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# ARBITRATION IS THE BEST METHOD TO SETTLE THE INTERNATIONAL TRADE DISPUTES.

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***Abstract***
*International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creation of contract, i,e, the parties' decision to binding resolution by one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures, usually by including a provision for the arbitration of future disputes in their contract. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems. Arbitration is one of the effective and popular methods among the existing methods of settlement of international trade disputes. In international trade parties can chose to and sometimes have to bring their case before a state court or national administrative authority. However, in an international context and for most contracts involving such subjects as sales, distributorship, licensing and joint ventures, business operator may feel at a disadvantage. The dispute could well be tried before the other party's nationals, in the other party's language, and according to the procedural rules of the opponent's country. To achieve neutrality and flexibility are therefore the two basic reasons why arbitration and other alternative dispute resolution processes, such as mediation , conciliation, good office, have been developed, with the support and co-operation of state courts. Arbitration, on the other hand, needs the parties themselves to institute the method of resolving the dispute between them[1]1 But it too has certain weakness if these are overcome international trade will flow very smoothly and nations will get benefits of international trade*

***Key words: Arbitration, Negotiation, conciliation, Mediation, International trade disputes, Alternative methods of settlement of trade disputes.***

## I. Introduction

There are several methods available for resolving disputes between two parties. The first and most important method is through the courts. When a dispute arises between two parties belonging to the same country, there is an established forum available for the resolution of the same. The parties can get the said dispute resolved through the courts established by law in that country. Generally, this has been the most common method employed by the citizens of a country for the resolution of their disputes with the fellow citizens[2].

When a dispute arises between two persons belonging to two different countries, the difficulty arises. One option available to the parties is to go to the domestic courts of either country for the resolution of that dispute. However, this approach may have its own problems. The first is the jurisdiction of the courts. The laws relating to jurisdiction of courts in a country are not made keeping in view the transnational disputes. Normally, they are designed to resolve domestic disputes, that is, disputes arising between two citizens of the same country. The other is dissimilarity in the legal system of two countries. The problem acquires serious dimensions if the county of one party follows common law system and the country of the other party follows

Civil law system. In spite of tremendous work done by many international organizations and institutions, unification or uniformity of different legal systems is still a distant dream[3]. The next is the choice of law applicable to the agreement and the consequential dispute between the parties. Availability of assets of the defendant in that jurisdiction is also a consideration for the purpose. The reason being that the enforcement of the judgment in any other jurisdiction may be a prolonged and cumbersome process. The absence of a treaty for the enforcement of foreign judgments between the two countries may render the judgment a worthless paper. If the judgment debtor happens to be a sovereign of that

[1] *Merrills.J.G. 'Interna onal Dispute Se lement',4th edn,NewYork, Cambridge University Press,2005. Ch.5 p.91*

[2] *Document Series No. 14: Alternative Dispute Resolution Methods( www.unitar.org/dfm ).*

[3] *'ALTERNATIVE DISPUTE RESOLUTION METHODS'by Vinod K. Agarwal, the participant in the Workshop on "Arbitration and Dispute Resolution" organized by the UNITAR at Harare,Zimbabwe from 11th to 15th September, 2001*

other country, the execution may involve claim for sovereign immunity. In some countries, sovereign assets enjoy sovereign immunity. The establishment of the fact in the court of that very country that the sovereign has waived the immunity itself will be a Herculean task. Apart from these difficulties, conventional difficulties, like undue delay in the dispensation of justice, complicated procedural formalities, transportation of entire evidence and witnesses from one country to the other country, high cost of litigation, judicial imperfection, etc., cannot be ignored. In view of these and other difficulties, either party avoids going to the courts in the country of the other party. It is for these reasons that the alternative dispute resolution methods are becoming more popular for resolution of disputes between parties belonging to two different countries. So much so that some persons have started calling them "appropriate" dispute resolution methods rather than "alternative" dispute resolution methods. The alternative dispute resolution methods offer distinct advantages over litigation[4].

When there is trade between or among the nations at international level, disputes are unavoidable. Dispute may occur usually due to high tariffs, customs red tape, foreign exchange controls, trade discriminations, restrictive cartel practices, and curbs, governmental and private which add to the normal difficulties of trade among nations. Commercial disputes between traders are rarely thought of as a barrier to international trade expansion.[5] Yet a great many medium sized and small companies find sources of supply in other countries of the world as they can better afford to prosecute in courts of law and go through the series of appeals until a decision comes down from the highest court of the land. Since from olden days till date efforts have been made to resolve the international trade disputes. Many peaceful methods have been evolved and developed. Now they have taken systematic legal shape. There are judicial and non-judicial methods. Arbitration and judicial settlement fall under the first category where as negotiation, mediation, inquiry and conciliation fall under the second category. Among all these methods of settlement of international trade disputes an arbitration is effective, enforceable, economical and less time consuming method which helps the traders stay in business. In this paper author discusses the different methods of settlement of international trade disputes with their advantages and disadvantages and finally discussion is made in detail about arbitration. At the end of the paper reader will come to realize that arbitration is the best mode of settlement of the international trade disputes.

**II. Different methods of settlement of international trade disputes:**

Usually, the methods of dispute settlement in international law are classified in two different ways. The first broad category represents diplomatic methods and includes negotiation, mediation, inquiry, and conciliation. In this category, the parties remain in overall control of the dispute, and can either accept or reject the suggested settlement[6]. The other general category is termed legal settlement, since the basis of settlement is international law. The types here are arbitration and judicial settlement, and are employed where a decision that is binding on the parties is needed. Let us discuss each of method's process in solving international trade in brief.

**i. Negotiation**:

Negotiation is a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter. Settlement is the primary way people adjust dispute, alter ownership, and rearrange their relationships. Because we reach settlements by negotiating, bargaining pervades personal, commercial, social and political life. Negotiation can also be defined as: a non-binding procedure involving direct interaction of the disputing parties where in a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each others position.

**Perceived advantages of negotiation**

❖ Flexibility[7]:One special attribute of negotiation as a method of resolving difference is flexibility, both with regard to the manner in which the parties proceed and with respect to the ultimate accommodation reached.

❖ Mutual gains: It allows difference to be adjusted in a way that either maximummutual gains or meets at least some needs of all parties to settlement.

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[4] *Ibid*

[5] *.Marris.S.Rosenthal-'Arbitration in the settlement of international trade disputes',Heionline-11law and contemp.probs,808,1945-46*

[6] *.Ibid*

[7] *Alternative Dispute Resolution Teaching Material Developed By: Tefera Eshetu & Mulugeta Getu , Sponsored by the Justice and Legal System Research Institute ,2009*

❖ Implicitly recognizes the dignity and worth of all participants: A third attribute isthat it implicitly recognizes the dignity and worth of all participants since negotiated resolution requires the parties assent.

❖ Takes in to account unofficial as well as official values Finally, unlike some other methods of resolving difference, negotiation takes in to account unofficial as well as official values –that is, it can reflect values that are important to the parties even though these values not have legal status.

**Perceived disadvantages of negotiations**

The following points might be taken as the disadvantages of negotiation.

❖ No assurance[8]: Firstly, no assurance as negotiation is all about bargaining, the parties have no assurance that they will reach a settlement. Nevertheless, the

❖ Soundness of the resolution may be impaired: Secondly, the soundness of the resolution may be impaired if the parties miss present their goal or the back ground information or if, after agreement is reached, circumstances change from what one or more parties anticipated during bargaining.

❖ Non enforceable: Thirdly, non enforceable sometimes negotiated settlement does not satisfy community mores or relevant and lawful interest of third parties and thus, may be unenforceable.

