



The role of private dispute resolution mechanism in international business

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Abstract

International business has always favoured Private Dispute Resolution outside municipal courts. This practice has increased dramatically over the past decade. Almost every dispute resolution process is preceded by more or less intense negotiations between the respective managers who are in charge of the project. Almost 90 percent of international commercial contracts contain arbitration clauses and international contract practice is making increasing use of the windows provided by ADR. Some commercial contracts contain highly sophisticated “multi-tier” dispute resolution clauses which require the parties to reach a settlement of their disputes by going through consecutive steps of different Private Dispute Resolution processes. As a consequence of these developments, every major international law firm has a dispute resolution group.

Legal departments of major companies are likewise discovering the inherent benefits and cost effectiveness of proactive dispute management, especially in light of the high potentiality for private dispute resolution to preserve valuable business relationships.

Working successfully in this field of international business and discovering these potentials requires the ability to make an informed choice between the various options available in the ever growing arsenal of private dispute resolution. However, although the privacy and confidentiality of these processes count among the major reasons why businessmen resort to them, it is precisely these reasons which make it hard for students and young practitioners to get a profound understanding of both the law and the practice of Private Dispute Resolution. This work provides the missing gaps, and seeks to provide an insight into the law and practice of the three archetypes of Private Dispute Resolution, ie Business Negotiation, Business Mediation and International Commercial Arbitration. It is expected that through this work, the reader will develop a better and deeper understanding of different mechanisms of Commercial Arbitration.

Keywords: international business, resolution mechanism, developments

Introduction

International business disputes are better resolved through three different dispute resolution mechanisms, negotiation, mediation and arbitration. They all constitute alternative dispute resolution mechanisms^[1].

Essentially there are two forms of dispute resolution: One which imposes a decision and determines issues definitively. The other provides the basis to help parties reach an agreed solution or settlement. As far as definitive determination is concerned, there are various mechanisms to achieve a final determination of dispute by the intervention of third party who imposes a decision. Once the mechanism is agreed upon, neither party can unilaterally withdraw from the process.

Nothing precludes the parties from settling the dispute by themselves, but once they submit to ADR a binding determination will in principle, be made enforceable through the courts.^[2]

ADR includes mediation, conciliation and arbitration, as well as combination such as med-arb. In ADR, a third party assists the parties, in the settlement of their dispute. Arbitration for instance, provides for the final determination of a dispute by a private tribunal. According to the limited Kingdom Community Legal Services Guide:^[3]

“There are many different types of alternative dispute resolution scheme. The one (or ones) you choose to use will depend on: how you want your problem dealt with and what sort of problem you have”.^[4]

The underlying idea of this work is to allow the reader to experience an international business dispute resolution through three different mechanisms to wit: negotiation, mediation and arbitration. Through this work, the reader will develop a better and deeper understanding of the similarities and differences of these three mechanisms.

The work is divided into three parts. Part one deals with arbitration, part two deals with mediation and part three deals with conciliation while part four discusses other mode of private dispute resolution mechanism.

Part five deals with conclusion and recommendation^[5].

Arbitration

The various attempts to define arbitration have sought to reflect the evolving general understanding and essential legal forms of arbitration.

Shorter Oxford English Dictionary refers to arbitration as “uncontrolled decision;” It goes further to say that arbitration is the settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decisions”.^[6]

David posits that “Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons, the arbitrator or arbitrators who derive their powers from a private agreement not from the authorities of a state and who are to proceed and decide the case on the basis of such an agreement.”^[7]

Saunders defined arbitration in the following words

“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.”^[8]

Halsbury’s Laws of England defined arbitrations as “The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law.”^[9]

Donke asserts that “Commercial Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitrator’s determination, the award, will be accepted as final and binding upon them”.^[10]

Arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws do not attempt a final definition.^[11] Although it does not provide a definition, the English Arbitration Act 1996 did set out clear statement of principles of what is expected from arbitration.

