The Nexus of the Rule of Law and Alternative Dispute Resolution: Who Boosts or Sets Back Whom?

Mareike Fröhlich

Abstract This chapter examines the complex relationship between alternative dispute resolution (ADR) and the rule of law, and how each influences the other. Essential to democratic governance, the rule of law ensures legal certainty, judicial independence and the protection of fundamental rights, while promoting fairness and accountability. ADR has become popular, particularly in regions with underdeveloped legal systems, as a means of attracting foreign investment and resolving disputes more efficiently. This chapter highlights the work of the INVESTinADR project in North Macedonia, which has explored the impact of ADR on investment promotion. ADR offers a flexible and less adversarial alternative to traditional litigation, particularly in commercial and international disputes. However, it faces challenges such as rising costs, delays and power imbalances, which can undermine its effectiveness and alignment with the rule of law. The quality of ADR depends on the impartiality of mediators and arbitrators, and issues such as limited remedies and lack of appellate review are of concern. In addition, ADR decisions often lack precedential value, which affects continuity and legal certainty, and there are increasing calls for transparency, particularly in cases of public interest. The relationship between ADR and the rule of law is complex and varies by context, with no clear consensus on whether one strengthens or weakens the other. In developing countries, ADR can improve access to justice where formal systems are distrusted, but success depends on balancing local and external needs. Concerns about the privatisation of justice through ADR and the need for transparency are significant, although ADR could also drive improvements in traditional justice systems. Ultimately, ADR and the rule of law are interdependent and can be mutually reinforcing if effectively integrated.

M. Fröhlich (✉)
Europa-Institut of Saarland University, Saarbrücken, Germany
e-mail: froehlich@europainstitut.de

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1 Introduction

The relationship between alternative dispute resolution (ADR) and the rule of law is complex, with a degree of interdependency between the two. This chapter attempts to answer the question of whether the rule of law is boosted or set back through ADR, or if ADR is boosted or set back through the rule of law. The rule of law is seen and understood as one of the most important principles for the functioning of a democratic state and is used by the EU, World Bank, and others as an indicator of a country's development. It is considered in each development strategy for countries in the Global South and is part of many development projects. Interestingly, especially in these countries, ADR has become very popular and is supported in projects aimed at increasing foreign investments. The mechanism of ADR is intended to minimise the risks of investors in countries that do not offer a comparable, functioning legal system.

This is also the underlying presumption for the project INVESTinADR, through which this publication was developed.[1] The project of the Europa-Institut of Saarland University and the Iustinianus Primus Faculty of Law of the Ss. Cyril and Methodius University in Skopje analysed the legal framework for ADR in North Macedonia to boost investment in projects and companies. Based on this analysis and additional feedback from practitioners and other stakeholders, recommendations for action were published. One key issue in supporting the development of ADR is the education of lawyers and raising awareness of ADR as an option to settle a conflict. To address this, an executive training course was designed and is now offered to graduates and practitioners in Skopje. The course aims to prepare them for upcoming challenges in the field of ADR practice.

In this context, the chapter explores the interconnected link between the rule of law and ADR. This complementary approach to justice can enhance the efficiency, accessibility and flexibility of dispute resolution. For a common understanding, the different definitions of the rule of law will first be explained (2.), followed by a description of the different components of ADR (3.). The chapter will then analyse which principles must be considered in ADR to truly support the rule of law (4.). The following section will discuss the inherent risks of ADR and how they impact the rule of law (5.). The final section will use these discussions to answer the introductory question of whether one boosts or sets back the other (6.).

[1] The project INVESTinADR is funded by the German Federal Ministry for Education and Research for the timeframe of 2021–2024. The purpose of the project was to analyse the legal situation of ADR in North Macedonia and give advice for improval of the legal framework.

