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GLOBAL COMMERCIAL TRANSACTIONS- ISSUES AND DISPUTE RESOLUTION

Strong corporate earnings and large company cash balances have driven companies to consider a wider horizon for expanding and carrying out organic as well as inorganic growths like Mergers and Acquisitions and other business development ventures in foreign lands. By this, companies can **lessen the cost of labour and find new opportunities to grow** beyond home countries. Joint Ventures, Licensing and Mergers and Acquisitions are the three most common types of cross-border transactions. But there are many **associated risks** like business, reputation, monetary etc. Also not all jurisdictions offer foreign investors the same robust **legal protections** as they would expect at home which makes them cautious about expanding cross border. In this article we are focusing more on these risks from the legal perspective.

Legal Issues

The primary legal aspects that add to the complexity of cross border transactions include:

1) Compliance risks referring to bribery and corruption
2) Unfamiliarity with local laws and regulation
3) Conflict of laws
4) Practical challenges like language barrier and time zone
5) Complex and unfavourable tax issues and, antitrust issues
6) Complexity/ regulation of inward investment
7) Insurance issues
8) Cultural differences between parties and lawyers
9) Challenges of dealing with a foreign counsel
10) Agreeing the governing law for the transaction
11) Enforcement of awards or judgment
12) Data protection
13) Intellectual property rights protection

14) Third party rights

15) Governance

16) Other aspects

Thus, these issues along with financial, environmental, employment and real estate concerns are to be blamed for global commercial transactions not coming through according to the expectations of the parties worldwide.

Reducing Risks

Companies have tried to reduce risks involved in a cross-border transaction in the following ways:

1. Agreeing to the governing law
2. Clearly drafting such deals with some commonality in the language
3. Adopting a standard approach in managing the process, structuring and due diligence involved in the deals

Dispute Resolution in International Transactions

International projects employ many participants, each of which brings into the project what the other participants lack like financing ability, political authority, technical know-how, procurement of supplies, human resources and so on. Therefore, such a setup involves dealing with numerous contracts entered into by various participants from different countries, either bilaterally or multilaterally, thus, increasing the risk of disputes arising between the participants due to credit and exchange rate risks.

The most effective way of dealing with these situations is anticipation of disputes and putting a mechanism in place for their resolution in the contracts instead of leaving them to be addressed in future as they arise. The trend is to adopt binding methods of dispute resolution so as to strike a balance between business and legal perspective taking into consideration the risk associated with erroneous determination of future disputes.

There are two forums open to the parties in an international contractual dispute- domestic courts and international arbitration (which is a becoming a popular choice).

In case of **domestic courts**, the courts of the seat or place of business of any of the contracting parties, is perceived as the most favorable forum. The parties may also select the courts of another party because of the legal advantages attached to the possibility of obtaining discovery or to the future enforcement of a judgment in that country. Practice, however, has developed the trend towards the selection of U.S. (particularly New York) or English courts, mainly because of the parties' relation with financial centers in New York or London and the applicability of New York or English law to the agreement under consideration (where there is a stronger protection of the rights of the creditors).

Recourse to **International Arbitration** has been increasing due to it being a truly neutral alternative to domestic courts and also due to the extent of authority conferred upon arbitral tribunals

and enforcement of arbitral awards. Additionally, arbitration clauses are enforced in domestic courts more easily and more successfully than forum selection clauses. One more plus point for arbitration selection is maintaining confidentiality of the proceedings or claims. This is particularly important when the parties do not want their dispute to go in public domain or concerned about its share value in case dispute goes in public domain. This is also due to the adoption of international treaties concerning the enforcement of arbitral awards such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("1958 New York Convention") or the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("1968 Brussels Convention") as well as pro-arbitration legislations[1] have largely favored the arbitral mechanism.

Enforcement of Contracts

Arbitration has indisputably been reinforced by the fact that even when an arbitral tribunal is set up, domestic courts may remain competent and may assist the arbitration process, either upstream by compelling a reluctant party to arbitrate or by ordering interim measures, or downstream by enforcing interim measures or a final arbitral award ordered by an arbitral tribunal (Refer to Arbitration and Conciliation Act, 1996 with recent amendments in 2015).

There is thus, a dire need to ensure effective drafting of an arbitration clause taking into consideration the seat of arbitration, the modalities of the nomination of the arbitrators, and the choice between ad hoc or institutional arbitration with due awareness of experience of arbitral institutions (such as the ICC, the London Court of International Arbitration, or the International Centre for the Settlement of Investment Disputes in Washington, D.C.) and where they will seek enforcement of the award. Further, the flexibility, effectiveness, optimization, both legal and economic, makes it the most appropriate method for the protection of rights of the parties.

Conclusion

Although Alternative Dispute Resolution (ADR) like mediation, arbitration techniques are supposed to be cheaper than the cost of litigation, international commercial arbitration can often prove to be more expensive than litigation especially in complex international cases whereby both parties appoint distinguished lawyers and eminent and expensive arbitrators. Also, because there is no strict application of the rules of evidence, irrelevant and inflammatory materials may be presented to the arbitration panel and time and money is spent on issues which are unnecessary. There are, also, situations in which arbitration is not usually preferred; for example, some sovereign States are unwilling to arbitrate, and there seems to be an inclination by bank

[1] In France (Articles 1442 to 1507 of the French New Code of Civil Procedure), Switzerland (Chapter 12 of the Swiss Private International Law Act), England (1996 Arbitration Act), or the United States (United States Arbitration Act).), the new Article 125 of the Turkish Constitution reflecting pro-arbitration view, many other pro-arbitration statutes in developing countries

creditors, and their lawyers, to prefer litigation for disputes arising out of some international loan agreements.

It is greatly desirable for the rules and practices of all or most nations to be the same with respect to international commercial arbitration whether those rules and practices concern public policy or not. If such uniformity were already in existence there would not be any objection against it.

Therefore, it is very important to seek appropriate legal advise and involve legal folks early in the discussions before making any decision. It is said that "Precaution is Better than Cure". Proper due diligence in advance can save lot of cost on unnecessary spending on litigation or arbitration and this savings can be used to grow the business in that particular country.