

The Growing Importance of International Arbitration in International Commerce

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Abstract. Following the rise and growth of globalization and emerging economies, business misunderstandings and disputes that transcend national borders may also be increasing. Such disputes could impede the functioning of international commerce. National legal mechanisms may not be an attractive option for international investors. On the contrary, international arbitration has become the preference of foreign investors through which many disputes can be resolved via an independent forum. To offer insights on this issue theoretically and empirically, this paper presents a discussion to investigate why international arbitration is important for the functioning of international commerce. The paper finds that international arbitration is conducive to promoting foreign direct investment, bringing cost and speed benefits and providing finality in the decision-making process. This proposition will be substantiated by focusing on previous research and particular examples.

Keywords: International arbitration, international commerce, foreign investment

1. Introduction

Given the gradual interrelated and globalized economy, economic growth and ascension of some countries to the status of emerging markets, there has been a significant increase in the rate of commercial disputes that transcend national borders.¹ In this context, international arbitration can be considered a more efficient and effective mechanism as it helps to promote market efficiency by creating a resolution mechanism that is not limited to local jurisdiction.²

Currently, international arbitration has gained an exceptionally strong and widespread acceptance as the mode of dispute resolution best suited to resolving the international commercial disputes, such as international contractual and commercial conflicts between trading multinational corporations and entities. It may be impossible to know exactly how widespread the acceptance is, but some commentators believe that up to 90 percent of all international contracts are governed by arbitration clauses.³

2. Why Is International Arbitration of Growing Importance?

2.1 International arbitration can promote FDI, which contributes to the flows of international investment and national economic development.

A significant advantage of international arbitration is the ability to enforce international arbitration awards through the New York Convention. Most countries in the world are now signatories to the Convention and the number of countries which have joined continues to increase.

The investment environment guaranteed by the great ability to enforce arbitration awards is conducive to attracting foreign investors and FDI.⁴ The study of Wagle (2011) demonstrates a positive association between the quality of arbitration and FDI. In Myburgh and Paniagua's (2016) research, international arbitration was found to have a positive impact on FDI, showing that countries' accession to the New York Convention has a beneficial effect on the rise in the level of bilateral FDI.

In addition, because FDI is one of the most fundamental mechanisms for cross-border capital flow into developing countries, international arbitration can have a positive impact on the economic growth and progress of these countries through the fostering of FDI. In the research conducted by Cayon, Correa and Espriella (2018), it is observed that international arbitration has a favorable impact on domestic economic development.⁵

In the example of Algeria, according to UNCTAD's report (2017), despite having a thriving domestic market, Algeria's economy is still comparatively closed and struggles to attract FDI. The study of Schwartz shows that the significant decline in FDI in 2017 may be related to foreign investors' distrust of the existing arbitration system, which appears to lack a basis for resolving FDI-related disputes.⁶ Ultimately, the Algerian government and stakeholders reversed this situation by enhanced and effective international arbitration to facilitate FDI flows in the country.

The same situation has happened in Korea. Before the 1973 New York Convention, Korea was in a very poor state. In 1960, Korea's GDP per capita was only \$80, a third of that of the Philippines at that time. Currently, Korea's GDP per capita is \$25,000 and they are one of the major trading countries with large trading companies. Prior to 1998, the economy was much more lagging and slow, and the number of arbitration was much smaller. After 1998, international arbitration has flourished, and so has the economy.⁷

Moreover, a number of scholars believe that the same experience can be applied to Pakistan currently and it will provide the option to have disputes arbitrated within Pakistan for foreign companies, which is beneficial to strengthen investor confidence and have a positive impact on Pakistani economy.⁸

In summary, a key factor for development is substantial foreign investment, which should therefore be sought and attracted. Foreign investment will not be attracted unless there are sufficient conditions of security and stability. As a result, host countries need to commit to these conditions before investing. Such commitments are only credible if they are enforceable, and international arbitration is the most effective means of enforcement.⁹ This advantage plays a important role in making international arbitration an indispensable strategy to stimulate and attracts investors to a country.¹⁰ Thus, international arbitration can promote the flow of international investment and national economic development and is of significant importance for the functioning of international commerce.

2.2 International arbitration can bring cost and speed benefits, and certainly adjustments can be made to the process to save time and money.

It is often argued that international arbitration can bring benefits in terms of costs and speed.

Nonetheless, there are many examples of expensive arbitration and lengthy proceedings. In some cases, this is in part because the parties may prefer a more thorough process and choose to examine the issues in detail knowing that it is more likely to produce a fair result.