Section 1 provides

- a. The object of arbitration is to obtain the fair resolution of dispute by an impartial tribunal without unnecessary delay or expense.
- b. The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. The Bahamas Arbitration Act 2009 is similar in structure and content to the English Arbitration Act 1996 and many of its provisions are materially identical.^[12]

There are four fundamental features of arbitration which ought to be viewed in conjunction with the primary objectives, which businesses seek when choosing dispute resolution processes in their contracts. These are not in consistent with the recognition of the advantages of international arbitration in many circumstances^[13]

Thus, the four fundamental features of arbitration are-

- It is an alternative to national court;
- It is a private mechanism for dispute resolution;
- It is selected and controlled by the parties;
- It is also a final and binding determination of party’s rights and obligations.

We will discuss the fundamental features of arbitration and then proceed to examine the primary objectives businesses seek when choosing dispute resolution processes in their transactions and the advantages of international arbitration in many circumstances.

Arbitration as an alternative to national courts.

There can be no gainsaying the fact that the most obvious fora for all disputes are national courts. They exist and are maintained by the state to provide a dispute settlement service for parties. Indeed, it is a clear manifestation and demonstration of state power and responsibility of the state to ensure that court exists, that appropriately qualified judges are appointed, that there are procedural rules to regulate the basis of jurisdiction and the conduct of case

before the court. It is important to note that arbitration is not a national court procedure. It is the position that when parties agree to arbitration they remove their relationship and disputes from the jurisdiction of national courts.

There are many reasons for parties to decide that their disputes should be resolved other than in the national courts; In reality, parties regularly agree to arbitration instead of the courts.

A private mechanism for dispute resolution

Arbitration is usually conducted in privacy and confidentiality to a large extent. Just as national courts are public, arbitration is generally private. In the same way as every contract between parties is a private matter between them, so too, the arbitration agreement is private between the parties.

Accordingly, when a dispute arises, it is to be resolved in the private dispute resolution system agreed between the parties, subject to certain safeguards. Having selected arbitration, the intention is for the arbitrators to determine the dispute and the entitlements and obligations of the parties in respect of the issues raised.

Selected and controlled by the parties.

The principal characteristics of arbitration is that it is chosen by the parties. It has been observed that however fulsome or simple the arbitration agreement, the parties have ultimate control of their dispute resolution system. This is called party autonomy. Party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration. In the main, national arbitration law seeks only to give effect to supplement and support the agreement of the parties for their disputes to be resolved by arbitration.^[14] Most laws are largely permissive and aim to support and enforce the agreement to arbitrate, rather than to intervene. Only where the parties are silent as to some aspect of the arbitration process will national laws impose their provisions.

Final and binding determination of party’s rights and obligations

As to the chosen alternative to national courts, the decision of the parties is for arbitrators to resolve the dispute finally. The parties have accepted that not only will arbitration be the form of dispute settlement, but also that they will accept and give effect to the arbitration award. Implied with the agreement to arbitrate is the acceptance that the strict rules of procedure and rights of appeal to a national court are excluded, subject to very limited, but essential protections. The decision of the arbitrators is final and binding on the parties. This is both a contractual commitment of the parties and the effect of the applicable law.

The Primary Objectives of Businesses in choosing Dispute Resolution Processes

There are no great surprises in what motivates the business community when choosing an appropriate forum and procedure for resolving disputes. The overriding objectives generally advanced are fairness efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections. These are complementary objectives, and to focus on one at the expense of the others leads to a result inconsistent with the expectations of the business world and denies basic commercial needs. Too often, the

practice of international arbitration has done just that, by focusing on perceived concepts of due process to the detriment of efficiency, resolution and certainty. Other objectives exist.

Efficiency, Time and Cost

Businesses do like speed and they are impatient with delay, and they have strong abhorrence for unnecessary cost. The duration of a financial dispute can have direct economic consequences for a business, whether in terms of delay in the collection of amount owed, or the setting of financial reserves that must be posted under accounting rules and which impair the reporting of profits until the final resolution of the dispute. Given that businesses know from experience that the longer it takes to resolve a dispute, the more effort and resources that will inevitably be expended on it; thus, it is hardly worth stating here that time has a direct and negative impact on the cost of adjudication.