2 A Definition or Key Elements of the Rule of Law

Conceptualising the rule of law is challenging because there is no universally accepted definition, making its content and scope complex. However, the importance of the principle has never been questioned. Its roots can be traced back to ancient times, when Plato and Aristotle discussed the equality of all citizens. The concept of the rule of law dates back to the Magna Charta of 1215, which limited the king's power in regard to the liberties of freemen and declared the king subject to the law. This led to the development of the English legal system, which supported an independent judiciary, the principle of parliamentary sovereignty, and the separation of powers. These ideas were especially promoted by *Locke* and *Montesquieu*, who saw them as protections against unfair governments and as safeguards for the liberty of men.[2] Since then, the rule of law has found its way into the constitutions of democratic countries and international organisations. The preamble of the Universal Declaration of Human Rights states: "[…]. Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, […]".[3]

In attempting to define the rule of law in general, it can be said that it is a principle ensuring that all members of a society, including the government itself, are equally subject to publicly disclosed legal codes and processes. According to *Dicey*, three key fields of action must be addressed: Regulating the power of the government ("absence of arbitrary power on part of the government"), ensuring equality before the law ("every man is subject to ordinary law administered by ordinary tribunals"), and privileging the judicial process (constitutional rights "are not the source but the consequence of the rights of individuals").[4] In continental Europe, especially in Germany and France, the principle of the rule of law developed differently, focussing more on the nature of the state rather than the judicial process. This distinction is reflected in the terms "Rechtsstaat" and "État de droit".[5] These different views are often categorised into a formal and a substantive/material theory, depending on the legal environment in which it developed. The formal theory deals with instrumental limitations and follows a minimalist approach, whereas the substantive understanding includes notions of justice and ideals within the definition.[6]

Even though there are different theories explaining the rule of law, most identify common key elements, such as legal certainty and clarity, equality before the law, a fair and impartial judiciary, proportionality, legal accountability, the protection of human/fundamental rights, access to justice, the limitation of government power, and respect for legal processes and institutions. In summary, laws must be publicly promulgated, which means that they are accessible and transparent. They should be equally enforced so that everyone is treated equally under the law. In cases of

[2] Chesterman (2007), margin number 3 et seq.

[3] https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[4] Dicey.

[5] Chesterman (2007), margin number 7 et seq.

[6] Chesterman (2007), margin number 12, El-Khoury and Wolfrum (2021), margin number 5 et seq.

violations, laws much be independently adjudicated, which requires an independent judiciary to interpret and apply the laws. Additionally, the rules must be consistent with international human rights norms and align with fundamental human rights standards.[7]

The UN General Assembly' 2012 Resolution on the rule of law at the national and international levels calls to promote access to justice for all. Based on this, the following conditions need to be addressed:

1. Due process and fair trial by "[…] committ[ing] to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial disputes settlement and legal aid."[8]
2. Access to dispute settlement by recalling "[…] to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all […]."[9]
3. Judicial independence by upholding the "[…] independence of the judicial system, together with its impartiality and integrity, and ensuring that there is no discrimination in the administration of justice."[10]
4. Consistency, predictability, and transparency by "[…] recogniz[ing] the importance of fair, stable and predictable legal frameworks "[…]."[11]

The rule of law is fundamental for ensuring fairness, preventing abuse of power, and providing a framework within which social, economic, and political interactions occur. Therefore, its role in post-conflict societies cannot be underestimated. The legislative framework in these countries is often characterized by non-functioning institutions, an unfair and discriminatory legal framework, exhausted resources, a neglect of fundamental rights, and the misuse of political or other powers. This leads to societal instability, mistrust, and insecurities that affect all areas of governance, including the judiciary, making ADR an appropriate or even preferable alternative for settling disputes.[12]

3 Components and Advantages of Alternative Dispute Resolution

Often, ADR is described as a new form of settling disputes, but the opposite is true. Negotiation is the first form of exchanging different views and attempting to balance them, and this is as old as humanity. From this, different forms of settling disputes

[7] El-Khoury and Wolfrum (2021), margin number 16 et seq.

[8] UN Declaration (2012), recital 12.

[9] UN Declaration (2012), recital 14.

[10] UN Declaration (2012), recital 13.

[11] UN Declaration (2012), recital 8.

