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Settlement of Commercial Disputes with Foreign Elements Involved in Arbitration: Legal Theories and Practice in the United Kingdom

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ESSAY

SETTLEMENT OF COMMERCIAL DISPUTES WITH FOREIGN ELEMENTS INVOLVED IN ARBITRATION: LEGAL THEORIES AND PRACTICE IN THE UNITED KINGDOM

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I. INTRODUCTION

The primary purpose of this essay is to examine the settlement of commercial disputes with foreign elements under the U.K. arbitration systems. The analysis is chiefly concerned with English arbitration since the use of private means to settle disputes between parties has long been established in England and the merits of conducting arbitration there (most notably in London) have been widely recognized by many foreign businessmen. However, this essay also includes a brief description of the system of arbitration in Scotland, which has developed differently from that in England. Two major topics are discussed: conduct of arbitration, and challenges to and enforcement of arbitral awards. While the first topic

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principally covers the reference to a dispute under a domestic arbitral system, the second one additionally contains a discussion of various aspects of foreign awards, including the relevance of international conventions to which the United Kingdom is a signatory. Among these conventions, two play the most prominent role in recognizing and enforcing foreign awards in the United Kingdom, that is, the New York Convention of 1958 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the Washington Convention of 1965 (the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States).

II. CONDUCT OF ARBITRATION

A. Choice of Proper Law

The parties to an arbitration agreement in England need not have the proceedings governed by the law of the place where the actual reference takes place. Nor are they restricted as to the choice of the seat of the arbitration. It is appropriate for parties with foreign elements involved to insert into an arbitration agreement a clause specifying their choice of law as well as the place of arbitration. An arbitration site can be any suitable venue of the parties' choice. It might be a famous permanent arbitral institution, for example, the London Court of International Arbitration, although such a choice is not mandated. In any event, resolution of the dispute is not bound by the model rules ordinarily used by the permanent arbitral body chosen as the site of arbitration. However, if an arbitration is to be held in England, it is common for the parties to select English arbitration law to govern the substance of their relationships. This enables the parties to secure the benefit of a highly developed arbitral system.

1. Application of Domestic Procedural Law

The principal legislation applicable to English arbitration is contained in the Arbitration Act 1950,[1] which, for the most part, still is the governing statute. Subsequent legislation, most notably the Arbitration Act 1975 and the Arbitration Act 1979, which consolidate the 1950 Act, also exerts some important influences.[2] The 1975 Act states that a nondomestic arbitration is one in which one or more parties are a foreign national (or a non-U.K. resident), or a corporate body "incorporated in, or whose central

1. Arbitration Act, 1950, 13 & 14 Geo. 6, ch. 27 (Eng.).
2. Arbitration Act, 1975, ch. 3 (Eng.); Arbitration Act, 1979, ch. 42 (Eng.), respectively.

management and control is exercised in, any [s]tate other than the United Kingdom."[3] The 1979 Act plays a key role in increasing the effectiveness of the arbitral procedure by limiting the right of appeal, thus ensuring the finality of the majority of arbitration awards.[4]

While the legislation applies to arbitrations deriving from valid arbitration agreements, the Acts do not embrace the whole of arbitration law, providing neither a comprehensive nor exhaustive code. In practice, many provisions of the legislation are not mandatory and might yield to specific provisions expressed to a contrary intention in the arbitration agreement drawn up by the parties to the arbitration.[5] The parties can determine their own rules of procedures, for example, what arbitral rules are to be applied, what procedure is to be followed, how to appoint arbitrator(s) and constitute a tribunal, and what powers are to be vested in the arbitrator(s) who are appointed. In these circumstances, the Arbitration Acts of 1950, 1975, and 1979 only regulate the issues in the absence of an agreement to the contrary between the parties. However, the parties' power to prescribe their own rules of procedure is not unlimited. There are certain provisions in the Acts that may not be excluded by express agreement, most of which concern the supervisory powers of the court.[6]

Under the English system, the courts always maintain a certain degree of control over commercial arbitrations. Similar to the legal system as a whole, the arbitration system is established on the basis of a marriage between statute law and judicial decisions. Part of arbitration law is to be found in judicial pronouncements, which are made in the context of principles laid down by previously decided cases. However, the passing of the 1979 Act, which more strictly limited the right of appeal to the court, has ensured that the process of arbitration enjoys a great degree of independence and finality. Although an arbitration agreement cannot oust the jurisdiction of the court, it is very rare to find a judicial intervention in a pending reference.[7] By continuing to maintain supervisory jurisdiction over a reference, the court today plays a very supportive role in the arbitral process.

