# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

# DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions ofthe authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Boardnor IJLRA shall be held liable or responsible in any manner whatsever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

# EDITORIAL TEAM

## EDITORS

### Megha Middha

*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

### Dr. Samrat Datta

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*

## *Dr. Namita Jain*

*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## Mrs.S.Kalpana

Assistant professor of Law

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*

## Avinash Kumar

*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

# ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN
2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# COMMERCIAL ARBITRATION AND UNCITRAL MODEL LAW

AUTHORED BY - KOSTUBH CHANDELA

## INTRODUCTION

Commercial arbitration is of several forms of dispute resolution for commercial agreements. The use of arbitration has increased along with the growth of international trade and commerce and the accompanying disputes springing from these pursuits. In its broadest sense, arbitration is a vehicle of dispute resolution in which parties to a contract select a neutral arbitrator (or a panel of arbitrators) to present their dispute for a legally binding ruling. Arbitration is often selected for the reasons of confidentiality, speed, enforceability of arbitral awards, and to eliminate the uncertainties in the choice of arbitrator and forum. Parties from different national origins may also be reluctant to accept national court litigation with the potential for national bias. Arbitration offers parties more control over how proceedings will be conducted. Arbitration awards are, with rare exception, final and binding.

Commercial arbitration has many different issues and the researcher need to have access to numerous resources to make informed decisions. Since no individual format provides exhaustive coverage of commercial arbitration resources, both print and electronic resources are presented in this guide.[1]

### I. Arbitration

Arbitration is derived from the nomenclature of the Roman Law, and means and arrangement for investigation and determination of a matter or matters of difference between contending parties by one or more unofficial persons chosen by the parties. It is the settlement of disputes, by the decision not of a regularly constituted tribunal, or ordinary court of law, but of one or more persons voluntarily chosen by the parties, who by reason of the confidence reposed in them find favour in the eye of litigants. Arbitration is essentially a private resolution of disputes by the parties concerned virtually appointing their own judge. They are allowed substantial leeway in determining the procedure to be employed in deciding the matter concerned often even the law

[1] *Jean M. Wenger is the Government Documents/Foreign and International Law Librarian at the Cook Country Law Library, a practitioner's law library in Chicago.*

applicable. An arbitrator, therefore constitutes a tribunal set up by the parties themselves, not as part of any mechanism established by the state or by a law, to adjudicate disputes. Though proceedings in arbitration are required to be organized on some systematic basis, there is a marked departure from the conventional judicial process in several aspects like hearing the parties concerned as well as deciding the dispute itself.[2]

Arbitration means any arbitration[3] whether or not administered by permanent Arbitral Institution. An Abritration is a reference to the decision of one or more persons of a particular matter in difference between parties. It is the submitting of a disputed matter to the judgement of one or more persons called arbitrators.

## II. Disputes or difference

If there is to be a valid arbitration there must be a dispute or difference between the parties. Every dispute is a conflict and as such dispute settlement process vary with the nature of conflict.

Abuert says that the solution of a conflict may be brought about in two major ways it may be either through

(i) Bargaining compromise.

(ii) Or through application of law to facts.

There is however another kind of conflict which Aubert call dissensus or conflict of values. Such a conflict can not be compromised because scarifices and advantages can not be quantified. When a conflict of interest is handed over to law it acquires the character of conflict of values. This involves disagreement regarding certain facts or concerning the norms which apply to such facts or both. This is necessary so that a solution could be found by an outsider who knows the rules of evidence and perceive the facts through them and can handle the normative order. Therefore, in case of conflict of value only one of the parties can succeed.

The spirit-the ethos has out of commercial[4] arbitration. It has been transformed into what Sir Michael Kerr has characterized as “International disputology”.[5]

## III. Present and Future Disputes

An agreement to arbitrate represented a compromise on the part of the parties; and this is reflected in the language which refers to a submission agreement as a compromise and to an arbitration clause as a clause compromiser. An arbitration clause is like a blank cheque which may be cashed

---

[2] Banerjee Durga Charan, “Law of Arbitration in India”. P.1

[3] Section(2)(1)(a). Venugopal, K.K., „Arbitration and Conciliation Act,1996

[4] Redfern, A., and Hunter, M, “Law and Practice of International Commercial Arbitra tion

[5] Aubert, V., Competition and Disensus: two types of conflict and conflict resolution (1963) 7. Journal of Conflict Resolution 26.

at a future (as yet known) date.

Generally National Laws are reluctant to give full effect to the future disputes but model law given full effect to both types of disputes whether existing and future disputes.

