

THE CONTRIBUTION OF INTERNATIONAL CHAMBER OF COMMERCE TO THE DISPUTE RESOLUTION

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Abstract

The resolution of disputes outside the courts, otherwise known as Alternative Dispute Resolution (ADR) is not a new phenomenon. This is because societies around the world have historically long used non-judicial methods, often with the help of a third party in the role of judge or facilitator, in order to reach a resolution of their conflicts. What is new is the promotion and widespread dissemination of ADR models, the guidance and in certain cases even the court's order to disputing parties to use ADR, as well as the increasing use of ADR as a tool to achieve broader goals than the resolution of specific disputes. The International Chamber of Commerce (ICC) is committed to strengthening the infrastructure of ADR, primarily arbitration and mediation worldwide and launching various services available to everyone. The results show that the ICC is increasingly seen as the go-to institution both in terms of the number of disputes addressed for resolution and in terms of the value of the disputes. This paper analyzes precisely these most prominent activities of the ICC in terms of providing solutions for the management of dispute resolution. The analysis of official statistical data presented by the ICC provides results that prove a constant ongoing demand for ICC services, i.e. reflecting its continuing global efforts.

Keywords: ADR, third party, conflicts, ICC, analysis, statistical data.

Introduction

Disputes or conflicts occur in all human relations, societies, and cultures. From the beginning of written history, there is evidence of disputes between children, spouses, neighbors, collaborators, superiors and subordinates, organizations, communities, populations and their governments, ethnic, religious, and racial groups, as well as different nations.¹ The definition of a dispute may appear superfluous at first sight. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. Provisions on the peaceful settlement of disputes, by definition, presuppose the existence of disputes for their application. Thus, Article 33 of the United Nations Charter is an obvious example “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”. According to International Court of Justice an international legal dispute can be defined as a disagreement on a question of law or fact, a conflict, or a clash of legal views or interests. Only States may apply to and appear before the International Court of Justice. International organizations, other authorities and private individuals are not entitled to institute proceedings before the Court.²

In general, a dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another.³ Disputes are usually taken as givens. The existence of a dispute typically becomes the starting point for inquiry into its

¹ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edition), San Francisco: Jossey-Bass, 2014, 3.

² <https://www.icj-cij.org/en/contentious-jurisdiction> [accessed 20.11.2022].

³ J. G. Merrills, *International Dispute Settlement* (5th edition), Cambridge: Cambridge University Press, 2011, 1.

subsequent development and resolution.⁴ In fact, it is important to distinguish disputes from differences. A dispute may be viewed as a class or kind of conflict which manifests itself in distinct justiciable issues. A “justiciable problem” is defined as a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being legal and whether or not any action taken by the respondent to deal with it involved the use of any part of the civil justice system. Justiciable problems are, for the most part, those that people face in their everyday lives, such as child support, consumer, education, employment, health, and welfare benefits.⁵

The term "Alternative Dispute Resolution" or "ADR" is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or minitrials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of ADR. ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems.⁶ Ideas and practices which stress the virtues of ADR as appropriate forms of dispute management were found in many societies before those societies were drawn into the world system (and often still are centrally important today), and they have also formed part of the value systems of various types of local ‘community’ and social movements which have looked for self-containment and even resistance in times of rapid social changes. A substantial part of the reforms that courts have experienced in the current era of ADR reform has involved extending the judge’s responsibilities for judicial case management. In the course of these developments, there has also been a shift in focus in both dispute management practice and academic commentary in the analysis of decision making from rules and their application to the processes of dispute management.⁷

Due to the pervasive presence of disputes and the need to save money, time, physical, emotional, and other aspects that are often associated with them, people have always been looking for peaceful ways of resolving differences between them. In search of dispute management and resolution, they have made continuous efforts to develop procedures that are efficient and effective, to satisfy their interests, to build or change relations for the better, to reduce suffering, and to control unnecessary depletion of emotional and physical energy or tangible resources.⁸

With the presentation of different ways of ADR, in addition to the management of justice according to the needs of the parties, a new and more comprehensive framework of forms has also been designed through which the parties can reach the necessary justice, i.e. various judicial institutions of a private nature have been established and promoted, thus developing 'informal' or 'private' justice. Notable examples of situations that have proven amenable to resolution outside of court institutions and statutory court proceedings include, but are not limited to:

- the field of international peace and world order,
- environmental and public policy,
- education,
- science and technology,
- sports,
- commercial contracts,
- property,

⁴ Richard E. Miller, Austin Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, *Law & Society Review*, Vol. 15, No. 3/4, Special Issue on Dispute Processing and Civil Litigation (1980 - 1981), 525-566, 525.

