The Various forms of Alternative Dispute Resolution (ADR) in International Commercial Disputes

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Abstract: Alternative dispute resolution, usually referred to by the acronym ADR, is the focus of growing interest in the business world, and particularly the international business world. Contract drafters are continuously inventing new ADR procedures, most of which are derived from, or inspired by mediation, although in fact this is only one type of alternative dispute resolution. There is no doubt that ADR has emerged out of practice. At present, there is a very broad range of alternative means of dispute resolution used in equally broad array of circumstances. An exhaustive list of different types of ADR cannot be drawn because ADR lends itself to numerous derivatives consisting of combinations of common types. Of all the ADR types, mediation is the most traditional and the most central, around which all the other derivatives gravitate.

Keywords: Alternative, dispute, form, international, settlement.

1. Introduction

The term *Alternative Dispute Resolution (ADR)* has two meanings: loosely, the acronym ADR includes further then so-called "amicable" methods of resolving disputes – the negotiation, the conciliation, the mediation, whatever their nature judicial or extrajudicial, namely those methods which offer the parties the possibility to participate in the research of an accepted solution of their dispute – other methods which, that even if they have not an amicable nature, they are alternative[1] means of dispute resolution.

ADR is commonly interpreted as meaning all *alternative* methods of resolving disputes. In other words, it is contrasted with the traditional method available to any individual wishing to assert his or her rights, i.e. the statutory procedures leading to a judgment rendered by a State court. From this perspective, it could be-and indeed has been-said[2] that arbitration belongs amongst the alternative methods of resolving disputes, for arbitration can only be used if the parties have made a special agreement (arbitration clause or submission agreement) providing for the resolution of disputes by one or more individuals (arbitrators) chosen for their particular skills. In this case, the procedure has a contractual rather than a statutory basis[3].

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[1] The adjective "alternative" is used with increasing frequency in the specific sense of "not conventional" or "not traditional".

[2] Ch. Jarrosson, *Les modes alternatifs de reglement des conflits. Presentation generale*. RIDIC, 1997, p. 328. From this perspective, in accordance with the Romanian procedural civil law, the analyzed category includes, the judges' obligation to try to conciliate the parties in front of the first court, obligation stated in Art. 131 (1) of the Code of Civil Procedure and the obligation provided in Art. 720¹ of the same law. This article states that *in commercial matters, the complainant will try to settle its conflict by direct conciliation with the other party*. This is a preliminary mandatory procedure as stated in art. 109 of the Code of Civil Procedure. For more details regarding the mandatory procedure of conciliation, see: I. Leş, *Tratat de drept procesual civil*, Editura All Beck, Bucureşti, 2001, p.803; I.Deleanu, *Tratat de procedură civilă*, All Beck, Bucureşti, 2005, p. 275; M.Tăbârcă, *Drept procesual civil*. Volumul II, Global Lex, Bucureşti, 2004, p. 267-269.

[3] For details, see Pierre Tercier, *Foreword*, in Jean Claude Goldsmith, Gerald H.Pointon, Arnold Ingen Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Kluwer Law International, The Netherlands, 2006.

According to a narrower interpretation, ADR refers to so-called "amicable" methods of resolving disputes. As such, it contrasts not only with litigation but also with arbitration[1]. If a dispute is decided by a judgment or an award, this is an imposed solution to the dispute handed down by a court or an arbitral tribunal[2]. More often than not, the decision is enforceable. In contrast, all other proceedings are in principle of an "amicable" nature, in that a third party to whom the parties have recourse does not render a decision which is enforceable by a process of execution, but simply helps the parties to find or agree to a mutually acceptable solution of a strictly contractual nature.

2. Definition

ADR may be described as a structured negation process during which the parties in dispute are assisted by one or more third person(s), the "Neutral", and that is focused on enabling the parties to reach a result whereby they can put an end to their differences on a voluntary basis.[3]

All ADR-processes are characterized by the involvement of one or several third person(s), the Neutral. The main task of the Neutral in most ADR processes is to assist the parties in gradually refocusing from what has happened in the past (and cannot be undone) to reshaping their future by seeking creative solutions which reflect their business interests. The involvement of the Neutral is a key ingredient of ADR; it is (s)he who is expected to adduce the added value that can be expected from ADR.

