World Bulletin of Management and Law (WBML)
Available Online at: https://www.scholarexpress.net
Volume-27, October -2023
ISSN: 2749-3601

ALTERNATIVE DISPUTE RESOLUTION (ADR) METHODS IN INTERNATIONAL BUSINESS

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To watch the podcast, please visit:
https://youtu.be/LsuVpVeeCwQ

Article history:

Received: August 14th 2023
Accepted: September 14th 2023
Published: October 17th 2023

Abstract:

For the inaugural episode of a podcast featuring discussions with international legal scholars, I had the privilege of hosting my esteemed instructor, Dr. Nasiruddeen Muhammad, hailing from the University of Dubai, UAE. During my time as a student at the University of Dubai, Dr. Nasiruddeen delivered lectures on subjects such as ADR, International Commercial Arbitration, International Negotiations, and the Economic Procedural Law of the UAE, all of which he skillfully linked to global legal practices. Back then, I was truly impressed by the depth of his legal knowledge, the expansiveness of his intellectual horizons, his unwavering attentiveness, and his warm kindness.

Fast forward to 2018, when I returned to Uzbekistan, and our mentor-student relationship with Dr. Nasiruddeen endured. Recently, he graced Tashkent with his presence during the Uzbek-Arbitration Week 2023, held at Tashkent State University of Law, where he actively participated. During his visit, he also spent several days as an honored guest in our country.

Keywords: commercial arbitration, international disputes, enforcement and recognition of awards, national courts, arbitral tribunal, jurisdiction issues, statutory requirements for appointment as an arbitrator, negotiations, advantages and disadvantages of international commercial negotiations, business negotiations.

Today, business relations are developing, they are even moving into interstate commercial relationships, and it is normal that conflicts naturally arise between business partners. Given that you are an expert in this field, I have a few questions. With your permission, allow me to get your answers to them.

Why today participants in international commercial relations must resolve a dispute in ADR? What are the advantages of referring disputes to arbitration for modern business entities? Why do you think international arbitration institutions should be used?

And really when we talk about businesses, we know that there are various reasons why businesses would want to resolve their disputes through arbitration, but at the heart of it, we probably need to look at the, what are the aspirations of businesses as a whole.

The starting point is to say, predictability is at the heart of every business. We know businesses do engage in commercial activities. The business is actually very much concerned about predictability. Now, predictability is at the heart of businesses. For instance, businesses would want to know which law should govern their dispute. And that's the whole essence of reducing agreements into writing because parties need to know in advance what are their rights and duties.

Including the law that would govern the contract. So in the event of a dispute, businesses would also want to know which law should govern that particular dispute. Why should they go to with the view to resolve the dispute and if possible, who should preside over the resolution of the dispute? When you put all this together, you can clearly see that only a bit of pressure can provide this to business.

Number one is predictability because businesses would want to know things in advance. For instance, who should preside over the case, which should govern the dispute, including the jurisdiction where they want to go to, for instance, should they resolve the dispute in the test can, should they go to buy, should they come to.

So all these are very important to businesses. And for long, you may recall the famous English

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practitioner, F.A. Mann had written extensively about this in terms of the importance of legal certainty, and the importance of predictability in commercial relationships. And that is actually number one, and which I believe is still the most important. But of course, apart from that, there are other reasons.

I mean, one of the advantages, as we know, is flexibility. Arbitration can be quite flexible compared to litigation in many dimensions. Right from the times of non-application of traditional evidentiary rules to the ability of the system to insulate the process or the proceedings from the application of domestic procedural laws at times, which could actually delay the process of arbitration.

So, in terms of flexibility, parties can structure their iteration in such a way that they can finish everything, either in a day, or in two days, or in essence, we can say in, in a matter of days, not months or not years. This is something that litigation actually generally does not offer.

There are other reasons associated with cost. We know this reason is quite relative because the argument that arbitration is not costly is quite questionable. But to a certain degree, it can also be advanced.

When you have a very small claim or a very small dispute, it really makes a lot of sense to have an arbitration, which would obviously turn out to be cheaper to the parties. But when you have a very complex dispute, you'll all agree with me that here, the argument can be quite relative, because it would require a lawyer's payment for a bit of creator payment for facilities.

This would, in a way, make arbitration a little more expensive, but still, in terms of the result, businesses are more willing to pay in order to get the desired result than to engage in a process that they cannot freely predict.

So this is very important in terms of why businesses actually do make this kind of choice. I have to also mention that apart from arbitration, there are other means of resolving disputes. But the nature of the dispute is actually what determines why businesses are opting for arbitration. Usually, disputes that normally go to arbitration at disputes, that businesses may not want to resolve it simply through negotiation. This is not to say that negotiation is not good. We know negotiation is excellent.

