LL.M. IV SEMESTER
SUBJECT: INTERNATINAL TRADE LAW
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TOPIC: International Commercial Arbitration

Introduction

International commercial arbitration has expanded rapidly in recent years. Given the dramatic increase in international trade and disputes arising from, International arbitration institutions have flourished, many jurisdictions have passed new or updated International arbitration statutes, arbitration jurisprudence has increased manifold, and international arbitration textbooks and courses have appeared in Law schools. U.S. Court have abandoned their traditional distrust of international arbitration, holding that the international nature of contracts constitutes a reason to recognize and enforce arbitration clauses that might not be held valid in a purely domestic context.

Unlike meditation which attempts to help parties volunteer resolve their disputes, International commercial arbitration is a binding dispute regulation mechanism. The parties must agree it to either at the time of drafting of a contract of sometime thereafter, usually after a dispute has arisen. With the exemption of international Centre for the settlement of investment disputes ("ICSID") arbitration, which always involves a sovereign entity or constituent subdivision or agency thereof, international commercial arbitration takes place between private parties (including, perhaps, state owned companies acting in a non sovereign is in capacity).

In its basic structure, international commercial arbitration resembles the usual litigation process. Parties make claims and defences, submit written pleadings, and call witnesses or submit their statements. Upon the completion of arbitration, the awards, which may be annulled by a special ICSID adhoc committee, most arbitral awards are considered final and binding on the parties. Whether and to what extent the award is "reasoned" (i.e. contains a doctrinal justification of the result) and whether dissenting opinions are rendered vary according to the arbitral rules used and the advantages or disadvantages of having a "reasoned" award in the jurisdiction(s) where the award may be enforced. The awards need not be made public, and, technically at least, are not binding precedent for future arbitral tribunals.

International arbitration differs from international litigation in that arbitrating parties determine to a large extent what procedural rules will cavern the resolution of their dispute, and who will decide the dispute. In the context of international trade in commodities, disputes are often resolved within the context of trade organizations and their standards. In “ad hoc” arbitration, the parties negotiate procedural rules directly, either before or after a dispute has arisen, then conduct the arbitration pursuant to those rules. Alternatively, the parties may adopt the arbitration rules developed by the United Nations Commission on International Trade Law “institutional” rules discussed below, yet, by them, do not provide the administrative apparatus (and resulting expense) connected with institutional arbitration.

Probably more common than ad hoc arbitrations are those run under the auspices of an arbitral institution. The oldest and perhaps best known of these institutions is the international Chamber of Commerce (ICC) located in Paris. The American Arbitration Association (AAA), based in New York but with affiliates throughout the United States, also has become increasingly active in administering international arbitration. It has concluded agreements with many foreign arbitral institutions, created supplementary rules for international arbitrations, and has allowed parties to conduct AAA arbitration under the UNCITRAL rules. Other well established institutions include the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce, newer institutions include those in Singapore and Vancouver. The Permanent Court of International Arbitration has recently updated its rules and prepared to act more along the lines of the ICC and AAA.

These institute do not themselves “decide” arbitration cases. The arbitrations often take place not in the home city of the institution, but at a location designated by the parties or arbitrators, Rather, for a fee, arbitral institutions administer arbitrations including receiving and distributing pleadings, and perhaps appointing arbitrators or reviewing an award for technical accuracy usually in connection with a decision by the parties to use the arbitration rules of the institution. These rules regulate such issues as the choice of arbitrators, the process of replacing an ill or deceased arbitrator, challenges to arbitrators for lack of independence, how and when parties file their pleadings, provisional remedies, the power of the arbitrators to hear witnesses language(s) of the proceeding, evidentiary issues, and the drafting and signing of the arbitral award. Most institutional rules allow the parties to modify the rules to some extent, and to “fill in the gaps” where the rules are silent. Parties thus look to the institution and its rules to resolve issues that are often not negotiated by the parties before they sign a contract.

