国际商事争议解决机制
专题研究丛书

A Study Series of Settlement Mechanism
for International Commercial Disputes

丛书主编　黄进

国际商事调解法律问题研究

尹力　著

WUHAN UNIVERSITY PRESS
武汉大学出版社

教育部人文社会科学重点研究基地重大项目成果

国际商事争议解决机制
专题研究丛书
A Study Series of Settlement Mechanism
for International Commercial Disputes
丛书主编　黄进

国际商事调解法律问题研究

尹力　著

武汉大学出版社

图书在版编目(CIP)数据

国际商事调解法律问题研究/尹力著.—武汉：武汉大学出版社，2007.6

国际商事争议解决机制专题研究丛书/黄进主编

ISBN 978-7-307-05532-2

Ⅰ.国… Ⅱ.尹… Ⅲ.国际商事仲裁—研究 Ⅳ.D997.4

中国版本图书馆 CIP 数据核字(2007)第 052105 号

责任编辑：张 琼 责任校对：黄添生 版式设计：杜 枚

出版发行：**武汉大学出版社** (430072 武昌 珞珈山)

(电子邮件：wdp4@whu.edu.cn 网址：www.wdp.whu.edu.cn)

印刷：湖北恒泰印务有限公司

开本：720×1000 1/16 印张：14.5 字数：266 千字 插页：2

版次：2007 年 6 月第 1 版 2007 年 6 月第 1 次印刷

ISBN 978-7-307-05532-2/D·727 定价：21.00 元

序

黄 进

2000年，教育部确定武汉大学国际法研究所为普通高等学校人文社会科学重点研究基地。对武汉大学国际法研究所来说，这不仅是对它成立20年来学术发展的充分肯定，而且是它“而今迈步从头越”的极为重要的发展机遇。

按照教育部当时的设计，进入普通高等学校人文社会科学重点研究基地建设计划的高校研究机构，应当具有“国家级水平”，它们要通过深化科研体制改革、组织重大课题研究和加大科研经费投入等措施，围绕体制改革、科学研究、人才培养、学术交流和咨询服务等任务的落实，打下坚实的科研基础，形成明显的科研优势和特色，而且还要在经过若干年的建设后，使其整体科研水平和参与决策的能力居于国内领先地位，并力争在国际学术界享有较高的学术声誉。

为了实现基地建设的总体目标，并抓住机遇充分发展自己，武汉大学国际法研究所除了在人才培养、学术交流及资料信息建设、咨询服务和体制改革方面始终自强不息、追求卓越外，还在科学研究方面通过组织重大科研项目、产出重大研究成果，不断促进国际法基础研究和应用研究协调发展，构建国际法知识创新体系，提升自己的整体学术水平。“国际商事争议解决机制研究”这一课题就是我们组织的第一批基地重大科研项目之一。

众所周知，在全球化背景下，人、财、物和信息的跨国流动日益频繁，国际商事争议的产生不仅不可避免，而且争议的数量大为增加，争议的类型更加多样化，争议的复杂性也有所发展。所以，建立和健全国际商事争议解决机制对于构建和谐世界日显重要。

目前，国内对国际商事争议解决这个课题的研究，仍然还停留在传统的理论和制度层面，应该说存在一些深层次的问题。首先，原有的研究不够全面，多注重国际民事诉讼和国际商事仲裁问题的研究，而忽视了和解、调解等选择

性争议解决方式（**Alternative Dispute Resolution** 即 **ADR**）的研究，没有能够反映制度创新的实际状况。其次，原有的研究具有一定程度的非整合性，一方面，对各种民商事争议解决方式的研究是独立进行的，缺乏深层次的比较研究和整合；另一方面，从国际法治的整体制度架构来看，对各种争议解决制度之间的互动关系没作深入的分析。再次，原有的研究对投资、贸易、海事、知识产权等具体商事领域的争议解决机制缺乏进行分门别类的研究。最后，原有的研究对新出现的商事争议解决方式，如网上仲裁等，也缺乏系统的研究。上述表明，对国际商事争议解决机制进行全面的、综合的、系统的、深入的以及分门别类的研究实属必要。