But at times, businesses would want to have that decisive determination, and they would want the ability to enforce it in the same way they can enforce a valid judgment of a competent court.

So it is actually for that reason, that either in-house counsel or businesses would make a rational decision to resolve the dispute through arbitration, not through negotiation, not through negotiation, and not through litigation.

So, since the pre-trial settlement is convenient for international commercial relations, the process is simpler, but how to solve the issue of judgment enforcement? Are there any problems in practice regarding the execution of international arbitration awards? Do all countries implicitly recognize and enforce international arbitration decisions?

This is very important in terms of understanding what arbitration is. And maybe we can take a step backward. Just to look at how we enforce judgment. Do we have problems when it comes to enforcing judgment? We know that in the context of litigation, parties do end up with a judgment, which can be easily enforced. So a domestic judgment can be easily enforced domestically without any.

It can be problematic when it is an international enforcement or international execution, where you need to think of whether there are, there is a particular agreement between the countries or their parties to a treaty and what have you. Now, when it comes to arbitration, it's almost the same.

The only nuance here is to say, okay, we probably need to look at the theory before we look at the practicalities. We know it has been, I would say not even an academic question, a theoretical question with practical implications for long as to whether an iteration is anchored in any legal system, the domestic or international.

The whole essence of this question is because of the ramifications associated with enforcement of the outcome. Because if we have an arbitration for instance in in touch and we want to enforce the judgment.

There is this argument or this feeling that maybe the courts in Uzbekistan may feel that they own this award because they have some sort of supervisory wrong over the award. And therefore, they're in control of the fit of that particular award. Now, if you have an international arbitration, you would also struggle with the same question.

And the whole problem associated with this type of question is because we are concerned about the enforcement of that particular. Would national courts be the determinants of its enforcement, or a bit ration should have a self-automated system whereby awards can enforce themselves in a way, but through the mechanism of domestic courts?

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And I know that if we look at the New York Convention, the whole essence of that conversation, which was established in his ago, we're taking a I think it was New York 1958 right? And if we look at the way to structure that all parties to the new convention have agreed. That they will enforce a bit for awards. From wherever that award is coming from. Inasmuch as it's coming from the parties to the convention.

So, to answer that question, we'll say that the New York Convention did an excellent job. In terms of ensuring that parties do not encounter. Problem theoretically, when it comes to. Execution of international and virtual awards. And if we look at the membership. Countries at the New York Convention will see that it has virtually covered. More than obviously a third of members of the United Nations.

So, in general, one can simply say that there is really. No problem associated with the enforcement of a bit for a lot of on the face of it. Now, another. An important instrument regarding the enforcement of a bit for awards is also the ICSID convention.

Now, we know that under the auspices of the World Bank. There is a center for the settlement of international investment disputes. Which is called ICSID. Convention for settlement of investment disputes as well, which is also an exit combination. Went even a step further. Beyond New York Convention to say that all members of exit. Would recognize a patrol award.

In the same way, they would recognize the judgments of their domestic courts. So, this means that there is a self-automated system through exit whereby a patrol awards. Should be enforced. I would say slightly different from the method adopted by the New York Convention because of the New York Convention.

The states still have a role in terms of how parties take the award from one country. You submitted to the jurisdiction of another country. And for the court of the enforcement country to recognize and enforce it. But under the exit.

Is automated enforcement automated execution. Because the language of exit says that awards be shown to the convention. Should be enforced by all member states as if the award.

Is actually the judgment of their respective domestic courts. Now, theoretically, these two international conventions. It has actually helped a lot in terms of.

Streamlining enforcement of patrol awards. And also reducing any problem that could be probably associated with enforcement. Now, what about in practice?

No matter how beautiful the language of these conventions is. We know that in practice we do encounter problems. To the extent that within the international administration community. We can classify legal systems. And we can classify countries. We can say this country is friendly.

To enforcement of the patrol award. And this country is not friendly. So now this is where the practice is actually. Probably contradicting the theory. And this is something which is also inevitable.

And I think that in the first place. And I think that in the first place, we have a lot of rules for interpretation. When it comes to certain things. Now, if we look at the language of the new convention, which says that all member states. Must enforce. Much as the language is very clear when it comes to resisting enforcement. Parties do rely.

Parties who do not want the awards to be enforced. They can capitalize on those exceptions. For instance, if we look at public policy exceptions. It's one of the grounds. Whereby parties resist in enforcement of an award. Would always try to. To capitalize on.

Rightly or ugly. And if you have a legal system. That is not supportive. Arbitration as a mechanism for resolving disputes. You'll see that the courts are likely. To give some sort of unhelpful interpretation.

