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Landscape of Dispute Resolution

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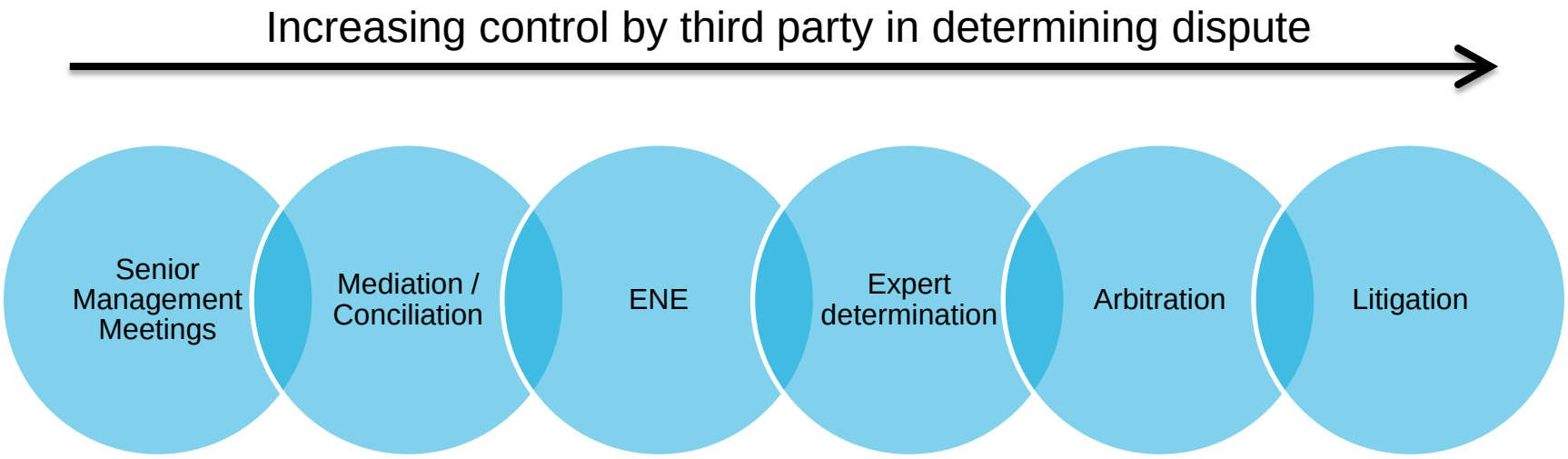
Taxonomy of Dispute Resolution

- Coercive
  - Litigation
  - Arbitration
- Consensual (Alternative Dispute Resolution)
  - Senior Management Meetings
  - Expert Determination
  - Mediation and alternative such as Conciliation and ENE

From Consensual to Coercive



Arbitration v Litigation

Arbitration

- Binding determination by arbitrator
- Parties decide in contract to refer any dispute to arbitration rather than litigation
- Parties decide jointly on the arbitrator
- Rules of evidence do not apply: no subpoenas, no interrogatories, no discovery process
- Rights of appeal are more limited

Arbitration v Litigation

International Arbitration

Pros:

- Neutrality (tribunal, procedure, place language)
- Right to choose arbitrators
- Procedural flexibility
- Privacy
- Finality
- International enforceability of awards

Cons:

- Can be difficult when recalcitrant party
- Risk of jurisdictional disputes
- Multi-party and multi-contract challenges
- Arbitrator's lack of coercive powers/ summary determination
- Awards cannot be appealed

Litigation

Pros:

- Procedural certainty
- Summary disposition
- Coercive powers
- May be more effective when a party is recalcitrant
- Right to appeal

Cons:

- Lack of neutrality
- Expensive disclosure process in common law countries
- Can be lengthy
- Lack of privacy
- Lack of finality
- Limits on international enforceability

Key Issue: Enforcement

- Arbitration awards are binding, final and should be enforceable in the 144 nations that are party to the 1958 “New York Convention”
- For foreign court judgments, there is no established multinational equivalent to the New York Convention: Enforcement of court judgments within the EU is relatively easy
- Certain major leading countries like the US or Russia are not party to any bilateral or multilateral agreements on the enforceability of foreign court judgments

2015 W&C-QMUL International Arbitration Survey

- Most valued characteristics of international arbitration:
  - Enforceability of awards
  - Avoiding specific legal systems
  - Flexibility
  - Selection of arbitrators
- Worst characteristics of international arbitration:
  - Cost
  - Lack of effective sanctions during the arbitral process
  - Lack of visibility regarding arbitrators' efficiency
  - Lack of speed

