UNCITRAL- Model Law Arbitration

(*IMPACT ON THE CARIBBEAN*)

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Emergence of International Commercial Arbitration

- 20 years ago, international arbitration only took place in the metropolitan hubs of America, Western Europe and Asia.
- The importance of international commercial arbitration as a dispute settlement mechanism is now quickly becoming recognised in quarters where it had been previously disregarded.
- We are witnessing a geographic democratisation of arbitration seats.
- This is particularly true in the Caribbean

Impact of Globalization

- Emergence of globalization and growth of international business has triggered an increase in international transactions
- Disputes occur even where a transaction or a contract is planned well.
- Parties must consider including dispute resolution mechanisms in a commercial contract. (Bradgate et al., 2008)

Historical Overview

- Int'l Arbitration was historically a simple self-regulated system.
- Two or more traders, in dispute over their commercial relationships would turn to another person to act on their behalf in resolving.
- International commerce cannot stay within national boundaries and international commercial arbitration crosses borders.
- Need for international regulations connecting national laws and offering a uniform solution
- Inadequacy of National laws in coping with enforcement of arbitration agreements and arbitral awards

The Geneva Protocol of 1923

- First protocol on arbitration clauses
- Basis for international enforcement of arbitration agreements and arbitral awards.
- The Geneva Protocol of 1927 extended the scope and the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards
- The 'New York Convention') of 1958 strengthened these provisions.
- Influenced by arbitral institutions such as the London Court of International Arbitration founded in 1892. (Redfern et al., 2004)

The New York Convention

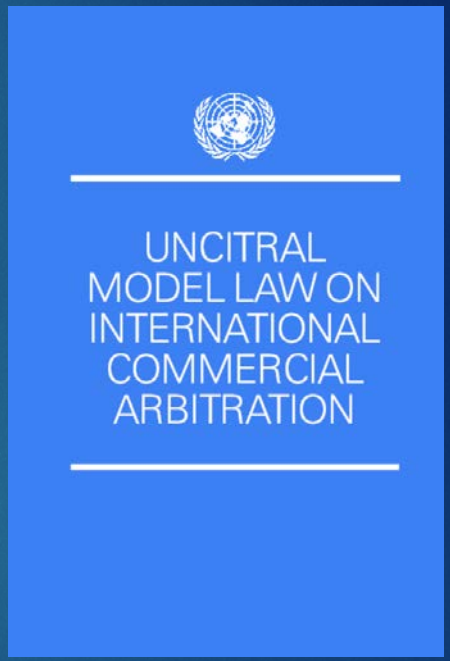
- Ratified by 142 of the 192 United Nations Member States
- Obliges them to recognize and enforce international commercial arbitration agreements and arbitral awards.
- The UNCITRAL Model Law adopted by the United Nations Commission on International Trade Law in 1985 is the other important contribution made by the United Nations to international arbitration
- Provides a simple and clear form for the arbitral process from the beginning to the end. (Sutton et al., 2007)

International Commercial Contracts

- Consist of parties who are most often from different countries which make arbitration preferable as a dispute resolution method rather than submitting the dispute to another parties' national court.
- Parties may appoint an arbitrator from another country or request an international arbitral institution to make an appointment thereby acquiring neutrality in the choice of law, venue, procedure and tribunal. (Sutton et al., 2007)

UNCITRAL Model Law (1985)

- The present Act is based on model law drafted by the United Nations Commission on International Trade law (UNCITRAL) both on domestic arbitration as well as international commercial arbitration to provide uniformity and certainty to both categories of cases.
- The desire to protect the arbitral process from arbitrariness makes it necessary for jurisdictions hosting arbitrations to have effective legislation that will guide the conduct of arbitrations.
- The UNCITRAL created a Model Law in 1985 that countries can use as a road map in establishing their own domestic legislation.