针对目前国内对该课题研究存在的问题，“国际商事争议解决机制研究”项目设计着重从如下两方面对该课题进行研究：一是对国际商事争议解决机制进行综合研究，从整体上探讨国际商事争议解决机制的各种基本问题，分析和总结国际商事争议解决机制的共性、互动性和整合性；二是对国际商事争议解决机制进行分门别类研究，具体探讨国际投资争议解决机制、国际贸易争议解决机制、国际海事争议解决机制、国际知识产权争议解决机制、国际金融争议解决机制、统一域名争议解决机制、电子商务争议解决机制、国际体育争议解决机制等特别机制的个性和特点。本课题的研究不仅希望在理论上有所突破，有所创新，有所贡献，而且希望在实务方面有助于参与国际商事交往的当事人，特别是我国的当事人，能够深刻认识国际商事争议解决机制及其利弊，善用相关机制，快捷地化解争议，以保证其进行国际商事交易的安全和便利，从而促进建立正常的国际商事交往秩序。同时，也希望我国的立法、行政、司法、仲裁以及其他相关机构能够认同和参考我们的研究，我们的研究成果对其工作有所裨益。

正是基于上述考虑，我们课题组决定编辑《国际商事争议解决机制专题研究丛书》，将本课题项下的部分专题研究成果予以出版，以飨读者。本丛书的顺利出版，离不开武汉大学出版社的大力支持和帮助。借此机会，我们衷心感谢武汉大学出版社对本丛书的厚爱！

2006 年 8 月 20 日于武汉大学国际法研究所

内容摘要

调解作为选择性争议解决方式（Alternative Dispute Resolution，简称ADR）的典型代表，在当代各国的争议解决实践中扮演着越来越重要的角色，成为国际商事争议解决机制的有机组成部分。本文主要在现有相关立法和实践的基础上，综合运用比较以及理论与实践相结合等方法，对国际商事调解的有关法律问题进行较为系统的研究。

本文共分为七章。

第一章主要论述了调解的普遍性法律问题。在现代社会，调解被公认为ADR中最具代表性的一种方式。尽管调解的各种定义彼此各异，但调解为产生争议的当事人提供了一个解决争议的方式，通常表现为当事人在一个中立的第三者的帮助下，解决他们之间的争议。虽然与“调解”一词相对应的英文表述有“conciliation”和“mediation”两个，但一般认为它们更多地只是表达的习惯不同，两者可以互相换用。调解不仅可以根据不同标准进行分类，而且具有当事人进入和参加程序的自愿性、中立第三者的介入与协助、程序的便捷性和灵活性以及契约性等本质特性。与其他争议解决方式尤其是与诉讼相比，调解具有独特的制度价值，并有控制冲突等功效。因此，效益与和谐是调解最基本的价值追求。

第二章结合联合国国际贸易法委员会的《国际商事调解示范法》考察了国际商事调解的含义。在判断调解的国际性方面，主要综合采用实质性连结因素认定标准和争议国际性认定标准，并且当事人自己也可以决定其调解是否属于国际调解。对“商事”一词应作广义的解释，以涵盖因各种商业关系而发生的事项；国际商事调解中之“调解”也是一个广义概念，泛指争议当事人邀请某个人或若干人组成的小组协助其友好解决争议的各种程序。同样，依据介入调解的第三者的性质可以将国际商事调解分为民间调解等几类，而民间调解这类国际商事调解是本书研究的重心。在综述联合国国际贸易法委员会的《国际商事调解示范法》以及中国、英国等国有关国际商事调解的立法和实践的基础上，本章认为，调解在世界上正处于蓬勃发展的态势，国际社会正致力于调解法制化的尝试和努

力，这在一定程度上反映了人们对调解与法治的关系的理解，也印证了“所有的调解都或多或少地处于法律的阴影之下”的论断。

第三章主要探讨了国际商事调解在现代社会兴起的根源。首先，在解决商事争议中，较之于诉讼与仲裁，调解具有降低争议解决的成本、维系当事人之间的商业关系、适应性强、保全当事人的商业信誉、为当事人提供一揽子解决争议问题的机会、彻底解决争议等程序优势，因此，采用调解既能缓解法院在解决争议方面的压力，又能克服诉讼审判以及仲裁的弊端，高质量地解决争议，从而适应了社会的客观需求。其次，在东方社会由于法的传统观念、儒家思想以及“和”的社会观念等传统文化的影响，在西方社会则由于多元化争议解决机制并存的理念、法治与人治关系相互包容的思想以及成本效益观的共同影响，使得无论在东方还是西方，社会主体对调解都存在着强烈的主观诉求。在上述两方面的综合作用下，商事调解必然在现代社会兴起。