2015 W&C-QMUL International Arbitration Survey

- If users could have any improvement made to international arbitration, what would it be?
  - Amending the New York Convention to narrow the grounds for non-enforcement of arbitral awards
  - Broadening the pool of arbitrators in number as well as in ethnic diversity
  - Feedback mechanisms on arbitrators
  - Addressing “due process paranoia” – the fear which inhibits tribunal decision-making

Alternative Dispute Resolution

Different methods

- Senior Management Meetings
- Mediation
- Conciliation
- Early Neutral Evaluation ("ENE")
- Expert Determination

1. Senior Management Meetings

- Parties have agreed in their contract, or agree after a dispute has arisen, that dispute be referred in the first resort to "senior management" representatives of each party
- One of the least formal methods of dispute resolution
- No third parties involved
- The matter is kept between the parties as a commercial rather than legal dispute

2. Mediation

- Competence of mediator:
  - May meet privately and hold separate discussions with the parties
  - Performs a similar role to a conciliator but more interventionist: will usually draw up terms which he considers to be fair having listened to each side´s views
  - May point out to the parties the probable outcome of the dispute
  - But not empowered to decide any disputes
- Types of mediation:
  - Voluntary - by agreement between the parties
  - Compulsory – required in some jurisdictions at some point in the litigation process

2. Mediation: Advantages

- Introduction of the third party mediator, who typically spends at least a part of the mediation process engaged in shuttle diplomacy between the parties
- Focus upon the interests of the parties rather than on their legal rights alone
- Procedure is entirely flexible
- Quick, consequently cheap and entirely confidential
- Even if "unsuccessful", the process will provides an opportunity for the parties to focus on the issues in dispute

2. Mediation: Disadvantages

- Not suitable where the parties require a court judgment or injunction
- Fraud cases may be less suitable for mediation
- Enforceability of mediation decisions
- Mediation Directive (2008/52/EC)
  - Ensure the quality of mediation through codes of conduct, training of mediators and other quality standards
  - Facilitate the recourse to mediation
  - Ensure the enforceability of agreements resulting from mediation

3. Conciliation

- A third party is chosen as a “neutral” or conciliator, whose role is to help the parties to reach an amicable agreement
- Unlikely to be any detailed investigation into the arguments of the parties. Instead they are encouraged and helped to come to their own decisions by the neutral third party
- The role of conciliator:
  - May see each party separately, listening to their views
  - Makes sure that each side understands the other´s viewpoint
  - “Hosts” and supervises settlement negotiations, but is unlikely to suggest terms of settlement himself

4. Early Neutral Evaluation ("ENE")

- Non-binding ADR process whereby a neutral party is retained to provide a non-binding evaluation on the merits of a dispute
- Advantages
  - most effective if attempted early before significant costs have been incurred
  - no procedural requirements for ENE beyond those agreed
  - opinion of a mutually respected neutral may assist the negotiations
- Disadvantages
  - non-binding
  - can polarise positions in negotiation if one party perceives it is "right" in light of the opinion

5. Expert Determination

- Advantages:
  - Can be highly effective where the parties anticipate a specific type of technical dispute
  - Quicker than litigation or arbitration
  - The procedure will be determined by the expert
- Disadvantages:
  - No appeal
  - Few disputes are purely technical

Combining dispute resolution methods

MedArb and ArbMed

- MedArb:
  - Parties to undertake a mediation which, if it is not successful, will see the mediator change roles and become an arbitrator
- ArbMed:
  - Parties to undertake an arbitration (usually very short) following which the parties then undertake a mediation

Energy Charter Treaty, Article 26

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably

Energy Charter Treaty, Article 26

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party to the dispute

(b) in accordance with any applicable, previously agreed dispute settlement procedure

(c) in accordance with the following paragraphs of this Article

Tiered Dispute Resolution Clauses

Advantages:

- Puts ADR "on the agenda“ and avoids being perceived by the other as a sign of weakness
- Particularly useful in disputes where the parties have a long-term relationship and want that relationship to continue
- In litigation, procedural rules oblige the parties to consider ADR but an agreement to ADR may be enforced by the party seeking to rely on it
- No corresponding duties and obligations in arbitration

Tiered Dispute Resolution Clauses: Example 1

“All disputes arising from or in connection with this Contract or the execution thereof shall be settled by friendly negotiation. The Applicable Law shall be the Laws of England.

If no settlement can be reached, the case in disputes shall be settled by arbitration in accordance with the Arbitration Rules of International Chamber of Commerce (ICC) in effect on the date of this Contract. Arbitration according to the rules of ICC shall take place in Geneva, Switzerland.”

Thank you

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