International Journal of Research in Management & Social Science
Volume 12, Issue 1 January - March 2024
ISSN 2322 - 0899

ALTERNATIVE DISPUTE RESOLUTION AND INTERNATIONAL TRADE

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INTRODUCTION

As the cutting-edge method of resolving disputes outside of court, Alternative Dispute Resolutions (*hereinafter* ADR) is gaining a lot of attention. Despite common misconceptions, ADR is not a novel concept; three key ADR methods, i.e., Arbitration, Conciliation, and Mediation, have been used for centuries to settle a wide range of conflicts. Many ethnic, cultural, and religious communities still turn to ADR processes as their preferred channels. Due to the increasing complexity and volume of contemporary international trade, alternatives to litigation which are the dominant means of conflict resolution in the majority of western legal systems are being explored.

Global trade is accelerated by the existence of alternative dispute resolutions and its application in resolving international commercial conflicts. ADR's importance to global economic initiatives is demonstrated by a transnational network of support for ADR. This support is exhibited by various chambers of commerce, institutional groupings, and state and federal legislation. Why are extra-judicial means of settling disputes pertaining to global commerce so important? Mainly because parties with different nations, legal systems, and ethnic backgrounds can resolve their disputes amicably through ADR's without fear of the forum state's judicial system becoming prejudiced.[1]

The anonymity and seclusion offered by the majority of ADR procedures are likewise valued by many disputants. ADR has an advantage over litigation since it can settle disputes with less damage to already-existing business ties.

The most often used ADR techniques available to parties engaged in international trade disputes is arbitration. The preference for arbitration is multifaceted. Party autonomy is the cornerstone of arbitration, wherein the parties to an arbitration agreement mutually adapt the process to their own needs and preferences. The arbitrator's ruling is final, and the parties agree to abide by it. Moreover, the arbitrators are chosen by the parties expressly on the basis of their qualifications as experts in their fields. If both parties actively participate, arbitration is speedier and less expensive than litigation.

Finally, it is protected by laws, treaties, and conventions that are recognized and upheld by many nations, including the United States of America. However, other forms of ADR's are also utilized in international commercial conflicts besides arbitration. Mediation is becoming more and more popular as a means of conflict resolution with the help of neutral third parties. A handful of the more modern methods, such as the minitrial, are also being researched as possible tools for conflict resolution in similar circumstances. Regardless of the precise ADR methods, there is a positive correlation between international trade and alternative dispute resolutions; this correlation is driven by the processes' increased accessibility and innovation.

ADR TYPES USED IN INTERNATIONAL TRADE DISPUTES:

- **Arbitration**

As was already said, arbitration is and has long been the most widely used ADR method for resolving issues involving international trade. The forum that gives the parties the most control over the laws, venue, arbitrator, administrative authority (if any), language, and procedural rules is preferred by the parties.[2] To put it briefly, arbitration gives parties the freedom to customize the forum to suit their specific requirements. Due to the possibility that any of the afore-mentioned elements could be crucial to the process's fairness, arbitration is therefore especially well-suited to cases involving international business conflicts. Furthermore, parties feel

1 WIPO official Report, https://www.wipo.int/amc/en/center/advantages.html (Accessed on April 22, 2024).

2 Trade Impact for Good, "Settling Business Disputes: Arbitration and Alternative Dispute Resolution", 2nd ed., 2016, International Trade Centre, Geneva, Switzerland.

more confident in a process that has worked well to settle disputes in long-term agreements, trade disputes, joint ventures, construction disputes, and marine disputes some of the most prevalent areas of international trade.[1]

In addition to flexibility and justice, parties to disputes frequently favour arbitration since many countries are signatories to international treaties and conventions that encourage its use. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y. Convention), which was established in 1958 and is currently ratified by over 70 states, is one of the most significant and well-known arbitration treaties.[2] The enforcement of the arbitral agreement and the arbitrator's decision is facilitated by the N.Y. Convention. Generally, enforcement can be found in any state that is a signatory, regardless of the parties' relationship to that state.

