

INTERNATIONAL COMMERCIAL ARBITRATION WITH DISPUTE RESOLUTION STRATEGIES THAT ARE USED ACROSS CULTURAL AND VARIOUS MULTIPLE STATES: CRITICAL SURVEY STUDY

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Abstract: International arbitration is sometimes called a hybrid form of international dispute resolution, because it blends elements of civil law and common law proceedings, with the opportunity for the parties to design the arbitral procedure under which their dispute will be resolved. International arbitration can be used to resolve any dispute considered "arbitrable," a term whose scope varies from country to country, but includes most commercial disputes. Companies often include international arbitration agreements in their commercial contracts with other companies, so that if a dispute arises in connection with the agreement, they are obligated to arbitration rather than pursue traditional litigation. Arbitration may also be used by two parties to resolve a dispute through a Submission Agreement, which is simply an arbitration agreement signed after a dispute has already arisen. International Commercial arbitration is a mechanism that is implemented by parties that are in dispute over business entities and any procedure that is business related. While the mechanism is not a new phenomenon, it is a part of the wider subject of Alternative Dispute Resolution. Many countries and business entities have adopted the method of conflict resolution as it is more peaceful and levels to produce amicable solutions to conflict that do not cause defamation and broken relationships. This article highlights the need for international commercial arbitration while covering its principles, basic components, advantages of using the method of dispute resolution as well as other important attributes. The paper extensively addresses various differences and similarity of international commercial arbitration with other dispute resolution strategies that are used cross cultural and in multiple states.

Keywords: CIA, ADR, Arbitration, Arbitrators and Legal Authority

1 Introduction

A dispute is a common phenomenon that is bound to happen due to man's disagreement with each other. It takes various forms and gets manifested in different forms as well. The whole idea of conflict is less pleasant and for that reason, people often try to resolve it so as to live as normally as possible. The process of conflict or dispute resolution is always undertaken so as to reduce the impact of the difference. Arbitration is sought by those in dispute as a way of a more agreeable and peaceful resolution of conflict. It is only natural that people will seek arbitration as a way to solve their differences as a way to eliminate any bad feelings and to maximize on restoring the previous relationship to the situation feel off for the parties. Since conflict often creates an undesired effect.

1.1 What is Arbitration

Arbitration is an Alternative Dispute Resolution (ADR) strategy that is adopted by opposing parties. ADR has used as opposed to undertaking the dispute through normal court proceedings due to many factors including limited time for conflict resolution, the need for privacy and the need to retain the relationship and image of the opposing parties. Arbitration involves parties who are in dispute and they often assign the role of arbitration to either a single party or a tribunal made of two or more members. Many tribunals are made up of three people or an odd number of people so as to break even. Commercial arbitration involves the process of arbitration in the resolving of the commercial case that goes beyond the jurisdiction of one country or administrative region. The process of international commercial arbitration is unique as the parties have the will to choose an arbitrator from people they know and trust who have expertise in commerce or particular subject of dispute (Menkel-Meadow, 2015)

1.2 Why conduct arbitration and other ADRs

There are numerous justifications that people give when choosing to adopt arbitration as opposed to other forms of conflict resolution methods. Among them is that arbitration works in the sense that it is done at the comfort of the two opposing parties. Novovic (2015) states that litigation is tough

on schedule and rarely do hearings and proceedings get scheduled at the convenience of anyone other than the legal counsel. The nature of litigation processes may destroy and never restore a relationship once it is destroyed. The process is full of scrutiny and the intention of such proceedings is rarely to get a relationship restored instead to its there to serve justice to however deserves it. The close nature of arbitration and the constant involvement in agreement formation at almost all stages are the key factors that make the process close knit and a tool in relationship restoration (Strong, 2012a). Other than that arbitration offers a host of other advantages that promote its application to disputes of all kinds including the international commercial disputes among business enterprises.

1.3 Key characteristics to arbitration

Arbitration is consensual in nature. The step by step proceedings of the arbitration process is agreed upon at all stages. The parties are not required to submit and arbitration dispute without an agreement to offer it. Additionally, all steps are critical in arbitration, and all process must be agreed upon by the opposing parties (Strong, 2012b). Without arbitration agreement, there is no chance of the arbitration taking place.

