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"UNCITRAL Model on International Commercial Arbitration"

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ABSTRACT

In 1960s with the growth of global trade, various national governments realized that there was a need for more harmonized set of global standards which would replace various national and regional regulations which were largely governing international trade at that time. As a result of this, United Nations Commission on International Trade Law (UNCITRAL) was established in 1966. UNCITRAL conforms success in this mission by stating that "much of the complex network of international legal rules and agreements that affect today's commercial arrangements have been reached through long and detailed consultations and negotiations organized by UNCITRAL". International trade has various benefits for its participants and acknowledges increasing economic independence globally. UNCITRAL model helps in expanding and accelerating global trade through developed harmonization and modernization of the law of international trade. The most worked areas of commercial law includes dispute resolution, international contract practices, transport, international payments and sale of goods. The main aim of UNCITRAL is to formulate modern, fair and harmonized rules on such commercial transactions. The other part of UNCITRAL model is to direct the coordination of work of other bodies that are active in international trade, which are both inside and outside of the UN to enhance cooperation, consistency and efficiency. In this article the author wants to highlight the importance of UNCITRAL model and how it is helping in International Commercial Trade in the present scenario.

ARTICLE

International Commercial Arbitration is of the method of resolving disputes between private parties which arise out of commercial transactions which are conducted across national borders. It helps the parties to avoid the process of litigation in national courts. It is primarily controlled by the terms which were previously agreed upon by the contracting parties and not by National Legislation and procedural rules. Nowadays most of the contacts contain a dispute resolution clause which specifies that if any dispute will arise under this contract, in that case it will be handled through arbitration and not legislation. The parties have the right to specify the forum, procedural rules and governing law at the time of the contract. Arbitration can be done in two ways. it can either be institutional or ad hoc. The terms of the contract will specify the type of arbitration. If the parties have agreed to have an arbitral institution to regulate the dispute, then it is an institutional arbitration. But if the parties have made their own rules for arbitration, then in that case it is an ad hoc arbitration. Ad hoc arbitration are managed independently by the parties who are also responsible for deciding on the forum, the number of arbitrators, the procedure to be followed and all the other aspects that are necessary for conducting the arbitral proceedings.

The UNCITRAL Model was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21st June 1985 in the 18th Annual Session of the Commission.

Volume 10, May 2020 ISSN 2581-5504

The General Assembly recommended, "that the States give due consideration to the Model Law on International Commercial Arbitration, with a view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice." The Model Law accounts for a sound and promising basis for the desired harmonization and improvement of various national laws. It covers all the stages of the arbitral proceedings, that is, from making the arbitration agreement to recognition and enforcement of the arbitral awards. This form of model law was chosen as a good source for harmonization and improvement of new arbitral laws.

The UNCITRAL Model Law is designed in such a way that it assists in improving and modernizing their laws, various arbitral procedures so as to take into account the particular characteristics of International Commercial Arbitration. It covers all the steps of arbitral procedures, that is, from the arbitral agreement, composition of jurisdiction of arbitral tribunal and the extent of the intervention of the court by the way of the recognition and enforcement of the arbitral award. This model was chosen as the source for harmonization and improvement by keeping in view the flexibility it gives to the States by making and giving them new arbitration laws. It is prudent to follow the model as closely as possible as it will prove to be the best contribution to the desired harmonization and also it will be in the best interest of the international arbitration, who are primarily the foreign parties and their lawyers.

Background to the Model Law

The model law was designed to treat the national laws on arbitration. The findings of the domestic laws showed that they were inappropriate for international cases and there was a huge imbalance existing between them.

A worldwide survey on national laws on arbitration showed that there were significant amount of disparities which were not only in regard to individual provisions and solutions but also in terms of development and refinement. Some laws go back to the nineteenth century, which are regarded as outdated and often associate the arbitral process with court legislation. Also there were other laws which do not address all the relevant issues. Even the laws that appear to be contemporary or ultra-modern and comprehensive were drafted by keeping in mind the domestic arbitration. The approach of domestic laws can be understandable by keeping in view that even today a bulk of the cases are governed by general arbitration laws which are of purely domestic nature. But its unfortunate result is that these traditional approaches are even imposed on international cases and as a result of which their need for modern practices are not met. If the parties are not given the right to choose their desired set of arbitration rules, then it can be very frustrating for them. Unexpected and undesired restrictions will restrict their powers to select their arbitrator freely or restrict them to choose their desired procedure of arbitration for resolving their disputes.

Problems or undesired consequences which arise from mandatory or non-mandatory provisions or from the lack of relevant provisions will annoy them as national laws and arbitration procedure differ widely. These differences are a constant source of concern in

international arbitration because there are at least one or both the parties are confronted with foreign or unfamiliar rules and regulations. It can be expensive, impractical and impossible for the parties to obtain full and precise knowledge of the of the law that is applicable in the arbitration. Due to the various uncertainties in the local laws, the parties will constantly feel at risk and it will affect the arbitral process and the selection of place of arbitration. There will be an increase in smooth functioning of the arbitral process if all the States would adopt to Model Law which is easily recognized, meets all the specific needs of the international commercial arbitration and provides and international standard with solutions which is acceptable to all the parties of different States and with different legal systems.