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3. Arbitration Act 1975, § 1(4)(a)-(b).

4. *See* Arbitration Act 1979, pt. 1 (General Provisions), §§ 1-2.

5. *See* MICHAEL J. MUSTILL & STEWARD C. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 58, 59 (1982).

6. *See id.*

7. *See id.* at 7.

2. Application of Foreign Procedural Law

Many foreign parties bring their disputes to England, and London is one of the busiest arbitration fora in the world. To a large extent, this is due to a highly flexible system in England that does not exclude application of foreign procedural laws. Existing legislation does not contain any provision, or imply any idea, that prohibits the use of foreign laws in the course of carrying out a reference. It has been acknowledged that the parties to an arbitration may choose a law other than the law of the place where the arbitration is to be held;[8] thus, the choice of law for arbitration can vary greatly.

However, no foreign arbitration law is applicable in England. It is especially noteworthy that adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985,[9] which is commonly deemed as a set of authoritative legal principles with the object of harmonizing and unifying the law of commercial arbitration on a worldwide basis, has been rejected in England. This rejection was mainly based on the opinion of the Mustill Committee (the Departmental Advisory Committee on Arbitration) in 1989 that the UNCITRAL Model Law was not suitable for English arbitrations on the ground that England should stick to its own arbitration system.[10]

Many foreign parties feel that the English arbitration system is attractive because once they indicate the choice of law in advance, they can avoid being governed by a law to which the parties are not accustomed. Consequently, their disputes can be settled following procedures with which the parties are already familiar. However, using a foreign arbitration law potentially has shortcomings. Foreign parties should pay special attention to the degree to which an English court will recognize and enforce the foreign law selected. Otherwise, it would be much safer to adopt domestic procedural law while conducting the reference in England.

B. Nature of an Arbitration Agreement

Section 32 of the 1950 Act defines an "arbitration agreement" as "a written agreement to submit present or future differences to arbitration."[11]

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8. *See id.* at 61.

9. UNCITRAL, Model Law on International Commercial Arbitration of 1985, U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, at 81-93, U.N. Doc. A/40/17, 24 I.L.M. 1302 (1985) [hereinafter Model Law].

10. *See* ARBITRATION LAW ch. 1, at 17-19 (Service Issue Guide No.7, Lloyd's of London Press Ltd. 1993).

11. Arbitration Act 1950, pt. 1, § 32

The agreement is usually a fairly detailed document, dealing with issues such as the constitution of the arbitral tribunal, procedures to be followed, matters to be decided, and how an award is finally given.

An arbitration agreement is indispensable to a successful settlement of commercial disputes. It is evidence of the consent of the parties to have their differences resolved through arbitration, thus establishing a binding contractual obligation between them. Moreover, an arbitration agreement outlines the authority of the tribunal, which, in principle, may only exercise such powers as the parties confer upon it.

The existence of an arbitration agreement provides the rationale for a court to decline to exercise its jurisdiction. If one party to an arbitration agreement commences legal proceedings in the court against the other party in breach of their agreement, the latter party may apply to have the court action stayed on the ground that a valid arbitration agreement exists between the parties and will be binding upon both parties. The 1950 Act places a mandatory obligation upon the court to stay proceedings wrongly brought in the court under certain circumstances. Under part 1, section 4, the court will grant a stay if it does not think that there is a good reason why the dispute should not be referred to arbitration.[12]

Where an arbitration agreement forms an integral part of an original commercial contract (that is, the main contract) between the parties, the obligation to arbitrate is treated as having a life of its own. The arbitration agreement is severable from the main contract and capable of surviving alone, giving the arbitrator continuing jurisdiction over not only disputes arising from events happening when the contract is still operational but also disputes arising after the contract has come to an end.[13] In practice, it is important that this autonomy survive the termination of the main contract, since the arbitration agreement is the base on which the arbitration is founded, and without it there can be no valid arbitration.