The other characteristic is that decisions made from the arbitration process are final and binding awards. In the international commercial arbitration, the results of the process are often those that should be implemented to eliminate the dispute. According to the Federal Justice Center (2012), the decisions do not take on the characteristic of being advisory. Instead, they are final and implementation of the decisions is on an immediate effect basis. Besides the awards being final they can also be enforced coercively upon agreement.

Either often selects the arbitrator by the disputing parties. The selection must be consensual so as to make it viable. On the other hand, the arbitrator may be chosen for the parties by an external party including the decision of a court and other arbitral institutions. The basis of this selection is to establish the fairest arbitrator that there can be to come to an agreement (Strong, 2012a). Impartial proceedings characterize the adjudicatory procedure. Arbitration is fair and bias-free, it is intended to give the parties an equal opportunity for the opposing parties to present their case and get a fair settlement as possible. According to Udoh & Sanni (2015), an arbitrator is often a liberal person with knowledge of the issue under the dispute in the international commercial dispute.

2 Advantages and Disadvantages of Using ADR

Opting to take in arbitration as a dispute resolution strategy has associated advantages to it. For example, the process of arbitration is less costly in the end as opposed to a typical court hearing and judgment. The cost of paying an arbitrator is often slightly higher than that of a regular advocate and other claims. In as much as this is the case, the arbitration process only has fees weighed on the payment of the arbitrators and the fees may be cost-shared among those in dispute (FJC, 2012). On the other hand, a normal court hearing has more costs that are linked to the process. The panel of judges, the advocates, members of the jury and all legal fees are higher than in the case of arbitration.

Secondly, arbitration is quite efficient for those who are in dispute. First of all, this is seen in the confidentiality associated with the process. Arthur (2013) states that the media together with the members of the public are not involved in the dispute resolution process and would be the case in a normal court session. The time and date of the meeting are at the convenience of the parties in conflict as opposed to being at the convenience of the court. They both enjoy the pleasure of

choosing when and how they want their meetings to take place. Unlike a normal litigation procedure, an arbitration process enjoys the liberty of having an expert make the decision (Blake, Browne & Sime, 2016). Court proceedings may not be biased, but the members of the jury often lack the knowledge of the case and purely base their decision on the laws they know, evidence given and intuition. Parties in a dispute often chose an arbitrator that they believe serve the purpose and have adequate knowledge on the subject of controversy. This, therefore, ensures that the decisions made are based on expertise and experience. With this being the case, an arbitration proceeding is likely to lead to a fairer and agreeable decision than litigation would result into. It is also significant to understand that arbitration has some disadvantages over court proceedings. For instance, arbitration does not enjoy the right to appeal a decision made by the arbitrator (Blake et al., 2016). The only circumstance that a person can file for an appeal is if there is evidence of fraud or corruption in the process. Other than that the decision is usually final and the parties have to agree to the terms and conditions as well as the action taken by the arbitrator. This has a negative impact especially if the loser feels as though the decision made did not entirely favor him.

Menkel-Meadow (2015), states that arbitration leads to the narcotic effect and a chilling effect. This is the effects that are associated with the opposing parties taking on two extreme sides and are unwilling to barge to come to a consensus. This makes the process even longer and more tedious to meet the demands of the two parties. The narcotic effect is the over-reliance on arbitration to settle a dispute. It is measured by a number of disputes presented for negotiation and the spillover that is left for arbitration. According to FSJ (2012), this effect often leads to the parties being unwilling to negotiate and come to an agreement. For an international commercial arbitration, this can have negative impacts on the business as there is a possibility that while the parties are at it, critical aspects of the business may suffer the consequences as they may be kept on hold as the dispute is solved.

3 When Arbitration Is Considered International

There is an evident difference in the way commercial and international disputes are handled and thus necessitates the differentiation between international and commercial arbitration. The definition of international arbitration is located within the UNICTRAL MODEL LAW established in 1985 amended and adopted in 2006 (FSJ, 2012). It states that arbitration is international if it meets the following characteristics;

- i. During the time of signing of the contract, the two parties who have signed the contract are located in two separate states. The places of business must be located in two separate states at the time that the two parties agree on the terms and conditions of the contract. This is only made effective if the contract is formalized and signed by the parties.
- ii. If the subject matter of the arbitration agreement is related to one or more countries. This must also be expressly agreed upon by the parties.
- iii. Finally, arbitration is international if the country of arbitration is predetermined by the parties and pursuant to the arbitration agreement. Additionally, if the place of the commercial relationship is placed or performed in a different deemed for to be an international location.