To some extent, the parties are able to determine the approach they want the arbitral tribunal to take and the consequences in terms of cost and speed. But it can be argued that some procedures in court proceedings can sometimes reduce costs, for example, in the English courts, where it is possible to apply for a summary determination of the case without a trial.¹¹ Under most arbitration rules, there is no similar procedure for summary determination. However, while in clear-cut cases a summary procedure will reduce the length of court proceedings, in more complex cases it may result in time being wasted on unsuccessful applications, with the result of further prolonging court proceedings.¹²

Some arbitration rules provide the option of expedited proceedings or set a time limit for making an award. In addition, the parties may agree among themselves on a schedule that is appropriate to the speed they desire. What's more, there is scope for the parties to agree, either at the time of drafting the arbitration clause or later, to limit within reasonable bounds the extent of processes that would otherwise be time-consuming or costly, such as the extent of document discovery and/or the extent to which particular facts must be proved.¹³

Moreover, except in special cases such as WTO or NAFTA, ICSID or perhaps ICC, arbitration does not require as complicated an organization as judicial systems do, not such large archives, not as complicated dockets, not such large numbers of support staff, not large requirements of infrastructure and technology, thus bringing certain benefits in terms of cost and time.¹⁴

In the final analysis, it is difficult to compare the cost and speed of arbitration with the cost and speed of court litigation on a very general level. While there is no doubt that litigation may be an attractive option in many cases, international arbitration offers a more flexible model with the ability

to more closely match the parties' expectations and requirements for cost and speed in a wide range of international commercial dispute cases. Therefore, it is beneficial for the functioning of international commerce.

2.3 International arbitration is highly flexible and therefore an important neutral instrument for resolving commercial disputes.

Neutrality has many aspects, especially in international arbitration, where parties can choose from a pool of experienced international arbitrators whose attitudes and values are likely to be pro-business and more in line with international commerce culture to resolve commercial disputes.¹⁵

Compared to domestic courts, international arbitration is considerably more flexible. The parties have the right to determine the number of arbitrators on the tribunal, the seat of arbitration, the procedure for selecting arbitrators, the powers of the tribunal, and the applicable law. In appropriate cases, the hearings or parts of hearings can be held at a location away from the "legal" seat of the arbitration.¹⁶ The selection of judges is based on the trust placed in them by the parties, and has been since the beginning. As a result, the issue of selecting judges and all their cultural political, financial and administrative influences are eliminated, reflecting great neutrality. In arbitration, based on this trust, the burden of selection is removed from society and each party selects its own arbitrator.¹⁷

This degree of flexibility also extends to the choice of arbitration center. According to Mattli (2001), arbitration centers can regularly respond to the desires of organizations by creating new services and updating their rules accordingly. For instance, there is room for choice of law, arbitrators specializing in commercial law, and the appointment of industry-specialized arbitrators who are able to make several realistic decisions more precisely than a jury or a judge (Bernstein, 2001).¹⁸

It is reported that China has spent \$1.3 billion on the "Belt and Road Initiative" for Africa. In addition, China has chosen to create its own arbitration centers, including the China-Africa Joint Arbitration Center in Shanghai, using the rules of the Shanghai International Arbitration Center, and similarly in Johannesburg as a subgroup under the umbrella of the "Arbitration Foundation of South Africa". The China-Africa Joint Arbitration Center provides a cost-effective and neutral instrument for resolving commercial disputes involving African and Chinese parties.¹⁹

2.4 International arbitration is confidentiality and privacy.

Another advantage of international arbitration is confidentiality and privacy. In many countries, court proceedings are somewhat public, particularly in high profile cases, and can lead to the distraction of a "trial by media", media contact by the parties, or unwelcome attention to the case by pressure groups or even competitors. In contrast, parties can often come to an agreement on the privacy and confidentiality of arbitration proceedings, whether or not the arbitration rules provide for confidentiality. An important issue for many parties is the commercial confidentiality of their business dealings, and that confidentiality is more likely to be maintained in arbitration proceedings.²⁰

2.5 International arbitration provides finality in the decision-making process.

International arbitration provides a greater degree of finality in the decision-making process than court proceedings. One of the disadvantages of court proceedings is that judgments are sometimes subject to one or more appeals, and these appeals can take years to resolve.²¹

In arbitration proceedings, such delays and potential diversions from review of legal principles are largely avoidable, and the decision of the arbitral tribunal is final, except for the usually limited grounds for challenge in court.²²

3. Conclusion

In the research conducted by Gary Born and Petra Butler, they conclude that, although international arbitration is not perfect, it is 'by a wide margin – the most expert, most fair, most efficient, and most neutral form of cross-border dispute resolution'.²³

In short, the amazing success and great importance of international arbitration since the 1980s has been linked to the wave of economic globalization. It is conducive to promoting FDI, saving time and money, ensuring neutrality, providing finality and maintaining confidentiality, which gives rise to new opportunities for international commerce.

As Dame Rosalyn Higgins noted 25 years ago, international arbitration is growing in importance as an area we should be concerned about. It is the paradigmatic form of international dispute resolution suited to resolving the commercial disputes. In the future, international arbitration will continue to ride the wave and play an important role in the functioning of international commerce. It may once again find itself in the right place at the right time.²⁴

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