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DISSERTATION

INTERNATIONAL COMMERCIAL DISPUTE SETTLEMENT

A COMPARATIVE APPROACH

(A dissertation on Arbitration)

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PREFACE

As a first attempt on writing a mere hundred pages or more on this interesting subject of international trade and law, my humble endeavours may not be at par with the other works of great international law writers such as Starke, Brownlie, Lanterpacht and Abdul Razzak Sanhury. Happy just to be an avid reader of international law in the shadows of such great writers, I have attempted in this dissertation, a humble effort to put side by side the approaches of arbitration between western and Islamic law.

Contrary to popular belief, International Law in Islam has been developing at a gradual but encouraging pace but alas, not in absoluteness of following pure Islamic ideals. This dissertation is an attempt to encourage the improvisation of arbitral proceedings and awards enforcement. The placing side by side of both western and Islamic arbitral principles and procedures is intentional and for the purpose of extracting the weaknesses of each system, eventually proposing innovations, if possible, to that matter at hand.

My special gratitude therefore to God for inspiring into me this interest of researching arbitral systems of both Islamic and Western (secular) perspectives, in search for innovative ways to enhance the practice of arbitration in international commercial dispute settlement. To my supervisor and guardian Dr. Shokry El-Dakkak, my warm thanks for his ever encouraging words to me, to pursue this research.

Sister Wanny from the Faculty office typed various drafts of this dissertation with admirable patience, but mostly, her reasonable charges for the service, is worth mentioning as well.

TO

LING YOUNG TUEN

A Legal Inspiration

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INTRODUCTION

Arbitration, and the law governing it have developed and is still evolving to new and more advance procedures, so as to upkeep with the changing national as well as international scenes of commerce and other transactions.

The sources for arbitration thus have emanated not only from traditional or customary sources but from newly established commercial practices vis-a-vis technological advancement in the commercial sectors. Flowing from the introduction of new sources for arbitration the procedures too were innovated to adapt to the shifts aforestated. A formal or standardized procedure although in some cases have been codified, lent very little assistance in times of parties unacceptability to the procedures; thus structuring their own arbitration agreement as to the procedures, law applicable and nature of disputes to be arbitrated. In most cases or events, it made the codified arbitral rules and procedures repugnant or outdated.

Parties to a dispute have always placed special reliance on arbitration settlement rather than judicial process due to its speedy, cheaper and agreeable terms in settling disputes. In the commercial sectors especially in the international arena, the reliance on arbitration saves costs as well as industrial survival, since the more time spent on litigating for dispute settlement would mean more money spent or alternatives/opportunities forgone for growth.

It is at this point of importance that the need for a more acceptable form of arbitral procedures and implements, should be heeded and undertaken in order to enact not formal or standardized rules and procedures but common and acceptable principles and basis applicable to all forms of arbitration, national and/or inter-national.

Empirically, we have observed or may have already known that the laws governing arbitration are derived from sources of civil or secular nature, and the distinctly Islamic or divine nature. The reception of both sources from each derivation are quite similar, since both have the same or relative procedures and requirements of arbitral rules. Nonetheless the effects or consequential awards from each may differ, as the circumstances and processing for the eventual awards is distinctly arrived at by each system.

In the eventual stages of this discussion and comparison of both approaches of arbitration i.e. in civil and Islamic perspectives, we would be able to contemplate and to an extent indicate which approach is more feasible in its applicability in terms of effectiveness, cost-saving and speed of dispute settlement.

It is therefore imperative to take due attention, that the arbitration method (from whatever system of law or agreed norms) has primacy over any legislative approach, because, firstly, the parties affected have a direct involvement in formulating the procedures to be followed by the arbitrators; secondly, the parties themselves in consensus choose the arbitrator; and thirdly, the final awards, if made in accordance with the parties prescription, are most likely to be enforced, as the losing party rarely puts aside a verdict for which it has given its consent. Yet with astonishing regularity, international contracts contain defective dispute resolution clauses including arbitration as a means to "end" the dispute.

