# DISPUTE RESOLUTION IN THE TEXTILE SECTOR

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## Alternative mechanisms to enable compliance and address power imbalance

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**Rambod Behboodi**
rbehboodi@GenevaTradeLaw.com
www.GenevaTradeLaw.com
@GenevaTradeLaw
+41768174694

# Dispute Resolution in the Textile Sector

**ALTERNATIVE MECHANISMS TO ENABLE COMPLIANCE AND ADDRESS POWER IMBALANCE**

# FOREWORD

The **Initiative Global Solidarity** (IGS) seeks to enable textile manufacturers and purchasers to collaborate and share responsibility for compliance with human rights, social, and environmental due diligence obligations in accordance with the German *Act on Corporate Due Diligence Obligations in Supply Chains*. The target countries are Bangladesh, Cambodia, Vietnam, and Serbia.

**FABRIC** supports the transformation of the garment and textiles industries "toward fair production for people and the environment" in six target countries: Bangladesh, Cambodia, Vietnam, Myanmar, Pakistan, and China.

The **Sustainable Terms of Trade Initiative** (STTI) brings 14 producer associations from 11 countries to contribute to a more balanced commercial relationship between manufacturers and purchasers, and to empower manufacturers to become more socially, economically, and environmentally sustainable.

The textiles sector is marked by two principal challenges:

- significant imbalance in negotiating power between manufacturers and purchasers; and
- the weakness of enforcement frameworks in respect of contractual breaches.

One contributing element to the overall project is a study of alternative dispute resolution (ADR). The object of the study is to examine structures and assess the feasibility of different approaches to ADR, and thus to lay the foundations for developing a strategy for the implementation of concrete measures to:

- create a more balanced commercial relation between buyers and suppliers in the textile and garment industry; and
- set up tools and training for manufacturers to ensure more balanced commercial compliance, including through alternative dispute resolution.

This study was prepared by an international trade law and policy specialist with thirty years of experience in diplomacy, negotiations, institution-building, and international dispute resolution. A former Deputy Commissioner of the Canadian Competition Bureau and former General Counsel at Canada's Finance Ministry, Rambod Behboodi has represented developing countries before international trade tribunals and advised them on regulatory and institutional reform. He is currently actively engaged in trade and climate change, business and human rights, trade and competition, and dispute resolution reform in multilateral and regional trade agreements.

In addition to deep research into social, economic, trade policy, and historical context of the sector, and lateral institutional analysis, in preparing this study the author has had the benefit of in-depth interviews with experts within and outside the sector, and validation exercises with the beneficiaries.

# EXECUTIVE SUMMARY

Devising effective and useful ADR procedures needs close attention to context. This paper examines the issue in three chapters:

1. What are the challenges of the textile sector that need to be addressed?
2. What are the existing dispute resolution frameworks?
3. What would a "model" framework *for this sector* look like?

The textiles sector is marked by two principal **challenges**:

- significant imbalance in negotiating power between manufacturers and purchasers, giving rise to deeply one-sided contracts; and
- the weakness of enforcement frameworks in respect of contractual breaches.

This explains in part why despite being an early adopter of international commercial arbitration *and* the seventh largest traded sector in global trade, the sector does not rank high in the *use* of commercial arbitration mechanisms either internationally or at the national level. Following major disasters, there have been attempts at redressing aspects of the imbalance, but these remain context-specific. Additional regulatory activity – mostly by the governments of purchasers and retailers – in the sector either for climate change or to address human rights concerns could exacerbate the upstream transfer of risks and cost to those least able to bear them. The overall context gives rise to three conclusions:

- Problems in the sector are structural and not institutional.
- Existing institutions are suboptimal addressing both core problems *and* routine resolution of commercial disputes.
- A new mechanism should balance the regulatory costs against the responsibilities of all the actors in the sector.

**Existing frameworks** for the resolution of commercial disputes are marked by two phenomena:

- a limited but growing diversity of *forms* of dispute resolution (arbitration, mediation, evaluation, etc.); and
- a wide – and sometimes bewildering – variety of private and public, general and sectoral, international and national *institutions*.

In general terms, the *forms* of dispute resolution can be described in three ways:

- Adjudication;

- Mediation, conciliation, or expert-driven "evaluation"; and
- Complaints/ombuds functions.

Each has strengths and weaknesses, but in general terms:

- Litigation before adjudicative bodies is costly and time-consuming. Because it is adversarial, it has the potential to rupture commercial relations. Because it is often length and heavy on procedures, requiring the involvement of expert legal counsel, it generally exacerbates underlying power imbalances. And yet, some form of adjudicative framework essential as a *final recourse*.
- Conciliation and mediation – and in some models, "evaluation" exercises – are generally non-adversarial and thus contribute to maintaining commercial relations. Properly structured – for example, by using sectoral experts – they can enhance substantive equity in the outcome, and even narrow litigated disputes. At the same time, without a full accounting of context, certain forms of non-adversarial dispute resolution could reinforce existing imbalances or result in stalemate.
- An ombuds function works well as a *dispute prevention* mechanism where it is within a concrete regulatory framework and fully supported by the stronger contracting parties. As well, an ombuds function is an effective mechanism to address problems in non-contractual relations.

Existing *institutions* – for example, international arbitration centres – are suboptimal. They are either remote, too expensive and cumbersome to engage, or not relevant to the sector.

A **model dispute resolution mechanism** for the sector must take account of these challenges and existing global context. For this reason, the working assumptions for developing these recommendations are:

1. Economic imbalance will continue.
2. Getting all governments and purchasers to agree is not easy.
3. The primary object of dispute resolution should be maintaining relations .

Against this background, it is recommended that:

- A **specialised** venue be established with the following characteristics:
  - hybrid (live and virtual)
  - specialised staff to collect data, engage in trilateral convening, and provide outreach, training, and technical assistance

    - mandate to enter into agreements for venue use with national arbitration centres
    - mandate for outreach, technical assistance, and training.
- The primary mode of dispute resolution should be **conciliation** with emphasis on expert-driven resolution, and arbitration with mix of lawyers and sectoral experts as last resort.
- A **complaints** or ombuds mechanism:
    - may require regulatory backstop; and
    - should be funded through a purchaser-supported arm's-length mechanism.

# CHAPTER 1: INTRODUCTION

Alternative dispute resolution (ADR) has a distinguished past, a checkered present, and a brilliant future. This is an evergreen observation.

ADR refers to the range of institutionalised and informal mechanisms for the resolution of disputes *other than* national courts. It includes quasi-judicial binding mechanisms such as *arbitration*, "evaluation" mechanisms such as *neutral fact-finding*, and voluntary mechanisms such as *conciliation and mediation*. From an institution-building perspective, the chief attraction of ADR is precisely its variety and flexibility.

There are many reasons firms and individuals engage in ADR. There may be concerns about the length and procedural complexity of court cases; costs of formal litigation; official corruption; ineffective or indifferent enforcement of court awards; uncertain or unsophisticated legal framework; excessive legalism of judges, or their lack of expertise in commercial matters; or contextual, subject-matter, or cultural inappropriateness. All of these concerns are magnified where parties are litigating a transnational contract in courts in which at least one party is "foreign". Properly conceived, an "alternative" framework seeks to address at least one of these without exacerbating the rest.

ADR can be altogether separate from the legal system as a parallel procedure, or a supplement to it, woven into the "normal" litigation process as a mandatory step before formal procedures are engaged. To avoid replicating existing procedures, it tends to have minimal judicial supervision – or, at least, "supervision" on very narrow grounds. ADR is intended to be more supple and agile, both in law and procedures, and thus more responsive to the disputing parties and their specific needs. Expertise developed among professional arbitrators is expected to correct for the perceived lack of specialization of generalist judges in domestic courts.

Finally, in a formal court procedure, specific parties litigate specific well-defined issues – such as the alleged breach of a contractual provision – and the trial will take place only in respect of those parties and the issues they are litigating. Where, for example, a supplier and a brand purchaser litigate an alleged contractual breach, there is only a limited role for other affected interests (such as those working for the supplier) to indicate the impact of the dispute on them.[1] "Alternative" dispute resolution is flexible in terms not just of the various mechanisms that can be at play – for example, arbitration or mediation – but also, and more important, of additional mechanisms, procedures, and substantive rules that can be devised to address sectoral needs and concerns. Indeed,

[1] Some jurisdictions provide for *amicus curia* ("friend of the court") briefs.

that is how they are typically distinguished from formal court procedures. For example, in structuring an alternative dispute resolution framework, we could make provision for a more global review and resolution of the relationship between suppliers and brand purchasers than would be permitted in a strictly contractual dispute, and potentially involve and address third party interests.

No system is perfect, and "ADR" broadly defined – that is, whether we are talking about arbitration or mediation, or other mechanisms – is not immune from basic human or institutional failings:

- depending on the context, rerouting disputes from courts to arbitration can, in itself, be abusive;
- mediation could re-enforce traditional cultural or economic imbalances;
- *ad hoc* dispute resolution risks inconsistency, indeterminacy, and therefore both unfairness and loss of economic stability;
- even where arbitrators are subject matter experts, individual arbitrators develop a reputation for being in favour of one side or the other (in investor-state disputes, for example, by consistently favouring investors) or bring into their quasi-judicial determination the rigidity of traditional courts;
- costs of venue and arbitrators can be prohibitive;
- absence of institutional framework and appeals could affect the quality of judgements; and
- enforcement could still be ineffective or indifferent, or not reach the intended ultimate beneficiaries.

In short, institutional design matters, but the very conditions that militate in favour of ADR also tend to mitigate its success. Devising effective and useful ADR procedures needs close attention to context.

This paper examines the issue in three chapters:

1. What are the challenges of the sector that needs to be addressed?
2. What are the available tools in the dispute resolution toolbox?
3. What would a "model" framework look like?

# CHAPTER 2: WHAT ARE THE CHALLENGES WE ARE TRYING TO ADDRESS?

Any exploration of "alternative dispute resolution" must begin with three interlinked questions:

- Alternative to *what*?
- *Why* the need for an alternative?
- Why *now*?

To understand the what, the why, and the when, this chapter proceeds in five sections, beginning with the sectoral context and concluding with ongoing challenges:

1. The economic, political, legal, and institution context of the sector
2. How do firms actually resolve disputes?
3. What are the challenges with existing frameworks?
4. Is it time for reform?
5. What are the impediments to "sticky" reforms?

## The economic, political, legal, and institutional context

At nearly $800 bn. in annual global trade, textiles[2] are the seventh largest traded product. Not surprisingly, the top exporter is China, with volumes nine time larger than the next

[2] Section XI of the Harmonized System, "Textile and textile articles". Harmonized System | WCO Trade Tools

largest exporter, Vietnam. Bangladesh,[3] Germany, and India round out the top five.[4] All top importers are developed economies.

Textiles trade has a unique history.

Until 1995, "a large portion of textiles and clothing exports from developing countries to the industrial countries was subject to quotas under a special regime outside normal" multilateral trading rules.[5] With the entry into force of the WTO Agreement, the GATT regime was replaced by the *Agreement on Textiles and Clothing* (ATC), which provided for "a 10-year transition period leading to the integration of the textiles and clothing sector into the regime of the General Agreement."[6] China joined the WTO in 2001.[7] The transition period for the ATC ended in 2005. China's share of global textile exports tripled between 2000 and 2010.[8]

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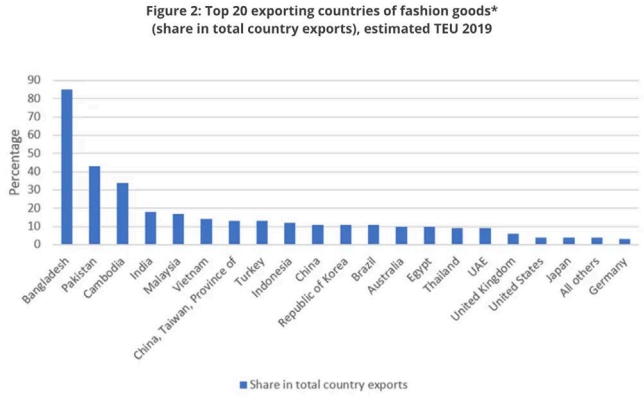
[3] Textiles constitute 85% of the total exports of Bangladesh.




The textile sector can help countries recover from COVID-19 | World Economic Forum (weforum.org)

[4] "In 2020 the top exporters of ***Textiles*** were China ($276B), Vietnam ($38.9B), Bangladesh ($37.3B), Germany ($35.9B), and India ($29.7B)." https://oec.world/en/profile/hs/textiles

[5] https://www.wto.org/english/tratop_e/texti_e/texintro_e.htm:

> [T]extile and clothing quotas were negotiated bilaterally and governed by the rules of the Multifibre Arrangement (MFA). This provided for the application of selective quantitative restrictions when surges in imports of particular products caused, or threatened to cause, serious damage to the industry of the importing country. The Multifibre Arrangement was a major departure from the basic GATT rules and particularly the principle of non-discrimination.

[6] Report of the Appellate Body, *US – Cotton Underwear*, WT/DS24/AB/R, at 11. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds24_e.htm

[7] https://www.wto.org/english/thewto_e/countries_e/china_e.htm

[8] https://www.statista.com/statistics/1204126/china-share-of-global-textile-exports/#:~:text=In%202020%2C%20China%20accounted%20for,around%20120%20billion%20U.S.%20dollars

See also Antonella Teodoro and Luisa Rodriguez, "Textile and garment supply chains in times of COVID-19: challenges for developing countries", UNCTAD, 29 May 2020:

> The accession of China to the WTO (2001) and the expiry of the WTO Agreement on Textiles and Clothing (which **ended a 10-year trade regime managed through**

The special textiles regime was not the only distorting factor in global trade.

Certain raw materials such as cotton were and remain heavily subsidized[9] and this has an impact on production and investment decisions in the sector; there were also alleged subsidies to producers and exporters of apparel and textile products.[10] In this light, although this paper concentrates on *private* dispute resolution, trade policy provides essential context for considering institutional reform. The relative negotiating power of China or India in establishing, protecting, and advancing their terms of trade, and in defending domestic institutions against importing countries' interests gives them and their exporters an advantage in international trade and investment relations. To address this particular imbalance, the *full* scope of required reforms extends far beyond the regulation and resolution of commercial disputes between private interests.

At the other end of the spectrum are the workers – the intended beneficiaries of the current wave of "business and human rights" measures.[11] The textiles sector remains highly labour-intensive; a large majority of workers are women, who in turn suffer from both traditional labour issues – low wages and lack of collective bargaining – and gender-related problems (sexual harassment and pregnancy discrimination).[12] Traditionally, the absence of a "common framework"[13] for brand purchaser conduct inhibited action, for fear of loss of competitiveness.[14]

In broad terms,[15] therefore, the sector comprises five sets of players:

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> **quotas**) on 1st January 2005 contributed to making China an important centre of textile and clothing global value chains (GVCs).

Textile and garment supply chains in times of COVID-19: challenges for developing countries | UNCTAD

[9] https://gro-intelligence.com/insights/us-cotton-subsidies

[10] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds451_e.htm

[11] https://www.ecotextile.com/2022062429526/labels-legislation-news/eu-urged-to-learn-us-lessons-on-forced-labour.html

[12] Business and Human Rights Resource Centre, "European textile industry and human rights due diligence: Key developments, human rights allegations & best practices", Briefing April 2018, at 3. https://media.business-humanrights.org/media/documents/files/EU_Textile_Briefing_Final.pdf

[13] *Ibid*, at 4. See also: "Common Framework for Responsible Purchasing Practices" of the *Partnership for Sustainable Textiles*.
Common Framework for Responsible Purchasing Practices - Bündnis für nachhaltige Textilien (textilbuendnis.com)

[14] *Ibid*:

> While progressive practice by leading companies serve as positive examples, they cannot make up for lack of action by others. It is crucial that all companies conduct proper human rights due diligence along their entire supply chain.

At 7.

[15] Excluding producers of the input raw materials as well as transport and other service providers.

- the manufacturers of garments and textiles based largely in developing economies, and related associations[16];
- garment and textiles workers;[17]
- the purchasers of garments and textiles[18];
- the governments of economies responsible for garments and textiles manufacturers;[19] and
- the governments of economies responsible for garments and textiles purchasers.[20]

Textile disputes reflect the complexity not just of the principal participants of the sector, but also of the market itself. Demand is seasonal and demand for particular fabrics or garments hinges on "notoriously fickle public tastes."[21] Between the raw materials and

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[16] The contracts are likely only between individual manufacturers and purchasers.

[17] The opening paragraph in Tineke Lambooy, "Case study: the international CSR conflict and mediation" (2009), 13(2) Nederlands-Vlaams tijdschrift voor mediation en conflictmanagement 5 captures the issue well:

> On 6 December 2007, the Dutch denim brand G-Star publicly announced that it had pulled out of its long-term relationship with the Indian/Italian jeans manufacturer and supplier Fibres & Fabrics International (FFI/JKPL).1 G-Star's loss of appetite towards its Indian supplier was the consequence of being trapped for two years between international campaigning by the Dutch campaigning organisations Clean Clothes Campaign (CCC) and India Committee Netherlands (ICN, hereafter together referred to as: CCC/ICN)2 and the destructive litigation undertaken by its supplier. Due to the cancellation of further orders by G-Star, the Indian jeans manufacturer, which at that time employed approximately 5,500 people in Bangalore and 100 to 150 people in Italy, risked going out of business in three months' time. Including family members and other dependents, this meant that over 20,000 people would lose their source of income.

At 5; highlight added.
https://media.business-humanrights.org/media/documents/files/media/documents/article-g-star-artikel-lambooy.pdf

[18] In some countries, purchasers are large brands based in developed economies. In most other countries, purchasing is effected through big buying houses that then sell to the brands.

