Arbitration as an Alternative to Litigation

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Introduction

Business relations have pushed forward to cross national boundaries to involve different governments and more people and corporations. Growth in business transactions increases rapidly because of developments in technology, international treaties which promote the business across national boundaries, and more alternatives for dispute resolution in business-based conflicts apart from the traditional litigation process. Parties in a business transaction use arbitration, litigation and other dispute settling alternatives to settle arising conflicts. However, the choice of the method of dispute resolution depends on the preference of contracting parties. Litigation has many advantages and demerits. Using litigation to settle disputes entail huge expenses; there is a lack of privacy and fairness in the process, and it is also time consuming. To avoid such effects, parties in dispute choose arbitration because it is less expensive, faster, confidential, flexible and cheap (Bhatia, Candlin & Gotti, 2012). Whether arbitration is effective compared to litigation in dispute settlement is the issue that will be addressed by this paper. This paper will discuss whether the statement that "arbitration is considered to be the preferable alternative to litigation because it is faster, more private, less expensive, fairer and successful in a majority of cases" is valid. In addition, it assesses arbitration for 21st century disputes.

Arbitration versus Litigation

Many factors determine the effectiveness of the arbitration process to conclude whether it is cheaper than litigation. These include the cost of initiating arbitration and the form of hearing requested by the parties; the weight of the dispute; and the rules that govern that arbitration. These also include the status of the parties involved; the number of arbitrators; the terms of agreement; and the costs of having an additional arbitrator. All this will determine the over-all

costs of arbitration. In addition to these factors, the cost of the arbitration forum that is not in litigation also affects the cost of the arbitration process (Bhatia, Candlin & Gotti, 2012).

Arbitration as a process of dispute settlement is quick and available; it is also flexible and fast (Stipanowich, 2010). This is because the decision about the length of time for the process and the place of settlement depend on the disputing parties. Therefore, this means that all other factors adjust to the period suggested by the parties.

There are also many arbitrators compared to judges who speed up the process of arbitration. In contrast, because of the few numbers of the judges, the litigation process takes a lot of time to reach at the resolution. The speed and flexibility of the arbitration process reduces the unnecessary delays and consequent deterioration of the relationship between the parties. Furthermore, the informal nature of the arbitration makes it more flexible. As a result, the disputing parties can adjust the program to suit their needs and circumstances. This means that, arbitration has little potential to interfere with normal schedules of the parties compared to litigation. In litigation, the jurists schedule the time of the case hearings regardless of the schedules of the parties involved. This means that litigation interferes with their personal and other activities. In arbitration, an arbitrator provides a quick and cheap way to help the disputing parties settle the conflict.

In the meantime, compared to the traditional litigation procedure, the process of arbitration is cheap. In this case, arbitration results in a final award that is executed. This award is enforceable without the challenge of being appealed or having to be subjected to a judicial review. In other words, it means that the parties arrive at a solution within a short time, without incurring additional costs apart from those of arbitration procedures. Furthermore, arbitration does not require the intervention of any other professional apart from that of the arbitrator

involved in the process. Arbitration is also effective and efficient. Disputing parties meet the awards issued through arbitration without the judicial execution (Stipanowich, 2010).

Confidentiality is a characteristic of arbitration (Stipanowich, 2010). This is the reason why many people prefer arbitration as a dispute settlement mechanism. In addition, issues to be solved are kept private from the public. This characteristic of arbitration gives it more advantages over litigation, especially in confidential issues such as family issues, intellectual property, industrial property and competition law. Confidentiality, as a duty, binds all parties, arbitral institution and the arbitrator. This is in contrast to the considerations that surround the litigation process because courts are government institutions which handle issues in the interest of the public. Therefore, issues that require confidentiality may be taken to the public.

Furthermore, arbitration is also a popular means to settle legal disputes because of its ability to solve complex conflicts through technical solutions. Parties choose arbitrators based on their technical ability to solve complex issues. Therefore, in most cases, they will select the arbitrator in relation to his or her competence and achievements. The ability of arbitration to solve technical issues relates to the arbitrator's adequate awareness of the background of the disputing parties and the terms of the contract. This leads to the high quality of the award because the resolution depends on the adequate experience and knowledge of the arbitrator in the field of dispute. The arbitrator is able to more comprehensively understand the conflict and lay down a more fair and just solution.

On the other hand, arbitration has limitations in certain circumstances. First, there are no chances for an appeal or recourse. In case the arbitrator issues a false award based on the facts or laws, there are no rights to appeal. However, this rule does not apply in all situations. Nonetheless, the exact limitations are not easy to define apart from the general terms which

depend on the facts. The arbitrator may issue an illogical and false award, but the parties will be bound by the decision because they cannot present the issue in court (Ware, 2013).

Second, the parties have no right of discovery of the arbitrator's permit. However, the parties' or arbitrators' agreement may allow them this. Nevertheless, this limits the parties involved in the direction offered by the arbitrator. In addition, though Ware (2013) argues that arbitration is fast, this is not always true. In some cases, arbitration may take a long time, especially when parties are firm and refuse to compromise their positions. In addition, when there are many arbitrators in the case, this may also take a long time because of the complexity of the process to reach the decision. Furthermore, an unknown incompetence and the biases of the arbitrator may undermine the quality of the award, especially when the arbitration fails to set the qualifications. The pre-qualified arbitrators from the arbitral institutions may suppress the quality of the award. The lack of juries further undermines the quality of the award from the claimant's point of view. This happens when the arbitrator makes the award based on the broad principles of equity and justice, and not on the evidence and rule of law.