The Convention requires a court to "shall... refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed" while determining whether to uphold an arbitration agreement. It also specifies that arbitral awards cannot be enforced in situations where the underlying agreement is unlawful, there are problems with due process, the dispute goes beyond what can be submitted to an arbitrator, the issues at hand cannot be resolved through arbitration under national law, or it would be against public policy to enforce the award.[3]

As a result, parties from signatory countries are encouraged to engage in International Commercial Arbitration (*hereinafter* ICA) under the N.Y. Convention. Nonetheless, this Convention is not the only one that allows for dispute arbitration under its authority. Arbitration between signatories is provided for by the Inter-American Convention on ICA, which is becoming more popular in Latin America, and the International Convention for the Settlement of Investment Disputes Between States and Nationals of Other States.[4] Furthermore, private bilateral or multilateral treaties between nations as well as state-level domestic regulations are designed to enforce arbitration agreements and acknowledge the importance of the arbitration process to global trade.

The United States of America offers arbitration a friendly atmosphere in both legislation and the courts. The N.Y. Convention and numerous other bilateral and multilateral agreements that allow for dispute resolution are ratified by the United States. In Scherk v. Alberto-Culver Co.[5], the Supreme Court acknowledged in 1974 how crucial it is for international trade to preserve arbitration clauses in contracts, even when the subject matter is not deemed arbitrable by domestic law. Establishing in advance the forum and applicable law for disputes through a contractual clause is a crucial prerequisite for achieving the orderliness and predictability that are crucial for any international commercial transaction. A parochial rejection by the courts of one nation to enforce an international arbitration agreement would frustrate these purposes and encourage the parties to engage in nasty manoeuvring to acquire tactical litigation benefits. In addition to endangering business people's willingness and ability to enter into cross-border agreements, this would impair the integrity of international trade and commerce. A contractual language that establishes the venue and relevant law for disputes ahead of time is an essential first step towards attaining the predictability and orderliness that are essential for any international business transaction.

The United Nations General Assembly (*hereinafter* UNGA) suggested that individual nations adopt the UNCITRAL Law in December 1985, after it had been drafted by a working group of the UNCITRAL. This law acts as a template for national arbitration laws. The Model Law aims to remove international arbitration from the local laws of each particular adopting state and to more uniformly regulate the practice and procedure of ICA. Its existence ought to be especially valuable to nations that stand to gain from modernity as well as those that might be enacting or extending arbitration legislation for the first time.

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1 *Ibid*.

2 United Nations, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Available at chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://uncitral.un.org/sites/uncitral .un.org /files/media-documents/uncitral/en/new-york-convention-e.pdf (Accessed on April 22, 2024).

3 Sumeet Kachwaha and Dharmendra Rautray, "India: International Arbitration Agreement 2021", Global Legal Group, 18th ed. 2022, pg. 72-84.

4 ICSID CONVENTION, REGULATIONS AND RULES, Washington DC, USA, April 2006, Available at chrome-extension ://efaidnbmnnnibpcajpcglclefindmkaj/https://icsid.worldbank.org/sites/default/files/ICSID %20Convention%20English.pdf. (Accessed on April 22, 2024).

5 Scherk v. Alberto-Culver Co. 417U.S.506 (1974).

UNCITRAL determined in 1979 that, "while a 1958 Convention protocol was not required, more work on a model law could assist States in reforming and modernizing their law on arbitration... reduce the divergences encountered in the interpretation of the 1958 Convention... and minimize the possible conflicts between national laws and arbitration rules."[1] This resulted in the idea for the model legislation development project.

UNCITRAL and the U.N. General Assembly accepted the final version of the Model Law, which creates a new international framework to control the procedural aspects of arbitration as lex specialis. It gives parties great latitude to customize the arbitration process to their needs, defines 'international' and 'commercial' broadly, restricts the role of the courts in the arbitration process, and gives arbitrators considerable power to make decisions, unless the parties agree otherwise. The Model Law, despite its recent promulgation, has already aroused a great deal of attention in the international community since it offers to further harmonize and streamline international arbitration on a global scale.[2]

Parties' decision to use arbitration as a forum for resolving disputes is mostly influenced by the availability of numerous administering agencies and formal arbitration rules that regulate the proceedings. The Stockholm Chamber of Commerce, the American Arbitration Association (*hereinafter* AAA), the London Court of Arbitration, the International Chamber of Commerce (*hereinafter* ICC), Court of Arbitration, and the Inter-American Commercial Arbitration Commission are a few of the more well-known national and international organizations that provide comparable services.

Every one of the afore-mentioned organizations has set protocols and guidelines for conducting international arbitration. A number of agencies, like the AAA and the ICC Court of Arbitration, administer UNCITRAL-drafted rules in addition to their own. The start of arbitration, the choice of arbitrators, the general procedure of the hearing, the structure and parameters of the award, and other procedural requirements essential to a systematic, equitable, and prompt resolution of disputes are all covered by the different rules.

