List of subjects and suggested Annotations

(a) Set of Arbitration Rules: If the parties have not agreed on a set of arbitration rules in their arbitration agreement and they wish to do so after the proceedings have begun they can choose either the UNCITRAL Arbitration Rules or the rules of an arbitral institution. In the latter case, they will have to sign an agreement with the arbitral institution. However, the arbitral tribunal has the power to continue the proceedings and apply the law governing arbitral procedure, if the parties fail to reach a consensus.

(b) Language of the Proceedings. Generally the rules of arbitral procedure, make provisions for the language to be used in the arbitral proceedings. The arbitral tribunal has the discretion to ask some documents to be translated if necessary. Another issue deserving consideration is the use of an interpreter in cases of oral presentation. Such arrangements can be made by the parties or the arbitral institution. The cost of translation or interpretation shall be apportioned as arbitration costs.

(c) Place of arbitration

(i) Determination of place of arbitration, if not agreed by parties.

The arbitration rules usually allow the parties to agree to the place of arbitration. Arbitral institutions generally use the location of the institution for administering arbitration. If the parties have not agreed, the arbitral institution retains the power to choose the place of arbitration. The factors that influence the choice of the place of arbitration are: suitability of the law on arbitral procedure, existence of a multilateral arbitral treaty on enforcement of arbitral awards between the State where the award may have to be enforced, convenience of parties as regards distance, availability and cost of the support services, location of subject-matter of dispute and the proximity to evidence.

(ii) Possibility of meetings outside the place of arbitration

There are many sets of arbitration rules and arbitral procedures that allow the meetings outside the place of arbitration, for example, the UNCITRAL Model Law on International Commercial Arbitration. Such provisions are generally made, keeping in mind the economy and efficiency needed to conduct an arbitral proceeding.

(d) Administrative Services

When an arbitral institution is conducting an arbitral proceeding, as agreed by the parties, it makes arrangements for audition chamber, secretarial assistance etc. When the case is not administered by an institution, it is generally the presiding arbitrator, who makes the above-mentioned arrangements. Often assistance is also provided by chambers of commerce or specialized firms. Administrative services include receiving secretarial assistance by a clerk, administrator and a rapporteur. Sometimes specialized assistance of a legal researcher may be required to study and comment on published case-laws, commentaries or preparation of summary reports.

(e) Costs.

If the arbitration proceeding is conducted by an institution, it decides the costs of proceedings, and may ask the parties to deposit an amount as advance. The cost estimates include travel expenses of the arbitrators, expenditures of administrative assistance, costs of expert advice, fees for arbitrators. Generally, arbitral laws make provisions on such matters.

(f) Confidentiality of information:possible agreements

Confidentiality is one of the most essential features of arbitration. Not all arbitral procedures or rules contain details on confidentiality. An arbitral institution may draw up an agreement on confidentiality with the parties. Such agreements may cover issues such as, material information (evidence, written or oral) which is to be kept secret. The

fact that an arbitration is taking place can be kept confidential by special procedures for maintaining confidentiality, for example, use of electronic mail, or other means.

(g) Routing of written communications between parties and arbitrators

If the arbitration rules do not specify the way in which communications should be routed between the arbitrators and the parties, the same can be classified and settled by the arbitrators or the arbitral institution. For example, a party may transmit a copy to the institution or the arbitrator, which in turn is forwarded to them as appropriate. A determined pattern can be agreed upon by consultation.

(h) Telex or other electronic means of sending documents

Though it is known that telex or other electronic means offer certain advantages over paper-based communications, certain safeguards must be placed to check the veracity of communications. For example, written evidence should not be sent by telefax. However, the arbitral tribunal retains discretion, if the situation so demands to decide the mode of mailing documents. The parties can, based on the availability of electronic datas decide and agree on the means of exchanging documents. When it has been decided to use electronic means, there should be agreement on matters such as use of computer, data, methods of storing information, names of the originator and addressee and titles of electronic files.

(i) Arrangements for the exchange of written submission

After the parties have stated their claims and responses, if they wish or if the arbitral tribunal so desires, written submissions may be presented. Such submissions are often called statements, rebuttal, rejoinder, memorial, counter-memorial, reply, replique etc. In such submissions, parties may want to present or comment on allegations or evidence or explain the law. The arbitral tribunal should set time-limits for written submissions to avoid protracted submissions. The tribunal also retains the power to decide whether written submissions can be made simultaneously, for example, the party who receives a submission is given a period of time to react with its counter-submission.

