

Dispute Settlement Mechanisms in International Contracts

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Introduction:

The field of international dispute resolution is enormously complex, involving multiple layers of frequently changing law (international and national; statutory, judicial and treaty), rules and regulations.

When parties enter into a contract, the last thing they want to think about is the kind of dispute that may arise. Indeed, it is sometimes impossible to speculate on that subject. Nonetheless, and particularly in the international setting, it is essential that a contract provide a mechanism for dispute resolution. The reason for this is basic: if no mechanism is provided, the parties will be more likely to resort to litigation in the courts, often in more than one country, each piece of such litigation may be expensive and time-consuming, and the result may be inconsistent judgments that are difficult to enforce without relitigating the merits. On the other hand, if some attention is given to alternative dispute resolution at the contract formation stage, because of international conventions, the parties can agree to a mechanism that substantially reduces the expense of resolving any future dispute and increases the odds of successfully enforcing a judgment or award.¹

Business globalization is causing more and more companies to engage in cross-border transactions. Individuals (including public officials) who would have had no occasion to meet in an earlier era of mostly domestic business now sit across from each other at multi-party international negotiations.

Corporations are discovering that durable agreements require collaborative relationships, which are difficult and sometimes impossible to achieve in a cross-cultural environment. This is especially the case if the parties are unwilling (as they often are) to disclose their strategic aims or other concerns in face-to-face encounters.

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¹ Mazzini, D., "Stable International Contracts in Emerging Markets: An Endangered Species", *International Law Journal*, 15 Boston University, 1997, at p.343.

Although international trade and commercial disputes may arise from all forms of trade and commerce, most commercial disputes in fact come from the areas of international sales of goods, contracts for the carriage of goods, international banking and finance, insurance contracts, international licensing or distribution agreements, international supply of services, international construction of works and foreign investment.²

A Brief History of Alternative Dispute Resolution (ADR):

ADR is a new terminology of an old concept. Non aggressive, non-confrontational approach to dispute settlement has been the teachings and practice of eastern philosophers since time immemorial. It is only recently since the method of ADR has been the subject of critical and scientific analysis. Ironically it is the academics in the West who brought ADR, with its famous 'win win solution' trademark to world attention. Society, commerce and trade all over the world are the beneficiaries of alternative dispute resolution.

Dispute resolution outside of courts therefore is not anything new; societies world-over have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes.³ The ADR movement in the United States was launched in the 1970s, beginning as a social movement to resolve community-wide civil rights disputes through mediation, and as a legal movement to address increased delay and expense in litigation arising from an overcrowded court system. Ever since, the legal ADR movement in the United States has grown rapidly.

Today, ADR is flourishing throughout the world because it has proven itself, in multiple ways, to be a better way to resolve disputes. The search for efficient and better ways to resolve disputes, and the art of managing conflicts, are as old as humanity itself, yet it has only been

² John, M., *International Commercial Law*, Butterworths, Sydney, 1997, at p. 525.

³ This history is drawn from a number of sources, including: Stephen B. Goldberg; Frank E.A. Sander and Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes*, Little Brown and Co.: New York, 2nd ed., 1992, at pp. 3-12.

within the last thirty years or so that ADR as a movement has begun to be embraced enthusiastically by the legal system. More recently, ADR has become institutionalized as part of many court systems and system for justice as a whole throughout the world.

ADR is continuing to win acceptance around the world among lawyers and their clients as a speedy, inexpensive and efficient method of resolving disputes. The use of a neutral facilitator to help the parties recognize their interests and devise options for mutual gain has not only spared disputants long, acrimonious battles in arbitral panels or courts, it has also made possible the continuing business relationships of the parties. ADR works well to resolve many if not most commercial disputes, which would otherwise have gone to arbitration or the courts for decision.

ADR is based on the four basic principles of "win-win" negotiation⁴ :

- (i) separate the people from the problem;
- (ii) focus on interests, not positions;
- (iii) invent options for mutual gain; and
- (iv) use objective criteria.

