

# The arbitration and model law law commercial essay

Law



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## **Introduction**

This document presents or highlights the challenges of Arbitration and How the Model law responds to them especially in relation to: (1) Conflicts of interests; and (2) the grant of interim measures in arbitral proceedings.

Many or most of the advantages of arbitration are of special importance in international complex long term contracts. This includes the expertise of the arbitrators, the neutrality of the procedure (with regard to nationality of the arbitrators, applicable law, venue, language etc.) its privacy, simplification and speed, the facilitated enforcement of the awards, the avoidance of a "rush to the court house" and the enhanced predictability. There exist very specialized types arbitration for instance, for maritime or construction deals, international investment disputes or "everyday" commercial cases. Within the past decade, the United Nations Commission on International Trade Law (UNCITRAL) has developed a model arbitration law which is geared specifically for international commercial disputes. The UNCITRAL model law approach, rather than looking to national law, which is generally geared toward domestic arbitration as opposed to international arbitration issues, emphasizes the will of the parties as the governing principle. UNCITRAL chose to use a model law structure because it is a flexible approach and it allows states to adopt easily the principles contained within the document. Initially, UNCITRAL considered preparing a protocol to supplement and clarify the 1958 New York Arbitration Convention[1], but UNCITRAL dropped this approach in favor of a model uniform law to serve as the basis for national arbitration laws.[2]

## **Definitions:**

In order to understand this concept firmly few elements such as "International", "Commercial", and "Arbitration" needs to be well defined before going further into details of the advantages and challenges of the international commercial arbitration. An arbitration is international if:(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or(b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country." Commercial Arbitration: Arbitration of a dispute as to a trade transaction for the supply or exchange of goods or services. In other words, a form of arbitration which is designed for use within commercial relationship and not personal, family law or labor law relationships. The UNICITRAL model law on Commercial arbitration, "... to cover matters arising from all relationships of a commercial nature, whether contractual or not." Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other

forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road." [3] Finally, the definition of International Commercial Arbitration, can be stated such as " A commercial dispute subject to arbitration and in which a significant international elements exists such as, for example, the head offices of the disputants are different countries or the performance of the underlying contract is in a foreign state.

### **International Commercial Arbitration with some advantages and some challenges**

International commercial arbitration has emerged as an important method of resolving disputes arising in private cross-border or transnational economic transactions. It is defined as a private way of resolving disputes which the parties choose from themselves [4]. Innovation as in information technology and computer networks, a global shift towards market economics within nation states and regional and multilateral free trade arrangements, have all led to an increasingly globalised world economy. The growth and influence of multinational corporations operating both globally and locally within domestic markets have resulted in apparently ' stateless' corporations who ' move around the world without particular reference to national borders' [5] As business practices and strategies have become increasingly complex and transnational, international commercial arbitration has become the leading alternative to litigation as a means of settling international commercial and business disputes. [6] The growth and development of International Commercial Arbitration has been fuelled by the needs and expectations of the international business community. Reasons traditionally given for the increased use of arbitration include of speed of resolving the commercial

disputes, decreased costs as compared with litigation of the dispute, privacy of the arbitral process, perceived neutrality of the arbitral forum, and the relative ease of enforcement of a final and binding arbitral award.[7] It is now standard practice to include an arbitration clause in contracts governing international commercial transactions such as, industrial and manufacturing joint ventures, technology transfer and licensing agreements, large scale construction and engineering, infrastructure projects and strategic alliances between corporations to develop innovative technologies or distribute goods and provide services in third countries. International commercial arbitration can be characterised such as a specialised international regime consisting of principles, norms, rules, and decision making procedures around which the expectations of the international business community converge concerning the legitimacy of resolving international business disputes by private extrajudicial means.

**Perceived Disadvantages of Arbitration**

International commercial Arbitration is a hybrid. It begins as a private agreement between the parties. It continues by the way of private proceeding, in which the wishes of the parties play a significant role. Yet it ends with an answer that has binding legal force and effect and which, under appropriate conditions, the courts of most countries will recognise and enforce. This relationship between national law and international law and conventions is of vital importance to the effective operation of international arbitration. It is irrefutable to maintain that the modern arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionalised, more expensive. Following are some of the disadvantages or challenges: The cost of arbitration: Firstly the fees and expenses of the

arbitration must be paid by the parties; and in international arbitration of any significance, these charges must be sustainable. Secondly it may be necessary to pay the administrative fees and expenses of an arbitral institution and these too can be substantial. In a major arbitration, it may be thought necessary (or desirable) to appoint a secretary or registrar to administer the proceedings. Once again, a fee must be paid. Finally, it will be necessary to hire rooms for meetings and hearings, rather than making use of the public facilities of the courts of Law.

