

INTERNATIONAL COMMERCIAL ARBITRATION

By

Dr. M.I.M. Aboul Enein

Director, Cairo Regional Centre for International Commercial Arbitration;
Secretary General, Arab Union for International Arbitration;
Vice President of IFCAI, and Chairman of the IFCAI International
Arbitration Institutions Section

Submitted to the Conference
Preventing and Managing
International Commercial Disputes
Towards a EuroMed Alternative Dispute Resolution Infrastructure
Rome – Italy
September 28th and 29th, 2007

I – INTRODUCTION:

There are many variations of disputes. Some disputes are entirely appropriate to be resolved by adjudication. In such event, the main question may be whether litigation or arbitration is the appropriate procedure and whether the issues for adjudication can be clarified or narrowed in any useful way.

Other disputes may be able to be resolved by negotiation or mediation. The assistance and dynamic of a neutral third party who may introduce carefully devised procedures for examining and where appropriate perhaps evaluating the issues, for exploring interests, concerns and options, for dealing effectively with emotional and hidden factors, and for generally assisting the parties towards settlement, may well facilitate and expedite resolution.

A proper understanding of the dispute, its nature and its implications will assist in selecting the way for its settlement.

Many commercial and investment disputes are entirely appropriate to be resolved by adjudication.

In domestic disputes, the debate about the advantage to arbitrate or to litigate may depend on the substance of the dispute, the circumstances of each particular case on the effectiveness of the local courts.

However, in an international transaction, the balance usually comes firmly in favor of arbitration. There are no international courts to deal with international commercial disputes. In effect, the real choice is between recourse to a national court and recourse to international arbitration.

A claimant who decides to take court proceedings will usually have recourse to the foreign courts of the defendant's state. He may not be able to depend on lawyers of his own nationality, but instead he will have to use the services of foreign lawyers. The proceedings may be in a foreign language which is the formal language of the court.

Thus, documents and evidence will have to be translated, with all the attendant costs, delay and opportunities for misunderstanding.

Moreover, he may find that the national court is unfamiliar with international commercial transactions.

Accordingly, it is apparent that it is not wise to bring a claim related to an international business before a foreign court. This is even more unwise if one of the parties to the contract is a state or state entity, the private party to the contract will be reluctant to have its dispute submitted to the national courts of the state party. He will usually have little or no knowledge of the law and practice of the court and may apprehend that judges may be biased.

In these cases, recourse to international arbitration in a convenient and neutral forum, is generally seen as the most acceptable way to settle the international commercial disputes by a carefully chosen arbitral tribunal composed of experienced arbitrators chosen by the parties with knowledge of the language and commercial intentions of the disputed contract, and who will sit in a neutral country.

II – ARBITRATION IS AN INSTITUTION BASED ON PARTY AUTONOMY

There are many factors that contribute to the preferred choice of arbitration as an alternative way for the settlement of disputes.

Arbitration is a hybrid process which begins as a private agreement. It is an institution which preceded national courts. It is based on party autonomy between the parties and continues as private proceedings as planned by the parties. However, these proceedings end with a binding award which national courts in most countries recognize and enforce. Thus, the private agreement result in a public effect, recognized and enforced through state courts and national law which reflects the hybrid nature of the arbitral process.

The hybrid nature result in the best advantages for parties in international trade. It provides for the most convenient way for the parties to settle their disputes.

It is evident that the application of the party autonomy principle is the main reason for the parties to select arbitration to settle their disputes.

Party autonomy has the greatest control on international commercial arbitration. It has been the main influence on the development of truly transnational rules and practices for international arbitration. These rules and practices have crossed the barriers of legal systems and national laws.

Moreover, the application of the party autonomy principle in arbitration is supported by some other adopted principles in modern arbitration, i.e., *competence de la competence*, separability, guarantees of defence and finality of awards.

The principle of *competence de la competence* provides the arbitral tribunal with the power to rule on motions related to its competence, including motions predicated on the absence of an arbitral agreement, its expiry or nullity, or its failure to include the subject matter of the dispute.