Which may try and get the process of enforcement. So, so there are problems when it comes to execution. But this will depend from one jurisdiction to another. I do remember, for instance, in the UAE here, sometimes back before the. New arbitration law, which was issued in 2018. Which has just been amended this year, by the way. Been associated with businesses when it comes to enforcing. The award is that parties who want to resist it. Would always try to rely on public policy exceptions.

And, and you'll discover that the courts have a very. The broad approach to public policy exception. And over the years. Awards were set aside. On the ground that. It conflicts with public policy exceptions under the new convention. But since the new arbitration law in 2018, things have begun to change.

And, I think the position is the same with most legal systems that have adopted social model law. Because under our social model law, even though we do have the same exceptions.

But there are mechanisms, within the law. That would support pro-enforcement interpretation. Rather than interpretations that would truncate enforcement. So to summarize my response to this question.

I would say yes, there are adequate provisions, under both the new convention and exit convention.

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That has actually provided for minus in which. Virtual awards can be enforced and executed smoothly.

In practice, some cases were quite successful. But there are cases where parties have actually relied on the exceptions provided under these laws in order to challenge the enforcement of the virtual award. And the best way to handle this is always to ensure that the legal system.

Some of the responses said yes, we have a very beautiful language in the law, both under the newer convention and the exit convention that actually provides for smooth enforcement. But in practice, parties who want to resist enforcement, have seen quite often they do rely on the exceptional grounds under the conventions in order to challenge enforcement of the awards.

The way to reconcile theory and practice is always to ensure that there is a judicial system that is friendly to arbitration and that is willing to adopt pro-enforcement interpretation when it comes to dealing with applications for enforcement or applications for challenging or resisting enforcement of an arbitral award.

The enforcement is governed by an international instrument. When international commercial relationships arise, it is very important to determine authority, the next issue is the need to determine jurisdiction. What can be included in the jurisdiction of international commercial arbitration? How important is the clear borders of jurisdiction when handling disputes? When it comes to the jurisdiction of the arbitral tribunals, we know that the jurisdiction is by consent of the parties.

So consent is at the heart of the jurisdiction. Unlike courts parties submit to the jurisdiction of the courts because the courts have inherent jurisdiction either as stipulated in the procedural laws or what have you. In the case of commercial arbitration, the tribunals do not have any jurisdiction except the one conferred upon them by the parties. So consent is very important.

Now the second thing is how far can we go in confirming the jurisdiction. So it is very important for parties to design or to ensure that their submission to the jurisdiction of the commercial arbitral tribunal is brought enough to cover all the issues associated with their disputes.

And it is generally in the form of the organization of the tribunals. So there is a need to have a very clear on a cubicle. So here we are talking about what the parties need. Once parties have written this in the arbitration document, this is what the tribunal will work with. Now in certain jurisdictions, they do work with what we call the terms of reference.

Not just some jurisdictions, but even some arbitral institutions, rely on terms of reference, a typical example is ICC arbitration.

So, when parties come to work on the terms of reference, it is also important to what they would want to submit to the jurisdiction of the court to the jurisdiction of the tribunal. This is very important in order to exclude certain things that should not, that the parties would reform. any power of the jurisdiction. Most often parties would assume that arbitrage tribunals, because they are not like courts, do not have inherent jurisdiction. On the contrary, no. We know they do. Particularly when it comes to institutional arbitration. Of course, this would not extend to substantive issues, but with several aspects, all that the tribunal would want in order to administer the administration would naturally fall under the inherent powers of the tribunals. So to sum up my response regarding this is to say that it is always important when it comes to conferring jurisdiction on tribunals to ensure that first of all, the dispute is captured, meaning that we should make it an all-encompassing dispute.

The second is we should also look at the constitution of the tribunal. Do we want to have one arbitrator or one person arbitrator, sorry, or do we want to have a three-panel arbitrator, this is important. Parties need to think about the law which law should govern, because this also goes to the jurisdiction, right? Parties need to include that the tribunal should resolve the dispute. In accordance with respect law or in accordance with EU law or in a court law, depending on what the parties would want. Number four, parties should also, as much as possible, and this is very important to designate the place where they consider to be the seat of the arbitration. Now this is very important because the nation of the seat would determine which court will have jurisdiction when it comes to a time set.

Here we are not looking at where, for instance, the assets are located. We are looking at the nationality of the award itself. Where is the award issued? This is very important.

And parties would also need to include, obviously, language is very important as well because we know in international arbitration, parties come from different orientations or different countries, speaking different languages. The lawyers come from different parts of the world and arbitrators are the same. It's very important to agree on the language so

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that it will go into the jurisdiction of the tribunal. And of course, I have seen of recent some quite peculiar submission agreements whereby parties can go into details even beyond the traditional typical choices. This is naturally where parties do know precisely the kind of dispute they want to submit and the one they do not want to submit to arbitration. For instance, if you have a very complex transaction, parties may feel maybe dispute regarding IP ownership. We can resolve it through negotiation. So parties can exclude that. You can have a very detailed arbitration clause mentioning aspects of the disputes that parties would want to be resolved through arbitration and clearly excluding certain types of disputes because they know they have a better forum to resolve those disputes.