The emergence of alternative dispute resolutions other than arbitration, such as conciliation and mediation, were sometimes favoured but to certain extent shunned, because of its non-permanency nature in full and complete settlement of the dispute. The binding authority of the award in arbitration proceedings, outclassed the non-effectiveness of the conciliatory and mediatory "promises" made by the parties in dispute.

The compromis, which is often accepted than appealed or objected has a greater attraction than the award since the latter would indicate the award giver's guilt or breach.

An international arbitration proceeding thus have a self-contained character to keep it within reasonable reach, to all parties in dispute. In international commerce, the differences in trading and commercial regulations have often left one party to an international contract in limbo as to which international rules of commerce it should resort to, especially if it involved a non-capitalistic economy state or relatively, an Islamic State. In resorting to arbitration, the means may lead to no ending as both parties should agree on the procedures and arbitrators chosen in the settlement. This could not be achieved if the parties came from distinct systems of law. The resort to the International Court of Justice may also be undesirable as the process may take a longer time, and without adequate assurance of effective enforceability of the decision on the guilty party.

In addition, and lamentable to say, the right of objection and appeal from arbitration awards and compromis, have made arbitration proceedings of no great difference from judicial proceedings except for the submission of the parties in dispute to the jurisdiction of the court's or arbitrator's authority.

There is much to be done than said about the states' acceptability of the awards from the arbitrators. In some unethical instances, the party ordered to furnish the award would blatantly object the award in toto or appeal to the appellate division of the arbitration authority for a review or setting aside of the award or compromis.

The aim of arbitration in international commerce is thus left unfulfilled and in repugnance; making international commercial transaction more difficult and restricted. The ideal concept of free trade would be utopian if the disputes in such transactions is left uncured.

The scope of this dissertation is limited to arbitration procedures and matters regarding international commerce as this is the predominant issues of dispute put forth in international arbitration. Commercial disputes are, and should be, strictly legal disputes. Other disputes which is international in nature would be presumed as political or politically-based disputes.

The discussions emanated from the issues involved shall be directed at an objective of introducing or putting forward an ideal form of arbitral principles and concept which may be adopted by parties in dispute, regardless of their nationality, legal system or belief. This ideal should thus invoke anticipation of traditionally assumed advantages of arbitration: privacy, simplicity, informality, and thus, speed.

CHAPTER 1

DEFINITIONS AND CONCEPTS

Arbitration, generally, means the determination of a dispute by an arbitrator or arbitrators, who in case of difference usually call in an empire to decide between them. The arbitrator, should be a disinterested person, to whose judgement and decision matters in dispute are referred. Generally too, almost all matters are referred. Generally too, almost all matters in dispute, not being of a criminal nature, may be referred to arbitration.

1.1. INTERNATIONAL LAW

1.1.1. Arbitration

The meaning of arbitration in international law is basically similar to that of the general meaning abovestated.

Specifically, arbitration in international commercial disputes means an agreement (by the parties) to submit to arbitration i.e. the parties have agreed to have their differences determined other than by a court of law (I.C.T), but does not even suggest whether the court they have chosen for themselves shall consist of one member or more.

In all events, the form of arbitration and the regulation of the proceedings are within the exclusive control of the parties.[2]

Stroud's Judicial Dictionary, 4th ed. 1976.

TEKLEWOLD GEBREHANA. Arbitration. An element of International Law. Almquist & Wiksell International Stockholm, Sweden (1984) at p.25.

Arbitration have also been coined as "the most civilized method" of settling a dispute.[3] The meeting of parties to a dispute for a resolution and settlement of the same would be impossible indeed without consensual agreement to formulate a common or compromising rules and regulations of the proceedings to be set up, and chaired by an authoritative and impartial arbitrator or arbitrators. In international arbitration proceeding, the procedures and formalities formulated would be in the nature of a mixed juridical institution, sui generis, which has its origin in the parties agreement and draws its jurisdictional effects from the civil law.[4]

At times, arbitration is constructed to be a method confined to a private jurisdiction by which litigations are withdrawn from the public jurisdictions, in order to be resolved by individuals, vested for a given case, with the power to judge such litigations.[5]

The exclusiveness of such litigation ensured privacy, a most important element in inter-state litigation and dispute settlement.