Salient Features of the Model Law

1. Special procedural regime for international commercial arbitration

The principles and individual solutions adopted by the model Law aim at reducing the problems and concerns of domestic laws. The Model Law represents a special legal system which works according to international commercial arbitration. The need for uniformity exists only in respect of international cases, but if any State has a desire to upgrade and improve its arbitration laws then it can work according to the rules of Model Law. According to the Model law, arbitration is international when the parties of the arbitration have their offices in different States. In addition to this, arbitration is international if the place of arbitration, place of performance of contract, the place of dispute is situated in a different State or the parties agree that the dispute is related to any third country.

Various facts are considered by different nations for adopting the provisions of Model Law. The place of arbitration is considered as the main criterion by majority of the national laws. It is observed that where national laws allow the parties to choose the procedural laws of their State other than the arbitration laws, the parties rarely make use of this opportunity. In the recent amendments of the arbitration laws, it is seen that there is a very little involvement of court in international commercial arbitration. It seems very clear that the parties to an arbitration agreement make a conscious decision of excluding the courts from their proceedings especially in respect to commercial cases.

2. Arbitration agreement

Article 7(1) of the Model Law gives validity and effect to commitment by the parties to submit to arbitration on an existing dispute (“compromis”) or future dispute (“clause compromissoire”). The agreement to future dispute has not come in full effect under certain national laws. According to Article 7(2) of 1958 New York Convention, requires the arbitration agreement to be in written form while certain national laws give validity to oral arbitration agreement as well.

Article 8 and 9 talks about the relationship between the arbitration agreement and use of courts. Article 8(1) of the Model Law requires any court to refer to parties to arbitration on the concerned subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. This request of reference is made by a party

while submitting its first statement on the matter of dispute. Article 9 says that if any interim measure of protection is obtained by court under their procedural law then they are also compatible with an arbitration agreement.

3. Composition of Arbitral Tribunal

Chapter III of the Model Law contains a number of provisions regarding the appointment, challenge, termination of mandate and replacement of the arbitrator. This chapter gives approach to the Model Law for removing certain difficulties of the law. This approach consists of (i) freedom of the parties to determine the existing set of arbitration rules, by any ad hoc agreement or procedure followed (ii) where the parties have not used the freedom to lay down the rules or procedure or any issue that has not been covered,

The Model Law provides a set of rules that ensures that the commencement of the arbitration proceedings are done effectively and the disputes are resolved.

4. Jurisdiction of Arbitral Tribunal

Article 16(1) of the Model Law talks about the two important yet not recognized principles of "Kompetenz-Kompetenz" or Competence-Competence and principle of separability or autonomy. Arbitral Tribunal also works on its own jurisdiction which includes existence or validity of any arbitration agreement. According to this every arbitration agreement will have its own clauses and those clauses should not intervene with any other agreement. If there are any objections regarding to arbitrator's jurisdiction then they should be made as earliest as possible.

The arbitral tribunal has the ability to rule on its own jurisdiction, that is, on the very foundation of its own authority and power. Article 16(3) of the Model Law also provides for instant control of courts in order to avoid unnecessary waste of time and money. But at the same time there are three procedural safeguards in order to avoid any risks or delay. They are- (i) short period of time (30 days) to resolve the matter, (ii) decision of the court is not appealable, and (iii) it is on the discretion of the arbitral tribunal to continue the proceedings and give the award even of the case is pending in the court.

If any party requests, then the Model Law gives power to the arbital tribunal to give some interim measures in the said dispute.

5. Conduct of Arbitral Proceedings

Chapter V of the Model Law provides for fair and effective arbitral proceedings.

Article 18 talks about the basic principles that both the parties should be treated equally and each party shall be given a full and proper opportunity to present their respective cases. There are other provisions also that talk about the basic fundamental rights of the parties. Article 24(1) says that unless the parties have legally agreed that there shall be no oral hearings or presentation of evidence, then the arbitral tribunal can hold such proceedings as and when requested by the parties. Article 24(1) deals only with the general right of party to oral

hearings and not with the procedural aspects of the case like length, number or timing of hearings. Another fundamental right of parties is of being heard and present the evidence related to the case in the arbitral tribunal. Article 26(2) assigns an expert, that expert takes full part in the hearings, testify the witness, check the evidence and in the last delivers his oral or written report of the case. There is an another provision which ensures fairness, objectivity and impartiality. Article 24(3) says that all the statements, written documents and related information given to the arbitral tribunal by one party shall also be delivered to the another party in the reasonable frame of time. If the decision of the arbitral tribunal relies on any report of the expert or any other documentary document, then the same shall be communicated to the parties. If the parties are required to be present for any hearing or meeting in the tribunal then they shall be informed well in advanced.