(j) Framing of issues, definition of reliefs sought

While considering the parties' allegations and arguments, the arbitral tribunal may, if it deems fit, with the parties approval, decide to frame a list of issues, as opposed to those that are undisputed. Such framing helps the arbitral tribunal to work more efficiently and cuts down delays in the working of proceedings. The arbitral tribunal may, as convenience demands, deal with the issues collectively or separately. For example, the decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues. If the tribunal has decided to take up one issue for consideration which is an important one, a decision on such issue is often referred to as a "partial", "interlocutory", or "interim" award. If the tribunal feels that the relief sought by the parties is not precisely formulated it may ask them to re-define the relief sought in a more definite manner.

(k) Documentary Evidence

It is often seen that written submissions contain sufficient information by which the arbitral tribunal can set time-limits for submitting evidence. This can be done after consulting the parties. The tribunal can accept a late submission of evidence, if the party concerned is able to show a sufficient cause. If after setting a time-limit, the party fails to provide sufficient cause for delay, the tribunal is free to draw its own conclusions and proceed with the case, on the basis of the available evidence before it.

As regards the origin and receipt of documents and the correctness of the photocopies, the arbitral tribunal should make it clear to the parties that unless any of them objects on the following conclusions within a specified time limit, it is free to conduct the proceedings: (i) a document is accepted as having originated from the source indicated in the document; (ii) a copy of the dispatched communication e.g. letter or telex, is accepted without requirement of further proof of when received by the addressee; and (iii) a photocopy is accepted as correct.

Parties can submit jointly a single set of documentary evidence whose authenticity is not disputed. This saves costs and avoids duplication.

(l) Assessment of physical evidence other than documents

Sometimes the arbitral tribunal may be called upon to assess physical evidence such as a sample of goods, viewing a video, other than documentary evidence. In such cases, the arbitral tribunal may want to fix the time schedule for taking of physical evidence upon inspection. For on-site inspections, the tribunal, may consider matters such as the time and place for meeting and the presence of the parties.

(m) Witnesses

The rules and laws on arbitral procedure generally provide adequate scope for taking evidence of witnesses. However, the arbitral tribunal may deem it fit to clarify, in advance of the hearings, certain matters as regards witnesses. These include: (i) advance notice to the tribunal and the parties required to be present; (ii) the notice should specify the subject-matter on which witnesses will testify, language to be used, qualifications, expertise, and experience of the witnesses.

Some practitioners also follow a procedure wherein, the party presenting the witness also submits the witness's attestation. Such method may lose its credibility because the party while interviewing the witness may influence him. If the arbitral chair allows such a statement, it must clarify the procedure for oath or affirmation.

The manner of taking oral evidence may be varied, namely :(i) questioning by the arbitral tribunal, where parties question the witness and later, the tribunal; (ii) questioning by the party presenting evidence and thereafter the arbitral tribunal poses questions,

Other collateral issues concerning oral evidence of witnesses are: whether witnesses should be allowed to stay in the hearing room when they are not testifying, the order in which the witnesses should be called for presenting evidence and allowing interviews prior to witness's appearance at the hearing. The arbitral tribunal hasthe discretion to decide these matters.

(n) Expert Witnesses

Most of the arbitration rules and procedure make provisions for participation of expert witnesses. The important issues concerning them are: (i) Experts can be appointed by an arbitral tribunal, if they feel the need. A profile for experts can be circulated whereupon the best acceptable to parties can be chosen. (ii) The expert shall be notified as to his terms of reference. (iii) The arbitration rules may also allow cross-examination of expert witnesses; (iv) Parties on their own, may request the arbitral tribunal to grant them permission to present expert witnesses.

(o) Hearings.

Generally speaking, arbitral rules and procedures in most legal systems allow for hearings. Such hearings can be arranged depending upon the discretion of the arbitral tribunal. The arbitral tribunal shall bear in mind the time-limits, expenses and date fixtures, when allowing a hearing. It shall also notify the parties concerned if one or more sittings normally extending to a single period, would meet their requirements. The arbitral tribunal may also decide the date, time-limit for oral hearings, length of the hearings, the order of the presentation of arguments and the taking of records. The legal counsel of the parties are also allowed to present a summarized note of their oral arguments.

(p) Multiparty arbitration

When a single arbitration includes more than two parties (multiparty arbitration), the considerations for organizing an arbitral proceedings are nearly the same as a two party arbitration. There is a possibility that the proceedings may get more complicated on account of flow of communications, decisions regarding time-limits, costs, hearing of witnesses, appointments and a host of other issues. This may lead to protracted proceedings.

(q) Filing of Award.

Some municipal legislations require that the arbitral awards be filed or registered with a court or a designated authority. These laws differ with regard to filing, registering or delivery of an award, time-period, the costs and the validity of an award based on the above requirements.