4 Legal Definition Of Commercial

This is an agreement that is transactions that are entered into by separate entities in the course of their business activity. The definition of commercial under an agreement is strictly based on business operations and thereby excludes aspects of inheritance, private and family laws. International Commercial Arbitration, therefore, covers the wide angle of businesses being performed beyond one state and by different companies

or business enterprises. All other entities and agreements outside the scope are left out of the definition of international commercial area (Chun, 2015). International commercial arbitration is, therefore, an agreement to settle a dispute out of court by business entities that have their area of service outside one common state.

5 The Legal Framework In International Commercial Arbitration

The legal framework of the international commercial arbitration is a system which governs and regulates the decision-making process, agreements and laws within the system. According to Kitagawa (2016), the legal framework of any institution acts as a critical guideline that is used to guide the operations of the entire system. The first element within the legal framework for this form of arbitration is the presence of an arbitration agreement. As mentioned earlier, the agreement is a binding contract that defines what happens in the process of arbitration. The agreement is based on the statements within the contract. An agreement of any kind must have a body and basis. Both of them are provided for in the business contract signed by the two opposing parties.

There must be institutional rules within the arbitration agreement. Once again these are drafted in the contract, sealed with signatures from both parties and act as an extension of the agreement that is between the two parties (Arthur, 2013).

The third element of the legal framework is the national legislation. International businesses have the mandate to operate within the state laws in which the business exists (FSJ, 2012). The legislative of the business or international entity must fit into the legislation of the present and existing countries for it to hold any value whatsoever. Models such as the UNICTRAL Model are used by business entities to come up with its legislation so as to meet the basic requirement and limit the possibility of disagreements occurring. These are the mandatory rules of arbitration that the opposing parties cannot deviate from in all circumstances.

Finally, international convention is the next element of the framework that must be present within the arbitration agreement. This acts as instruments that guide the process of arbitration once again in a legislative manner. Of all the instruments, the New York Convention is the most significant instrument. It acknowledges, identifies and enforces the arbitral awards that are foreign. The four components of the legal framework are necessary to arbitration and all international arbitrations often consider these essential elements to make it relevant and viable. The ultimate rule, however, is recognition and agreement from all the parties that are in dispute at the time (Moses, 2012).

One more critical attribute of an arbitration agreement is that of separability. It means that the arbitration agreement is stand alone and is treated separately from a signed contract (Moses, 2012). The requirement of a commercial contract does not have an influence over the agreement. Secondly, the validity of the arbitration agreement is not affected by the validity or life of the contract. Separating these important elements is vital so as to improve the validity and strength of the arbitration agreement.

6 Ny Convection, The Uncitral And Relationships To Cia

This convention is often associated with the success of implementation of international arbitration among states as it acts on two areas namely recognizing and effecting arbitration agreements and recognizing and enforcing international arbitral awards. The Model Law (the United Nations Commission on International Trade Law Model Law) is the other instrument with significant influence on international commercial arbitration. It relies on other legislations such as the NYC to determine the arbitration cases (In-house counsel practical guide, 2013).

6.1 Lexi Arbitri

Lex causa and ad hoc, These are important terminologies in international commercial arbitration. Lex arbitri means seat or terms of the arbitration, lex causa which mean the law that will determine the dispute and ad hoc arbitration which means an arbitration that is overseen by a non-institution.