Advantages of ADR Mechanisms:

The use of arbitration, mediation and other forms of alternative dispute resolution is well established in many contexts, including international commercial transactions, employment relationships, consumer-level financial transactions, family and divorce matters, and so forth. As conflicts arises between two or more individuals, corporations or groups when the fulfillment of the interest, needs or goals of one side are perceived to be incompatible with the fulfillment of the interest, needs or goals of the other side. Normally disputes would end up in litigation and subsequently delayed. Legal standard do not guarantee access to realistic solutions that meet the needs of individuals whose lives have come apart by legal disputes. They may even block

⁴ Fisher, R., and Ury, W., *Getting to Yes*, Penguin Books: New York & London, 2nd ed., 1991, at pp. 3-94.

access as dispute resolution through courts which has become increasingly stylized, complex and expensive.⁵

ADR can take three forms, depending upon the nature of the case and what the parties want. The first is binding arbitration which can determine all or part of the case. The second, non-binding arbitration, evaluates the parties' positions, but either party can reject the results. The third type of process is mediation, where a trained neutral, through joint and private sessions during the mediation proceeding, brings the parties together and aids them to settle their case. These types of proceedings are not mutually exclusive, and where the case warrants it, a trained arbitrator and mediator can bring different processes to bear in order to help the parties to end their dispute.

There are seven principal benefits to Alternative Dispute Resolution:

1. The parties choose their neutral judge/arbitrator/mediator with full knowledge of his or her background, training, experience, and proven track record. The parties can also pick the place where the matter will be heard.

2. The proceedings are flexible. The process may take a few hours, a few days or even weeks for a complicated arbitration, but the parties' and attorneys' important other matters, vacations, family duties, and other salient issues are considered in determining where and when the hearings will be held.

3. Speed of resolution far surpasses that available in the courts. If needed, cases can be heard or resolved in days or weeks, rather than months or years.

4. Lower costs are a hallmark of ADR. Although the arbitrator/mediator fees must be paid, the savings in attorneys' fees, discovery costs, and other litigation expenses far outweighs the cost of the mediator/arbitrator.

5. Confidentiality is also a prime benefit of ADR. The papers filed in a court proceeding are usually public, as is the trial. The parties often receive adverse publicity. Arbitrations and mediations are closed to the public. Even if the mediation is unsuccessful, no matters discussed at the

⁵ Macfarlane, J., " 'The Mediation Alternative' Rethinking Disputes", *The Mediation Alternative*, at p. 11

mediation proceedings can later be disclosed if the case then proceeds to litigation.

6. Lastly, the parties can achieve a better assessment of their exposure and the value of the case in an ADR proceeding. The parties can bind themselves to a “high-low” range in arbitration, and the parties have complete control over the amount of any settlement in mediation.

7. One of the great advantages of ADR is that the parties have control over the process, - no more court waiting lists, no more long drawn out formal processes; instead, an informal, quicker and cheaper process designed to get to a solution so that the parties can get on with business.

Another great advantage of ADR is that, unlike the court system where everything is on the public record, ADR can remain confidential. This is particularly useful for disputes in, for example, the IT industry where disputes over intellectual property are in great need of confidentiality.

Arbitration as a Method of Dispute Resolution:

Arbitration is one of the various methods of dispute resolution but undoubtedly the most popular. It is defined in the Halsbury's Laws of England as "the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction".⁶

Arbitration may be defined as a private judicial process, recognized in law, in which one or more independent persons hear and decide a dispute. It is the preferred method of dispute resolution in international commercial contracts for a number of important reasons: First, arbitration can resolve disputes with less publicity than is likely to occur with conventional litigation. Even though total confidentiality of any given arbitral proceeding cannot always be assumed because the ability of the parties to maintain such confidentiality is impacted by local law, arbitral institution rules, and the parties' agreement—arbitration is, in general, an inherently private proceeding. Second, since arbitration is less public, and less formal than litigation, it is often less destructive of

⁶ *Halsbury's Laws of England*, 3rd ed., Vol. 2, at p 2, para 2.

the ongoing working relationship between and among the parties to the dispute, a critical consideration when there is an ongoing business relationship. Third, the parties agreeing to international arbitration have the opportunity to (1) select the arbitrators and their qualifications; (2) choose the location for the arbitration and the language to be used; (3) choose the applicable procedural rules of arbitration and applicable substantive law; (4) establish schedules and deadlines and the scope of discovery and (5) enforce a judgment more easily than in litigation.

Today, arbitration has been promoted and regulated in many international treaties and conventions, such as European Convention on International Arbitration,⁷ the Washington Convention of 1965⁸ which creates the International Centre for the Settlement of Investment Disputes (ICSID) and the UNCITRAL Model Law on International Commercial Arbitrations⁹.