Thus, when businesses pay for private adjudication, they rightly expect speed and efficiency from the process, just as they expect these qualities from other service providers. It is here that business expectations too often run into harsh conflict with international arbitration, since realistically, it is difficult to comfortably predict an arbitration of any commercial complexity ending in fewer than two or three years.^[15] This has attracted criticisms in the context of arbitration having become as time-consuming as conventional litigation. The point should be noted that, although there are still courts in the world in which the resolution of a dispute can take considerably longer, there are also many that do not and where litigation is conducted with reasonable efficiency and speed. It is suggested that in the real business world, a time frame of two to three years is simply too long, particularly for a private process paid for by the parties, in which any right of appeal is largely given up.

Resolution and Certainty of Contractual Rights

There is a strong nexus between a timely resolution of international commercial dispute contractual rights expectations in terms of certainty. It has been noted that successful businesses revolve around good planning and business leaders value resolution because it allows them to plan against known outcomes rather than operating under a cloud of uncertainty. In our globalized world, business decisions are made on a daily basis of when, how, and what types of transactions to pursue and accept. Every international contract is assessed by its likely benefit measured against the risk and associated cost.

Litigation, by contrast, whether in court or arbitration, entails significant uncertainty, and this uncertainty is anathema to most businesses. For instance, if the meaning of a contractual term can remain in doubt for years pending adjudication, then the assessment and rationale for making such contract is also called into question, and this is not conducive to good business. While business leaders also expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision. Win, lose or draw, businesses want – and need – to be able to address and plan against the fallout of a decision, in terms of the financial ramifications, the manner in which they conduct business or negotiate agreements, their relationship with the opponent, and their relationship with other parties where similar issues may be presented.^[16]

The Undeniable Value of International Arbitration

In the increasingly globalized world, that is so interconnected and “floit”,^[17] International arbitration continues to be a viable and important partner for businesses expanding internationally, particularly in novel markets and emerging countries. Notwithstanding the defects, there are still good reasons that can make it preferable to litigation in many circumstances, and we do not deny this here. The international enforceability of awards is one such advantage, and the neutrality of process in comparison with the courts of less developed legal system is another. Furthermore, although it is easy to complain about how long arbitrations take to conclude, there are still countries like Nigeria and the Bahamas where lawsuits may take a decade or longer to resolve. Finally, even an imperfect international arbitration may have its value simply because it is often easier to deal with the devil you know than the devil one does not know.^[18]

Moreover, arbitrators and arbitration institutions should not content themselves with comparisons to undeveloped legal system or other forms of adjudication that suffer from greater or different problems. The reason for this seems obvious; whatever other advantages arbitration may offer, it is not fulfilling one of the basic needs of its business customers: which is – the need for early resolution. One of the most potent advantages of arbitration is that its institutions and constituencies have the power to change the manner in which it is conducted in order to meet the needs of the parties, and thereby to close the gap in customer expectations. These writers are confident that the international arbitration constituencies possess the ability to adapt to new challenges, so that experiences like the ones that may occasion undue or inordinate delay are avoided and most importantly, that a provision for resolving issues early should be a high priority for international arbitration.

Other Modes of Private Dispute Resolution Mechanism – Mediation and Conciliation

Apart from arbitration, there are other private dispute resolution mechanisms that play a pivotal role in international business such as mediation and conciliation. Mediation is a form of Alternative Dispute Resolution (ADR) in which a neutral third party (mediator) facilitates the negotiations – between the parties, often in “caucus” sessions, and usually the parties retains the right to decide.^[19] Putting it another way, mediation is a process whereby a mediator, i.e, a neutral third party works with the parties to resolve their dispute by agreement, rather than imposing a solution. It is sometimes known as conciliation. Historically, and because of the slightly different methods applied in public mediation and Conciliation in International Law, they were perceived as different processes. Consequently, mediation sometimes refers to a method where a mediator has a more proactive role (evaluative mediation) and conciliation sometimes refers to a method where a conciliator has a more facilitating mediator role (facilitative mediation).

