

LECTURE SEVENTEEN

The Arbitration Agreement and the Model Law

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

MODEL LAW

ARBITRATION ACT 1996

Chapter II Arbitration agreement

- Article 7. Definition and form of arbitration agreement
- Article 8. Arbitration and substantive claim before court
- Article 9. Arbitration agreement and interim measures by court

Chapter III Composition of arbitral tribunal

- Article 10. Number of arbitrators
- Article 11. Appointment of arbitrators
- Article 12. Grounds for challenge
- Article 13. Challenge procedure
- Article 14. Failure or impossibility to act
- Article 15. Appointment of substitute arbitrator

Chapter IV Jurisdiction of arbitral tribunal

- Article 16. Competence of arbitral tribunal to rule on its jurisdiction.
- Article 17. Power of arbitral tribunal to order interim measures.

CHAPTER II. ARBITRATION AGREEMENT

UNCITRAL Commentary

17. Chapter 11 of the Model Law deals with the arbitration agreement, including its recognition by courts. The provisions follow closely article 11 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 1958) (11ereafter referred to as "1958 New York Convention"), with a number of useful clarifications added.

Article 7 Model Law. Definition and form of arbitration agreement

- 7(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- 7(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

LECTURE SEVENTEEN

UNCITRAL Commentary

18. Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*co-promis*") or a future dispute ("*clause compromissoire*"). The latter type of agreement is presently not given full effect under certain national laws.
19. While oral arbitration agreements are found in practice and are recognized by some national laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article 11(2) of that Convention by adding '*telex or other means of telecommunication which provide a record of the agreement*', by covering the submission-type situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another", and by providing that "the reference in a contract to a document" (e.g. general conditions) "*containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract*".

Article 8 Model Law. Arbitration agreement and substantive claim before Court	
--	--

- | | |
|---|--|
| <p>8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.</p> <p>8(2) where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court</p> | |
|---|--|

UNCITRAL Commentary

20. Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modelled on article 11(3) of the 1958 New York Convention, article 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, in-operative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

Article 9. Model Law. Arbitration agreement and interim measures by court	
--	--

<p>It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.</p>	
---	--

PRIVATE INTERNATIONAL LAW

UNCITRAL Commentary

21. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Like article 8, this provision is addressed to the courts of a given State, insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

UNCITRAL Commentary

22. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules. The approach consists, first, of recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to fundamental requirements of fairness and justice. Secondly, where the parties have not used their freedom to lay down the rules of procedure or a particular issue has not been covered, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively to the resolution of the dispute.

Article 10. Model Law. Number of arbitrators

- 10(1) The parties are free to determine the number of arbitrators.
10(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Model Law. Appointment of arbitrators

- 11(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
11(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
11(3) Failing such agreement,
(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

LECTURE SEVENTEEN

<p>(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.</p> <p>11(4) where, under an appointment procedure agreed upon by the parties,</p> <p>(a) a party fails to act as required under such procedure, or</p> <p>(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or</p> <p>(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,</p> <p>any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment</p> <p>11(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.</p>	
--	--

<p>Article 12. Model Law. Grounds for challenge</p>	
<p>12(1) when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.</p> <p>12(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.</p>	

<p>Article 13. Model Law. Challenge procedure</p>	
<p>13(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.</p> <p>13(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.</p>	

PRIVATE INTERNATIONAL LAW

<p>13(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.</p>	
---	--

UNCITRAL Commentary

<p>23. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14 provide for assistance by courts or other authorities. In view of the urgency of the matter and in order to reduce the risk and effect of any dilatory tactics, instant resort may be had by a party within a short period of time and the decision is not appealable.</p>	
---	--

<p>Article 14. Model Law. Failure or impossibility to act</p>	
--	--

<p>14(1) if an arbitrator becomes <i>de jure</i> or <i>de facto</i> unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.</p>	
---	--

<p>14(2) if, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).</p>	
--	--

<p>Article 15. Model Law. Appointment of substitute arbitrator</p>	
---	--

<p>Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.</p>	
---	--

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

<p>Article 16. Model Law. Competence of arbitral tribunal to rule on its jurisdiction</p>	
--	--

<p>16(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail <i>ipso jure</i> the invalidity of the arbitration clause.</p>	
--	--

LECTURE SEVENTEEN

16(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

16(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

UNCITRAL Commentary

24. Article 16(1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

25. The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

Article 17. Model Law. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

PRIVATE INTERNATIONAL LAW

UNCITRAL Commentary

26. Unlike some national laws, the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by a party (article 17). It may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard.

EXAM QUESTION

Identify the principal differences between the Model Law and the Arbitration Act 1996,
and,

Consider whether or not the provisions of the Model Law provide a more or less advantageous regime for the governance of international arbitral proceedings. Than that provided by the Arbitration Act 1996 in the United Kingdom

ADDITIONAL READING