**ii. Conciliation**

Conciliation is used to settle disputes which its parties desire to use this mechanism to settle disputes arising between them. Conciliation does not impose direct applications for law in relation to disputes, but rather it respects dispute circumstances, the parties' circumstances, and its effect on international peace and security. Conciliation is a legal political tool; thus, it differs and varies from other peaceful settlement mechanisms, whether mere political or mere legal. Conciliation is important in many ways, especially human, legal, and political aspects.[9]

**Perceived Advantages of Conciliation**

❖ Economization in Procedures[10]: The philosophy of conciliation as a peaceful means of settling disputes depends on many principles on which the procedural law is based. The most important principle is economization in procedures, which is the one that the legislator seeks to achieve in all the legal means by all means, even if by shortening the settlement period or by establishing a new mechanism to resolve disputes between the parties. This mechanism would achieve the stability of the legal situations and absolute justice. These goals are undoubtedly difficult to achieve through the judicial or the arbitral means, while they are easy to achieve through the friendly means, like conciliation.

❖ Achieving justice: The most important goal which the legislator seeks toachieve. Many countries produce conciliation due to its advantages presented in avoiding lengthening the dispute procedures, not being preoccupied by formalities, and finding a solution which ends the dispute and does not allow its appeal , the parties' direct participation in all procedures, exchanging points of views, and reaching a satisfactory solution. Conciliation fulfills the parties' desires in getting medial justice, which is achieved through getting a quick settlement by simple procedures and the parties effective participation.[11]

❖ Getting a quick settlement: By simple procedures and the parties' effective participation. Thus, conciliation leads to shortening the time; this might be due to the simplicity of its procedures.

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[8] *Ibid.*

[9] *Helmy, Nabil Ahmed, International Conciliation, 1990, p.7.*

[10] *Conciliation Mechanism: An amicable mechanism to settle business disputes advantages and disadvantages', research article by, Dr.Taha Kassem published in International journal of multidisciplinary and current research,vol 2, sept/oct2014 issue.*

[11] *Mousa,Mohammed Ibrahim, International commercial conciliation and the change of the prevalent view about the means settling the international trade disputes; Alexandria,New University press,2005,p.58*

❖ Cost-Effective Justice: There is no doubt that economizing in procedures and avoiding formalism lead to achieving cost-effective justice. If conciliation in a short time. This does not cost parties a lot.[12]

❖ Maintaining Contractual Relationships: When the disputant parties select conciliation, they do not think of settling their current dispute at the time of the dispute, but rather they consider their future relationships. The settlement they reach expresses the parties' satisfaction and persuasion. The solution is not imposed on the parties, which allows conciliation to maintain the peaceful relationships between the disputants.[13]

❖ Repairing Resulting Damages: Similar to the judicial and arbitral systems and means, conciliation aims at repairing the damages which affect one of the parties of the relationship due to the failure in execution.

❖ Establishing Balance and Equality: Between Parties Conciliation aims not only at repairing the damages resulting from the contractual relationships, but also at finding a kind of balance or equality between the parties' obligations. The logic of the commercial conciliation greatly helps in the continuation of the contractual relationships between the parties and taking them from dispute to execution.

**Perceived Disadvantages of Conciliation**

❖ No Binding Decision: If no agreement can be made between the parties, each will be left in the same position as they started. There is no binding decision handed down which can be frustrating to parties who have invested time, money and effort into the process.

❖ Conciliator Involvement: Although the conciliator is meant to be an impartial third party, the ability for them to involve themselves in the proceedings through their 'active' involvement can question the unbiased nature of the conciliator

**iii .Mediation**

Mediation is the attempt to help parties in a disagreement to hear one another, to minimize the harm that can come from disagreement (e.g. hostility or 'demonising' of the other parties) to maximize any area of agreement, and to find a way of preventing the areas of disagreement from interfering with the process of seeking a compromise or mutually agreed outcome.[14] Mediation, as used in law, is a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties concrete effects. Typically, a third party, the mediator assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic.etc

**Perceived advantages**

❖ Mediation is relatively inexpensive[15]: Seeing a case through trial is an expensive proposition.

❖ Mediation is relatively swift: There is no dearth of mediators ready and willing to assist parties whose goal is to try to settle a matter. A quick web search will result in hundreds of mediators and mediation websites, some specializing in certain types of cases and some more experienced and able than others. Mediation does not run by a clogged court

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12 *Redwan,Abuzeid, "General principles in commercial arbitra on", Cairo,Dar Elfiker Alaraby,1981, p.3.*

13. *Supra note 11*

14. https//en.wikipedia.org/wiki/mediation.retrieved on 19/05/2016

15.Supra note 7

schedule and sessions can be easily scheduled any time at the mutual convenience of the parties and the mediator, and can take place in a variety of locations.

❖ Mediation is relatively simple: There are no complex procedural or evidentiaryrules which must be followed. While most would agree that a general rule of fairness applies, the maximum penalty a party can impose for foul play is to walk away from the mediation and take his chances in court.[16]

❖ Mediation allows the parties to revise and adjust the scope of their conflict: In a trial, initial pleadings and rules of procedure limit the issues which a party can raise. In mediation, as circumstances change so can the topics up for discussion. This increased flexibility makes it easier for negotiators to act as problem-solvers instead of adversaries.

❖ Mediation allows for flexible solutions and settlements: The relief available in court is usually based on pecuniary damages, and equitable relief is hard to come
by. In mediation, however, the parties can agree to a settlement requiring, or restraining, action by one party which was not originally envisioned as something beneficial to the other party.

❖ Settlements reached in mediation are more agreeable: Because any settlement arrived at through negotiation is necessarily agreed to voluntarily by both parties ,obligations under the agreement are more likely to be fulfilled than obligations imposed by a court.

**Perceived Disadvantages**

❖ Mediation does not always result in a settlement agreement[17]: Parties might spend their time and money in mediation only to find that they must have their case settled for them by a court. Opting for mediation, therefore, presents something of a risk. Further, if mediation fails, much of a party's "ammunition" might have already been exposed to the opposing party, thereby becoming far less useful in the ensuing trial.

❖ Mediation lacks the procedural and constitutional protections: The lack of formality in mediation could be a benefit, as noted above, or a detriment.

Mediation between parties of disparate levels of sophistication and power, and who have disparate amounts of resources available, might result in an inequitable settlement as the less-well positioned party is overwhelmed and unprotected.

❖ Legal precedent cannot be set in mediation: Many discrimination cases, among others, are brought with the intention of not only securing satisfaction.

❖ Mediation has no formal discovery process: If one of the parties to a dispute cannot fully address the case without first receiving information from the other party, there is no way to compel disclosure of such information. The party seeking disclosure must rely instead on the other party's good faith, which may or may not be enough.[18]

**iv. Inquiry**

In an international dispute involving in particular a difference of opinion on points of fact, the States concerned may agree to initiate an inquiry to investigate a disputed issue of fact, as well as other aspects of the dispute, to determine any violations of relevant treaties or other international commitments alleged by the parties and to suggest appropriate remedies and adjustments. Inquiry may also be resorted to when parties to a dispute agree on some other means of settlement (arbitration, conciliation, regional arrangements, etc.) and there arises a need for collecting all necessary information in order to ascertain or elucidate the facts giving rise to the dispute.[19]

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[16] *Ibid*
[17] *Ibid*
[18] *Ibid*
[19] *Handbook on the Peaceful Settlement of Disputes between States ;OLA/COD/2394 UNITED NATIONS PUBLICATION Sales No. E.92.V.7 ISBN 92-1-133428-4.*

**Perceived advantages**

❖ Time bound: One advantage of this method is that it permits a party to make a compensatory payment without formally accepting its fault, and the matter need not be prolonged.

❖ Impartial detective work: According to Collier and Lowe, even if there is a legal basis to the dispute, the inquiry could help in resolving it.[20] This could be seen as a form of impartial detective work, to remove the risk of two separate national inquiries which might conflict in their findings. Inquiry is appropriate where the parties actively welcome the involvement of an impartial commission.

❖ Dually qualified members: It is historic approach has been to appoint an inquirycommission containing well-qualified members, whose task is to find out the facts.[21]

**Perceived disadvantages:**

❖ It is not appropriate in all cases: one clear reason why inquiry has not been the adopted method is as follows. In a wide range of disputes, it is not appropriate to solve the dispute by simply finding out the facts.[22] Also, this type of official third party involvement would not be the process favoured by various states in certain circumstances.

❖ It can prepare just report: Enquiry commission can finally prepare its reportwhich may be accepted or rejected by the party or parties, hence, it has no binding force.

❖ Time consuming: Though it is submits it's report within time frame, if one of the parties to disputes does not accept then they prefer next alternative dispute settlement method, so it is waste of time.

**III. Arbitration is the best method of settlement of international trade disputes**:

International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creation of contract, i,e, the parties decision to submit disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures and usually by including a provision for the arbitration of future disputes in their contract. International arbitration has enjoyed growing popularity with business. There are a number of reasons that parties elect to have their international trade disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards, the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality and other benefits.

International arbitration is sometimes described as a hybrid form of dispute resolution, which permits parties broad flexibility in designing arbitral procedures. As one example, consider the international Bar Association (IBA)'s Rules on the taking evidence, in international commercial Arbitration, revised in 2010. These rules adopt neither the common law jurisdiction's broad disclosure procedure nor follow fully the civil law in eliminating entirely the ability to engage in some disclosure related practices. The IBA Rules blend common and civil systems so that parties may narrowly tailor disclosure to the agreement's practice that applies to international arbitration. Like there are a variety of approaches at international arbitration that may be agreed between the parties. International arbitral practice has given rise to its own non-country specific standards of arbitrators have freedom to apply them.

**Difference with Arbitration and Mediation**

International arbitration is a significant variant of the practice in many countries of arbitration, from which it is derived and shares many features. It is not just the fact that international arbitration arises in the context of international contracts that makes it different. In the international dispute resolution community, it is widely accepted to be a different entity, involving different practices and rules, and being represented by a different community of arbitrators and legal practitioners.

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[20] *Collier, J. and Lowe, V., The Settlement of Disputes in International law, Oxford, Oxford University Press, 1999; Ch 2, p.24.*

[21] *Shaw, M. N., Interna onal Law, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 18, p.923.*

[22] *Shaw, M. N., Interna onal Law, 5th edn, Cambridge, Cambridge University Press, 2003; Ch 18, p.925*

It is essential to draw a firm distinction between Arbitration and Mediation or conciliation, which are both sometimes characterized as form of ADR (Alternative Dispute Resolution). In countries where mediation is new or struggling to be introduced as a concept, this association has given rise to the misleading impression that mediation is a form ofnon-binding arbitration, with the arbitrator proposing or suggesting outcomes based on an assessment of the parties' rights. In fact, arbitration and mediation or conciliation is fundamentally different: the former is a binding determination of legal rights; the latter two forms of dispute resolution involve facilitated negotiation which aims at producing a consensual settlement. The one leads to a binding determination (arbitration). The other only in the event that parties agree to settle their dispute on mutually satisfactory terms (mediation).

**The Advantages of International Arbitration**

Promoted as a way to resolve disputes efficiently, proponents of arbitration commonly point to a number of advantages it offers over litigation, court hearings, and trials.

❖ Avoids hostility: Because the parties in an arbitration are usually encouraged to participate fully and sometimes even to help structure the resolution, they are often more likely to work together peaceably rather than escalate their angst and hostility toward one another, as is often the case in litigation.[23]

❖ Usually cheaper than litigation: Arbitration is becoming more costly as more entrenched and more experienced lawyers take up the cause. It is not unusual, for example, for a well-known arbitrator to charge $3,000 to $4,000 per day for his or her services. And most parties in arbitrations will also hire lawyers to help them through the process, adding to their costs. Still, resolving a case through arbitration is usually far less costly than proceeding through litigation because the process is quicker and generally less complicated than a court proceeding.

❖ Faster than litigation: According to a recent study by the Federal Mediation and Conciliation Services, the average time from filing to decision was about 475 days in an arbitrated case, while a similar case took from 18 months to three years to wend its way through the courts.

❖ Flexible: Unlike trials, which must be worked into overcrowded court calendars, arbitration hearings can usually be scheduled around the needs and availabilities of those involved, including weekends and evenings.

❖ Simplified rules of evidence and procedure: The often convoluted rules of evidence and procedure do not apply in arbitration proceedings -- making them less stilted and more easily adapted to the needs of those involved. Importantly, arbitration dispenses with the procedure called discovery that involves taking and answering interrogatories, depositions, and requests to produce documents -- often derided as a delaying and game-playing tactic of litigation. In arbitrations, most matters, such as who will be called as a witness and what documents must be produced, are handled with a simple phone call.

❖ *Private*: Arbitration proceedings are generally held in private. And parties sometimes agree to keep the proceedings and terms of the final resolution confidential. Both of these safeguards can be a boon if the subject matter of the

**Disadvantages of Arbitration**

Being aware of the possible drawbacks of arbitration will help you make an informed decision about whether to enter or remain in a consumer transaction that mandates it -- or whether to choose it as a resolution technique if a dispute arises.

❖ Limited recourse[24]: A final decision is hard to shake. If the arbitrator's award is unfair or illogical, a consumer may well be stuck with it and barred forever from airing the underlying claim in court.

❖ Uneven playing field: Some are concerned that the "take-it-or-leave-it" nature of many arbitration clauses work in favor of a large employer or manufacturer when challenged by an employee or consumer who has shallower pockets and less power.

[23] *Arbitration pros and cons-by Barbara Kate Repa(Law-Authours/Barbara-Repa.Html).*
[24] *Ibid*

❖ Questionable objectivity: Another concern is that the process of choosing an arbitrator is not an objective one, particularly when the decision-maker is picked by an agency from a pool list, where those who become favorites may get assigned cases more often.

❖ Lack of transparency: As mentioned, the fact that arbitration hearings are generally held in private rather than in an open courtroom, and decisions are usually not publicly accessible, is considered a benefit by some people in some situations. Others, however, lament that this lack of transparency makes the process more likely to be tainted or biased, which is especially troublesome because arbitration decisions are so infrequently reviewed by the courts.

❖ Rising costs[25]: While most still claim that arbitration is less costly than litigation, its costs are increasing. According to a recent survey by Public Citizen, a consumer watchdog group, the cost of initiating an arbitration is significantly higher than the cost of filing a lawsuit: $6,650 to $11,625 to initiate a claim to arbitrate a consumer claim worth $80,000 versus $221 to file that action in a particular county court. Add to that the arbitrator's fees -- multiplied by three if a panel is involved -- in addition to administrative costs, and the process appears to be less of a bargain.

**IV. Conclusion**

Alternative Dispute Resolution or ADR, as the current search for better dispute resolution methods has come to be labelled , embraces processes for dispute resolution that are truly alternative to the judicial system. The most dominant and widely applicable ADR type, however, is arbitration. In negotiation, the parties to a dispute, through communication and discussion, convey their position to each other and attempt to persuade the other to take a position by making compromise. Mediation / conciliation is negotiation by nature, the only difference being the appointment of one or more neutral third parties to the conduct of the negotiation. In mediation proceeding there are different processes in which the mediator performs different activities starting from setting the table for parties discussion to proposing alternative solutions for parties agreement. Both in negotiation and mediation if parties reached in terms of agreement to settle their difference, their agreement would bind them and has legal effect based on law of contract. Arbitration is a mode of settling differences through the investigation and determination, by one or more unofficial persons selected for the purpose of some disputed matters submitted to them by contending parties for decision and award, in lieu of a judicial proceeding. In arbitration the agreement of the parties to be arbitrated by private judge is the primary condition, and after this agreement arbitral tribunal will be established by the appointment of arbitrator(s). Unless otherwise parties agree on the contrary, proceeding in arbitration is pretty much similar with that of court proceeding. Other alternative dispute settlement methods are like snake without teeth because of not binding effects of their decision. Whereas the arbitration not only gives it opinion, it sees that it should be respected by means of having enforcement force. From the analysis that has been made it is obvious that there is need for substantial improvement in the field of international commercial arbitration. There are a great many legal problems that press for solution, and on the operating level there is also much progress to be made. Wider and more thorough knowledge of arbitration techniques is essential if arbitration is to grow in use in international trade. In this there is great promise in the post-war activities of the American Arbitration Association and the International Chamber of Commerce. In its infancy arbitration was attacked most vigorously because "it ousted the courts of jurisdiction." But, although many courts are still hostile to commercial arbitration, the purely legalistic and jurisdictional attacks of the courts have lessened and current criticisms are more realistic and more substantial. But it has been my observation that although arbitrators in New York have great freedom in ignoring settled principles of law, in practice they do not act arbitrarily or with caprice. On the other hand they give careful attention to any legal citations that are made during the course of arbitration, and they are keenly aware of statute law and court decisions affecting the controversy before them. When they depart from the settled law it is only in the interest of substantial justice applying to the specific case with which they are dealing. And furthermore, businessmen frequently prefer arbitration based on facts as interpreted by arbitrators to the uncertainty of the way in which the courts will appraise commercial facts, particularly in the field of international trade. More often than not the services of businessmen who have an understanding of the techniques and practices of international trade will result in more equitable decisions than cases that come before the courts, whose decisions must be based on the determination of facts either by courts or juries who cannot be conversant with mercantile problems and customs. It should be entirely possible to incorporate in such legislation provisions to prevent the perversion of arbitration procedures for the selfish and improper ends of any business group. At the present time there is a greater demand for merchandise than manufacturers and merchants can possibly supply. It is therefore an appropriate time to plan for the future when goods will again be plentiful and when, in a period

[25] *Ibid*

of surpluses and declining markets, commercial disputes will grow in numbers and in bitterness. Exporters and importers who favor arbitration as the method of settling the disagreements should now work with the American Arbitration Association and the International Chamber of Commerce and other organizations in their efforts to obtain sound legislation which will not only improve existing commercial arbitration but also prevent possible abuses. First, the international merchant needs legislation in most countries of the world which will insure universal recognition of the validity of the arbitration clause, which will adequately define the powers of the arbitrators in all jurisdictions, and which will enable the enforcement of foreign arbitration awards in the jurisdictions of the losers.

But there should also be enacted protective legislation to allow the courts to invalidate arbitration awards in cases involving cartel control of patents or trademarks or other restrictive practices in the production and distribution of goods. The legislation should also dearly establish that if two parties enter into a contract that is contrary to public policy or contrary to the laws of the countries of either the buyer or the seller that the contract is obviously unenforceable and that arbitration is therefore invalid in such situations. Whereas the powers of the arbitrators should be broad, an appeal to the higher courts should be possible in the event that the arbitrators are guilty of fraud or of dishonesty or of obvious prejudice. Some of the weaknesses ascribed to international commercial arbitration are inherent in the business system as currently practiced. More fundamental changes than elimination of or emasculation of commercial arbitration are needed to correct these abuses. Weaknesses properly attributable to arbitration are few and minor compared with the great advantages in practice, particularly to the average exporter and importer who is limited in his knowledge of foreign trade techniques. Such exporters and importers are eager to avoid disputes with each other. When disputes do arise, their chief concern is for a speedy, economic and fair settlement of the disagreement so that they may continue their business relations with each other with harmony and good-will prevailing on both sides. A system of international arbitration conducted by tribunals of a high integrity and thoughtful understanding, and backed by laws of the international trading countries of the world, would give assurance to merchants and manufacturers of all countries that the barrier of commercial disputes can be easily surmounted.