International Commercial Arbitration:

International *arbitration* is defined as a systematic methodology of dispute resolution privately agreed to by contracting parties. The system creates a process, whereby an appointed private judge acting as a neutral having expertise in the disputed area, conducts a hearing without the normal formal civil court proceedings.¹⁰ Arbitration is a process and system of dispute resolution dating back to ancient Greece 500 B.C., and has developed internationally as a customary practice originating over the centuries primarily from international maritime trade.¹¹ Although the proceedings are entirely private, arbitral decisions are rendered on the predicate of international law (treaty, and/or customary law) and enforced via treaty. In view of the above, however, international commercial arbitration is viewed as an alternative dispute resolution mechanism to that of municipal (law of one's own nation) litigation and

⁷ Made in Geneva in April 1961, see United Nations Treaty Series (1963- 1974), vol. 484, no. 7041

⁸ Entered into force on October 14, 1966.

⁹ The Model Law was adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on June 21, 1985 by the General Assembly Resolution A/40/17, 40 G.A.O.R. Supp. No. 53, A/40/53.

¹⁰ Jones, S. S., *International Arbitration*, 8 Hastings International and Comparative Law Review, Winter, 1985, at p. 213.

¹¹ King, T. H. and Le Forestier M. A, "Arbitration in Ancient Greece", *Dispute Resolution Journal*, September, 1994.

the uncertain relative domestic court rulings.¹² Therefore, the fundamental purpose and objective of international commercial arbitration is to promote, harmonize, and facilitate the growth of international trade and commerce.

Essentially, commercial international arbitration finds governance and enforcement via pertinent multilateral or bilateral convention, treaty, or agreement. Most notable are the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (sometimes called the "New York" or "U.N. Convention"), and the United Nations Commission on International Trade Law Model Rules of Arbitration (UNCITRAL).¹³ The effective and predictable enforcement of arbitral proceedings are greatly enhanced and facilitated by such treaty and convention law. With the above, and because: a.) international commercial arbitration leads to more predictable outcomes than international domestic municipal law decisions, b.) is also less expensive than litigation c.) provides faster resolution to disputes, and finally, d.) most international entities prefer private negotiation to resolving disputes rather than litigation. Therefore, arbitration is the preferred mechanism for resolving international commercial disputes.¹⁴

How the Process of International Arbitration Works:

The topic of arbitration can be considered under three headings; why the process of international arbitration works - how it may be put into effect-and the requirements of success when a party actually participates in an international arbitration.

The whole process of international commercial litigation includes three stages:

- (i) Choice of forum and commercial and commencement of proceedings;
- (ii) Carrying out the proceeding under the rules of the court and

¹² Janis, M. W., *An Introduction to International Law*, Foundation Press Publication, Inc. New York, New York, 1999.

¹³ The Model Law was adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on June 21, 1985 by the General Assembly Resolution A/40/17, 40 G.A.O.R. Supp. No. 53, A/40/53.

¹⁴ Hoellering, M. F., "Managing International Commercial Arbitration: The Institution's Role", *Dispute Resolution Journal*, June, 1994.

(iii) Enforcement of judgment

Two sets of rules – the procedural rules of a court and conflicts rules (where the conflict rules have not been fully codified in the rules of the court) are the most relevant to the process. The conflict rules dealing with international commercial litigation can be divided into two categories – those relating to the determination of a court's jurisdiction and those relating to the determination of the governing law of the dispute.

The international arbitral process works because awards may be enforced throughout the world in a much more effective manner than national court judgments. International treaties for the enforcement abroad of judicial decisions tend to be bilateral and can hardly be said to cover the globe.¹⁵ By contrast, mainly as a result of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards prepared under the auspices of the United Nations and ratified by about 80 countries, the courts of signatory States are bound to enforce awards rendered abroad. The only grounds on which the enforcement of such awards must be refused are grave violations of procedure, jurisdiction, or public policy (art. V. of the 1958 Convention).

Most of the signatories to the 1958 Convention have expressed the so called reciprocity reservation, limiting the scope of the Convention's application to awards rendered in other countries which also are parties to the Convention. As a consequence, it is quite difficult for any party to propose a place of arbitration located in a country which is not a party to the Convention.

The second theme - how the arbitral process may be put into effect concerns the contract drafting techniques which should be used to obtain the most appropriate forum for the settlement of disputes.