## IV. Commercial Arbitration

Commercial Arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms with mediation[6], no doubt merging into adjudication.

Commercial arbitration is distinguished from other types of arbitration in as much as the commercial arbitrations derive their authority solely from contract, they resolve the whole dispute and, generally, do so according to law. There is a major exception to the rule that a commercial arbitrator should decide according to law. Sometime merchants insert clauses[7] in arbitration agreements which authorize arbitrators to resolve disputers ex aequo et bono or as amicable compositors.

In the former case the arbitrators may depart from strict law and decide the case according to equity and good sense. In the latter case, the arbitrator will use its good officers to engineer in an amicable settlement. Strictly speaking, amicable settlement is not a determination but the conclusion of a new to settle the dispute. Some national laws expressly recognize this type of arbitration.

## V. International Commercial arbitration

What makes commercial arbitration international? This questions is important because there are international conventions which establish special rules for facilitating commercial arbitration and for the recognition and enforcement of international arbitral awards. There are two major conventions[8] namely: the convention on the recognition and Enforcement of Foregin Arbitral Awards (commonly known as New York Convention, 1958) and the UNCITRAL Model Law on Commercial arbitration. The New York Convention is restricted to the imposition of duties on state parties to recognize and enforce foreign arbitral awards. The UNCITRAL MODEL LAW is more extensive code. The New York Convention, does not actually use the term „International‟

[6] The secondary meaning of compromise is given as „An Agreement under which the parties make mutual concession‟, in Robert, Dictionaire de la longue francaire.

[7] UNCITRAL Model Law Article 7(1)

[8] Gillies. P. and Moens. G. (Prof.). International Trade and Business Law, Policy and Ethics (1998)p.732.

but applies its provisions to „arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards was „Sought" and to „arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought". The UNCITRAL Model Law gives a more detailed account of what constitutes „International Arbitration".

Under Article 1(3), an arbitration is international if at the time of the conclusion of the agreement: the parties have their place of business in the same state, the arbitration will yet be international if the designated place of arbitration, the place where a substantial part of the commercial obligations have to be performed or the place with which the subject matter of the dispute is most closely agreed that the subject matter of the arbitration agreement relates to more than one country. International commercial arbitration[12] means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is

(i) An individual who is a national of, or habitually resident in, any country other than India.

(ii) A body corporate which is incorporated in any country other than India.

(iii)A company or an association[9] or a body of individuals whose central management and control is exercised in any country other than India.

(iv)The government of foreign country.

In fact, the world of commercial arbitration is not premised on its participants possessing any legal qualifications: it is only in four out of the one hundred and twenty five New York Convention countries that there is an express legal requirement that an arbitrator must be a qualified lawyer.

New York Convention, 1958, UNCITRAL MODEL LAW 1985, are all silent on the arbitrators qualifications: the only requirement contained in the UNCITRAL Model Law is that the person appointed (as arbitrator) should be independent and impartial.

In principle, the arbitrators can only exercise[10] such powers as the parties by their agreement to arbitrate bestow upon them. These powers are supplemented and added by the law relating to arbitration (This is the law governing the contract or even which can be chosen by the parties concerned). The approach of the model law is also towards recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an *adhoc* agreement, the procedure to be followed, subject to fundamental requirements and justice. In case the parties

[9] Sec. 2(f), Arbitration and Conciliation Act, 1996

[10] China, Peru, Columbia, Ukraine are the only four New York Convention Countries that have prescribed the legal qualification for arbitrators

ISSN: 2582-6433

have not used their freedom to lay down the powers of the arbitrators, model laws provisions can be used to invest the arbitrators with requisite authority.

Several third world states were suspicious of international investment arbitration because it has given rise to a system of competing norms which favour the foreign investor to the detriment of developing[11] states.

## VI. ARBITRATION-ELECTRONIC FORMATION OF CONTRACT

Due to incapability of traditional law, electronic formation of contract became inevitable. The main features of the paper based regime "writing", "signature", and "original". Writing given validity signature identifies signer and authenticity of document.

"Original" ensures integrity. Enforceability, authenticity and integrity of a paper document can also be achieved by an electronic document. The Information Technology Act, 2000, (which is based on UNCITRAL Model Law) provides legal recognition to electronic records and electronic signatures, their use, retention attribution and security. A message bearing digital signature, verified by a public key listed in the valid certificate is as valid, effective and enforceable as if the message had been written on paper and signed by hand.

In respect of all functions of paper writing, signature and original electronic records can provide the same level of security as paper.

