VOLUME 6 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

COMMERCIAL ARBITRATION AND UNCITRAL MODEL LAW

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ABSTRACT

Commercial arbitration is of several forms of dispute resolution for commercial agreements. The use of arbitration has increased along with the growth of international trade and commerce and the accompanying disputes springing from these pursuits. In its broadest sense, arbitration is a vehicle of dispute resolution in which parties to a contract select a neutral arbitrator (or a panel of arbitrators) to present their dispute for a legally binding ruling. Arbitration is often selected for the reasons of confidentiality, speed, enforceability of arbitral awards, and to eliminate the uncertainties in the choice of arbitrator and forum. Parties from different national origins may also be reluctant to accept national court litigation with the potential for national bias. Arbitration offers parties more control over how proceedings will be conducted. Arbitration awards are, with rare exception, final and binding.

I. INTRODUCTION

Commercial arbitration has many different issues and the researcher need to have access to numerous resources to make informed decisions. Since no individual format provides exhaustive coverage of commercial arbitration resources, both print and electronic resources are presented in this guide.[2]

Arbitration is derived from the nomenclature of the Roman Law, and means and arrangement for investigation and determination of a matter or matters of difference between contending parties by one or more unofficial persons chosen by the parties. It is the settlement of disputes, by the decision not of a regularly constituted tribunal, or ordinary court of law, but of one or more persons voluntarily chosen by the parties, who by reason of the confidence reposed in them find favour in the eye of litigants. Arbitration is essentially a private resolution of disputes by the parties concerned virtually appointing their own judge. They are allowed substantial leeway in determining the procedure to be employed in deciding the matter concerned often even the law applicable. An arbitrator, therefore constitutes a tribunal

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set up by the parties themselves, not as part of any mechanism established by the state or by a law, to adjudicate disputes. Though proceedings in arbitration are required to be organized on some systematic basis, there is a marked departure from the conventional judicial process in several aspects like hearing the parties concerned as well as deciding the dispute itself.[3]

Arbitration means any arbitration[4] whether or not administered by permanent Arbitral Institution. An Abritration is a reference to the decision of one or more persons of a particular matter in difference between parties. It is the submitting of a disputed matter to the judgement of one or more persons called arbitrators.

In its broadest sense, arbitration is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary process of law, a domestic tribunal as contradistinguished from a regularly organized court proceedings according to the course of law- depending upon the voluntary act of the parties disputant in the selection of judges of their own choice. Its object is the final disposition in a speedy and inexpensive way, or the matters involved so that they may not become the subject of future litigation between the parties.

Arbitration arises from the Agreement of parties in dispute. Confidentiality is no longer presumed to be an implied term of an arbitration agreement – "If you want it, you must (now) provide for it", says Dr. Gerold Herrmann, Father of the UNCITRAL MODEL LAW. arbitration is conducted in a judicial manner and the decision of the arbitral tribunal is binding upon the parties and is recognized and enforced by courts in arbitration, the parties are the sole source of the arbitral tribunals power and they have much control of the arbitral process than litigants have of judicial proceedings in the courts.

According to ***Fali S. Nariman***[5]"My exhortation to all who administer commercial arbitration is to work towards an arbitral regime, which rekindles the spirit of arbitration-The spirit that give[6] the life."

[3]Banerjee Durga Charan, "Law of Arbitration in India". P.1

[4]Section(2)(1)(a). Venugopal, K.K., „Arbitration and Conciliation Act,1996

[5]See the Article „Does the World need Additional uniform Legislation on Arbitration" in Arbitration International, Vol.15 No.3p.211 at 225.

[6]Article, The Spirit of Arbitration, Presented on Feb. 17.2000 in Hong Kong, President, International Council of Arbitration (ICCA).

DISPUTES OR DIFFERENCE

If there is to be a valid arbitration there must be a dispute or difference between the parties. Every dispute is a conflict and as such dispute settlement process vary with the nature of conflict.

Abuert says that the solution of a conflict may be brought about in two major ways it may be either through

(i) Bargaining compromise.

(ii) Or through application of law to facts.

There is however another kind of conflict which Aubert call dissensus or conflict of values. Such a conflict can not be compromised because scarifices and advantages can not be quantified. When a conflict of interest is handed over to law it acquires the character of conflict of values. This involves disagreement regarding certain facts or concerning the norms which apply to such facts or both. This is necessary so that a solution could be found by an outsider who knows the rules of evidence and perceive the facts through them and can handle the normative order. Therefore, in case of conflict of value only one of the parties can succeed.