[12] UN Security Council (2004), p. 10.

have evolved over time.[13] ADR refers to methods used to resolve disputes without resorting to traditional court litigation. It encompasses different methods, each with unique procedures and benefits, but all aim to provide a more flexible, efficient, and less adversarial means of resolving conflicts. This is especially common in business, commercial and investment disputes, a practice that dates back to the New York Chamber of Commerce in the late 18th century.[14]

As mentioned above, ADR mechanisms take different forms. Negotiations are the basis for all forms of ADR and are recognised by direct discussions between parties to reach a voluntary settlement. This process can be formal or informal. A more facilitated process is mediation, where a neutral third party (mediator) helps the disputants reach a mutually acceptable resolution without imposing a decision. Similar to mediation is conciliation, but the conciliator may take a more active role in suggesting solutions and terms of settlement. The most formal approach is arbitration, a private dispute resolution process where an impartial third party (arbitrator) makes a decision. Decisions in ADR procedures can be binding or non-binding, depending on the agreement between parties. ADR is used in various fields of legal disputes, but mainly in commercial and investment disputes, both at the national and international level. Prominent areas for negotiations and mediation are matters of labour law and family law.

While ADR operates outside the formal judicial system, it offers various benefits and supports the rule of law in several ways. These will be examined in the following section by using arbitration as an example. There are important differences among the different modes of ADR but some of the benefits apply across all ADR processes. For example, arbitration "gives the parties the opportunity of resolving their dispute: (i) in a neutral place of arbitration; (ii) by a tribunal of experienced, independent, and impartial arbitrators; (iii) selected by or on behalf of the parties themselves for their suitability for the task; (iv) working in the language of the contract and of the frequently voluminous documents that form part of that contract; and (v) in a manner which will result in a binding decision that is internationally enforceable."[15]

[13] Barrett and Barrett (2004), pp. 1 et seq., Born (2009), pp. 8 et seq.

[14] Barrett and Barrett (2004), p. 72.

[15] Blackaby et al. (2023), margin number 1.122. A wider definition by Sternlight (2007), p. 575 says that ADR "(1) may increase access to justice by making it easier for people who are poor; illiterate, or geographically dispersed to bring or respond to a claim; (2) it may reduce the amount of money and time needed to resolve disputes; (3) it may provide an alternative or biased court systems; (4) it may promote foreign investment opportunities; (5) it may provide justice to groups, such as women and minorities, whose interests are not well served by the formal legal system; (6) it may bring community members together and establish greater social harmony; and (8) it may help community members work together to better protect their individuals rights."

3.1 Efficiency

ADR processes are typically faster and less costly than traditional litigation, helping to alleviate court congestion and reduce legal expenses. This is achieved by avoiding time-consuming procedural aspects like evidence, immunity, discovery or other matters which typically evolve in national court litigation.[16] Moreover, some arbitral institutions allow fast-track procedures with a single arbitrator and a fixed timeframe. Nevertheless, the objective of efficiency in terms of time and costs has become less tenable. With a 30-fold increase in cases in the last 50 years, counting only the requests made to the ICC International Court of Arbitration,[17] delays have become more common. These delays are often due to the time needed to establish an arbitral tribunal and issue an award, exacerbated by the workload of arbitrators, who often have additional professional commitments.[18]

Furthermore, the costs of ADR proceedings can be high, as arbitrators and/or arbitral institutions must be paid. In addition, parties bear the costs for supporting staff (such as translators or IT experts), witnesses and legal advisors.[19] Although this is often not mentioned when compared with national court litigation, parties in court cases also participate in these costs. However, in court litigation, the salaries, fees and reimbursements for actual expenses have not increased to the same extent as in ADR proceedings. Governments often cap or cover these costs, rather than passing them on to the parties. Even though both national court litigation and ADR involve similar costs and timeframes, these expenses must be accepted to ensure a correct and fair decision.[20]

One aspect which is often underestimated is the function ADR could fulfil in supporting the formal justice system. It could step in to minimize the workload of courts, acting as a supplement to the formal justice system. This would be particularly effective in handling small cases or in situations where a consistent line of decision-making already exists.[21]

3.2 Accessibility

ADR can provide more accessible justice, particularly in communities where formal legal systems are inadequate or overloaded. Accessibility is usually linked to the need for "equal protection of the law for all citizens and others in the national territory", as well as equal opportunity to seek and receive remedies for alleged violations of one's legal rights by public or private actors before courts and other conflict