The Information technology Act 2000 gives legal recognition to data message, corresponding to paper documents[12] so that the message could serve the same function. Section4 (writing), section 5 (signature), and section 7(original).

The validity of the electronic contract can not be questioned in the absence of a paper document, if the agreement is enforceable in law. So we can say that some of the features of the Contract Act, 1872, are adopted to the new environment of paperless communication.

## VII. CHOOSING BETWEEN ARBITRATION AND LITIGATION

The possibility of a legal dispute is never absent in international trade transactions. The reasonable exporter, in spite of the care he has taken in the preparation of the contract of sale, has to contemplate acting against the buyer who is in breach of contract.

Ideally, the exporter should consider this issue before entering into the contract of sale. When he

[11] Sornarajah, M., Article „International Commercial Arbitration: The Protection of State Contracts.

[12] Law of Arbitration ADR and Contract. pp. 354-355.

has made his choice from the procedures available for dispute resolution, he should insist that the term giving full expression to the chosen procedure is inserted into the contract. It is common experience that agreement on this point is easier during the course of negotiation than that when a dispute has arisen, as in the latter situation. The aggrieved [13]part has no means of compelling the other to agree to an extra judicial procedure of dispute settlement.

If the exporter decided in favour of dispute resolution out of court, he may insert into the contract of sale an alternative dispute resolution (ADR) clause which embraces mediation and conciliation or an arbitration clause.

## VIII. DISTINCTION BETWEEN INTERNATIONAL AND DOMESTIC ARBITRATION

It is important to make a distinction between International[14] Arbitration and Domestic Arbitration. Although this module does discuss some concepts that are common to both types of arbitration, the essential thrust is to discuss commercial arbitration, since it is only this facet of arbitration that is involved in the resolution of disputes concerning international trade.

(1) If the nature of the dispute and arbitration involve the interests of a foreign trade, it will be treated as a foreign arbitration. The Delhi High Court in ***GAIL v. Spie Capag*** held that an arbitration agreement, which possess[15] the flavour of international trade and commerce, would be within the realm of the law relating to foreign arbitrations, even in fact a domestic award and not a foreign award.

This was widely considered to be a progressive judgement, since it brought into the realm of commercial arbitration law many more arbitration agreements, which would otherwise have been dealt with under the domestic law.

### Conclusion

The concept of parties settling their dispute in a binding manner by reference to a person or persons of their choice or private tribunals was well know to ancient and medieval India. Appeals were also often provided against the decisions of such persons or tribunals to the courts of judge appointed by the king and ultimately to the king himself. However, the law or arbitration as is known to modern India owes its elaboration, in phases, to the British rule of India. Through a

[13] Schimith off and Simond, International Economics and Trade Law. P. 472

[14] Ali Shipping Corporation. v. Shipyard Trogir (1998) I Llyod‟s Rep. 643 CA

[15] AIR 1994 Del. 75.

 ISSN: 2582-6433

series of what were know as Regulations framed by the East India Company in exercise of the power vested in it by the British government, beginning with the Bengal Regulations of 1772, the court in different parts of British India were empowered to refer, either with the consent of the parties or at the instance of the parties, certain suites to arbitration. The successive Civil Procedure Codes enacted in 1859, 1877 and 1882, which codified the procedure of civil courts, dealt with both arbitration between parties to a suit and arbitration without the Intervention[16] of a court. The law relating to contracts also simultaneously developed certain principals of relevance to arbitration. Ordinarily, all disputes arising under a contract have to be settled by courts established by the state. Section 28 of the contract Act, 1872 provides that every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract., by the usual legal proceeding in the ordinarily tribunals, or which limits the time within which he may thus enforce his rights, is void to the extent

**REFRENCES**

1. Gill H. william, Evidence and procedure in arbitration.
2. Gillies, P. and Moens, G.(prof.). international Trade and business law, Policy and ethics (1998).
3. Holdsworth, History and English Law(1964).
4. Kwatra, G.K., 'The New Arbitration and Conciliation Law of India, The Indian Council of Arbitration Publication.
5. Martin H., and Redfern A., International Commercial Arbitration (Sweet & Maxwell).
6. Mittal D.P., ' Law of Arbitration ADR and Contract'.
7. Mozeley and Whiteley, 5 Concise Law Dictionary
8. Schimithoff and Simond, International Economics and Trade Law.
9. Singh, S.D., 'Law of Arbitration, 7th ed., Eastern Book Company, Lucknow.

[16] Nripendra Nath Sircar, The Law of Arbitration in British India, 1942: