International Regulations Dealing with Alternative Dispute Resolution for International Commercial Disputes

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Abstract: At present, no generally applied international ADR rules exist. However, many legislative initiatives registered in time. The United Nations Commission on International Trade Law adopted, thus, a Model Law on International Commercial Conciliation in 2002. The European Union has also been active in the area of ADR presenting in May 2008 a Directive on Certain Aspects of Mediation in Civil and Commercial Matters that represents its most important initiatives in this field. There are also various international conventions that deal with dispute resolution such as the International Convention on the Settlement of Investment Disputes. The many legislative initiatives are useful, even necessary.

Keywords: alternative, commercial, dispute, international, rule.

1. Introduction

Parties turn to one of the processes of ADR when they feel that resolution of their disputes should, for various reasons, be sought outside the constraints of proceedings before national courts or a state-supported arbitration system, and in a procedure which is the most informal possible. There is no doubt that ADR represents today a new form of justice, a way of avoiding lengthy, complex and costly litigation or arbitration procedures. Alternative dispute resolution has become increasingly topical in the international business community. One reason for ADR being considered by the business community as an increasingly attractive complement to litigation is that there are many situations today where the true object of a commercial dispute is not adequately resolved by a court ruling or an arbitral award. The interest in having the matter resolved may dissolve with the passage of the time necessary to try the case before a court or an arbitral tribunal; monetary relief may be inadequate; the solution received from a court or arbitral tribunal - though legally correct - may simply miss the point of restoring the commercial relationship from which the dispute arises[1].

Today, commercial contractual relations often develop into relationships rather than being limited to the mere exchange of goods. It is clear, therefore, that the goals pursued by users of ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contract, maintain the contractual relationship and make their joint project a success. This is more important than the dispute itself, even though ADR might fail and also have a negative impact on the ensuing litigation or arbitration. Growth in the use of ADR simply reveals that companies are increasingly aware of the fact that contracts often give rise to disagreements about their meaning or performance.

The purpose of this type of ADR is to ensure that the contract operates properly, rather than simply to remedy the consequences of any failure in its performance[2].

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[1] 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. 3.

[2] 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, p.21-52.

ADR offers to the international business community and their legal advisers a possibility to resolve disputes trough commercial settlements that are more relevant to a company's operations than obtaining justice as defined and provided by law.

Even if today there are no international rules that mandate parties to use ADR for the resolution of their commercial disputes some recently published international documents could be mentioned as valuable initiatives in this field. In addition, there are various international conventions that deal with – or that include provision for – dispute resolution.

2. The International Convention on the Settlement of Investment Disputes between States and Nationals of Other States

The International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly known as the ICSID Convention or the Washington Convention) is of particular relevance in the context of international trade and investment[1].

The ICSID Convention was formulated by the Executive Directors of the World Bank and was submitted by them to member States of the Bank in March 1965 for their consideration and with a view to signature and ratification[2]. The Convention entered into force on 14 October 1966.

The preamble to the Convention refers to the need for international cooperation in relation to economic development and investment. Such investment may give rise to disputes, which should be settled on the basis of international methods of dispute settlement.

Article 1 of the Washington Convention established the International Centre for Settlement of Investment Disputes (the ICSID Centre), based in Washington DC, for the purpose of dealing with such investment disputes.

The ICSID Centre is a public international organization that provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.

The provisions of the ICSID Convention and the services of the ICSID Centre are now being widely used, particularly in relation to bilateral investment treaties.

3. The UNCITRAL Conciliation Rules (1980)

The United Nations Commission on International Trade Law (UNCITRAL)[3] recognized the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations.

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[1] Detailed information about the Convention can be found in Christoph Schreuer, *The ICSID Convention: A Commentary, Cambridge University Press*, 2001.

[2] As of January 2006, 155 States had signed the Convention and 143 have ratified it. Romania ratified the ICSID Convention in 1975. The list of contracting states of the Convention is available online: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

[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.

Responding to the need for the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations on 4 December 1980 UNCITRAL adopted the Conciliation Rules. These Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.

4. The UNCITRAL Model Law on International Commercial Conciliation (2002)

Moreover, UNCITRAL adopted a **Model Law on International Commercial Conciliation** (the Model Law on Conciliation) in 2002[1] and recommended that all states consider enacting national legislation on this basis in view of the perceived desirability of creating a uniform legislative framework for the application of conciliatory settlement procedures in international commercial disputes.

The model law makes it clear that it should be interpreted in light of its international origins, as well as the need to promote uniform application and respect for good faith. It is also clear that the issues that fall under the model law's scope but that it not specifically address are to be dealt with according to the general principles from which the model law stems.