The principle of separability means that the arbitral clause is deemed to be an agreement independent of the other conditions of the contract in which it features. It follows that the nullity, rescission or termination of that underlying contract does not necessarily affect the arbitral clause, assuming such clause is itself valid.

Arbitration also should be based on the principles of guarantee for defence. Thus, the parties to arbitration must be treated equally, and each should be accorded a fair and full opportunity to present his claims or defences.

Moreover, modern arbitration is based on the principle of finality. This means that an arbitral award is final and subject to no appeal, but may be set aside, for defects in the proceedings or in the award itself.

III – ADVANTAGES OF ARBITRATION

Arbitration offers advantages that litigation, from its nature, can never provide. These advantages vary from one case to another. In many cases a major advantage is that the arbitrator or arbitral tribunal understands the language of the contract and is so expert in the field of the dispute that the entire procedures can in many instances be conducted without the

intervention of lawyers, other representatives or even experts, with major gains in speed and economy. But even where lawyers represent one or both parties, arbitration can have many advantages, some of which are briefly stated as follows:

1 – The privilege of choosing the applicable law on the substance:

The desire of the parties in international trade to avoid the limitations and the rules of national laws which are not suitable for international trade.

They can choose the law or the rules applicable to the substance of the case.

2 – The privilege of choosing the rules of procedures:

The parties have a wider choice of procedures in arbitration than in litigation; they can choose the law or rules applicable to the proceedings.

3 – Selection of qualified arbitrators

The parties can choose as arbitrators the qualified persons for the subject of the dispute. If they cannot agree upon a particular person or persons, they can almost invariably agree upon some institution to make the appointment, and thereby agree upon the qualifications of the person or persons to be appointed.

In some countries, the law authorizes the national courts upon request of any of the parties to make the appointments if the parties fail to make them.

4 – Avoiding different levels of litigation

Litigation requires more time and judgments are subject to appeals and different levels of litigation which require delays and result in losses.

5 – Confidentiality

Confidentiality is not secured in litigation but may be generally secured in the arbitral process.

It is generally accepted that parties when faced with disputes deem the confidentiality of arbitration as an important factor in favoring their choice⁽¹⁾. Authorities on the subject of arbitration usually consider confidentiality of the arbitral process as one of the advantages of arbitration. Some authorities deem it a fundamental characteristic of international commercial arbitration.⁽²⁾

Professor Sanders expresses fully this trend by stating that “The principle of confidentiality is still generally accepted, but its legal basis has become, more and more, the subject of discussion” He stated that confidentiality is based on various grounds. He suggested that these bases are:

- (a) It follows from the character of arbitration as a private form of jurisdiction, and that privacy is envisaged by the parties when entering into an arbitration agreement,
- (b) It may be also regarded as an implied term in their arbitration agreement,

⁽¹⁾ Redfern A.andM.Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION,Third ed.,London Sweet and Maxwell 1999,P.23-48

⁽²⁾ Expert report of Stephen Bond in Esso/BHP v.Plowman (1995) 11 Arbitration International No.8 at 273- See also Arbitration International (1993)No.3.

(c) In view of its general acceptance, confidentiality may be regarded as customary arbitration law.⁽³⁾

6 – Choosing a neutral place of arbitration

In arbitration, the hearings (if there is to be one) and any preliminary meeting can be held in a place of the parties' choice. Apart from its great convenience in some cases, it can be in neutral territory rather than on what is perceived to be the home territory of one party.

7 – The possibility of resolving the disputes on documents only

The parties may agree in some disputes to resolve their disputes by arbitration on documents only without a hearing. Such documents may simply be sent by electronic means.

8 – Choosing the language of the proceedings

The parties may choose the language or languages of the arbitral proceedings.

9 – Harmonization of Hybrid Procedural Patterns

One of the great advantages of arbitration in international commercial disputes is that it would permit the application of multicultural procedures which would not be applied in any national court all over the world.

⁽³⁾ Sanders P., QUO VADIS Arbitration :Kluwer Law International (1999) p. 4-6 .

In the last few decades and as a result of the unprecedented developments in international trade and investments more and more cases that include players from different legal systems are submitted for arbitration.