6.2 Arbitrability

Cases that must be taken through court, It is important that before requesting for arbitration, there is need to know if the case is under the category of those that can be arbitrated. Different cases and various courts have their laws, and for individual countries, one issue may be settled through arbitration while the same issue may not be resolved through the same process in a different country. For the various disputes and countries, there are many factors that limit or encourage arbitration. One such factor is the penalty associated with defying a law related to the conflict. For a dispute to be solved through arbitration, the tribunal must go through all the legal documentation and oversee that the issue in dispute qualifies to settle out of court. The court of a country also reserves the right to determine if a difference should be taken to arbitration or not. These are bound by national laws. With this in mind, some cases must be decided by a court of law (Moses, 2012). These surpass the autonomy of the parties. Such cases include but are not limited to disputes that are linked to insolvency, all criminal proceedings including fraud & corruption, patent or land registration and distribution and issues surrounding divorce. In as much as divorce falls under this category, a divorce settlement can, however, be agreed upon outside of court. Other cases are often largely determined by the nature of the dispute and the consequences of the conflict as well as the national impact of the procedure and countries. Strong (2012a) further agrees that no one state has the right to be defamed in the process of international commercial arbitration.

7 Arbitration Rules and Laws

These are a unique set of laws that are established to control the proceedings of an arbitration phase. They guide what should be done and by who. The rules are also formulated to facilitate the process of arbitration. In reality, these rules are often used to enable an understanding between the two parties. The agreement is necessary so as to accomplish the intention of arbitrations. The rules for the proceedings are crucial as they limit behavior and encourage agreement. The rules of arbitration are often indicated in an arbitration clause and they are agreed upon. What this implies is that the rules are made after a consensus and not just one sided. They are used throughout the process and are consistently referred to by both the arbitrators and the parties in dispute. They are commonly employed if a dispute arises between the two opposing parties while arbitration (Strong, 2012b).

It is recommended that arbitration clauses be made from arbitration institutions on international stages. These include ACCA, the ICC and the LCIA in Australia. These organizations recommend that the arbitration clauses be made about the rules of these institutions. On the contrary of the parties present an ad hoc arbitration, there may be the adoption of the UNICTRAL arbitration rules which are universal in nature. It should be noted however that the parties have the freedom to choose which particular rules they want to go by. All this is made only possible if the parties comply with the set standards. In international commercial arbitration, the failure to live up to the rules written down leads to automatic dismissal by the arbitrators and consequent adoption of any rules that largely depend on the particular lex arbitri (Blake et al., 2016).

8 Arbitration Clause

The arbitration agreement is a clause that is located within the larger contract of the international commercial contract. An arbitration clause can be a simple agreement by the two

organizations on how they would settle a disagreement out of court in the event that a dispute arose. They could be simple things such as settling unfair treatment, faulty products or failure to meet the agreement as expected. The clause is binding in nature and cannot be reversed once the parties have both agreed and signed to it (Novovic, 2015). A good clause must be time bound, must identify the place for conflict resolution and must specify the number of arbitrators to be used in the occurrence of a dispute.

9 Procedure and Evidence of Arbitration

The typical process of arbitration is primarily made up of nine main steps. The number of steps and detour from the nine steps is often made at the discretion of the parties and that of the arbitrator to suit their specific needs.

The first step is the reference by one party to initiate arbitration. The initiation process often comes after numerous attempts through negotiation to reach to an agreement about a dispute (Kitagawa, 2016). The disputing parties then agree to set up an appointment with the arbitrator.

In international commercial arbitration, the arbitrator is appointed in three ways. The disputing parties can pick their arbitrator after assessing their needs in relation to their skills and expertise on the issue. The second way is through a tribunal. The tribunal comprises of an arbitrator for each disputing party. These arbitrators agree and appoint a third arbitrator who acts as the balance between the two sides. Finally, an arbitrator may be appointed by the use of an external party who is either nominated by a court or the individuals in the dispute (Strong, 2012b). The second step is the preliminary meeting held by the arbitrator to go over the case and the seek clarity from the opposing sides. The meeting is usually made up of the arbitrator(s), the disputing parties and their legal counsel. The meeting is held with the sole purpose of coming up with a timetable and the appropriate procedure that will be undertaken to reach to a solution of the problem. The statement of response and claim is the summary that is used to summarize the problem. In it, there is the matter in dispute and the solutions that the parties are seeking. Pleadings can be sought by the disputing parties so as to clarify the dispute terms and conditions. The objective of these pleadings is to avoid surprises and lay out all the facts for conflict resolution.

The next step is the discovery and inspection stage. Here the legal team goes through the background information of the problem guided by the disputing parties. According to Moses (2012), all relevant documents are thus listed down of which they are in control of. Inspection is then carried out and here the presented documents are viewed to ascertain association with the case and their use in the dispute resolution process.