The kind of dispute that can be referred to arbitration depends primarily upon the wording of the agreement, which is subject to the parties' particular needs and should be decided in advance. While the scope can be quite wide, the parties may not have all their differences settled by arbitration. In the event that the scope needs to be limited, certain general rules have to be considered by the parties, and the types of dispute that fall within this scope must be spelled out in the agreement.

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12. *See id.* § 4.
13. *See* MUSTILL & BOYD, *supra* note 5, at 8.

C. Composition of a Tribunal

A tribunal for an arbitration can be constituted in a number of different ways. While a common arrangement is for each party to appoint his or her own arbitrator, arbitration can begin with the appointment of a sole arbitrator or more than two arbitrators, depending upon the wording of the arbitration agreement. Appointment also can be made by the court if either party fails to do so or mutual consent to the appointment fails. Furthermore, in the event of the two arbitrators failing to make a unanimous award, an umpire will be appointed, either by the parties or by the court, to make the ultimate decision.

English arbitration law says little about what kind of formal qualifications an arbitrator should possess. However, in practice, a validly appointed arbitrator must meet the requirements set forth by the arbitration agreement, and the law in turn enforces any such express agreement regarding the required qualifications.[14] More importantly, an arbitrator should not have any relationship with either of the parties or any connection with the arbitration dispute so that there can be no ground of objection based on the lack of impartiality of the arbitrator.[15]

1. Sole Arbitrator

Referring a dispute to a sole arbitrator has obvious advantages: speed and economy. Under the 1950 Arbitration Act, appointing a sole arbitrator is available to either of the parties to the agreement or the court in certain instances. The most usual basis for appointment of a sole arbitrator is agreement by the parties to the dispute.[16] Also, where the agreement provides for two arbitrators, with one to be appointed by each party, if one party fails to select an arbitrator "for seven clear days" after the other party has appointed an arbitrator, the other party may appoint their own nominee as sole arbitrator.[17]

The court usually exercises its authority when the parties fail to agree on the appointment of a sole arbitrator.[18] Moreover, under section 25(2),

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14. *See id.* at 11.

15. *See id.* at 212.

16. Under section 6, in the event that the agreement is silent as to the constitution of the tribunal, "[u]nless a contrary intention is expressed therein, every arbitration agreement shall . . . be deemed to include a provision that the reference shall be to a single arbitrator." Arbitration Act, 1950, § 6.

17. Arbitration Act 1950, pt. 1, § 7(b).

18. By virtue of section 10(1)(a), "where the agreement [requires a reference] to a single arbitrator, and all the parties do not . . . concur in the appointment of an arbitrator, the court has

appointment of a sole arbitrator can be made by the court when the authority of the arbitrators is revoked or the arbitrators are removed for some reason, even if the tribunal originally had more than one member.[19] Also, according to section 8(3), "[a]t any time after the appointment of an umpire, . . . the [court] may, on the application of any party to the reference . . . , order that the umpire shall enter upon the reference" as the sole arbitrator in place of the existing tribunal.[20]

2. Two or More Arbitrators

Until the 1979 Act came into effect, a three-arbitrator tribunal was unusual in English procedure because of section 9(1) of the 1950 Act (unamended). This section provided for one arbitrator to be appointed by each party and the third to be appointed by the two nominated arbitrators. So, in effect, the reference was supposed to be to a tribunal consisting of two arbitrators and an umpire. Under the 1979 Act, however, an arbitration agreement now takes effect as a reference to three arbitrators. The award of any two is binding unless the agreement provides otherwise.[21]

A commercial arbitration conducted by a tribunal of two or three arbitrators is undoubtedly more costly than one conducted by a single arbitrator. It also generally takes longer to obtain an award. However, a tribunal of two or three arbitrators can be very effective in practice, since it is likely to prove more satisfactory to all of the parties and the ultimate award is more likely to be acceptable.

A reference to two arbitrators usually involves a tribunal consisting of two members, one appointed by each party, or sometimes three members, with the additional member serving as an umpire. The case is decided by the two arbitrators, or by the umpire if the two arbitrators cannot agree. Under section 6(1) of the 1979 Act, unless there is an express contrary intention, "every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they cannot agree [on a mutual award]."[22] In the event that the parties who are required to appoint an umpire fail to do so, the court has the power to make such an appointment

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power to make the appointment on their behalf." *Id.* § 10(1)(a).

19. *See id.* § 25(2).

20. *Id.* § 8(3).

21. *See* Arbitration Act 1979, § 6(2), *amending* Arbitration Act 1950, § 9(1).

22. *Id.* § 6(1), *amending* Arbitration Act 1950, pt. 1, § 8(1).

on their behalf.[23]

A reference to three arbitrators is not the same as a reference to a two-arbitrator panel plus an umpire. Here the third member is appointed as an additional arbitrator. A third arbitrator sits with the other two arbitrators and has an equal voice in the reference, whereas an umpire merely sits with the arbitrators in a nonvoting capacity until they fail to agree in the proceedings. The court may appoint a third arbitrator under section 10(1)(c) of the 1950 Act, "where the parties or the two arbitrators are required or are at liberty" to make this appointment but fail to do so.[24]

3. Removal of an Arbitrator or Umpire

Removal of an arbitrator or umpire might be sought by the parties in consideration of their own interests, thus leaving open the possibility of having a new arbitrator as an alternate or an umpire appointed to conduct the reference. Any party may apply to the court for removal of an arbitrator or umpire "who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award."[25] The court also may remove an arbitrator or umpire who has "misconducted himself or the proceedings."[26] Misconduct can have a broad meaning, including conduct that makes the proceedings contrary to the natural justice.[27] In practice, however, it is normally at the discretion of the court to decide whether an action is considered as a misconduct.[28]

D. General Course of Reference

Arbitrators are entitled to adopt whatever procedure they think fit, provided that the procedures are not contrary to the express or implied terms contained in the arbitration agreement. Due to the existence of a large variety of specialized arbitrations, it is difficult to compose a list of requirements that are fundamental to all references. However, as a general rule, an arbitration should be conducted judicially, in accordance with a common law adversarial procedure rather than an inquisitorial approach.[29] Under such a procedure, the arbitrator seeks out the truth by choosing between the two alternative versions of the case forwarded by each party.

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23. *See* Arbitration Act 1950, pt. 1, § 10(1)(c).
24. *Id.*
25. *Id.* § 13(3).
26. *Id.* § 23(1).
27. *See* JOHN PARRIS, ARBITRATION PRINCIPLES AND PRACTICE 173-74 (1983).
28. *See id.*
29. *See id.* at 261.

These versions must be fully presented and tested.

Under section 12(1) of the 1950 Act, unless a contrary intention is expressed, every arbitration agreement is deemed to contain a provision that the parties to the reference will "submit to be examined by the arbitrator or umpire, on oath or affirmation, in relation to matters in dispute, . . . produce . . . all documents in their possession [to be disclosed], and do all other things which during the proceedings on the reference the arbitrator or umpire may require."[30] In these circumstances, each party is given the same opportunity to put forward their own case and test that of the other party. It is in each party's interest to comply with any procedural order made by the arbitrator. While an arbitrator does not have the same powers as a judge in imposing penalties and sanctions for noncompliance, an arbitrator does have the right to apply to the court for a continuation of the reference due to the default of one party in failing to abide by the order.[31]

The arbitrator may conduct a hearing and decide how the case shall be heard. While a hearing is not a compulsory step in a valid reference,[32] if it is initiated, the usual practice is to follow the procedure of an ordinary action in court, that is, the plaintiff in such an action corresponds to the claimant in an arbitration and the defendant corresponds to the respondent in an arbitration. Also, under sections 12(2) through 12(3) of the 1950 Act, an arbitrator has the authority to examine on oath or affirmation the witnesses in the reference whenever the arbitrator "thinks fit."[33] However, arbitrators are not compelled to do so unless the agreement so stipulates.

III. ARBITRATION AWARDS

A. Challenge of an Award

Although the purpose of arbitration is to achieve a binding determination for settling disputes, there is always a winner and a loser. An award that is supposed to be final for both parties, in practice, sometimes proves not to be so. Rarely does each side emerge completely satisfied with the award. An award can be challenged in the hope that it will be set aside or at least amended.

In England, the most effective method of challenge is by appeal to the court for varying or setting aside the award, or remitting it to the tribunal

30. Arbitration Act 1950, pt. 1, § 12(1).
31. *See* Arbitration Act 1979, §§ 5(1)-(2).
32. *See* PARRIS, *supra* note 27, at 94.
33. Arbitration Act 1950, pt. 1, § 12(1)-(3).

for reconsideration. The appellate system ensures a degree of judicial control over the decisions of arbitration tribunals, and an award that proves to be in clear violation of the law can be corrected in due course. However, under this system, the essential purpose of arbitration, that is, low cost, privacy, speed, and above all finality, will unavoidably be at risk. Possibly due to this reason, the right of appeal is strictly limited by the 1979 Act. Parties who favor finality of awards may contract out of any right of appeal to the court by entering into an exclusion agreement after the commencement of the arbitration.

The English court normally maintains a measure of supervision over how an arbitral award is finally granted. Under the 1979 Act, on the determination of the appeal, the court may by order "confirm, vary, or set aside the award."[34] The court may "remit the award to the reconsideration of the arbitrator or umpire together with the court's opinion," in which case the arbitrator or umpire must make the award within three months after the date of the order unless the order otherwise directs.[35]

An appeal may be brought by one party either with the consent of the other or with the leave of the court.[36] However, if one of the parties is satisfied with the award and will not consent to an appeal, the party wishing to appeal must persuade the court to grant leave for the appeal to be filed. Under the terms of section 1(4), the court must not grant leave for an appeal unless it thinks that, considering all the circumstances, the determination of any question of law arising out of the award could substantially affect at least one party's right.[37] Additionally, the court may make the leave to appeal conditional to the applicant's compliance with any stipulations as the court thinks appropriate.[38]

Parties to an arbitration held in England are allowed to contract out of the right of appeal on questions of law by means of an exclusion agreement.[39] Such a waiver enables the parties to avoid long and expensive proceedings in the court. And more importantly, leaving out the right of appeal is compatible with the increasing recognition of the autonomy of the arbitral process and the finality of awards.

However, section 3(6) of the 1979 Act further provides that an exclusion agreement will not be binding on an award or a question of law unless the agreement is entered into after the arbitration in question has

34. Arbitration Act 1979, § 1(2)(a).
35. *Id.* § 1(2)(b).
36. *See id.* § 1(3)(a)-(b).
37. *See id.* § 1(4).
38. *See id.*
39. *See id.* § 3(1).

begun.[40] The aim of this provision is to prevent one party from taking advantage of the other in the course of negotiating and executing the main contract. This is likely to happen if the benefits of court protection are actually needed but are given up too early.

B. Enforcement of an Award

While a losing party might wish to challenge an award, the winning party might be equally desirous of having the award legally enforced. There is a distinction between enforcement in England of a domestic award in which the arbitration takes place in England and enforcement of a foreign award that was made outside England in which local recognition and enforcement are sought. Enforcement of a domestic award is relatively simple, and the successful party may invoke the assistance of the court in obtaining a judgement or order on which the party can levy execution. Enforcement of a foreign award in England is more complicated, because the award is often additionally governed by the relevant obligations incurred under the international treaties to which the United Kingdom is a party.

The New York Convention of 1958[41] is the most important treaty of modern times regarding international commercial arbitration. The Arbitration Act 1975 gives effect to the treaty, with section 3(1) providing for the enforcement in England of foreign awards made in its context either by action or in the same manner as a local award is enforced under section 26 of the 1950 Act.[42] Also, the Arbitration (International Investment Disputes) Act 1966[43] gives effect in the United Kingdom to the Washington Convention of 1965.[44] These treaties have had an important effect upon uniformity in the recognition and enforcement of foreign awards among their signatories, including the United Kingdom.

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40. *See id.* § 3(6).

41. *See* U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 46 (1986).

42. *See* Arbitration Act 1975, ch. 3, § 3(1) (Eng.).

43. Arbitration (International Investment Disputes) Act 1966, ch. 41 (Eng.).

44. International Centre for Settlement of Investment Disputes (ICSID), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, Doc. No. ICSID/2, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter Washington Convention].

1. Removal of Protection Under Sovereign Immunity

It is important for foreign investors to take into consideration the English law of foreign sovereign immunity, which is codified in the State Immunity Act 1978.[45] This is particularly relevant if foreign investors intend to operate in the capacity of state enterprises directly owned by their governments. Their commercial activities will not be immune from lawsuits because the state-owned nature of these activities does not entitle foreign investors to immunity. This position on foreign state enterprises is likely to be most important so far as enforcement of arbitral awards is concerned. It would be imprudent for a foreign party, on the ground of its special relationship with its own government, to refuse to accept an English court's enforcement of an award against it.

Application of sovereign immunity to commercial transactions is prohibited by the State Immunity Act. Under section 14(2), while the central government of a foreign state is entitled to immunity from legal actions in the United Kingdom, an entity owned by that state is not entitled to such immunity.[46] Moreover, section 9 provides that where a state has agreed in writing to submit a dispute to arbitration, the state is not immune from proceedings in the courts of the United Kingdom relating to the arbitration concerned.[47] This provision therefore strengthens the enforcement powers conferred upon the English courts in respect to not only domestic awards resulting from references in England but also foreign awards obtained overseas.

2. Enforcement of Domestic Awards

There are usually two ways in which a judgement or court order of enforcement can be obtained on a domestic award, that is, by an action on the award, or by an application made by the winning party under section 26 of the 1950 Arbitration Act.[48] The action may take different forms. It is possible to bring an action in the court to obtain judgement for a sum of money, or to acquire specific performance or an injunction to prevent an act from being done, or to sue for a declaration that the award is binding.[49] Under these circumstances, the plaintiff must satisfy the court that there is a valid arbitration agreement in existence and that the award secured is in line with the terms of the agreement.

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45. State Immunity Act, 1978, ch. 33 (Eng.).
46. *See id.* § 14(2).
47. *See id.* § 9.
48. *See* Arbitration Act 1950, pt. 1, § 26.
49. *See* MUSTILL & BOYD, *supra* note 5, at 368-69.

Alternatively, the winning party may apply to the court to obtain an order permitting the enforcement of the award as a judgement in the context of section 26 of the 1950 Act.[50] An application under section 26 definitely provides a quicker and cheaper remedy than bringing an action on an award. However, it is worth noting that section 26 can only be appealed in cases of a rather simple nature, and it is not suitable where an objection is taken to an award that cannot properly be disregarded without a formal trial.

Where the property of the losing party is located outside England, an award enforcement will inevitably require judicial assistance from the relevant foreign court. This court will be entrusted by the English court to execute against the property of the losing party. This judicial assistance is normally based on the international agreements that the United Kingdom has signed. Both an English court and a foreign court may mandate each other to pursue certain legal actions on each other's behalf.

3. Enforcement of Foreign Awards

Many foreign investors would like to have disputes incurred in England settled by arbitration in a country outside England, for example, in a neutral country without a connection with any of the parties to the arbitration agreements. Enforcement of a foreign arbitral award is of particular significance to the winning party, especially when the assets of the losing party are located in England. In practice, if a foreign award is enforced, it is necessarily recognized by the court, which orders its enforcement as valid and binding upon the parties to it. Recognition is an integral part of enforcement, and so far as a foreign award is concerned, enforcement and recognition are always inextricably linked.

Procedures for enforcing foreign awards are the same as those for enforcing domestic awards made by English arbitrators, either by a cause of action on the award or by an application under section 26 of the 1950 Act.[51] The conditions to be met before a foreign award is enforced depend on whether the award is being enforced at common law by a cause of action or under section 26, or under any international convention to which the United Kingdom is a signatory. In the latter case, the foreign court in question must request judicial assistance from the English court that will

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50. *See* Arbitration Act 1950, pt. 1, § 26(1). Under this section, "[a]n award on an arbitration agreement may, by leave of the [court], be enforced in the same manner as a judgement or order to the same effect, and where leave is so given, judgment may be entered in terms of the award." *Id.* § 36.

51. *See* PARRIS, *supra* note 27, at 159.

enforce the award on its behalf.