The spirit-the ethos has out of commercial[7] arbitration. It has been transformed into what Sir Michael Kerr has characterized as "International disputology".[8]

PRESENT AND FUTURE DISPUTES

An agreement to arbitrate represented a compromise on the part of the parties; and this is reflected in the language which refers to a submission agreement as a compromise and to an arbitration clause as a clause compromiser. An arbitration clause is like a blank cheque which may be cashed at a future (as yet known) date.

Generally National Laws are reluctant to give full effect to the future disputes but model law given full effect to both types of disputes whether existing and future disputes.

COMMERCIAL ARBITRATION

Commercial Arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than

[7]Redfern, A., and Hunter, M, "Law and Practice of International Commercial Arbitration

[8]Aubert, V., Competition and Disensus: two types of conflict and conflict resolution (1963) 7. Journal of Conflict Resolution 26.

force. From the start, it must have involved a neutral determination, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms with mediation[9], no doubt merging into adjudication.

Commercial arbitration is distinguished from other types of arbitration in as much as the commercial arbitrations derive their authority solely from contract, they resolve the whole dispute and, generally, do so according to law. There is a major exception to the rule that a commercial arbitrator should decide according to law. Sometime merchants insert clauses[10] in arbitration agreements which authorize arbitrators to resolve disputers ex aequo et bono or as amicable compositors.

In the former case the arbitrators may depart from strict law and decide the case according to equity and good sense. In the latter case, the arbitrator will use its good officers to engineer in an amicable settlement. Strictly speaking, amicable settlement is not a determination but the conclusion of a new to settle the dispute. Some national laws expressly recognize this type of arbitration.

INTERNATIONAL COMMERCIAL ARBITRATION

What makes commercial arbitration international? This questions is important because there are international conventions which establish special rules for facilitating commercial arbitration and for the recognition and enforcement of international arbitral awards. There are two major conventions[11] namely: the convention on the recognition and Enforcement of Foregin Arbitral Awards (commonly known as New York Convention, 1958) and the UNCITRAL Model Law on Commercial arbitration. The New York Convention is restricted to the imposition of duties on state parties to recognize and enforce foreign arbitral awards. The UNCITRAL MODEL LAW is more extensive code. The New York Convention, does not actually use the term „International" but applies its provisions to „arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards was „Sought" and to „arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought". The UNCITRAL Model Law gives a more detailed account of what constitutes „International Arbitration".

[9]The secondary meaning of compromise is given as „An Agreement under which the parties make mutual concession", in Robert, Dictionaire de la longue francaire.

[10]UNCITRAL Model Law Article 7(1)

[11]Gillies. P. and Moens. G. (Prof.). International Trade and Business Law, Policy and Ethics (1998)p.732.

Under Article 1(3), an arbitration is international if at the time of the conclusion of the agreement: the parties have their place of business in the same state, the arbitration will yet be international if the designated place of arbitration, the place where a substantial part of the commercial obligations have to be performed or the place with which the subject matter of the dispute is most closely agreed that the subject matter of the arbitration agreement relates to more than one country. International commercial arbitration[12] means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is

(i) An individual who is a national of, or habitually resident in, any country other than India.

(ii) A body corporate which is incorporated in any country other than India.

(iii)A company or an association[12] or a body of individuals whose central management and control is exercised in any country other than India.

(iv)The government of foreign country.

In fact, the world of commercial arbitration is not premised on its participants possessing any legal qualifications: it is only in four out of the one hundred and twenty five New York Convention countries that there is an express legal requirement that an arbitrator must be a qualified lawyer.

New York Convention, 1958, UNCITRAL MODEL LAW 1985, are all silent on the arbitrators qualifications: the only requirement contained in the UNCITRAL Model Law is that the person appointed (as arbitrator) should be independent and impartial.

In principle, the arbitrators can only exercise[13] such powers as the parties by their agreement to arbitrate bestow upon them. These powers are supplemented and added by the law relating to arbitration (This is the law governing the contract or even which can be chosen by the parties concerned). The approach of the model law is also towards recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an *adhoc* agreement, the procedure to be followed, subject to fundamentalrequirements and justice. In case the parties have not used their freedom to lay down the powers of the arbitrators, model laws provisions can be used to invest the arbitrators with requisite authority.