[19] Many of which are in "weak governance zones." "Briefing", *supra*, at 8. For a counterpoint see also *ibid*:

> … the whole situation had become out of hand and had turned into an international conflict between G-Star, FFI/JKPL, CCC/ICN, the Indian Organisations, and – to a lesser extent – the governments of India and the Netherlands.

At 25.

[20] Their role, it should be emphasized, extends beyond trade policy. *Ibid*:

> Under the UK Modern Slavery Act 2015 any company that operates in the UK and has an annual turnover exceeding £36 million is required to report annually on steps it is taking to tackle modern slavery in its operations and supply chains. […]

At 6.

> In 2017, France adopted a law establishing a "duty of vigilance" for large multinational firms carrying out all or part of their activity in France. […] The Dutch parliament also passed a law on corporate due diligence to prevent child labour in 2017.

At 8.

[21] "Enforceable Arbitration of Commercial Disputes in the Textile Industries" (1952) 61(5) Y.L.J. 686, at 688-9.

the final sale to the consumer, there are a host of contracts,[22] each relentlessly dependent on the last – each susceptible, therefore, of causing potential breaches and disputes along the way downstream. Because of the unpredictability of the market, "*efficient* breaches" at the marketing end have long been a potentially viable business strategy,[23] pushing further breaches upstream.

All along the chain, power imbalances result in transfer of risks of contractual uncertainty, [24] breach, or failure to fulfil to the weakest links in the chain.

## How do firms resolve existing disputes?

Typically,[25] there are two types of disputes[26] between suppliers[27] and brand purchasers in the sector: contractual and those related to intellectual property (IP) protection.[28]

- Contractual disputes are, in general terms, *vertical* and arise where a counterparty to a purchase-and-sale contract either does not fully perform its terms (products are not delivered on time or payment is not made), or there is a disagreement between the counterparties as to the existence of a contract or its meaning or scope (in the case of the pandemic, for example, the scope of a *force majeure* clause).[29]

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[22] Traditionally, contracts can be written or oral.

[23] *Ibid*, at 686.

[24] Where there is a "contractual" dispute between parties, oral contracts give rise to two distinct uncertainties: a *baseline* uncertainty of demonstrating the *existence* of a contract, and the *evidentiary* challenges of establishing the *terms* of the contract alleged to have been breached.

[25] Given the changing dynamics of the sector and increasing international awareness of and attention to broader social issues, it is likely that the profile of disputes could become more complex in the coming years. "Briefing", *supra*. Or concerns about carbon footprint or other environmental matters: https://www.lawdonut.co.uk/business/sector-specific-law/clothing-manufacturer-legal-issues

[26] There are many different possible *causes of action* that will give rise to multiple – and innovative – plaintiffs and litigation. See for example litigation related to Auchan in France: https://www.business-humanrights.org/en/latest-news/auchan-lawsuit-re-garment-factories-in-bangladesh/, and to KiK in Germany: https://www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/

[27] Workers are not in a contractual relationship with retailers, brands, or purchasers; in this respect, they do not figure prominently in a "dispute" framework. "Briefing", *supra*: "The numerous legal, practical and financial barriers faced by foreign victims trying to access remedies in the home states of transnational corporations has been extensively documented." At 8.

[28] Intellectual property rights include trademarks, copyright (especially for design), patents (for materials), and trade secrets. See in particular Christine Cox and Jennifer Jenkins, "Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property", USC Annenberg School for Communication (2005).
http://learcenter.org/pdf/RTSJenkinsCox.pdf

[29] There are also other specific agreements subject to arbitration. See for example the *Accord on Fire and Building Safety in Bangladesh* (Accord) signed on 15 May 2013, an agreement between global brands and trade unions created in the aftermath of the Rana Plaza building collapse to establish a fire and building safety programme for workers in the textile industry in Bangladesh. The Permanent Court of Arbitration administers the arbitrations arising under the Accord.
https://pca-cpa.org/en/cases/152/

- IP-related disputes could be vertical (between a brand purchaser and manufacturers with which it has a working relationship) or diagonal (between a branch purchaser and another manufacturer), and more rarely horizontal (between brands or between manufacturers).[30]

*Effective* enforcement of rights, whether contractual or IP-related, depends on the "transparency and certainty"[31] of both *laws* and *institutions*.

Without robust IP laws,[32] for example, it is not just the brand that owns the IP that is affected: a manufacturer's ongoing relationship with the brand and its investments in a given production line are also put at risk. Similarly, the best laws on the book matter little if the enforcement framework is unresponsive because of complex or inaccessible procedures, institutional corruption,[33] jurisdictional limitations, or unavoidable delays – common even in the *normal* operation of national courts.[34]

Dispute resolution can be through *public* institutions, such as courts, or – mostly in the case of contractual disputes – *private* ones such as arbitration centres. Arbitration, it has

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[30] This depends on the nature of the alleged infringement. See European Commission, "IP in the Fashion Industry".
https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-02/EU_IP_HD_Fact_Sheet_IP-fashion-industry.pdf

[31] APEC, *International Commercial Disputes: A Guide to Arbitration and Dispute Resolution in APEC Member Economies*, at ii.
https://www.apec.org/publications/1999/12/international-commercial-disputes-a-guide-to-arbitration-and-dispute-resolution-in-apec-member-econo

[32] https://blog.ipleaders.in/fashion-industry-adopt-alternative-dispute-resolution-indian-perspective/

[33] See in particular *Chevron and TexPet v. Ecuador (II)*, (PCA Case No. 2009-23).
https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/341/chevron-and-texpet-v-ecuador-ii-
In its **Second Partial Award on Track II dated 30 August 2018** the Tribunal found:

> In Part V above, the Tribunal has found that the Lago Agrio Court, the Appellate Court, the Cassation Court and the Constitutional Court did not investigate Chevron's allegations of procedural fraud and judicial misconduct; and the Appellate, Cassation and Constitutional Courts also did not investigate the allegedly corrupt 'ghostwriting' of the Lago Agrio Judgment. This was not done in ignorance of Chevron's specific allegations at the time. In the Tribunal's view, these Courts had sufficient information available to them so as to amount (at least) to a strong prima facie case of judicial misconduct, procedural fraud in the Lago Agrio Litigation and (as regards the Appellate, Cassation and Constitutional Courts) the 'ghostwriting' of the Lago Agrio Judgment.

At para. 8.28.

[34] *Ibid*:

> Today's fashion industry can be rapid, but the court system is running much slower. Since such disputes may last months or years, at the moment of settlement the design of the dispute isn't really necessarily the same. As the trends are still evolving, the decision of courts can have a limited effect on the industry by the time the matter has been litigated and resolved.

been argued, "only functions well in legal systems that permit the parties to commercial disputes to reach final settlements through arbitration without much intervention from their courts."[35] With one caveat: enforcement of arbitration awards in itself could require recourse to national courts.

### What are the challenges with the existing frameworks?

Reliable *analyzable* data on dispute resolution in the sector are difficult to find. This is partly because basic differences in laws and institutions between countries compromise the comparability[36] of the underlying data: for example, higher costs or longer timeframes for litigation in one country might be counterbalanced by its specialised courts[37] or more effective enforcement of judgements. Within each country, litigation costs and timeframes before national courts depend on not just structural issues,[38] but also the complexity of the facts or the uncertainty of the law as new issues emerge.

In general terms, the following observations would be uncontroversial:

- Litigation before national courts tends to be laborious,[39] imposing heavy costs both directly (court or legal fees) and indirectly (distraction from the main business of the firm, or devoting scarce human resources to manage the litigation), with a particularly negative impact on the party with fewer resources. These costs are pronounced for small and medium-sized enterprises (SMEs).[40]

[35] APEC, *supra*, at i.
[36] See for example Lord Justice Jackson, "Review of Civil Litigation Costs: Preliminary Report", May 2009. The report canvasses the complexity and diversity of cost regimes in one developing and eight developed jurisdictions.
https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf
[37] "Arbitration Study", *supra*, at 13.
[38] See for example Lord Justice Jackson, "Review of Civil Litigation Costs", December 2009 – a nearly 600-page report on the causes of increasing civil litigation costs in England and how they have impeded access to justice. There is no single cause or, indeed, remedy; some of the identified problems - for example, "No win, no fee" or cost-shifting agreements – were initially considered *innovations* to help access.
https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf
[39] "Enforceable Arbitration," *supra*, relying on studies dating back to 1907: "court enforcement of contracts is often commercially unsatisfactory, time-consuming and expensive." At 686.
[40] *Review*, *ibid*: "There is concern that at the moment many SMEs do not have access to justice in respect of IP disputes, because of the prohibitively high costs of litigating in the [Patent County Court]." At 252. This, *despite* the fact that the PCC "exists in order to resolve lower value IP disputes and IP disputes between SMEs." This is not limited to one set of claims or court structures. As the *Review* observed, "SMEs should not be deterred from litigating by the fear of indeterminate liability for adverse costs." At 339.

- Litigation before national courts might well be unavoidable where there is an underlying disagreement as to the existence of a contract or the nature of the commercial relationship.[41]
- In some contexts, neither a sophisticated court structure[42] nor a resourceful litigant[43] provides effective protection against the "gaming" of the judicial process.
- In the textile sector, exporter-producers tend to be[44] in a significant power imbalance relative to brand purchasers.[45]
- In the absence of strong trade unions and other avenues of collective action, workers are in a deeply disadvantageous position relative to both suppliers and brand purchasers.

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[41] In one instance, the order was made by one party for textiles to be delivered to a third party. At issue was the existence of a contract between the seller and the ostensible buyer.
*UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016*, at 57.
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf

[42] *Chevron*, *supra* :

> [T]he Lago Agrio Judgment was left unremedied by the Lago Agrio Appellate Court and (subject to the issue of punitive damages) the Cassation and Constitutional Courts, with sufficient knowledge of the Claimants' allegations regarding gross judicial improprieties in the Lago Agrio Litigation and the corrupt 'ghostwriting' of the Lago Agrio Judgment.

At para. 8.51.

[43] Chevron's market capitalisation is US$280 bn.
https://companiesmarketcap.com/chevron/marketcap/

[44] There are correctives to the imbalance, not the least of which – as we have observed above – is the trade and diplomatic weight of a producer's home country and the surrounding NGO context. See in particular Lambooy, *supra*.

[45] The top fifteen clothing companies are from France, the US, Spain, Japan, Canada, Sweden, Italy, Germany, and the United Kingdom, with market capitalisation ranging from US$300 bn (LMVH) to US$10 bn for Next.
https://companiesmarketcap.com/clothing/largest-clothing-companies-by-market-cap/
Size matters. See European Centre for Constitutional and Human Rights Policy Paper, "*Farce majeure*: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers":

> The unequal relationship between brands and their suppliers manifests itself in purchase orders, which are largely contracts of adhesion, i.e. take-it-or-leave-it agreements – a point confirmed by many suppliers. Such contracts maximize the rights and interests of the party offering the contract, who will require that the other party accept the terms without negotiation, even though they are quite disadvantageous to the latter.

At 3.

- The pandemic has again[46] exposed key institutional shortcomings in the sector, with purchasers suspending or cancelling orders[47] or unilaterally changing contractual terms,[48] without effective or indeed *any* apparent recourse.[49]
- Modern business relations cut across multiple jurisdictions.[50] National courts tend to operate within defined subject matters,[51] cultural traditions,[52] and

[46] Cancellations because of general economic malaise have a long history. See "Arbitration in the Wool Textile Trade—The Franco-British Agreement" (1924), 15:11 Journal of the Textile Institute Proceedings 584:

> International arbitration is of course much more difficult, but a striking demonstration of the possibilities in that direction was made in 1921-22, when a large number of disputes arising out of American cancellations during the slump were submitted [...] to the arbitration of a Committee [...].

At 585.

[47] In Bangladesh alone, there were US$3 bn worth of orders cancelled or suspended *within the first month of the pandemic*. International Labour Organization, "Recommendations for garment manufacturers on how to address the COVID-19 pandemic," at 4. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/briefingnote/wcms_741642.pdf

[48] *Force majeure*, *supra*:

> PVH Corp (the parent company of Calvin Klein, Tommy Hilfiger and other brands) informed suppliers that it unilaterally changed the payment terms of "goods that are currently cut and in the production lines or finished goods" from 90 days to 120 days.

At 7.

[49] *Ibid.* Under its purchase agreements, the department store Kohl's has "the right to cancel orders 'in whole,' completely unilaterally, at its 'sole and absolute discretion,' and without 'any liability, cost of charge whatsoever'." At 5.

Another cancellation provision shifts the entire cost of "beyond our control" cancellations onto the manufacturer:

> We can ask you to suspend or cancel any delivery or order if we cannot use, or are hindered or prevented from using, the Goods because of any cause beyond our control ... If we suspend or cancel an order we will not be legally responsible for any direct or indirect damage or loss this may cause you.

At 7.

[50] "Arbitration Study", *supra*: "It is generally accepted that international litigation is unsatisfactory and has several uncertainties that greatly increase trading costs and pose significant barriers to trade and FDI." At 12.

[51] "Briefing", *supra*:

> In 2015, survivors and relatives of victims of the 2012 fire at the Ali Enterprises factory in Pakistan, which left 260 people dead and dozens more injured, filed a claim against KiK, the factory's main customer, in a regional court in Dortmund, Germany. They argued that KiK shares responsibility for the injuries and deaths due to the lack of fire safety measures at the factory. In 2016, the court, in a historic decision, accepted jurisdiction over the case and granted legal aid to the victims and their families.

At 9; highlight added.

[52] This was recognized early on in the life of arbitration facilities: "Franco-British Agreement", *supra*:

> Finally, its judgments should be such as will satisfy the sense of right and justice am ng those who are in the habit of conducting transactions similar to the one in dispute. In all these respects an Arbitration Tribunal. Properly constituted, offers advantages over a Court of Law. And in the last respect especially it is preferable when the dispute

geographic boundaries.[53] Transboundary *enforcement* of foreign judgements is not automatic[54] and depends on a complex web of domestic laws[55] and bilateral[56] and multilateral[57] treaties, itself giving rise to additional delays, costs, and uncertainty.[58] Arbitral awards may be enforced transnationally under the *New York Convention*.[59]

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> has arisen between people of different nationalities, each of whom is naturally suspicious of the impartiality of a foreign court in a matter affecting the interests of its own nationals on the one hand and aliens on the other.

At 584-5.

[53] See for example: https://www.viac.vn/en/arbitration/advantages-of-commercial-arbitration-a61.html

[54] "Arbitration Study", *supra*: "there is as yet no universally (or near universally) accepted regime for the enforcement of national court decisions across jurisdictions", at 17.

[55] *Ibid*:

> [M]ost risks are particular to international litigation. They include the risks of inconsistent or conflicting national laws, lack of requisite experience and expertise, enormous costs and time, parallel proceedings, the lack of confidentiality, and the difficulty of enforceability of judgments.

At 12.

[56] See for example the *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, as implemented in Canada.
https://laws-lois.justice.gc.ca/eng/acts/C-30/FullText.html
But note Article XII: application to a province is subject to further designation.

[57] See for example *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*.
https://www.hcch.net/en/instruments/conventions/full-text/?cid=78

[58] Baker MacKenzie, "Enforcement of Judgments", *Global Practice Guide* (Chambers.com, 2019):

> In certain cases, a foreign judgment granting non-monetary relief (ie, declaratory or injunctive) will be recognised and enforced in Canada (Pro Swing Inc. v Elta Gold Inc, [2006] 2 SCR 612). Such enforcement is possible where the foreign judgment was rendered by a court of competent jurisdiction, the rendering was final and the nature of the judgment was such that comity required it to be enforced. However, a foreign contempt order is quasi-criminal in nature and, accordingly, may not be enforced.

At 8.
https://www.bakermckenzie.com/-/media/files/people/pirie-john/chambers-enforcement-of-judgments.pdf?sc_lang=en&hash=E39EDAF54C69795406C0130F2C04AE0F

"Arbitration Study", *supra*:

> The Hague Convention of 30 June 2005 on Choice of Court Agreements39 and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters attempt to remedy the uncertain recognition and enforcement of foreign judgments. [...] However, the 2005 Convention has only been signed by the European Union, Denmark, Mexico, Montenegro, the United Kingdom, and Singapore. It remains to be seen whether the 2019 Judgments Convention, which took 17 years to negotiate, will have more success.

At 13; footnotes omitted.

[59] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*.
https://www.newyorkconvention.org/new+york+convention+texts
The *New York Convention* has 170 parties.
https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

- Whether before national courts or through arbitration, litigation tends to have a negative, and perhaps terminal, impact on commercial relations.[60] Where parties to a relationship wish to maintain commercial relations or, at the very least, terminate the relationship amicably, other avenues of dispute resolution should be explored.[61]
- Generalist domestic courts are not equipped to address highly technical commercial disputes[62] in terms of prevailing trade practice.[63]

A comparative table of characteristics can be found in Annex I.

### Why *now*?

Two factors outside the four corners of this study are likely to exacerbate pressures on producer-exporters and, therefore, their workers: carbon pricing[64] and human rights[65] considerations. Each of these is largely driven by importing countries or the home

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[60] Again, this was a key feature of early attempts at devising arbitration mechanisms in the textile sector. "Franco-British Agreement", *supra*:

> Except in one or two isolated cases, the awards of the Chamber's arbitrators have not been challenged, and in the speedy resumption of normal relations, the work has been of inestimable value to the trade as a whole.