3. Forms of ADR

The attempt to dress an exhaustive list of different types of ADR it is an aim impossible to reach. The reasons for this weakness are:

a) there are no legal rules and there are no universal definitions in this area;

b) these techniques are very flexible; ADR lends itself to numerous derivatives consisting of combinations of common types;

c) there are different practices.

Despite these inconveniences it has been detected various forms of alternative dispute resolution starting with negotiation perceived as the foundation skill for successful implementation of many ADR processes[4] and reaching to arbitration, the less consensual technique.

Negotiation may be generally defined as a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter[5]. The whole point of parties negotiating is to achieve an advantage that is not possible by unilateral action. The focus of this chapter is on two-party negotiations. Multiparty or multilateral negotiations where three or more parties are involved, present additional challenges. In dealing with groups in multiparty negotiations, lawyers must be skilled in

[1] ADR in the United States today is still conceptually deemed to include arbitral proceedings. Outside the United States, ADR is also perceived as a reference to alternative methods of managing or resolving differences or disputes. Alternative dispute resolution outside the United States is therefore normally not considered as including arbitration.

[2] For details, see O. Căpăţână, B. Ştefănescu, *Tratat de drept al comerţului internaţional. Partea generală*. Volumul I, Editura Academiei R.S.R., Bucureşti, 1985, p. 203.

[3] For details, see Carita Walgren, *ADR and Business*, in Jean Claude Goldsmith, Gerald H.Pointon, Arnold Ingen Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Kluwer Law International, The Netherlands, 2006, p. 6-7.

[4] See Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, Third Edition, Thomson West, USA, 2008, p. 15.

[5] For details, see Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, Third Edition, Thomson West, USA, 2008, p.16.

developing and maintaining coalitions, agreements with other individuals or groups to engage in joint action on particular issues.

Negotiation differs from other methods of dispute resolution in the degree of autonomy experienced by the disputing parties. In negotiation, parties attempt to reach agreement without the intervention of third parties such as judges, arbitrators or mediators. Parties also have the power to decide process norms in negotiation[1].

In another opinion[2], negotiation is the most flexible and informal of dispute resolution methods. Where the proper conditions exist, negotiation also has the greatest potential for a quick and relatively inexpensive resolution to the dispute.

Mediation is a structured negotiation in which a neutral third party, the mediator, uses a number of recognized techniques to assist the parties to the dispute to frame their own agreement in order to resolve the dispute

Conciliation is an informal process, similar to mediation but less structured than the mediation process. In conciliation, a neutral third party intervenes in a conflict in order to assist parties in arriving at a resolution. The neutral third party engages in a variety of techniques to reduce tensions between the parties, improve communications, and understand and interpret issues and positions.

The UNCITRAL[3] Model Law on International Commercial Conciliation[4] defines conciliation as "a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute"[5].

The Model Law uses the term "conciliation" to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person. In some cases, the different expressions seem to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used. In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties.

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[1] Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, Third Edition, Thomson West, USA, 2008, p.16-17.

[2] Dennis Campbell, *Dispute Resolution Methods. The Comparative Law Yearbook of International Business Special Issue*, published under the auspices of the Center for International Legal Studies, London, 1994, p 90-91.

[3] The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. The General Assembly gave the Commission the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law.
The Commission is composed of sixty member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years, the terms of half the members expiring every three years.

[4] Adopted by UNCITRAL on 24 June 2002, the Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements.

[5] See UNCITRAL Model Law n International Commercial Conciliation and Guide to enactment, available at: www.uncitral.org.

In accordance with Article 4.6., "*the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute*".

The directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters defines mediation as a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

Accordingly, in the international commercial context, the term conciliation is used interchangeably with mediation.

Early Neutral Evaluation: A process initiated in Northern California, attracting some interest is England, is Early Neutral Evaluation (ENE). The court appoints a neutral at an early stage to consider the pleadings and documents, meet the parties and hear their submissions, and then express a non-binding view. He helps them to consider how to conduct the litigation expeditiously and economically, considers processes other than litigation for the resolution of the issues, and, where appropriate, facilitates settlement.

The findings of the consultation only have the weight of an opinion and are not binding n the parties. But parties have the possibility of submitting themselves in a binding manner to the opinion, in which case the method is very close to arbitration[1].

Mini-Trial: This ADR procedure involves the formation of a committee ("Panel") made up of two high ranking directors from amongst the parties, one appointed by each of them and one neutral mediator as president.