Whereas in many international contracts the great majority of the clauses are carefully and intelligently negotiated and drafted, the jurisdictional clause is often shockingly inadequate.¹⁶ Obviously, rights

¹⁵ Cappelletti, M., "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access to Justice Movement", *The Modern Law Review*, vol. 56, May, 1993.

¹⁶ Detailed analysis of these methods: Goldberg, S.; Sanders, F. and Rogers, N., *Dispute Resolution: Negotiation, Mediation and Other Process*, 3rd ed., Aspen Law and Business, New York, 1999.

under a contract are ultimately only as secure as the competent jurisdiction will make them, and hence a party which allows reference to a jurisdiction which is incapable of properly understanding the contract and its context, or worse will not act impartially, has in fact undermined the entirety of the contract.

Arbitration clauses are a subcategory of jurisdiction clauses. There are two kinds; institutional arbitration clauses, and ad hoc arbitration clauses. The former refers to a permanent institution which will: set the arbitral process in motion, principally by nominating arbitrators wherever necessary; monitor their performance and replace them if they fail to carry out their tasks or if they are legitimately challenged on grounds of bias or impropriety; establish and collect the arbitrators' fees; and issue the award with an institutional imprimatur.¹⁷ Ad hoc arbitration clauses do not refer to such a permanent institution, but purport to be self-executing, either by setting forth in detail a full set of rules for the conduct of the arbitration, or else by referring to a preexisting body of rules such as the UNCITRAL Arbitration Rules of 1976. The disadvantage of ad hoc arbitration clauses is that they rely to a great extent on the voluntary cooperation of both sides, and tend to break down if the respondent acts obstreperously. Consequently, it is generally preferable to insert an institutional arbitration clause in the contract.¹⁸

Institutions that Deal with Dispute Settlements:

For the purpose of the settlement of disputes in which African developing countries are involved, three arbitration institutions are those commonly referred to in their international contracts. First and foremost is the International Court of Arbitration of the International Chamber of Commerce (ICC)¹⁹, which handles the greatest number of cases by far. The settlement of commercial disputes is only one of a great variety of activities of the ICC. The methods offered by the ICC for settling such disputes are various, including conciliation and expert opinions and so-called referee decisions. But by far the most important mechanism is

¹⁷ Noone, M., *Mediation- (Essential Legal Skills)*, Cavendish Publishing Ltd., Great Britain, 1996.

¹⁸ Rosenberg, S. and H. Folberg., "ADR: An Empirical Analysis", *Stanford Law Review*, vol. 46, at pp. 1497-1526, 1994.

¹⁹ International Chamber of Commerce – ICC International Court of Arbitration is located at 38, Cours Albert 1er, 75008 Paris, France.

arbitration, conducted by the International Court of Arbitration (ICA).. This Court does not actually decide disputes, but nominates tribunals to deal with arbitrators (two of whom are generally party nominated) or of a sole arbitrator. Once the final award has been rendered, the tribunal disappears. The Court has nearly 50 members, most of them non Europeans.

The next most active institution, although having less than one-fifth of the ICA's caseload, is the London Court of International Arbitration (LCIA).²⁰ The LCIA has no activity other than arbitration. As in the case of ICC arbitration, parties referring a dispute to the LCIA may select a venue for the proceedings in any country of their choice. Having been until recently a predominantly English institution, the LCIA now, under its revised statutes, is composed of lawyers from all over the world; from Nigeria to Australia and Argentina, and also from the USSR and China.

The third institution is the International Centre for the Settlement of Investment Disputes (ICSID), established under the auspices of the World Bank pursuant to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States. References to ICSID are often seen, not only in contracts but also in investment promotion laws as well as in bilateral treaties. However, only a few cases are actually submitted to ICSID. The reason may be an inherent restriction on ICSID's jurisdiction, namely the requirement that one of the parties must be a State. No State agency or parastatal company may validly refer a case to ICSID arbitration unless the State formally notifies ICSID that the agency or parastatal body concerned is to be deemed, for the purposes of the 1965 Convention, to have the same identity as the State. This notification is rarely given. As regards disputes directly implicating States, these are generally settled by negotiation, and hence resorting to the ICSID arbitral mechanism has remained rare. Nevertheless, the institution's potential importance is considerable, and negotiators of international contracts should be aware of it.

