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A Critical Study to the Role of International Arbitration in the Resolution of International Business Disputes

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Abstract

This study aims to evaluate the effectiveness of international arbitration in resolving international commercial disputes. The study provides a critical review of the role of arbitrators in conducting proceedings and developing laws due to the internationalisation of modern commercial law and investigates the International Bodies that are involved in International Commercial Arbitration. It covers the International Chamber of Commerce and the United Nations Commission for International Trade Law and their significant role in the development of commercial arbitration. Also analyzes the "New York Convention" text, which is a crucial piece of legislation in the recognition and enforcement of arbitral awards globally. Moreover, the study highlights the current challenges confronting International Commercial Arbitration and sets out the potential challenges it could face in the future. Finally, in the Conclusion, the study summarizes the current role of International Arbitration in the modern world. Finally, this study concludes by outlining the current role of international arbitration in the modern world.

Keywords: *International Arbitration, Critical study, resolution, business disputes*.

1. INTRODUCTION

International agreements and international trade are the life blood of nations. Therefore, those engaged in international commerce have a vested interest that commercial agreements are honored and, ultimately, that in the event of a dispute between the parties they have open to them a competent dispute resolution process which is capable of issuing an award which is recognised and enforceable internationally. International commercial arbitration is currently the preferred option for the resolution of cross-border disputes. It was appropriately referred to by Robert Brinder as the 'servant of international business and trade' .

This work assesses the role of international arbitration in seeking to resolve international commercial disputes in light of the statement that in contemporary times 'arbitrators tend to enjoy a greater freedom in conducting proceedings' and developing laws due to the 'internationalisation' due to the more informal nature of modern commercial law.

The first section of the work shall explore the "Some of the International Bodies Involved in International Commercial Arbitration". The topics covered here shall be the International Chamber of Commerce and United Nations Commission for International Trade Law and the role that they have played in the development of commercial arbitration. The following section shall take a look at "International Commercial Arbitration". Following this, the work shall analyse the text of the "New York Convention", given that it is a crucial piece

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of legislation in the recognition and enforcement of arbitral awards globally. The following chapter, "The Challenges Confronting International Commercial Arbitration", shall set out the challenges which international commercial arbitration is facing and could face in the future. The next section explores the "The Arbitration Agreement / Clause". Finally, the Conclusion shall conclude by outlining the current role of International Arbitration in the modern world.

2. LITERATURE REVIEW

2.1. Some of the International Bodies Involved in International Commercial Arbitration

2.1.1 International Chamber of Commerce

In 1923 the International Chamber of Commerce ('ICC') established an arbitration mechanism aimed at settling disputes in matters concerning international trade. Generally speaking, the ICC has played a pivotal role in international arbitration. For instance, the ICC was involved with other parties in the drafting of the Protocol on Arbitration Clauses 1923 and the Convention on the Execution of Foreign Arbitral Awards 1927. Further, it was the ICC who submitted a draft document to the United Nations referred to as the Convention on the Recognition and Enforcement of International Arbitral Awards in 1953, which later became the New York Convention. The ICC now plays a fundamental role in administering and handling international commercial arbitrations.

2.1.2 United Nations Commission for International Trade Law ('UNCITRAL')

Established in 1966, UNCITRAL was formed to work towards the gradual transformation and harmonisation of the laws pertaining to international commercial arbitration and international trade. The UNICTRAL is ideally placed to formulate rules for this purpose as it is well positioned, being a UN body, to coordinate and follow the progress of other work in this field. The Model Law produced by UNICTRAL is intended to act as a template for states to use as an aide in drafting their respective arbitration laws to ensure conformity and uniformity in the field of international arbitration. The Model Law is a comprehensive document covering preliminary matters such as the drafting of the arbitration agreement / clause through to jurisdictional matters and the role which the national courts play in recognizing and enforcing an arbitral award.

The main focus of UNCITRAL is on the legal relationships between international parties. The Model Law devised by UNCITRAL was intended to be utilized by governments, making adjustments as they see fit, to incorporate the law as their own national arbitration law. UNCITRAL Model Law on International Commercial Arbitration 1985 is aimed at governing the procedure of arbitrations in the national jurisdiction fora. This Law has facilitated the harmonisation of national arbitration laws. The Model Law specifically states that it only applies to matters regarded as 'international'. For the law to be applicable, Article 1(3) of the Model Law defines an 'international' matter as one in which (i) the parties to an agreement have their businesses residing in different states; (ii) the seat of the arbitration ought to be in neutral state (neither falling within any of the states where either of the parties businesses are located); and (iii) the subject matter is related to any matter other than the place where the seat of the arbitration is to take place.

