Reservations under the new york convention law international essay

Law

Arbitration also offers confidentiality and privacy to parties. With respect to confidentiality, parties are generally prohibited from revealing or utilizing information obtained during the arbitration process; while privacy ensures that arbitration proceedings are conducted in private to the exclusion of third parties.[1]This is unlike litigation where proceedings are usually conducted in public and without confidentiality. By providing confidentiality and privacy in arbitration, parties may be more willing to disclose relevant information which may facilitate the efficient resolution of the issues in dispute, but which they generally would have been unwilling to disclose.[2]More importantly, confidentiality protects the reputation of parties which is highly important to parties whose businesses thrive on reputation.[3]7. 2. LIMITATIONS OF ARBITRATIONArbitration, like other dispute resolution mechanisms, possesses not only strengths, but limitations. This section therefore seeks to examine the following factors which limit the effectiveness of arbitration.

7. 2. 1. Reservations under the New York Convention

The potency of the New York Convention, as earlier elaborated, is limited by Article 1 (3) of the Convention which permits contracting states to make two reservations. The first reservation permits states to apply the Convention to disputes arising out of " commercial relationships" as defined by the relevant state.[4]The effect of this reservations on the effectiveness of arbitration is exemplified by the decision of the Tunisian Cour de casssation,[5]which affirmed the refusal by a lower court to recognize and enforce an ICC arbitral award on the ground that the dispute was not of a commercial nature as defined under Tunisian law, since Tunisia had made the commercial

reservation under the New York Convention. This decision must have been devastating for the parties having expended time and money on the process. To avoid such a problem, parties may have to familiarize themselves with the arbitration laws of prospective enforcement jurisdiction to determine what matters are classified as commercial. This would however prove very difficult, if at all possible. The second reservation permits states to recognise and enforce only those awards made in other contracting states. Thus, about half of the 148 contracting states which have adopted this reservation can validly refuse recognition and enforcement of awards made in non-contracting states.[6]Parties must therefore ensure that their awards are made in a contracting state by choosing such a state as the seat of arbitration. However, notwithstanding this limitation, foreign arbitral awards remain more enforceable anywhere in the world than court judgments for reasons highlighted earlier.

7. 2. 2. Costs and Delays

Critics of arbitration frequently argue that international arbitration has become more expensive and much slower than other forms of dispute resolution, thereby defeating some of the major reasons for its emergence and popularity.[7]Several reasons account for the costs and delays associated with arbitration. Arbitration costs can generally be categorized under two heads: fees and other general expenses. The main fees associated with arbitration are the arbitrators' fees, the administrative fees of an arbitral tribunal (when institutional arbitration is used) and lawyers' fees. Other general expenses may arise from costs of securing the venue or the living expenses of arbitrators and witnesses.[8]All of these fees and

expenses are borne by the parties in arbitration and perhaps in mediation/conciliation and expert determination. Conversely, with litigation, parties do not pay to secure the courts where the hearing takes place, the judge’s salaries or living expenses.[9]They simply pay court filing fees which are static and often minute, and then pay their legal representatives. Notwithstanding this, the cost associated with arbitration is relative and would differ on a case-by-case basis depending on several factors. Institutional arbitration may, for example, be much more expensive than ad-hoc arbitration. Similarly, a choice of three arbitrators as opposed to a single arbitrator or high demand arbitrators would necessarily accumulate higher costs. Costs may also be higher where parties engage reputable legal firms to represent them in the arbitral proceedings. Thus, to say that arbitration is more expensive than litigation may not entirely be correct. More importantly, the aggregate benefits of arbitration often outweigh the costs associated with it especially when compared with the corresponding costs and benefits of other dispute resolution mechanisms.[10]On the other hand, an arbitration process may suffer from delays as a result of procedural problems usually associated with ad-hoc arbitration, unnecessary court interference, busy schedules of high demand arbitrators, time involved in constituting a three-member tribunal; or delay tactics frequently employed by parties.[11]Delays can however be entirely avoided or severely reduced by the parties. For example, a choice of document based proceeding over oral hearing may reduce delays.[12]Parties can also insist on time limits within which certain aspects of the proceedings must be concluded. A survey recently conducted revealed that the appointment of a sole arbitrator and the exclusion of

discovery process are the most effective ways to expedite arbitral proceedings.[13]Parties can thus utilize their autonomy to minimize such delays.