⁵ *Consultation Paper: Alternative Dispute Resolution*, Dublin: Law Reform Commission, 2008, 10-11.

⁶ *Alternative Dispute Resolution Practitioners Guide*, Washington D.C.: Center for Democracy and Governance, 1998, 4.

⁷ Maria Federica Moscati, Michael Palmer, Marian Roberts (editors), *Comparative Dispute Resolution*, Cheltenham: Edward Elgar Publishing Limited, 2020, 5.

⁸ Christopher W. Moore, op. cit., 3.

- labor,
- insurance,
- family,
- consumer protection,
- social development and issues related to the community,
- control and prevention of crime, and
- children's justice.

The ICC's approach to dispute resolution

It is clear that, from one perspective, the word “alternative” refers to looking outside the courtroom setting to resolve some disputes. In this respect, the ICC fully supports the long-standing approach of the legal profession and of the courts that, where it is appropriate, parties involved in commercial disputes should be encouraged to explore whether their dispute can be resolved by agreement, whether directly or with the help of a third party mediator or conciliator, rather than by proceeding to a formal “winner vs. loser” decision by a court. This happens every day in the courts, in family litigation, in large and small commercial claims and in boundary and other property disputes between neighbours.⁹

In most situations, the involved parties have a range of approaches and procedures at their disposal to respond to or resolve their disputes; however, procedures available to them vary considerably in the way conflicts are addressed and settled.¹⁰

When commercial disputes arise, ICC’s market-leading dispute resolution services can be relied on to resolve them as efficiently and economically as possible. It offer a wide choice of administered procedures as an alternative to litigation for resolving domestic and international disputes. What’s more, its globally accessible and completely neutral services are available to anyone: from individuals and private sector enterprises to states and state entities.¹¹

Businesses, states and international organizations, including the United Nations, the World Trade Organization, the World Bank and, most recently, the G20 look to the ICC as an authoritative voice in international trade and investment. All trust in ICC to provide the support, insight and recommendations they require. Bridging both the public and the private sectors, the ICC stands apart as a unique organization capable of answering the manifold needs of all actors in international commerce.¹² The ICC does more than support trade in today's global economy. It also help solve difficulties in international business through its administered dispute resolution services. These services, which are based exclusively on rules that only it is empowered and authorized to administer, include arbitration – a private procedure which parties can do much to shape, leading to a binding and enforceable decision. Its flagship International Court of Arbitration steers ICC arbitration. Over the years, it has also launched additional complementary services, now gathered within the International Centre for ADR. It include mediation and other forms of amicable dispute settlement; sourcing experts to provide opinions on technical, legal and financial matters; and helping to set up and run dispute boards.¹³

The 2020 Survey by Queen Mary University, London in partnership with law firm White & Case, reveals that of all nominations received, ICC stands out once more as the most preferred institution among arbitration providers, including market leaders featured in the rankings who have led the field for well over a decade. The survey rankings reflect ICC’s standing as a truly global and independent institution with close to 100 years’ experience in resolving commercial disputes, and a contemporary purpose to leverage dispute resolution to

⁹ *Consultation Paper: Alternative Dispute*, 1.

¹⁰ Christopher W. Moore, op. cit., 3.

¹¹ <https://iccwbo.org/dispute-resolution-services/> [accessed 20.11.2022].

¹² *ICC Dispute Resolution: A World of Experience, a Wealth of Expertise*, Paris: International Chamber of Commerce (ICC), 2012, 1.