Mediation can be more effective than simple negotiations. This is because the mediator works with the parties to effect a compromise, either by suggesting grounds of agreement or forcing them to recognize weaknesses in their cases. The mediator may, if required, evaluate the merits of the parties’ case in a non-binding manner. However, the mediator cannot make a binding adjudicatory decision. The parties

can obtain any remedy they wish; the only limits are on what they can agree. This differs from the position in litigation, arbitration and expert determination, where the court or tribunal is limited to remedies available at law.^[20]

It is important to note here that in some instances, the Private Dispute Resolution or Alternative Dispute Resolution (ADR) may involve another mechanism e.g. an admixture of Arbitration and mediation. This is commonly referred to as mediation/arbitration or (med-arb).^[21] This can happen where parties agree that if mediation does not result in a negotiated settlement, the dispute will be referred/resolved by arbitration and the mediator is converted into an arbitrator. In this process, there is initially facilitative mediation (i.e. the mediator does not evaluate the strength of the parties cases) followed by binding arbitration. This is normal situation in arbitration in China. What is unique in this situation is that the mediator is converted into an arbitrator, in order to make a determinative decision if the mediation fails.

The idea of the same individual acting as both a mediator and then an arbitrator gives serious misgivings. In view of the confidential and prejudicial information relied on during the mediation process, it is generally considered that the mediator would be compromised to then convert himself into an arbitrator to make a decision on the merits. In these circumstances, many parties would not be fully open and frank with the mediator for fear of being prejudiced at the arbitration stage.

These – arbitration, mediation and conciliation are some of the main Private Dispute Resolution or (ADR) mechanisms requiring parties' agreement for resolution of dispute. One mechanism though not discussed in detail in this work but which is commonly used especially in resolution of diplomatic dispute is Negotiation.^[22]

However, only a brief mention of negotiation is apposite here. Negotiation may be defined in a nutshell, as "communication for the purpose of persuasion".^[23] Or as "a process of communicating back and forth for the purpose of reaching a joint decision".^[24]

Since someone only needs to be persuaded to reach a decision if he has a different view than his opponent, negotiation can also be circumscribed as communication for the purpose of reconciling competing interests or as a way to "communicate or confer with another so as to arrive at the settlement of some matter".^[25]

Negotiation may be described as a (voluntary communication) process whereby two seek an agreement to establish what each shall give or take, or perform and receive in a transaction between them.^[26] In short, negotiation is a two or multiparty communication process, by which two or more persons seek to advance their individual interests through joint action.^[27] Negotiation is thus the basic form of all non-adjudicatory dispute resolution process. This is why many regard negotiations as being outside the realm of ADR. Thus, our focus in this work remains the key Private Dispute Resolution mechanisms i.e arbitration, mediation and conciliation.

The dividing line between processes such as negotiation and arbitration and 'involuntary' adjudication before domestic courts also marks the distinction between "Alternative Dispute Resolution (ADR)"^[28] and litigation before domestic courts.^[29] ADR processes have been developed since early 1970's and in the US, mediation is generally regarded as the prototype of all ADR

processes/mechanisms.^[30] Article 5 (2) ICC ADR Rules takes account of this fact and provides that "(i) in the absence of an agreement of the parties on the settlement technique to be used, mediation shall be used". Mediation has its root in the Chinese culture, where it forms an essential part of neighbourhood justice system.^[31] In 1979, representatives from US Fortune 500 companies and major law firms founded the "CPR Institute for Dispute Resolution" (CPR) in New York which was renamed into "CPR International Institute for Conflict Prevention and Resolution in 2005."^[32] Since its foundation, the CPR has been the major catalyst for the development of ADR in the US.^[33] ADR is a generic term. It denotes a range of private dispute resolution processes that have been developed as alternative to litigation before domestic courts, which in the US, has long since been criticized as too slow and too costly and as failing, ultimately, to provide a resolution of disputes that is fair and that the parties will respect.^[34] Even though settlement agreements are reached before a court or "in the shadow" of court proceedings, parties in ADR – processes to arrive at settlements that are more creative, satisfactory, lasting and conducive to the preservation of business relationships than those imposed by a court.

Thus, arbitration, mediation and conciliation as forms or private dispute resolution mechanisms compliment litigation and other adjudicatory forms, providing processes which can either stand in their own right or be used as an adjunct to adjudication. This enables practitioners to select procedures (adjudicatory) or (consensual) appropriate to individual disputes. Arbitration, mediation and conciliation within the context of private dispute resolution or Alternative Dispute Resolution (ADR) gives parties more power and greater control over resolving the issues between-solving approaches and methodologies, and provides for more effective settlements covering substance and nuances.