Now, this or the totality of this is what would go into the jurisdiction of the tribunal.

One thing is very important. The tribunals cannot manufacture jurisdiction. Now, they
have to rely on what the parties confer or condemn. The more details the parties have, the better the resolution of the dispute. Now, in terms of the how important or in terms of the importance of the borders of jurisdiction when handling disputes. Now, this is also very important because it goes back to the issue of consent because the tribunals cannot arbitrate over what parties have not consented to. Now, that's very important.

For that reason, it is quite important for parties to take into account the borders. Now, here the border depends and you can clarify more here. It depends on what we are looking at when it comes to the borders. There could be borders in terms of the substantive matter of dispute. Parties need to make that delineation and there could be matters that are not even a bit trouble. We know in many domestic legal systems, there are prohibitions or there are laws that would provide for the exclusion of a bit fruition of certain types of disputes. Now, these are quite important. For instance, and this depends from one country to another. In many jurisdictions, we know we normally say criminal matters are not a bit wrong. And in the case of the United Arab Emirates, for instance, disputes are arising out of agency relationships. The law is not the subject matter of arbitration. So it depends from one jurisdiction to another.

Determining jurisdiction will certainly prevent the judgment from being reversed on appeal. Jurisdiction is very important. All we know is that not everyone can work in international commercial arbitration, in my opinion, an appointment to international arbitration is a big position, with a lot of responsibility and requires a lot of experience. With this in mind, I would like to ask, do international arbitrators have the same arbitral immunity as national judges? Who can arbitrate in international arbitration institutions? Are there written statutory requirements for appointment as an arbitrator?

Questions regarding the immunity of arbitrators are very important. But maybe to start with the second part before we come to the immunity, for instance, who can be an arbitrator? Or who can arbitrate international arbitrations? Whether they written strategic requirements for their appointment? Now, this is a very important question. And the starting point is to say, well, there is no statutory requirement, right? So hardly would you find this, except we know there are qualities of an arbitrator. Now that's very important. So, but in terms of where we let's say comparing this with the national judge, where we know there are qualifications of a national judge, should be X, Y, Z. Now, when it comes to arbitrators, we do not have that as such, unless if a particular legal system have included that in the national legal system. In some we do, some would say, that an arbitrator must have the qualities of a judge. Now, if you have that, that is really good. But in terms of saying whether there is some sort of universally accepted, the reason is simple, because arbitration is a matter of consent, we want parties to choose who they want.

Now, all like a national judge, whereby parties do not have any right to choose, right? It's the state that appoints. In the case of arbitration, parties would want to choose who they are comfortable with. So the more we stretch on some sort of statutory requirement, the more we are taking out or the more will be the private parties of that freedom to choose. So, that is one balance that needs to be drawn between the desire to uplift the standard of conducting arbitration and the ability of parties to choose who they want. That is that is very important. There is no universally accepted statutory requirement as such, but we know national legal systems are free to come up with the criteria. Now, in terms of whom, what is expected in terms of the arbitrator is for one arbitrator not to suffer from any of the grounds that would make that arbitrator disqualified, right? So impartialities are at the heart of it, right? Because of what we're looking at, no matter what, even though parties have the freedom to choose whom they want, even though the parties are the ones to choose and appoint the arbitrator, one fundamental requirement is that the arbitrator must remain impartial, right? So it is not a justification that the fact that parties have appointed me, then I should be by asked. That is at the heart of the requirement. So an arbitrator must

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not be asked and must not be partial. This is well-stated in the IBA guidelines. This is well-stated in the ancestral model law and you will find this in all national legislations, right? Then there are desirable requirements as we know, which is knowledge, right? Competency, qualification. Now, these are very important and you will discover that that's how businesses are appointing their arbitrators. Knowledge is very important and here we can look at knowledge of arbitration and knowledge of subject matter. A knowledgeable arbitrator is likely to do the work well and to do a job well than, somebody who is simply not knowledgeable. That's the starting point and the same thing goes with the subject matter.

Imagine you have an intellectual property dispute or you have a construction dispute or have energy-related dispute. Now, if you have somebody who is knowledgeable in this particular field, you're likely to have a better outcome than somebody who is not knowledgeable and the reasons here are to the fold. One reason is we're looking at the quality of the outcome. The other reason is strategic because if for instance, I have no knowledge whatsoever, for instance, regarding, let's say, for instance, Islamic law and you have a dispute that may be related to Islamic banking or Islamic finance. As an arbitrator, it will take me some time to study this, to understand this and this will be built. In the end, it will add to the cost. Now, this is where the strategic choice will come.