第四章分析了国际商事调解的基本原则和程序保障。由于当事人意思自治、合法性与合理性相协调以及调解人的独立与公正等原则反映了调解的客观需要及其规律，因而是调解必须遵循的几项基本原则。调解的灵活性是其最重要的程序利益，要受到当事人的自律和第三者的权威与公正性的制约，在当事人的自律和第三者的公正不能得到充分保证的情况下，这种灵活性就很容易被恣意滥用所取代，调解也就失去了其正当性。因而，灵活性既是调解的程序利益也是调解的致命弊病所在。因此，有必要建立一定的程序规则，为调解提供最基本的程序保障。调解的程序保障主要涉及调解当事人的行为规范、调解人的资格、权责与中立性以及保密等方面的问题。但在调解的程序保障上有一个度的问题，否则，为此制定的过度的规则就会侵蚀灵活性这个调解最重要的程序利益，因而应努力寻求程序保障与程序利益的协调，并以最低限度的规则和最大限度尊重当事人的意思自治作为行动指南。

第五章阐释了国际商事调解程序的相关问题。在严格的法律意义上，由于合意是调解的本质要素，调解具有一种反程序的外观。因此，与其说调解程序，毋宁说是调解的过程，与诉讼程序甚至仲裁程序所指称之“程序”并不能在法律意义上完全等同，之所以仍然使用程序一词，更多的是出于一种约定俗成的表达习惯，冠以“程序”名称的有关内容准确地说应该是指调解过程中的带有一定的普适性的做法。调解程序基于当事人之间的合意而开始。从理论上讲，调解的实质性启动尚取决于对争议事项可调解性的判断，在一般意义上，只要是商事性质的争议事项都可以以

调解方式解决。其实，调解实践中对于个案的可调和性也很重视，即当事人相互之间的权利要求是否存在弹性处理的空间，这往往决定了调解解决争议能否获得成功。在调解程序进行中，确定调解员、进行调解前的准备以及进行调解会议是几个关键性的环节。调解程序可能因为当事人达成和解协议或调解不成后的放弃这两种情况而终止。而且，调解员在促进当事人的沟通以及程序或实质性的一些事项上发挥着重要的作用，这通常又取决于调解员的个性品质及其调解技能。

第六章对国际商事调解的协议进行了探讨。调解协议是当事人达成的将其争议交付调解解决的合意，主要有合同中的调解条款和独立的调解协议书这两种表现形式。调解条款与合同其他条款既具有相关性，又具有一定的独立性，因此，即使合同其他条款无效，也不影响调解条款的效力。调解协议书不仅具有独立性，而且具有广泛的适用性，既适用于合同订立前后发生的一切与合同有关的争议，也适用于非合同争议。调解协议一般只能延缓而非排除司法或仲裁管辖权，加上当事人有权单方面退出调解程序，因此很难从法律上规定调解协议的强制执行力。调解的处理协议是否具有法律效力及其能否强制实施这个重要问题直接关系到调解作为一种独立的争议解决方式的生命力。和解协议对当事人的约束力至少与合同相等，但由于和解协议毕竟是当事人处理其争议的结果，其对象和客体是争议的民商事法律关系，与一般意义上的以某一实体民商事法律关系为其对象的合同有所不同，这使得在其强制实施问题上具有一些特殊性。因此，对和解协议的执行力问题的解决，目前主要将和解协议通过仲裁程序转化为仲裁裁决，利用国际上现存的行之有效的承认和执行外国仲裁裁决的制度保障和解协议的法律效力。

第七章对中国国际商事调解进行了回顾和展望。在回溯中国古代以及近现代调解制度的流变的基础上，重点考察了当代中国国际商事调解的实践和立法现状，揭示其成功的实践经验以及立法上的缺失，得出了在现代法治社会将调解纳入法制轨道已然是一种潮流的背景下，有必要进行我国商事调解立法的建构的结论。在商事调解的立法建构上，目前国际上主要有在仲裁立法中规定商事调解的有关问题、制定统一调解法以适用于所有种类的调解以及制定单一的商事调解法三种立法模式。在对这几种立法模式以及我国的有关实践和立法进行综合考量的前提下，我国应以制定一部单一的商事调解法为宜，而且它应该既适用于国际商事调解也适用于国内商事调解。在立法指导思想上，应将借鉴国际上关于商事调解的立法和整合本土资源结合起来，并充分体现调解所具有的自愿性、灵活性等本质属

性。在立法内容上，这部商事调解法应涵盖商事调解的基本原则、法律的适用范围、调解机构、调解程序、和解协议的法律效力以及联合调解等内容。

关键词：争议　调解　联合国国际贸易法委员会　国际商事调解示范法

Abstract

Conciliation, as the typical representative for Alternative Dispute Resolution (ADR), plays a more and more important role in the practice of dispute resolution among states and constitutes one of the organic compositions in the international commercial dispute settlement system as well. Based on the existing legislation and practices, this dissertation, by using the comparative approach and combining theory with practice synthetically, attempts to research the legal issues on the international commercial conciliation.