²⁰ LCIA, the International Dispute Resolution Centre, 8 Breems Buildings, Chancery Lane, London EC4A 1HP, England.

The American Arbitration Association (AAA)²¹ administers thousands of arbitrations and mediations in the United States. It has a large number of Canadians on its international roster and provides arbitration facilities that are available to Canadian parties and counsels. It has provided services in 39 countries through its roster of approximately 20,000 trained neutrals.

Selection of the Method of Arbitration:

An arbitration clause should clearly indicate whether the arbitration proceeding will proceed under the auspices of an international arbitration institution, or whether it will proceed without such supervision but under preexisting arbitration rules. This is in effect a choice between an "institutional" or "administered" arbitration and an "ad hoc" arbitration. Depending on the type of arbitration selected, the parties will need to give careful thought to which institution they wish to select (in the case of an institutional arbitration), or the procedural rules they want to govern (in the case of an ad hoc arbitration).

In an ad hoc arbitration, the parties and arbitration tribunal manage the arbitration themselves, but typically employ an agreed set of comprehensive procedural rules, such as those drafted by the United Nations Commission on International Trade Law (UNCITRAL), commonly known as the UNCITRAL Rules. The UNCITRAL Rules are specifically designed for ad hoc international arbitrations. If procedural disputes arise before the tribunal is fully constituted and able to act on its own, the UNCITRAL Rules provide for an "appointing authority" to decide such disputes as disagreements on the selection and disqualification of arbitrators.

Qualifications and Conduct of the Arbitrators:

The Arbitration Rules of UNCITRAL, the LCIA and American Arbitrator's Association (AAA)'s International Rules require that all arbitrators be impartial and independent.²² The ICC Rules only expressly require independence.²³ The ICSID Rules require a statement

²¹ American Arbitration Association – International Center – 1633 Broadway, 10th floor, New York, U.S.A.

²² UNCITRAL Rules art. 10(1); LCIA Rules art. 5.2; AAA International Rules art. 7.1.

²³ ICC Rules art. 7(1), but arbitrator may be challenged for "lack of independence or otherwise." ICC Rules art. 11(1).

from the arbitrator that he or she will judge fairly between the parties and will not accept instruction from them.²⁴ In light of these differing tests, a party may wish to insert a clause requiring that all arbitrators be impartial, which is the key test,²⁵ and may even wish to require all arbitrators to declare that they can and shall decide the case impartially. As added insurance, the arbitration clause may include a requirement that all arbitrators shall abide by the International Bar Association's Rules of Ethics for International Arbitrators.

Place for Proceedings:

The location of arbitration is important for at least three substantive reasons. First, venue affects enforcement of both the arbitration agreement and the arbitration award. Again, the U.N. has played an important role in this process. The U.N. Convention basically provides that countries ratifying the convention will specifically enforce an agreement to arbitrate future disputes, and will enforce foreign arbitral awards rendered in other nations that ratify the convention.

Following adoption of this multilateral treaty, several nations have passed conforming

legislation. (If a country has not ratified the treaty and/or adopted conforming legislation, one should think twice about agreeing to arbitrate in that jurisdiction, unless there are equivalent bilateral accords and legislation.). Another substantive aspect of choosing the place of the arbitration is that it will impact the arbitration proceedings themselves.

Another substantive aspect of choosing the place of the arbitration is that it will impact the arbitration proceedings themselves. The U.N. approved a Model Arbitration Law in 1985 and, since then, some variant of it has been adopted by several countries. Still other countries have adopted their own, internally-generated arbitration legislation. It is fundamental that the place of the arbitration have a national law that is conducive to arbitration generally.

If the parties fail to set forth the situs of the arbitration in the arbitration clause, some institutions' rules allow the arbitrators to decide

²⁴ ICSID Rules of Procedure for Arbitration Proceedings Rule 6(2).