Several factors participated in the birth of hybrid procedural patterns which reflect the harmonization of legal cultures.

The domination of the party autonomy principle in most modern laws of arbitration which include minimum mandatory rules permitted the parties, and the arbitral tribunals, to benefit from harmonizing the different proceedings to realize procedural flexibility.

The adoption of the UNCITRAL Rules and more importantly the UNCITRAL Model Law, which was adopted in many countries, were very important factors in this regard. So long as every party is having full opportunity to present his case, and be treated on equal footing with the other parties.

10 – Cost of arbitration

Cost is often mentioned as one of the advantages of arbitration. However, this advantage is sometimes challenged because arbitrators are paid, in many instances high fees while in national courts less fees are paid to the courts, and judges are not paid by the parties.

However, losses resulting from delays may exceed sometimes by far whatever expenses may be required as costs of arbitration.

11 – The application of the New York Convention

The New York Convention of 1958 provides, in many cases, a better means for enforcing awards in foreign countries than the equivalent enforcement procedures for judgments.

IV – CLAUSES PROVIDING FOR ARBITRAION AND OTHER ADR TECHNIQUES:

Though the advantages of arbitration satisfy the parties to select it as a way for the settlement of their disputes. Still they may try to join their clauses of arbitration with the possibility of trying to settle their disputes by some other ADR techniques before arbitration. Thus, many commercial and investment contracts included clauses of arbitration providing for conciliation or mediation before resorting to arbitration. This policy proves to be successful in many cases for the quick settlement of the disputes if the conciliation or the mediation was successful to settle the disputes before resorting to arbitration.

A question may be raised: why parties may need a chance for settling their disputes by mediation or any other ADR techniques before resorting to arbitration?

Sometimes parties who must deal with one another are in dispute or conflict, but are unable to negotiate an agreeable resolution. This occurs in many different situations. The parties may have differences of views based on involving serious mistrust, hostility, misperception, stereotyping, or poor communication. Memories over the past may rule the present. The parties may have conscious or unconscious psychological emotions to have revenge or express anger. These perhaps arise from their previous relationship or

events occurring between them. Consequently, this may lead to block, thwart, or punish the other party.

The parties may perceive themselves as having opposing or conflicting interests or needs. They may have incompatible values, and each tries to impose its value structure on possible settlements. They may incorrectly assess the situation involving them, have unrealistic expectations. They may not understand the real nature of their interdependency. If they are in a power struggle or an escalating conflict, they may believe they can win a test of fight.

Parties may lack necessary information. They may not agree about facts or information relevant to the dispute. They may have conflicting information, or assess data differently. They may disagree on the methods they should use to resolve the dispute and may not know how to negotiate effectively.

The dispute may have many facets and there may be many parties to it. The number of issues and parties may be so great that the parties themselves cannot organize and manage to exchange information. The parties may have inflexible constituencies, difficult to educate or manage, having high and apparently nonnegotiable expectations. Finally, in the most complex disputes, some or all of these problems are present.

Some of these seemingly intractable conflicts are in fact negotiable, but the parties are unable to negotiate successfully without outside assistance. They need a trusted third party, who can comprehend the whole dispute impartially. This party could analyze the sources of conflict and the barriers to negotiation, and intervene as necessary to assist the parties to overcome their dispute resolution problems. They need a trusted diagnostician, counselor, teacher, moderator, and facilitator. In short, they need a mediator.

These are some of the reasons to have a joint clause of arbitration and mediation in commercial and investment contracts.

National courts were hesitant to give full legal effects to these kinds of agreements before.

However, in recent years national courts began to honor these agreements. If any party to an agreement of this kind began the proceedings of arbitration without trying the mediation first, the national court enforce the agreement and force him to try it initially before arbitration. This trend began by the decision issued by the London High Court on October 11, 2002 in *I.B.M v. Cable and Wireless*. Moreover, the French Court of Cassation adopted the same view in its decision of February 14, 2003 in *Poire v. Tripier*. The Egyptian Court of Appeal adopted the same attitude on July 27, 2005 in case No. 103/121.