[12]Sec. 2(f), Arbitration and Conciliation Act, 1996

[13]China, Peru, Columbia, Ukraine are the only four New York Convention Countries that have prescribed the legal qualification for arbitrators

Several third world states were suspicious of international investment arbitration because it has given rise to a system of competing norms which favour the foreign investor to the detriment of developing[14] states.

ARBITRATION-ELECTRONIC FORMATION OF CONTRACT

Due to incapability of traditional law, electronic formation of contract became inevitable. The main features of the paper based regime "writing", "signature", and "original". Writing given validity signature identifies signer and authenticity of document.

"Original" ensures integrity. Enforceability, authenticity and integrity of a paper document can also be achieved by an electronic document. The Information Technology Act, 2000, (which is based on UNCITRAL Model Law) provides legal recognition to electronic records and electronic signatures, their use, retention attribution and security. A message bearing digital signature, verified by a public key listed in the valid certificate is as valid, effective and enforceable as if the message had been written on paper and signed by hand.

In respect of all functions of paper writing, signature and original electronic records can provide the same level of security as paper.

The Information technology Act 2000 gives legal recognition to data message, corresponding to paper documents[15] so that the message could serve the same function. Section4 (writing), section 5 (signature), and section 7(original).

The validity of the electronic contract can not be questioned in the absence of a paper document, if the agreement is enforceable in law. So we can say that some of the features of the Contract Act, 1872, are adopted to the new environment of paperless communication.

CHOOSING BETWEEN ARBITRATION AND LITIGATION

The possibility of a legal dispute is never absent in international tradetransactions. The reasonable exporter, in spite of the care he has taken in the preparation of the contract of sale, has to contemplate acting against the buyer who is in breach of contract.

Ideally, the exporter should consider this issue before entering into the contract of sale. When he has made his choice from the procedures available for dispute resolution, he should insist that the term giving full expression to the chosen procedure is inserted into the contract. It is common experience that agreement on this point is easier during the course of negotiation

[14]Sornarajah, M., Article „International Commercial Arbitration: The Protection of State Contracts.
[15]Law of Arbitration ADR and Contract. pp. 354-355.

than that when a dispute has arisen, as in the latter situation. The aggrieved [16]part has no means of compelling the other to agree to an extra judicial procedure of dispute settlement.

If the exporter decided in favour of dispute resolution out of court, he may insert into the contract of sale an alternative dispute resolution (ADR) clause which embraces mediation and conciliation or an arbitration clause.

Resolution alternative to courts (ADR) Modes

(1) Negotiation

(2) Conciliation

(3) Arbitration

2. Negotiation

The problem should be approached pragmatically with a view tosettling the dispute to the mutual advantage of each party; in the spirit of give and take. Negotiating a dispute is the mediation between two competing interest. Negotiation is a compromise.

3. Conciliation

Next step, when negotiation fails intervention of a conciliator becomes necessary to reconcile the competing interests. The conciliator is not an arbitrator and is not bound by law in order to do what he thinks just and reasonable.

4. Arbitration

The aim of arbitration on the other hand, is to achieve theresolution of a dispute through the appointment by parties adopting an adversarial in stance of a private "judge" who is an arbitrator, who will decide on the matters in dispute.

Litigation in civil court is costly and time consuming and unproductive-litigation thus destroys both parties in terms of money, time, energy and good relations. If the dispute be decided after endless waiting and endless review, endless appearance before the courts, the party would prefer to negotiate, renegotiate, conciliate the deal.

The Delhi High Court ordered as follows in ***National Thermal Power Corporation v. Canara Bank.***

"I feel that it will be proper, expedient and in the interest of justice to refer the disputes subject matter of these appeals to the high powered committee" in terms of the decision in ***Oil and Natural Gas Commission v. Collector of Excise***[18] as suggested in a report referred to by the Supreme Court

[16]Schimith off and Simond, International Economics and Trade Law. P. 472

in this case.

"I would also like to state that the government respects the views expressed by this Hon"ble Court and has accepted that public undertakings of the central government and the Union of India should not fight their litigation in court by spending money on fees on counsel, court fees, procedural expenses and wasting public time. That all disputes, regardless[17] of the type, should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government or through arbitration and resource to litigation should be eliminated."