²⁵ See English Arbitration Act 1996, Chapters 1(a) and 24(1)(a) (June 17, 1996); Departmental Advisory Committee on Arbitration Law (Chairman, The Rt. Hon. Lord Justice Saville), Report on the Arbitration Bill pp. 101-04 (February 1996).

the situs based on the circumstances of the parties and the case,²⁶ while other rules authorize the institution itself to select the situs.²⁷ If the parties do not specify a forum, but have agreed to submit to particular arbitration rules that allow the arbitrators to decide the forum, it will be difficult for the parties to challenge the arbitrators' choice of forum.²⁸ It should be noted that choosing a situs does not mean that all arbitral proceedings have to take place there; the arbitrators generally have discretion under the arbitral rules to conduct some proceedings at other venues.²⁹

Minimum Requirements to be Met:

The following minimum requirements set-forth by the New York Convention is necessary to enforce an arbitration³⁰:

“The arbitration clause should meet the minimum requirements of the New York Convention, i.e. that: 1) the agreement is in writing; 2) the agreement deals with differences that have arisen or that may arise between the parties; (3) the agreement is valid under the law to which the parties have subjected it; (4) the parties have legal capacity under that law to enter into such an agreement; (5) place of arbitration; (6) number of arbitrators; (7) language of the arbitration; (8) law to be applied in the arbitration; and (9) the international arbitration institution and/or arbitration rules that the parties intend to use, unless an ad hoc arrangement is intended. “Ad hoc” refers to arbitrations conducted without institutional assistance, established rules, or both.

²⁶ UNCITRAL Rules art. 16; AAA International Rules art. 13 (administrator may initially determine the place of arbitration, subject to the power of the arbitrators to determine the situs).

²⁷ ICC Rules art. 14 (ICC International Court of Arbitration shall fix the place of arbitration if not agreed by the parties); LCIA Rules art. 16.1 (seat shall be London unless and until the LCIA Court determines that another seat is more appropriate).

²⁸ *Stanicoff vs Hertz*, 406 N.E.2d 1318, 1319 (Mass. App. 1980).

²⁹ ICC Rules art. 14 (arbitrators may conduct hearings or deliberate at any location they deem appropriate), LCIA Rules art. 16.1 (arbitrators may hold hearings and deliberations at any convenient location), AAA International Rules art. 13 (arbitrators may hold conferences, hear witnesses or inspect property at any place they deem appropriate).

³⁰ Gwyn, A. H. and Taylor, B. O. Jr., “Comparison of the Major International Arbitration Rule”, *Construction Lawyer*, Vol. 19, No. 3, July 1999.

Ad hoc arbitrations can be very effective, if the appointed arbitrators are competent and the contract designates an authority, such as a chamber of commerce or court, to appoint the arbitrator or the chairman of the arbitration panel if the parties cannot agree. Provided these minimum requirements are met, then the NYC prescribe that signatory nations enforce the arbitral judgments as international law amongst the signatory nations.”

Effect of Award:

In agreeing to arbitrate disputes, the parties probably intend to supplant traditional forms of litigation.³¹ Without some special drafting, however, the parties may unexpectedly see themselves subjected to extensive post-arbitration court proceedings. For example, the longstanding rule in English law is that issues of law arising from an arbitration award are subject to full review in the High Court of England. English law, however, permits parties to exclude such review if they do so expressly. Chinese law, on the other hand, permits arbitration if the award is "final and binding." For these reasons, the "model" provision specifies that the award shall be final and binding, and excludes the right to appeal issues of law.

Under the aforementioned U.N. Convention, there may still be review of an arbitration award at the enforcement stage. The general rule, however (with some major anecdotal exceptions), is that a foreign award will only be denied enforcement if there is proof that: (1) the arbitration agreement was invalid, e.g., for want of capacity; (2) there was inadequate notice; (3) the matter arbitrated was not arbitrable; (4) the arbitral tribunal was not constituted in conformity with the parties' agreement or the law of the place of arbitration; (5) the award was not binding or has been set aside by the courts where it was rendered; or (6) the award is against public policy.³²

Mediation as a Method of Dispute Resolution:

Mediation is defined in Black's Law Dictionary as “a private, informal dispute resolution process in which a neutral third party, the

³¹ Mendes, Errol P., “Assessing the Ultimate Question About International Commercial Arbitration; The Enforcement of Foreign Arbitral Awards”, 5 Canada – U.S. Business Law Review, 1992, at p. 233.