While the rules of the various arbitral institutions contain similar provisions on many issues, there are important difference among the various institutional rules. Take, for example the situation in which two parties have agreed that arbitration is to be before a three-arbitrator tribunal. The ICC rules generally provide that each party nominates an arbitrator, with the third arbitrator being chosen by an ICC body unless the parties have provided that the party appointed arbitrators agree on a third arbitrator within a fixed time-period. The UNCITRAL rules provide for a similar procedure, except that when the party appointed arbitrators cannot agree either on the third, presiding arbitrators or on an institution to appoint that arbitrator, the Secretary-General of the Permanent Court of arbitration at The Hague, upon application by a party, chooses the appointing authority for that arbitrator.

By contrast, the AAA International Arbitration Rules provide that the parties may agree on any procedure for appointing arbitrators. However, if within sixty days after the commencement of the arbitration the parties have not agreed on the procedure for or the designation of the arbitrators the AAA administrator may, upon written request by a party, appoint the arbitrator(s) or perform all functions provided for in a procedure agreed to by the parties. Interestingly, the standard AAA Commercial Arbitration Rules, in cases in which the parties have not agreed on the tribunal or its selection, contain somewhat different default procedures for the choice of arbitrators. In such cases, the AAA provides the parties with a list of potential arbitrators. The parties may then strike names from the list and rank remaining names in order of preference, with the AAA choosing from the list any arbitrators on which the parties cannot agree.

The strengthening of the international arbitral system has created many reasons for parties to choose international arbitration over court litigation. Parties often prefer a neutral dispute resolution forum, such that no party need submit to the jurisdiction of the courts of another party's home nation. In many cases, the parties may choose their own judge(s), who may come from a neutral jurisdiction, who often have expertise in the field in question, and who, barring illness or death, virtually always decide a case from beginning to end (thus eliminating the possibility of having different judges hearing different motions or other aspects of a complex lawsuit) Independent of court backlogs, the parties, in conjunction with the arbitrators, set their own schedule, and follow their own procedural rules. The arbitration proceedings are, at least in principle, non-public, thus allowing parties, especially those with long-standing relationships, to resolve their disputes away from public scrutiny.

Whether international arbitration is cheaper than international litigation is a hotly debates issued, and depends upon a number of actors. Whereas judges are paid by the state, and a single arbitrator

In a smaller matter may serve gratuitously, each arbitrator of the three-arbitrator panel typical of a large arbitration may demand relatively high fees for all time spent in connection with the arbitration, including reading pleadings and documents, travelling to the site of the arbitration, writing the award, etc. The number of parties involved, the amount in controversy, and the willingness of the parties to accept the arbitral award immediately, rather than attempting to challenge it in the courts, may also determine the ultimate cost-effectiveness of international arbitration vis-a-vis international litigation.

Some observers find that the increase in popularity in international arbitration carries with it the seeds of the system's own demise. The clam is that as international arbitration has moved beyond those parties that traditionally used it, viz, parties to trade in commodities, parties with long-standing relationship, etc. Arbitration has become simply litigation before a different type of tribunal. As a result, the process has become more litigious and less a true alternative to national court litigation. The future of international arbitration may well depend, at least in part, on the ability of arbitrators, signatories to arbitration agreements, and courts to maintain the integrity of the international arbitral process.

International Commercial Arbitration

Commercial arbitration has been going through an incredible growth over the last decades and has become a "hot-topic". An entire industry has developed around alternative dispute resolution. (ADR) Certain countries have even adopted arbitration laws that limit judicial reviews of arbitration awards (Belgium, Switzerland, and England) in order to facilitate this growth market and get their share of this multimillion-dollar industry.

If the parties to a contract decide to use commercial arbitration to resolve any dispute they might have, they will have to do so either by inserting a clause to that effect into the written agreement or agree to submit a conflict to arbitration when it arises. Since it can be safely stated that parties in dispute will be having a hard time agreeing on anything, it is better to include an arbitration clause in the original agreement.

The arbitration forums of the international chamber of Commerce and the London Court of international arbitration are mos' widely used for international arbitration.