The UNCITRAL Model Law

- Fills the gap for international arbitration,
- Assist states in reforming and modernizing their laws on arbitral procedure
- Covers all stages of the arbitral process i.e.
  - Arbitration agreement
  - Composition and jurisdiction of the arbitral tribunal
  - Extent of court intervention
  - Recognition and enforcement of the arbitral award
  - The new chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration
  - Standard version of the UNCITRAL Model Law is the amended version

United Nations
UNCITRAL

Aim of The UNCITRAL Model Law

- The foundational instrument for international arbitration
- Principal aim is that foreign and non-domestic arbitral awards are recognized
- Require member states domestic courts to give full effect to arbitration agreement Assist states in reforming and modernizing laws on arbitral procedure

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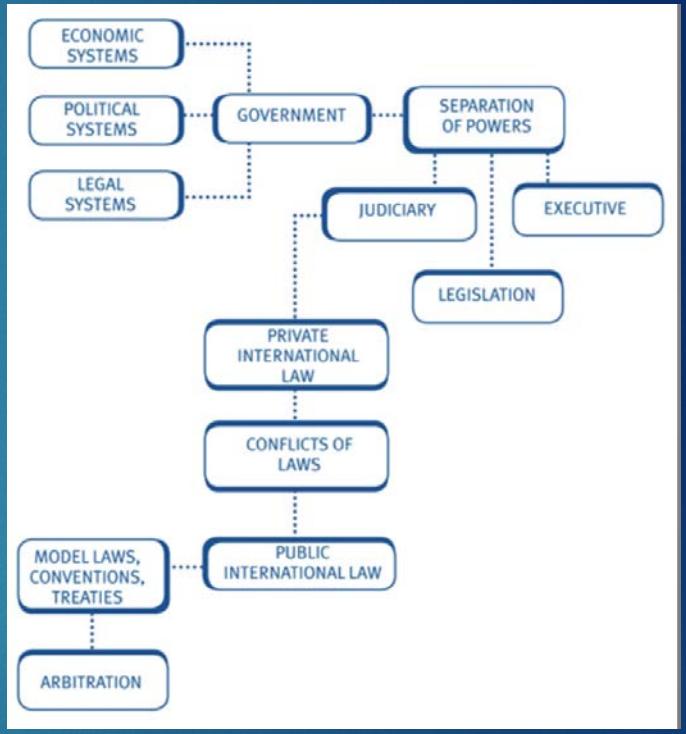


Why was the Model Law needed?

- Recognition of International commercial arbitration as a dispute mechanism is increasing
- Existing legislation were inadequate not contemplating use of electronic commerce
- Inadequate legislation at the national level created obstacles to international trade
- Maintaining a cross border legal framework
- The model law is key to developing the framework for cross border international trade
- Increased harmonization and modernization of the law of international trade

How does UNCITRAL achieve this ?

- Preparing and promoting the use and adoption of legislation
- Geographic democratization of arbitration seats in the Caribbean

Global Centers for Arbitration

- OHADDAC
- OHADDA

Caribbean States Ratifying the New York Convention

- *Trinidad & Tobago (1966)*
- *Barbados (1993)*
- *Jamaica (2002)*
- *BVI (2014)*
- *Bahamas*
- *Bermuda (1979)*
- *Dominica Republic (2008)*
- *Surinam (1964)*
- *Cuba (1974)*
- *Belize (1980)*
- *St Vincent & Grenadines (2000)*
- *Dominican Rep (2002)*
- *Guyana (2014)*

Key Intl Arbitration Centers

- In Asia Hong Kong which established the Hong Kong International Arbitration Centre and Singapore, which established the Singapore International Arbitration Centre in 1991,both of which have now become key international arbitration centres, had not yet positioned themselves as major venues for settling international commercial disputes.
- The situation in developing countries was no better. For instance, while Mauritius is now seeking to establish itself as a sophisticated international arbitration jurisdiction with the establishment of the Mauritius International Arbitration Centre, which is associated with the LCIA, until 1992, its arbitration law was modelled after 19th century English legislation, as did many other former English colonies in Africa at the time.
- In Latin America, countries influenced by the 19th century ideals of Carlos Calvo, enunciated in the Calvo Doctrine, generally shied away from international arbitration.
- Notwithstanding the establishment of international arbitration centres in Dubai and Bahrain in the past two decades, generally, Middle Eastern states too have historically been impervious to international arbitration

Impact on the Caribbean

- The UNCITRAL Model Law is designed to assist states in reforming and modernising their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.
- It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award.
- It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by states of all regions and the different legal or economic systems of the world. Amendments to articles 1(2), 7 and 35(2), a new Chapter IV A to replace article 17 and a new article 2A were adopted by UNCITRAL on 7 July 2006.
- The revised version of article 7 is intended to modernise the form requirement of an arbitration agreement to better conform to international contract practices.
- The newly introduced Chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration.
- As of 2006, the standard version of the UNCITRAL Model Law is the amended version.[

