ALTERNATIVE DISPUTE RESOLUTION

Law & Practice

Edited by

Adnan Yaakob
Ashgar Ali Ali Mohamed
Arun Kasi
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ALTERNATIVE DISPUTE RESOLUTION

Law & Practice

Alternative Dispute Resolution: Law and Practice is divided into 44 chapters which cover alternative dispute resolution (ADR) mechanisms in all their varieties, including negotiation, mediation, conciliation, ombudsman, arbitration, and court adjudication. These ADR mechanisms can be used alongside existing court systems and have gained widespread acceptance because of its speedy resolution of disputes and outcomes that preserve and sometimes even improve relationships.

The primary objective of this book is to enhance reader's understanding of the various regulatory framework governing ADR on diverse issues at both national and international levels. This includes the application of ADR to fintech, Islamic banking and finance, labour, and construction disputes among others. Online dispute resolution, Singapore Mediation Convention, and university arbitration are also featured in this book.

All those concerned, both the legal and non-legal community such as legal practitioners, arbitrators, mediators, academicians, and students, will find this book as a valuable aid for a good understanding of matters pertaining to ADR without having to refer to several other sources.

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INTERNATIONAL ARBITRAL INSTITUTIONS*

Introduction

This chapter generally discusses international arbitration and tribunals, the key term here is 'international arbitration'. What does it mean? How does it work in practice? Can it contribute to the creation of a peaceful world through settlement of disputes between states and non-state actors? These are some of the main issues that this chapter seeks to explore. The main international arbitration body which this chapter refers to is the Permanent Court of Arbitration ('PCA').

Over the past decades, the use of international arbitration has grown remarkably, mainly in Asia and Africa. The emergence of new arbitration centres is one of the salient features of this growth which has contributed tremendously to the development of institutional arbitration. Only 10% of the current institutions existed before 1940. In the last 30 years, 70% of the arbitration institutions have been established — 50% and 20% in the last 20 and 10 years respectively. Even though there is a slow growth rate at the moment — in 2008, 2009, 2010, at least two new institutions were created in each year.[1]

* This chapter is contributed by Syed Hamid Syed Jaafar Albar, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad.

1 SL Brekoulakis, JDM Lew, LA Mistelis *The Evolution and Future of International Arbitration* (2016).

International arbitration is one of the most important legal means of settling international disputes alongside judicial settlement. In addition to these, there are diplomatic means of settling international disputes but they fall outside the scope of this chapter. This chapter focuses on 'international arbitration courts and tribunals' which, like judicial settlement, is a legal means. Unlike judicial settlement, which is characterised by the fact that a dispute is settled by a standing tribunal (like the International Court of Justice ('ICJ')), arbitration is designed by the parties to the disputes. They can choose the arbitrators, the law governing arbitration proceedings (the procedural law) and the law applicable to the dispute (the applicable law). International arbitration can take place between two or more disputing parties. It can take place between two states (interstate arbitration); between states and non-state actors; individuals or private companies (sometimes termed 'mixed arbitration'); or between two non-state actors.

Irrespective of the status of the disputants, arbitration can be conducted on *ad hoc* basis, in which case the parties to the dispute are responsible for determining and agreeing on the arbitration procedure, not subjected to the procedures of an arbitral institution; or it can be conducted by institutional arbitration. In institutional arbitration, the parties rely on the procedural rules of a chosen arbitration tribunal, and are assisted during the procedure by that tribunal. There are many different arbitration courts and tribunals that can assist in the settlement of international disputes. The most prominent among them include the PCA in the Hague and the International Centre for the Settlement of Investment Disputes ('ICSID') in Washington, which settles investment disputes between the state and a foreign investor.

The subject matter of international disputes that can be settled through international arbitration include commercial law disputes between two private parties, investment disputes between states and foreign investors, or disputes between states in relation to the law of the sea, for instance, boundary determination. This chapter focuses mainly on arbitration involving at least one state; and disputes in the field of public international law rather than private international law.

