

Schiedam, 9th May 1967.

Gentlemen!

I C C has done a great deal for the promotion of arbitration as a means of settlement of international commercial disputes. I C C concerned with international trade was logically also concerned about the way disputes arising out of international trade could be solved. Experts out of different countries worked on a good set of rules of Conciliation and Arbitration, the I C C -rules. They provide the international business world with a machinery to get rid of their disputes. On what basis these disputes are dealt with?

In case the contract itself refers to a specific national law, applicable to the contract, the arbitrators will have to apply this national law. Often however the contract does not contain any reference to the law applicable. Then the arbitrator will have to decide according to the rules of conflict of law, which law has to be applied to the substance of the dispute. Whether the arbitrators really do so is another question, but from pure legal point of view they should do so. This is even so, when the parties have used the possibility, offered by the I C C -rules Article 19, to give arbitrators the power to act as "amisables compositeurs", i.e. to decide "ex aequo et bono". This clause does not free the arbitrators from the search of the applicable law as it does not free them from compulsory rules of law. Therefore in any case, in every international arbitration some national law will have to be found and will be applicable to the substance of the dispute.

So far theory. Now practice,

In practice parties to an international contract do not think in terms of national law but on international lines. What counts for them are the terms of the contract and the customs of international trade. It is there they are looking for the answer in case their contract gives rise to questions. First of all the contract

itself should be looked upon to find the answer and in case it does not, international trade usages should fill the gap. Why do the parties insert an arbitration clause in their international contract? There may be many reasons to do so, but one of them certainly is that they want to avoid to go to a national court in some remote country and run the risk to have the dispute decided on the basis of some national law, even more unknown to them than their own national law. They have more confidence in arbitrators who know the trade and will decide the case according to the customs of the trade. Certainly these arbitrators will apply legal concepts such as "force majeure" but they will do so in the way this concept is understood by international business itself without referring to a specific national law or court precedents based on a specific national law.

It is to this point, this contrast between theory and practice in international arbitration, that I wanted to draw your attention for a moment. International business is thinking on international lines and international arbitrators are inclined to follow this way of thinking. We, lawyers have difficulties in following this trend. We are nationally trained. Comparative law is a comparatively new branch of the law. We like solid ground under our feet: law texts and court precedents, all national materials. To us international arbitration seems to live in a kind of legal vacuum. Is this really so?

In my opinion the situation should be judged in a different way. We should not be afraid of these developments in international commercial arbitration. On the contrary we are confronted, I think with a fascinating development. International trade is creating its own private international law and international arbitrators are the pioneers of this movement. Like in the Middle Ages the merchants created the Law Merchant, this phenomenon repeats itself today on a worldwide scale. In our days we live in the renaissance of the Lex Mercatoria. The main characteristics of this Lex

Mercatorio, so well analysed in Mitchell's brilliant Essay on the Early History of the Law Merchant (Cambridge, University Press 1904) we can also notice in the actual development of the international arbitration: the predominant role of customary law, the spirit of equity and its strongly marked international character. These characteristics also apply to our international arbitration of to-day.

Why did I mention all this? Because, when my analysis is right, there seems to be a fascinating task for an organisation like the I C C. Which organisation could be more qualified than ^{ICC} to study this movement and to promote its further development? I C C did already an excellent job when codifying INCOTERMS. It could be a great help for ~~the~~ international trade when the principles underlying the international arbitral decisions would be analyzed and made available to the international business world in a similar way.

Of course this is a gigantic task but international business has never been afraid of entering upon such a task. Thousands of international arbitral awards would have to be analysed. Therefore it seems indicated to start on ~~a~~ far more modest scale by analyzing first the material available in the archives of I C C itself. Then we could see, whether the results are really as I expect, worth-while.

These results could not only be the disclosure of a modern Lex Mercatoria. The principles of the new Law Merchant would on their turn set the pattern for the harmonisation of national laws. In the same time international arbitration, always promoted strongly by I C C would be stimulated all the more.

Is the vision too bold? Montreal with its daring World Exhibition seems a good place to lay the foundations for such a new world wide project. And you, gentlemen, could be the initiators when you would agree to ~~propose a resolution,~~ inviting I C C to study the idea and get the work started.