ADR also tends to enhance co-operation and to be conducive to the preservation of relationships. Effective impartial third party intercession which the three forms of ADR represent can help to overcome blocks to settlement, and by expediting and facilitating resolution, it can save costs and avoid the delays and risks of litigation. Sometimes, but not necessarily, it can help to heal or provide the conditions for healing underlying conflicts between parties. Private Dispute Resolution/ ADR processes, like adjudication procedures, have advantages which make them suitable for some cases but not for others.^[35]

It must be emphasized that the use of terminology is not uniform. While in the US one tends to consider arbitration as a form of ADR, Continental Europe and English doctrine and practice tend to regard arbitration as a different method of dispute resolution. It is worthy of note that the European approach to ADR excludes not only litigation before domestic courts but all forms of adjudication, including arbitration. It has also been observed that given the fundamental difference between the broad powers of the arbitrators to decide the dispute,^[36] it seems more appropriate not to include arbitration in the ADR concept, but to consider it as a separate third category.^[37] Consequently, the European Union Commission's Green Paper of arbitration in its definition of ADR highlighted the fact that the definition of ADR has to exclude arbitration so called.^[38]

However, it has been further suggested that the practices and procedures of arbitration have strongly influenced some “hybrid” ADR procedures which cannot be understood without an appreciation of dispute resolution generally and arbitration in particular. From a pragmatic perspective, arbitration should therefore be regarded as part of the arsenal of ADR techniques.^[39]

Conclusion

Today, Private Dispute Resolution or ADR has developed into a legal service industry, at least in progressive and “litigious societies” like the United States and the United Kingdom. There will always be conflicts and disputes in human affairs especially in international relations or diplomatic angle as well as in international business.^[40]

Thousands of diverse business disputes arise and are being settled every day all over the world. When one thinks about the many conflicts and disputes they encounter in daily lives, be it in their families at the universities, in their offices, or businesses, one will realize that conflicts are not limited to the world of international business. They exist in almost every realm of human interaction.^[41]

Litigation as a means of resolution of disputes or conflict tends to be money consuming, time consuming, unpredictable, stressful and with obvious potentiality of damaging business relationship.

Thus, the need for ADR in International business can hardly be overemphasized. In international business, ADR has been very popular for many decades. The many risks involved in litigation before foreign courts, where judges may have difficulties in applying foreign law or interpreting complicated documentation and their likely predisposition to favouring of the local party, have provided additional incentive for the search and development of ADR techniques.^[42]

Knowledge of ADR processes, therefore, belongs to the arsenal of every international business lawyer involved in conflict management. Thus, every international business lawyer should be aware of the choice of Dispute Resolution process and should be able to advise parties of various options to resolve their disputes with each other. Being aware of these options and their specific characteristics is an essential element of prudent conflict management as part of “dispute wise” management practices. As more and more lawyers and persons are discovering the benefits and cost effectiveness of pro-active dispute management especially in international business, it is crystal clear the Private Dispute Resolution is the way forward in the ever evolving global community, especially in the light of the high potential for Private Dispute Resolution to preserve valuable business relationships. In this regard, these writers strongly hope that this work will be useful to the students and lawyers involved occasionally with international dispute settlement in all its three main ramifications.

This work has attempted to examine the three dispute resolution mechanisms and their advantages and drawbacks. The work strongly emphasizes the need for international commercial lawyers to seek and pursue resolution rather than litigation in transnational commercial or business disputes so as to preserve and save international business relationships. This will promote business dealings and continuity and will enhance a jurisdiction as an ideal and attractive center for international alternative dispute resolution in the overall interest of the nation. This is the central and continuing theme of this paper.

Recommendations

Every International Business Firm should have a department dealing with Alternative Dispute Resolution (ADR).

Pro-active dispute resolution initiatives and planning should be an integral part of every law firm before venturing into court’s litigation. Pro-active dispute resolution planning involves both avoidance of conflicts and the efficient planning and management of existing disputes.

Dispute resolution initiative and planning should become a critical function of corporate law departments, law firms and even public sector law departments.

Such planning and initiative should aim at creating a framework to anticipate, avoid and manage disputes. In progressive jurisdictions like the UK, continental Europe etc. powerful economic incentives, increased emphasis on risk management, and the growing complexity of dispute resolution options are among the numerous reasons compelling private and public sector lawyers to engage in dispute resolution planning and initiatives.