Evolution Of International Arbitration And Tribunals

International arbitration has evolved over a long period of time. Before international courts and tribunals were established, disputes between states and state like entities were settled through international arbitration. Ancient Greece used arbitration to settle disputes between allied states and city states relating to their independence and sovereignty. In the middle ages, arbitration was also largely used and, in those arbitrations, the dispute was often settled by a single arbitrator, usually the emperor. Most often the single arbitrator was the Pope or a king or an emperor from another state. However, these arbitrations involved different entities than what we now call states. The way in which the dispute was settled did not resemble modern day practice.

Historically, the decision of the king or emperor was regularly based on principles of equity than law, was not reasoned and the arbitrators were not fully independent and impartial. With the Peace Treaty of Westphalia 1648 after the 30 years of war in Europe and the primacy of state sovereignty that came along, arbitration almost disappeared in interstate relations. Later, arbitration resurfaced towards the end of the 18th and 19th centuries. These arbitrations paved the way for the contemporary arbitration we now have.

This evolution is a result of the effectiveness of international arbitration compared to litigation in resolving disputes. Some of the reasons are:

(1) international arbitration can resolve disputes more swiftly than traditional court litigation since there are only limited appeals from arbitral awards;

(2) international arbitration can be less expensive than traditional court litigation;

(3) international arbitration can provide better-quality justice, since many domestic courts are overburdened, which does not always allow judges sufficient time to produce legal decisions of high quality;

(4) clients can play an active role in selecting arbitrators who are experts in a particular field, rather than generalist-like court judges;

(5) international arbitration is flexible, and the individual parties to a dispute play a significant role in selecting the procedure that is most appropriate for resolving their international dispute;

(6) international arbitration can be confidential, which is useful if the parties wish to continue their business relationship or to avoid negative publicity;

(7) international arbitration is neutral and this is very important for cross-border transactions, since it avoids the possibility of a 'home court' advantage for one party;

(8) in certain countries, judges do not rule independently and, on the other hand, in international arbitration, an award must be independently made, or it cannot be enforced;

(9) in certain cases, such as investor-state disputes, international arbitration offers the sole remedy for the violation of a legal right.

Jay Treaty Arbitration

The Jay Treaty (Treaty of Amity, Commerce and Navigation) is an important treaty that was signed between the United States and Britain in 1794. John Jay (1745-1829), the first Chief Justice of the US Supreme Court and former Secretary of Foreign Affairs negotiated on the American side and Lord William Grenvill, Foreign Secretary, on the British side.[2]

2 KS Ziegler 'Jay Treaty (1794)' Oxford Public International Law 2013 at http://opil.ouplaw.com.

Modern arbitration started with the adoption of this treaty. Its main aim was to settle outstanding issues following the American War of Independence. In order to achieve this, it established three types of commissions by way of dispute settlement mechanism. The first commission was established to settle the dispute between the two states mainly in relation to boundaries. The second and third commissions were established to hear two types of mixed disputes. First, claims for compensation due to British nationals for debts owed to them by the US nationals, which would be compensated by the US. Secondly, claims from US nationals against Britain for treatment of their property subsequent to the independence of the US.

The Jay Treaty paved the way not only for a modern form of arbitration to settle disputes between two states, but also for disputes between nationals of one state and another state. It also set precedents since the decisions of the commissions were based on law and contained reasons. At the same time, the commissions were composed exclusively of nationals of both parties.[3]

Alabama Claims Arbitration

The Alabama Claims arbitration is another notable example in this respect. The dispute related to damages suffered by the US government, due to attacks on union ships by Confederate Navy ships which had been built in British shipyards during the American Civil War. One of the ships was the CSS Alabama. In 1871, the US and Britain signed the Washington Treaty in which they decided to have this and some other claims settled through an international arbitral tribunal in Geneva. The arbitration ruled in favour of the US and it set an important precedent to successfully settle interstate claims through arbitration.

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3 E De Brabandere, Giulia Pinzauti 'A Historical Perspective on International Arbitration' Coursera 2018 at https://www.coursera.org.