So if you have a dispute related to that, it would make sense to appoint somebody who is also knowledgeable in the subject matter because that arbitrator will not spend much time understanding. The same argument goes with construction disputes. If you have somebody who is knowledgeable about construction issues, can easily understand what it means to constitute a delay, what is snagging, and what are the industry requirements, without taking unnecessary time to rely on the experts to be presented. So this is also at the heart of the qualification. And of course, integrity. Integrity is also very important because I'm looking at this because this is what will determine the immunity at the end. Integrity is very important because, in the end, arbitrators are dispensing justice. And what matters when it comes to this is the integrity of the panel. And arbitrator who is known to be highly reputable, often being fair.

This is not to say there should be an edge over senior arbitrators over the newcomers, nor I may not have any previous record of presiding over an arbitration. But you can tell from the pedigree of my CV that I'm capable of dispensing justice. Now, these are all part of the things that parties need to take into account when it comes to a point in an arbitrator. So in summary, we can say that in response to the second part of the question, a person who can be appointed as an arbitrator is obviously somebody who has the pedigree and the necessary requirements, even though there may not be necessary statutory requirements, but there are best practices when it comes to this. Now, do arbitrators have immunity like national judges? Now that's a tricky question. We know that arbitrators, do have immunity.

Now the question is, is it immunity like that of national judges? This is a debate sometimes here in the UAE. There was a time when there was a prohibition under the penal code under the procedural law, which put together arbitrators along with expanse by saying that they can be liable. So means that the immunity was actually taken away, but this has been amended now. So in other words, it will look, like it would be quite absurd to expect arbitrators to be drawn, to be drafted into a litigation on the basis simply they have presided over a matter. Now that is one acceptable. And that's why arbitrators do have immunity from prosecution when it comes to the conduct of their work. Unless we know to every general rule, there is an exception, just like national judges, when, and this is not to say that to my knowledge, I have never come across any case, but it is something that can happen. If there is a case in which an arbitrator is found wanting, maybe committing a crime involving either taking a bribe. Now that is, that would obviously fall under the exceptions. In that case, there will be no immunity in the same way to apply to national judges. So arbitrators are immune from criminal prosecution, they're getting the conduct of their arbitration in general. The only exception is when they are engaged in criminal activity, in which case, the same would apply even to national judges. I wouldn't want to jump to say it is always like national judges, because when it comes to national judges, the immunity at times is not just statutory, it has multiple layers. So for instance, in some jurisdictions, even if you have a case against a member of a judiciary, there is a judicial council that is responsible for that. Now in the case of arbitrators, we do not have that, right? So that's why I wouldn't jump to say it is immunity like national judges, but we know arbitrators are immune from prosecution over the conduct of their arbitration unless they engage in criminal activity. But having said that for each country, we need to look at the legal system, because not all legal systems are the same. The only thing is there are international best practices

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regarding this as part of the guidelines, for instance, you should buy the ABA, regarding the conduct of arbitrators. So if you look at that, you'll see that arbitrators are supposed to have that immunity. It is our responsibility when it comes to designing our domestic laws to ensure that arbitrators are protected, otherwise, they will never be able to do the job.

Thus, it can be said that an arbitrator is a non-state position. What is commercial negotiation*? How to parties should prepare for the* negotiation*? How to succeed in a* negotiation *while creating a good customer relationship? What types of disputes are currently being resolved through international negotiations? Are there advantages to negotiating disputes?*

And as you rightly pointed out, this is like a little switch from arbitration to negotiation. Now, the starting point, which I would consider to be the general question, which is, what is commercial negotiation? Now, I think we all know we negotiate every day, you know, go straight at home with our siblings, with our daughters, sons, with our wives, with our husbands, you know, it happens. It's something that it's a daily thing. So negotiation is something that we all know that everybody does. And one can clearly say there is no exception, everybody engages in negotiation. But I like the question which you ask, which is, what is commercial negotiation? Now, this is very important, because commercial negotiation is not the same as the type of negotiation that we generally do at home. Of course, the skills would be relevant, but the context actually differs. Some would say, for instance, that negotiation is a given take.

This is one of the simplest definitions one can play with, to say it's a given take, meaning that when it comes to negotiation, you should be ready to give, and you should be ready to take. The other party should also be willing to give and be willing to take. Now, what that clearly means is in commercial negotiation, parties are coming prepared with a plan in terms of at what level are they willing to give in, and at what level are they willing to concede to a particular presentation. But there are, of course, we know certain types of negotiations that are zero-sum, so where it's all about taking, there is little given.