[16] Born (2021), p. 85.
[17] Born (2021), p. 92.
[18] Blackaby et al. (2023), margin number 1.147.
[19] Blackaby et al. (2023), margin number 1.144 et seq.
[20] Blackaby et al. (2023), margin number 1.148.
[21] Reuben (2010), p. 6.

resolution mechanisms".[22] This ensures that those who break the law do so with the understanding that they may be sanctioned by the courts. However, this system may not function effectively when courts are understaffed, underfunded, or when access is too complicated due to foreign or unfamiliar procedural rules, costs, language barriers, distance, weak legal frameworks, or inexperienced judges.[23] In these cases, ADR steps in where the formal justice system fails to fulfil its social role and where the conditions for proper decision-making are lacking.[24]

Moreover, national courts are often not equipped and competent enough to understand the consequences of their decision for both parties in international commercial or investment disputes.[25] In this context, the benefit of ADR lies in the possibility for the parties to participate in or decide on the selection of appropriate arbitrators and the composition of arbitral tribunals. Since both parties can substantially influence the selection of arbitrators, they ensure that there is no bias, prejudice or partiality. Additionally, they can request that the arbitrators be skilled and experienced in the subject matter. This increases the parties' confidence in the outcome of the arbitration process and is a prerequisite for a "fair and effective arbitration".[26]

3.3 Flexibility

ADR offers flexible solutions tailored to the specific needs and interests of the parties involved, which may not always be achievable through court judgments. Except for a few basic principles, there is no fixed procedural code, allowing the arbitration process to be adapted to the circumstances of each case.[27] This reflects party autonomy, which exists in formal justice but is maximized in ADR, along with procedural flexibility. It enables the parties to respond to the specific circumstances of the case. In general, parties have the freedom to agree on the existence and extent of discovery or disclosure, the methods for presenting facts and expert evidence, the duration of the hearing, the format for site inspections, the arbitration schedule, and other related matters. This flexibility allows them to shape the length and outcome of the proceedings, contributing to a more efficient resolution for the parties.[28]

Another significant benefit of ADR is the lack of an appellate review mechanism in most cases. Decisions are final, and a review is typically only possible on grounds of procedural fairness, jurisdiction, or public policy. This reduces the costs and duration of litigation, a factor that is particularly important to most companies. Some legal

[22] World Bank (2007), pp. 66 et seq.

[23] Butler (2023), p. 159.

[24] World Bank (2007), pp. 66 et seq.; Michel (2011), p. 17.

[25] Born (2021), pp. 77 et seq.

[26] Blackaby et al. (2023), margin number 1.31, 1.32 et seq. (for more details on the person of an arbitrator).

[27] Blackaby et al. (2023), margin number 1.127.

[28] Born (2021), pp. 81 et seq.

jurisdictions now offer an opt-in/opt-out option for appellate review, allowing parties to contractually define the grounds for review in ADR.[29]

3.4 Preservation of Relationships

ADR often focuses on collaborative solutions, which can preserve or even improve the relationships between parties, unlike the adversarial nature of court proceedings. ADR is constructed to facilitate an amicable settlement of the dispute which can only be achieved if both parties are in favour of a cooperative approach to arbitration.[30] Sometimes, ADR is the only way how parties can avoid bringing the dispute to one of the home courts, which may be biased, or prevent multiple litigations in different national courts.[31]

For the same reason, ADR procedures are usually subject to the principles of privacy and confidentiality, which is only in a few exceptional cases available in courts. However, a distinction must be made between privacy and confidentiality. In principle, all ADR proceedings are private and conducted to the exclusion of the press and other interested parties. The principle of confidentiality with regard to the award and its underlying reasons is no longer as strictly applied. On the one hand, parties may have a vested interest in making a decision public if it involves a standard case constellation. On the other hand, the principle of transparency increasingly requires ADR proceedings to be opened up, at least in the area of arbitration.[32]

4 Challenges of ADR and its Implications for the Rule of Law

While ADR may offer many benefits, such as efficiency, cost-effectiveness, and flexibility, it is not without risks. Issues such as power imbalances, lack of formal legal protections, enforcement challenges, and potential biases need to be carefully considered.