¹³ Ibid.

secure more widespread peace and prosperity.¹⁴

On January 1, 2021, the latest iteration of the ICC Arbitration Rules went into change.¹⁵ The 2021 Rules, which were released alongside a revised notice to Parties and Arbitral Tribunals on the Conduct of Arbitration (the ICC Note), attempted to address the latest developments in international arbitration, also including virtual hearings in the aftermath of the pandemic, rephrase arbitral appointments and ethical lapses, third-party funding, and the growing prevalence of multi-party arbitrations. Moreover, the ICC Court issued a COVID-19 set of guidelines (the COVID-19 Guideline Note) in April 2021,¹⁶ which analyses specific steps that may assist alleviate the pandemic's adverse effects on ICC arbitrations, particularly as it relates to the organization and execution of virtual hearings.

In April 2021, ICC and Jus Mundi launch partnership to publish ICC arbitral awards. It means ICC and Jus Mundi have joined forces to make publishable, ICC arbitral awards freely available to the global legal community. Commenting on the agreement, ICC Court President, Alexis Mourre said: "The publication of ICC awards on an opt-out basis through a trusted partner is an important development in the ICC Court's policy to enhance transparency in ICC Arbitration. The increased availability of awards will contribute to improve the quality of ICC Arbitration as much as to strengthen the legitimacy of arbitration in general".¹⁷

The current state of the ICC's activity in terms of dispute resolution

The annual ICC Dispute Resolution Statistics reports provide an overview of the cases administered by the ICC International Court of Arbitration and the ICC International Centre for ADR. The disputes submitted to the ICC Court covered a broad range of sectors. Construction and engineering disputes lead with the significantly larger number, followed by energy disputes, and then those involved state or state-owned entities. In 2021 a total 853 new cases were filed at the ICC International Court of Arbitration, a fall from 2020's 946 cases.¹⁸ More specifically, the registered 853 new cases in 2021 and 27 requests for an emergency arbitrator, which is slightly lower than 2020 but nothing that could indicate a change in the growing trend of disputes administered by the ICC. New cases registered under ICC Arbitration Rules in 2021 involved 2,206 parties from 143 countries. The top five were: USA, Brazil, Spain, The United Arab Emirates, Mexico. Those countries were followed by France, Germany, China and Hong Kong, India, and Italy. The ICC International Centre for ADR registered 80 new requests, a few more than in 2020 (77) - the largest number of cases registered in a year. The split of cases between the requests was: mediation: 44, expertise: 25, dispute boards: 4, cases related to trade finance instruments: 7.¹⁹

In 2020, the ICC Court registered a total of 946 new cases – the highest number of cases registered since 2016, when a complex cluster of small disputes effectuated a marked increase in the statistics. Of the 946 registered cases, 929 were held under the trusted ICC Rules of Arbitration and 17 under the ICC Appointing Authority Rules. The 2020 figures also revealed the highest number of parties involved in cases and appointments or confirmations of arbitrators. Other records include the geographical diversity of arbitrators and places of arbitration.²⁰ In addition, in 2020, the International Centre for ADR (the 'Centre') received a total of 77 new cases registered under the Mediation Rules, Expert Rules, Dispute Board Rules and DOCDEX Rules.²¹

In 2019, a total of 869 new cases were registered, of which 851 cases under the ICC Arbitration Rules and 18 under the ICC Appointing Authority Rules. In terms of diversity, the 851 new cases under the ICC Arbitration Rules involved parties originating from 147 countries and independent territories, arbitrators from 89

¹⁴ <https://iccwbo.org/media-wall/news-speeches/icc-worlds-most-preferred-arbitral-institute-global-survey-finds/> [accessed 15.11.2022].

¹⁵ <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [accessed 17.11.2022].

¹⁶ <https://iccwbo.org/media-wall/news-speeches/icc-court-issues-covid-19-guidance-note-for-arbitral-proceedings/> [accessed 17.11.2022].

¹⁷ <https://iccwbo.org/media-wall/news-speeches/icc-and-jus-mundi-launch-partnership-to-publish-icc-arbitralawards/> [accessed 15.11.2022].

¹⁸ <https://iclg.com/cdr/arbitration-and-adr/17580-icc-arbitration-remains-popular-despite-slight-2021-downturn> [accessed 24.11.2022].

¹⁹ <https://insight.opus2.com/icc-releases-preliminary-figures-for-2021> [accessed 24.11.2022].

²⁰ *ICC Dispute Resolution 2020 Statistics*, Paris: International Chamber of Commerce (ICC), 2021, 4.