Now, and in commercial negotiation, it's also like that. Of course, some of us, and I, myself, belong to that school whereby I do not believe that there are negotiations that are completely zero-sum. Even in the case of zero-sum, there is still room for maneuver. And if there is room for maneuvering, what that means, there could be some give and take, even though certain the gifts may not look really actual, they may appear to be like give. So in commercial negotiations, parties are trying to resolve their dispute, their difference, and their misunderstanding without being assisted. Now, that's at the heart of understanding what commercial negotiation is.

In other words, they want to face each other, and they want to resolve the dispute among themselves without the help of a mediator, without the assistance of a detractor, or without the intervention of the court. So, not all disputes would actually be a good candidate for this kind of method. There are certain disputes in which parties can still negotiate and say, oh, we believe this aspect is better. We submit this to a mediator. However, disputes regarding ABC, we can negotiate among ourselves. Right? So, when it comes to commercial negotiation, parties would always try to identify the type of commercial disputes, which they confess to each other, which they are willing to make certain adjustments, make to make compromises in order to arrive at a viable solution that would work for both, not for one party. Now, that's one fundamental characteristic of a good negotiation, because, in the end, a good negotiation has to be win-win. Both parties must be happy at the end of it. They may not necessarily get what they want, but they are supposed to achieve their objective. And these are two important things. It is one thing to get what you want, and it's another to achieve your objective. So, negotiation, a successful negotiation is about achieving the objective, not necessarily getting what you claim or claiming what you want. And that's the way to arrive at what we call a win-win, whereby both parties will be happy. So, that's how we can look at a commercial negotiation.

Now, with this broad understanding of commercial negotiation, it would, I mean, naturally, it would mean that parties would have to prepare for this, because if I'm talking about achieving my objective, not necessarily getting my demand, then I need to prepare for this. I need to, first of all, clarify what is my objective in the negotiation. So, imagine two commercial entities negotiating a dispute over, let's say, the price of a subject matter. And the parties have been in business and negotiation for the last 10 years. You may discover that one of the objectives could be the continuity of that business relationship, not necessarily winning over the price issue.

And another objective could be, no, I want to end this relationship because I have a better partner. So, you will discover that the dispute over price is not the main issue. The main issue is about whether the relationship should continue, whether it shouldn't. So,

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Available Online at: https://www.scholarexpress.net
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when parties are going into this kind of dispute or this kind of negotiation, naturally, they would have to prepare. It is considered one of the best practices. And there are various methods whereby parties can prepare for these kinds of negotiations. First of all, parties need to have clarity in terms of the objective, which is very important. The second is, parties must be willing to make adjustments when it comes to negotiation. The third is parties must identify what are their alternatives.

So, this is where the role of alternatives comes in when it comes to negotiation. Because you're not going into negotiation it has to be my position or no more discussion.

Because that is not a negotiation. That is something else. A good negotiation is, I have my objective. This is what I want. Then I do have other options which I'm not presenting now till the negotiation goes on. So, this is what we call alternatives. And with the alternatives, we have various categorizations there. So, a good negotiator should be able to know what are the best alternatives to a negotiated agreement, and what is the worst alternative to a negotiated agreement. And this is what we call Malatna and what have you. This is a good time in the largest when it comes to negotiation. And we use a conundrum to draw this. So, that's, when you're going into the negotiation table, you can identify what we call a no-go area.

So, at the heart of preparing for negotiation is first of all to even ask yourself, do I have to negotiate this? Now, this is very important because not all types of disputes are good for negotiation.

Imagine if I have an upper hand and I have options. So, let's say, let's say we're talking about a distributorship agreement. I am producing, I mean, the business of production, and I have options to have multiple agents. At times, it would be a waste of time to be negotiating with one agent.

Right? Because you already have options or less if there is something specific. So, we always ask ourselves, why do I have to negotiate? And the rule is always to negotiate only when you have to.

So, you shouldn't negotiate when you don't have to negotiate. The way to understand this is always to interrogate yourself, not by looking at what you want, but by looking at the objective behind what you want. Because in the end, a successful negotiation is the one that achieves its objective. So, at times, when you can go to a negotiation, for instance, and you'll sell, my demand is I need X. And the other party will say, okay, you get it. You'll discover that most negotiators will not be happy with this outcome because that is not negotiation. It's not a negotiation. It's something else. And you'll have to ask yourself, what happened?

Was the other party scared? Were they intimidated? Have they discovered an alternative? Couldn't be there, not revealing something to us which would let her backfire, you know? So, this is not a negotiation. But a good negotiation is the one that, oh, I have this objective and in the end, I have achieved my objective, not necessarily getting my demand. Another thing that is also important, and the hyper preparation is to understand that in negotiation, you deal with a pie, and it's not about getting it all, right? It's about how you split it. Because that's what will lead to the win-win. If I'm to take it all, that will not be a win-win. The other party will not be happy. And even if I'm happy by succeeding now, the happiness may not last for a very long time.