Parties are guaranteed under Article 19 of having the freedom to decide or agree on the procedure which is to be followed by the arbitral tribunal while conducting the proceedings. It also empowers the arbitral tribunal to conduct the arbitration proceedings in the manner it considers to be most appropriate. It also empowers the arbitral tribunal to determine whether the evidence is admissible or relevant. Parties having the freedom to determine the rules and procedure are of much importance in international cases as it allows the parties to select the rules according to their specific wishes and needs which are not disturbed by any other domestic concepts. When a due notice is given only then the arbitral proceedings can be continued without or in absence of the party. It particularly applies when the party fails to appear at the hearing or does not produce any documentary evidence without mentioning any reasonable cause for such failure. Also the arbitral tribunal has the power to continue the proceedings when the respondent fails to communicate his statement of defence.

6. Making of award and termination of proceedings

Article 28 of the Model Law deals with independent aspects of arbitration. Arbitral tribunal decides the disputes with such rules of law which are agreed by the parties. This provision is more significant in two aspects- It gives parties the privilege to choose substantive law. It is important because there are a number of national laws which do not clearly or fully recognize their rights. Furthermore, by stating the "rule of law" instead of "law", the Model Law gives the parties a large number of options in regard to the selection of law that is applicable in dispute, for instance, agreeing on a certain rules of law which is identified by an international forum but is not yet recognized by other national law. If the parties have not identified any other particular law, then the arbitral tribunal can choose any national law applicable in the conflict.

Under Article 28(3) of the Model Law, parties may allow the arbitral tribunal to decide any dispute as 'amiables compositeurs. Under international law amiable compositeurs refers to an unbiased third party who can decide dispute between the countries. At present this type of arbitration is not known or used in all legal systems around the world and also there does not exist any particular source of power of arbitral tribunal under this. While making an award, the Model Law gives special attention to the fact that arbital tribunal has a number of

Volume 10, May 2020 ISSN 2581-5504

arbitrators (particularly 3 arbitrators). it makes sure that any award or decision shall be made by the majority of arbitrators.

Article 31(3) says that, any award given shall state the place of arbitration and it should be made sure that the proceedings have been made at that place. Arbitral award must be in writing and state its date. It should also state the reason the on which the decision was based, unless the parties have mutually agreed on the terms of the award.

7. Recourse against award

Most of the time national laws equate arbitration awards to court decision and provide a variety of recourse against arbitral awards. They vary a lot with long periods of time along with a large and exhaustive list of grounds which differ widely in various legal systems. Model Law continuously attempts to improve this situation which is of big concern to those who are involved in international commercial arbitration.

The first measure which is to be adopted for the improvement is to allow only one type of recourse and the elimination of the other ongoing methods of recourse of the procedural law of the State that is in question. An application for the same shall be made under article 34 within time period of 3 months from the date of receipt of order. According to the Article 36 "recourse" means continuously "attacking"the award. It is very clear that the party is not prohibited from seeking the court control. "Recourse" also means taking resort to court, which is an organ of the judicial system.

The Model Law contains the complete list of limited grounds based on which an award can be set aside. This list is taken from Article V of the 1958 New York Convention. Some of its grounds include- lack of capacity of parties to conclude arbitration agreement or even lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of the party to present his case; award deals with matters not covered by submission made to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or any failing agreement to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental concepts of procedural justice. Article V of 1958 New York Convention provides for grounds for setting aside the awards for refusal of acknowledgement and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva,1961). Under its Article IX, a decision of a foreign court for setting aside an award on any reason other than the one stated in the list of Article V of the 1958 New York Convention will not be constituted as the ground for setting aside any award.

It can be noted that the grounds for setting aside the award are almost similar to those of the grounds for refusing the enforcement. There are two practical differences between the two- First of all, the grounds relating to public policy including non-arbitrability may be different in substance depending on the State in question, that is, either the State of setting aside or the State of enforcement. Secondly and more fundamentally, the grounds for refusal of

Volume 10, May 2020 ISSN 2581-5504

enforcement are valid and effective only in the State where the winning party is seeking enforcement.

Conclusion

We have seen that International Commercial Arbitration is preferred as the best dispute resolution procedure for cross border disputes. Judgement of local domestic courts are not as willingly acceptable and enforceable as the judgement of the International Arbitral Tribunal. Also, the judgement of a domestic court of one jurisdiction are not easily enforceable in another domestic court with different jurisdiction without the re-run of the trial. International arbitration is protecting the parties from unreliability of litigation of local domestic courts. It is a most important for all the domestic countries to have a private forum for the resolution of all their commercial disputes.