The model law specifies that it covers any procedure, whether it bears the name of conciliation, of mediation or an equivalent name, in which the parties ask a third party to help them in their efforts to reach the amicable resolution of a dispute arising from legal, contractual or other relations, or linked to such relations.

The law contains provisions concerning important legal questions that may arise within the framework of mediation. It contains provisions dealing notably with the beginning of the conciliation procedure, the number and the appointment of the conciliators, the conduct of the conciliation, communication between the conciliator and the parties, disclosure of information, confidentiality, admissibility of elements of proof in other proceedings, the end of the conciliation procedure, med-arb, lis *pendens* and the enforceability of the agreement arising from conciliation. The Commission also suggests that States should adopt a section that provides for the interruption of the prescription (or limitation period) when conciliation begins and for its resumption in the event of failure.

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.

[1] UNCITRAL adopted the Model Law by consensus on 24 June 2002. During the preparation of the Model Law, some 90 States, 12 intergovernmental organizations and 22 non-governmental international organizations participated in the discussion. Subsequently, the General Assembly adopted the resolution A/RES/57/18 in 19 November 2002 recommending that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice. The preparatory materials for the Model Law have been published in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish). These documents are available on the UNCITRAL web site: www.uncitral.org.

5. The Uniform Mediation Act

At another level the National Conference of Commissioners on Uniform State Laws (NCCUSL)[1], in collaboration with American Bar Association Section of Dispute Resolution adopted in 2001 the Uniform Mediation Act[2].

This Act is designed to simplify a complex area of the law. Currently, legal rules affecting mediation can be found in more than 2500 statutes. Many of these statutes can be replaced by the Act, which applies a generic approach to topics that are covered in varying ways by a number of specific statutes currently scattered within substantive provisions. Existing statutory provisions frequently vary not only within a State but also by State in several different and meaningful respects. The privilege provides an important example. Virtually all States have adopted some form of privilege, reflecting a strong public policy favoring confidentiality in mediation. However, this policy is effected through more than 250 different state statutes. Common differences among these statutes include the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute (such as whether the mediation takes place in a court or community program or a private setting).

The purpose of the draft is to promote the use of mediation as an appropriate dispute resolution mechanism while protecting the rights of the parties involved in the process. It strengthens the laws adopted by the State legislatures and the rules of judicial practice by introducing a legal privilege that allows the parties, the mediator and the other participants in the process to forbid that the information communicated during, mediation be used in subsequent court procedures. It is said that this privilege will ensure the uniformity of solutions before the courts of the various States.

The privilege granted has very wide scope. The mediations or communications that are excluded from it are rare and listed restrictively. Among those exclusions are, quite fortunately, threats of physical injury during the sessions of mediation, abuse or negligence suffered by persons needing protection and recourse to mediation for criminal purposes. Other exceptions make it possible to set the privilege aside in order to demonstrate that the out-of-court award was obtained by fraud or under the influence of violence or that the mediator infringed ethical rules. The Uniform Mediation Act requires that the mediator report any situation that may give rise to a conflict of interest and that he reveal his or her professional qualifications when this is required of him or her. The NCCSUL also suggested that adjustments should be introduced to bring the law into line with UNCITRAL'S model law[3].

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[1] The National Conference of Commissioners on Uniform State Laws has worked for the uniformity of state laws since 1892. It is a non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each jurisdiction determines the method of appointment and the number of commissioners actually appointed. Most jurisdictions provide for their commission by statute. The state uniform law commissioners come together as the National Conference for one purpose—to study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable. It must be emphasized that the Conference can only propose—no uniform law is effective until a state legislature adopts it. The Conference is a working organization. The uniform law commissioners participate in drafting specific acts; they discuss, consider, and amend drafts of other commissioners; they decide whether to recommend an act as a uniform or a model act; and they work toward enactment of Conference acts in their home jurisdictions. See:
http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11.

[2] The text of this act is available online: http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm.

[3] For details, see Nabil N. Antaki, *Cultural Diversity and ADR Practices in the World*, 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.296-301.

6. The Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters

On May 21, the European Parliament and the Council enacted a Directive to encourage the use of mediation in civil and commercial matters, and to make uniform throughout the European Union the legal status of certain attributes of that practice.

The Directive culminated a ten-year process that occasioned each member state within the European community to consider the role of mediation in commercial affairs, and to take a position on the minimum requirements of the use of commercial mediation throughout the region.

As stated in its Article 1, the purpose of the Directive is "*to facilitate access to cross-border dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings*". Its scope of application shall cover "*cross-border disputes, [...] civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority* (*acta iure imperii*)".

The context of the Directive

As the practice of commercial ADR has grown around the world, certain aspects of its legal and commercial recognition have followed – some quickly, as in the United Kingdom, and others slowly. Standardized legal status has been elusive[1].

