WORKING OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) ARBITRATION RULES AND COMPARATIVE STUDY OF IRAN AND INDIA

ABSTRACT
OF
THESIS

SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy
In
LAW

BY
SHAHAB ABDOLLAH

Under the supervision of
PROF. IQBAL ALI KHAN
CHAIRMAN

DEPARTMENT OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH (UP) INDIA
2016
ABSTRACT

The present work contains six chapters.

Chapter first has discussed about historical background trade, international trade, arbitration in general and UNCITRALT Arbitration. This chapter also has analyzed the evolution of the international trade which it formed and how the processes of promotion of transactions have grown gradually. Subsequently, this work has discussed about all aspects of international trade which have been changed today into the new form of trade. Apart from discussing some common issues had taken up at different historical backgrounds of the League of Nations and World War I and II since 1914 to 1939 separately. The historical background of international trade and commercial arbitration mechanism has examined at the developing of international trade up to now. This chapter has also discussed about the growth of international trade and commercial arbitration from 1920 to 1950 and also its growth from 1950 to the present.

The importance position of international arbitration has been discussed in chapter two. This chapter finds legal position of international arbitration and focus on the promotion of the international trade to use arbitration mechanism of resolving international disputes. This work has also discussed about legal obligation of international institutions to promote and encourage using of arbitration mechanism. The reasons to choose of arbitration facility under its benefits or advantages have been analyzed in this chapter.

Chapter three is devoted to find the objective, philosophy behind the UNCITRAL and Arbitration Rules systematically the process of arbitration has been discussed in more details in this chapter. This chapter has been taken up the concept of arbitration in the UNCITRAL process. This chapter has scrutinized the arbitration mechanism under the UNCITRAL Rules and analyzed the process of arbitration from the intention of the parties to refer the subject matter to this mechanism under the arbitration agreement to end of the process.

Chapter four discusses to find the procedure of the development of the mechanism for the solution of international dispute settlement and presenting international institutions of solving international disputes. The development of WTO dispute settlement system under
the panel and Appellate Body system and the procedure of the hearing have analyzed. The impact of new technology on the development of dispute settlement mechanism has been taken up in chapter fourth. This chapter has taken up about the impact of Information technology facility and hearing of the arbitration on information technology for solution trade and commercial settlement which have included; online filing, case management websites, and videoconferencing base on its applications.

Chapter five deals with judicial response under the text of that article of UNCITRAL Arbitration Rules and brief summary of fact, hearing of tribunal of how the courts and tribunals have applied. This chapter seeks to assist in attaining to each article with cases related. Present work has provided that each case summary information on its decision and where it is reported. This chapter has been analyzed a summary of principal cases from the UNCITRAL and also other rules in relation.

In the last, in chapter six, conclusion and suggestion have been given to highlight to the various important concepts of arbitration and its position and historical background of UNCITRAL and international legal instruments of resolving trade and commercial disputes. The suggestions have given to affect to the development of using arbitration mechanism and support by national courts.

SIGNIFICANCE OF STUDY TO CHOOSE OF TOPIC

One of the most significant trends to preferred means of resolving international commercial dispute is increase to the support of arbitration by national courts in most States. Ratify of international convention by new states and accept of international arbitration process globally. The freedom of UNCITRAL arbitration rules from other direct divisions of United Nations as a mechanism of resolving trade is significant to study.

The General Assembly established the UNCITRAL by its resolution 2205(XXI) in 1966 to promote the progressive harmonization and unification in international trade law and international trade co-operation among States. The UNCITRAL is a main legal core body of United Nations system in field of international trade (it is a subsidiary organ of General Assembly). The aim of establishing UNCITRAL began when world trade began to expand dramatically in the 1960s. National governments began to realize the need a global set of rules to harmonize international and regional regulations to govern international trade. They need to indentify and support a global
system of rules and global level to ensure universal rights. The act all levels to ensure that legal rules are taken at the most international and regional level to pursue norms and laws. They shape the global opportunities and disputes across countries that influence international trade opportunities. It plays an important role in developing that framework in pursuance of its mandate to further progress by preparing and promoting international trade. The commission may establish appropriate working relationships with intergovernmental organizations and international non-governmental organizations concerned with the progressive harmonization and unification of the law of international trade.¹ International trade refers broadly to economic and commercial activities that cross national boundaries or that have an effect across national boundaries.