First parties to an international contract[18] can remit the resolution of their dispute to judges of their own choice. This is a particular advantage to parties who reside in different countries, with different legal and cultural backgrounds, as they may be reluctant to submit.

Secondly, finality, rather than meticulous legal accuracy is the preference of many involved in trade. An arbitration award is final, whereas a judgement of a court may be appealed and further appealed so that considerable time lapses before the matter has been finally determined.

Thirdly, arbitration is confidential, it is clear from recent cases, that confidentiality is a term to be implied into an arbitration agreement.

Finally, an arbitration award is enforced as a judgement of the court.

DISTINCTION BETWEEN INTERNATIONAL AND DOMESTIC ARBITRATION

It is important to make a distinction between International[19] Arbitration and Domestic Arbitration. Although this module does discuss some concepts that are common to both types of arbitration, the essential thrust is to discuss commercial arbitration, since it is only this facet of arbitration that is involved in the resolution of disputes concerning international trade.

(1) If the nature of the dispute and arbitration involve the interests of a foreign trade, it will be treated as a foreign arbitration. The Delhi High Court in ***GAIL v. SpieCapag*** held that an arbitration agreement, which possess[20] the flavour of international trade and commerce,

[17](1999) 97 Comp. Case., 930
[18] (1995) 4 Supp. SCC. 54
[19]Ali Shipping Corporation. v. Shipyard Trogir (1998) I Llyod"s Rep. 643 CA
[20]AIR 1994 Del. 75.

would be within the realm of the law relating to foreign arbitrations, even in fact a domestic award and not a foreign award.

This was widely considered to be a progressive judgement, since it brought into the realm of commercial arbitration law many more arbitration agreements, which would otherwise have been dealt with under the domestic law.

(2) Attention is also focused on the nature of the parties in order to determine whether the arbitration in which they participate can be termed as commercial arbitration. This inquiry revolves around ascertaining the nationality, the habitual place of residence or, if the party is a corporate entity, the seat of its central control and management.

The English legislation that implements New York Convention and makes an arbitration domestic, if both parties are British

Though the New York Convention and its predecessor treaties were confined almost exclusively to regulating commercial arbitration, the model law, while attempting to meet the specific needs of commercial arbitration also provides an international standard that can be adopted by the municipal laws of the states concerned with respect to conduct of even domestic arbitration. The model law can therefore, be described as presenting a special legal regime geared to commercial arbitration, without affecting any relevant treaty in force in the state adopting the Model Law.

The Arbitration and Conciliation Act 1996 though purporting to deal with both international and domestic arbitration on an equal plane, separately defines commercial arbitration. Following the pattern laid down by Article 1(3) of the Model Law. Part I of the Arbitration and Conciliation Act 1996 applies to domestic arbitration.

An arbitration may be “Domestic” where all relevant factors are connected with one country only or it may be “International” in the sense that it involves a foreign element or a number of foreign elements. It is, of course, perfectly possible for the same legal regime to be applied in both domestic and international cases. Section 2(f) of Arbitration and Conciliation Act, 1996, defines commercial arbitration. The Act makes some distinction between the categories of arbitration, particularly relating to selection of the arbitrator, the law applicable as well as enforcement of the award.

It is indeed necessary to identify an award as being part of either commercial arbitration or domestic arbitration for, it is well recognized and indeed quite evident from the statutory provisions themselves, that more freedom may be allowed in an international arbitration than in domestic arbitration.

Adhoc Arbitration And Institutional Arbitration

Two types of arbitration exist, ad hoc and institutional . In ad hocarbitration, parties organize and plan their own arbitration, including the selection of arbitrators, designation of rules and applicable law, and the powers of the arbitrators. All aspects of the arbitration must be specified in the arbitration agreement.

When parties select ***institutional arbitration***, an arbitral institution provides the rule of procedure for the arbitration and performs supervisory andadministrative functions such as keeping the proceeding on a timetable. Parties can select an international institution such as the ***International Court of Arbitration*** (ICC) or a national institution such as the ***American Arbitration Association*** (AAA) or the ***London Court of International Arbitration*** (LCIA)

An *Adhoc* arbitration is conducted under rules of procedure which are adopted for the purpose of the arbitration, normally after a dispute has arisen. If parties opt for *adhoc* arbitration they may agree on the identity of the arbitrator or leave his appointment to a third person, for example, the President of the law society in London. It may be advisable for the parties to provide for the application of one of the standard sets of arbitration rules. *Adhoc* arbitrations often taken place under the provisions of a submission agreement which itself often established the arbitral tribunal and sets out the procedural rules upon which the parties have agreed. More usually however, an *adhoc* arbitration arises under an arbitration clause.

Institutional Arbitration

Disputes in international trade are normally complex and involve issues that demand considerable technical expertise. Therefore, parties are anxious to ensure that disputes between them are decided by persons who possess adequate knowledge and expertise in the field. These persons[21] are not found readily and may not ordinarily be available to settle disputes[22] as and when they arise. Thus parties resort to an institution that specializes in the conduct ofarbitration. This institution prescribes the rule of procedure that will govern the conduct of arbitration. The institution may also designate the arbitrators involved. The bodies also provide trained staff to administer the arbitration. There is also provision of facilities for the actual conduct of proceedings. Time limits are normally imposed for the speedy completion of proceedings.

[21]In the event of failure of appointment. See 18(3) application to the court to give direction for making appointments or making appointment itself

[22]Such as UNCITRAL Arbitration Rules. The Rules of Arbitration of ICC, 1998.

3.10.1. International Chamber of Commerce

An institution that is renowned worldwide for its expertise in the conduct of arbitral proceedings, it has its seat in London. The ICC has an elaborate set of rules for conducting arbitration and the parties are free to adopt them as they are with modification. Experts are normally appointed to serve on the arbitral panels constituted by the ICC, But the parties are free to choose their own.

Normally, the ICC becomes involved in the arbitration through the stipulation of a clause in the contract between the parties that any dispute arising there under would be resolved in accordance with ICC rules.

A body called court of Arbitration exists in the ICC that is primarily responsible for the conduct of Arbitration. It has various functions to perform. It examines whether there exists a proper agreement between the parties to Arbitrate under ICC auspices. Arbitrators are normally selected by this body, which will also hear any challenge preferred by a party regarding the choice of an arbitration.

Indian Council for Arbitration:

ICA has primarily been involved in institutional arbitration in India. The ICA is essentially organized on the lines of ICC, though it has not resolved many international disputes and has mainly resolved domestic disputes. A qualified panel of personnel is maintained by the ICA from whom parties can choose arbitrators.

Under Section 11(2) of the Arbitration and Conciliation Act 1996, the parties are free to agree on a procedure for appointing arbitrators. This can be constructed to imply that the Act gives statutory recognition for institutional arbitration in as much as the parties may, before or after a dispute has arisen, agree to abide by the rules of procedure of an arbitral institution. Since the procedure for appointment of arbitrators is one of the most important aspects dealt with in the arbitration rules, this is an important enabling provision from the point of view of arbitral institutions.

3.10.3. International Centre for Alternative Dispute Resolution (ICADR)

In October 1995, the ICADR was inaugurated heralding a new beginning in institutional arbitration in India. ICADR is a unique Centre that provisions for alternative dispute resolution including arbitration. Disputes can be referred to the centre in the following two ways.

(i) By a clause in a contract providing[23] for the reference of all future disputes under that contract.

(ii) By a submission agreement providing for the reference of an existing dispute.

Whether the arbitration agreement provides for *adhoc* or institutional arbitration, it should always specify the seat and the language of the arbitration.

Accordingly to Mozeley and Whitely Arbitration is where two or more parties submit all matters in dispute to the judgement of arbitrators who are to decide the controversy.

In order to be treated as an agreement to refer a dispute to arbitration it is not necessary that the terms arbitration or arbitrator should have been used in it.

CONCLUSION

The concept of parties settling their dispute in a binding manner by reference to a person or persons of their choice or private tribunals was well know to ancient and medieval India. Appeals were also often provided against the decisions of such persons or tribunals to the courts of judge appointed by the king and ultimately to the king himself. However, the law or arbitration as is known to modern India owes its elaboration, in phases, to the British rule of India. Through a series of what were know as Regulations framed by the East India Company in exercise of the power vested in it by the British government, beginning with the Bengal Regulations of 1772, the court in different parts of British India were empowered to refer, either with the consent of the parties or at the instance of the parties, certain suites to arbitration. The successive Civil Procedure Codes enacted in 1859, 1877 and 1882, which codified the procedure of civil courts, dealt with both arbitration between parties to a suit and arbitration without the Intervention[24] of a court.

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