If parties opt for arbitration it is advisable to use one of these institutes. The AAA is another option but only handles around 200 international cases per year (for reasons explained below) where the ICC handles around 400 international cases. The LCIA is decisively smaller than its "Paris" and "New York" counterparts and is the most costly of the three. (Please note that Paris and New York are of coursed only the seat of the governing bodies, appointing the arbitrators and handling all administrative matters, the proceedings itself can take place all over the world.

Advantages of Alternative Dispute Resolution

(1) **Familiarity with Procedure:** When international contract disputes are brought before a national judge there is normally one party unfamiliar with the procedure. In case of arbitration with one of the international institutes this is not the case. Furthermore the procedures in arbitration are simple compared to the civil procedure of many countries.

(2) **No home-court advantage:** Even when it is not justified, there will always be distrust towards a foreign court, especially when the court is from the homeland of the opposing party. This is not the case with arbitration before an impartial tribunal and sometimes even on neutral gourd.

(3) **Choice of Law**: National judges will often "lean" towards the laws of their own country and resist the use of transnational laws and trade usage. (lex mercatoria)

(4) **Clear Jurisdiction**: There is no doubt in case of an arbitration clause which tribunal has jurisdiction an issue which can be the ground for expensive and tedious jurisdictional defense motions in a law-suit. (Although there is always the risk of the opposing party questioning the validity of the arbitration clause solely for the purpose of delaying the arbitration).

(5) **International Enforcement**: This is probably the most important reason to elect arbitration for dispute settlement. About 100 countries are signatories to the 1958 New York convention, which makes the enforcement of an arbitration award a "shoe-in" compared to enforcing monetary judgments from a national court in another country.

(6) **Confidentiality**: The proceedings before the tribunal and the final award are normally kept confidential. This protects business secrets and can facilitate settlement by reducing the opportunities and incentives for "media-play" by the parties.

Disadvantages of Alternative Dispute Resolution

(1) **High Costs:** The costs of conducting an international arbitration are considerable. Actually, with the legal fees, administration costs and arbitration fees, the average arbitration can be more expensive than a lawsuit.
(2) **Delay tactics:** Speed used to be one of the advantages of arbitration. This is no longer so. In case of a technical or complex legal matter the arbitration can last just as long, or even longer, than a lawsuit. Furthermore, there are ways in which an arbitration procedure can be delayed, not unlike the delays experienced in a lawsuit.
(3) **Limited Juridical Review:** With legal systems all over the world more positive towards arbitration, the judicial reviews of the arbitration procedure and subsequent rewards are being limited to procedural or "public policy" checks only (not a review of the merits of the case). This means that there now exists the risk that one has to take defense against an obvious erroneous arbitration award in each country where one has assets and that is a signatory to the New York. Convention, since the arbitration award can no longer be annulled in the country of the arbitration situs.

International conventions and Treaties

Treaties aim to facilitate the international commercial arbitration mechanism across national borders.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention)

330 U.N.T.S. 3, 21 U.S.T. 2517 (June 10, 1958)

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention)

575 U.N.T.S. 159 17 U.S.T. 1270 (March 18, 1965), Established the International Centre for the Settlement of Investment Disputes (ICSID)

Inter-American Convention on International commercial Arbitration (Panama Convention)

Organization of American States, Treaty Series, no. 42

Inter-American Convention of Extraterritorial Validity of Foreign Judgements and Organization of American States, Treaty Series, no. 51

Convention for the Pacific Settlement of International Disputes

Adopted July 29, 1899 Replaced by convention of Oct. 18, 1907 as between contracting parties to the later convention

Convention for the Pacific Settlement of International Disputes

Adopted October 18, 1907

European Convention on International Commercial Arbitration

484 U.N.T.S. 349 (Apr. 21, 1961)

Agreement relating to application of the European Convention on International Commercial Arbitration

523 U.N.T.S. 93 (Dec. 17, 1962)

European Convention Providing a Uniform Law on Arbitration

(Council of Europe, ETS No. 56)

Opened to signature January 1, 1966; has not entered into force

Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation (Moscow Convention)

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