The heads of legal departments should make a chart at the end of each year showing the costs avoided via sophisticated claims management and early case assessment.^[43] IT-based litigation, and risk analysis firm should throughout the year, make a point of identifying firms that consistently propose settlement strategies or find ways to steer the company out of litigation, or keep costs down.

It is further recommended, in this regard, that litigation should be the last option to be given to a potential client. Lawyers/ law firms should endeavor to advise clients of the benefits of ADR and indeed explore all options to settle disputes via Alternative Dispute Resolution Mechanism. A recent research study sponsored by the American Arbitration Association (AAA) has confirmed the cost – saving effect of this approach. It appositely observed as follows;

“A stream of evidence has long suggested that there is real business value to the rapid, comparatively in expense, and easily accessed alternative to the judicial system that ADR represents.

In fact, the attribute of ADR, by their very nature, encourages the use of a “Portfolio approach” to disputes. Such an approach recognizes that “winning” should be measured by how well the organization manages over time, the overall economic and non-economic impact of the full array or portfolio of disputes it faces across all facets of its business. Moreover, the utilization of a portfolio approach appears to be a differentiating characteristic of well-managed corporate legal departments, one that is very much in tune with other risk management practices in what are generally considered well-managed business organizations.

Typical of the portfolio approach is a willingness to take a more global view of the full spectrum of organization’s disputes, addressing each of them in relation to other disputes in the port folio with an overall goal of minimizing risk, cost, time spent, and resources expended, while preserving important business relationships. Even in situations where a favourable judicial outcome was likely, winning was not necessarily the primary goal. If the use of ADR methods or outright settlement were likely to lessen risk, conserve scarce corporate legal department resources for higher priority matters, and help maintain good relationships with customers, suppliers, and employees, then resolution through America’s contentious, costly, and overburdened court system was something to be avoided”.^[44] These writers no doubt concur with the above observations.

