South Carolina Journal of International Law and Business

Volume 1 | Issue 1 Article 4

2003

Examining Alternative Dispute Resolution in the International Business Domain

Reyburn W. Lominack III

EXAMINING ALTERNATIVE DISPUTE RESOLUTION IN THE INTERNATIONAL BUSINESS DOMAIN

Reyburn W. Lominack, III

I. INTRODUCTION

In the international business world, disputes arising between culturally diverse parties are becoming more complex as the global business market economy expands. In the international domain, above the conventional, substantive business dispute hangs a psychological imbalance attributed to the conflicting values each diverse party places on its social, political, and economic goals. When the traditional judicial system is looked to for resolution, perceived "home-field" advantages, unreasonable litigation expenses, and lack of confidentiality make it difficult for any party to feel successful. Alternative Dispute Resolution (ADR) provides an effective resolve for these concerns, making it the preferred method of conflict resolution in the international business world.

This article will examine how ADR in the international business setting helps parties overcome perceived biases in foreign judicial proceedings. Moreover, it will suggest using ADR as a means for cultivating and preserving cross-cultural business relationships, essential for the advancement of a strong, global industrialized market economy. The first section will briefly survey the development of ADR and its relationship with the international business world. The second section will discuss the advantages and disadvantages of an ADR system in a global business setting. Finally, the article will discuss the importance of governmental support for a global ADR system.

II. THE DEVELOPMENT OF ADR IN THE INTERNATIONAL BUSINESS WORLD

ADR has an extensive history, with references to its use appearing in Greek mythology,[6] in the New Testament,[7] in early Jewish and Roman law, and in the Norse sagas.[8] Some more particular forms of dispute resolution can be traced back to Confucian China, 12th Century England, and colonial North America.[9] "English courts were [traditionally] hostile to arbitration and that hostility carried over, initially, in the early courts of the United States."[10]

The earliest indications of English hostility to arbitration date back to 1609 when an English court declared, in the *Vynior's Case*,[11] that "contracts to submit to arbitration were revocable." "Even later, as the common law began to recognize parties' intent as a significant factor in contract enforcement, arbitration clauses continued to be treated as revocable."[12] It wasn't long, however, before political and industrial economic persuasion led English Courts to find themselves constrained by the passage of the Arbitration Act of 1698, which stated that once an arbitration award was made, the common law courts should not overturn the award, either for an error in law or an error of fact.[13] The English courts were directed to allow arbitration awards to stand unless they were made under fraudulent or otherwise unfair procedures.[14]

As the common law began to develop in the United States, early courts were likewise reluctant to divest their judicial expertise in favor of an alternative, quasi-institutional form of justice.[15] In 1854, however, the Supreme Court made a significant statement in favor of arbitration in *Burchell v. Marsh*.[16] The Court noted:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the

---

[6] ("Venus, Juno, and Pallas Athene agreed to let Paris decide which was the most beautiful.") *See* LAURA J. COOPER ET AL., ADR IN THE WORKPLACE, 2-3 (The Labor Law Group ed., 2000).

[7] (In I Corinthians 6:1-7, Paul exhorts the early Christians to submit their disputes to arbitration rather than the courts.) Id.

[8] Id.

[9] *See generally* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 481-83 (1995).

[10] Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, (citations in original), 2 PEPP. DISP. RESOL. L.J. 141, 145 (2002).

[11] 4 Eng. Rep. 302 (1609).

[12] Haydock & Henderson, *supra* note 5, at 145-46.

[13] Benson, *supra* note 4, at 481.

[14] *Id.*

[15] Haydock & Henderson, *supra* note 5, at 146.

[16] 58 U.S. 344 (1854).

> honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.[17]

This novel perspective advanced a judicially maturing appreciation of the ability of disputing parties to select and adhere to the decisions of a neutral third party, favored for his or her knowledge of "the common law of the shop."[18]

Because of this appreciation, and the understanding that the economy can only *benefit* from such speedy resolutions, the United States Supreme Court developed a positive position toward arbitration relatively early in U.S. history.[19] Shortly after the initial common law reception to arbitration followed successful attempts to implement federal and state arbitration legislation.[20]

As more countries began to develop their own common law and legislative structures, the ADR advancement led to the establishment of various institutions taking the role of "middle-man" in the world of conflict. "Various ADR institutions, such as the prestigious American Arbitration Association (AAA) and the International Chamber of Commerce (ICC), have been using ADR in the business setting for well over half a century."[21]

Many other industrialized countries have developed institutionalized forms of dispute resolution reflecting their own unique cultural beliefs and norms. The International Chamber of Commerce in France and the London Court of International Arbitration in England have provided the two principal civil law and common law traditions that influence most international arbitration proceedings.[22] As Rau and Sherman point out, "[a]rbitral institutions in Switzerland (Geneva), Austria (Vienna),

---

[17] *Id.* at 349-50.

[18] United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 580 (1960).

[19] Haydock & Henderson, *supra* note 5, at 146.

[20] *See* Arbitration Law of the State of New York (this statute made arbitration agreements binding under New York law and enforceable in New York courts and is recognized as the first modern arbitration statute in the United States) (1920); Federal Arbitration Act of 1925 (drafted by the American Bar Association); Draft State Arbitration Act of 1928 (written and recommended by the American Arbitration Association).

[21] *See* Betty Southard Murphy, *ADR's Impact on International Commerce*, 48-DEC DISP. RESOL. J. 68 (1993).

[22] *See* Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX INT'L L.J. 89, 91 (1995).

and Sweden (Stockholm) have also played a role in recent years in providing a Europeanized approach to arbitral procedures, and smaller arbitral institutions in virtually all European countries follow similar approaches."[23]

According to Stallard, "[a]s each form reflects that particular country's traditions, experiences, and philosophies, when a conflict arises that transcends national borders and becomes an international affair, these different dispute resolution cultures necessarily collide."[24] This cultural collision represents one of the greatest fears business entities have when compelled to deal with international conflict resolution.

While not without its flaws, ADR nevertheless remains the favored forum in which to tackle these trepidations. ADR is most likely to result in a decision, which takes into account long-term business and industry considerations that most courts are not well equipped to handle on an international level. [25] Presently in the international commercial setting, ADR is by far the most commonly used method of dispute resolution.[26]

III. ADVANTAGES AND DISADVANTAGES OF ADR IN THE INTERNATIONAL BUSINESS WORLD

Many of the advantages ADR has over traditional litigation are prevalent in both business and non-business related transactions, as well as on a national and international level. Some advantages are especially applicable to the international business setting and serve as catalysts for increased global market activity and efficiency.

Perhaps the most widely discussed advantage of ADR in the international setting is the expediency it provides. In the context of labor arbitration, Cooper, et al., suggest, "[...] its primary claim to legal preference—has always been that it is faster, cheaper, and simpler than litigation." [27] In a typical judicial system, a dispute between parties from different countries could take as long as ten years to become fully resolved. Typical problems contributing to such a delay include acquiring jurisdiction over the parties involved,[28] taking

---

[23] *Id.* at 119 n.6.
[24] Amanda Stallard, *Joining the Culture Club: Examining Cultural Context when Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463 (2002).
[25] Murphy, *supra* note 16, at 68 (1993).
[26] *Id.* at 69.
[27] *See* Cooper, *supra* note 3, at 500-01.
[28] *See generally* Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583 (2001).

discovery from sources thousands of miles away,[29] and enforcing a judgment that may eventually be awarded.[30]

Prolonged litigation subjects all parties to increased court fees and discovery costs. Realization of these expenses may substantially reduce the number of risks a business entity is willing to take in the future. Additionally, the state of the economy at the time a dispute arises and the time it is resolved in a traditional judicial proceeding may vary so significantly that it materially alters the bargaining relationship between the parties. Such instability may even affect a party's willingness to continue the business relationship.

ADR provides a valuable solution to these concerns. First, costs are generally relatively low in arbitration and can be distributed equally among all the parties. Additionally, a typical arbitrator has a much more limited docket than does a typical judge. Consequently, an arbitrator's resolution of the dispute is generally much quicker.

ADR also provides the advantage of allowing the parties to select the arbitrator of the dispute. This is particularly advantageous in an international business dispute because a skillful arbitrator "can acknowledge and reconcile different cultural, legal and social norms in reaching a decision, whereas courts are generally bound by the procedural rules and substantive law of the country in which they sit." [31] Furthermore, having the parties agree upon an arbitrator significantly reduces the risks of perceived bias.