Under the Model Law, an arbitral award is regarded as legally binding. Further, Article 36(1) of the Model Law states that recognition and / or enforcement of an arbitral award may only be refused in limited circumstances, namely: (i) the arbitration agreement is deemed invalid, or the parties were incapacitated in some way; (ii) adequate notice was not furnished to the party against whom the award is being made relating to the appointment of the arbitrator or the arbitration proceedings; (iii) the arbitration agreement has in some way been contravened or the arbitral award is in breach of the laws where the arbitration hearing is held; and (iv) the award has been set aside or suspended by a national court of

the country where the seat of the arbitration is. Further, the UNCITRAL Arbitration Rules of 1976 are used by parties all over the world and incorporated into their agreements.

2.1.3 The UNICTRAL Model Law text

The Model Law, which was amended in 2006, is accepted worldwide. A country can adopt the Model Law, modifying it as required and incorporating it into their national law. The Model Law is an attractive option as many countries desire to attract parties from overseas to enter cross-border agreements and the Model Law facilitates this by providing familiarity and uniformity in the arbitration laws of different states.

Article 4 sets out a waiver of the right to object. Further, under Chapter 4, a party can challenge the jurisdiction of the arbitration panel, but this right shall be forfeited unless it is exercised immediately and promptly. Article 5 of the Law provides transparency by requiring that no court shall intervene in arbitration proceedings, thereby instilling confidence in those involved in such proceedings that the arbitral award shall offer finality. The form that the arbitration shall take is governed by Article 7, which the parties usually agree upon in advance. There are also penalties available to arbitrators for those who flout the procedure. For instance, in the event that a party attempts to obstruct the arbitral process, the party in default can risk losing the case (see Article 25).

In accordance with Ch. 4(A), this provision deals with the enforceability of interim measures. Whilst, the issuance of an award can be done on agreed terms (see Article Ch.6), a party who is not satisfied with an arbitral award is entitled to challenge the award but only on the ground of a violation of process (see Ch. 7). That is to say that the court can set aside an award if it is contrary to public policy. Furthermore, under Ch. 8, a part can make a request that an award be set aside (This provision has been modelled on Article V(1)(e) of New York Convention). It ought to also be mentioned that UNCITRAL rules govern the procedure and conduct of arbitrations and do not provide rights and obligations to the parties.

2.2 International Commercial Arbitration

International commercial arbitration developed as a means of resolving differences between parties to international cross-border transactions. The popularity of this method of dispute resolution in international contracts is due to a variety of factors. Overall, the benefits of including an arbitration agreement in international contracts outweigh the implications of not doing so. An international contract that does not have an arbitration agreement included within the contract could, in the event of a dispute, be subject to the myriad of private international law rules, which would result in uncertainty for the parties to such agreements. This would not only result in uncertainty between parties to cross-border transactions, however, it would also act as a disincentive to international investment and international commerce as a whole.

One of the benefits of international commercial arbitration is that it is generally more cost-effective than litigation. Further, the procedures adopted are simpler. However, this may not always be the case as procedures in complex cases can similar to those of a national court system .

There is also greater scope for arbitration proceedings to be quicker if a suitable procedure is adopted. Furthermore, arbitrators tend to be technically qualified which can assist in facilitating a sound and quicker outcome to a case involving relatively straightforward legal issues but complex factual points. Furthermore, arbitration tends to be more flexible and accommodating than litigation, whereby the parties can often arrange a hearing date which is mutually convenient. Another appealing fact about arbitration over litigation is the fact that arbitration affords confidentiality for the parties concerned, whilst in the national court system the proceedings are in the public domain. Finally, and perhaps of most significance in the world of international commerce, arbitration proceedings are of a less confrontational nature than the adversarial approach adopted by court proceedings. This is not surprising

given that arbitration is a completely consensual process. Arbitration also affords commercial expediency which facilitates amicable relations in circumstances where the parties have an ongoing contractual relationship (pg 379, J. Murdoch and W. Hughes, Construction Contracts: Law and Management, Fourth Edition, 2008, Taylor & Francis).

The commitment to refer a dispute to arbitration is totally consensual by the parties to an agreement. Neither party is arbitrarily compelled to embrace arbitration as a means of dispute resolution. This is of assistance in reaching an amicable settlement. The remit of the arbitrator's jurisdiction is defined by the wording of the arbitration agreement / clause, which is usually included within the contract. The scope of the arbitration ought to be restricted, however, to matters which are within the competence of an arbitrator to resolve. The arbitration agreement itself only becomes effective once differences arise between the parties to a contractual agreement. Typical matters found in an arbitration agreement / clause are the means of choosing an arbitrator/s, the choice of arbitration rules to be followed in the event of a dispute, the seat of the arbitration and the law governing the arbitration hearing.

Should the parties be inclined to choose an institutional body to manage the arbitration, for instance the International Chamber of Commerce ('ICC') or the London Court of International Arbitration ('LCIA'), these bodies have their own sets of rules which they refer to in the event of a matter being referred to them. In choosing the above factors, such as the seat of the arbitration, the parties ought to be mindful of the arbitration laws applicable to the country. For instance, an arbitration hearing held England or Wales shall be governed by the Arbitration Act 1996. Such issues can influence the outcome and ultimately the finality of any arbitral award.

The parties have a choice of choosing a recognised institution to handle the arbitration or, in the alternative, to opt for an ad hoc process, in which no institution is chosen and the parties can agree upon issues such as the number of arbitrators, the language to be used, and the procedure to be adopted, etc.

2.3 New York Convention

2.3.1 The Origins

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') was concluded by a diplomatic conference convened by the United Nations in 1958. The idea for an international treaty on arbitral awards had its origins, however, in an initiative by the ICC which inspired the UN to prepare the document in 1953.

The ICC formulated the first draft which was presented to the United Nations Economic and Social Council ('ECOSOC'). A subsequent draft for a Convention for the Recognition and Enforcement of Foreign Arbitral Awards was eventually submitted to an International Conference held at the United Nations Headquarters in New York.

2.3.2 The Convention Text

The opening clause, Article I, para. 1, provides that the Convention applies to 'the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought', between differences arising between the parties, both physical and legal. The Convention defines "arbitral awards" as awards which are made either by appointed arbitrators or permanent arbitral bodies such as the ICC (see Article I, para. 2).

Before the Convention shall apply, an arbitration agreement must be made in writing in which the parties openly agree to submit their differences to arbitration, whether contractual or not (see Article II, para. 1). Such an agreement can come in the form of an arbitral clause inserted in a contract or an arbitration agreement. A signed contract, letters or telegrams

can also constitute such an agreement (Article II, para. 2). Should a national court of a Contracting State be seized of a matter found to be within the ambit of the Convention, the court shall, 'at the behest of one of the parties and in the absence of a finding that the said agreement is null or void, refer the matter to arbitration.

Further under Article III Contracting States are required to recognize an arbitral award as having binding effect and therefore must enforce them pursuant to their own national arbitration laws. In addition, the parties ought to not be required to undergo more burdensome conditions, or have to pay higher fees when seeking recognition or enforcement of their award, than it would be required to seek to enforce a domestic award (see Article III). Article VI of the Convention provides that there is a requirement that an arbitral award and the arbitration agreement, as defined by Article II, be furnished to the court.

The right of a party against whom the recognition and enforcement of an arbitral award is invoked can challenge this only in circumstances falling within Article V, para. 1(a)-(e), namely, inter alia, the arbitration agreement is invalid under the applicable law, proper notice of the appointment or the arbitrator or arbitration proceedings was not furnished, the issue is outside the remit of the arbitral panel, the composition of the arbitration panel or procedure adopted was not in accordance with the arbitration agreement / clause and / or "The award has been invalidated by a competent court." or is yet to become binding on the parties.

It is also open to the State seized with an arbitral award under the New York Convention to refuse to recognize or enforce an award if it is found that the subject matter is incapable of being settled by arbitration pursuant to the laws of that country (see Article V, para. 2(a)), or the State considers that the recognition or enforcement would go against public policy (see Article V, para. 2(b)).

Article VII (para. 1) of the Convention also provides that multilateral or bilateral agreements entered into by Contracting States pertaining to the recognition and enforcement of arbitral awards are not affected by the Convention, nor do the provisions deprive a party to an arbitral award of any right to enforce or have recognised an award in an manner that is open to him.

The arbitration law of Contracting States, party to the Convention shall govern the procedure of the arbitration hearing. Accordingly, the enforcement of the New York Convention awards can differ from state to state.

Despite this, the New York Convention has proved to be 'one of the most successful treaties in commercial law' . It affords international investors and those entering cross-border commercial transactions with confidence that they have entered binding commitments. The beneficiaries of the Convention are both private parties and governments.

The success and appeal of the Convention is largely due to the fact that enforcing an arbitral award under the Convention is easier than seeking to enforce a judgment from a national court. Further, the success of the Convention is also due to the number of States that have signed / ratified the treaty. Currently there are 117 States party to the treaty (as at 1999). The confidence instilled in parties to international commercial arbitrations by the Convention is in the legal certainty which it offers to those engaged in cross-border transactions in Contracting States. Parties doing business in States that are yet to become parties to the Convention are exposed to a higher level of risk, which ultimately renders the transaction more costly, due to the requirement of additional security, protracted negotiations, and also an increase in transaction costs.

3. METHODOLOGY

The study provides a critical review of the role of arbitrators in conducting proceedings and developing laws due to the internationalisation of modern commercial law and investigates the International Bodies that are involved in International Commercial Arbitration. It covers the International Chamber of Commerce and the United Nations Commission for International Trade Law and their significant role in the development of commercial arbitration.

4. DISCUSSION

4.1 The Challenges Confronting International Commercial Arbitration

The increasing number of parties to cross-border transactions has inevitably results in a greater demand for a dispute resolution mechanism at the international level. More agreements being entered, means more disputes between parties. This results in more arbitration or litigation being pursued in order to resolve their differences. International commercial arbitration has to date filled this role. However, there is still a distinct lack of appropriately qualified and properly equipped arbitrators to consider such disputes.

In 1997, more than 85% of arbitrators appointed were residing in either Europe or the United States and Canada , whilst under 60% of the parties to arbitrations conducted by the ICC were from such countries. Further, the seat of the arbitration was, in virtually 90% of the cases, located in the Western part of the world. Albeit such choices were normally made by the parties themselves, this data indicates that there is greater confidence in the legal systems and arbitrators deriving from the West than from other parts of the world .

This distinction clearly raises a problem if international commercial arbitration is to be seen globally as an acceptable and effective means of resolving international commercial disputes around the globe. This lack of venues and suitably qualified arbitrators in other parts of the world could result in, inter alia, more parties seeking to resolve their disputes by initiating proceedings in their national court system. This can present a myriad of problems, not least the differing jurisdictional issues, the additional expense, the problems trying to enforce an award and, more importantly, the damage that this could have on a continuing business relationship.

On a further note, the involvement of the court system in arbitration cases can generally prove problematic. For instance, the backlog of cases, the often protracted proceedings, the higher costs levied in relation to management of cases and the need to appoint counsel to attend the hearing. This nullifies the benefits of referring a dispute to arbitration in the first place.

Albeit, these problems could be remedied somewhat by ensuring that the courts role as a supervisor of the arbitration is confined strictly to the enforcement aspect of the arbitral award and not becoming involved at the venue of arbitration.

A party against whom an arbitral award has been made can challenge the recognition and enforceability of such an award in the national court of a Contracting State, if such a party 'furnishes to the competent authority where the recognition and enforcement is sought, proof' of one or more of the points set out at Article V(1)(a)-(e). Accordingly, whilst arbitral awards made by a Contracting State to the Convention do provide a degree of finality and legal certainty given that they are binding, in the event of a dispute between the parties, there is scope to challenge the validity of such an award if a party can satisfy one or more of the aforementioned points as set out at Article V.

4.2 National Arbitration Laws

This problem has been somewhat allayed by the introduction of national arbitration laws such as the Arbitration Act 1996 in England and Wales. Under the 1996 Act, an arbitrator's award can only be challenged either on a point of law (see section 69), lack of jurisdiction (see section 67) or due to a serious irregularity (see section 68). In all the aforementioned cases, any such challenge can only be brought when all appeals / reviews as provided for by the arbitration agreement / clause have been fully exhausted. This limited scope for challenging an arbitrator's award ought to prove to be a big incentive to a party to a cross-border transaction to select England or Wales as the seat of arbitration in the event of a dispute. Under the legislation, the courts do, however, still retain a power to remove an arbitrator (under section 24) and make a ruling on a point of law (under section 45).

4.3 The Arbitration Agreement / Clause

The scope of the jurisdiction of any arbitration hearing is set out in the arbitration agreement / clause. In the event of a dispute between the parties, the agreement is therefore the first place to consult to gauge what action ought to be taken to resolve the parties' differences. Under normal circumstances, the agreement / clause would contain information such as the choice of arbitration (ad hoc or institutional), the seat of the arbitration, the law governing the agreement and perhaps the rules applicable to the arbitration. In the event that the agreement fails to specify any matter important to the arbitration, the arbitrator usually exercises his / her discretion to allow matters to proceed. Despite having agreed upon the details outlined in the arbitration agreement, parties to such agreements do occasionally flout the agreement by pursuing the matter in a foreign court in the event of a dispute.

Whatever the reason that such a course of action is taken, the courts may be called upon to remedy the situation by granting an injunction to suspend the offending foreign proceedings, at least until the matter has been arbitrated upon in accordance with the arbitration agreement. In the case of Aggeliki Charis Compania Maritima SA v. Pagnan SpA - Angelic Grace , following the collision of two vessels, the owners of the vessels both blamed each other for the incident. In seeking to resolve the matter, the courts had to consult the wording of the arbitration agreement to determine what action had been agreed upon by the parties in the event of such an occurrence. Foreign proceedings were initiated by one party. The court granted an injunction against such proceedings on the premise that to do so to restrain the foreign proceedings would not offend 'comity' as the foreign proceedings were clearly in breach of contract. The foreign proceedings were deemed to be 'vexatious and oppressive' given that they were contrary to the agreement between the parties. In his reasoning, Millet L.J. said:

"In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. there have been many statements of great authority warning of the dangers of giving an appearance of undue interference with proceedings of a foreign court.... in my judgment, there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."

The Honourable Judge continued by saying that he was of the opinion that where an injunction was sought to restrain a party from pursuing a matter in a foreign court in clear violation of an arbitration agreement, which in this case was governed by English law, the English court ought to not feel any 'diffidence' in granting an injunction in these circumstances, on the condition that the injunction is applied for promptly and, in any event, prior to the foreign proceedings reaching an advanced stage. The Court explicitly stated that it felt that there ought to be no distinction to be drawn between an injunction to restrain proceedings in violation of an arbitration clause and one in breach of an exclusive jurisdiction clause: see Continental Bank N.A. v. Agelakos Compania Naviera SA.

The rationale for the position taken by the English courts, in the event of foreign proceedings being issued in clear breach of an arbitration agreement, appears to be that without granting the injunction against the foreign proceedings, a party to the agreement shall be deprived of a contractual right, in circumstances where the award of damages in such instances would be regarded as an inadequate remedy. Given that this jurisdiction is discretionary, however, good reason ought to be established first as to why it the discretion ought to be exercised in any given case.

Overall, the position of court systems in different countries differs on this point. The English courts are inclined to approach the matter by granting a stay of foreign proceedings in favour of allowing the arbitration to proceed in the agreed manner, in the absence of compelling reasons against this course of action: The El Amria . In short, the courts normally hold the parties to their bargain.

5. CONCLUSION

Arbitration is becoming increasingly more popular as a means of solving international commercial disputes. One of the attractions of arbitration as a means of dispute resolution in international commercial contracts is the informality that arbitration affords. Whilst arbitrators do enjoy greater freedom in conducting proceedings than the less flexible procedures of the court system, that is in no way to suggest that this is at the expense of a just outcome to the case. It is apparent from the various institutional bodies and sets of rules applicable to arbitration that the arbitral system has remained closely guarded to ensure that the procedures adopted, whether for an ad hoc or institutionalised arbitration hearing, follow a prescribed set of rules designed to facilitate a just outcome for both parties.

The New York Convention, for instance, has played a fundamental role in galvanising arbitral awards as being binding and enforceable around the globe. Provisions such as these act as a catalyst to encourage cross-border transactions and international investment between parties who would otherwise be reluctant to enter contractual arrangements until they were assured that there exists a competent system means of dispute resolution in the event that differences arise between the parties. The introduction of the New York Convention in the field of international commercial arbitration has made great strides in instilling confidence in parties to international commercial agreements, that in the event of a dispute, should an arbitral award be made in their favour, they can have the award recognised and enforced internationally, in a Contracting State.

Arbitration is therefore likely to continue to be a preferred choice for the resolution of international commercial disputes for years to come. The ongoing work in this area that is being carried out by institutions such as UNCITRAL, ICC or the LCIA, to name but a few, has helped to educate and equip arbitrators and arbitration centres to become more client focused and therefore better able to accommodate the differing needs of merchants or investors around the world.

Whilst international commercial arbitration is a long way off from establishing a central jurisdiction for the enforcement of arbitral awards, or a uniform set of rules for the procedure of enforcement of awards, arbitrators are enjoying this greater freedom whilst ensuring that the awards they issue are in the interests of all parties concerned by remaining binding and enforceable.

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