After inspection, the next step is the interchange of evidence. The arbitrator is handed with the written evidence before the hearing takes place (Menkel-Meadow, 2015). The arbitrator is expected to go through the document to familiarize him with all the angles of the dispute through the evidence presented.

The next step is the hearing. This is not a necessarily a compulsory step as it can be avoided if the decision can be made by viewing the documented evidence alone. Failure to do so leads to the parties giving their witness accounts, clarification of information by them and the witnesses and questioning of witnesses are an important part of the hearing. While the hearing takes place, it is possible for either the parties to be present at the hearing as they are entitled to do so (Udoh&Sanni, 2015).

Legal submission then takes place. In this step, the legal counsel gives their summaries to the arbitrator. The summary contains their evidence and applicable laws. Legal submissions take two forms, that is, they are either presented through writing or orally. Oral presentations are done at the hearing while those in writing can be submitted soon after the hearing ends.

The final step in the procedure is the award. The award is the decision made by the arbitrator, the justification for his decision. It is the summary of the proceedings in written form and it is often final.

10 Court Supervision and Support Intervention

While arbitration's sole purpose is to settle a dispute out of court, there are exceptional times when there is need for a court intervention. These are covered under the domestic uniform Commercial Arbitration Acts (CAA) which is carved in the Model Law. This indicates that the court will offer assistance in instances where situation is made necessary in the clause under the Model Law.

The first of such a situation is if there is a request for the court to refer the matter to arbitration. This is when the case or dispute is first taken to court and the disputing parties seek arbitration as an alternative to conflict resolution. In such a case the court is mandated to offer the request to the parties. This is captured under the s. 8 (Model Law, Art 7). Under the Model Law Art 11 (s. 11) the law is mandated to intervene in a dispute if the parties fail to come to an agreement even with the issues of choosing the arbitrator. The court may make the necessary appointment and establish an arbitrator for the opposing parties to facilitate the process of arbitration (FSJ, 2012).

Under the Modal Law, Art 13 (s. 13), the court can be requested by the parties to the international commercial arbitration to break even and decide on the challenge. This often takes place in the event that the arbitrator fails to rule on the challenge entirely. Within the Model Law, Art 14 (s. 14), a party may take in a request to the court to terminate the mandate of the arbitrator if he is not satisfied with the way things are carried out. The court enforces the identification and enforcement of interim measures issued by the tribunal under the Model Law, Art 17H. In addition to recognition and compliance, the court is mandated to intervene on the issue interim measures which are related to the arbitration proceedings (FSJ, 2012).

According to In-house Counsel practical guide (2013), the court with the approval of the tribunal may intervene and assist in taking of evidence. A party may also make the formal request for the assistance with the adoption of the international commercial court of arbitration. This is captured in the Model Law, Art 27 (s. 27).

The court may step in to demand evidence and documentation of a party that fails to do so before the tribunal (FSJ, 2012). If one party refuses to take an oath before the proceedings or does not oblige to answering questions that would facilitate the decision-making process. On the same note, the court may also intervene in deciding which questions may be asked in the tribunal hearing.

11 Improving the Efficiency of Arbitration

Due to recent issues that have seen to it that international commercial arbitration becomes less convenient, there has been a need to counter the problem by coming up with ways through which arbitration can be improved. These strategies evolve from the parties to the process to the award system. The first is that there is need to hasten the process by choosing a tribunal within the shortest time possible. This can be done by confirming the availability of the arbitrator and agreeing to use the least number of arbitrators as possible in smaller cases (Novovic, 2015). This, in turn, ensures that the process is initiated faster and the least amount of resources is used in the intervention process. Other measures include using technology such as video conferencing for hearings and testimonies for those who are very far away.

The number of witnesses can also be limited so as to avoid dragging of the case and over repetition of an old stated fact.

Finally, there can be the use of consolidation when it comes to hearings and other procedures. This is important to limit the number of proceedings that are similar from running separately. More resources are thus saved from the original proceedings. The logic behind these moves is that arbitration should be a dispute resolution method that is convenient, cost effective and saves on other resources including time for the commercial enterprises. For an effective commercial arbitration process, therefore, the process needs to adopt the most relevant tools including the adoption of technology (Arthur, 2013).

12 In Selecting Arbitration Location – Examples of Countries

A host of countries has adopted the legislation based on the UNICTRAL Model as pertaining international commercial arbitration passed in 1985 and enacted in 2010. These countries have taken the initiative to do so for them to reach a more methodological way to solve their international commercial disputes through a uniform and agreeable arbitration process. Examples of countries that comply with this model are Australia, Canada, Cambodia, China, Germany, USA, Kenya, the UK and Singapore. It is important to note that the adoption dates vary from country to country and that the changes made to the model may have directly influenced the decision of the states to adopt the model to settle international commercial disputes. Varying dates vary from the initial document of 1985 to those adopted after the amendments to the legislation in 2010 through to 2012. These countries extend to cover the UK Great Britain and the Northern Ireland as well as other overseas territories that comply with the old and revised models. In these countries, the priority is to establish a consensus on dispute resolution no matter the continent or area (FJC, 2012).

13 Factors to Consider when Choosing an Arbitration Institution

According to Onyema (2015), an arbitration institution is an institution that takes up the responsibility of finding a solution to a conflict through arbitration. It takes up and spearheads the process of arbitration. The arbitrator facilitates arbitration through the institution. Decisions made are solely those of the arbitrator and are not in any way influenced by the institution that he belongs to. Using an institution to intervene in international commercial arbitration is advantageous as there exists pre-established rules. This minimizes the stress of formulating new sets of rules that may consume too much time. Institutions which are reputable offer the arbitration process with a wealth of expertise making the search process for an expert less tedious. Of the organizations that are known these are the most common; International Chamber of Commerce (ICC), American Arbitration Association (AAA), London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID).

In choosing arbitration institutions, there are factors that must be considered. The institution must elude permanency. This implies that the case that is brought before it should be old enough to cover its years of operation. This is particularly a requirement for major project agreements and long-term contracts. The institution should be present at the time that the dispute arises (Chun, 2015).

Secondly, the arbitration institution must have qualified staff to perform the work of arbitration. Most of the mentioned institutions have a good reputation of having qualified staff that is conversant with international disputes. According to Menkel-Meadow (2015), without such expertise, it is unrealistic to employ the services of an institution in international commercial disputes resolution. An institution must be up to date with the changing rules and laws that define arbitration, as well as the times, changes so do the rules and requirement for arbitration. A good institution will adopt these

changes as they occur so as to be up to date with the relevant rules in their cases.

Finally, the aspect of money is a critical one. The desired institution should be able to charge a realistic fee for the process of arbitration. Fees often vary per institution with some summing up their costs to include the administrative fees in conjunction with the time spent in the arbitration process. Other institutions assess the fees by adding the administrative fees with reference to the amount of money in dispute. For the international commercial arbitration, this is an important factor to consider as the process could be too expensive and lead to major losses if not appropriately implemented.

14 The Arbitrators

After all, factors have been considered, and both parties have agreed to have arbitration as a way of dispute resolution, they must come up with the person who controls the proceedings, and this is known as the arbitrator. The opposing parties often choose the arbitrator and in most cases, it is recommended that the two sides choose the arbitrator as it will help them gain a sense of representation. Having chosen their arbitrators also improves their sense of ownership of the process. In a multicultural, international commercial dispute, it is important that each party has its representation so as to limit the extension of conflict into cultures and language differences (Kitagawa, 2016).

A good arbitrator is one who is conversant with the laws of the country in which the dispute is being solved. While choosing an arbitrator, the parties are often advised to choose a number of arbitrators that are odd in number so as to reduce the possibility of a tie in decision making. An odd number also facilitates neutrality. On the other hand, if the amount in dispute is small, then just one arbitrator is recommended. When picking three arbitrators, the disputing parties select the primary arbitrators. The two arbitrators then select the third arbitrator to break even. In case there is the intervention of the institution, the arbitrators are selected by the institution depending on the expertise and experience.

While the institution may offer a better chance of providing expertise than hand-picked arbitrators, it is, therefore, important that when looking at the qualifications of the arbitrator, experience, and expertise in the area of conflict be a prime component to consider. A good arbitrator will make the case and a bad one will break a dispute (Novovic, 2015). With this in mind it is critical that when settling international commercial disputes, there be careful consideration of the people to be charged with that task.

15 The Arbitral Award

These are the consequences of the international dispute the parties are accused and charged with. Unlike a court, the arbitrator does not have the authority to impose fines and send a party to prison to serve time for the crime. Instead, the arbitrators offer awards to the parties or either of them that is found in fault of the contract agreement. It should be noted that the powers of the arbitrator in the awarding process are different in different countries (Moses, 2015).

In matters of punitive matters, different states have a different opinion of the same. While in America punitive damage is recognized, the European nations and Germany do not have regard for it. In these countries the punitive damages are not recoverable. Such issues, therefore, put the powers of the arbitrary tribunal on the spot. Such information should, therefore, be considered when making an arbitration agreement among states when speaking of matters that present varying opinions. Important to note is that the Model Law states that the parties can refuse recognition of punitive damages if it violates public policy. The other issue that often leaves room for contention is that of discovery. The law of the jurisdiction is the one that often determines the availability of

development. Things such as technology have also made the process of discovery pretty difficult as the process demands for an exchange of numerous documents that may be tedious to deliver through email communication.

An award can also take the form of a cost award. Strong (2012a) states that there are two broad categories of cost award that are the arbitration cost and party cost. The arbitrations costs are often the administrative costs that are paid to the administrative, traveling costs, expenses related to the tribunal and additional experts that were used to settle the dispute in the arbitration process. On the other hand, expenses of the parties are the individual costs of the proceeding in presentation of the case, lawyer representation, witnesses and experts such as accountants, communications disbursement are all included in the parties' legal costs.

16 Challenging An Arbitrary Award

In most instances, the ruling is often final, and the award cannot be appealed. In the case where the party feels as though justice was not served however can establish an appeal and challenge the awards. The reason for challenging an award is for the purpose of making modification in whole or in part to depict fairness and neutrality. Challenging most awards is often done before courts and each law has its procedure of carrying out a challenge. There are three grounds for challenging an award. The first is that it can be challenged base on jurisdictional grounds. This happens when there is none existence of a binding clause within the international commercial agreement. The other is that an award can be challenged on procedural grounds. This is the failure to follow the recommended procedure as stated in the arbitration agreement. An example of such is the inability to notice of a meeting or hearing appointment. Finally, an award can be challenged based on substantive grounds. These require that there must be evidence of error on the side of the arbitral tribunal in decision-making process while conducting the arbitration process (Udoh&Sanni, 2015).

When an award has been successfully challenged, it is considered and given to a new tribunal to look at the dispute. Once this is done, the tribunal is expected to make a final award that is also given a specific timeline. The decision of the second tribunal often carries the day, and the results are enforced immediately by the opposing parties.

17 Recognition And Enforcement Of Arbitrary Award

In addition to challenging the arbitration awards can be enforced by the losing party if he fails to comply. It is viewed as easy for enforcement to be applied in a foreign/national court as opposed to the other court systems. Arbitration is conclusive and most laws of states hold that the terms of the arbitration results should be applied immediately. Failure to do this, the court can be used to intervene. Here the winning party can take up a suit for compliance of the agreement. Upon the submission of the necessary documentation, the court is set to grant recognition and enforcement of the awards. There are however incidences when the court may refuse to give recognition and enforcement. According to FJC (2012), the reasons are provided for in the New York Convention under Article V.

These grounds are:

- i. The award is not yet a binding action for the two opposing parties.
- ii. Matters dealt with in the arbitration and award is beyond the scope of arbitration submission.
- iii. The tribunal or the arbitral proceedings were not in compliance with the arbitration agreement signed by the two parties.
- iv. The law to which the two parties have been subjected to is in conflict with the arbitration agreement.

- v. Finally, there could be rejection based on negligence in giving important notices to the party whom an award was invoked.

18 Sources Of Legal Authority For Arbitration

International commercial arbitration draws upon a diverse mix of legal authorities. Some of these authorities are promulgated by various state entities and are thus “public,” while other authorities arise from the agreement of the parties and are thus “private.” Both forms of authority are central to the arbitration process and must be taken into consideration by both judges and arbitrators. However, not every type of authority is relevant to every issue (Novovic, 2015).

International commercial arbitration also involves a number of legal authorities that are not used in litigation. Some materials that are familiar with litigation may be utilized differently in proceedings related to international arbitration. Strong (2012b) states that this unique approach to legal authorities arises not only because of the high degree of party autonomy in arbitration, but also because of the specific way in which international commercial arbitration combines practices and procedures found in both the common and civil law. Below is a summary section of the legal materials that are employed in international arbitration. It also includes insights into the fundamental principles of international commercial arbitration.

- i. Substantive law Arbitration and litigation – this address the substance of legal disputes in very similar ways. Arbitral tribunals use the law or legal principle that is chosen by the parties or, in the absence of side agreement, the law or legal principle that the tribunal determines to be appropriate, typically through the application of standard choice of law (i.e., conflict of law) analyses. In this respect, tribunals’ actions are very similar to those of courts. International commercial arbitration however differs from other forms of adjudication (Arthur, 2013). International business arbitration allows the parties or the arbitrators to decide that the substance of the dispute is not to be governed by the law of a particular country but instead by reference to general principles of law. An example of such are those found in the *lex mercatoria* or encompassed in the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts. The in-house counsel practical guide (2013) state that substantive disputes also may be governed by the United Nations Convention on Contracts for the International Sale of Goods (sometimes known as the Vienna Convention for the International Sale of Goods, but more commonly referred to as the CISG), which is a self-executing treaty under U.S. law that applies automatically to transactions involving the international sale of goods between parties who reside in contracting states. Although parties can opt out of the CISG, some do not. This can lead to surprises, since the CISG differs in several key regards from Article 2 of the Uniform Commercial Code (UCC), the provision that governs domestic sales of goods and that is often (erroneously) assumed to apply in international matters. Because parties usually want their disputes to be determined in accordance with international commercial protocols, it is not uncommon for one of these internationally oriented legal regimes (i.e., the UNIDROIT Principles or the CISG) to apply. In such cases, courts have very limited ability to review the arbitrators’ determinations regarding the choice of substantive law, since matters involving choice of law are for the arbitral tribunal to decide (FJC, 2012). Applying general or transnational principles of law should not be confused with deciding a matter primarily by reference to certain equitable principles. Most arbitral rules and statutes now forbid arbitrators to decide a dispute on this basis except with the express permission of the parties. Absent this express authority, arbitral tribunals follow the governing legal principles, although those principles may, of course, involve equitable considerations. Different substantive laws may apply to different aspects of an arbitral

proceeding (Blake et al., 2016). For example, the law that governs the issue of the validity of an arbitration agreement might be different from the law that governs the merits of the dispute. It is, therefore, important to distinguish between the different legal issues under discussion and apply the law that is appropriate to each of those issues.

- ii. Procedural law - Identifying and applying the appropriate procedural law is a much harder task in international commercial arbitration than it is in international litigation. There is a wide variety of legal authorities from which to choose, and it can be difficult to determine which authority governs which procedural issue. The process is further complicated by the fact that some procedures are entirely internal to the arbitration itself and some procedures that involve interactions between the arbitral tribunal and the court.

No single law governs all of these issues, nor can a single interpretive rule be followed in all instances. Instead, it is often best to consider procedural disputes on a motion-by-motion basis. Courts and arbitrators rely on seven different types of authority to determine matters of procedure in international commercial arbitration. They include arbitrary awards, agreement between the parties, case law, federal statutes on arbitration, arbitral rules, treaties, scholarly articles and monographs (Chun, 2015).

19 Concluded Comments

ADR through international commercial arbitration has proven quite successful in the past couple of years to settle commercial disputes that are global in nature. The success of international business arbitration has been realized over the past couple of years due to its meticulous formation, rules and events that surround the process of arbitration. In the trend of globalization, the dispute resolution method enables the society to look at differences from a different yet realistic angle. Many factors are being put into place by the process and the involvement of experts to make the method not only short but also the most sought form of arbitration practice when it comes to settling commercial disputes internationally. That said, the numerous advantages make international commercial arbitration the best way to resolve international disputes. On the other hand, the challenges associated with the method of ADR all work in collaboration with its positive side to effectively handle the issues of conflict resolution interstates.

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