The dissertation is divided into seven chapters.

Chapter 1 mainly expounds the universal legal issues in the conciliation. Conciliation is regarded as the most typical representative for the ADR in nowadays society. The conciliation provides a kind of approach to resolve disputes, not considering the concrete differences among the various definitions of conciliation. The normal way is that the parties to disputes resolve their disputes by the assistance of a neutral third party. There are two ways to express the "调解" in English, namely conciliation and mediation. In spite of arguments on their meanings, they can be alternatively used in general. The conciliation can be classified into different types from different perspectives. The essential and specific properties of the conciliation are the voluntarity of the parties to accept and join the procedure, the involvement and assistance of a third party, the facilitation, the flexibility and contractability. Therefore, compared with the other ways for dispute resolution, especially with the lawsuit, the conciliation has its own specific institutional value. Besides, its functions and effectiveness can also be reflected by succeeding in controlling conflicts. All in all, conciliation emphasizes the benefit and harmony as the most basic value pursued by the conciliation.

Chapter 2 firstly observes the concept of the international commercial conciliation on the basis of *the Model law on* International Commercial

Conciliation issued by the United Nations Commission on International Trade Law. Then, it puts forward that the international judgment for conciliation mainly adopts the comprehensive one built on the standards of the material connecting factors and that of disputes internationally recognized and permits the parties to determine if their conciliation is covered by international conciliation. The term "commercial" should be understood in its general meaning so as to embrace all the issues related to the business. The conciliation in the international commercial conciliation is also a concept in general which refers to the various procedures for solving the disputes in good faith initiated and organized by the parties to disputes by inviting a person or some persons to assist them in the dispute resolution. Likewise, in accordance with the nature of the third party, the international commercial conciliation can be divided into different kinds, including the nongovernmental ones. The international commercial conciliation, which belongs to the nongovernmental ones, is the main issue illustrated in this dissertation. This chapter also sets forth the legislation and practices of the international commercial conciliation around the world and considers that the conciliation is now in a state of growth. Moreover, the international community is now attempting to make the conciliation be a legal system. In a sense, this attempt reflects the understanding of the relationship between the conciliation and the rule-of-law, and also confirms the thesis "all the conciliation is more or less under the shadow of law".

Chapter 3 inquires into the reasons of the rise of the international commercial conciliation in the contemporary society. The first reason lies in the advantages of the conciliation in solving the commercial dispute when compared with the procedures of lawsuit and of arbitration. Such advantages are reducing the cost of dispute settlement, maintaining the business relation between parties, enjoying effective adaptability, safeguarding the business credit standing of the parties, providing the opportunities to solve the series of disputes and settling the disputes completely. Therefore, the adoption of the conciliation can not only relax the pressure of the court in solving the disputes but also overcome the disadvantage of lawsuit and arbitration, thus the high – quality resolution for disputes meets the objective necessity of the society. The second reason rests with the influence of the traditional legal ideas, the Confucian thoughts and the "harmony" sense in the eastern society and that of the ideas of the times

including existing of various dispute revolution systems, attaching importance to the benefits and relations in the western society, which made the social subjects themselves eager to utilize the conciliation in solving their disputes. Upon the aforesaid subjective and objective aspects, the rise of the commercial conciliation surely has its inevitability.

Chapter 4 analyzes the basic principles and procedural safeguards in the international commercial conciliation. The autonomy of will of the parties, the adjustment of the legitimacy and the reasonability, the independence and justification of the conciliators, which show the objective needs and the law of the conciliation, should be the basic principles compulsorily abided by in the process of conciliation. The flexibility of the conciliation is the most important procedural interest, which is restricted by the self-control of the parties to disputes as well as the authority of the third party. If the self-control of the parties and the authority of the third party cannot be enough ensured, this flexibility may be easily abused and thus lead to the loss of justice. Thus the procedural interest of the conciliation is, to a large degree, the fatal disadvantage of itself. It is imperative to establish a set of certain procedural rules in order to provide safeguards for the conciliation. The procedural safeguards mainly touch the behavior regulations of the parties, the qualification, the rights and obligations and the neutrality of the conciliator, and etc. It is necessary to pay attention to the degree of the procedural safeguards of the conciliation, otherwise, the extreme rules will be in erosion of the procedural interests. Thus, coordinating the procedural safeguards and the procedural interests should be pursued in line with the guidance of the least rules and the most respects for the authority of the will of the parties.