In the mini-trial, the disputing parties have the case presented to them by their respective lawyers or other representatives on an abbreviated non-binding basis, to enable them (or in the case of companies, then-chief executive decision-makers) to assess the strengths, weaknesses and prospects of the case. In effect, the parties themselves become a tribunal, informally hearing the case (resulting in the Centre for Dispute Resolution calling this process the "Executive Tribunal"). With the benefit of these insights, the parties have an opportunity to enter into settlement discussions on a realistic, business-like basis.

A key figure in this process is a neutral adviser, usually authoritative in the field of the dispute, who may chair and manage the process, asking questions and clarifying issues. If required, the neutral adviser may give a non-binding opinion, and may also adopt a mediatory rote in any settlement discussions. The case is presented in accordance with an agreed procedure and timetable. Ordinarily, no witnesses are called, but experts may explain technical aspects, or key witnesses may explain parts of the case.

Dispute Review Board (DRB) are preventive ADR mechanisms identified primarily with the construction industry. The DRB hears disputes and makes non-binding recommendations based on the facts and the panel members' expertise.

The board is composed of three members with construction industry expertise—the contractor and owner each select a board member and both of them select the third member. The costs of the DRB are typically shared by owners and contractors. DRB members usually visit the construction site periodically and familiarize themselves with the parties and the project.

Unlike other ADR processes that are initiated after a dispute arises, DRBs are established at the pre-construction phase of a project and hear ongoing disputes.

[1] In that case the method is called Binding Expert Determination. For details, see J.C.Goldsmith, *Les modes de reglement amiable des differends (RAD)*, in Revue de droit des affaires internationales nr. 2/1996, Forum Europeen de la Communication, p. 224.

Mediation-Arbitration (Med-Arb): This procedure was defined as a hybrid[1] form of ADR.

Mediation-arbitration (med-arb) is a process by which an attempt is first made to resolve a dispute by mediation, and if that fails, then the process is converted to arbitration, generally, but not necessarily, using the same neutral in both capacities.

Where the same person serves as mediator, and then as arbitrator, the reservation has been expressed as to whether he will not have fatally compromised the integrity of his adjudicative role. To meet this concern, a med-arb option has been formulated in which, if the mediation does not resolve the dispute, the mediator may act as an advisory, non-binding arbitrator, but not as a formal arbitrator making a binding decision.

The parties must find someone else to arbitrate formally if this is what they wish.

Another option is that, if the matter remains unresolved at the end of the mediation phase, the parties can then decide whether they want the mediator to act as arbitrator. If the neutral has not in fact compromised himself, and the parties want him to decide the issues, rather than to appoint a new neutral, there is an argument that they should be allowed to do so.

Arbitration-Mediation (Arb-Med) it is also considered as being a hybrid process[2] in which the third party neutral begins as an arbitrator and then shifts roles to the mediation process.

Baseball arbitration: This procedure is commonly practiced between baseball teams during the trade of a player.

Under this procedure, each party formulates a settlement offer setting out his preferred form of award, and all such offers are handed to the arbitrator, who chooses the one considered to be most fair and most reasonable. In certain cases, the offers of the parties can include a minimum and a maximum which is left to the discretion of the arbitrator.

This process is accordingly designed and intended to discourage claims and to encourage the submission of reasonable proposals.

Mediation and last offer arbitration – **Medaloa** is a combination of mediation-arbitration and baseball arbitration because the choice between the two offers submitted by each of the parties is made in the name of mediation, that is to say, without binding effect, save in the case of refusal where the mediator decrees, but this time without having to limit himself to the offers of the parties, as an arbitrator.

Arbitration is generally defined as a dispute resolution process in which disputants present evidence to a neutral third party who renders a binding decision.

The various forms of ADR that we have classified and analyzed could be anytime complemented with new ADR procedures inventing by practice. This means that one of the most important features of these techniques is their flexibility, the parties having the possibility to organize the whole procedure in their attempt to solve a dispute.

The above identification of various forms of ADR could lead to the conclusion that even if in practice there is a very broad range of alternative means of dispute resolution used in an equally broad array of circumstances, most of them are derived form, or inspired by mediation, although in fact this is only one type of alternative dispute resolution[3].

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[1] Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, Third Edition, Thomson West, USA, 2008, p. 255.
[2] Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, Third Edition, Thomson West, USA, 2008, p. 255.
[3] For details, see Jean-Francois Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in Jean Claude Goldsmith, Gerald H.Pointon, Arnold Ingen Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Kluwer Law International, The Netherlands, 2006.

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