International Business Law

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PART III –

INTERNATIONAL LITIGATION

When direct negotiation fails, it is possible to distinguish into 3 main criteria for the resolution of dispustes between the parties:

COURT	arbitration	ADR

It has to be pointed out that basically business tends to avoid to defer the resolution of international litigation before national courts.

WHY?

For several reasons:

1. long and expensive proceedings interrupt the fluidity of commerce.
2. the loss of income (because of a party's default) is seen preferable to risks and costs outside the business (court fees).
3. companies generally want to avoid to get an image of being too litigious

In addition:

Sometimes it may be unwise to entrust a dispute governed by a different or "foreign" system of law to national judges whose qualifications and training are deeply rooted in their own legal system.

The contract and all the correspondence and documents relating to the dispute may have to be traslated into the working language of the judge of the national court.

AND, VERY IMPORTANT

With some exceptions (e.g. cases within the European Union) **the network of treaties for the recognition of national court judgements is incomplete. By contrast arbitration awards are more readily enforceable across national frontiers than judgements of national courts, particularly when the losing party has refused or failed to appear in the proceedings.**

Court actions are opened to public scrutiny.

AS A CONSEQUENCE…

In case of a default would occur it is usually difficult for the parties to reach an agreement in respect to the authority to which submitting their agreement, since their relationship has been corrupted.

Therefore parties usually agree on which proceedings undertake (litigation before national courts – arbitration) before signing the contract.

Actually, **in contrast to domestic contracts** (where all concerned expect the local national courts to have jurisdiction, even in the absence of a contractual provision to that effect), **parties to international contracts need to agree on what will happen if a dispute cannot be resolved by negotiation.**

This is best done at the time of negotiating the contract.

CHOOSING A FORUM

In case the parties agree to submit to a national courts their disputes the contractual clauses may decide:

1) **to determine which will be the forum.**

Example:

These Agreement is governed and will be interpreted in accordance with the Italian Law. ***The Milan courts will have exclusive jurisdiction*** *to settle any claim or dispute which might arise between the parties.*

OR

2) **to let the possibility open to turn to another forum**, too.

Example:
This Agreement shall be governed and interpreted according to Austrian law and ***the Austrian courts shall have non exclusive jurisdiction*** *in respect of any dispute arising in relation thereto. Party B irrevocably agrees to be subject the jurisdiction of the Austrian courts, should party A refer any dispute thereto.*


ADR
ARBITRATION

ADR

(ALTERNATIVE DISPUTE REOLUTION)

DEFINITION

A type of dispute resolution that seeks to limit the costs of litigation by using alternative, often out-of-court means, such as arbitration, conciliation and summary possession proceedings. Alternative dispute resolution options are voluntary, and often involve a neutral third party to make decisions.

The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy.

ADR procedures may take many forms, from third party assisted negotiation to mini trials. The procedure may be more or less sophisticated.

Contracts often provide from a <u>"cooling off"</u> period in which the parties agree not to take any formal step, such as commencing an arbitration, for a given period in order to allow an opportunity to their disputes to be resolved by other means.

Most known ADR

MEDIATION

MINI TRIAL

SETTELEMENT

MEDIATION

Mediation, a form of ADR, **aims to assist two (or more) disputants in reaching an agreement. The parties themselves determine the conditions of any settlements reached — rather than accepting something imposed by a third party. The disputes may involve (as parties) states, organizations, communities, individuals or other representatives with a vested interest in the outcome**.

Mediation, in a broad sense, consists of a cognitive process of reconciling mutually interdependent, opposed terms as what one could loosely call "an interpretation" or "an understanding of".

Mediators use appropriate techniques and/or skills to open and/or improve dialogue between disputants, aiming to help the parties reach an agreement (with concrete effects) on the disputed matter. Normally, all parties must view the mediator as impartial.

Disputants may use mediation in a variety of disputes, such as:

- **commercial, legal, diplomatic, workplace, community and family matters**.

A third-party representative may contract and mediate between (say) unions and corporations. When a workers' union goes on strike, a dispute takes place, and the corporation hires a third party to intervene in attempt to settle a contract or agreement between the union and the corporation.

SETTLEMENT

It may be useful to conduct ADR proceedings using a combination of settlement techniques. For example, the Neutral could be asked to give his or her opinion on a specific issue in the course of a mediation.

Regardless of the settlement technique chosen, the Neutral cannot bind the parties. However, the parties may agree contractually to abide by the Neutral's opinion, evaluation or recommendation.

During the first discussion, the parties should also seek to agree upon the most appropriate procedure to be followed.

The specific procedure can include any of the following elements:
procedural calendar;
exchange of documents;
production of memoranda;
identification of persons taking part in the proceedings;
meetings between the parties and the Neutral;
other means to ensure the smooth execution of the procedure.

Usually it can be determined that if the parties cannot agree upon an ADR settlement technique, mediation will be used. The parties allow themselves to select the most appropriate settlement technique.

The Neutral, in conducting the procedure, must take into account the wishes of the parties - which is of fundamental importance given the consensual nature of ADR - while being guided by principles of fairness and impartiality.

MINI TRIAL

A mini-trial is a process that usually occurs late in the pre-trial process. Each side will present a limited version of their case before an independent neutral as they would at trial. Also in attendance are the decision-makers from both sides who witness the presentation of trial evidence. Once the trial has concluded, the neutral will not render a decision but instead will work with the decision-makers independently in the hopes of facilitating a settlement.

EXPERT DETERMINATION

In expert determination, **an independent third party considers the claims made by each side and issues a binding decision**.

The third party is usually an expert in the subject of the dispute and is chosen by the parties, who agree at the outset to be bound by the expert's decision.
It can be most suitable for determining technical aspects of a complex dispute. Expert determination is also a process of adjudication (see above), and parties agree at the outset to be bound by the expert's decision.

ARBITRATION

POSITIVE ASPECTS

1. Neutrality
2. Confidentiality
3. Procedural flexibility
4. Expert arbitrators
5. Enforcement of awards

NEGATIVE ASPECTS

1. Limited powers of arbitrators
2. Multi-party disputes
3. Awards not binding on third parties

INTERNATIONAL ARBITRATION

Is often regarded as being more equal, as its deciding committee often consist of jurists and businessmen.

High costs must be compared with shorter proceedings. Instituted courts of arbitration like at the "International Chamber of Commerce" or the "London Court of International Arbitration" might not cost more than courts of law.

The Convention of New York 1958 rules, that sentences issued by courts of arbitration enjoy equal value as normal sentences regarding execution.

The parties agree on proceedings before a court of arbitration, if necessary on the composition of the arbitrators, of the applicable law, of the language used and in the end on the nature of the sentence and its validity as title of execution

Choosing the rules

Ad hoc rules

1. Arbitration clause ad hoc;

2. UNCITRAL rules

Instituational Arbitration

1. ICC (International Court of Arbitration, founded in 1923)

2. LCIA (London Court of International Arbitration, fouded in 1892)

3. ICSID.

4. ENERGY CHARTER TREATY

AD HOC RULES

- **The principal benefit of an ad hoc arbitration is that it can be tailored to the precise needs of the parties and the type of dispute likely to arise under a particular contract.**

- In reality the negotiation of a properly drafted ad hoc clause is a major task and one that should not ne undertaken lightly without specialist advice.

- Time and money can be saved by adopting the **UNCITRAL rules**, adopted by the United Nation Commissionon International Trade Law in 1976.

INSTITUTIONAL ARBITRATION

- **Institutional arbitration is something described as administered or supervised arbitration**, although the degree of administration varies greatly from one institution to another.

- **The rules of prominent and well-established arbitral institutions are the ICC, the LCIA and the AAA (American Arbitration Association) rules**.

- They ensure that the arbitral tribunal is appointed, that the basis of the remineration of the arbitrators is established, that advance payments are made in respect of the fees and expenses of the arbitrators, that time limits prior to the formation of the arbitral tribunal are observed.

EXAMPLE OF AN ICC RULES – ARBITRATION CLAUSE

- "*All disputes arising in connection to this Agreement shall be settled in accordance with the Arbitration* ***rules of the International Chamber of Commerce in Paris (ICC)*** *as valid at the time of the arbitration proceedings* ***excluding access to ordinary courts*** *by* ***three (3) arbitrators*** *appointed pursuant to such arbitration rules. The arbitration panel may also be binding force decide on the effectiveness of this arbitration agreement.* ***The arbitration proceedings shall take place in _____ . The Parties agree on English as the language*** *to be applied in any arbitration proceeding".*

ICSID

The International Centre for the Settlement of Investment Disputes (ICSID) was established by the Washington Convention of 1965 and seeks to promotes the settlement of investment disputes by means of two different procedures – arbitration and conciliation.

In order to use the ICSID procedure, three conditions must be fullfilled:

The parties must agree that their disputes be submitted to ICSID arbitration;

the dispute must be between a contracting state and a national of another contracting state;

the dispute must be a legal dispute arising directly out of an investment. Although the term investment is not definied in the Convention, in practice it has been taken to include investment by the provision of services and technology as well as more traditional forms of capital investments