Ratification of the New York Convention in the Caribbean

- Jurisdictions in the Caribbean have increasingly come to appreciate the importance of ratifying this treaty.
- The New York Convention enhances their ability to attract foreign investment
- Out of the 156 parties to the New York Convention, 16 are from the Caribbean region: Suriname (1964); Trinidad and Tobago (1966); Cuba (1974); Bermuda (1979); Belize (1980); the Cayman Islands (1980); Haiti (1983); Dominica (1988); Antigua and Barbuda (1989); Barbados (1993); St Vincent and the Grenadines (2000); Jamaica (2002); the Dominican Republic (2002); Bahamas (2006); the British Virgin Islands (2014); and Guyana (2014).
- Between 1958 and 2000, there were only 10 ratifications from countries in the Caribbean
- Between 2000 and 2014 there have been six ratifications suggesting an increased awareness of its importance
- Other jurisdictions are encouraged to ratify this Convention.

Majority of jurisdictions in the Caribbean have not adopted the model law

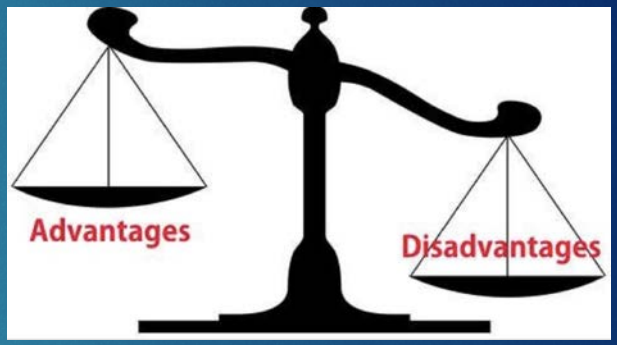
- Attract foreign investment

Advantages of the Model Law

- Increased Popularity of international commercial arbitration
- Arbitrator can be appointed from which country as necessary
- Neutrality in choice of law, venue, procedure and tribunal
- National courts may be biased
- National courts may lack the expertise/competence/ resources
- An enforceable decision
- Flexibility of the Arbitral Process
- Confidentiality National courts may be biased on lack of competence, resources or experience to provide a satisfactory resolution for many international commercial disputes while arbitration offers a theoretically competent decision-maker who is in principle unattached to either party or any national authority. (Born, 1994)

Disadvantages of the Model Law

- Cost and Delay
- Possibility of biased arbitrators
- Difficulties of the enforcement process in countries not member of the New York Convention
- Opportunities of creating procedural rules in favour of one party
- Limited discovery rights in terms of public interest to provide confidentiality
- Slow and expensive.
- Even though arbitration apparently provides a neutral process in terms of the choice of law and there are still concerns about complete neutrality.
- Neither New York Convention nor The UNCITRAL Model Law contains a provision concerning matters such as fraud, arbitrator bias or misconduct.
- It is suggested that similar to national courts private arbitrators might also have financial, personal or professional relations with one of the parties and they might be also biased, maybe even greater than national courts and the arbitral awards may be also questionable. (Born, 1994



Rise of Arbitration in the Caribbean

- At the turn of the century, many countries had not ratified the 1958 New York Convention, neither did they have modern arbitration legislation for which the United Nations Commission on International Trade Law (UNCITRAL) Model Law had been created in 1985 to serve as a guide. The Caribbean region was one such group of countries.
- The importance of international commercial arbitration as a dispute settlement mechanism is quickly becoming recognised in quarters where this has been previously disregarded.
- This is particularly true in the Caribbean.
- The region is a very attractive location to host arbitrations due to its neutral geography, at the crossroads of the Americas and the mixture of its legal regimes, covering both common and civil law.
- Moreover, with the ramping up of domestic legislation to facilitate the creation of international business companies, the region has become home to a remarkable number of offshore corporate entities.
- This has made jurisdictions such as the British Virgin Islands (BVI), the Cayman Islands and Bermuda very attractive offshore financial centres, with a need to bolster their offering for dispute resolution.
- With the intensification of commerce, Caribbean countries have come to appreciate the need for a geographically neutral dispute settlement mechanism.