IV. THE SYSTEM OF ARBITRATION IN SCOTLAND

The system of arbitration in Scotland has developed differently than the system in England. For example, Scotland adopted the UNCITRAL Model Law on International Commercial Arbitration through section 66 and schedule 7 of the Scottish Law Reform Act 1990.[52] The Model Law, as amended for the purpose of functioning more properly in the Scottish context, applies to international commercial arbitrations held in Scotland. It provides in an easily accessible form a code for resolving commercial disputes by means of arbitration with the aim of promoting compliance with the unification and the harmonization of international common practices. The Model Law emphasizes party autonomy, with a top priority placed on the agreement of the parties. It is up to the parties to the arbitration to decide the number and appointment of the arbitrators, the place and language of the arbitration, the rules governing the substance of the dispute, the formalities for conducting the reference, and the procedures for challenging awards. The court, in reality, generally has a supportive rather than interfering role in the arbitral process. The reception of the Model Law into Scots law is of the utmost significance as it creates a special legal regime for the conduct of international commercial arbitration, thus significantly improving the attractiveness of Scotland as a convenient forum for arbitration.

However, the Model Law is not a comprehensive law, and a number of matters in connection with arbitration will continue to be governed by current Scottish law, for example, the Arbitration (Scotland) Act 1894,[53] the Administration of Justice (Scotland) Act 1972,[54] and the relevant common law of Scotland. Moreover, since Scotland is not an independent state but part of the United Kingdom, the major treaty obligations of the United Kingdom, for example, the New York Convention of 1958, the Washington Convention of 1965, and other international treaties for the reciprocal enforcement of judgements founded on arbitral awards, in appropriate circumstances, might have the effect of overriding the provisions in the Model Law applied in Scotland.

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52. Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, ch. 40, § 66; *id.* sch. 7.
53. Arbitration (Scotland) Act 1894, 57 & 58 Vict., ch. 13 (U.K.).
54. Administration of Justice (Scotland) Act 1972, ch. 59 (U.K.).

V. CONCLUSION

Even in the best of circumstances, commercial disputes inevitably will arise in the interpretation and implementation of business commitments that already have been undertaken. Foreign business people are most concerned with the availability of adequate facilities in the relevant country for solving swiftly, efficiently, and as inexpensively as possible, any differences that might arise in the course of a transaction. Arbitration has distinct advantages when compared to conciliation and litigation, two other independent methods. Arbitration is perceived as the most popular alternative for settling international commercial disputes. First, arbitration takes a consensual commercial approach to the solution of problems, and therefore, it is more dependable than conciliation, which merely pursues compromise with the remote possibility of achieving justice. Second, rather than having to commence an action in court, parties generally may refer their dispute to less lengthy and costly proceedings through a tribunal sitting in private sessions. In addition, unwanted publicity can be avoided.

In the United Kingdom, the agreement to arbitrate is the foundation of commercial arbitration. Foreign business people, for the most part, are free to choose their own way of arbitration, provided that all the relating issues are reasonably specified in the agreement beforehand. The rules that govern the conduct of arbitration under English law are derived from a marriage between statutory, that is, the Arbitration Acts of 1950, 1975, and 1979, and common law, which is applied in the form of judicial decisions in terms of English doctrines of precedent, along with the express agreement of the parties. While arbitration, within the meaning of the Acts, should normally be based on an agreement in writing and be subject to limits imposed by the Acts on the power of the parties to prescribe their own rules, the parties may opt for the place of arbitration, the procedure to be followed, the powers to be vested in the arbitrators, and the type of tribunal in particular circumstances. An arbitration agreement cannot oust the jurisdiction of the court. In reality, however, the court merely provides a supporting rather than an interfering role. The court's powers to complement the arbitral process in the context of the common law are largely governed by the Acts and may only be used in the absence of codes in the Acts and an agreement between the parties.

While courts have no general powers to intervene in a pending reference, they may do so after an award has been given. Therefore, a challenge of an arbitral award can be made by appealing to the courts for judicial review. Both domestic and foreign awards can be enforced in England by bringing an action in court or taking the shape of an order for summary relief under section 26 of the 1950 Act. Recognition and enforcement of foreign awards may additionally be based on provisions in the relevant international treaties,

principally the New York Convention of 1958 and the Washington Convention of 1965.