³² See Article 5 of the 1958 New York Convention on the *Enforcement of Foreign Arbitral Awards*.

mediator, helps disputing parties to reach an agreement." The mediation mechanism may be generally defined as the intervention of an unbiased third party in a dispute so as to facilitate party resolution of differences on a voluntary basis. The process differs from conciliation and arbitration with respect to the involvement and powers of the third party. Notwithstanding this definition, currently no consensus exists about the specifics of transnational mediation or its procedures, thus further complicating matters when it is employed as the *only* contractual means of dispute settlement.³³ More specifically, when international parties use mediation *exclusively*, there is no guarantee of a binding or definitive outcome at all.³⁴

In a voluntary effort, the mediator facilitates communication between parties and encourages settlement. There is, unlike in arbitration, considerable latitude available to the mediator, as he can privately discuss the merits of a dispute with each party individually -- unthinkable in the adversarial arbitration process.

In this context, there seems to be a considerable lack of clarity as to the scope of the words 'mediation' and 'conciliation'. There is, for example, no consistency in the use of these terms worldwide, and a number of ADR systems perceive them to be synonymous. The US and Australia use the term 'mediation' while 'conciliation' is commonly used in China, Japan, Thailand and Singapore.

Black's Law Dictionary also fails to resolve this distinction, if any, by defining the word 'conciliation' as "the adjustment and settlement of a dispute in a friendly, unantagonistic manner, used in courts with a view to avoiding trial and in labour disputes before arbitration."

Special Characteristics of Mediation:

As compared to arbitration and other more elaborate forms of ADR, mediation is most likely to:

³³ Lisa C. Thompson, "International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards", 24 *Syracuse Int'l Law Journal*, 1997, at page 11.

³⁴ *AMF Inc. vs Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985) (U.S. district court held that parties must receive a non-binding advisory opinion prior to litigation per their agreement); *DeValk Lincoln Mercury, Inc. vs Ford Motor Co.*, 811 F.326, (7th Cir. 1987).

- Minimize costs and time: Mediation is the shortest and the cheapest form of ADR.
- Protect continuing relationships: This stems from the fact that the process requires cooperation by the parties in order to succeed.
- Overcome communication obstacles: A skilled mediator can overcome obstacles to communications between the parties such as anger, fear of indicating weakness if a settlement is suggested, or reluctance to put the first offer on the table for fear of establishing a "floor" or "ceiling".
- Expand solutions and settlement possibilities. : Research has shown that even skilled negotiators often fail to properly estimate what the other party wants, expects, or needs to accomplish in resolving a dispute. Mediators can focus on those matters and help develop alternative solutions that address them.

On the other hand, mediation is particularly inappropriate where:

- Formal discovery is needed to develop the facts: While there are often some information exchanges during mediation, there are generally no formal discovery opportunities as exist in litigation or even arbitration.
- A party refuses to negotiate: If a party is absolutely convinced of the strength of its positions, a mediation is usually a waste of time and money.
- A party seeks delay: It is possible for a party to use mediation simply to delay the filing of litigation, although the delay involved is usually modest.

Mediation and Choice of Forum :

International dispute resolution organizations offer procedural rules for mediation. Since mediation has only recently come to the forefront, however, these rules remain vague in many areas. For example, the mediator's duties are not detailed specifically.³⁵The International Chamber of Commerce Rules of Optional Conciliation merely state that

³⁵ Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 Fordham Int'l L. J., 1991, at pp. 578, 585; Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 Hastings Int'l Comparative Law Review, 1995, at pp. 637, 639.

the mediator has discretion to conduct the proceedings as he or she sees fit.³⁶ The only restriction imposed on the mediator by many of these rules is that the mediator operates under the principles of impartiality, equity and justice. Mediators are left to determine the contents of these principles.

Given the lack of rule specificity and the discretion granted to the mediator, the success of the mediation often depends on the talents and temperament of the mediator. His or her ability to get the disputants to negotiate and work towards compromise is of utmost importance. Ultimately, if these techniques fail and the parties are not satisfied with the settlement, they can pursue other methods of dispute resolution, such as traditional litigation or arbitration.

The existence of a forum selection clause raises several issues that must be addressed by counsel. The first is whether the clause is to provide for an exclusive forum or is merely a consent to the jurisdiction of a given court. It cannot be presumed that forum clauses necessarily apply to all disputes between the parties or, on the other hand, that they must always be restricted to contractual causes of action. As with many other issues, the scope to be given a forum clause is a question of the parties' intent, and counsel should bear this in mind when drafting a clause.

Since the modern rule holds forum selection clauses to be prima facie valid and places the burden of proof squarely on the shoulders of the party resisting enforcement of the clause, the question naturally arises as to what bases exist for setting aside such a clause or for defeating its enforcement.