If a company from Japan contracts with a company from Mexico to have a Japanese arbitrator if a dispute arises, the Mexican company's perception of cultural bias will naturally be great. In a typical negotiation, however, an arbitrator from the United States might be selected, thereby reducing the perceptions of bias.[32] With ADR in the international business setting, the parties can mutually engage in the arbitrator selection process, making decisions that correspond to their own political, social, and economic agendas.

Another advantage of using ADR is that it provides a private system of resolution, which most business entities prefer. Parties desire confidentiality because it allows them the ability to control the

---

[29] *See generally* Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L.J. 73 (Winter 2003).

[30] *See generally* Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure*, 30 CORNELL INT'L L.J. 493 (1997).

[31] Murphy, *supra* note 16, at 68-69.

[32] The author recognizes that in many transactions, the selection of a non-neutral arbitrator may simply be ,the product of unequal bargaining power.

flow of information, avoid the damage of publicity from an adverse award, and mitigate the potential for a flood of "copycat" litigation.[33] Rothman contends that, "the confidentiality of arbitral proceedings enables parties to resolve their disputes in private, without media attention, and ensure that the substance of the proceedings will not be disclosed."[34] Brown adds that, "not only is the hearing in private with strangers excluded, but the parties, by entering into arbitration agreement, accept a mutual obligation not to disclose or use for any other purposes any documents which are prepared for and used in the arbitration."[35]

In a global business setting, the desire for confidentiality is great because of the extensive scope of marketability. Most business entities would prefer to keep their disputes private to avoid publicity that may hurt their image or benefit their competitors.[36] Advances in communication technology have figuratively shrunk the geographical business world so much that even a little bad publicity can quickly go a long way. Private dispute resolution therefore, becomes a beneficial tool for maintaining a superior business reputation.

ADR has many advantages, not the least of which is its capacity to account for the tremendous differences between parties' political, economic, and social backgrounds.[37] While the advantages of ADR in an international business setting are generally attractive, there in turn exists a downside to its operation.

ADR in the international business setting will only work if the selected arbitrator is committed to making fair and expeditious decisions, keeping in mind the relative social, economic, and political objectives of each culturally diverse party.[38] If the arbitrator exhibits prejudice in any manner, the offended party may consider the resolution process unsuccessful, regardless of the actual outcome.

Another problem is that arbitration decisions are not always consistent and are rarely binding in subsequent proceedings, leaving parties only to speculate about the probability of prevailing on a similar issue in the future. Generally, this problem can best be

---

[33] See generally Philip Rothman, *Pssst, Please Keep It Confidential: Arbitration Makes It Possible*, 49-SEP DISP. RESOL. J. 69 (1994).
[34] *Id.* at 29.
[35] Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L. L. REV. 969, 973 (2001).
[36] *Id.*
[37] Murphy, *supra* note 16, at 75 (*citing* Christopher W. Moore, *Have Process, Will Travel: Reflections on Democratic Decision Making and Conflict Management Practice Abroad*, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM (Winter 1993) p.1).
[38] *Id.* at 68-69.

resolved by clearly defining in the contract what procedural and substantive rules will govern the transaction. The downside to this resolution, however, is that parties with relatively low bargaining power may be coerced into risky business ventures without adequate protection of their cultural values and objectives.

Another major concern for parties is the ability to enforce an award that may be issued. The effectiveness of private international arbitration is dependent "on substantial and predictable governmental and intergovernmental support."[39] Government plays a significant role in the ADR process, such that without the assurance of enforcement by a national court in whose territory an award debtor's property is located, international commercial arbitration simply would not work.[40]

IV. GOVERNMENT'S ROLE IN ADR IN THE INTERNATIONAL BUSINESS WORLD

Perhaps the most significant promoter of ADR on the global business scale has been governmental approval and encouragement. The demand for ADR has been supported by governments around the world, enabling businesses to act with the knowledge that their choice to use ADR is recognized, that ADR awards will be respected, and if needed, will likely be enforced by national governments.[41]

One of the most troubling facets of the struggle to globalize ADR in cross- cultural business transactions is the instability of many governmental frameworks. As Stallard points out, many current problems with dispute resolution analysis and implementation deal specifically with transitioning countries.[42] Transitioning countries are those "undergoing dramatic economic, political, or social change" and, accordingly, facing countless "institutional challenges, including the critical challenge of strengthening the rule of law."[43]

In the future, when these countries have stronger social, economic, and political foundations, they are more likely to play a significant part in the internationalization of ADR. "The administration of international justice broadly conceived is becoming fully integrated with and supplemented by a system of alternative

---

[39] W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 107 (1992).
[40] *Id.*
[41] *Id.*
[42] Stallard, *supra* note 19, at 463.
[43] *Id.* at 482 (*citing* Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339, 339 (2000)).

methods, which is in fact the only viable alternative that does justice to the growing demands of the international community."[44]

This process of internationalization requires not only the support of both public and private institutions, but also business entities that are willing to make riskier investments, relying on the support of a global ADR system tailored to protect their best interests. While the reluctance to engage in a dispute resolution process in which there is no guarantee of ultimate success seems unsettling, the increased level of consistent enforcement by state and national governments around the industrialized world has led most sophisticated entities to disregard it as a significant business concern.

V. CONCLUSION

With the advancement of modern technology, multi-billion dollar, global business transactions are accomplished with the press of a few buttons. The relative ease with which businesses interact with each other on an international level would have been unheard of fifty years ago. With the expansion of this transactional domain, however, comes an increased responsibility to develop and promote the use of effective dispute resolution systems that adequately account for diverse cultural objectives.

As the international business world continues to progress, and less developed countries become more involved, ADR will correspondingly continue to adapt to new needs and demands.[45] Stallard suggests that, "[a]lthough the cultural dynamics of dispute resolution are complex and important, they are likely much easier to learn, agree upon, and master before and during cross-cultural business deals than relying on foreign court systems once a conflict has arisen."[46]

Businesses today realize this and appreciate the necessity of a regulatory system, which will not only foster stronger perceptions of fairness and success, but also preserve on-going international business relations vital to the development of a strong, global market economy. ADR is by no means a definitive solution to the multicultural dilemmas faced in today's global business market. However, in most instances, it is a superior alternative to litigation and can typically be organized in such a way as to promote the best interests of all the parties involved.

---

[44] Francisco Orrego Vicuña, *Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation*, 57-JUL DISP. RESOL. J. 64, 70 (2002).
[45] *Id.* at 65.
[46] Stallard, *supra* note 19, at 486.

REFERENCES

Benson, Bruce L. *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479 (1995).

Borchers, Patrick J. *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L.J. 73 (Winter 2003).

Brown, Alexis C. *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969 (2001).

Cooper, Laura J. Et Al. ADR IN THE WORKPLACE, 2-3 (The Labor Law Group ed., 2000).

Haydock, Roger S. & Henderson, Jennifer D. *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141 (2002).

Hazard, Jr., Geoffrey C. & Taruffo, Michele. *Transnational Rules of Civil Procedure*, 30 CORNELL INT'L L.J. 493 (1997).

Moore, Christopher W. *Have Process, Will Travel: Reflections on Democratic Decision Making and Conflict Management Practice Abroad*, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM (Winter 1993) p.1.

Moore, Lawrence W. *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583 (2001).

Murphy, Betty Southard. *ADR's Impact on International Commerce*, 48-DEC DISP RESOL. J. 68 (1993).

Rau, Alan Scott & Sherman, Edward F. *Tradition and Innovation in International Arbitration Procedure*, 30 TEX INT'L L.J. 89, 91 (1995).

Reisman, W. Michael. SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 109 (1992).

Rothman, Philip. *Pssst, Please Keep It Confidential: Arbitration Makes It Possible*, 49-SEP DISP. RESOL. J. 69 (1994).

Stallard, Amanda. *Joining the Culture Club: Examining Cultural Context when Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463 (2002).

Wanis-St.John, Anthony. *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339 (2000).

Vicuña, Francisco Orrego. *Dispute Resolution Mechanisms in the International Arena: The Roles of Arbitration and Mediation*, 57-JUL DISP. RESOL. J. 64 (2002).