**Delay:** An increasing complaint is that of delay, particularly at the beginning and at the end of the arbitral process. At the beginning, the complaint is of the time that it may take to constitute an arbitral tribunal, so that the arbitral process can start to move forward. At the end of the arbitration the complaint is of the time that some arbitral tribunals take to make their award, with months- and sometimes years or more-passing between the submission of post hearing briefs and the delivery of the long awaited award.

**Limits of arbitrator's powers:** In general, the process accorded to arbitrators, whilst adequate for the purpose of resolving the matters in dispute, fall short of those conferred upon a court of law.

**Non-Signatories:** The problem of " Non-Signatories" arises when an individual or a legal entity which is not a party to the arbitration agreement wishes to join in the arbitration as one of the claimants-or, more usually, is brought unwillingly into the arbitration as one of the respondents. A common example is that of a claimant with a dispute under a contract between itself and the subsidiary of a major international corporation. The contract contains an arbitration clause, and so arbitration can be compelled against the subsidiary company, but the claimant would very much likely to bring

the parent company into the arbitration, so as to improve its chances of being paid, it succeeds in its claims. If all the relevant parties could be brought into the same arbitral proceedings, it would reduce the task of conflicting decisions. But this is not possible, unless all parties are joined in same way by an arbitration agreement. Consolidations: A different problem arises where there are several contracts with different parties, each of which has a bearing on the issue in dispute. This is again something that is becoming increasingly common, with the development of global trade. For example, a major international construction project is likely to involve not only the employer and the main contractor which itself may be a consortium of companies, but also a host of specialised supplies and sub-contractors. Each of them will be operating under different contracts, often with different choice of law and arbitration clauses; and yet any dispute between, say, the employer and the main contractor is likely to involve one or more of the suppliers or sub-contractors. In court proceedings, it would usually be possible to bring all the relevant parties before the court in the same proceedings; in international arbitration, this is more difficult to achieve. Conflicting awards: Finally, there is a problem of conflicting awards. There is no system of binding precedents in international arbitration -there is to say, no rule which means that an award on a particular issue, or a particular set of facts, is binding on arbitrators confronted with similar issue or similar facts.[8]. Judicialisation: The change that international arbitration has become too much like litigation is not new. In a collection of essays on International Arbitration in the 21st century, Lillich and Brower wrote about the increasing ' Judicialisation' of international commercial arbitration 6

meaning both that arbitrations tend to be conducted more frequently with the procedural intricacy and formally more native to litigation in national courts and they are more often subjected to judicial and control[9]

## **The Model Law**

The Model Law began with a proposal to reform the New York Convention. This led to a report from UNCITRAL, to the effect that harmonisation of the arbitration laws of the different countries of the world could be achieved more effectively by a model or uniform law. The final text of the model law was adopted by resolution of UNCITRAL, at its session in Vienna in June 1985, as a law to govern international commercial arbitration; and a recommendation of the General Assembly of the United Nations commending the Model Law to Member States was adopted in Dec. 1985. The Model law has been a major success. The text goes through the arbitral process from beginning to end, in a simple and readily understandable form. It is a text that many states have adopted, either as it stands or with minor change, as their own law of arbitration. So far, over forty states have adopted legislation based on the Model law, with some states, such as England, choosing to modernise their laws on arbitration without adopting the model law whilst paying careful attention to following its format and having close regard to its provisions. Model law has established specific set of rules and regulations regarding International Commercial Arbitration so as to avoid the above mentioned challenges of arbitration process. Following are the two main challenges of arbitration process where Model law has given some rules and guidelines to follow:



## **Conflicts of Interest:**

According to a widely used definition, " A conflict of interest is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest". Problems of conflicts of interest increasingly challenge international arbitration. Arbitrators are often unsure about what facts need to be disclosed, and they may make different choices about disclosures than other arbitrators in the same situation. The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and their right to a fair hearing and, on the other hand, the parties' right to select arbitrators of their choosing. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international arbitration

community apply different standards in making decisions concerning disclosure, objections and challenges. Experience shows that challenges raise a great variety of circumstances in which parties allege that there has been a failure to disclose information that is arguable relevant. The practical issue for the arbitrator is how and where to draw the line as to disclosure. The IBA (International Bar Association) guidelines deal with the issue of conflicts of interest and disclosure by arbitrators in some detail and are intended to provide that standards which should be applied by the arbitrators in deciding what to disclose. These guidelines have been criticised in a number of respects as is discussed with respects to challenges. However, as regards disclosure and best practices as to disclosure, the IBA Guidelines have proven to be very helpful.[10] They do not purport to set down hard and fast rules. Nevertheless, they are used by the arbitrators in deciding what to disclose and by parties in deciding whether disclosure was inadequate.[11] General standards 2 of the IBA Guidelines provide more detail in this respect as it states that: "(2) Conflict of interest An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or ability to be impartial or independent. The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirement set out in General Standard (4). Doubts are justifiable if a reasonable and informed third party would reach the

conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision. Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake." Model Law rules via Article 11, 12 & 13 covers and provides the solutions for the issues of Disclosure, Impartiality or Independence. As per article 11, it is clearly stated that " When a person is approached in connection with his or her possible appointment as an arbitrator, he or she disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances."\*\* Model statements of independence pursuant to article 11 of the Rules "No circumstances to disclose" I am impartial and independent of each of the parties and intend to remain so..... I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration." Circumstances to disclose"..... Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances..... I confirm those circumstances do

not affect my independence and impartiality. I shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration." The duty to check on potential conflictsThe disclosure obligation in Art. 11 requires the arbitrator to check as to potential conflicts, particularly as regards relationships within the arbitrator's law firm if he is associated with a law firm. For e. g. in the case Tecnimont case, a chairman who was a partner in a large law firm was unaware that separate offices of the firm represented Tecnimont's parent company and that the chairman's office represented a subsidiary owned by Tecnimont. Article 11 sets out a standard for disclosure under the Rules. Article 11 is closely related to the issue of challenges under Art. 12 in particular. Article 12 states as follows,

**Any arbitrator may be challenged if circumstances exists that give rise to justifiable doubts as to the arbitrator's impartiality or independence.**

**A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.**

**In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.**

Article 12 (1) is very broad in its reference to impartiality and independence. It is required here to distinguish impartiality as to the procedure and as to the merits. Issues as to Impartiality and the Procedure: Arbitral proceedings

are intended to be flexible and cost effective. There is no set code of procedure. Moreover Appointing Authorities and arbitration institutions are reluctant to second-guess the procedural decisions of tribunals and rarely uphold a challenge on those grounds except where the arbitrator's conduct is manifestly improper, particularly where such decisions are made during hearings themselves. As a result, to provide a basis for a challenge under the Rules, the conduct of the arbitrator or Tribunal generally must constitute a clear violation of the Rules or the principles of due process. Issues as to Impartiality on the Merits: At the outset, there is an issue as to a premature expression by the Tribunal of its view on the merits. In a number of unreported cases, a Tribunal or sole arbitrator has either issued a procedural order or a partial Award that does not resolve an issue but where the document comments on the merits of the issue. These ' preliminary views' may be the subject of challenges as indicating a predisposition on the merits. It is usually difficult to succeed with such a challenge, as the challenging party is almost invariably seeking to avoid an ultimate unfavourable decision on the point. Nevertheless, the issue does arise and could be avoided. As per Article 12(2), a party may become dissatisfied with the arbitrator that it has appointed. However a party may only challenge the arbitrator for reasons of which it becomes aware after the appointment has been made. In some instances, a party will challenge the arbitrator that it appointed when it is challenging the entire tribunal. Whereas, the Article 12(3) deals with an arbitrator's failure to act or the impossibility of acting. It provides that the procedure with respect to the arbitrator will be the set out in art. 13. It applies to sole arbitrators as well as to Tribunals. With respect to sole

arbitrators, the failure to act or the impossibility of acting in essence blocks the proceedings automatically. With respect to Tribunals, the failure to act by one arbitrator or the impossibility of acting may result in a blockage of the proceedings.