As with many other issues, the starting point for this analysis begins with the U.S. Supreme Court's opinion in *Bremen v. Zapata Off-Shore Co.*³⁷ Speaking for the majority, Chief Justice Warren Burger

³⁶ As with arbitration, parties can avoid uncertainties of mediation procedure by choosing the rules of international organizations such as the International Chamber of Commerce (ICC) Conciliation Rules, the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules or the Commercial Arbitration and Mediation Center for the Americas (CAMCA) Mediation Rules. *Id.*

³⁷ 407 U.S. 1, 15 (1972).

summarized the Court's view as to the general basis for attacking forum clauses:

“The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”

Chief Justice Burger adds that “A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”

Distinctive features of mediation:

(a) Accessible

All disputes whether in litigation or not and whether based upon legal rights or not, can be referred to mediation. Mediation can be conducted at short notice anywhere that the parties feel comfortable and at ease.³⁸ They can be structured to be more or less formal or informal, depending upon the nature of the dispute and the wishes of the parties.

(b) Voluntary

Mediation expect the parties to take responsibilities for resolving their own disputes. Each party to the mediation must freely agree in their choice of mediator, freely choose to participate in the process and freely reach or not reaching agreement.³⁹

Both the mediator and the parties are free to withdraw from the process at any time without giving any reasons. The parties can never be forced to either continue with a mediation or reach a settlement.

(c) Confidential

The parties to the mediation must feel free to speak openly about all their needs, interest and feelings. They must also be certain that what they say at all stages of the mediation will be treated as confidential and will be without prejudice, and will not be used as evidence in any later

³⁸ Goldberg, S. B.; Sander, F. E. A. and Rogers, N. H., *Dispute Resolution: Negotiation, Mediation, and other Processes*, Boston, Mass., Little Brown, 1992, at pp. 12-76.

³⁹ Golann, D., *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators*, Boston, Mass., Little Brown, 1996, at pp. 65-89.

arbitral or judicial proceedings. The parties normally expressly agree that the mediator cannot later be called to give evidence about what occurred in the mediation and that all documents will be returned to the parties or destroyed at the conclusion of the mediation.

(d) Facilitative

Mediation is interest-based and problem solving. It avoids position-based bargaining. The mediator's job is to assist the disputants in retaining control of their disputes while working out their own solutions. In a neutral and impartial way, the mediator assists the parties by helping them; identify each other's needs and underlying interests, whether these be substantive, procedural or psychological.⁴⁰ Secondly, develop as many options as possible for settlement and finally reach an agreement which satisfy them and accommodates all their needs.

The Centre for Disputes Resolution's statistic show a settlement rate of 85%, with the vast majority of cases being settled during the mediation itself.⁴¹ The World Trade Organisations (WTO) has developed a Dispute Settlement Understanding for trade disputes. The aim of the procedure is to achieve a mutually acceptable solution to parties to a trade dispute. Under article 5, mediation may be undertaken voluntarily by the parties, although the Director-General may offer mediation with a view to assisting the parties to settle dispute. The Article specifies that mediation is confidential and without prejudice⁴² to the parties' rights.

Conclusion:

ADR is continuing to win acceptance around the world among lawyers and their clients as a speedy, inexpensive and efficient method of resolving disputes. The use of a neutral facilitator to help the parties recognize their interests and devise options for mutual gain has not only spared disputants long, acrimonious battles in arbitral panels or courts, it has also made possible the continuing business relationships of the parties. ADR works well to resolve many if not most commercial disputes, which would otherwise have gone to arbitration or the courts for decision. The same techniques, can work equally well to make global deals -- especially those which have complicated issues and more than two parties.

⁴⁰ Folberg, J. and Taylor, A., *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, San Francisco, Jossey-Bass, 1984, at pp 73-98.

⁴¹ Centre for Disputes Resolutions, Press Release, 2nd August, 1999.

⁴² *Cutts vs Head* [1984]Ch 290 at p. 306.

International arbitration exists largely because there is no real alternative "neutral" forum for resolution of disputes. Parties choose arbitration, rather than racing to courthouses in their individual countries, in hopes of obtaining fair, independent decisions. Most international arbitrators take their roles in dispensing equal justice quite seriously, and strive for cross-cultural procedures that will seem fair to all concerned. Arbitration can provide an efficient and flexible alternative to litigation. When properly structured, arbitration can speed the resolution of disputes.