Surveys indicate a growing dependence on agencies, even though parties are able to arbitrate without the support of an arbitral institution (ad-hoc arbitration). This reliance is based primarily on convenience, as agencies offer not only a tried-and-true set of guidelines and protocols for the arbitration, but they can also select arbitrators from a pool of pre-screened applicants and set up ancillary services like scheduling hearings at a location of the parties' choosing. Lastly, the majority of the main arbitral institutions are equipped to handle ADR matters involving mediations and conciliations in addition to arbitration.

In an effort to attract more international arbitration to the US in general and New-York in particular, the AAA founded the World Arbitration Institute in 1984. The Institute wants to make New York a desirable venue for ICA proceedings while also highlighting the advantages of arbitration for the business community. Selecting an arbitration site is always a big decision because it affects a lot of things like the procedures that apply to the arbitration, the kind and extent of judicial intervention, the availability of qualified arbitrators and attorneys who have handled cases internationally, and the facilities and administrative support that are offered.[3] The growing importance of international arbitration has led major world cities like Cairo, Geneva, Hong Kong, Kuala Lumpur, London, New York, Paris, San Francisco, Stockholm, Vienna, and Zurich requesting that parties arbitrate in their agency. Abu Dhabi is the newest participant in the area; it will ratify the Abu Dhabi International Arbitration Centre on February 01, 2024.

- **Mediation & Conciliation**

Both mediation and conciliation are traditional methods of extrajudicial dispute settlement that are currently experiencing a resurgence of attention. Numerous groups and cultures have long practiced these ADR approaches. For centuries, eastern countries, including China and Japan, have depended on mediation and conciliation as the preferred means of resolving disputes.

Mediation and conciliation have long been used to settle disputes involving international public law. The Roman Catholic Church and international organizations like the United Nations and International Court of Justice

1 Michael F. Hoellering, "The UNCITRAL Model Law on International Commercial Arbitration", 20 INT'L 327 (1986).

2 *Ibid.*

3 Igor M. Borba, "International Arbitration: A Comparative Study of the AAA and ICC rules"(2009), Master's Theses.

(*hereinafter* ICJ) have served as mediators in a number of conflicts in an effort to find a peaceful, amicable conclusion to a developing issue.

The AAA and the People's Republic of China have conciliation agreements that allow for the cooperative settlement of business disputes involving US parties and their economic interests in Romania and China, respectively. Joint conciliation has been used to resolve a number of instances, demonstrating the technique's viability and success.

For the same reasons that mediation is a fantastic way to resolve disputes in the public sector, parties involved in international trade are beginning to see the benefits of employing mediation in their disputes. More and more mediators are turning to mediation as a first resort when trying to resolve complex, large-scale disputes. Even in situations when mediation is unable to resolve the dispute altogether, parties often agree on a number of ancillary factual and legal issues, which simplifies and expedites the remaining subjects for arbitration or litigation. The majority of American practitioners engaged in international trade who responded to surveys said that they would be open to trying mediation and conciliation in their disputes. This suggests that American practitioners are adopting a different mindset, possibly influenced by their international counterparts.

Several institutions have broadened their regulations to include mediation and conciliation in response to the growing trend of interest in these processes. Conciliation Rules were published by UNCITRAL in 1980 and approved by the General Assembly to be used in disputes involving international trade. The guidelines offer a sample conciliation clause as well as instructions on how the process should be carried out from the start to the finish.

The Commercial Mediation Rules were published by the AAA and went into force in September 1984 as a means of mediating all kinds of commercial disputes. Since 1980, the construction sector has operated under successful mediation procedures; nonetheless, these are primarily applied in domestic conflicts. Similar to the UNCITRAL Rules, the AAA Rules contain a model clause and procedures from the beginning of the mediation to settlement..

Both the AAA Commercial Mediation Rules and the UNCITRAL Conciliation Rules emphasize the significance of maintaining confidentiality and nondisclosure during and after the settlement process. The effectiveness of mediation, in particular, depends on the parties' complete trust in the confidentiality of the information they provide to the mediator, who makes an effort to obtain all pertinent facts from each party on the disagreement. Therefore, the sustainability of the process is compromised if the mediator is not bound by confidentiality in post-settlement actions or in acts conducted after unsuccessful attempts at settlement.

The International Chamber of Commerce has also released the Conciliation Procedures. Generally speaking, the ICC regulations follow the same procedure, even though they are not as clear as those of UNCITRAL or the AAA. Additionally, a suggested model clause is included.