But if both parties are happy, you will have an enduring peace for a very long time, because both parties are happy, having achieved their objective. So, these are some of the things that we always need to take into account when it comes to preparing for the negotiations, always prepare for the alternatives, not go with a single option to the table of take it or leave it, which at the end may end up spoiling a business relationship. The third part of the question, which is very important, regarding customer relationships, is at the heart of all negotiations, creating a good customer relationship is at the heart of negotiation.

And in terms of how to succeed in negotiation, this is very important. And this depends, there is no hard and fast rule in terms of how to cultivate this. It depends from culture to culture, and it depends from context to context. And that's why it's always good for a negotiator to understand the negotiation environment. In some cultures, it will be considered a rule to go to a negotiation table and start with the subject matter of negotiation. So, if you go into that kind of negotiation and you start just straight to the point, the others may not feel comfortable, and you may not succeed at the end, because you have started with the wrong premise.

So, it is always good to look at that. What does it take to build a rapport before we even go to the negotiation table? Here we have two approaches, we know we have hard negotiators, and then we have good negotiators. Hard negotiators at times would think that making life difficult for the other party is part of the tactics of winning negotiation.

Now, this is also wrong. It may have worked for a short time, but it may not work for a long-term business negotiation. One of the common examples

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Available Online at: https://www.scholarexpress.net
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we normally give is to invite somebody for negotiation, not at the negotiation table, but somewhere where you are comfortable. So, you have maybe a negotiation table with a single chair and a big table, where you'll be expecting the other party to either stand or sit without a chair trying to make life uncomfortable. Now, that is really not a good approach. But of course, we know some of those hard negotiators have also come up with many tactics, which as putting a very uncomfortable chair, for instance, for the other party. So, this is also not a very good negotiation. A good negotiation is to make the other party also feel comfortable, feel at home, feel relaxed. So, when that happens, that would go a long way in terms of building a good relationship through the negotiation. Because at the end of the negotiation, there is one thing that is very important, which is trust. Parties are willing to open up in negotiation when they feel they can trust the other party. Now, this is something that many have navigated for long because as rational negotiators, as scientific as we want to be, we always want to kick out this aspect. We don't want to rely on trust because trust can be quite subjective. We want to rely on something that we can see, verify, and analyze. But still, when it comes to negotiation, still at the heart of it, trust is critical. Because now we are dealing with human behavior.

It has always remained that parties in negotiation would feel more comfortable when they feel they can trust the other party. And if that is the case, then cultivating a good relationship is the most successful tool for a successful negotiation. So, good customer relationship is quite critical. Otherwise, parties may simply be back out from negotiation.

How should lawyers prepare for business negotiations in commercial disputes? In your practice, has any major economic dispute been resolved through negotiation?

That's a very, very tricky question. I'll give you an example. Remember, we started by saying do not negotiate, unless when you have to. So, you resolve disputes through negotiation when the only way to achieve your objective is through that. One good example, and let's look at international negotiation. So imagine we have an interstate dispute. But we need to link this to a commercial activity because this is a subject matter of our discussion. So imagine you have a border between two neighboring countries.

And the border or the disputed part is endowed with natural resources. You see, at the heart of this dispute is the economic benefit that both countries would reap from this particular disputed either island territory or whatever.

So when you have a dispute like this, of course, one way of resolving it is for country A to send its military, take over the land, put up its flag, and start exploiting the resources.

The border is a very important way to do this. Now, using brutal force may probably give a sense of winning, but you cannot predict how long will this last. Right? Of course, the other country may either try to strike back strong. And even if they cannot, you never know how local people will behave. In one way or the other, you have that fear that the business can be sabotaged either by the government or by people from the other side. So in this kind of case, you can clearly see this is the best way to go about this. Both have legitimate claims over this. And it's not something that can be decisively resolved, not even through arbitration, let's say even through litigation, because there's nothing you can do. Even if you go to litigation, it will take ages when it comes to disputed territories. In this kind of situation, one way of fixing this is to negotiate a method of commercial utilization of this, so that parties of both countries can benefit and share the profit together.

So in the context of natural resources, we're talking about, let's say, monetization negotiations, where parties will negotiate in good faith, exploit the resources there, divide the process, and everybody's happy. And the aim is obviously to get the economic benefit, and both countries are getting it. So if you look at a context like this, I would say a dispute like this is better resolved through negotiation and not through any other means. But there are other types of disputes whereby the best way to resolve them is actually through arbitration. Usually, these are disputes, these are kind of disputes which would not necessarily go to court for litigation. But because parties want to save time, they want to have predictability, they can opt to go through an iteration. So in most cases, these are instances where parties are not looking at maybe even the continuity of that particular commercial relationship. They are willing to say bye-bye and go on with their lives. Or even if they want to continue, they want to have a clear-cut decision, which is an award, so that the parties will never go back to that issue again. So they can just be looking at the future.