Difference between Arbitration, Conciliation and Mediation.

It is imperative at this point to note the distinction between arbitration and the other alternative resort of dispute settlement. The unaware reader of international law would easily be confounded by the close similarity of conciliation and mediation with arbitration.

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3 GODWIN. The Law and Practice of Arbitration (1974) at p.1.

4 supra n.2. at p.26.

5 supra n.3 at pp. 11-12.

What is Conciliation?

Conciliation is an institution not far removed from arbitration, but certainly quite different from it in law. Vast literatures[6] available for conciliation describe this well-known system as an attempt by a third party, designated by the litigants, to reconcile them either before they resort to litigation (whether to court or arbitration), or after. This is generally based on showing each side the aspects of the dispute contrary to it, in order to reach a solution, which will generally be found between the positions of the two parties.

The traditional conciliation is usually a presentation of the merits of the dispute, which are certainly undisputed when the parties are persuaded to become more reasonable. Definitely in the same aspect, when the parties are unreasonable, the resort to litigation shall be contemplated and acted by one or both parties. The essential objective and primary concern of conciliation is therefore to bring socially the disputing parties to reasonableness.

The importance of conciliation before any arbitration is greatly emphasized in most Arbitration Conventions. The Washington Convention of 1965[8] in special regards to Articles 34 and 35 stipulated for a settling up of a conciliation committee or commission.

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6 V. FOX Conciliation. International Disputes : The Legal Aspects, London (1972); SINGER, The Use of Conciliation for Dispute Settlement, in General Reports to the 10th International Congress of Comparative Law, Budapest, Akademia; Kiado, 1981; HAMZEH, International Conciliation Amsterdam 1964; HOLTZMANN, Conciliation : A Promising Procedure for Resolving Multi-party Disputes, Report submitted to the ICCA Interim Meeting, Warsaw, 1980.

7 MAURO R.S., International Arbitration Law, Kluwer Law and Taxation Publishers, Deventer Boston, 1990 at p.3.

8 Convention for the Settlement of Disputes Concerning Investments between States and Nationals of Other States, Washington, March 18, 1965. NB-88 countries had ratified this convention by June 1986.

As regards to Article 34(1) of the above Convention, the duty of the commission is to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. Cooperation from the parties is expected in regards to the recommendations of the commission of possible terms of settlement. The closure of the proceedings would be signified by the drawing up of a report regarding the parties failure to negotiate or the recording of any agreement reached by the same parties.

Article 35 stipulated that parties to a dispute in a conciliation proceedings shall be estopped from invoking or relying on any views expressed or statements or admissions or offers of settlement made by any one party, or the report or any recommendation made by the commission.

The conciliator is given vast powers to conduct the conciliation process as he thinks fit.[9] This should be guided by the principles of impartiality, equity and justice. The submissions from the parties in dispute could be requested by the conciliator when any additional information is necessary.

Conciliation is thus encouraged and regarded as an essential and preventive step against inter-state (party) litigation. Some arbitration bodies formulated rules and regulations of arbitration inclusive of clauses regarding conciliation, taken as a separate preliminary proceeding.[10]

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[9] Article 5 of the International Chamber of Commerce, Conciliation and Arbitration Rules (effective January 1st 1988).

[10] Inter-American Commercial Arbitration Commission (IACAC); Milan Court of Arbitration, Title I Conciliatory Proceedings. Arts. 12-17; Euro-Arab Chamber of Commerce, Rules of Conciliation, Arbitration and Expertise. Arts 12-18, amongst others.

What is Mediation?