At 585; highlight added.
See also "Enforceable Arbitration", *supra*: "Lengthy lawsuits also had an adverse effect on business relations, for few parties to court actions maintain connections with disputing customers during the period of the controversy." At 692.
And "Mediation, real or virtual":

> Litigation is the status-quo for dispute resolution, it is currently the most popular dispute resolution mechanism in India and is fraught with problems – its costly, time consuming, being adversarial it destroys pre – existing relationships and courts cannot provide relief that is not mandated by law.

https://indiantextilejournal.com/mediation-real-or-virtual/

[61] ICSID, "Background Paper on Investment Mediation, July 2021" at 5.
https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation_Oct.2021.pdf

[62] See also Vietnam International Arbitration Centre:

> [T]he right to choose arbitrators to resolve the dispute gives parties the opportunity to select experts with suitable expertise and practical experience to the nature of dispute (insurance, construction, finance, intellectual property, etc.). It helps to considerably improve the quality of dispute resolution in comparison with the option of administrative assignment of judges at the court.

Edited. https://www.viac.vn/en/arbitration/advantages-of-commercial-arbitration-a61.html

[63] "Enforceable Arbitration", *supra*, at 692.

[64] See EU Commission proposed "Regulation establishing a carbon border adjustment mechanism", COM(2021) 564 final.
https://ec.europa.eu/info/sites/default/files/carbon_border_adjustment_mechanism_0.pdf

[65] Sherman, *supra*.
See also the *Act on Corporate Due Diligence Obligations in Supply Chains*.
https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html

economies of purchasers; each will result in additional costs or certification requirements for imported products. Given existing imbalances both contractual and structural, it can be safely assumed that the *risks* and *costs* of additional import measures will, in large part, be transferred to producers – and, from there, potentially to the workers. To be sure, corrective measures *at this inflection point* will not reverse economic (or geopolitical) realities, but could, in some measure, blunt the impact of current and future regulatory and trade developments on the most vulnerable.

## Impediments to the establishment and functioning of rebalancing ADR

The principal object of a reform programme is not, of course, to merely *devise* model contractual provisions or optimal frameworks. To ensure that the models are adopted and the frameworks used, an ADR framework would need to be:

- implemented by insertion of model ADR contractual provisions in new and existing contracts, or through legislative or regulatory backstops, in multiple jurisdictions;
- made functional and reliably usable by ensuring long-term and stable resourcing; and
- protected against future erosion of its protective or rebalancing elements: even after reform, the same dynamics that plague the sector could, absent regular corrective measures, reemerge.

There are at least four impediments to the viability of a reform project in the sector.

### Ongoing imbalance in producer-purchaser relations

The largest textile and garment manufacturer in Vietnam has a market capitalization of just under $270 m.[66] It is expected that Vietnam's apparel market will reach $3 billion by 2022. This is still a third the size of the 15th largest brand purchaser. The "fashion and leather goods" revenues of LVMH alone[67] amount to 75% of Vietnam's total annual exports.[68] And whereas Vietnam, and its manufacturers, are dependent on brand purchasers, the purchasers tend to have a wide range of options in sourcing their materials.

This imbalance in trade and economic capacity has multiple consequences for the players. At a minimum at the level of private interactions, it translates into "take it or

[66] https://www.statista.com/statistics/1042582/vietnam-major-textile-companies-by-market-capitalization/#:~:text=In%202018%2C%20the%20Vietnam%20National,billion%20U.S.%20dollars%20by%202022

[67] https://www.lvmh.com/investors/profile/financial-indicators/#activite

[68] https://www.statista.com/statistics/986023/vietnam-export-value-textiles-garments/

leave it" contracts that are highly disadvantageous to the smaller player.[69] Should Vietnam seek to impose corrective measures, it can expect a number of outcomes, none of which would advance its long-term interests:

- loss of business by the branch purchaser affected
- investor-state litigation
- pressure by the developed country home jurisdiction of the purchaser
- state-to-state litigation in trade fora by the developed country home jurisdiction

*And* the resulting loss of business-climate reputation and trade-policy focus, not to mention the costs of defending itself in any litigation.

That difficult-to-correct substantive *contractual* imbalance is at the heart of the challenges faced by producers – when, for example, at the start of the pandemic, many purchasers simply cancelled existing orders. The resulting imbalance is independent of any *institutional* concerns or problems when it comes to procedures ("slow domestic courts"), or the interpretation, application, and enforcement of the contracts ("non-specialist judges"): where a one-sided contract permits unilateral cancellation or non-payment by a branch purchaser, a faster and more specialised arbitration relying on the underlying provisions would simply dismiss the producers' claims more quickly.

### Transboundary enforcement

Even a balanced contractual framework does not alter the dynamics of *enforcement*, which, almost by definition, militate strongly against producer interests. This is because prosecuting a contractual breach and enforcing an international award – whether by a court or an arbitral tribunal – in a highly globalized and dispersed sector raise special and challenging issues of their own.

Retailer or purchasers and producers are typically in different jurisdictions. As well, retailers tend not to have major operations or assets in the jurisdiction of the producers. This gives rise to two issues: the litigation or arbitration *venue*, and *enforcement*. The

[69] John F. Sherman, III, "Integrating Remedy into Supply Chain Contracts", International Bar Association Webinar, 22 June 2022: "What's wrong with traditional supply chain contracts when it comes to human rights? They offload buyer's HRTs responsibilities onto suppliers." At 4.
Contracts serve as compliance risk-transfer vehicles:

> Supplier promises by reps and warranties to comply with buyer's code of conduct
> Buyer conducts Compliance audits
> Buyer disclaims of third party beneficiary rights
> Supplier indemnifies buyer for all harm
> Buyer disclaims duty to monitor, duty to inspect, to force changes in supplier operations

At 5.

first is relatively easy to resolve – at least on paper[70] – but the second requires state cooperation: for example, in establishing the *juridical* framework for transboundary contracts or, as we have seen above, the *treaty* framework for extraterritorial enforcement of court orders.[71]

### Underlying contract laws

Even *balanced* substantive contractual provisions and solid judicial or arbitral institutions could be defeated in at least two ways:

- an inaccessible, overly complex, or unclear[72] *legal* framework for effective enforcement;[73] or

[70] See for example *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3):

> Claims arising out of alleged mistreatment caused to the investor by the state of Mississippi in the course of commercial litigation between the claimant and one of its competitors in the funeral home and funeral insurance business.

https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/24/loewen-v-usa

[71] Given the breadth of the membership of the *New York Convention*, this might not be an issue for *arbitral* awards.

[72] See Lambooy, *supra*, at 32-33. The table sets out the web of domestic and international hard and soft law (Indian, Dutch, ILO, and OECD Guidelines, *infra*) that applied to the underlying dispute.

[73] The Iranian contract law regime is a good example of excessive complexity to the point of inscrutability. As Mehdi Pirhaji, Rasul Mazaheri Kuhanestani, and Mohammad Reza Eskandari Pudeh point out in "Analysis of Contract Law in Iran", 6(6) Mediterranean Journal of Social Sciences 49, this is in part due to the wild diversity of the *sources* of private law in the Islamic Republic:

> In Private Law, Iranian Civil Code is strongly affected by the French Civil Code. Although the main resource of Iranian Civil Code, especially in its first volume, was the Islamic jurisprudence, the French, Belgian, and Swiss laws were also used in providing some Articles particularly in the second and the third volumes. Islamic Law is one of the features of Islam. Islam also includes doctrines and the principle of faith, which determines what a Muslim has to believe. It also includes Sharia which determines what any Muslim has to do. These are all specified by Devine Revelations.

At 49. Although the text is drawn from Roman Law, the jurisprudence appears to draw upon Islamic principles (at 51); much of the legal terminology is in Arabic, and influences on commentary, interpretation, and application include the Ottoman Civil Code. At 52.
https://www.researchgate.net/publication/283817838_Analysis_of_Contract_Law_in_Iran

- apparently neutral[74] choice of law or choice of forum[75] clauses that shift the risks of the contractual relationship onto the less powerful party.[76]

### The impact of trade and investment policy

Trade and investment policy can have an important impact not just on terms of trade but also on private business relationships. The obligations set out in trade and investment[77] agreements – for example, the protection of IP or investor rights, or the prohibition against discriminatory taxation or regulation – limit in some measure the legal capacity of countries to defend their domestic industries.[78]

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[74] For example:

> [A] very critical and fundamental concept of International Arbitration, which is the principle of competence-competence, meaning that the arbitral tribunal has jurisdiction to rule on the extent of its competence to hear a dispute in light of the arbitration agreement at issue.

https://www.shutts.com/IntlDisputesBlog/unconscionable-arbitration-agreements-the-impacts-of-uber-technologies-inc-v-heller

[75] See *Uber Technologies Inc. v. Heller*, [2020] SCC 16:

> The mediation and arbitration processes require US$14,500 in up-front administrative fees. This amount is close to Mr. Heller's annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into … Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.

https://www.canlii.org/en/ca/scc/doc/2020/2020scc16/2020scc16.html

[76] For a discussion of different approaches to contractual risk apportionment, see *Tilden Rent-A-Car Co. v. Clendenning*, 1978 CanLII 1446 (ON CA). The court noted the prevailing rule in *English* common law:

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The court observed that, "An analysis of the Canadian cases, however, indicates that the approach in this country has not been so rigid." The essence of the difference in approach was captured here:

> The Canadian court was impressed by the abuses which would result -- and, in England, have resulted -- from enabling companies to hold ignorant signatories to the letter of sweeping exemption clauses contained in contracts in standard form. The English courts, however, were much more impressed with the danger of furnishing an easy line of defence by which liars could evade contractual liabilities freely assumed.

https://canlii.ca/t/g1bxl

[77] Most transactions in the sector are contracts of sale rather than investments. At the same time, investment agreements or investor-state arbitration mechanisms provide additional protections to foreign investors in commercial relations that are not always available to domestic producers.

[78] This operates in two ways. The more direct impact is the threat of, or actual, litigation by an investor in respect of a protective measure. Concerns exist not in respect of an actual loss, but the fact of litigation:

> [T]he 2012 ICSID case **Veolia Propreté** resulted in a decision dismissing the investors claims and ruling in favor of the respondent state. In that case, a 2018 award dismissed a claim involving a long-term waste management contract in the Egyptian

To be sure, many of the core trade obligations are also *good governance* requirements that would also generally benefit domestic economic actors.[79] At the same time, it should be uncontroversial to observe that trade and investment treaty obligations coupled with severe imbalance in economic and commercial power *and* dependence on export markets[80] limit the capacity of *some* national governments in protecting their exporting industries.

> **To foster economic development and sustained growth in trade, [...] international disputes will require effective and efficient dispute resolution mechanisms.[81]**

## Evaluation

The preceding sections strike a note of caution: many of the problems of the sector are deeply structural and not given to fast and easy remedies. One example is telling: despite

governorate of Alexandria in which Veolia sought compensation for alleged damage resulting from an increase in the minimum wage following a change in the labor law.
http://arbitrationblog.kluwerarbitration.com/2019/07/26/impact-of-the-arab-spring-on-the-international-arbitration-landscape/
This could, in turn, result in regulatory chill: where a state forebears from enacting necessary measures for fear of being challenged.

[79] See, for example, Article X of the GATT:

> 3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
> (*b*) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.

Or Article 41 of the Agreement on the Trade-related aspects of Intellectual Property Rights (TRIPs Agreement):

> 2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
> 3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

[80] 85% of the exports of Bangladesh are in the sector.

[81] Petra Butler and Dharshini Prasad, "A Study of International Commercial Arbitration in the Commonwealth", [2020] the Commonwealth Secretariat, at 12.
https://thecommonwealth.org/news/arbitration-study-urges-countries-not-lose-foreign-investment-and-trade

being the seventh largest sector in terms of globally-traded products, the sector does not figure prominently in the use statistics of major international arbitration centres.[82]

Three broad conclusions guide the rest of the analysis:

- by providing more flexible, less costly, speedier procedures, and awards that are more easily enforced internationally, certain forms of ADR are preferable to litigation before domestic courts;
- imbalance in power relationships result in imbalanced contracts, and so regardless of the venue in which contractual disputes are resolved and the ensuing awards enforced, purely contractual outcomes are likely to be disadvantageous to the weaker party; and
- the oncoming layering of additional regulatory requirements onto the existing contractual relations should be accompanied by a rebalancing solution.

[82] "Arbitration Study", *supra*, at 36-8.

# CHAPTER 3: ALTERNATIVE DISPUTE RESOLUTION FRAMEWORKS AND SOLUTIONS

**Arbitration practitioners face the challenge of dealing with diverging legal systems and business practices, cultural differences, language barriers, and the demand for fast-paced decision making.**[83]

The preceding chapter has referred to "alternative dispute resolution" as a generic concept (mechanisms *alternative* to domestic courts) rather than a concrete set of policies, practices, or institutions. This chapter examines in more detail what those "alternatives" are and how they work.

### What does "ADR" mean?

In very general terms, ADR "refers to the different ways people can resolve disputes without a trial."[84] At this level of abstraction, ADR would also include bilateral negotiations,[85] rendering the concept *institutionally* unhelpful. This is because in the ordinary course, a contractual dispute does not end up in court the moment it arises: *formal* dispute resolution is typically preceded by attempts, on the part of disputing parties, to resolve the matter through negotiations *before* assuming the costs of recourse to formal or third party mechanisms.

For the purposes of this paper, a modified and workable definition of ADR would be:

> processes and techniques of conflict resolution that 1) involve recourse to third party assistance, and 2) fall outside formal means of resolution through direct governmental action.[86]

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[83] https://www.unilu.ch/en/further-education/faculty-of-law/cas-arbitration/

[84] https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml

[85] https://www.dol.gov/general/topic/labor-relations/adr

[86] See https://www.law.cornell.edu/wex/alternative_dispute_resolution. The two modifications to the definition are essential for identifying the proper ambit of the study of ADR here:

1. "Negotiations" or "transactions" in themselves are part and parcel of normal commercial conduct and do not require institutional framing. ADR concepts *and institution* are useful when transactions do not materialise and negotiations fail.

Again in broad terms, six types of institutionalized ADR can be identified[87]:

- Arbitration
- Conciliation
- Mediation
- Neutral evaluation
- Neutral fact-finding
- Customary dispute resolution

### Arbitration

Arbitration is an *adjudicative* process driven in large part by the disputing parties. Common features are:

- it is an *adversarial* process;
- arbitrators are typically selected *ad hoc* by the disputing parties;
- the disputing parties assume the costs of the arbitrators and venues;
- "tribunals" are presided over by arbitrators that have quasi-judicial functions and authorities;
- rulings are *binding* upon the disputing parties and thus *enforceable* through domestic courts[88]; and
- rulings are *final*, in that except on narrow grounds, they are not subject to further appeal to domestic courts.

"Arbitration" is a widely-used mechanism in interstate,[89] private-state,[90] and private commercial disputes; it is deployed for both transboundary and domestic dispute

2. All ADR is, in some form or another, either informed by, enabled, or enforced by some "governmental authority"; in a modern economy, there is no such thing as "outside governmental authority". At issue is the *nature* of that authority and the *scope* of its intrusion in bilateral settlement of disputes, not the existence of it.

[87] These can, in turn, be batched under "facilitative", "evaluative", and "adjudicative", but the broader categories are not helpful for this analysis.

[88] See for example the US *Federal Arbitration Act*, 9 U.S. Code § 9:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

https://www.law.cornell.edu/uscode/text/9/9

[89] See for example *Understanding on Rules and Procedures Governing the Settlement of Disputes* of the WTO (DSU). In addition to the formal state-to-state panel process, the DSU provides for arbitration under Articles 21, 22, and 25.
https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm

[90] ICSID: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf

resolution.[91] It may be entered into voluntarily by both parties as an *alternative* to litigation before domestic courts; it may be mandatory for a defendant (upon the request of a plaintiff), with choice of forum (court or arbitration) left to the plaintiff,[92] or mandatory for both parties.[93]

### Conciliation

"Conciliation" and "mediation" are sometimes used in the same framework,[94] and sometimes they are so used interchangeably.[95] The differences between "conciliation" and "mediation" appear to be contextual[96] or institutional[97] rather than conceptual. At

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UNCITRAL: https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration

[91] APEC, above.

[92] Investor-state disputes do not *require* an investor to go through arbitration in all instances; where the conditions are met, the investor has the option of having recourse to international arbitration. See for example Article VIII of the bilateral investment agreement between Switzerland and the Philippines:

> 2. If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration.

Cited in *SGS Société Générale de Surveillance v. Republic of the Philippines* ICSID Case N° ARB/02/6.

[93] More common, as we have seen in *Heller*, in contracts of adhesion.

[94] See, for example, Article 5 of the Dispute Settlement Understanding of the World Trade Organization:

> *Good Offices, Conciliation and Mediation*
>
> 1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

[95] UNCITRAL Mediation Rules, Article 1(2): "Mediation under the Rules is a process, whether referred to by the term mediation, conciliation or an expression of similar import [...]." Highlight added. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_mediation_rules_advance_copy.pdf

[96] See for example the important differences, in the context of family law, between conciliation and mediation:

| | | |
|---|---|---|
| **Regulation** | Mediators are regulated by the Code of Civil Procedure, 1908. | Conciliators are regulated by the Arbitration a Conciliation Act, 1996. |
| **End Result** | Mediation aims to reach an agreement between parties and it's enforceable by law. | Conciliation aims to come to a settleme agreement and it is executable as a decree of ci court. |

https://fmacs.org.uk/is-there-a-difference-between-mediation-and-conciliation/

[97] "Background", *supra*:

> ICSID mediation envisions the appointment of 1 mediator or 2 co-mediators by agreement of the parties, with the default being one mediator appointed by party agreement. By contrast, ICSID conciliation envisions a 3-member conciliation commission with each party appointing one conciliator and the third, presiding conciliator appointed by agreement;

the same time, for both analytical and institution-building purposes it would be useful to maintain a distinction between the two modalities based on the nature and extent of a third-party's engagement in the resolution of the dispute.

In this context, "conciliation" may be defined:

- as against arbitration, as a *voluntary* process; and
- as against mediation, as involving third party conciliators that *could* variously:
  - help clarify the issues,
  - propose potential solutions for consideration by the parties,[98]
  - serve as subject matter experts,[99]
  - issue neutral "evaluations" of the matter before them,[100] or
  - make recommendations, propose solutions, or draft settlement agreements.

### Mediation

"Mediation" is a voluntarily[101] *facilitated* bilateral negotiation:

> The intervention into a dispute or negotiation by an acceptable, impartial and neutral third party (with no decision-making power) to assist disputing

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> [T]he role of the conciliation commission is to clarify the issues in dispute, whereas the role of the mediator is solely to assist the parties with reaching a mutually agreeable solution [...].

At 4-5.

[98] "Unlike the conciliator who has an active role in the conciliation process (eg he can propose a solution to end the conflict) [...]."
https://www.cmap.fr/faq/what-is-the-difference-between-mediation-and-conciliation/?lang=en

[99] "Implementing the Standards of the OIE", G/SPS/GEN/437:

> Subject to the agreement of both parties, disputing countries can request mediation by a panel of independent experts selected by the Director General of the OIE. This process has several advantages, as it is not as resource-demanding as the formal WTO process and allows for technically based solutions. At the end of the process, the recommendations from the panel are communicated by the Director General to both parties.
>
> [The] mediation mechanism was effective in facilitating technical discussions that assisted in significantly narrowing initial differences.

Although the paper refers to "mediation", the structure more closely resembles what the current literature would describe as "conciliation".

[100] https://viamediationcentre.org/readnews/MjAz/Difference-between-Mediation-and-Conciliation

[101] In some jurisdictions, "mediation" is a mandatory part of the formal litigation process. To the extent that this reduces engagement in formal litigation, the process could help reduce the burden on the courts. But this requires the engagement of the courts in the first place.
https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html

parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.[102]

Mediation recognizes four core events in a given relationship:

1. the existence of an underlying relationship;
2. a disagreement as to the satisfactory performance by one side of an agreed term or condition of the relationship;
3. the breakdown of bilateral negotiations between the parties; and
4. a willingness on the part of the parties to the resolve the disagreement and *to continue the relationship*.[103]

The key features of mediation follow the function and the objective:

- Voluntary process *throughout*: the parties agreed to the rules, appoint the mediators, and select the venue.
- The mediator acts as a "facilitator" for the negotiating parties. This could involve "relationship-building or procedural assistance", although mediation remains fundamentally an informal process.
- Preparing for mediation involves a mediator "undertaking a comprehensive review of the issues"[104] and gaining a global understanding of the parties' relationship.
- The mediator encourages parties to explore options they not had not been previously contemplated,[105] or – more rarely[106] – proposes such options.
- Confidentiality of the process is a key element of mediation – this is as between each party and the mediator, between the two parties, and externally.
- An agreement at the end of mediation is usually drafted *by the parties*, and it would generally be enforceable between *as a contract*.
- Mediation is an *interest-based* procedure:

> In court litigation or arbitration, the outcome of a case is determined by the facts of the dispute and the applicable law. In a mediation, the parties can also be guided by their business interests. As such, the parties are free to choose an outcome that is oriented as much to the future of their business relationship as to their past conduct.[107]

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[102] https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html
[103] *Ibid*.
[104] *Ibid*.
[105] https://www.law.cornell.edu/wex/mediation
[106] It has been suggested that this function is more in line with the tasks of a conciliator.
[107] Highlight added.

### Neutral evaluation

This is a process where "a neutral third party hears presentations by disputants of their positions, then provides them with his or her evaluation of the case."[108] A voluntary process, "evaluation" is useful where the fact pattern is complex, the law is uncertain, and both parties and counsel acknowledge that an "early evaluation" would be useful in assessing whether to pursue costly and lengthy litigation. It has features similar to mediation and conciliation in that the parties "need to be invested in the process, be non-confrontational and willing to actively listen to the evaluator's opinions."[109] Because there is an element of an adversarial process, however, *unlike* mediation the evaluator will not engage in *ex parte* discussions. For these reasons, the technique is "at mid-point between mediation and binding adjudication."[110]

Neutral evaluation was initially a way for courts to manage their caseload; in some jurisdictions it remains connected to disputes that are *already* in litigation or arbitration.[111] However, the structure or modalities of the process could also be useful as a "reality check" outside the framework of ongoing litigation:[112] where, despite the risks and uncertainties, at least one of the disputing parties is persuaded that litigation could be more effective than mediation, but has some doubts about the outcome, or the other side shows confidence for their side. To ensure that the parties are confident that evaluation provides a realistic assessment of their chances of success in litigation, the evaluator must be "an expert in the substantive area of the dispute."[113]

### Neutral fact-finding

Neutral fact-finding is a narrower variation on neutral evaluation.[114] This involves investigation and analysis by an independent third party of a *factual* dispute – for example, of a threshold nature[115] – to make written findings.[116] This would be the case where there are disputes on meeting regulatory requirements in foreign jurisdictions.

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https://www.wipo.int/amc/en/mediation/what-mediation.html

[108] https://www.mediate.com/neutral-evaluation-an-effective-adr-process/

[109] *Ibid*.

[110] https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/eval.html

[111] https://www.buildingdisputestribunal.co.nz/early-neutral-evaluation/early-neutral-evaluation-model-clause/

[112] Justice Canada, *supra*: "in a private context, it may be triggered as soon as a deadlock arises in connection with the dispute."

[113] *Ibid*.

[114] "ADR in the Minnesota State Court System", at 3. https://www.mncourts.gov/mncourtsgov/media/scao_library/ADR/ADR_Info_Sheet.pdf

[115] http://www.adrprocesses.com/earlyNeutral.php

[116] "Minnesota", *supra*.

Typically, the factual report is non-binding unless the parties agree to be bound by it.[117] Even where a disputing party is seriously considering proceeding to litigation or arbitration, neutral fact-finding "can help narrow the dispute and shape the discovery process, possibly encouraging settlement."[118]

### Customary dispute resolution

Standard classifications of ADR processes inexplicably leave out[119] the oldest[120] non-adversarial dispute resolution mechanisms: those traditionally used by aboriginal societies. Given their complexity and diversity, for ease of reference, I will use the term *customary* dispute resolution mechanisms (CDRMs). Also because of their diversity (reflecting local cultural – mostly oral – traditions), it is not evident the extent to which customary concepts and practices are transposable outside their specific aboriginal context.[121] At the same time, it should be conceded that many procedures currently in place in target countries or at play in this study are *Western* adversarial transplants that are equally alien to many local cultures. CDRMs may provide additional insight missing in current praxis.

Indeed, studies of CDRMs have identified – and sought to address – issues that are commonplace in all transnational commercial transaction, an in particular in the textile sector: "power imbalances, cultural differences and language barriers along with theoretical concerns such as goodness of fit [...]."[122] Some of these challenges are directly relevant to the challenges of the sector:

> Another facet of power which plays an important role in conflict resolution is the degree to which Indigenous forums retain dependency upon the laws,

[117] Maryland Rules, Rule 17-102(k). https://govt.westlaw.com/mdc/Document/N22CFF090B79311DBB4ACEAAAE7EB7386?viewType=FullText&originationContext=documenttoc&transitionType=StatuteNavigator&contextData=%28sc.Default%29

[118] Mary Dunnewold, "What Every Law Student Should Know" (2009), 38(2) Student Lawyer. https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/what_every_law_student_should_know.pdf

[119] https://www.adrprocesses.com/

[120] Robert Neron, "ADR in the Aboriginal Context", ADR Institute of Canada. https://adric.ca/adr-in-the-aboriginal-context/

[121] See *ibid*: "due to the diversity and distinctiveness of the various aboriginal peoples living in Canada, there is a diversity of dispute resolution mechanisms that are contextual to the culture from which they come."

[122] Wenona Victor, "Alternative Dispute Resolution in Aboriginal Contexts" (2007), Canadian Human Rights Commission, at 8. https://www.chrc-ccdp.gc.ca/sites/default/files/adrred_en_1.pdf

> systems and resources outside of, and often in contradiction to, the Aboriginal culture, community, traditions and laws.[123]

Where the animating feature of the predominant modes of ADR is an "equitable balancing" of the parties' obligations under a given contract, CDRMs seek to restore "collective harmony".[124] Regardless of the modalities, CDRMs require a different appreciation of time and place.[125] The diversity of aboriginal practices also suggests an organic approach to institution-building.[126] An important aspect of CDRMs is *community* monitoring so as to *prevent* disputes in the first place.[127] Of particular note, "relationships and their preservation is often one of the main guiding principles to dispute resolution."[128]

In a commercial context, the results, though unpredictable, could be interesting:

> [F]our days spent "relationship-building" means the dispute itself is finally settled within an hour and all are happy with the outcome. This approach is compared to two days of intensive, stressful negotiation with little or no time spent on relationship-building, which may result in misunderstanding and stalemate.[129]

Finally – and, perhaps, heretically – CDRMs challenge the universalism of Western notions of "impartiality". Even as we seek the ideal of the mediator/conciliator/arbitrator as "an outsider, impartial and unbiased,"[130] in the context of an existing power imbalance, ADR is just as likely to replicate the deficiencies of court systems as to correct for them.

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[123] *Ibid*, at 10; highlight added.

[124] Neron, *supra*. See also *ibid:* "Since all life is connected and inter-related, ensuring 'balance' and 'harmony' is paramount." At 27.

[125] https://ama.asn.au/indigenous-dispute-resolution/; see also Victor, *supra*:

> For example, within many Aboriginal communities "work" takes a back seat to the "relationship-building" portion of any interaction. Many meetings and interactions begin with an extended period of time devoted to the informalities of simply sitting together, talking and laughing about everything but the issue at hand. To many, this segment of the get-together may appear frustrating, especially if the meeting ends with "let's get together again tomorrow to pick up where we have left off" when in fact, the meeting had not even yet started.

At 29.

[126] "Alternative Dispute Resolution in Aboriginal Communities", Northern Territory Law Reform Committee, Australia, (1992): "communities are best able to solve their own problems by developing their own strategies and programmes." At 2. https://justice.nt.gov.au/__data/assets/pdf_file/0005/483431/NTLRC-Report-17C-Alternative-Dispute-Resolution-in-Aboriginal-Communities.PDF

[127] *Ibid*, at 6.

[128] Victor, *supra*, at 27.

[129] *Ibid*, at 29-30.

[130] *Ibid*, at 30.

By valorizing "personal involvement," "first hand knowledge," and "ties to community and culture",[131] structures such as "village councils" could well enhance the mediation/conciliation function.[132]

## Analysis of ADR frameworks

The preceding discussion of the context of the sector (and its players) and various alternative models of dispute resolution (and their strengths and weaknesses) brings us inexorably to a simple conclusion: the problems are deep and real solutions are likely to be radical – and equally as likely, not susceptible of effective implementation.

Simple, but perhaps simplistic.

This section seeks to highlight key challenges – but also benefits – of each structure to help identify a reform path forward.

### Structures

#### ARBITRATION

Arbitration in the textile sector has long provenance.[133]

One of the early innovations to cut the costs of litigation of transboundary contracts before national courts was to settle jurisdiction in an arbitration agreement: by

[131] *Ibid*, at 31.
[132] *Ibid*, at 10-11.
[133] "Enforceable Arbitration," *supra*:

> [T]he Silk Association, now renamed the National Federation of Textiles, had provided its members with a voluntary arbitration tribunal set up in 1898. [...] In 1930 wool began to arbitrate its disputes through the American Arbitration Association, which, unlike the other two tribunals, is a nationwide organization handling labor, commercial, and international controversies for various industries as well as private disputes.

At 693-4.

addressing the form, applicable substantive law,[134] the seat,[135] and the venue for arbitration in the contract, parties reduced many of the uncertainties (and, therefore, costs) of litigation. The global proliferation of arbitration centres[136] provides a reasonable range of options to contracting parties as to location, procedural rules, and costs – not just of counsel, which exist regardless of venue, but also of the venue and the procedure itself.

At the outset, and assuming a substantively balanced contract, we can identify three challenges:

- Local producers may be wary of domestic courts and weary of litigation they will have experienced, but at least they are familiar with court procedures conducted in their own language in their own backyard, and they are likely to know lawyers they trust for local advice. The same level of familiarity may not be assumed in respect of ADR centres and international arbitration counsel.
- The five most popular arbitration frameworks are the International Chamber of Commerce (Paris), Singapore International Arbitration Centre, Hong Kong International Arbitration Center, London Court of International Arbitration, and

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[134] See, for example, the judicial review of the arbitration award in *Metalclad v. Mexico*, Supreme Court of British Columbia:
https://jusmundi.com/en/document/decision/en-metalclad-corporation-v-the-united-mexican-states-decision-of-the-supreme-court-of-british-columbia-on-the-challenge-by-the-petitioner-the-united-mexican-states-of-the-arbitration-award-2001-bcsc-664-wednesday-2nd-may-2001

> This proceeding involves a challenge by the Petitioner, the United Mexican States, ("Mexico") of an arbitration award (the "Award") issued on August 30, 2000 by a tribunal (the "Tribunal") constituted under Chapter 11 of the North American Free Trade Agreement ("NAFTA") between the United States of America, Mexico and Canada (the "Parties" or the "NAFTA Parties"). In the Award, the Tribunal granted damages in the amount of $16,685,000 (U.S.) against Mexico in favour of the Respondent, Metalclad Corporation ("Metalclad"), an American corporation established under the laws of the State of Delaware. Mexico seeks to set aside the Award. The matter comes before this Court because the place of the arbitration was designated to be Vancouver, B.C.

Highlight added. The applicable substantive law was the NAFTA (paras. 20 and 24); the "seat" of the arbitration was British Columbia (para. 39).

[135] See, in general: "The Place or 'Seat' of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration n° 10'623".
https://www.lalive.law/data/publications/msc_place_or_seat_of_arbitration_ASA2003.pdf
More particularly:
https://viamediationcentre.org/readnews/MjY5/Place-of-Arbitration-Seat-vs-Venue:

> In general, the 'seat' is a place where the court have supervisory and governing powers over the arbitral proceedings. However, the 'venue' is a place where the proceedings of arbitration such as hearing of witnesses, experts or the parties or the inspection of goods and properties are concluded.

[136] Shawn Kirby and Andrew Cottrell, "Comparing the duration and cost of international arbitration".
https://www.wr.no/en/news/publications/international-arbitration-update-december-2021/comparing-the-duration-and-cost-of-international-arbitration/

Arbitration Institute of the Stockholm Chamber of Commerce.[137] Presented with a purchase contract[138] that includes an arbitration clause – or, depending on the nature of the contract, multiple arbitration clauses[139] or an arbitration clause with multiple options[140] – *in principle* the local manufacturer has to seek specialized advice on the advisability of accepting the clause and thus a dispute resolution venue potentially half-way around the globe and applicable laws entirely unknown to the manufacturer.[141] *And*, having got the advice, then it should be in a position to *negotiate* a different venue with the purchaser. (In practice, to the extent that there are written contracts, these are contracts of adhesion; arbitration centres are pre-selected to reflect the interests of the stronger party.)

- In some arbitration centres, costs are scaled based on the amount in dispute and number of arbitrators. In this way, the upfront costs of arbitration itself are contained.[142] But these are only some of the upfront costs and do not include the cost of counsel specialized in international commercial arbitration.
- Although relatively speedy, arbitration can take 6-22 months to final resolution.[143] At the higher end, these timelines end up replicating domestic courts.[144] For this

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[137] *Ibid*.

[138] With the caveat that purchase contracts could be oral or written.

[139] See, for example, arbitration and mediation facilities offered by the World Intellectual Property Organization for fashion disputes: https://www.wipo.int/amc/en/center/specific-sectors/fashion/

[140] See, for example, the model arbitration clause options set out in:
https://www.swissarbitration.org/centre/arbitration/arbitration-clauses/

[141] Swiss Arbitration touts Swiss law as "favorite choice of law" in international contracts: "Swiss contract law provides parties with maximum autonomy and control over their contract, more than almost any other jurisdiction."
https://www.swissarbitration.org/swiss-arbitration/swiss-contract-laws/

[142] "Comparing", *surpa*. See for example the Singapore cost framework:

| | **Sole Arbitrator** | **Three Arbitrators** |
|---|---|---|
| US$1m dispute: | 50,036 (max 66,715) | 131,234 (max 174,979) |

These appear to be in line with the cost framework for the ICC:

| | **Sole Arbitrator** | **Three Arbitrators** |
|---|---|---|
| US$1m dispute: | 62,714 (average) | 141,472 (average) |

The costs are comparable to arbitration under Swiss rules:
https://www.swissarbitration.org/centre/arbitration/cost-calculator-2021/

[143] "Comparing", *supra*.

[144] In respect of Investor-State arbitration, it has been observed that, "Actual ISDS practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method of dispute resolution."
"Reform of Investor-State Dispute Settlement", UNCTAD, 2013, at 4.
https://unctad.org/system/files/official-document/webdiaepcb2013d4_en.pdf

> reason, and not surprisingly, arbitration centres are now introducing expedited alternatives to alternative dispute resolution.[145]

As we have already seen,[146] however, in lightly-negotiated contracts an arbitration clause could, in itself, create an imbalance in the relationship by discouraging recourse to dispute resolution altogether. And this is assuming an otherwise balanced contract. Given existing contractual practices, faster arbitration simply translates into speedier enforcement of an unequal contract in a venue far from home applying unknown laws against the smaller party in a dispute.

### NON-ADVERSARIAL PROCESSES

Non-adversarial options such as *mediation*, *conciliation*, or *neutral fact-finding/evaluation* offer credible alternative paths for dispute resolution even in unequal relationships. Of these, conciliation and neutral fact-finding offer the most workable structures for unequal relationships. Assuming that the *existing* unequal contractual framework will continue to operate in the future, we make the following four observations:

- A *mediator*, as we have seen, facilitates negotiations – including through *ex parte* communication with the parties – but does not otherwise intervene or interfere in the relationship. The outcome[147] of mediation is "contingent upon a number of contextual variables."[148] At least three of these variables are relevant to our analysis:
  - the existence of an unequal relationship in private or institutional settings,[149]

[145] *Ibid*: "Recent years have seen the arbitral institutions introduce alternative expedited procedures to address concerns of the increasing time and costs of international arbitration."
[146] *Heller*, *supra*.
[147] Jacob Bercovitch, J. Theodore Anagnoson and Donnette L. Wille, "Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations" (1991), 28(1) Journal of Peace Research 7:

> Medication outcomes may be perceived, and defined, very differently by an outside observer, the parties involved [or the mediator him/herself. Furthermore, outcomes may be seen as successful in the short terms and as unsuccessful in the longer term [...] or depending the extent to which they meet certain normative criteria [...].

At 9.
See also Marieke Kleiboer, "Understanding Success and Failure of International Mediation" (1996), 40(2) Journal of Conflict Resolution 360, at 361.
[148] *Ibid.*
[149] *Ibid*, at 10.

- the depth and strength of the pre-existing relationship[150] and the expected future relationship – one of the key determinants of whether to pursue litigation or non-adversarial alternative dispute resolution, and
- the nature of the underlying dispute.[151] We have already seen an example of this in Pandemic-related cancellations.

None of these variables *determines* the outcome of mediation, but they do complicate the analysis of its potential success in the context of highly unequal parties.[152]

- In the light of the foregoing, *conciliation* offers modest correctives that could help in the non-adversarial resolution of disputes between unequal parties. If we consider mediation as a facilitated *process*[153] leading to bilateral resolution, conciliation may be described as a tripartite search for a facilitated *solution* to the dispute. In this respect, we offer two observations.
  - Mediation can lock in existing inequalities and power imbalances through the notional impartiality or neutrality of a "facilitating" mediator;[154] a conciliator can offer substantive correctives to the relationship – and therefore, to the resolution – even as she remains strictly *impartial*.
  - Whereas cultural and linguistic factors – among others – could have an impact on the outcome of a mediated settlement, a conciliator's *expert* intervention can offer a path forward that, at once, preserves the parties' autonomy in arriving at a settlement *and* recognizes the importance of third party substantive contribution to the resolution of the dispute.
- Of the two "neutral" procedures, "evaluation" falls closer to a full adjudicative process. It is lighter than either formal litigation or arbitration, and in some measure less adversarial, but it does require involvement of counsel and a comprehensive case brief. And, of course, neutral evaluation does not in any way rebalance an unequal relationship; it merely identifies the adjudicative risks of the

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[150] *Ibid*, at 12.
[151] "Understanding", *supra*, at 364.
[152] *Ibid*, in particular at 368.
[153] Leah Wing, "Mediation and Inequality Reconsidered: Bringing the Discussion to the Table" (2009), 26(4) Conflict Resolution Quarterly 383, at 390.
[154] Wing, *ibid*, sets out the justification in the following terms:

> Inequality in participants' experience of the process or the outcome can occur if any aspect of the mediation process is not carried out properly; for example, if mediator neutrality is violated.
>
> Mediators and the mediation process are not responsible for societal, organizational, or interpersonal imbalances in power. In fact, attempting to address imbalances of power violates the fundamental belief in neutrality embedded in this mechanism.

At 387.

underlying dispute in the context of an unequal contract. The lighter "neutral fact-finding" could be useful where the dispute centres on matters that require sectoral expertise – IP or quality – but, again, does not address the problem of one-sided contracts and challenging contexts such as the Pandemic.

- In practice, it has been challenging to universalize CDRMs across even *similar* cultural contexts, and so its reach into and effectiveness for resolving international commercial disputes may well be limited. However, CDRM as a *concept* holds some promise because it is premised on both maintaining existing relationships *and* some notion of "rebalancing" (the existing literature does not explain this further). Unlike mediation, CDRMs take into account both "the social context and specific circumstances";[155] by concentrating on *relationships*, they validate the experience of the smaller party rather than negate or subsume it under notional *procedural* neutrality or impartiality.

### Contractual clauses

Model arbitration clauses are variations on a single theme[156] that includes the following elements:

[155] *Ibid*, at 391.

[156] See for example:

> Any dispute, controversy, or claim arising out of, or in relation to, this contract, including regarding the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Arbitration Centre in force on the date on which the Notice of Arbitration is submitted in accordance with those Rules.
>
> The number of arbitrators shall be... ("one"," three", "one or three");
>
> The seat of the arbitration shall be... (name of city in Switzerland, unless the parties agree on a city in another country);
>
> The arbitral proceedings shall be conducted in... (insert desired language).

Arbitration Model Clauses - Swiss Arbitration Association

Or:

> Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non- contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.
>
> The law of this arbitration clause shall be ... (Hong Kong law). *
>
> The seat of arbitration shall be ... (Hong Kong).
>
> The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language)." **

Model Clauses | HKIAC

Or:

> All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of

- the scope of matters covered by arbitration;
- the venue;
- the law governing the contract;
- the number of arbitrators;
- the place of arbitration; and/or
- the language of the arbitration.

Model mediation clauses are slightly differently structured to take account of the fact that mediation (and other forms of ADR) is generally meant to be voluntary. A *mediation* (or conciliation) clause could therefore have one of four forms:

1. purely facilitative;[157]
2. "first step" hortatory;[158]
3. mandatory;[159] or

> Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Arbitration Clause - ICC - International Chamber of Commerce (iccwbo.org)

[157] For example: "The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules."
https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/

[158] *Ibid*: "In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules."

[159] For example:

> Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Mediation of the Swiss Arbitration Centre in force on the date when the request for mediation was submitted in accordance with these Rules.

Highlight added.
https://www.swissarbitration.org/centre/mediation/mediation-clauses/
Similarly:

> (x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below.

Highlight added.
https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/

4. "waterfall":[160] "multi-tiered clauses typically require the parties to work their way through different dispute resolution processes."[161]

On the whole, *required* mediation might well not achieve the expected or stated purpose.[162]

Similar contractual clauses may be formulated for neutral evaluation or fact-finding, with one potentially important caveat: this technique, as we have seen, depends to a large extent on the specific subject-matter expertise of the evaluator or factfinder.[163] This means that recourse to generic arbitration frameworks might not be optimal. *Sector-specific* neutral evaluation might well require either a more comprehensive model clause[164] or a dedicated venue (preferably both). A model clause on neutral factfinding

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[160] For example, to require recourse to arbitration within a given timeframe:

> In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/

[161] https://www.buildingdisputestribunal.co.nz/resources/model-clauses/

See also World Intellectual Property Organization (WIPO), "Results of the WIPO Arbitration and Mediation Center International Survey on Dispute Resolution in Technology Transactions": "In interviews, many Respondents confirmed their use of multi-tier clauses providing for negotiation and mediation followed, if necessary, by arbitration or court litigation." At 19.
https://www.wipo.int/export/sites/www/amc/en/docs/surveyresults.pdf

[162] "Building", *Ibid*.

[163] Justice Canada, *supra*:

> In choosing a neutral evaluator, the parties should apply the following basic criteria: impartiality, a reputation for good judgement and fairness, experience in litigation, and to the greatest extent possible, expertise in the subject area of the dispute.

Highlight added.

[164] See generic clause:

> [Name of first party] and [Name of second party and Ors] hereinafter referred to as the parties, are parties to [[a contract entered into on or about [enter date]] or [ proceedings in the [ ] Court referred to as CIV- ]].
>
> The parties have agreed that all matters in dispute between them shall be referred to Early Neutral Evaluation by [Name of Evaluator] in accordance with the Agreement for Early Neutral Evaluation and Rules for Early Neutral Evaluation of the Building Disputes Tribunal (**BDT**) which procedures and rules are deemed to be incorporated by reference herein.
>
> [if the parties are unable to agree upon the identity of an Evaluator within five (5) working days from the date of this agreement, then the Evaluator shall be appointed by BDT upon the application of any party.]

https://www.buildingdisputestribunal.co.nz/early-neutral-evaluation/early-neutral-evaluation-model-clause/

by a sectoral expert would require either *ex ante* agreement as between the disputing parties on what constitutes "facts" for such an exercise, or a degree of indeterminacy as to the potential ambit the factfinder's scope of work.

Finally, a non-arbitration resolution framework might require a hard arbitration deadline to avoid a scenario where negotiation or mediation are used as delaying tactics:

> If either party is dissatisfied with the [factfinder's determination][mediation or conciliation outcomes], either party may, by service of a Notice of Arbitration, require the matter in dispute to be referred to arbitration in accordance with the Arbitration Rules of the [venue]."[165]

#### Enforcement mechanisms

Because of the *New York Convention*, arbitration provides the most effective *enforcement* framework for interjurisdictional disputes. All other alternative mechanisms rely on domestic enforcement of resulting settlement agreements – to the extent they are binding or the parties elect to make them binding.[166]

### Review of existing regional and international frameworks

Detailed comparative analysis of the specific rules of the numerous alternative dispute resolution centres now in operation is outside the scope of this study.[167] More important, it would not be helpful for at least four reasons:

1. The most critical features of ADR – expedited timeframes, independent third party involvement, privative clauses excluding court involvement, enforceability

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[165] https://www.buildingdisputestribunal.co.nz/resources/model-clauses/

[166] In the *Accord Arbitration*, the Parties:

> did not request to record their settlement in the form of an arbitral award on agreed terms, but rather requested the Tribunal to "issue an order for the termination of these arbitral proceedings (pursuant to Article 36(1) of the UNCITRAL Rules (2010)) with immediate effect." Consequently, the Tribunal shall adopt a termination order.

PCA CASE NO. 2016-36, at para. 35; highlight added.
https://pcacases.com/web/sendAttach/2438

[167] A report prepared for the African Development Bank assessing arbitration centres in three countries ran to 85 pages. Dr. Werner Jahnel, "Assessment Report of arbitration centres in Côte d'Ivoire, Egypt and Mauritius".
https://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%C3%B4te_d%E2%80%99Ivoire__Egypt_and_Mauritius.pdf

through the *New York Convention*, and party control over seat and venue[168] – appear to be common across the board.[169]

2. Certain features of more advanced or complex arbitration frameworks might well be attractive for specific litigants or in respect of specific disputes, [170] but whether each feature is *sectorally* useful or necessary is an open question.[171]
3. In the light of the systemic and structural issues identified above, it is not the details of the procedural rules[172] but rather the core imbalance in the producer-purchaser contractual relationship that appears to be the principal cause of the problems in the sector.
4. The interaction of domestic law, international conventions governing the sale of goods, and the scope of discretion of arbitrators is complex[173] and, again, outside the scope of this study.

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[168] Paula Plaza, "International Arbitration: A Comparative Analysis of the Rules of the ICC, HKIAC, and SIAC".
http://www.mjilonline.org/international-arbitration-a-comparative-analysis-of-the-rules-of-the-icc-hkiac-and-siac/

[169] See, for example, *ibid*, at 80-82.

[170] See for example the ICC's new rules:

> A new provision allowing the joinder of additional parties in the course of the arbitration (Article 7(5)), as well as an amendment allowing the consolidation of cases in presence of different parties (Article 10(b)), will make the ICC Rules even more suitable to these cases.

https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/

[171] *Ibid*. Three of ICC's new rules, though attractive, present conflicting cases of relevance:

> Transparency will be increased thanks to the introduction of a requirement for the parties to disclose third-party funding arrangements (Article 11(7)). The integrity of the proceedings will be further protected by the introduction of a provision empowering the arbitral tribunal to exclude from the proceedings new counsel in presence of a conflict of interests (Article 17(2)), and allowing the Court to disregard unconscionable arbitration agreements that may pose a risk to the validity of the award (Article 12(9)).

Third-party funding is likely not an issue in producer-purchaser disputes. Conflict should *in any event* be a bar to participation. And as we have, some of the biggest challenges with the sector are to be found in the substantive provisions of agreements rather than in the arbitration arrangements.

[172] See table in the Annex setting out the basic criteria used in assessing arbitration frameworks. Of note, substantive fairness of the underlying contracts is not one of these. "Assessment Report", *supra*.

[173] See for example, ICC arbitral award no. 11333:

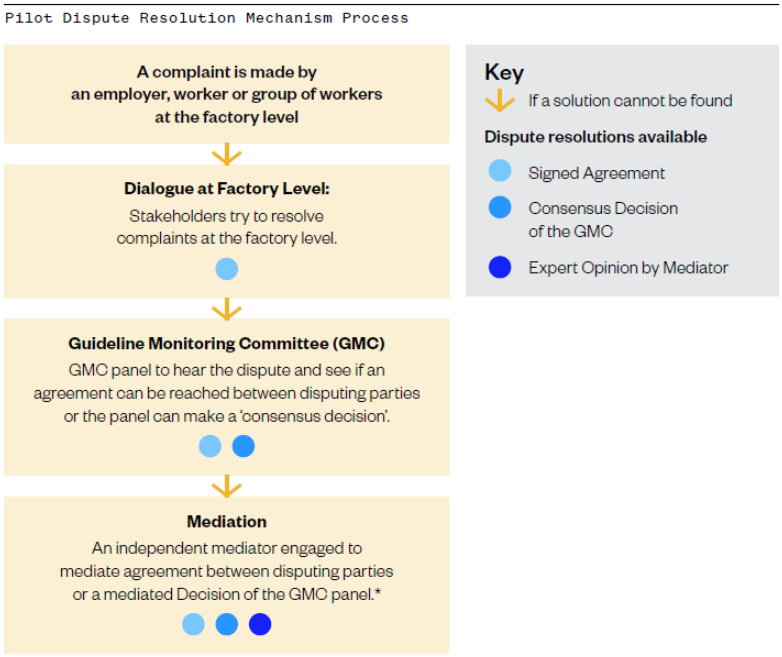
> [1] The buyer and the [seller] agreed in the Agreement that '[t]he law to be applied to the sales conditions is the French law', without any precision as to whether this reference includes the CISG or whether reference is made to domestic French law.
>
> [3] The CISG entered into force in France on 1 January 1988. Since then, it is the French law of international sales of goods. In other words, the CISG will govern all international contracts for the sale of goods within the meaning of Art. 1 CISG, provided that they satisfy the conditions laid down in Art. 1 [(1)(a) and (1)(b)], that the sale is not one of a kind excluded (Art. 2 or Art. 3) and that the parties have not excluded the application of the CISG (Art. 6).

This section will examine, in broad outline, existing sectoral mechanisms, ADR structures in the four countries that are the target of this study, and other frameworks with global mandates.

## Sectoral ADR

### ACT

ACT is "an agreement between 19 global brands and IndustriALL Global Union in pursuit of living wages for workers in textile and garment supply chains."[174] It engages in "collective bargaining at industry level."[175] It achieves its objectives through collective bargaining, freedom of association, and purchasing practices. ACT itself does not have a dispute resolution framework, but it does facilitate the negotiation of framework mechanisms in the sector. One such instance was negotiated in 2020 as a pilot project.[176] Of note, the mechanism relies in the first instance on a bilateral monitoring body, followed up by expert mediation; it does not have an arbitration mechanism.




[7] [U]nless the parties agreed to exclude the application of the CISG, the reference made to 'French law' in the Agreement leads to the application of the CISG, which is, since 1 January 1988, the French law of international sales of goods. Thus, the issue is whether by referring to French law the Parties intended to exclude the CISG and agreed on the application of the French Civil Code.
http://www.unilex.info/cisg/case/1163

[174] https://actonlivingwages.com/who-we-are/

[175] https://actonlivingwages.com/what-we-do/

[176] ACT, "From COVID-19 to Living Wages ACT 2020 Update", at 21. https://actonlivingwages.com/app/uploads/2021/04/From-COVID-19-to-Living-Wages-ACT-Report-2.pdf

## BANGLADESH ACCORD

In the aftermath of the Rana Plaza building collapse, global brands and trade unions entered into an agreement to establish a fire and building safety programme for workers in the textile industry in Bangladesh.[177] The Accord is administered by a highly expert secretariat to address health and safety issues and labour relations under various international codes.[178] It establishes two dispute resolution mechanisms.

The *Accord Safety & Health Complaints Mechanism*[179] uses the criteria for non-judicial grievance mechanisms prescribed by the UN Guiding Principles on Business and Human Rights (UNGPs).[180] The process has the following elements:

- Accord brand and union signatories agree to ensure that workers have access to effective and independent remedy.
- In an investigation, an RSC complaint handler will determine the remedy/remediation requirements with regard to safety and health.[181]
- The RSC team works with complainants and factory management to ensure that the requirements are fully implemented.
- If factory management does not comply with the required remediation/remedy of the SHCM, the RSC will implement a notice and warning process, which may lead to the termination of the business relationship.

This mechanism has been used extensively.[182]

The Accord also establishes an *arbitration* framework.[183] The framework provides for a review of the complaint by the "Steering Committee". The decision of the Committee may be appealed to "final and binding arbitration". The model clause had some weaknesses:

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[177] https://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf

[178] https://bangladeshaccord.org/about and https://bangladeshaccord.org/resources

[179] https://bangladeshaccord.org/updates/2020/11/02/review-accord-complaints-mechanism-ungps-criteria. In 2020, the complaints function of the Accord was handed over to an entity called RMG Sustainability Council.
https://www.rsc-bd.org/en/heath-safety

[180] Office of the High Commissioner for Human Rights, "Guiding Principles on Business and Human Rights", UN 2011, at 33. See also Annex III.
https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

[181] The procedure is also open to non-OSH complaints on referral by all the parties. Archive of complaints may be found here:
https://www.rsc-bd.org/storage/app/media/Archive_of_complaints_closed_by_Accord.pdf

[182] International Accord QAR Mar-22 (wsimg.com)

[183] Roger Alford, "Arbitrating Bangladesh Labor Rights (Part II)", Kluwer Arbitration Blog, 2013.

> There is no governing law clause, no arbitration seat, and no arbitration rules. If a party refuses to arbitrate, there will be no obvious court for the petitioner to file a motion to compel arbitration. [...]
>
> Only disputes "arising under" the Agreement are subject to arbitration, apparently limiting the scope to breach of contract and excluding disputes relating to third-party injuries that relate to the agreement. [184]

The Steering Committee feature ended up being a jurisdictional matter for the first decision to be issued under the arbitration clause. Composed of three members from each of the brands and the unions and an ILO chair, the committee was deadlocked because the chair refused to cast a vote. The arbitrators held that *absence* of a formal decision did not deprive them of appellate jurisdiction:

> Hence, the only way to release the petition from Steering Committee limbo would be for one of the union or brand representatives – presumably here, one of the union representatives – to 'cross the floor' and vote to reject it, which would then produce the majority vote that the Respondents contend is the condition to invoking arbitration. **The Accord signatories could not have intended to promote that kind of gamesmanship as the only way to access arbitration in the event of an evenly divided Steering Committee.** Equally, they could not have intended to deny a claimant access to arbitration in the event of a tie but make it available if the claimant lost by a majority or unanimous vote.[185]

Notably, the arbitrators made a distinction between expert review and arbitration:

> By providing for initial consideration of a petition by industry representatives on an Accord-established body (the Steering Committee), by a process that would generally be expected to take a limited amount of time (21 days), **the Accord provided for a serious examination in the first instance by actors with knowledge of, and a stake in the success of, the Accord**, but one that fell short of a full-blown arbitral proceeding [...] The purpose of the initial procedure before the Steering Committee is neither achieved nor compromised in any way by the circumstance whether the Steering Committee vote is in favor of the petitioner or respondent, or as here, an equal vote. Here, the Claimants did not secure from the Steering

[184] *Ibid*.
[185] Cited in Diane Disierto, "A Model for Business and Human Rights through International Arbitration under the Bangladesh Accord: The 2017 Decision on Admissibility Objection in Industrial Global Union and Uni Global Union", Kluwer Arbitration Blog 2017.

Committee the relief they sought, and it matters not that the result followed from a majority vote against them or an equal vote.[186]

### Regional ADR centres

Each of the four target countries has an ADR framework.

- The *Bangladesh International Arbitration Centre* (BIAC)[187] was established as a non-profit entity in 2011. It is supported by the International Chamber of Commerce-Bangladesh, the Dhaka Chamber of Commerce & Industry, and the Metropolitan Chamber of Commerce & Industry. It offers arbitration and mediation services subject to rules updated in 2019. Its panel of arbitrators includes eminent former judges or officials with no sectoral focus.[188]
- The *Belgrade Arbitration Center* (BAC)[189] has been in operation in 2014. It adopted its code of ethics only at the end of 2020. It appears to have had only one case.[190]
- The *National Commercial Arbitration Centre* (NCAC)[191] of Cambodia was established by law in 2009. Until 2020, a total of 25 cases had been submitted to the centre. Over 50% of the cases involved real estate or construction, and only 8% related to international trade.[192]
- Established in 1993, the *Vietnam International Arbitration Centre* (VIAC)[193] handled over 200 cases in 2020, with an average dispute value of $3.3 million. Just over 20% of the cases were international.[194]

The model clauses are standard form. So are the principal advantages (timeliness, party independence, commercial expertise). Cost structures vary and presumably reflect local conditions. None offers sector-specific services or statistics.

### International ADR centres

#### THE LEADING CENTRES

The five leading[195] international arbitration centres are:

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[186] *Ibid*.
[187] https://www.biac.org.bd/
[188] https://www.biac.org.bd/panel-of-arbitrators/
[189] https://www.arbitrationassociation.org/en/belgrade-arbitration-center/
[190] https://www.arbitrationassociation.org/en/belgrade-arbitration-center/awards-and-summaries/
[191] https://ncac.org.kh/
[192] https://ncac.org.kh/statistics/
[193] https://www.viac.vn/en
[194] https://www.viac.vn/images/Resources/Annual-Reports/2020/VIAC_Annual-Report.pdf
[195] Ashurst, "International arbitration: Which institution?" https://www.ashurst.com/-/media/ashurst/documents/news-and-insights/legal-updates/2017/december/quickguide---comparison-of-the-major-arbitral-institutions.pdf

- International Court of Arbitration of the International Chamber of Commerce (ICC)
- Singapore International Arbitration Centre (SIAC)
- Hong Kong International Arbitration Centre (HKIAC)
- London Court of International Arbitration (LCIA)
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

Those responding to a survey[196] identified the following factors[197] for selecting their preferred venue:

- greater support for arbitration by local courts and judiciary
- increased neutrality and impartiality of the local legal system
- better track record in enforcing agreements to arbitrate and arbitral awards

A brief review of the top two international arbitration facilities provides additional context.

### INTERNATIONAL COURT OF ARBITRATION (INTERNATIONAL CHAMBER OF COMMERCE)

The *ICC*, based in Paris, appears to be the most preferred institution.[198] The principal drivers for the preference were "the general reputation of the institution and the respondent's previous experience of that institution."[199] One element of the "general reputation" is quality control: "the arbitrators submit their draft awards to the ICC Court [...] for scrutiny."[200] Another is its expert staff. In 2020, it registered over 900

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See also White & Case, "2021 International Arbitration Survey: Adapting arbitration to a changing world", which had Swiss Arbitration in the top five, with Singapore and Hong Kong gaining in popularity.
https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/current-choices-future-adaptations

[196] White & Case, *ibid*.

[197] *Ibid*. The other choices were highly technical:
- ability to enforce decisions of emergency arbitrators or interim measures ordered by arbitral tribunals
- ability for local courts to deal remotely with arbitration-related matters
- allowing awards to be signed electronically
- political stability of the jurisdiction

third-party funding (non-recourse) permissible in the jurisdiction

[198] White & Case, *supra*.

[199] *Ibid*.

[200] Plaza, *supra*.

arbitrations[201] and 77 new mediations.[202] Its new rules,[203] in force as of 2021, focus on "greater efficiency, flexibility and transparency in both complex arbitrations and smaller cases."[204]

### SINGAPORE INTERNATIONAL ARBITRATION CENTRE

The *SIAC*[205] is a non-profit organization established in 1991. Based in Singapore, it has representative offices in India, the Americas, China, and Korea. It is the most preferred arbitration framework in the Asia-Pacific.[206] Like the ICC, it has an expert staff and a review function to ensure both quality and coherence.[207] In 2021, it received 469 new cases,[208] of which 405 were international.[209] Its mediation rules came into force only in 2020.[210]

Notably missing in this list is sectoral focus or expertise in textiles. The key differences appear to be in "the degree of administration, fee structure for arbitrators and timing for advances of costs, and choice of arbitrators."[211]

## Specialised ADR centres

We look at two specialised ADR centres, one related to the textile sector and the other outside of it.

### WIPO ARBITRATION AND MEDIATION CENTER

The *World Intellectual Property Organization* Arbitration and Mediation Center (AMC) was established in 1994 and offers "arbitration, mediation and expert determination

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[201] ICC International Court of Arbitration.
https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/
[202] ICC International Centre for ADR.
https://iccwbo.org/dispute-resolution-services/mediation/icc-international-centre-for-adr/
[203] https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/
[204] International Chamber of Commerce, International Court of Arbitration, "ICC Dispute Resolution 2020 Statistics", at 4.
https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/
[205] https://www.siac.org.sg/
[206] Annual Report 2021, at 5.
https://www.siac.org.sg/images/stories/articles/annual_report/SIAC-AR2021-FinalFA.pdf
[207] See FAQs:

> Pursuant to Rule 32.3 of the SIAC Rules 2016, prior to making any award, the Tribunal is required to submit the award in draft form to the Registrar. The Registrar may suggest modifications to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw the Tribunal's attention to points of substance. No award shall be made by a Tribunal until it has been approved by the Registrar as to its form.

https://www.siac.org.sg/faqs/siac-general-faqs#faq54
[208] SIAC Annual Report, *supra*, at 16.
[209] *Ibid*, at 19.
[210] *Ibid*, at 4.
[211] Plaza, *supra*.

procedures" to private parties for both contractual and non-contractual (IP infringement) disputes.[212] Over the last ten years, the AMC has administered around 900 cases (and an additional 750 requests for "good offices").[213] The mediation services offered by the AMC reflect the classical model;[214] the vast majority result in a settlement agreement.[215] Its "expert determination" framework[216] is similar to "neutral fact-finding". In particular:

- the parties can agree to informal and expeditious procedures;
- it can be combined with other modalities;
- the procedure is confidential; and
- either the parties or the Center can select and appoint the expert.[217]

The AMC does not provide for quality control and does not appear to have dedicated staff to support arbitrators, mediators, or experts. This helps keep fees modest.[218] At the same time, the AMC is developing sectoral expertise in the fashion industry, including by collaborating with "relevant stakeholders and organizations."[219]

### DRC

The *Fruit and Vegetable Dispute Resolution Corporation* (DRC) is a "member-based" sectoral framework for the resolution of business-to-business commercial disputes in

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[212] https://www.wipo.int/amc/en/center/background.html
[213] https://www.wipo.int/amc/en/center/caseload.html
[214] See, for example: "In a mediation procedure, a neutral intermediary, the mediator, helps the parties to reach a mutually satisfactory settlement of their dispute."
https://www.wipo.int/amc/en/mediation/what-mediation.html
[215] https://www.wipo.int/amc/en/center/caseload.html
[216] As defined:

> A consensual procedure in which the parties submit a specific matter (e.g, a technical question) to one or more experts who make a determination on the matter. The parties can agree for such outcome to be binding.

https://www.wipo.int/amc/en/center/wipo-adr.html
[217] https://www.wipo.int/amc/en/expert-determination/what-is-exp.html
[218] In the case of Expert Determinations:

| **Amount in Dispute** | **Administration Fee** | **Expert's Fees** | |
|---|---|---|---|
| Up to $250,000 | $250 | $2,500(*) | |
| Over $250,000 | 0.10% of the value of the expert determination, up to a maximum fee of $10,000 | $300-$600 per hour (**) | $1,500-$3,500 per day (**) |

https://www.wipo.int/amc/en/expert-determination/fees/index.html
[219] https://www.wipo.int/amc/en/center/specific-sectors/fashion/

North America.[220] It provides mediation and arbitration services to "all facets of the produce and transportation industry in fresh fruits and vegetables",[221] including buyers and vendors, as well as brokers and transportation providers, within North America. Membership of the DRC is mandatory for *Canadian* buyers and sellers of fruits and vegetables, and optional for all other participants in North America.

The DRC has three processes:

- a mediation framework;
- an expedited or abbreviated arbitration procedure (no hearing) for disputed amounts of less than $50,000; and
- a normal arbitration framework for greater disputed amounts.

The DRC monitors compliance with the awards; where a member fails to comply with an award, its membership is terminated and the DRC will help facilitate enforcement. The arbitrators tend not to be lawyers. Because the arbitrators are drawn mostly from retired experts in the sector, the awards reflect notions of fairness as well as legal considerations. Of note, the DRC:

- requires all members to conduct business in accordance with internationally recognized "fair and ethical trading" standards;
- sets out standard contractual provisions that apply by default in the absence of specific agreement;[222]
- requires all members to submit to mediation or arbitration to settle disputes, using rules that are also internationally recognized;
- provides services up to and including informal mediation at no additional cost beyond the membership fee;
- does not collect a percentage of a mediated settlement; and
- provides court enforceable decisions and awards.[223]

Unlike the other frameworks discussed in this paper, 80% of disputes are resolved through "mediation". The DRC's mediation services are more akin to conciliation or neutral evaluation, in that sectoral experts will review the matter and offer a preliminary view as to likelihood of success or one party or the other. Where parties fail to come to agreement through mediation, they may seek arbitration. Here, as well, sectoral experts

[220] https://www.fvdrc.com/
[221] https://www.fvdrc.com/membership/members/
[222] In the sector, many transactions are based on oral contracts.
[223] https://www.fvdrc.com/about/faqs/

have a considerable role: a third of the panel of arbitrators are not lawyers. This, the disputing parties have found, is particularly helpful where:

- the underlying dispute is about day-to-day business rather than specific contractual provisions; or
- the amount at issue is small and the parties do not consider it necessary for a lawyer to arbitrate the matter.

## Case studies

One of the benefits of ADR is confidentiality – often, the very fact of mediation or arbitration is not made public. Especially for non-adversarial dispute resolution where the parties seek to maintain an ongoing business relationship, confidentiality is not just a benefit but an imperative. This, in turn, poses a challenge for the proper study of the operation of ADR and its terms of success:[224] without knowing the details of a dispute, the nature of the power relationship, and the mediation dynamics (including the special skills or expertise of the mediator or conciliator), it would be difficult to draw meaningful conclusions from denatured fact patterns.

For these reasons, the "case study" section has been broadened to include not just examples of mediation or arbitration, but also – and crucially – government measures to address specific problems and other mechanisms that are not discussed in this paper.

### WIPO AMC

The WIPO AMC appears to be the only international ADR instance that is developing expertise in the sector – albeit for a highly specialised field, intellectual property. Four denatured "cases" – two related to fashion and two completely outside the sector – help highlight aspects of ADR that could be particularly beneficial to manufacturers.

#### MEDIATION

- **Luxury Goods:** A European watchmaking company and a US-based company entered into an exclusive distributorship agreement. The agreement included a "waterfall" dispute resolution clause: all disputes must be submitted to WIPO *Mediation* and, failing resolution, to WIPO Expedited Arbitration.
  A dispute arose in respect of unpaid bills and orders withheld by the US company. The matter went to mediation. The AMC proposed a list of candidates with specific expertise in trademarks and in the watch industry, and later appointed a mediator in accordance with the parties' choice.

[224] One major university with a strong international dispute resolution programme actually discourages research on mediation because of this.

The mediator held separate calls with each party, and then attended a joint mediation session in Geneva. With the mediator's help the parties concluded a settlement agreement at the end of the session. [225]

- **Copyright**: A Dutch company concluded a copyright license with a French company regarding the publication of a technical publication. The license agreement included a WIPO mediation clause. The licensee became insolvent and defaulted on the royalties due under the license. When the licensor requested the mediation procedure, the AMC, after consultation with the parties, and with approval of the court appointed liquidator, appointed an intellectual property specialist as the mediator. Following two meetings between the parties and the mediator, a settlement agreement was concluded.[226]

### "WATERFALL" PROCEDURE

A publishing house entered into a contract with a software company for the development of a new web presence. The project had to be completed within one year and included a clause submitting disputes to WIPO mediation and, if settlement could not be reached within 60 days, to WIPO expedited arbitration. After 18 months, the publishing house was not satisfied with the services delivered by the developer, refused to pay, threatened rescission of the contract, and asked for damages. The publishing house filed a request for mediation.

Although the parties failed to reach a settlement, mediation helped focus the issues that were addressed in the ensuing expedited arbitration proceeding.[227]

### ARBITRATION

The case had to do with trademark enforcement through normal court litigation between entities in multiple jurisdictions. The parties settled the disputes by entering into a new agreement that included a WIPO expedited arbitration clause. There was a new infringement allegation under the agreement, and this went to WIPO expedited arbitration proceedings.

Following consultations between the parties and the AMC, a trademark specialist was appointed as sole arbitrator. After two rounds of pleadings, the arbitrator conducted a one-day hearing and issued an award six months after the commencement of the proceedings. Finding partial infringement of the settlement agreement, the arbitrator

[225] https://www.wipo.int/amc/en/center/specific-sectors/fashion/
[226] https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ace_9/wipo_ace_9_3-main1.docx
[227] *Ibid*.

granted the primary remedy claimed and ordered the European company to refrain from infringing behavior.[228]

### PRELIMINARY ASSESSMENT

The AMC examples provide three useful lessons:

- A non-adversarial process such as mediation led by sector experts has the potential to resolve non-contentious disputes.
- "Waterfall" clauses have two benefits:
  - they provide a path forward in the event mediation (or other non-adversarial procedures) fails, thus highlighting for the parties the potential costs of failure to resolve a dispute; and
  - even where they fail to resolve a dispute, they could narrow any ensuing arbitration.
- Even in the case of highly contentious and court-litigated disputes, ADR mechanisms (such as arbitration) in *specialized* settings can help bring the dispute to a close.

#### Pandemic measures

The Pandemic gave rise to a great many order cancellations or invocation of *force majeure* clauses in the sector.[229] As we have seen, pre-existing commercial imbalances result in contractual terms that transfer most economic risks to the party less able to insure against it or to weather it. These imbalances exist in every walk of life; intervening crises merely exacerbate, and do not cause, their harmful effect in contractual arrangements.