Comments

The UNCITRAL Notes on Organizing Arbitral Proceedings are intended to serve as a reference table, to be used by arbitration practitioners, especially in international arbitration cases. The rationale behind the Notes is to bring out a uniformity of approach in recognizing the important issues in arbitral proceedings. The Notes provide a detailed account of the procedural and substantive issues that may come up in most arbitral rules and procedures. These shall serve as a useful guide to parties, arbitrators and arbitral institutions to organize arbitral proceedings in a fair, expeditious and cost-effective way.

The Notes are a judicious blend of principles existing in most legal systems. Their non-binding nature leaves enough scope and flexibility for their acceptance. Bearing in mind the fact that the Afro-Asian countries follow either a common law or civil law system of jurisprudence, it would be appropriate if these Notes are used by all those concerned with arbitration in general and arbitral proceedings in particular.

IV. Build-Operate-Transfer (BOT) Projects

Background

The Commission at its 27th (1994) and 28th (1995) sessions considered notes [8] prepared by the UNCITRAL Secretariat. The notes emphasized the relevance and importance of build-operate-transfer (BOT) projects. There was wide support for BOT projects in the Commission. It was noted, that the work undertaken by the Commission would supplement the advanced progress made by the United Nations Industrial Development Organization (UNIDO) in this area. At the present session, the Commission considered yet another report submitted by the Secretariat.[9]

Concept of BOT

BOT basically is a project which a Government awards to a group of investors by way of a concession agreement the development, operation, management and exploitation of such projects. The group of investors, often a consortium, undertakes to develop the project according to the concession agreement. While the generic term for such projects is build-over-transfer (BOT), terms such as "build-own-operate" (BOO), "buildown-operate-transfer" (BOOT), "build-operate-lease-transfer" (BOLT), are interchangeably used. Such BOT projects, unique in their nature, offer many benefits to the host governments, namely: such projects are not financed from budgetary provisions and do not affect public debt; the private sector participates in a major way in the transfer of financial and technical expertise; and besides there is scope for augmentation of public infrastructure, higher potential for foreign direct investment (FDI) and improving the skills of local entrepreneurs.

One has, however, to be aware that BOT projects involve signing of complex contractual agreements. Besides the Government and the project consortium, a host of interrelated parties such as construction companies, equipment suppliers, independent capital investors, institutional investors and multilateral agencies would also be involved. The agreements for assigning risk allocation and other contractual obligations may call for lengthy negotiations. This calls for an adequate and detailed legal framework.

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[8] Doc. Nos. A\CN.9\399 and A\CN.9\414.

[9] Doc. No.A\CN.9\424.

The Role of a Legal Framework

The legal issues that need consideration in a BOT project include the following:

(i) Confidence-building Measures for FDI

As most of the funds are generally generated from FDI and other commercial borrowing, the investors would like a certain amount of transparency in laws, which would guarantee a safe long-term investment and protection of their property from expropriation or nationalization without fair compensation.

(ii) Areas relevant to BOT that require legislation

The two areas that require special mention in this regard are firstly, promotion of foreign private investment which calls for legal provisions for private ownership of land, repatriation of profits, foreign exchange convertability etc. The second area is the general commercial legislation, particularly incorporation of commercial enterprises, assignment of trade receivables and public procurement. In some of these areas there are internationally harmonized texts such as, the UN Convention on Contracts for International Sale of Goods, the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on Procurement of Goods, Construction and Services and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the World Bank's ICSID Convention and the MIGA Convention. Besides these, investors may also like to see specific provisions in legislations providing a legal basis for private sector participation.

(iii) Prevailing approaches to BOT legislation

Legislative approaches may differ. Some governments may prefer a setting of general parameters for BOT contracts, whereas others may draw up a specific BOT legislation. There are other examples, where a government may choose areas like power generation, roads or water treatment for BOT contracts. Special legislations provide the details about procurement of BOT contracts. Some Governments often adopt one time specific legislation for specific projects.

Subject-matters covered by national legislations

The UNCITRAL Secretariat after having examined draft legislations on BOT projects of twenty-four countries, listed the following, as the micro-legal issues affecting BOT contracts:

(i) Fields of concession: Some governments specify the areas, for example power generation, water treatment etc. where concessions can be granted;

(ii) Statements of policy: Some national legislation make hortatory provisions for BOT contracts;

(iii) Competent authority: National Laws may also provide for setting up of a nodal agency or a governmental body in charge of issuing licences, approval of concession instrument, monitoring of contracts;

(iv) Planning and co-ordination: Depending upon the importance and the role of a BOT project in a national economy, governments may draw up master plans that provide the finer details of a BOT Contract;

(v) Publicity: Laws also provide for informing the people through a Government gazette or a public registry of having signed a BOT contract;

(vi) A number of laws also make provisions for payment of penalties or liquidated damages, and termination of agreement on a specific breach of an agreement;

(vii) A contract may stand terminated on grounds of expiry of concession period, expropriation by government or