The purpose of a conciliator (in conciliation) is to persuade both parties to realize the benefits obtainable as an alternative to court or judicial settlement in terms of convenience and expedition. The mediator or viz mediation, have a more purposive aim of making each party to waive part of his claim in order to reach a settlement through an aliquid datum and an aliquid retentum i.e. giving up part claims in exchange of receiving the rest.[11]

In actual fact, there is only an artificial difference between conciliation and mediation. Mediation seemed to be much closer to the concept of arbitration but with the exclusion of formal agreement between the disputing parties as to the rules and regulations of such situation. The mediator often have the identical role of the arbitrator but in similarity to the role of the conciliator, both the former and latter played common roles of bringing the disputing parties together to submit to a nominated independent third party for preliminary negotiations before any litigationary resort.

The slight difference in terminology between mediation and conciliation explained the reason of the absence of provisions regarding mediation in international arbitration conventions.

Commentary

Thus, from the careful explanation of the above terminologies between conciliation and mediation vis-a-vis arbitration, a line of distinction could be drawn to assist towards the proper understanding of what amounts to arbitration and not otherwise. The distinction drawn between them is thus necessary and intentionally done.

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11 supra n.7 at p.6.

1.1.2. Arbitrators

Arbitrators are nominated third parties in a dispute in commercial arbitration, arbitrators are nominated to be an umpire in deciding a resolution.

In civil law however, there is a difference between an arbiter and an arbitrator. Though both find their power in the compromise of the parties, an arbiter is obliged to judge according to the customs of the law : whereas an arbitrator is at liberty to use his own discretion, and accommodate the difference in that manner which appear most just and equitable.[12]

At this juncture, it should be noted that there is no confusion as to the quality of an arbitrator who should be a disinterested person, indifferent between the disputants, incorrupt and impartial. He should thus be the final judge of law and fact and bound by the rules and regulations formulated in the arbitration agreement and cannot award anything contrary thereto.

In commercial practices, nationally or internationally, arbitrators may be appointed for each disputant as advocates, unless the parties otherwise desire.[13] The numbers of arbitrators may vary from one to more in a tribunal as the case may be.

In so far as the selection of the arbitrators are concerned, the criteria for the said nomination are frequently not stated by the parties. Arbitration clauses in an international agreement may have only the aspects of the nationality or residence of the arbitrators to be chosen but this need not be necessary if the arbitration proceedings are to be held in international arbitration centres or institutions where there are appointed or residing arbitrators who may be of the same nationality of one

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12 supra n.1.

13 French Government v. Tsurushima Maru (1921) 37 T.L.R 961.

of the parties. In all events anyhow, the sole arbitrator or the chairman of the arbitral tribunal shall be chosen from a country other than those of which the parties are national.[14]

More provisions as to the selective criteria of an arbitrator could be observed in the following states and its rules :-

United Kingdom

'....In selecting arbitrators consideration will be given, so far as possible, to the nature of the contract, the nature and circumstances of the dispute and the nationality, location and languages of the parties. Where the parties are of different nationalities then, unless they have agreed otherwise, sole arbitrators or chairmen are not to be appointed if they have the same nationality of any party...'[15]

United States

'Where the parties are nationals or residents of different countries, any neutral arbitrator shall, on the request of either party be appointed from among the nationals of a country other than that of any of the parties.'[16]

Italy

'The Arbitral Council shall choose arbitrators in such a way as to guarantee maximum independence and impartiality. Moreover, in the case of a sole arbitrator or chairman of an arbitral tribunal, the Arbitral Council shall, if the parties are not of the same nationality, appoint a person who has a

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14 Art. 2, para 6, ICC Rules of Conciliation and Arbitration.

15 Art. 33, Rules of the London Court of International Arbitration.

16 Art. 16, Commercial Arbitration Rules. American Arbitration Association.

different nationality from that of each of the parties.'[17]

India

'A Panel of Arbitrators shall be appointed by the committee from amongst persons who are qualified and willing to serve as arbitrators generally or in specific fields and who are from time to time recommended by the members of the council or any other person or organisation.'[18]

USSR (as it then was)

'The capacity to act as an arbitrator shall belong to a person included in the list of arbitrators and possessing adequate special knowledge in resolving disputes....'[19]

The provisions from various Arbitration Rules abovementioned served the purpose of specifying the impartial quality of the arbitrator to be chosen but lamentably not to the skill or academic criteria of the same. The arbitrator chosen should thus not act or conduct the proceeding as a judge eventhough his faculties were groomed from the judiciary, nor should he be lengthy as a practising advocate giving and analysing legal matters, eventhough he came from that profession. Those arbitrators who are trained in law sometimes indulge in slow and outdated proceedings, or may even try to imitate court proceedings, which is exactly what the parties initially wish to avoid by referring the dispute to arbitration.