Rise of Arbitration in the Caribbean

- 20 years ago few jurisdictions could accommodate international arbitration
- International arbitration could only took place in the hubs of America, Western Europe where transboundary transactions made it a necessary mechanism
- American Arbitration Association established in the 1920's
- International center of dispute resolution established in 1996
- International chamber of commerce (Paris)
- London court of International arbitration (UK)
- Recognition of International commercial arbitration as a dispute mechanism is increasing in the Caribbean
- Geographic democratization of arbitration seats in the Caribbean
- Caribbean an attractive location to host arbitrations due to it neutral geography and mixture of legal regimes (common law and civil law)

Arbitration Infrastructure in the Caribbean

- Arbitration infrastructure in the Caribbean region' examines the extent to which Caribbean countries have established the necessary infrastructure to capitalise on the demand for international arbitration in this region.
- Of importance is the extent to which they mirror international best practice as reflected in the UNCITRAL Model Law on International Commercial Arbitration 1985.
- The extent to which Caribbean jurisdictions have ratified the New York Convention 1958, under which successful parties can enforce awards in this treaty's 150 plus contracting states must also be examined.
- This includes the following jurisdictions: the Bahamas, Barbados, Bermuda, the British Virgin Islands, the Dominican Republic, Jamaica, and Trinidad and Tobago.

Impact on the Caribbean

- Democratization of arbitration seats
- Intensification of international arbitration in the Caribbean
- Best Caribbean arbitration jurisdictions
- BVI International Arbitration Center
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- Attract business opportunities to their borders

Importance of ratifying the Treaty in the Caribbean

- At the turn of the century, many countries had not ratified the 1958 New York Convention, neither did they have modern arbitration legislation for which the United Nations Commission on International Trade Law (UNCITRAL) Model Law had been created in 1985 to serve as a guide. The Caribbean region was one such group of countries.
- Attract foreign investment
- 156 parties to the convention (16 from the Caribbean)

Bahamas

- Early in 2013, the Bahamas government formed the Arbitration Council, designed to provide an action plan for establishing the Bahamas as a major arbitration hub
- The infrastructure of arbitration legislation, facilities and skilled personnel has attracted major cases to the Bahamas.
- The strategic location of the islands just off the US mainland has made it an ideal location for US parties seeking a neutral venue to resolve their disputes.
- The Bahamas entertains aspirations of establishing itself as a regional and international hub for international arbitration.
- For the Bahamas, the impetus to sign the New York Convention came originally from the maritime sector.
- As arbitration is a preferred method of resolving maritime disputes and as the Bahamas is the seventh-largest ship registry in the world as per Lloyds, ratifying the New York Convention was imperative to allow awards to be automatically enforceable in signatory states.
- The Council, consisting of members from the government and private sector, is mandated to consider how to generate more activity in this area, to position The Bahamas as a leading arbitration hub and gateway to investment in the region, to establish commercial and maritime arbitration centres, and to prepare the appropriate strategic or business plans.
- As part of this initiative, the Arbitration Committee of the Bahamas Financial Services Board has encouraged a complete revamping of the arbitration legislation. Although this has not yet come to fruition, the Bahamas' intensification of its pursuits to establish itself as major international arbitration hub in the region is a testament to the fact that the demand for international arbitration is on the rise in the Caribbean.

Barbados

- Barbados' ambition to establish itself as a regional hub for international arbitration is explicitly advocated in its legislation.
- The New York Convention, is given effect in Barbados under the Arbitration (Foreign Arbitral Awards) Act.
- Arbitration in Barbados revolves around the Arbitration Act 1958; the Arbitration (Foreign Arbitral Awards Act) 1980; and the International Commercial Arbitration Act 2007.
- The Arbitration Act applies to domestic arbitration and international arbitration that are not of a commercial nature.
- According to section 4 of the International Commercial Arbitration Act, two of its objectives are: to establish in Barbados a comprehensive, modern and internationally recognised framework for international commercial arbitration by adopting the UNCITRAL Model Law; and to provide the foundation for the establishment in Barbados of an internationally recognised centre for international commercial arbitration.
- This jurisdiction also engaged in discussions with the LCIA to establish an office on the island.

Bermuda

- Enacted modern arbitration law based on the UNCITRAL Model Law only eight years after the Model Law's establishment.
- Has two different arbitration regimes: the Arbitration Act 1986 governs the arbitration of domestic disputes, while the Bermuda International Conciliation and Arbitration Act 1993, which incorporates into Bermuda legislation the UNCITRAL Model Law, applies to international commercial arbitrations.
- Arbitration is the typical form of dispute resolution used in the insurance and reinsurance industry in Bermuda.
- Apart from Bermuda's modern legislation, policymakers have sought to enhance this jurisdiction's attractiveness as a centre for international arbitration by modifying its immigration policy to make it international arbitration friendly.
- Under Bermudian labour policy, arbitrators sitting in an international commercial arbitration in Bermuda do not require work permits.
- Bermuda is another one of the region's jurisdictions striving to become a major arbitration hub.

British Virgin Islands

- BVI aspires to become a nerve centre/go to country for the resolution of international commercial disputes and to become the go-to country for international arbitration and all other forms of dispute resolution
- Arbitration legislation could be found in the BVI from the 1970s
- In May 2014, the BVI government ratified the New York Convention 1958.
- BVI is also attractive because of the flexibility in its statutes
- The Arbitration Act expressly provides the ability for parties to an arbitration agreement to opt in or opt out of certain provisions.
- The BVI also allows parties to choose a governing law that is distinct from the seat of arbitration; recognises that the hearing venue, applicable rules and the courts in which applications in aid of the arbitration
- The BVI provides foreign parties contracting with a party in such a jurisdiction the opportunity to choose that jurisdiction as the seat of arbitration, the law of a third-party jurisdiction as the governing law of the contract, but for the arbitration to be heard in BVI, and for the BVI courts to have exclusive jurisdiction in aid of the arbitration
- This example provides a neutral venue and an experienced commercial court to assist with interim matters in aid of the arbitration, yet results in an award that is quickly and easily enforceable.
- The BVI is also set up for virtual arbitration. With a legislation based on the UNCITRAL Model Law, the BVI framework is flexible enough to support virtual hearings.
- In 2017, the BVI government passed a Labour Code (Work Permit Exemption) Order, under which persons coming into the territory to undertake select classes of business will be exempted from the requirement of a work permit. One class of persons captured by this exemption, are persons coming into the territory to participate, in one way or another, in international arbitrations.
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Dominican Republic

- The Dominican Republic has enacted modern arbitration legislation based on the UNCITRAL Model Law and is a party to the New York Convention..
- In a region where most of the economic power houses are Spanish-speaking, the Dominican Republic's vision of establishing itself as a hub for international arbitration does not seem so far-fetched.
- The Dominican Republic-Central America Free Trade Agreement calls for arbitration as the key mechanism for dispute resolution and has entered into 15 bilateral investment treaties with Argentina, Chile, Cuba, Ecuador, Finland, France, Haiti, Italy, Korea, Morocco, the Netherlands, Panama, Spain, Switzerland and Taiwan, which submit disputes to international arbitration.
- Considering that Latin American countries have fiercely opposed international arbitration for most of their history, the Dominican Republic is a perfect illustration of the rise of international arbitration in the region.

Jamaica

- International commercial arbitration in Jamaica is governed primarily by the Arbitration Act 1900 (the Jamaican Act of 1900) and the Arbitration (Recognition and Enforcement of Foreign Awards) Act 2001, which makes provision for the application of the New York Convention.
- Jamaica has been actively involved in arbitrations in the mineral sector, especially bauxite.
- Although outdated, the Jamaican Act of 1900 was designed to facilitate arbitration.
- Under this piece of legislation, the court will generally stay proceedings where a valid arbitration agreement is in place, and may remove an arbitrator engaged in misconduct.
- In recent years much attention has been centred on modernising the century-old Arbitration Act to bring it in line with the UNCITRAL Model Law. This was done in 2017 with the new Jamaican Arbitration Act 2017 based on the UNCITRAL Model Law.

Trinidad and Tobago

- Trinidad and Tobago has been engaged in international commercial arbitration cases, particularly in the petroleum sector, for a very long time.
- Arbitration in Trinidad and Tobago is governed by the Arbitration Act Chapter 5:01 which is also based on early English legislation and as such has provisions similar to those under the Jamaican Act of 1900.
- The New York Convention 1958 was given effect in Trinidad and Tobago by the Arbitration (Foreign Arbitral Awards) Act Chapter 5:30.
- In 1996, Trinidad and Tobago established the Dispute Resolution Centre of Trinidad and Tobago as part of the Trinidad and Tobago Chamber of Industry and Commerce
- The goal of the Dispute Resolution Centre is to become the premier institution for the promotion and operation of an alternative dispute resolution training and referral system within Trinidad and Tobago and the wider Caribbean.
- While this jurisdiction has demonstrated its commitment to addressing the country's need for international arbitration facilities, in order to compete in the rapidly expanding world of international commercial disputes, the country will need to upgrade its arbitration legislation.

The Future of International Arbitration in the Caribbean

- Adoption of arbitration as a preferred dispute resolution mechanism is accelerating across the region
- Jurisdictions in the region seem on track to meet the demand for international arbitration facilities in this part of the world.
- Caribbean jurisdictions have come to appreciate the importance of international arbitration as the ideal dispute settlement mechanism in the rapidly evolving world of international commerce and trans border transactions
- They have begun to upgrade their legal systems to cater to this market.
- Numerous jurisdictions in the region are now party to the New York Convention and the upgrading of domestic laws to cater to international arbitration is gaining momentum.
- This is a significant level of development for a region where the use of international arbitration has not been traditionally endorsed.

Challenges

- Many jurisdictions in the region still lack modern international arbitration infrastructure
- Much legislation continues to be based on archaic models, better suited for the commercial transactions of their time, rather than the modern transboundary transactions that characterise global commerce these days.
- For instance, although the UNCITRAL Model Law 1985 is designed to assist states in reforming and modernising their laws on arbitral procedure to take into account the particular features and needs of international commercial arbitration in contemporary times, the majority of the jurisdictions in the Caribbean have not yet adopted any modern arbitration legislation.
- The arbitration laws of Antigua and Barbuda, Dominica, Grenada, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines, for instance, are all based on the English Arbitration Act of 1950. So, while the English Arbitration regime is governed by the Arbitration Act 1996, former English colonies in the region have not upgraded their arbitration regimes decades after their independence.
- The New York Convention 1958 has better representation in the region, but compared to the number of jurisdictions in the region, this is still a small representation. A review of the list of countries who are yet to ratify the New York Convention indicates that Belize, Grenada, St Kitts and Nevis, St Lucia and Suriname have not ratified the New York Convention.
- This suggests that these jurisdictions have not yet come to appreciate the importance of this instrument in enhancing their attractiveness as investment hosts. In determining whether a particular jurisdiction is ideal for investment, potential investors look favourably on their ability to protect their investment by being able to enforce awards from disputes arising from such investments.
- Thus, to improve their domestic international arbitration regimes it is suggested that these countries that have not updated their domestic arbitration legislation do so, as the benefits of upgrading their arbitration regimes can be significant. It is advised that Belize, Grenada, St Kitts and Nevis, St Lucia and Suriname ratify the New York Convention. Additionally, the countries whose domestic arbitration legislation is modelled after some outdated model, should aspire to look towards the UNCITRAL Model Law for guidance in upgrading their arbitration laws.

Conclusion

- International Commercial Arbitration has not been a completely ideal way to resolve international disputes yet, but Born suggests that it is the least ineffective way and comparatively better than the alternatives. (1994)
- Even though in domestic disputes litigation in national courts may be preferable to arbitration depending on the circumstances in each particular case, in international disputes opinions are strongly in favour of international commercial arbitration as the nature of international disputes differs from domestic disputes in many aspects.
- Despite the disadvantages of this method, such as the possibility of biased private arbitrators, the difficulties of the enforcement process in some countries who are not members of New York Convention, the opportunity of creating procedural rules in favour of one party, limited discovery rights in terms of public interest to provide confidentiality and in some cases slow and expensive nature of this kind of dispute resolution, it would be true to say that international commercial arbitration becomes more and more preferable with regard to its overwhelming advantages.
- Offering theoretically competent arbitrator as a neutral decision-maker, easily and reliably enforceability in many foreign states than foreign court decisions, providing greater freedom in terms of procedural rules and timetables, giving a chance to disclosure business secrets in terms of confidentiality are mostly more advantageous in comparison to the possible disadvantageous sides of these characteristics. In conclusion, as a most suitable way to resolve international commercial disputes, international commercial arbitration has come to be the accepted method of resolving international commercial disputes.

Thank You for your attention

Q & A