Moreover, the tribunal for the first time was composed of a majority of arbitrators which were not nationals of one of the state's party to the dispute, a practice which persists to date. The independence of the tribunal thus was enhanced. In that sense, the Alabama Claims arbitration was one of the first arbitrations that very much resembled the current practice. The case was also important in establishing the rule that the parties to the dispute can freely determine the law applicable to the dispute, and that this can include non-binding rules or so-called soft law. This was the beginning of a series of several other inter-state arbitrations, and paved the way for the Hague Convention 1899 that created the PCA.

Concurrently with these developments, there were more than 120 so-called mixed claims commissions in the 19th and the start of the 20th centuries. Like the model of the Jay Treaty, these commissions heard several types of claims, inter-state claims and/or claims from nationals of one state against another state. They were very often created following an armed conflict between two states or internal disturbances in one state during which nationals of other states had suffered injuries. For example, several claims commissions were established between the US and Mexico in the late 19th century, and various commissions were established to settle claims with Germany after the Second World War in the 20th century. It is important to note, however, that the claims of individuals had to be brought by the state of their nationality. In other words, individuals often had no direct access to the commission or tribunal.

Since the creation of the Permanent Court of International Justice in 1921 and its successor, the ICJ in 1945, arbitration became less popular especially for settling inter-state disputes. However, by the end of the Cold War in 1991, arbitration has become increasingly popular again among states, as it is illustrated by the growing number of cases settled under the auspices of the PCA. Moreover, this is evidenced by the large interstate arbitration practice in subject matters such as diplomatic protection, environmental disputes, territorial disputes, or disputes under the Law of the Sea Convention. There were also increases of so-called mixed arbitrations.

Permanent Court Of Arbitration

The PCA is the main international arbitration institution located in the Hague in the famous Peace Palace which was built in 1913 to host the PCA. The PCA was established in 1899 during the First Hague Peace Conference — a conference which was convened by the Russian Tsar Nicholas II, with the predominant aim to strengthen the means to settle international disputes peacefully to avoid recourse to the use of force. The most important outcome of the Conference, *inter alia* was the signing of the Convention for the Pacific Settlement of International Disputes (known as the First Hague Convention). During the first Hague Peace Convention in 1899, the idea of establishing an international dispute settlement body was mooted which subsequently led to the establishment of the PCA based on the Convention for the Pacific Settlement of International Disputes 1899.

The PCA, though inaugurated as a permanent court, is neither a court nor a tribunal in the sense of an international court or tribunal like the ICJ. It is also not permanent, since the PCA has no permanent body of arbitrators who are elected and to whom one can submit a dispute. Instead, the PCA is an arbitration institution with a permanent secretariat, known as the International Bureau and headed by the Secretary-General, which assists the parties by establishing and administering disputes for each case through an *ad hoc* tribunal. The PCA also has an administrative council which is composed of the diplomatic representatives of the contracting parties. The administrative council is a sort of general assembly and it is responsible for shaping the policy of the PCA and overseeing the work of the International Bureau.

As an arbitration institution, the PCA administers arbitration and provides facilities for parties to arbitrate their specific disputes that fall under the purviews of both private and public international law. The dispute resolution services of the PCA include arbitration, conciliation and fact-finding in disputes involving different categories of parties. Unlike the ICJ, the PCA handles disputes involving various combinations of parties ranging from states, private parties, state entities, and intergovernmental organisations.[4]

4 SI Strong 'Class and Collective Relief in the Cross-Border Context: A Possible Role for the Permanent Court of Arbitration' Hague YB Int'l L. 23 2010 p. 113.

Although the PCA has its headquarters in the Hague, dispute resolution proceedings conducted under its auspices may take place at any other location agreed upon by the parties to a case and/or the adjudicators. Parties can decide to submit a dispute to arbitration under the PCA. After submitting the dispute, they will have to constitute the arbitral tribunal which will hear their case and render the award. Arbitrators can be appointed from the list of arbitrators which the PCA maintains, but could also be chosen outside that list. The Pacific Settlement of International Disputes 1907 ('PSID 1907') provides that: 'Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator'.[5] Despite the fact that the Convention required that arbitrators be chosen from this list of 'members',[6] it became clear, in the early history of the PCA, that parties preferred to have the autonomy to appoint arbitrators from outside that list. This proves to be easily accomplished by having recourse to art. 47 of the PSID 1907 which authorises the International Bureau, 'to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.' As there is no definition of the expression 'special Board of Arbitration', this article has been invoked to authorise PCA involvement in arbitration involving non-state parties (including the adoption of various sets of procedural rules therefor) and to enable parties to select whomever they wish as arbitrators, by characterising the proceedings as a 'special Board of Arbitration' pursuant to art. 47 of the PSID 1907.