Finally, arbitration is not always cheap as claimed. In certain situations, arbitration proves to be expensive. The rates charged by an arbitrator who handles the dispute is a major factor that determines the cost of arbitration. Compared to the judges in litigation, who are not chosen by disputing parties and paid by the governments rather than the parties, in arbitration, the parties select arbitrators to make a judgment and issue an award. Parties in the dispute pay the arbitrators who must be impartial in all situations. The amount of work and its price, the profile and the number of the arbitrators and the duration of the arbitration process determines the total fees of the arbitrators. In most cases, parties pay on an hourly basis to determine the arbitrator's fee rather than the amount of work done. The legal framework applied to the process

also affects the cost of arbitration. In addition, the arbitrator's fee varies based on the arbitrator. However, most arbitrators use hourly rate to charge the parties (Bhatia, Candlin & Gotti, 2013).

Few legal analysts dispute the fact that arbitration is an appropriate alternative to litigation regardless of the argument that it is not the best way out to avoid expensive court trials (Bhatia, Candlin & Gotti, 2013). Ad hoc arrangements and arbitral institutions have settled many cases. Despite the ineffectiveness of arbitration, many analysts still consider litigation to be more expensive than the former. Litigation is expensive, especially when it concerns conflicts that involve international commercial transactions that require court trials. Despite these traditional high costs of litigation, other corporations prefer litigation. In the current century, gas and oil companies prefer using litigation to settle their disputes. Cross-border litigation is known well as the method of resolving disputes that involve international transaction. In most cases, this is an option chosen by the parties during the commencement of international transactions.

High cost is a general characteristic related to litigation as an alternative to dispute settlement. In addition, there are other costs such as those incurred during the settlement of international disputes. Cross-border litigation in many jurisdictions is more expensive than international arbitration. Fees that comprise of the total cost of litigation include fact finding and evidence collection fees, attorney's fees, defense expenses and court fees. In addition, litigation takes a lot of time which increases the cost of dispute resolution. For instance, processing served and mandatory documents, responses and disposition take a lot of the time which increases the legal fees. Compared to arbitration where arbitrators receive their payment from the parties, in litigation, judges obtain their payments from the government. However, the parties may pay the counsel fee, which varies based on the counsel. The high cost incurred in litigation relates to the long duration that the process takes. In most cases, litigation takes several years before arriving

at a solution. This relates to the slow nature of the litigators in dispensing the case. In addition, several adjournments also contribute to the long duration of the process which increases the legal fee and extra costs.

Arbitration for 21st Century Disputes

Arbitration is becoming increasingly complex, costly and lengthy, especially at the international level. Stipanowich (2009) notes that arbitration is becoming 'Americanized' and blames its complexity on the law firms that run cases within their jurisdiction like litigation. However, Bhatia, Candlin and Gotti (2012) argue that there are other factors which contribute to the complexity of the arbitration in the 21st century apart from the impact of American law firms. Arbitration in the international system grows relative to the growth in the international economy. These changes cause the development of new arbitral institutions such as the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) to handle complex cases.

In addition, the growth in the global economy has caused the emergence of complex and large cases. The amounts involved and the number of parties in the disputes has increased. International projects have many parties with different roles, such that in case of disputes, these parties present competing interests. Multiple contracts are also evolving. Furthermore, disputing parties come from different political and legal cultures and often there is no general understanding of how the cases should proceed. Finally, based on the trends of globalization, arbitration spreads into issues that were previously considered as cases which cannot be arbitrated because they are of interest in the public policy (Stipanowich, 2009).

Currently, claims that involve consumer and employee disputes and security laws are the subject of arbitration. Therefore, arbitration of such issues is subject to scrutiny by the public and

courts to ensure fairness in the procedure and to protect the concerns of public policy. This increased scrutiny has an impact on commercial arbitration. These issues make arbitration in the 21st century more complex. Therefore, the international community has to develop an integrated mechanism of arbitration to uncover and present the facts in a fair and effective manner, equally understandable and approachable by all parties from different legal systems. This is possible based on technological progress that creates a lot of pressure to complete the arbitration process quickly. However, faster products require more finances to enable speedier resolutions. Instant communication facilitated by current technology creates perceptions that traditional mechanisms of dispute resolution are slow and outdated. Therefore, because of the flexibility of the arbitration, many people choose it over litigation (Stipanowich, 2009).

Conclusion

As the international system embraces the forces of globalization, legal disputes become more and more complex. Just like human relations are developing, so do the disputes that erupt between parties from different nations. Therefore, people seek more efficient methods to settle the disputes. A controversial argument lies between the efficiency of litigation and arbitration. The debate about these mechanisms of dispute resolution relates to the cost, flexibility, time, privacy and availability. While some observers argue that litigation is efficient, many others prefer arbitration because it is cheaper, more flexible, more available and less time consuming than litigation. Furthermore, the trends of the 21st century require a dispute resolution mechanism that adapts to the changing nature of the international system. Therefore, arbitration is the preferable alternative to litigation.

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