To mitigate these risks and to support the rule of law, certain conditions must be fulfilled. Parties should thoroughly assess the suitability of ADR for their specific dispute, seek experienced and impartial neutrals, and consider obtaining legal advice to ensure their interests are adequately protected throughout the process. Participation in ADR should be voluntary, ensuring that parties are not coerced into a process that may not suit their needs. States should provide a supportive legal framework that recognizes and enforces ADR outcomes, providing legal certainty and upholding

[29] Born (2021), pp. 80 et seq.

[30] Born (2021), p. 89.

[31] Born (2021), pp. 72, 74.

[32] Blackaby et al. (2023), margin number 1.125; Born (2021), p. 88.

the integrity of the process. Nevertheless, some of the advantages can also have drawbacks, which may impact the rule of law and raise questions about the legitimacy and efficiency of ADR.

In the following subsections the different concerns will be elaborated.

4.1 Imbalance of Power

One main concern is the power imbalance between the parties. Without the structure of a formal court setting, there is a risk that parties feel coerced into accepting unfavorable terms. Different power dynamics can disadvantage weaker parties, who may be pressured into settlements due to power imbalances or lack of legal representation. There is no formal protection against the manipulation by the other party.

Moreover, ADR does not know formal discovery. ADR processes, especially mediation, often lack the formal discovery procedures found in court litigation, which can lead to unequal access to evidence and information. It is up to the parties to define the procedure, the length, as well as the limits for seeking evidence. In formal justice, this is not possible, as the organisation of the evidence procedure is essential for a fair trial. Nevertheless, it can also be seen as an expression of party autonomy, allowing them to decide not to include a lengthy discovery procedure.

The question is whether both parties fully understand the consequences of this decision, especially given the limited procedural safeguards. The informal nature of ADR can sometimes result in inadequate procedural protections, especially for parties who may be less knowledgeable or less powerful. However, portraying ADR as depriving parties of all procedural rights available in formal proceedings is also inaccurate. Parties may benefit from regional human rights protections. The ECtHR has ruled that, although it is permissible to waive the formal legal processes and exclude the public in the case of ADR proceedings,[33] it is not possible to waive all judicial rights to a fair trial.[34] This includes ensuring the impartiality of the tribunal and a fair trial,[35] principles which must also be observed in ADR proceedings.

Another problem is the equal access to investment arbitration. Due to the contractual construction of investor-state arbitration where host states offer in bilateral investment treaties (BIT) or other agreements the possibility to initiate arbitration proceedings but investors usually do not or rather cannot offer this in advance.[36]

In case where there is an imbalance of power between the parties, legal support should be provided. But in contrast to most formal justice systems, ADR does not require mandatory legal representation. Parties may choose to represent themselves, which can be risky if they lack sufficient understanding of the law or the process, potentially leading to unfavourable outcomes. However, mandatory representation

[33] ECtHR, *Tabbane v. Switzerland*, App no. 41069/12, para. 25.

[34] ECtHR, Souvaniemi and others v. Finland, App no 41069/12.

[35] ECtHR, Souvaniemi and others v. Finland, App no 41069/12.

[36] Reinisch (2023), pp. 229 et seq.

would undermine the principle of party autonomy. This would leave the responsibility for safeguarding the parties' interest to the members of the tribunal.

4.2 Quality of ADR

In this case, the quality of ADR needs to be high, which largely depends on the quality of the members of the tribunal. The effectiveness of ADR heavily relies on the skills and experience of the mediator or arbitrator, as inadequate expertise can lead to poor decision-making. One major concern is the potential for bias among the selected individuals. Questions about the impartiality and neutrality of the arbitrator or mediator may arise, especially if they are selected by one of the parties. To avoid this, there are different possibilities: the selection could be made by a neutral third party with no vested interest in the case, as in the *Lake Lanoux*[37] and the *Rann of Kutch* case.[38] Another option is the development of a permanent tribunal, like the proposed multilateral investment court (MIC),[39] or the establishment of permanent and institutionalised dispute settlement tribunals, as included in some new investment agreements.[40] It is also argued that the possibility of acting as arbitrator and counsel at the same time (so-called double hatting) should be avoided and prohibited. This should be included in future agreements and become a standard so that rejections of arbitrators on such grounds will be eliminated.[41]

In addition, ADR offers only limited scope for legal remedies. It may not provide the full range of remedies available in court, such as injunctive relief or punitive damages, which are generally only available in formal justice systems. In addition, some complex disputes require significant intervention or comprehensive remedies that only a court can provide. Another issue arises with multiparty arbitrations, which can only proceed when all parties agree.[42] This might not always be possible due to conflicting interests, but an affect the quality of the proceedings. Moreover, most

[37] Lake Lanoux Arbitration (France v. Spain) (1957), 24 ILR 101.