Chapter 5 mainly expounds the issues concerning the procedures of the international commercial conciliation. In the strictly legal sense, the conciliation shows the appearance of anti-procedure which is determined by the consent of the parties to disputes, the key element of the conciliation. In this sense, it is not so much a procedure of conciliation as the process of it, and this process should not be equal to that of lawsuit or arbitration in the legal sense. The reason for using the term of "procedure" mainly lies in the fact of the term "usage" which has been accepted through common practices. The dissertation names it "procedure" herein to illustrate that it refers to the universal and

applicable ways of the conciliation. The procedure of the conciliation begins with the consent between the parties. Theoretically, the actual initiation of the conciliation is determined by the judgment on the conciliatability of the disputing issues. In a general sense, the disputing issues relevant to the commerce can be solved by way of conciliation. As a matter of fact, the conciliation also attaches importance to the reconcilability of the individual case in practice, namely the flexible room for the parties' requirements for rights. The determination of the conciliator, the preparation of the conciliation and the convening a conference for the conciliation are the key links in the process of the conciliation. The procedure may be cancelled due to the settlement agreement between the parties or to the abandon themselves to the unsuccessful conciliation. The conciliator plays an important role in the aspects of urging the parties to exchange ideas and requirements and of the procedural or essential issues in the process of conciliation. However, the role of the conciliator is also determined by his/her personal character and his/her skills.

Chapter 6 inquires into the issues relevant to the conciliation agreement which emphasizes the initiation of the conciliation and the settlement agreement which stresses on the treatment of the conciliation. The conciliation agreement is a kind of agreement which is reached between the parties to be willing to hand over their dispute to the conciliation. In general, this kind of agreement has two forms: the conciliatory articles in the contract and the independent conciliatory agreement. The conciliation articles as a whole has its own independence as well as relation with the other articles in the contract. So, even if the other articles of the contract are ineffective, this does not influence the effect of the conciliation articles. The conciliation agreement can be stand by itself and be adaptable. This means that it can be applicable not only to the disputes before or after the contract in practice but also to the non-contract disputes. The conciliation agreement can postpone but not exclude the judicial or arbitrary jurisdiction in general. Moreover, any party has the right to claim their withdrawal from the conciliation. Therefore, it is very difficult to regulate the coercive power of the agreement in legal ways. As to the settlement agreement, the key problem is whether it has the legal effect and can be implemented compulsorily. This directly influences the vitality of the conciliation which is an approach to independently solve the disputes. At least, the restriction of the settlement

agreement is similar to that of the contract. But due to the fact that this kind of agreement is after all the result reached by the parties, the object is the legal relation in civil and commercial issues involved in disputes. In general, this is different from the contract which regulates the substantial legal relation. All these make the settlement agreement be specific in compulsory implementation. There is a practice for the solution of the implementation of the settlement agreement, namely, transforming the agreement into the arbitration award through the arbitration procedure. By this way, the legal effect of the settlement agreement can be guaranteed by using the system of the recognition and implementation of the foreign arbitration award in the international community.

Chapter 7 traces back and looks forward into the future of the international conciliation in China. On the basis of tracing back the change of the ancient, modern and contemporary conciliation systems, this chapter observes the practice and legislation of the Chinese commercial conciliation and puts forward its successful practical experience and the imperfectness of the relevant legislation. So, it is imperative for China to construct the legislation on the commercial conciliation because it has been a trend to put the conciliation into the legal system in the contemporary rule-by-law society. At present, there are three models of legislation on the commercial conciliation: first, the issue concerning conciliation is provided in the legislation on arbitration; second, uniform law on conciliation is made in order to adapt to all kinds of conciliations; third, independent commercial conciliation law is enacted. On the basis of comprehensive consideration of the above models and of Chinese relevant practices and legislations, it is better to draft a single commercial conciliation law which can be implemented in both international and domestic commercial conciliation. In the respect of guiding ideology for legislation, it is necessary to combine the legislation on commercial conciliation around the world with the domestic experiences and embody the essential nature of the authority of will of the parties and that of flexibility. As far as the contents of the legislation are concerned, it should cover the basic principles, the scope of application, the bodies, the procedure, the legal effect of the settlement agreement as well as the coordinated conciliation.

目　录