References

1. See generally Brown & Marriott, *ADR Principles and Practice* 2nd.ed, Sweet & Maxwell, 1999.
2. See JD, Mistelis 2, Kroll SM. comparative international commercial arbitration etc.
3. CLS Information leaflet No 23 (English version).
4. CLS Information No 23, 5.
5. P. 2 of Julian DM Lew, *International Commercial Arbitration*.
6. The shorter Oxford English Dictionary (3rded, 1969).
7. David, *Arbitration in international Trade*, Pg 5.
8. Saunders (ed), *Words and Phrases Legally Defined* (3ed) Butterworths 1988, 105.
9. Halsbury's *Laws of England* (4thed, Butterworths 1991), para 60, 332.
10. Donke, *Arbitration*, 1.
11. By contrast some national laws define arbitration agreements. See e.g, Model Law, Article 7.
12. This section 1 is modeled on and is materially identical to S.1 of the Bahamas Arbitration Act, 2009.
13. Chartered Institute of Arbitrators CI Arb etc, 4-5.
14. See UK, Bahamas, Nigeria Arbitration Acts, etc.
15. Note that some institutions have published claims of purportedly shorter periods of the average time to render award.
16. For lawyers and advisers, they should always bear in mind the key values and needs of their clients be they individual or business organisations. When a dispute arises, the first question that should be paramount is efficiency and certainty. Other consideration include; how long will the arbitration take, how much will it cost, and what will the likely outcome of the key issues be.
17. ¹In the words of a US journalist Thomas Friedman, who defined globalization as the inexorable integration of markets, nations, states and technologies to a degree never witnessed before.
18. However, it is submitted here in the light of the foregoing that neutrality is becoming less of a factor as business become increasingly globalized. Not only are transnational companies necessarily more comfortable with other legal systems, they have also come to establish a presence in countries other than their headquarters location, thereby diminishing concerns about an opponent's perceived "home town" advantage.
19. Berger Klaus Peter, *Private Dispute Resolution in International Business, Negotiation, Mediation, Arbitration* Second Edition, Volume I: Wolters Kluwer, Law & Business, 154.
20. Lew Juliam DM p.p.14; Para 145 – 147
21. See Hill, "MEDARB: New Coke or Swatch?" 13 *Arb.Int* 105 (1997); Motivaz "Alternative Dispute Resolution in India", *J. Int. Arb*,1998:15(2):117.
22. Note that the focus of this work is on Private Dispute Resolution and as such negotiation in the context of resolution of diplomatic disputes squarely belongs to the realm of Public International Law or International relations and diplomacy.
23. Goldberg, Sander, Rogers, Cole, *Dispute Resolution*, 17.
24. Fisher, Wry, Patton, getting to Yes, 32; Buhning'Uhle, Kirchoff, Scherer, *Arbitration and Mediation in International Business*, 136; O' Connor and Seymour, *Neuro Linguistisches Programmieren Gelungene Kommunikation und Personliche Entfaltung*, 46.
25. Gamer (ed), *Black's Law Dictionary*, definition of "Negotiation".Most lawyers conceive of the negotiation process as simply an earlier version of court adjudication. They approach negotiation and other ADR processes as if they were merely variants or extensions of the judicial adversarial model which to so many lawyers is the paradigm of disputing. But this is completely wrong. See Klaus Reler Berger, 2, 90.
26. Saner, *the Expert Negotiation*, 15.
27. Salacuse, *The Global Negotiator*, 7.
28. Another translation is "Avoiding Disastrous Result; See Risse and Wagner, in Haft and Von Schlieffen (eds), *Handbuk Mediation*, 23(4), 4.
29. See Buhning Uhle, KircChhoff, Scherer, *Arbitration and Mediation in International Business*, 169, et seq.
30. See Herbert Smith (ed), *the inside Track-how blue-chips are using ADR*, 6. "Mediation was overwhelmingly the most frequently used ADR process and most widely used across different jurisdictions".
31. In China, it has been observed, that the concept of mediation has evolved out of the antithesis of "li" and "fa" as part of Confucian Philosophy, which has always been in favour of allowing a party to save face and to work towards the preservation of its relationship with the other side. See Donahey, *ICSID Rev; FILJ* (1995), 120, 121 et seq. the Chinese characters for mediation in their alphabets means "to reconcile" or "to conciliate".
32. See www.cprdr.org.
33. See Gottwald in Henssier and Koech (eds), *Mediation in der Anwalspraxis*, 203 et seq;
34. See Rau, Sherman, Peppet, *Processes of Dispute Resolution*, 2; Brown and Marriot, *ADR Principles and Practice*, No 2 -001.
35. Brown and Marrinot, *Ibid*, No 2. 019. (Brown and Marrinot, *ADR Principles and Practice*, No. 2. 001).
36. See for the requirement of a dispute as a prerequisite of an arbitration – the definition of arbitration is said to be "dispute oriented". Thus, based on this private and contractual character of arbitration, legal doctrine has developed the following definition of arbitration. "Arbitration ...may be defined as a private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law. Brown and Marrinot, *ADR Principles*, No 4. 004, see also Lew, Mistelis, Kroll *supre note 9*
37. See Demeyere, *Arb Int, L* (2003) 313, 322.
38. Eidenumuller *IDR*,2002:14:15.
39. See Brown and Marrinot, *Supra* No. 2 – 002.
40. Business relationships between two companies may go sour. This may lead to a business dispute. We encounter conflicts in our daily life.
41. One may find it difficult to see the difference between the terms, "dispute" and "conflict" as they are widely used by lawyers all over the world. For an attempted definition, see the concept classification in the beginning of this work.
42. See Buhning – Uhle, Kirchoff, Scherer, *Supra* 12 at seq, who list the difficulties to find an appropriate forum, the difficult to ensure the neutrality of the

foreign court the confrontation with unfamiliar methods of taking of evidence, the determination of the applicable law by the court and the problem to have foreign judgments enforced in other countries. Burhring – Uhle, Kirchhoff, Scherer, *Ibid.*, 27 et seq

43. See Hobeck, Mahnken, Koebke, *Schieds VZ* (2007), 225, 226 et seq. Early case assessment is a standardized litigation management tool that serves to settle disputes as early as possible through appropriate ADR methods. See younger, *Alb. L. Rev.* 1996, 951-952.
44. AAA, *Dispute-Wise Management*, I et seq.