One of the ways in which such imbalances can be remedied is through *ex post* risk reallocation or collective action. Indeed, we have seen such measures in the "bailouts" of the 2008 Financial Crisis. One risk-reallocation ADR scheme put in place in response to the Pandemic is worth a quick look.

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[228] https://www.wipo.int/amc/en/center/specific-sectors/fashion/

[229] THE COVID 19 PANDEMIC'S EFFECT ON THE TEXTILE INDUSTRY (baltictimes.com)

See also "Textile and garment", *supra*:

> For the moment, European and American retailers, the two destination markets for this sector, are still cancelling their orders. Cancelled orders are a cause for concern in many sourcing countries.
>
> [...] shippers are increasingly invoking 'force majeure' clauses within their contracts to halt their payments [...]

## RESOLUTION OF COMMERCIAL RENT ARREARS

The *Commercial Rent (Coronavirus) Act, 2022* (CRCA) of England and Wales sets out a six-month reprieve against forfeiture in case of non-payment of rent to enable the parties[230] to:

- negotiate existing arrears; or
- refer an element of the outstanding and eligible arrears for private arbitration[231] on a tenant's *viability* and *affordability*.[232]

## CASES

There have not been many cases under the scheme. The awards are helpful in five respects:

- The framework is ringfenced[233] and before arbitration may take place in respect of a request for permanent relief of "protected rent", basic conditions much be met.[234]

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[230] Pandemic arrears: first arbitration award finally published (cms-lawnow.com)

[231] Awards | Falcon Chambers Arbitration | FCA (falcon-chambersarbitration.com)

[232] *Commerz Real Investmentgesellschaft mbH Applicant v. RHL Realisations 2022 Limited (formerly Rush Hair Limited)* (co. no. 03774837):

> CRCA section 14 in turn deals with the award on the matter of relief from payment. If relief is potentially available, the protected rent debt may be written off in whole or part, or the tenant may be given time to pay (including by instalments), limited to a 2 year maximum deferral. Alternatively, as appropriate, the tenant may be granted no relief.

At para. 43.
CRCA_Final_Award_(Signed)_18.7.22.pdf (falcon-chambersarbitration.com)

[233] *Signet Trading Limited Applicant v. (1) Fprop Offices (Nominee) 4 Limited (2) Fprop Offices (Nominee) 5 Limited* (Final Award):

> The starting point in considering whether the 2022 Act applies to the rent payable in respect of the premises is to consider the wording of the 2022 Act itself.
>
> Section 1(1) of the 2022 Act refers to relief from payment of protected rent debts due from the tenant "under a business tenancy" and "rent" is defined in s.2 of the 2022 Act as an amount payable by the tenant "under the tenancy for possession and use of the premises comprised in the tenancy".
>
> The 2022 Act is therefore concerned with rent falling due pursuant to specific business tenancies relating to specific premises. Each business tenancy for which relief from payment is sought must be considered separately and must meet the criteria set out in the 2022 Act

At paras. 51-53.
Signet_Trading_Limited_v_Fprop_Offices_(Nominee)_4_Limited_(Final_Award).pdf (falcon-chambersarbitration.com)

[234] *Commerz*, *supra*, at 42 & 44.

- Relief may only be granted where the business of a party requesting relief is in fact viable or "would become viable if it were to be given any kind of permissible relief from payment of the (assumed) protected rent debt."[235]
- Settlement offers may be made directly through the arbitration request.[236]
- So as not to discourage recourse to arbitration, cost orders may only be made in respect of the arbitration fees.[237]
- The default position of the legislation is for the publication of the award.[238]

### PRELIMINARY ASSESSMENT

The relevance of this *domestic* mechanism for commercial rent relief for an *international* framework for the settlement of textile sector dispute is threefold:

- In the context of a global crisis affecting both property owners and commercial renters, the UK government established an *arbitration* framework with limited *substantive* risk-and-cost reallocation.
- The *risk* element – contained in the definition of "protected rent" – acknowledges that certain businesses were affected by pandemic-related government measures more than others, and the relief seeks to correct for those measures. The *cost* element – contained in the notion of *viability* – considers the relationship between the owner and the renter as ongoing and shifts the cost of any relief onto the owner *only* where the renter demonstrates the capacity to continue to provide benefits to the relationship.
- The framework specifically excludes counsel cost awards so as not to discourage recourse to the framework.

These elements will be useful in structuring a responsive resolution framework for sectoral disputes especially at times of crisis.

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[235] *Ibid*, at 58.
[236] *KXDNA Limited v. 60 SA Limited* (Award no. 1), at para. 4.
KXDNA_v_60_SA_Award_no_1.pdf (falcon-chambersarbitration.com)
[237] *Commerz*, *supra*: "So far as costs are concerned, CRCA section 19(7) provides that (arbitration fees aside) each party must bear its own costs. Therefore, costs are not an issue for me." At 77. Counsel cost awards "may act as a deterrent to tenants considering a reference to arbitration on the basis they have nothing to lose." "Pandemic arrears", *supra*.
[238] *Ibid*, at 78.

### National complaints mechanisms

The UK and Australia have established complaints mechanisms (with dispute resolution features) to manage relations between major grocery retailers and their suppliers.

#### AUSTRALIA

Along with a standard mediation/arbitration framework, the Australian Competition & Consumer Commission has established a two-stage complaints mechanism under its Food and Grocery Code comprising a "Code Arbiter" and an "Independent Reviewer".[239]

The Code Arbiter has an investigating and a resolution function, with a unique feature:

- uniquely, the Code Arbiter has authority from the retailer or wholesaler to enter into an agreement on their behalf to settle a dispute relating to their Code obligations;
- the process is launched on the basis of a confidential complaint from a supplier;[240]
- unless otherwise agreed, the process must be concluded within 20 business days; and
- remedies may include compensation or agreement variance.

Code Arbitrator determinations subject to review by a government-appointed Independent Reviewer. Even where a supplier agrees with a remedy, they may refer it to the Independent Reviewer for *systemic* concerns. This process is also confidential.

#### UNITED KINGDOM

The *Groceries (Supply Chain Practices) Market Investigation Order*[241] requires the UK's large grocery retailers to follow the Groceries Supply Code of Practice[242] (Code). The Code, published in 2009, sets out a number of good faith[243] and substantive[244] requirements, including in respect of commercial risk allocation.[245] The Code is

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[239] Mediation and arbitration may be invoked without recourse to the complaints framework. Where the complaints framework is engaged, the process must run its course before mediation or arbitration can be used.
https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct/resolving-disputes-with-retailers-or-wholesalers-under-the-food-and-grocery-code#options-for-resolving-your-dispute

[240] *Ibid*: "The Code Arbiter is not allowed to disclose to the retailer or wholesaler the identity of a supplier who has made a complaint, except with the supplier's express consent."

[241] https://www.gov.uk/government/publications/groceries-supply-code-of-practice

[242] https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice

[243] See Parts 2 and 3 governing "fair dealing" and "variation".

[244] See Part 4, "Prices and Payments".

[245] Article 10:

**Compensation for forecasting errors**

administered by the Groceries Code Adjudicator[246] (GCA). The GCA is funded by a levy on the largest grocery retailers in the UK. It may:

- launch investigations where there is a suspicion that one or more retailers have breached the Code;[247] or
- arbitrate[248] in disputes between retailers and suppliers.[249]

The investigative power of the GCA is subject to a statutory guidance document.[250] A review of the GCA found that:

- suppliers and retailers agreed with the GCA's approach to consider arbitration as a last resort, as it preserved relationships and saved costs;[251]
- in the three-year review period, there had been only one major investigation. This was not considered a drawback: "by using its powers only for the most serious

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(1) A Retailer must fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error in relation to Grocery products and attributable to that Retailer unless:

(a) that Retailer has prepared those forecasts in good faith and with due care, and following consultation with the Supplier; or (b) the Supply Agreement includes an express and unambiguous provision that full compensation is not appropriate.

(2) A Retailer must ensure that the basis on which it prepares any forecast has been communicated to the Supplier.

https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice#compensation-for-forecasting-errors

[246] https://www.gov.uk/government/organisations/groceries-code-adjudicator

[247] See for example the investigation against Asda:

The GCA received information from suppliers between March and July 2016 that indicated they were being asked for significant financial contributions to keep their business with Asda. [...]

The GCA continued to receive supply-side information about the way Project Renewal had been designed and implemented and in March 2017 held a further meeting with Asda to further intensify her approach to the issues raised. [...]

Asda suppliers, more than those to any other regulated retailer, reported having raised Code-related issues over the past year. Asda assured the GCA the lessons had been learned, and the results were a low point from which it now wanted to measure significant improvement.

https://www.gov.uk/government/case-studies/code-clarification-variation-of-supply-agreements

[248] There was only one arbitration in 2020.
https://www.gov.uk/government/publications/2019-to-2020-gca-annual-report-and-accounts/hc349_gca_annual_report_and_accounts_2019-2020#Appendix

[249] https://www.gov.uk/government/organisations/groceries-code-adjudicator/about

[250]
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511676/GCA_Statutory_Guidance_updated_March_2016.pdf

[251] UK Department for Business, Energy and Industrial Strategy, "Statutory Review of the Groceries Code Adjudicator: 2016-2019", at para. 21.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901016/gca-report.pdf

breaches, [GCA] had developed trust with the retailers", allowing to use soft powers to achieve regulator ends;[252]

- the GCA's three-stage approach to investigations was considered highly effective:
  1. making retailers aware of supplier concerns,
  2. requesting that retailer Chief Compliance Officers investigate the matter, and
  3. intervene if no satisfactory outcome presents itself;[253]
- the large retailers – the notional villains of the UK grocery market – reported that, "the GCA has had a positive impact on the groceries market, by creating a more level playing field for those who fall under its remit;"[254] and
- the combination of a strong investigative and enforcement framework, a clear code of conduct, and greater supplier familiarity with the Code[255] empowered suppliers to raise issues directly with retailers in order to solve bilateral issues.[256]

### PRELIMINARY ASSESSMENT

Elements of these procedures – for example, the "anonymous" complaints process – have come under scrutiny and criticism. As well, the investigative "Code" model works best when all of the major players are in and under the same jurisdiction. These instances are helpful, however, because they highlight the fact that "levelling the playing field" in sectors marked by significant imbalances between purchasers and suppliers requires some form of governmental institutional and substantive intervention, and – eventually – a large degree of buy-in from the more powerful interests.

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[252] *Ibid*, at para. 25. In particular:

> Large retailers reported that the effective and proportionate use of formal enforcement, combined with the collaborative approach (referred to in paragraph 28 above) and a high degree of scrutiny, had enabled the GCA to drive increased compliance on a sustained basis. The GCA's collaborative approach had also been effective in raising awareness of the Code with suppliers and it had given them confidence to raise issues with large retailers about disputes.

At para. 34.

[253] *Ibid*, at para. 28.

[254] *Ibid*, at para. 38. This was confirmed by other players in the supply chain:

> Large retailers, most suppliers and other parties in the grocery supply chain reported that the GCA has created a more level playing field and it had not limited the ability of the UK's groceries retailers to compete and provide a good consumer offer.

At para. 8.

[255] *Ibid*. See, for example: "In 2017, the GCA launched a Code Confident campaign which encouraged suppliers to "Know the Code; Get Trained; and Speak Up" to the GCA and to the regulated retailers' Code Compliance Officers." At para. 71.

[256] *Ibid*, at paras 68-9.

### International complaints framework

The OECD *Guidelines for Multinational Enterprises*[257] set out non-binding "principles and standards of good practice consistent with applicable laws and internationally recognised standards" agreed by OECD members.[258] These are in respect of investments, rather than transboundary commercial transactions. The principles and policies constitute a code of good practice for business interests. It is not necessary to delve too deeply in the details here. Rather, of interest is two other points:

- the *fact* of comprehensive guidelines for business conduct covering human rights,[259] industrial relations,[260] and the environment,[261] among others, negotiated and agreed under the auspices of an international organization; and
- the establishment of *National Contact Points* (NCPs).[262]

NCPs have four functions:

1. promote the Guidelines and respond to enquiries;
2. serve as a grievance mechanism to resolve specific cases of non-observance of the Guidelines;
3. cooperate with other NCPs in transnational matters; and
4. report to the Investment Committee comprising representatives of adhering countries.[263]

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[257] OECD, 2011. https://www.oecd.org/daf/inv/mne/48004323.pdf

[258] *Ibid*, at 17.

[259] *Ibid*:

> States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations [….]

At 31; highlight added.

[260] *Ibid*: "Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards." At 35; highlight added.

[261] *Ibid*:

> Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.

At 42; highlight added.

[262] *Ibid*, at 68.

[263] *Ibid*.

Governments have committed to provide adequate human and financial resources to the NCPs so that they may carry out those functions effectively.

In their twentieth year of operation, the NCPs handled 54 cases, for a cumulative total of 575.[264] Of note, agreement was reaching in "54% of all cases where mediation occurred."[265]

The 2020 Annual Report sets out two mediation and conciliation case studies.[266] In each instances, the relevant NCP was an official of the *home* country of the investing multinational entity *operating* in a different country. The support of the NCP for the mediation and conciliation processes appears to have been instrumental in addressing conduct affecting workers in the host country. And each entailed commitments for future conduct that required further follow-up[267] by the NCP.

### Evaluation

The preceding review has brought the broad outlines of a dispute resolution framework for the textile sector into greater focus. The following seven observations will guide the development of our model in the next section:

- *Arbitration* is a necessary element of any private dispute resolution framework – at a minimum, as we have seen, as a backstop, but also because arbitration awards are generally more easily enforceable across jurisdictions than court decisions. However, arbitration is not optimal as *routine* recourse for the following four reasons:
  - adversarial processes tend to have a negative impact – including termination – on ongoing business relations and should be considered only where the relationship is no longer salvageable;
  - however streamlined, *all* adversarial processes are costly in both financial and human resources terms;
  - in the absence of substantive correctives, given the *ex ante* imbalance in relations and existing contractual provisions, a more effective dispute resolution framework simply ends up enforcing already unequal and disadvantageous contracts; and

[264] "Annual Report on the OECD Guidelines for Multinational Enterprises 2020", OECD 2021, at 3. http://mneguidelines.oecd.org/2020-Annual-Report-MNE-Guidelines-EN.pdf
[265] *Ibid*, at 10.
[266] *Ibid*, at 11; see Annex II.
[267] The report sets out other instances of "positive development" as a result of NCP follow-up. *Ibid*, at 16.

    - in any event, arbitration is invariably between two parties to a contract, and do not, as a matter of course, take into account the interests of affected parties (such as workers).
- Traditional *mediation* has the potential of locking in and exacerbating existing power imbalances (the *impartiality* and *neutrality* of a mediator can give a patina of respectability and credibility to an otherwise flawed process). In some instances, however, combined with expedited arbitration, mediation has the potential of reducing contentious issues and therefore the costs of arbitration and its impact on ongoing business relations.
- Expert intermediation – or, in modern parlance, *conciliation* – offers three significant benefits:
    - sectoral experts tend to be more sensitive to – or, at any rate, more aware of – built-in imbalances in business relationships;
    - unlike mediators, conciliators may offer solutions based on their own expertise and sectoral knowledge; properly structured, conciliation as a framework can offer basic correctives to these imbalances; and
    - like mediation, conciliation preserves business relationship; unlike mediation, by offering potential correctives to the relationship, it may help deepen and strengthen those relationship.[268]
- As the Bangladesh Accord arbitration findings demonstrated, however, careful thought must be given in structuring the right balance between expert review or conciliation, and arbitration.
- The core problems of the sector are *substantive*. In the case studies, as well as in the ACT, Bangladesh, DRC, and OECD models, we have seen a number of different solutions to substantive imbalances. These include:
    - standard default contractual provisions;
    - codes of conduct – even more effective when negotiated multilaterally;
    - widespread brand adherence and government involvement in both substance and structure should not be discounted; and
    - correctives built into arbitration frameworks.
- An ombuds, complaints, or investigative function within an institutional structure supported at least in part by purchasers and preferably backstopped, as in the case of the OECD or the Bangladesh Accord, with government commitments, could help develop, popularize, and implement best practices.
- No mechanism will function properly without an effective education, outreach, awareness-raising, and training campaign from the outside, and a strong

[268] We have seen variations of this in the UK CGA framework.

compliance culture from within the sector and its players. This is especially true for SMEs.[269]

[269] "Arbitration Study", at 34.

# CHAPTER 4: A MORE LEVEL PLAYING FIELD

Arbitration frameworks exist in each of the target countries; international commercial arbitration centres not only dot the globe but compete with ever elaborate rules, innovations, and offerings. Many, if not all, arbitration centres have expedited facilities and scaled fee structures, so there are no apparent structural barriers to *access* to arbitration (or other ADR).

The principal problems of the sector are substantive and not procedural: contracts arising out of deeply unequal relationships perversely allocate risks and impose costs on the weaker party. Given the structure of the sector, additional importer regulations, whether for carbon capture or human rights concerns, are likely to further transfer costs and risks to the developing country producers – or their workers.[270]

To be effective and longstanding, sector-wide reform must tackle and correct that imbalance; doing so would require widespread brand-purchaser buy-in as well as supplier cohesion. In the light of competition law concerns, the "prisoners' dilemma", and competitive pressures, it would be unrealistic to expect the one or the other to arise organically. A trilateral sectoral code[271] involving suppliers, purchasers, *and* implicated governments beginning incrementally from "best practices" and default balanced substantive provisions[272] would be a reasonable starting point for more structural rebalancing of the relationships. In the absence of strong local trade unions, such a structure should benefit from workers' advocates in formal or *ad hoc* engagements.