Recent Alternative Dispute Resolution (ADR) techniques:

- **The Minitrial**

ADR procedures that are currently gaining favour include the minitrial, which has been referred to as "formally structured settlement negotiations" or "an Information Exchange". The procedure comprises providing summaries of each side's strongest case to top management executives, who have final say over settlement decisions. There are also often neutral third parties engaged. Transforming a legal disagreement into a business problem is the aim of the minitrial. Cases without multiple parties, innovative legal difficulties, credibility concerns, or constitutional issues are particularly well-suited for this method.

Minitrial procedures have been issued by the Center for Public Resources and the AAA. The procedures outline general requirements such as a written agreement, the selection and presence of a neutral advisor, the surrender of an advisory award in the event that a settlement cannot be reached, and the preservation of the proceedings' confidentiality, even though the process is generally structured in accordance with the mutual desires of the parties. The German machinery company and its American distributor successfully resolved a recent international dispute through the use of the minitrial method. The distributor filed a long-arm lawsuit and withheld money owed to the manufacturer after the German company ended its long-standing agency arrangement with the American company. On the grounds of bad service, the German supplier sought for dismissal. The American corporation's lawyer recommended a minitrial after being told to start over and taking into account the potential delay. The German company accepted.

ISSN 2322 - 0899

The parties decided on a one-page letter of procedure that was meant to be uncomplicated. Each party's lawyer would have around an hour to present their case; there would be no use of an impartial consultant; and everyone there would be able to ask questions. Each side would have a principle present who is authorized to determine the issue. In addition, the agreement stated that following information exchange, the parties would meet to attempt to resolve the disagreement.

Charles Parlin, the U.S. company's attorney, told the AAA that outside counsel's marshalling of the evidence made the minitrial function. For instance, outside counsel created a timeline that showed what he thought he might prove about the German company's true intentions for terminating the employee. In response, the opposing attorneys created a tabulation intended to demonstrate that the American party's estimate of the damages was wildly exaggerated. The American side put out a number of ideas during the minitrial to promote settlement. Following the sharing of information, the two parties had separate lunches to assess each other's presentations. After some time, the parties met again and quickly came to an agreement.

According to Mr. Parlin, the minitrial differed significantly from customary settlement negotiations. First, the parties made significant progress towards dispute resolution when officials with the authority to settle were present. Second, each lawyer had a unique chance to speak with the executives of the opposing party in front of a global audience during the minitrial. Mr. Parlin came to the conclusion that European businesses generally wary of going to court in the US and are therefore open to any method that seems to offer quick, affordable, and fair settlement of conflicts.

- **Other ADR Techniques**

A relatively recent approach to alternative dispute resolution is 'med-arb', which combines arbitration and mediation. The method requires for the disagreement to be first mediation, where resolution talks and efforts are investigated, with the assistance of a neutral. Any unresolved matters following mediation are arbitrated by the same neutral, who issues a definitive and legally enforceable decision. Since the neutral party mediates the dispute initially, they become aware of the advantages and disadvantages of each side's case, which is one of the primary problems with med-arb. After obtaining this private information, the neutral has to decide the case in the role of an arbitrator. Given the delicate nature of the case, it is imperative that the parties to the mediation have complete faith in the impartial third party that has been selected.

Advisory committees for conflict resolution are another ADR tool. This method has the benefit of allowing a joint committee representing all parties' interests to settle disputes right away as they emerge. These committees have proven effective in resolving complex construction disputes quickly, which is crucial for maintaining the timeline for production.

Lastly, non-binding arbitration has been successfully applied, particularly in the European construction sector. The outcome is admissible in any further action between the parties, even though it is not legally binding. It appears that the parties are sufficiently persuaded to accept the award by this 'threat' of admissibility.

CONCLUSION

The development of transnational commerce has been and will continue to depend on extrajudicial conflict resolution techniques for international trade. ADR is beneficial not only because it is a private method of resolving disputes but also because it relieves participants of concerns regarding local legal systems and relevant legislation.

Other techniques, like mediation, conciliation, the minitrial, and advisory arbitration, are being employed more and more successfully, even if arbitration has been the most common ADR procedure in international business disputes. An increasing number of parties are ready to try alternative dispute resolution (ADR) instead of taking the chance of going to court in one or more foreign fora due to the favourable experiences with its many forms. We may anticipate more innovation and implementation of ADR as people customize it to suit their needs, given its recent surge in popularity.