[38] Indo-Pakistan Western Boundary (Rann of Kutch) (India v. Pakistan) (1968) 50 ILR 2.

[39] Bungenberg and Reinisch (2021a), pp. 1 et seq.

[40] E.g. Section F (Resolution of investment disputes between investors and states) of Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, pp. 23 et seq. The agreement entered into provisional application in 2017. Most of the agreement is in force, but not all parts. The provisions related to investment protection and the Investment Court System (ICS) are excluded from provisional application. For more details, see Bungenberg and Reinisch (2021b), pp. 470 et seq.

[41] Reinisch (2023), pp. 224 et seq.

[42] Blackaby et al. (2023), margin number 1.131 et seq.

ADR processes do not include an appellate mechanism. While this can be an advantage in saving money and time, it also means that an incorrect award cannot be properly reviewed or corrected. Therefore, modern solutions like the mentioned multilateral investment court and the tribunals in some agreements include an appellate tribunal.

4.3 Lack of Continuity and Legal Certainty

Binding further development of the law is also advantageous for high-quality and consistent decision-making within the framework of ADR procedures. However, this is one of the disadvantages of ADR. Decisions in ADR, especially in arbitration, do not set a precedent for future cases. This is even more important, as ADR proceedings rarely have an appeal instance. Awards are generally final and binding. As a result, two tribunals with the same facts could come to a different decision—"Each award stands on its own". Even if an older award is available, it has no effect on subsequent cases.[43]

Legal precedents play an important role in the development of the law. They lead to consistency and uniformity in case law and thus promote legal certainty and trust in the legal system. Precedents supplement and interpret written law, closing regulatory gaps efficiently. The role of case law is particularly important in the dynamic development of law in rapidly changing areas, ensuring legal certainty. ADR procedures do not inherently support such a role, but in recent years, concerns about transparency have been raised, leading to more public disclosure of awards, partly for this reason. Another development is de facto case law by some international courts and tribunals or better a notion of persuasive authority in the field of investment arbitration. Here, earlier investment awards and their reasoning are taken into account using it as persuasive evidence of interpretation and specification of law.[44] Different is the possibility of authoritative interpretations by the parties of an agreement, where joint bodies of the agreement interpret the different provisions.[45]

The limited role of legal development in ADR is concerning, because the rising use of ADR might hinder the formal justice system from using its opportunity to decide crucial cases, develop and interpret the law, and uphold the rule of law.[46] Therefore, already in the phase of drafting an arbitration treaty, like in investment arbitration the international investment agreements, a more precise language is used and various definitions are offered.[47] The idea of an appellate mechanism would not

[43] Blackaby et al. (2023), margin number 1.137 et seq.
[44] Reinisch (2023), pp. 232 et seq.
[45] Reinisch (2023), pp. 235 et seq.
[46] Moffitt (2010) p. 8.
[47] Reinisch (2023), pp. 234 et seq.

only include a review instrument and improve the impartiality of the arbitrators but would lead to a more coherent decision-making.[48]

4.4 Transparency and Accountability

All these reservations merge into the big discussion about whether ADR procedures should not be more transparent. In principle, one of the major advantages of ADR is that the procedure and the decision are confidential. However, this is criticised, as illegal business practices can be hidden without the public scrutiny inherent in court proceedings.