When you have disputes like that, then my recommendation would be that kind of dispute is better resolved through arbitration than through negotiation. The problem with this kind of question is there is really no one cap fits all. You cannot find one cap that will fit all the cases.

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But if you look at the current disputes that are generally resolved through negotiation, one would comfortably say that most commercial disputes are initially being attempted to be resolved through negotiation. When the negotiation fails, then parties would say, okay, since we cannot negotiate, the best thing is we go through arbitration. That's what the multi-tiered arbitration clause is all about, which is to say that parties can start by negotiation if they cannot negotiate, they can go through arbitration.

Do commercial negotiations around the world differ from others? Do the parties rely on any international document to settle the dispute?

Now, here, you are kind of really hitting on a very important or you have pointed at a very important issue when it comes to negotiation.

We know or it goes without saying that cultural influence in negotiation is real. No matter how we try to have some sort of standardized framework for negotiation and how negotiators are being trained, still, when it comes to cultural nuances, we cannot escape that.

And the culture here is broadly defined. We're not just looking at people, we're not looking at countries, we're not looking at their, geographical locations. We can even look at specializations because the way lawyers negotiate differs from the way business experts are times negotiate.

It also differs from the way engineers probably would negotiate because, in all these areas, there are certain traits which members of the profession have all been identified with. So really, the question is, are there differences? The answer is yes. And starting with the most obvious is to say that the way an English, let's say, negotiate, would negotiate, would likely differ from the way a Japanese negotiator would negotiate or the way a Chinese negotiator would negotiate.

This goes back to maybe one good example which we always talk about in terms of human relationships or building a rapport. It is quite common for an English negotiator, for instance, or somebody trained in that fashion to simply come to a negotiation and go straight into the issue after greeting each other and saying, okay, let's start. Now, this may not be something that a Japanese or Chinese negotiator would start. Maybe they may want to have some sort of bonding before the discussion. It could be maybe drinking tea, it could be a green tea or something, you know, maybe a little chat. And of course, during that period, the negotiator is weighing and assessing the other party in terms of how to build a relationship to proceed. Now, these are cultural influences in negotiations and these are real. And it is always good for a good negotiator to put yourself into the other person's position. So if you are negotiating with an English negotiator, you'll try to do something that would make him or her comfortable. The same thing if you're negotiating with a Japanese or Chinese negotiator, it is your responsibility as a good negotiator to put yourself to put yourself in his position in order to make him or her comfortable. So whatever you do in order to achieve that, is something that is considered a good negotiation practice. So, here, my response is simple. Yes, commercial negotiations around the world differ. If you go to Africa, for instance, the approach may be different compared to, let's say, the approach in the States or in Europe. In terms of whether parties have to rely on an international document to settle the dispute, I wouldn't say they have to, but if you have it, they're better.

And of course, here, we need to also make a distinction between the types of negotiations that we're talking about. Commercial negotiation is pretty straightforward, but we do also have international negotiations, right? And it's happening in various dimensions now. In the context of the environment, we do have climate change negotiations that are taking place. In the context of artificial intelligence, we know lots of instruments have been negotiated in the context of the world trading system. Lots of rounds of negotiations are taking place. So I will say we need to kind of make a distinction between those that would naturally require some sort of documents and pure commercial negotiations, which may not necessarily need that. But at the heart of it, all that matters is at the end, if a dispute is resolved, the outcome needs to be respected.

That's the most important. And the question is, how do you secure that? Now, in the context of negotiation, it is a little tricky because it is not like a situation. We don't have a mechanism of enforcement, but we do have a settlement, right? So the best advice is always to say when a negotiation is conducted, let it be reduced into writing, and let it be signed by parties so that that document in itself can be presented. Should any of the parties decide to back out from it, the document can be used and can be presented to the court for the court to enforce it as a contractual obligation between the parties. Now, this will depend from one legal system to another. Under common law, we know there is no stand-alone principle of duty to negotiate in good faith. But under civil law, there is an obligation to negotiate in good faith.

World Bulletin of Management and Law (WBML)
Available Online at: https://www.scholarexpress.net
Volume-27, October -2023
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So the jurisdiction where this is to be presented also matters. And I would say, That enforcement of negotiation in civil jurisdiction is likely to be much easier than enforcing a negotiated settlement in the common law jurisdiction, or less than until you have it signed. Then in that case, you will discover that common law is also very, very, I would say, supportive of things reduced to writing, signed by parties, to the extent that common law would not allow parties to delegate from a written agreement which has been entered into between the parties.

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