In such situations, technical experts are usually appointed or nominated as arbitrators due to the advantage of such persons being able to go straight to the issue without being impressed by

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17 Art. 19, para 6. International Rules. Milan Court of Arbitration.

18 Art. 11 Rules of Arbitration. Indian Council of Arbitration.

19 Para 4.1, Rules of Arbitration Court. USSR Chamber of Commerce and Industry.

restricting legal arguments. These kinds of arbitrators were deemed to be able to take a decision going straight to the root of the problem without wasting time on procedural issues. Nevertheless, the lack of legal training and experience of dispute settlement of such arbitrators may lead them to be too rigid and tactless in negotiating for a compromis between the disputing parties in the arbitration proceedings.

The real difficulty however emanated from the settlement of the dispute itself vis-a-vis the intellectual, technical and/or ethical experience and capabilities of the nominated arbitrators. The litigants i.e. disputing parties to arbitration, come from countries with different legal systems and more confoundingly, the necessity to understand their way of reasoning, to be able to interpret their intentions and behaviour, and to apply different procedural rules when necessary. All this needs time, the right attitude and specific experience.[20]

The appointment of the arbitrator and his willingness (acceptance) is an essential ingredient for an effective arbitration. The enforceability of the award or compromis as the case may be, relied heavily on the validity of the arbitration proceeding without which no settlement of dispute could be resolved.

In international arbitration, the Washington Convention of March 1965[21] have specific and express provisions on the capacity of the person appointed as arbitrator :-

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20 supra n.7 at p.201.

21 The first enforcement by statute in Italy, May 10 1970. As of June 24, 1987, 97 states had followed the conditions of the convention, of which 89 had made their ratification.

"Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry and finance, who may be relied upon to exercise independent judgement. Competence in the field of law shall be of particular importance in the case of person on the Panel of arbitrators.

The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity."[22]

1.1.3. Disputes

The relevant consideration to any general situation of differences and conflicts between state parties in an international arbitration would be restricted to that which is **arbitrable** in nature.

Thus, contractual and/or commercial disputes could be considered as arbitrable since the compromis seek would be possibly negotiated in absence of political or legislative elements.

Any legal dispute arising directly out of an investment between a contracting state (or any constituent subdivision or agency of a contracting state) and a national or another contracting state, which the parties to the dispute consent in writing to submit to the tribunal (or arbitration centre) could thus be said as arbitrable.[23]

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22 Art. 14, Washington Convention (1965), cit.

23 Art. 25, Washington Convention (1965), cit.

There are other instances of dispute that involved legal differences or relationship whether contractual or not concerning a subject matter capable of settlement by arbitration.[24]

The Geneva Convention[25] defines arbitrable disputes as

"any difference that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration."

The **Washington Convention,**[26] have specified that arbitrability requires the subjective concern of the nature of the parties, the objective concern of the relationship with the investment and the due consent of the parties.

In relation to this, the proper specification of "international arbitrable commercial disputes" would be that of arbitration agreements for settling 'business disputes of an international character.'[27]

Disputes are generally divided into legal and political disputes. The problem of distinguishing between the two is prevalent in each instance of cases that came for arbitration. There are however, criteria to be followed in order to separate political issues from legal issues so as to determine the award with regards only to legal issues in dispute and not political in nature. The tests to be

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24 Art. II, New York Convention (1958).

25 Geneva Protocol (1923) at Art.1.

26 Supra n.23.

27 See Art.1 of International Chamber of Commerce Rules.

considered are basically on these factors[28] :-

(a) the degree of importance of the subject of the dispute.

(b) the distinction between matters governed by international public law and those not governed by it.