### **Interim Measures:**

In practice, the parties to a dispute often feel the need for interim measures in connection with an international commercial arbitration. 1 Interim measures of relief, also called conservatory and provisional remedies, 2 provide a party to the arbitration with an immediate and temporary protection of rights or property pending a decision on the merits by the arbitral tribunal. Such measures, having a huge practical importance, are often indispensable if an award subsequently rendered is to be effective. Several kinds of interim measures, such as attachment, injunctions or orders safeguarding and preserving perishable property, requesting payment of part of a claim, or imposing the posting of security for costs, may be granted by arbitrators or by local courts. Such measures are particularly varied and innovative, as international trade practice continues to generate new kinds of remedies according to the needs of the parties to the dispute and to the increasing complexity of cases. As arbitration is based by nature on a contractual agreement between parties, there is no single or even central international arbitration forum. Therefore, the rules governing the powers of arbitrators to order interim measures must be analyzed by reference to the various systems of international arbitration. Under the principle of freedom of contract, the parties may theoretically draft every contractual provision according to the specific needs of the dispute.

## **Article 26 of the Model Law**

Article 26 provides a detailed set of provisions regarding the type of interim measures that may be granted, the condition under which they may be granted or rescinded, the costs and the liability with respect to the interim measures. Article 26(1) set out the principle that a Tribunal may grant interim measures. Article 26(2) defines the in a non- exclusive manner the type of interim measures that may be granted. Article 26(3) and (4) deal with the standard that is to be met for granting an interim measures. Article 26(5) deals with termination of interim measures by the Tribunal. Article 26(6) deals with security for the granting of an interim measure. Article 26(7) provides that Tribunal may order a party to provide notice of a change in circumstances relating to an interim order. Article 26(8) deals with the potential liability of a party in whose favour an interim measure is granted. Article 26(9) deals with the compatibility of Art 26 with requests for interim measure addressed to courts or other judicial authorities. Overall Article 26 seeks to provide, in a very broad and detailed manner, for measures that will preserve the rights of the parties, the integrity of the arbitral process and the possibility that the award will be carried out. The past decisions of tribunals on requests for interim relief are as varied as the requests themselves. Nevertheless, it is clear that Tribunals have treated broadly similar situations in different fashions. For e. g. the two cases namely Occidental and Perenco, in the former the interim measure was refused after a thorough analysis of the legal authorities whereas in the later, the interim measures were granted after an equally thorough analysis. However, despite the breadth and detail of Art. 26, the ability of a party to obtain interim measure of protection from

a tribunal in UNCITRAL arbitration depends on several factors: the terms of the arbitration agreement, the Rules, the laws of the place of arbitration and the laws of any jurisdiction in which such enforcement may be sought.

Interim measures ordered by state courts: For counsel, the area of interim measures is complex. As a general matter, it is easier and more appropriate to seek interim measure from a court prior to the constitution of the Tribunal.

If there is a need for interim measures prior to the constitution of the Tribunal, there may in fact be no other choice. Once the tribunal has been constituted, there will be an issue as to whether the party should apply first to the Tribunal and then to the court or vice versa. If the Tribunal has no reasonable possibility of granting an effective interim measure, then direct resource to the state court may well be appropriate, provided that the Tribunal is given a prompt notice of the measure and that the local procedure permits such a course of action. A concern may arise where the effect of the application to the state court may be to delay the arbitral proceedings. For example, if a request to a state court to order an interim measure could result in delay in the proceedings (as a result of appeals, for example), then counsel should carefully consider the potential negative impact on the arbitral proceedings. A concern may also arise where the application to the state court duplicates a potential application to the Tribunal. In such a case, the general rule is to apply to the tribunal, whatever limitations one may see with respect to the enforcement of the Tribunal's order. Moreover, if an application is made to a state court and it is refused, there is a real danger that the Tribunal may consider that as a material factor in deciding whether to grant the measure. However, it is submitted



that the Tribunal should make the ultimate decision as to whether an interim measure should be granted even if previously refused by the state court. It is the Tribunal that must decide the merits and that should ensure that its Award is effective.

### **Conclusion:**

To sum up the facts, it can be stated that the Model law on International Commercial Arbitration has been widely accepted as due to more clear approach and understanding of the current scenario shown by the whole document.