7. 2. 3. Limited Powers of Arbitrators

Arbitrators being private administrators of justice, lack coercive powers which are exclusively possessed by states and state delegates – judges, for example.[14]Coercive powers may become relevant to an arbitrator seeking to compel action by either one of the parties or a third party. An arbitrator requiring the attendance of a witness, or seeking to attach an asset may be unable to do so without support from national courts[15]and reference to the courts may result in more costs and delays, or may be contrary to the intentions of the parties who sought to avoid the courts in the first place. However, 89% of respondents in the 2012 survey earlier referred to revealed that in practice requests are very rarely made to courts for assistance with interim measures.[16]It is therefore doubtful whether the lack of coercive powers of arbitrators would significantly affect the effectiveness of arbitration.

7. 2. 4. Consolidation of Proceedings and Joinder of Parties

As stated earlier, arbitrators derive their powers to resolve disputes from the consent of the parties. Consequently, arbitrators generally lack the powers to unilaterally order a consolidation of two or more separate but inter-related arbitrations or to join a third party to the proceedings.[17]On the contrary, courts, because of their inherent jurisdiction derived from the state can merge similar suits or join third parties without first seeking consent, in order

to save time, costs and avoid conflicting decisions. Although arbitrators cannot do the same, national arbitration laws of some jurisdictions however permit arbitrators to consolidate arbitrations or join a third party once the consent of all the parties have been obtained.[18]

7. 2. 5. No System of Precedents

In common law countries, precedents are a vital part of the judicial process as the decisions of superior courts are binding on lower courts where similar issues are raised, unless the lower court is able to distinguish the case before it from similar decided cases. The major justification for the use of precedents has been to prevent conflicting decisions on similar issues. Precedents are however not used in arbitration, as arbitral awards rendered by arbitrators are made on a case-by-case basis in accordance with the discretion of the arbitrators, and are generally not binding on future arbitral tribunals.[19]This has sometimes led to conflicting awards on similar issues decided by different arbitrators.[20]One reason why precedents are not used in arbitration is the fact that proceedings are private and confidential and as such awards are not published for arbitrators to refer to when making a decision on a pending dispute.[21]Hence, it has been suggested that arbitral awards should be publicized for this purpose to facilitate consistency.[22]However, as noted earlier, confidentiality constitutes one of the main reasons why business users utilize arbitration and it should not be ditched in a bid to develop a system of precedents aimed at ensuring consistency. This is because consistency basically aims at ensuring that decisions are fair and just and this can be achieved by appointing knowledgeable and experienced arbitrators. Moreover, precedents are only used in common law countries

and are not used in civil law countries and it is doubtful those judicial decisions rendered in common law countries can be said to be more just and fair than those rendered in civil law countries where precedents are not used.

7. 2. 6. Limited Grounds of Appeal

The existence of very limited grounds of appeal has already been acknowledged as a strength of arbitration. It may however also constitute a limitation when appeals against erroneous and arbitrary decisions rendered by arbitrators are disallowed.[23]Consequently, it has been suggested that an international arbitration appellate body be established to review arbitral awards with the aim of achieving accuracy and limiting erroneous awards. [24]However, establishing such a body may lead to rigidity, delays and more costs all of which arbitration has sought to eliminate in the first place. Rather, parties can reduce the risk of erroneous decisions and the consequent need for appeals, by appointing arbitrators with integrity, knowledge and experience

AN ASSESSMENT OF THE EFFECTIVENESS OF ARBITRATION

The strengths and limitations of arbitration have been analysed in the previous section and there is no doubt that arbitration possesses significant strengths, which may however be limited by its weaknesses. This section thus seeks to outline the ways in which the strengths of arbitration can be maximized and its weaknesses minimized, to achieve effectiveness. To begin with, parties can achieve a neutral forum by ensuring that the jurisdiction chosen as the seat of arbitration is one in which neither of them are

significantly associated with, so as to prevent bias and achieve a fair and just outcome. A centralized forum can also be achieved where parties execute an arbitration agreement which explicitly adopts arbitration as the dispute resolution mechanism to the exclusion of all other mechanisms, as this would prevent problems of parallel proceedings. More importantly, it is very essential that the place chosen by parties as the seat of arbitration should be a pro-arbitration jurisdiction and/or a New York Convention signatory for several reasons. First, where a New York Convention signatory state is chosen as the seat of arbitration, parties can be assured that validly executed arbitration agreements and ensuing arbitral awards would be recognized and enforced irrespective of the reservations made by some contracting states. Secondly, because the arbitration laws of the place chosen as the seat usually governs the arbitration process,[25]choosing a pro-arbitration jurisdiction would be guaranteed the following: very limited interference from the courts; confidentiality and privacy; the application of pro-arbitration doctrines like competence-competence and separability; very limited grounds of appeal/finality of the award; support from the courts when necessary; and party autonomy. Parties can exercise the autonomy guaranteed by the pro-arbitration jurisdiction to appoint independent, impartial, knowledgeable and experienced arbitrators to ensure a fair and just decision, thereby dispensing with the need for precedents. The autonomy can also be utilized to design or adopt procedural rules which would eliminate or reduce delays and consequently, costs.[26]A brief review of some of the provisions of the French New Code of Civil Procedure may help illustrate the importance of choosing a pro-arbitration jurisdiction as the

