years or so), requiring very sophisticated legal and contract procedures. The pace of development of technology also plays an important part. This development has to date largely been confined to a few industrial countries, yet its products are sought and obtained by lesser developed countries, calling for very special techniques to protect the weaker parties, whilst at the same time giving adequate rewards to the stronger. Thirdly, the financing of international trade is now being done under highly complex arrange-

*This article is based on a speech given by Lord Wilberforce to the Arab-British Chamber of Commerce, and first issued to members of the Chamber in October 1986, in Chamber Economic Report Number 20. The title of the proceedings was The Settlement of Commercial Disputes in the Arab World. The Editors wish to thank Lord Wilberforce and Sir Richard Beaumont for permission to print the text of the speech.
ments in many cases, with constant currency changes, blocking arrangements, moratoria and so on, often requiring frequent adjustments to legal obligations. And lastly amongst the factors contributing to the current state of international trade and disputes, and the one perhaps most important for the practising lawyer, is the appearance of states and state organised enterprises in the trading field. Many important contracts worldwide are now entered into by state enterprises, or by mixed public/private sector enterprises in which the state owns a controlling influence. The involvement of a sovereign state in a contract affects every stage of an international commercial transaction, from the making of the contract to the settlement of disputes and the enforcement of any such settlements.

INTERNATIONAL LEGAL SYSTEMS: THEIR SIMILARITIES AND DIFFERENCES

All disputes involve the same basic elements. There is the existence of a contract, negotiation on the contract and, in the event of things going wrong, conciliation, mediation, arbitration, litigation, and finally enforcement. It is in the acceptance and effectiveness of each of these elements that individual legal systems tend to differ. It is in my view very important that each legal system should consciously and deliberately develop its own methods and its own approach. Secondly it should have understanding and confidence in what others are doing; and thirdly it should be willing to accept solutions of any disputes, and understand the foundations on which business relationships are based, in systems which do not entirely correspond with its own conceptions. This is just as true of the developed world as of the developing world. The West has to learn to accept and to understand the procedures, feelings and cultural sentiments of the countries in which it does business.

The Western Nations

The Western legal system has always had, and still has, great confidence in litigation. Western lawyers are basically trial lawyers trained to win disputes: arbitrations or conciliation proceedings are considered in some senses as of secondary importance to court proceedings.

Western systems are nevertheless coming to see that this pure process of litigation and trial lawyers is not necessarily generally acceptable. Other states often greatly distrust court proceedings. At the same time, states or state enterprises may often be involved in commercial cases, and there is the greatest possible difficulty in bringing them before domestic courts. Moreover litigation involves very rigid procedures, both in the resolution of disputes and in subsequent enforcement.

This conflict between litigation and conciliation is producing a great deal of competition between those countries which insist on a litigatory adversarial process for settling disputes, and those willing to adapt themselves more to the views of developing countries which do not place so much trust in court proceedings. For example countries within the Eastern Bloc are much more willing (and it is to their