UNCITRAL’s business is the modernization and harmonization of rules on international trade or business. Now the question is what is the trade? Trade means faster growth, higher living standards, and new opportunities through commerce and cover matters arising from all relationship of a commercial nature, whether contractual relation or not and transaction on trade. So the UNCITRAL formulations are modern, fair, and harmonized rules on commercial transactions. The UNCITRAL is a mechanism to solve international trade problems (disputes) which are chosen by the both parties for dispute settlement between themselves. It has several instruments which include: conventions, model laws and rules which are acceptable worldwide-legal and legislative guides. It also has recommendations of great practical value-updated information on case law and enactments of uniform commercial law-technical assistance in law reform projects-regional and seminars on uniform commercial law.

The UNCITRAL carried out its work yearly depending on the subject-matters with alternative matters. The UNCITRAL has established six working groups to perform the substantive preparatory work on topics within commission’s program of work. Each working group of the commission typically holds one or two sessions yearly. Each of the working group is composed of all member states of the commission. The UNCITRAL working group II is arbitration and conciliation that relates to the private methods, as it provides. Though, the resolution mechanisms are created but current statement of UNCITRAL initially spoke in terms of the ‘progressive harmonization

and unification’ of the law of international trade. Arguably, the task of modernizing the law of international trade was implicit in UNCITRAL’s core mission.

The resolution creating UNCITRAL referred to the ‘progressive’ harmonization and unification of trade law not simply its harmonization and unification. The resolution also emphasized that the progressive harmonization and unification of trade law based on the United Nation’s broad agenda of economic development and the promotion of friendly relations among nations. Reports to the General Assembly and the commission in the late 1660s suggest that international actors understood the “progressive harmonization and unification” of trade law as involving the reconciliation of divergent practices and an articulation of emerging of international norms.2

The nature of the arbitration may give the public a legitimate interest in certain aspects of the arbitration. The UNCITRAL arbitration is acceptable to private parties because it offers flexibility of Ad hoc arbitration coupled with safeguard of an established, tested set of procedural rules. The UNCITRAL arbitration is more confidential and less public; it designed for using in Ad hoc international commercial arbitrations. The UNCITRAL arbitration rules occupy an important position, both historically and in contemporary arbitration practice.

Arbitration is a well recognized mode for resolving disputes arising out of commercial and trade transactions. This is equally true for international commercial transactions. With the growth of international commerce there was an increase in dispute arising out of such transactions being adjudicated through arbitration. After the end of WWI, commensurate with the importance of international trade and the increased use of international commercial arbitration, a need was felt for providing proper arbitral machinery for the resolution of disputes between the contracting parties subject to the jurisdiction of different States.3 The choice of arbitration as a method of resolving disputes also gives each party an opportunity to participate in the selection of ‘neutral’ tribunal. One or more arbitrators may be chosen for their special skill and expertise in commercial law, intellectual property, civil engineering or some other relevant discipline.4

---

Traditionally speaking arbitration is a private process to solve disputes in the field of international trade with selection of the parties, because it is normally neutral stranger. Arbitration mechanism is a private process where the arbitrators are appointed based on the agreement. International trade area is the scope of the arbitration to get on with umpires under the privately appointment. Arbitrator is a third party which the parties have got trust with them. It has evaluated new and free form of the procedures to extend the privacies and voluntaries of the parties. It got some evaluations because the parties may appoint one or more than two arbitrators to resolve the problem during recent decades. So it needs to get on the agreement then appoint the arbitrators and all procedures.

In fact, arbitration is a private form of adjudication with the third party intervening to control and bind an award on the parties. It means that arbitration mechanism is flexibility and simplified procedure. The parties agree that specified type of disputes which have arisen or certain differences which may arise between the parties in respect of a defined legal relationship will be arbitrate or enter into an Ad hoc agreement to arbitrate. The parties also agreed that the decision of the arbitration process will be binding on them. In many judicial procedures, the award should be binding needless to accept the parties but the decision of the arbitration will recognize and enforce unless it is against the public policy.

In the case of inherently confidential documents within the arbitration, the parties shall disclose the documents, so the confidentiality of awards depends on what the applicable rules provide. Ad hoc arbitration depends on the law applicable and the rule of United Nations Commission on International Trade (UNCITRAL). This is rarely likely to have any express provision governing confidentiality, in the case of documents disclosed by the parties.