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[270] Sherman, *supra*.

[271] Lambooy, *supra*. Codes are not alien to the sector. See for example "Fair Wear Foundation", a "Multi Stakeholder Initiative [...] that supports and promotes good labour conditions in the garment industry." At 17.
www.fairwear.org
See also "ACT Update":

> ACT is an agreement between 21 global brands and IndustriALL Global Union in pursuit of living wages for workers in textile and garment supply chains. We believe that collective bargaining at industry level, enabled by freedom of association and responsible purchasing practices, is the most realistic pathway to making an impact on wages.

At 6.

[272] See DRC, *supra*.

This chapter is more modest in its outlook: knowing what we know about the imbalance and the substantive challenges of the sector, how do we structure an optimal dispute resolution framework?

## A "Waterfall" conciliation framework

Building on the conclusions of the last section, the following five considerations serve as the basis for an optimal *sectoral* dispute resolution framework:

- The mechanism would be housed in a *specialized venue* financed in part by brand-purchaser levies and with an express mandate to train and inform SME producers in ADR.
- An independent *complaints or ombuds* function would have the mandate to engage all players, and to investigate and publicise, where appropriate, egregious departures from sector norms.
- A modified form of *arbitration*[273] should be kept as an option to allow a level of predictability and security for both parties in the operation and enforcement of their contracts. At the same time, it must remain a last resort because it disrupts ongoing relationships, it can be costly, and in any event, it ends up enforcing unequal contracts.
- *Mediation* in its classical sense should always be an option for the parties, but given the structure of the sector, not the preferred choice.
- The optimal *procedure* would be a mandatory "waterfall" *conciliation* mechanism, with a neutral fact-finding option.

### Venue

The textiles sector was one of the pioneers of commercial arbitration.[274] For that purpose, specialized textiles dispute resolution centres were established both locally and internationally.[275] Despite the size of the sector, textiles do not form a significant part of the business of mediation and arbitration in general centres. There are likely two reasons for this:

- the extreme one-sidedness of contracts does not leave much room for mediated resolution or balanced arbitration; and
- in smaller part, the absence of a specialized textile venue.

[273] See ICC rule changes and the pandemic arrears framework, *supra*.
[274] "Franco-British Agreement", *supra*.
[275] *Ibid*, and "Enforceable Arbitration", *supra*.

The relative success of specialized venues in sectors with similar power profiles[276] provides some support for the latter argument.

A sector-specific dispute resolution venue for each producer market is not likely to be viable. At the same time, local arbitration centres provide services in local languages and have facilities close to the producers, thus reducing the costs and other challenges of ADR. A sectoral ADR venue would have the following three characteristics:

1. to keep footprint costs reasonable, it should be a hybrid venue;
2. its staff should specialize in textile sector disputes, collect and analyze data, develop training modules for mediators and arbitrators, and engage in public relations, advocacy, and information dissemination with the sector; and
3. the venue should have the capacity to enter into agreements with regional arbitration centres for sharing facilities, service and filing of documents, mediator/arbitrator referrals, and training activities, while at the same time ensuring neutrality.

### Model contractual clause

A "Waterfall" clause establishes a sequence of mandatory events for the treatment of a dispute. There is some disagreement whether "mandatory" negotiation or mediation is a net positive. At the same time, even in certain formal dispute resolution frameworks mediation has been instituted as a required step. And, as we have seen, in some contexts, a required pause before formal arbitration might well lead to either settlement in full or a narrowing of the dispute. If an *expert-driven* and specialized venue is agreed, "conciliation" – an expert-driven mediation framework – is likely to be more effective in settling disputes than traditional mediation.

In this instance, the proposed "Waterfall" approach would be a combination of conciliation and arbitration, supplemented by "neutral fact-finding" and the possibility of a without-prejudice reference to mediation:

1. Mandatory Conciliation
    a. Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to conciliation in accordance with the [Sectoral Venue or Specialised Rules].
    b. The place of conciliation shall be [specify place].

[276] See the DRC and the UK Code models, *supra*.

c. The language to be used in the conciliation shall be [specify language].

2. Mandatory Arbitration
   a. If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the conciliation within [60][90] days of the commencement of the conciliation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the [Sectoral Venue or Specialised Rules – Expedited Arbitration depending on the value].
   b. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the conciliation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the [Sectoral Venue or Specialised Rules].
   c. [The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators].]
   d. The place of arbitration shall be [specify place].
   e. The language to be used in the arbitral proceedings shall be [specify language].
   f. Subject to paragraph (g), the dispute, controversy, or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].
   g. Where *force majeure* is found to exist, the arbitral tribunal may consider each party's viability, capacity to allocate risk, and affordability in determining the award.[277]
3. Expert Determination
   a. At any time in the course of conciliation or arbitration, the parties may agree to refer a discrete question of fact for Expert Determination in accordance with the in accordance with the Expert Determination Rules of the [venue].
   b. Where parties agree with the findings of the Expert Determination, those findings will form an agreed basis of conciliation and, in the case of arbitration, will be binding to the extent relevant on the arbitrator.
4. Mediation
   a. Without prejudice to the framework set out above, the  may at any time submit a matter for mediation in accordance with the [Sectoral Venue or Specialised Rules].

[277] Awards | Falcon Chambers Arbitration | FCA (falcon-chambersarbitration.com)

### Criteria for the selection and verification of arbitrators, conciliators, experts, and mediators

In line with the approach to the venue and the dispute resolution framework, it is proposed that:

- a panel of conciliators and experts be selected on the basis of experience in diplomacy or negotiations in the sector;
- a panel of arbitrators be selected with a mix of legal, commercial arbitration, and sectoral experience; and
- a panel of mediators be selected principally on the basis of deep mediation experience in the covered regions.

The primary method of *appointment* should be party control and consensus, with a possibility for the parties, where they cannot agree on conciliator or the arbitrator, to refer appointment, along with criteria, to the venue.

The ICC's new rule provides an additional layer of protection for the parties; it should be considered:

> Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the [venue/Board of the venue] may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.[278]

### Rules of procedure

A modern set of rules, comparable to the standard guaranteed by the ICC, LCIA, Swiss Rules or similar modern arbitration rules, to be developed in consultation with the stakeholders.

## Clarification of relationship with local, transnational, or international law

### Institutional compatibility with local laws

The African Development Bank Assessment Report analysed a number of criteria that would be both relevant and useful here:

- Arbitration friendly environment at the seat of the venue (notably regarding the laws of the seat of the venue, if such is the place of arbitration)

[278] https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_12

- Arbitration friendly state court intervention (if seat of venue is the place of arbitration)
- No impediment to enforcement
- State court intervention limited or representing no risk in the light of the neutrality requirement[279]

The third bullet might be supplemented by "being party to the *New York Convention*," and overall we might add, "friendliness and compatibility of the domestic judicial, legal, and enforcement framework with all forms of alternative dispute resolution."

#### Enforceability of contractual clauses and arbitration awards in the light of imbalance in power and economic structures

The ICC has moved to address the question of imbalance in procedural terms. Opening arbitration awards or conciliation settlements to court challenges on substantive or equity grounds could well vitiate much of the gains of alternative dispute resolution. The solution to the problem of imbalance is, as has been noted above, through *ex ante* codes of conduct, changes in standard form contractual practices, and move towards more balanced resolution rather than enforcement of unbalanced contracts.

### Desirable elements

#### Review or appellate structure

The ICC and the SIAC provide for internal review frameworks to ensure both coherence and quality for arbitration awards. The Australian Code sets out the possibility of a "Reviewer" to address concerns about Code Arbiters. A review framework has both positive and negative elements that need to be considered in the light of the requirements of the sector:

- Mediation and conciliation agreements or settlements should, on the whole, not be subject to further review.
- If the venue is structured properly, arbitration will be rare and focused. In any event, routine and speedy institutional review of awards by a permanent expert body could be useful in enhancing the legitimacy of the venue – and, at the same time, avoid additional counsel costs and delays in an appeal.
- A review framework will impose additional administrative costs on the venue that will need to be defrayed either through an increase in the costs of arbitration or third party financing.

[279] Jahnel, *supra*, at 49.

### Specialised secretariat

A specialised secretariat has been identified as an important factor in determining choice of venue for arbitration. Properly structured, it could also serve an important function for mediation and conciliation. A secretariat would be invaluable for developing and delivering training materials and for advocacy, outreach, and information dissemination.

A full-time and permanent secretariat is costly to maintain. This could be defrayed through a membership framework, or through third party financing.

### A complaints or ombuds function

> **A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it.**[280]

Dispute *prevention* is one of the key principles set out in the UNCTAD reform paper.[281] One way to achieve this, as various fora discussed above have demonstrated, is through a rigorous independent complaints or ombuds framework. In this respect, we make the following four observations:

- A complaints, investigation, or ombuds mechanisms works well when it has a close and ongoing relationship with the stakeholders. For this reason, the framework should be structured as a permanent feature of any venue, rather than as an *ad hoc* approach. The *staffing* can be mixed, but the ombudsperson at the very least should have a specific term of office.
- As with a secretariat, staffing an expert investigative mechanism is costly. Because one of the objects of "dispute resolution" is to increase security and predictability for all the parties in the sector, and also to ensure the independence of the investigative function, funding for such a mechanism needs to be secured for the medium term.
- Transparency – of funding, of rules and procedures, of performance, *and* of failure – is essential in any modern organization, but it is not an unalloyed good. Fear of punishment could inhibit whistleblowing; conducting negotiations in the public sphere and on social medial can inhibit concessions. Publicity is important in highlighting abuses; it can, itself, be abused and manipulated. Finally, due process dies in darkness, but the fact of an investigation could itself harm an ongoing business and its suppliers – and their workers. For this reason, when it

[280] *UN Guidelines*, *supra*, at 34.
[281] "UNCTAD Reform", *supra*, at 5.

comes to investigations, there needs to be a balance between these competing interests.

- To the extent possible, to ensure coherence and without prejudicing the rights of the disputing and interested parties, it may well be useful to connect, in some way, the various stages of resolution. We have seen how mediation, properly structured, could reduce the number of issues in contention – and thus, both the cost and the intensity of any arbitration. As with neutral fact-finding, a complaints mechanism could also be used to feed into the resolution process.

## Standard elements

### Administration and accountability

As has been emphasized throughout this section, one of the imperatives in developing the model has been cost control. Principally for this reason, but also for the sake of institutional efficiency, it is essential to have a light administrative footprint, in terms both of personnel and physical infrastructure.

The accountability structure will depend in large measure on the funding framework. Here, the guiding principle must be bifurcation:

- *substantive* accountability should be maintained through an independent board of sectoral experts, including industry representatives; and
- *financial* accountability should be through a separate committee comprising donors, member representatives, and stakeholders.

### Audit and evaluation

Audit depth and frequency depend to a large extent on the requirements at the home of the venue. In some jurisdictions, non-profit or charitable organizations are subject to annual audits, or at a minimum annual financial reporting. It may well be that regular audits become more relevant where the financial turnover of the venue or its activity levels hit certain targets. At any rate, external auditors should report to the financial accountability committee in the first instance, and a final report should then be presented to the main supervisory board. The role of the administrators in the process should be strictly supporting and in no way should they act as gatekeepers to either instance.

### Compliance

In the light of the proposed structure, compliance would have at least three elements:

- *internal* compliance, to ensure that the administration acts in accordance with the laws of the home of the venue, and is managed in full compliance with basic human rights considerations;
- *conflicts* management, to ensure that arbitrators, conciliators, mediators, and other external experts meet the most rigorous principles of ethics and avoid actual and apparent conflicts; and
- *partner* compliance, so that entities with which the venue enters into partnership agreements maintain similar levels of *ethics and values* in internal management and in their overall operations.

# CHAPTER 5: CONCLUSION

The Bangladesh Accord and the ACT pilot projects suggest that widespread *purchaser engagement* is not impossible. The challenge is to bring the purchasers to the table and get them to agree to a readjustment – however minor – of existing relations without the intermediation of a major disaster.

The fact of the German Due Diligence law (as well as similar legislation in existence or in development in key purchaser jurisdictions) also suggests that *government engagement* in the sector is not unthinkable. The challenge is to ensure engagement beyond legislation and, in particular, in ensuring that the risks and costs of such frameworks are not transferred upstream.

In the light of the foregoing, if the *diagnosis* presented in this paper is correct, two interlinked parallel paths are before the various players:

- to the extent that the beneficiaries agree with the recommendations set out in this paper, developing an *engagement and implementation* strategy; and
- use of multilateral *trade policy* frameworks, mechanisms, and leverage to secure *both* the policy objectives of "due diligence" initiatives *and* global rebalancing of the sector.

# ANNEX I – COMPARATIVE TABLE

| | International litigation | International commercial arbitration | International commercial mediation |
|---|---|---|---|
| **Jurisdiction** | - Party autonomy (by contract)<br>- Domestic civil procedure law<br>- Hague Choice of Court Convention | Party autonomy (by contract) | Party autonomy (by contract) |
| **Applicable Procedural Rules** | Domestic civil procedure law | - Rules agreed by the parties (either ad hoc or institutional)<br>- Applicable arbitral legislation | Rules agreed by the parties |
| **Place or seat** | At the forum of the court with jurisdiction | Chosen by the parties | None |
| **Venue** | At the forum of the court with jurisdiction | Chosen by the parties (and may vary from the seat) | Chosen by the parties |
| **Language** | Official language of the court | Chosen by the parties | Chosen by the parties |
| **Taking of evidence** | Domestic civil procedure law | - Chosen by the parties or determined by the tribunal<br>- Standard guidelines may be incorporated (e.g. IBA and Prague rules on the taking of evidence) | None |
| **Confidentiality** | Public | - Chosen by the parties (expressly or through the choice of arbitral rules)<br>- Implied by law | Chosen by the parties |
| **Time** | Varies between jurisdictions; as set out in the country reports, the average time of enforcing contracts (proceedings and enforcement) is 636 days in the Commonwealth. Timings may extend where there is a possibility appeal(s) | Varies depending on the nature and scale of the dispute. According to the 2012 World Bank survey arbitral proceedings took 326 days on average (based on global data) | Typically expeditious (1–2 days) |

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|---|---|---|---|
| **Decision- makers** | Judge (designated by the courts / not chosen by the parties) | Arbitrator (generally chosen by the parties; otherwise appointed by appointing authority/ institution) | Mediator (generally chosen by the parties) |
| **Qualification of party representatives** | Must have standing before the court (as prescribed in applicable legislation and court rules) | No restriction on qualification of party representatives (save some countries where the arbitrator must be locally qualified) | No restriction on qualification of party representatives |
| **Interim measures** | Domestic civil procedure law | - Rules agreed by the parties (either ad hoc or institutional)<br>- Applicable arbitral legislation | None |
| **Choice of law** | Private international law of the forum; Court determines applicable law which generally allows parties' choice of a domestic law | Parties generally have an unfettered choice of law (subject to mandatory overriding laws) and may choose between national legal systems and other bodies of law, including lex mercatoria or soft law regimes such as the UNIDROIT principles | Not applicable |
| **Appeals (merits)** | Generally available | Subject to the procedural rules chosen by the parties and the applicable arbitral legislation. Judicial review at the enforcement and recognition stage is generally limited (often limited to lack of jurisdiction and procedural irregularities) | None |
| **Legal regimes and data on cross-border enforcement** | - There was no separate information available for all Commonwealth countries (the information was generally aggregated proceedings & enforcement).<br>- Reciprocal treaties on the recognition of foreign judgments<br>- 2005 and 2019 Hague Conventions | - Enforcement proceedings required (557 days on average globally)<br>- 1958 New York Convention<br>- 1927 Geneva Convention (less prominent today) | 2019 Singapore Convention |

# ANNEX II – OECD NCP CASE STUDIES

**IUF & AB-InBev**: On 2 April 2019, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Worker's Associations (IUF) representing the local union in India (HBLMU), submitted a specific instance to the Belgian NCP, alleging that AB InBev, a Belgian-Brazilian brewing company, had not observed the OECD Guidelines by interfering in trade unions activities, refusing to recognize the HBLMU president as a union representative and engaging into anti-union practices that led to suspensions of unionists and workers. Mediation set up by the Belgian NCP and conducted by a professional mediator initially did not lead to an agreement but the parties resumed their dialogue focusing on the central issue of the dismissal of four employees. The NCP continued to support the process by overseeing a conciliation session lasting several days between the parties. This led to an agreement whereby the company notably provided the workers with a direct remedy by committing to reintegrate the dismissed workers and recognise their role of trade union representatives. The workers representatives, for their part, agreed to cease their protests and local actions.

**Teck-Quebrada Blanca Mining Company and Mineworkers Union**: On 29 November 2017, the Mineworkers Union n°1 of the Teck-Quebrada Blanca Mining company submitted a specific instance to the Chilean NCP alleging that the company Teck-Quebrada Blanca did not observe the OECD Guidelines during a 2017 collective bargaining agreement due to environmental non-compliance in the company's operations. The issues particularly concerned equal opportunities for the workers, non-discrimination processes, transparency and health and safety in the workplace. The company refuted the claim but nonetheless engaged constructively in the mediation procedure overseen by the NCP, which eventually resulted in an agreement structured in ten points. As part of the agreement, the company notably committed to improve communication with workers in a transparent manner and to hold meetings with trade unions and the human resources department on a monthly basis. The company further agreed to strengthen mechanisms for reporting harassment in the workplace. It also includes follow-up actions by the NCP.

# ANNEX III - EFFECTIVENESS CRITERIA FOR NON-JUDICIAL GRIEVANCE MECHANISMS (UN GUIDELINES)

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

- Operational-level mechanisms should also be:

h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.