The PCA has its own set of procedural rules. These rules, however, are optional. It also administers arbitration which function, for example, under their own central arbitration rules. Nowadays, the PCA is mostly used for the arbitration of interstate disputes and disputes between foreign investors and states. It also administers to a lesser extent, disputes between private parties and occasionally, conciliation proceedings between states. For interstate disputes, the PCA has

5 The Pacific Settlement of International Disputes 1907, art. 44.

6 *Ibid* art. 45.

administered disputes in a vast range of fields of international law. The Secretary General of the PCA often acts as appointing authority in international arbitrations or as authority to decide challenges to arbitrators for alleged lack of independence and/or impartiality.

As part of its arbitration services, the PCA conducts international commercial arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976 (revised in 2010) ('UNCITRAL Rules 1976'). Article 6(1) of the UNCITRAL Rules 1976 provides, in the absence of an agreement among the parties in international commercial arbitration on the appointing authority, either of the parties may propose the name of any person or institution including the Secretary General of the PCA as an appointing authority. This gives a significant recognition of the PCA as an international dispute settlement body. Administrative support is also provided for arbitration conducted under the UNCITRAL Rules 1976 at the PCA. This places the PCA on a unique global position in the history of dispute settlement in the modern world. This is why it is being described as the precursor of the modern-day processes of international dispute settlement. Although the PCA was initially established to handle disputes between states since the 1930s, it was authorised to also handle international disputes involving states and private parties through arbitration and conciliation. The kind of cases the PCA handles ranges from commercial disputes, investment disputes, environmental disputes, disputes relating to outer space, etc.

In the past 20 years, the PCA has revitalised itself with the modernisation of its system of dispute settlement among states and other disputants. Arbitration is one of the key areas it has revitalised and the UNCITRAL Rules 1976 has represented the global standard that provides 'fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements although they were originally designed for commercial arbitration'.[7] One thing that supports the argument that

7 See Permanent Court of Arbitration, UNCITRAL Arbitration Rules at https://pca-cpa.org/en/home/ (accessed 2 March 2019).

PCA is more of a facilitative institution for arbitration, conciliation and other processes of dispute resolution, is the fact that there are no judges in the court. This is why some have considered the name 'Permanent Court for Arbitration' as a misnomer.[8] It only has an International Bureau headed by a Secretary General to assist the parties and facilitate the process of dispute resolution. The International Bureau maintains a list or roster of potential arbitrators and provides all necessary administrative needs to facilitate arbitral proceedings. Without any doubt, it is clear that these are the usual basic requirements for an international arbitration centre to function as a true dispute resolution body.

In order to reinforce its jurisdiction, the PCA has Rules of Procedure for almost all types of disputes that come before it. These rules are meant to facilitate proceedings that would lead to amicable settlements of disputes referred to it. The following points give an outline of the Rules of Procedure for arbitration and conciliation of disputes before the PCA.

(1) Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

(2) Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which Only One Is a State.

(3) Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States.

(4) Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties.

(5) Permanent Court of Arbitration Optional Conciliation Rules.

(6) Permanent Court of Arbitration Optional Rules for Fact-finding Commissions of Inquiry.

8 J Golden 'National Groups and the Nomination of Judges of the International Court of Justice: A Preliminary Report' The International Lawyer Vol. 9(2) April 1975 pp. 333-349.

(7) Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment.

(8) Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment.

(9) Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising under Multilateral Agreements and Multiparty Contracts.[9]

The UNCITRAL Rules 1976 also form part of the list if a dispute relates to international commercial arbitration referred to PCA. These rules place the PCA at the apogee of international dispute settlement bodies through arbitration and conciliation.