This is particularly the case if there is a public interest in the legal dispute. This is less likely the case in commercial disputes, but awards rendered against host states in investment arbitration usually concern taxpayers' money.[49] Moreover, due to the regulatory nature of the measures involved in these kind of disputes, important public interests require special procedural adaptations. Hence, these inherent public interests justify more transparent proceedings in investor-state-disputes or other cases where the state/government is involved.[50] The question was raised if this could have some spill-over effects for commercial arbitration.[51]

Therefore, there should be a distinction between the type of ADR procedure. While ADR can be confidential, there should be mechanisms to ensure that the process is transparent when a public interest is concerned. Moreover, transparency and publicity ensure that arbitrators and mediators are held accountable for their conduct which will raise the overall quality of ADR.

4.5 Potential for Inefficiency and Enforceability Restraints

ADR attracts many parties, but they should be aware about the enforceability of decisions. There are some processes, like mediation, that may result in non-binding agreements, which can lead to further disputes if one party does not adhere to the settlement. The enforcement depends on the type of ADR, since arbitration awards are generally enforceable, but the enforcement of ADR outcomes can vary based on the seat and the specific terms of the agreement. At least arbitration produces in most of the cases enforceable and final awards. Without such high degree of enforceability, the outcome of the arbitration itself would not be useful.[52]

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[48] Reinisch (2023), pp. 237 et seq.

[49] Blackaby et al. (2023), margin number 1.125.

[50] Reinisch (2023), pp. 238 et seq.

[51] Blackaby et al. (2023), margin number 1.126.

[52] For more details Born (2021), pp. 75 et seq.

Finally, there is a major risk of duplicative processes. If ADR does not result in a settlement, parties might end up going to court anyway, resulting in additional time and expenses. This may lead to prolonged negotiations. Mediation and negotiation processes can sometimes drag on without resolution, delaying the final settlement of the dispute. This would undermine the efficiency of ADR.

5 Conclusion

Returning to the initial question of whether the rule of law is boosted or set back through ADR, or whether ADR is boosted or set back through the rule of law, the answer is simple: there is no definitive conclusion, and instead, more questions need to be raised. The common understanding that ADR and court litigation are exclusive need to be overcome and an inclusive system should be set up.[53] The relationship between ADR and the rule of law varies, depending on the different perspectives one may take.

First of all, in the developing context, ADR plays a crucial role in implementing and enhancing the rule of law and access to justice for citizens in these countries. Often, their trust in the formal justice system is lacking. The idea is that, as a side effect, such a system can also help develop and eventually take over the role of formal justice. However, a balance in support from countries and development cooperation has to be found. It is questionable whether this transition is really needed or if it reflects a Global North perspective. More research is needed to determine if primarily ADR-based justice system can fully meet the right to access to justice.

Second, the question arises whether ADR allows or supports the privatization of justice, which is characterized by confidentiality and lack of transparency. This leads to less public accountability and loss of the educational function of dispute settlement.[54] While this argument can be made, it is generally agreed that the rule of law should limit the excessive use of ADR, making the process more transparent—though this risks ADR no longer being an alternative to the traditional judiciary. But this could also be seen as an opportunity, especially in developed countries, to reform and improve the traditional judiciary. In this scenario, ADR would serve as an alternative where the standards of decision making in courts are not guaranteed. By using ADR mechanisms, the rule of law could actually be strengthened, raising decision-making standards in respective countries, potentially attracting more foreign investments and improving trade. This, in turn, could boost economic welfare and allow countries to invest more in their traditional judiciary.

Third, a lack of rule of law standards is less problematic in commercial disputes where parties exercise their autonomy, but it is more dangerous when public interests are involved. The possibility of biased or impartial tribunal members could cause greater or different harm, namely jeopardizing public opinion, compared to most

[53] Sternlight (2007), p. 581 et seq.

[54] Sternlight (2007), p. 570.

commercial disputes. Such disputes are driven by private parties and their autonomy, which cannot and should not exist unconditionally for public actors, for democratic reasons.

Finally, the original question might have been the wrong one. Instead, the question should be whether either can exist independently. *Moffitt* calls this the "symbiotic mutualism", like the relationship between clownfish and anemones, where each protects the other from different enemies.[55] This is an ideal picture to explain the relationship between the rule of law and ADR. Both need each other: developing the rule of law globally requires the implementation of ADR in countries where formal justice systems are not trusted or effective. On the other hand, for an ADR system to effectively complement the formal justice system, rule of law principles must be respected.

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