(c) the nature of the arguments put forward by the parties or by one of them.

The main concern for arbitrators in any proceeding would be that of legal disputes when international commercial transaction is involved. Political issues are extracted and kept abreast from the compromis because in such issues, the state does not base its claim on the law, or on its rights, but on criteria of a different nature such as principles of justice, of fairness or on advisability and so on.[29]

It is thus imperative to separate arbitrable from non-arbitrable disputes. In cases where an arbitration agreement consist of both arbitrable and non-arbitrable issues the extreme solution would be the nullity of the entire agreement. In order to keep the contract alive, the parties must ascertain whether their intention is to have all or none of the matters in dispute to be arbitrated. Otherwise they should resort to submit to arbitration only issues of arbitrable in nature and discard those which are non-arbitrable in issue. There is thus no end if arbitrable and non-arbitrable issues are simultaneously referred to arbitration due to its inseparable nature.

Where an international commercial dispute involves purely commercial considerations there is no quarrel with the application of commercial principles in the resolution (or arbitration) of the

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[28] Arangio-Ruiz, Controversie internazionali (International disputes), Enciclopedia del Diritto (Legal Encyclopedia), X at p.387.

[29] Morelli, Notions of International Law, 6th edition, Padova 1963, at 369.

dispute. The parties should be ready and willing to comply with the awards or compromis based purely on commercial considerations in types of disputes arising from purely commercial causes. These disputes arose significantly from non-governmental interests.[30]

Causes of Disputes

The differences of practices and principles between states in international trade and transactions are inevitable.

[illegible] the normal tendency of such parties in transaction is to strike common bargaining and negotiationary terms and conditions of trade, resulting in inter-state or party-state contracts. Problems could arise in regard of such contract which governmental interests predominate. Those problems are sometimes curable if the dispute are purely commercial in nature and thus settled according to commercial principles.

Disputes which arose from political and economic changes at most times have a tremendous impact on international contracts. The disputes arose from such change would normally be in the manner of legislative enactments of a sovereign party which altered or somewhat vary the terms and conditions of the contract at hand.

The change from a dictatorship to a democracy may not affect the binding force of a contract. The doctrine of 'pacta sunt servanda' and 'resic stan stantibus' is always relied on in times of a sovereign state's claim of termination of contract or invalidity of such contract due to a change in governmental doctrines.

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30 J.Paulsson, "Third World Participation in International Investment Arbitration" (1988) 2 I.C.S.I.D. Rev.19.

In Company Z v State Organisation ABC,[31] where the contract was signed by a dictator of an African State who did not have authority under the law of that state to sign contracts. The arbitration tribunal deemed the contract invalid for lack of authority from the dictator, but since the contract had already been executed and work have been rendered, the state was estopped from denying the existence of the contract, which had already come to its knowledge.

A political revolution, for example the Iranian political upheaval against the Shah and the creation of an Islamic Republic, by the people, may cause dispute to existing contracts between external parties with that of the former government. In the case of Framatome v. Atomic Energy Organization of Iran (A.E.O.I),[32] where French companies formed a consortium to construct two nuclear reactors in 1977 with the Shah's government, it was stopped by the new Republic. Damages was sought by the French companies in an arbitration tribunal hearing. The new Republic in the circumstances of a protocol between Iran and France, succeeds to the obligations of the old one. The award is supportable on the ground that the contract from which the dispute arose was supported by a bilateral treaty. The doctrine of pacta sunt servanda was taken as the general principle of law underlying that contract between the French companies and Iran as a state party.

Economic changes may have an impact (significantly) on long-term contracts. The dispute arose from such changes would normally be in the form of imbalance advantages (trade and foreign exchange) to one party, resulting in another to a loss in opportunity and/or trading privileges. Draughtsmen of long-term contracts between parties and states may have prudently taken into account of such changes by inserting provisions as to how parties should adapt to their new changes.

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31 (1983) 8 Y.C.A. 94.

32 I.C.C. Award 3896 in 1982: (1984) Journal du Droit International 58.