Usage Of International Arbitration

International arbitration is also called a hybrid form of international dispute resolution, since elements of civil law procedure and common law procedure are blended together, which allows the parties to design the arbitral procedure under which their dispute will be resolved. Any dispute that is considered to be 'arbitrable' can use international arbitration to resolve it. Companies in their commercial contracts with other businesses often include international arbitration agreements, which in an event of dispute, are obliged to arbitrate instead of pursuing traditional court litigation.

Similarly, via what is known as a 'submission agreement' (an arbitration agreement that is signed between them after a dispute has already arisen), the parties are enabled to resolve a dispute by arbitration. Typical arbitration agreements are very concise. For instance, the

9 See Permanent Court of Arbitration, PCA Arbitration Rules at https://pca-cpa.org/en/home/ (accessed 2 March 2019).

International Chamber of Commerce ('ICC') model arbitration clause, merely reads: 'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules'. Rules are frequently added by the parties in respect of the law governing the contract, the place of arbitration, the number of arbitrators, and the language of arbitration.

Arbitral awards can be enforced through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also known as 'New York Convention') in all member states. It has 159 State Parties and thus arbitral awards can be enforced in approximately 75% of the countries around the world.[10]

Investment Arbitration

Investment arbitration, a relatively recent phenomenon, concerns the institution of arbitration proceedings by foreign investors against states on account of bilateral or multilateral investment treaties, or domestic laws providing consent to arbitration by the state. It is the best way to respond to the expropriation of private investments by a state. For quite some time, the investment arbitrations have also existed from older cases. It is commonly used in the general field of international dispute settlement only when the bilateral investment treaties ('BITs') were concluded starting in 1959 and the ICSID Convention was initiated by the World Bank in 1965. Since then, the scenario has changed completely. In thousands of treaties and investment contracts, investment arbitration is chosen as the dispute settlement mechanism

10 Shearman & Sterling, Columbia Law School '1958 New York Convention Guide' at http://newyorkconvention1958.org/ (accessed 2 March 2019).

leading in practice to hundreds of cases per year between states and foreign enterprises. When it comes to applicable laws and legal framework, for investment arbitration, the fundamental framework is provided by treaties of public international law, mainly bilateral instruments of more than 2,000 BITs, and multilateral instruments as the ICSID Convention, the Energy Charter Treaty, and regional instruments such as NAFTA[11] and CAFTA.[12] European laws provided through the Lisbon Treaty, have initiated a wide range of issues and discussions for investment arbitration concerning its conflicts with existing BITs and the future competence to conclude new BITs by EU Member States. National law also plays a role in the legal framework of investment arbitration.[13]

International Arbitration Rules

Rules are provided by most international arbitration institutions governing the resolution of disputes to be resolved via arbitration. The best-known rules of arbitration include those of the ICC; the London Court of International Arbitration (LCIA); the International Center for Dispute Resolution of the American Arbitration Association (ICDR); the Singapore International Arbitration Centre (SIAC); and the Hong Kong International Arbitration Centre (HKIAC). Investment arbitrations are often resolved under the rules of the World Bank's ICSID or the UNCITRAL Rules 1976. Most of the arbitrations involving Russian businesses take place under the rules of the Stockholm Chamber of Commerce (SCC).

11 North American Free Trade Agreement.

12 Central American Free Trade Agreement.

13 Karl-Heinz Böckstiegel 'Commercial and Investment Arbitration: How Different Are They Today?' The Lalive Lecture 2012 Arbitration International 28(4) 2012 pp. 577-590.

Conclusion

In the past decades, international arbitration courts and tribunals have contributed tremendously to the dispute resolution mechanism through its effective, speedy and flexible methods. Businesses prefer to resolve their disputes as fast as possible which cannot be achieved through traditional litigation. Sometimes it might take years for a dispute to be resolved through this channel. This can be an option but definitely not the first. What is fascinating about international arbitration is that it involves both disputing parties and strives to reach a win-win decision unlike traditional courts which emphasise on who is wrong and who is right. International arbitration can be confidential, which is useful if the parties wish to continue their business relationship or avoid negative publicity. This element of confidentiality is very important for the businesses because they want as far as possible to retain the good name in the market.