²¹ *Ibid*, 21.

jurisdictions, and a proportion of women arbitrators now reaching 21%. 2019 also saw the highest number of cities hosting ICC Arbitrations (116 cities spread over 62 countries), and a record number of new cases involving a state or state entities (20%).²² In 2019, the ICC International Centre for ADR (‘Centre’) received a total of 61 new cases registered under the Mediation Rules, Expert Rules, Dispute Board Rules and DOCDEX Rules.²³

In 2018, 842 new cases were registered with the Secretariat. The figure is slightly lower than the 966 cases filed in 2016, which included however 135 related small-claim cases arising from a collective dispute.²⁴ In 2018, the ICC International Centre for ADR received a total of 70 new cases registered under the mediation rules, expert rules, dispute Board rules and DOCDEX rules.²⁵

2017 was another busy year for the Court with 810 new cases filed until the end of December. The figure is slightly lower than the 966 cases filed in 2016, which included however 135 cases related to a set of very small claims in a collective dispute. As of end 2017, 1578 pending cases were being administered by the Court and over 23300 cases had been registered since its creation in 1923.²⁶ In 2017, the ICC International Centre for ADR registered 30 new filings under the ICC Mediation Rules. Apart from two requests for conciliation, parties overwhelmingly opted for mediation. The 86 parties in the 2017 filings came from 31 countries and independent territories across the world.²⁷

According to statistics, a total of 966 new cases administered by the Court were filed in 2016 – involving 3099 parties from 137 countries. Constituting a record year for the Court in its 94-year history, the figures reflect continuing growth of the world’s leading arbitral institution and its ongoing efforts to make ICC dispute resolution services more accessible worldwide.²⁸

Moreover, the substantive analysis of the annual reports published by the ICC highlights some conclusions about the issues to which the ICC gives special emphasis and priority:

- maintaining the reputation created as the most preferred arbitral institution in the latest comprehensive market survey,
- pointing to the reputation,
- the number of new cases registered,
- draft awards approved,
- countries of origin of arbitrators,
- places of arbitration,
- further progress of the number of women arbitrators sitting in ICC tribunals,
- nature of the disputes,
- choice of law,
- amounts in dispute,
- expedited procedure,
- languages of awards,
- reaffirming global and regional reach with the opening of the Secretariat's fourth overseas case management office around the world, taking into account the greatest possible reach,
- creating of new cooperative bridges and the deepening of existing ones with relevant institutions and organizations that entrust the resolution of disputes to the ICC (UNCITRAL, UNIDROIT, FIDIC, WTO, World Bank), and organizing of dispute resolution events around the globe, including regional conferences, trainings, Young Arbitrators Forum events and educational events.

²² *ICC Dispute Resolution 2019 Statistics*, Paris: International Chamber of Commerce (ICC), 2020, 4.

²³ *Ibid*, 19.

²⁴ *ICC Dispute Resolution 2018 Statistics*, Paris: International Chamber of Commerce (ICC), 2019, 8.

²⁵ *Ibid*, 17.

²⁶ *ICC Dispute Resolution 2017 Statistics*, Paris: International Chamber of Commerce (ICC), 2018, 52.

²⁷ *Ibid*, 64.

²⁸ <https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/> [accessed 24.11.2022].

Conclusion

ICC appreciates that ADR processes bring additional benefits that are not available through the litigation process. These processes is likely to reduce the overall financial costs of resolving disputes, perserving party autonomy, the involvement of the parties in the creation of the platform for the resolution of the dispute, and respect for confidentiality. The research of the last six-year period highlights that the year 2016 with 966 cases has been the most fruitful in terms of cases addressed for review and resolution by the ICC assistance machinery, while with 810, 2017 was the poorest represented in terms of the number of cases. In recent years, in addition to the ICC International Court of Arbitration, the ICC International Center for ADR is also entering the game with sure steps (providing a range of services that can be used separately, successively or even concurrently with other dispute resolution procedures). In addition, the number of parties involved and the countries from which the parties come in the disputes submitted for resolution by the ICC have also increased. Added to this is the ever-increasing number of jurisdictions that are trying to expand their geographic reach. Finally, the representation of women in the processes led by the ICC shows continuous growth.

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