Today arbitration solves the problems in the field of international trade under the procedure and process given to the arbitrators by the parties. The good faith of the arbitrators is under the surveillance of the parties. Furthermore, it is a motivational factor for the parties to select the arbitration process for solving the problems will be a mechanism in future. In UNCITRAL process of arbitration all developed and developing countries are using these rules and mechanism to settle international trade disputes. As it is a mechanism of dispute settlements between the parties, all UN members may use these rules. It became an international mechanism for disputing
parties. It is separated of others sections of United Nations. The mandate of UNCITRAL does not extend to either participate in private or public disputes. It is related to international commercial disputes as well. It neither uses legal advice in particular dispute nor offer any legal advice to any recommendation to private and legal practitioner for legal assistances. The UNCITRAL neither keep any list of potential administers or arbitrator nor appoints any appointing authority to dispute under the UNCITRAL arbitration rules.

The UNCITRAL arbitration Rules are a procedure to be appointed by the disputing parties and it has nothing to do with other inter-governmental or non-governmental organizations. All parts of United Nations have special determined roles based on their rules. They cannot advise to UNCITRAL because it is a mechanism appointed by the disputing parties. It is also separated from other arbitral institutions and Ad hoc arbitration to be a procedure of solving trade disputes. The UNCITRAL Rules essentially are under the agreement of the parties and their acceptance to refer to the UNCITRAL. The arbitrability of subject matter is very important in being referred to it. By virtue, the final can present the award for recognition and enforcement by national courts. Each arbitral institution has special rules and it may be similar to the UNCITRAL in proceeding arbitration but the rules might not impose its own effectiveness to it. To use the UNCITRAL arbitration rules, the disputing parties shall refer the subject matter with agreement in writing. It might be agreed at the time of arising problem or in future. The parties would like to settle the disputes with the private procedure of arbitration as well. UNCITRAL provided that in proceeding of its arbitration rules, the parties have to appoint the rule and the composition of the arbitral tribunal to arbitrate the trade and commercial disputes. They should be satisfied with their acceptance and shall give confidentiality and separatability of their relationships with the parties and also to the other arbitrators in person. It normally relates to all the international arbitration rules around the world concerning to international trade problems. All procedures, provision of composition of arbitral tribunal in field of international trade are under the parties’ governance. The process of hearing is under taking of the arbitrators. The law application and the place, languages, appointing the arbitrators, challenges of arbitrators and other requirements of hearing to commence shall be appointed by the parties and submit to the arbitral tribunal.
The duties of the arbitrators are to do the hearing of the arbitration while the duties of
the parties are to submit and arrange all documents for the arbitral tribunal. The
parties shall do ancillary duty which includes: the fee of arbitral tribunal, expert and
witnesses which the parties shall pay to them. Today the arbitration technically has
become a mechanism of solving the international trade and commercial disputes. It
uses technology to facilitate the hearing for both the parties and to control the hearing
by the parties. New technology provides the appearance of the experts and witnesses
to participate to the hearing. To use arbitration, new current technology and device
would develop the mechanism of hearing. It will develop the mechanism of hearing
and it may depends on the place of arbitration and application of the arbitral to do so.

In general it is assumed that arbitration has the following benefits: 1) confidentiality
and privacy. 2) Informality of the proceeding. 3) lower costs 4) efficiency 5) technical
specialism 6) a final award which could be enforced at the courts. The above
mentioned benefits however, appoint the arbitration as a mechanism of the disputing
settlement in international trade and commercial relationship. The arbitration
agreement is not discharged by the death of a party to such agreement, either with
respect to the deceased or with respect to any other party. The main reason to choose
the arbitration to be a mechanism of the dispute settlement in the field of international
trade law and commercial that it is a regular process to reach a good decision and
binding on the parties. It is undertaken by the States for recognition and enforcement
of the international arbitration to recognize and enforce the arbitration award. In
general the UNCITRAL arbitration rules are closely related to international principle
of the hearing for solving the disputes between the merchandises’ parties. In addition,
for making any the application to enter the process of arbitration the parties shall
choose an arbitration mechanism with the especial arbitration agreement in writing, if
they have been appointed the UNCITRAL Arbitration Rules.