seat of arbitration, to achieving an effective arbitration process. The French New Code of Civil Procedure has been chosen since France is a leading pro-arbitration jurisdiction. Article 1447 and 1465 of the said Code recognizes the separability and competence-competence doctrines; Article 1448 severely limits court interference; Article 1449 and 1460 guarantee speedy court assistance where needed; Article 1456 regulates the impartiality and independence of arbitrators; Article 1479 guarantees confidentiality; Article 1484 upholds the binding nature of an arbitral award; Articles 1508, 1509 & 1511guarantees party autonomy; while Article 1520 provides for very limited grounds for appeal to ensure finality. Other pro-arbitration countries include England, Switzerland, U. S, the Netherlands, Belgium, Sweden, Singapore and all Model Law countries generally.[27]

FUTURE OF ARBITRATION

While it may be impossible for anyone to correctly predict the future of arbitration, attempts can however be made based on existing indices as follows: First, there is no doubt that international commercial transactions would continuously increase, since the benefits associated with international trade is now generally recognized, and this would consequently lead to more international commercial disputes, requiring an effective means for resolution. As the preceding sections have shown arbitration possesses the strengths essential to achieve such effectiveness. It is therefore likely that arbitration would increasingly be sought after and utilized by parties. Secondly, states increasingly realizing the economic benefits associated with hosting arbitration proceedings, would strive to ensure that their jurisdictions are more arbitration friendly.[28]The Government of Singapore, for example,

introduced two initiatives aimed at promoting the conduct of International arbitration within that jurisdiction. The first of such initiative was a tax incentive introduced in 2002 to exempt the income earned by non-residents, serving as arbitrators in Singapore, from tax; while the second initiative was a visa exemption introduced in 2008 for foreigners conducting arbitration in Singapore.[29]More states would increasingly follow this pattern. Similarly more States, appreciating the relevance of arbitration to international trade would ratify the New York Convention. This is attested to by the fact that only 24 states signed the Convention in 1958 when it was concluded, but currently, 148 states have signed, ratified or acceded to the Convention. In 2012, for example, two more states - Tajikistan and Liechtenstein acceded to the Convention.[30]Lastly, obstructionist tactics may increasingly be imported from litigation into arbitration since parties are frequently represented by lawyers who are used to such tactics employed in litigation to frustrate opponents. This may however not significantly limit the popularity of arbitration.

CONCLUSION

The nature of International commercial transactions exposes parties to legal risks and uncertainties when disputes arise from such transactions, particularly because of the differences in their legal, cultural and ethnic backgrounds. For such parties, an effective dispute resolution mechanism must significantly reduce, and where possible eliminate all of these associated risks and uncertainties. Arbitration possesses significant strengths capable of dealing with such risks by guaranteeing party autonomy; a neutral and centralized forum; a final and binding decision;

limited grounds for appeal; wide recognition of foreign arbitral awards; as well as confidentiality and privacy. It also possesses corresponding weaknesses capable of limiting its strengths, such as costs; delays; limited powers of arbitrators; limited grounds of appeal; absence of a system of precedents; problems of joinder/consolidation; and reservations made by some contracting states to the New York Convention. However, while it is true that these weaknesses exist and can limit the effectiveness of arbitration, a lot can be done by parties to severely minimize them while maximizing the strengths. An optimal use of arbitration by parties who take all the steps outlined in the paper, would guarantee the effective resolution of international commercial disputes. More importantly, none of the other dispute resolution mechanisms available to parties possess the strengths which arbitration possesses; and the weaknesses of such mechanisms are not such that parties can manoeuvre around as exists with arbitration. Arbitration is therefore highly effective for the resolution of international commercial disputes. Commentators who dispute the effectiveness of arbitration cannot realistically blame the system, as any blames if at all put forward, must correctly be levelled against users who fail to optimally utilize the system to achieve effectiveness.