In Europe, the absence of uniform treatment of rudimentary ADR processes has been regarded by some observers as an inconvenience, and by others as a serious hindrance to commercial growth in the region[2].

The Directive is one of the follow-up actions to the Green Paper on alternative dispute resolution presented by the Commission in 2002, the other being the European Code of Conduct for Mediators established by a group of stakeholders with the assistance of the Commission and launched in July 2004[3].

Finally, a Directive[4] on certain aspects of mediation in civil and commercial matters was adopted today 23 April 2008.

Provisions of the Directive

In accordance with its Article 1, the terms of the directive are intended to apply only to cross border mediation disputes[5], however not preventing their application to internal mediation processes. The Directive excludes disputes sounding in family law and community law, does not apply to administrative actions; to matters in which the state itself may be liable; and to any efforts by courts to settle matters that

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[1]In the United States alone, some jurisdictions have adopted the Uniform Mediation Act and others have not; some states have approved ethical regulations requiring attorneys to advise clients of ADR and others have not; and so on.

[2] [2] For details, see F. Peter Phillips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn't*, article available online:
http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf.

[3] For details, see: *A boost for mediation in civil and commercial matters: European Parliament endorses new rules*, available online:
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/628&format=HTML&aged=0&language=EN&guiLanguage=en.

[4] The text of the Directive is available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.

[5] That means that matters that arise internally are unaffected by the Directive. Regarding the directive of certain aspects for mediation in civil and commercial matters, the nationality of the parties subject to the dispute, remains very important, because as it is mentioned the directive applies to cross-border disputes within the European Union, with the exception of Denmark who has not adopted of this directive. If one of the parties to the dispute is a national of a country other than a EU Member States, the European party or parties should not take for granted that the principles of the European Union directive are the same as those of the legal order of the national outside the European Union, so this should be considered before opting for a legal forum outside the EU.

are before it and finally, the Directive does not apply to rights and obligations on which the parties are not free to decide themselves.

On the subject of mediation quality, in its Article 4 the Directive calls on the states to "*encourage voluntary codes of conduct by mediators and by organizations providing mediation services*". This is substantially short of a requirement that mediators must be licensed. Instead, the states "*shall encourage codes of ethics and shall encourage training of mediators to ensure effectiveness, impartiality, and competence in relation to the parties*."

Furthermore, the Directive requires states to provide for enforcement of agreements that result from mediation (Article 6). This is particularly useful in a region of many languages and laws, almost all of whose civil justice systems are enshrined in a Civil Code. Each Civil Code will now grant judges the power to recognize settlement agreements obtained through mediation to be enforceable contracts.

In its Article 7, the Directive ensures that mediation takes place in an atmosphere of confidentiality and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation.

To this end, the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties.

Some critics

The Directive achieves its main goal: it recognizes and establishes uniform judicial treatment of cross-border commercial dispute resolution throughout the European market[1].

However, the fact that the provisions of the Directive limit its scope only to cross-border commercial transactions is seen by the observers as a first disappointment.

Then, the Directive's concern about the quality of the mediation service seems disproportionate.

The challenge to the growth of commercial mediation in Europe, however, is not that it is practiced poorly or that mediation centers have not adopted effective codes of conduct. The problem is that commercial mediation itself is not practiced. Commercial enterprises in Europe have a comparatively poor understanding of the mediation process as a management tool, and are unaware of the benefits that accrue from its systematic use.

Similarly, most European courts outside the United Kingdom do not appreciate the nature of the process and the effect that court-annexed mediation can have on the efficiency of dispute resolution in their jurisdictions. The Directive does not address this central challenge of education, advocacy and end-user training, but rather addresses the ethical regulation and quality standards of a profession for which there is, sadly, very little current demand.

By far the most egregious flaw in the Directive is its treatment of the confidentiality of statements made, and information produced, in the course of a mediation[2].

Article 7 of the Directive provides: "*Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give*

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[1] For details, see F. Peter Phillips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn't*, article available online:
http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf.

[2] For details, see F. Peter Phillips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn't*, article available online:
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evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation".

The effect of this provision is that any statement, offer, demand or concession made by a party during mediated settlement discussions can be repeated, reproduced, compelled, broadcast or entered in evidence by anybody – except the mediator.

The heart of the concern is that no well-counseled party will enter into serious negotiations of compromise if one's adversary can take any statement made during negotiations and use it in open court, in arbitration, in regulatory proceedings, or in the press.

Creating an area of security, freedom and justice, this directive aims to provide a key element for access to justice which should include alternative dispute resolution methods, which moreover releases the pressure on the Member States Courts.

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