PREVENTING COMMERCIAL DISPUTES AND WAYS TO RESOLVE THEM

Nowadays, parties from different jurisdictions are involved in many international transactions. The amount of such transactions is rapidly growing. Some parties hire lawyers and consultants at the initial stages of their pre-contractual negotiations and drafting contracts, while others prefer to rely on their own experience and knowledge and, thus, temporarily save a portion of money as they believe so. However, such behaviour to economy funds might cause to future considerable costs and, even worse, losses, because those parties did not conduct a due diligence of the deal properly.

This Article aims to provide an overview of various forms of dispute resolution and what is more important to give some insights on how to prevent disputes from arising or at least minimize potential risks related to default which may occur on the opposite side.

1. Preventing commercial disputes

There are numerous strategies and tactics on how to secure one's interests and rights and, hence, successfully perform the deal and gain a certain benefit from it. We will not list all of them one by one, but outline three most efficient techniques, such as "good faith negotiations", "drafting appropriate provisions into the contract" as well as "mitigation measures".

Good Faith Negotiations

First of all, as parties to international transactions come from various countries with different economic, political, cultural, social and legal systems and features, they may understand concepts from their own perspectives and background. "Good faith" term is not an exception and can be understood and construed in the ways that may be incompatible.

For instance, Ole Lando wrote that good faith is "a moral principle accepted by every honourable man and woman is that a person shall act in accordance with good faith and fair dealing"[1].

To avoid such misunderstanding, we endevour to give a more precise meaning to it. Black's Law Dictionary introduces a good faith as "a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek

[1] Ole Lando, 'The Structure and the Salient Features of the Principles of European Contract Law'. Juridica Int'l 4, (2001), P. 4-15.

unconscionable advantage"[2]. Based on that, the key elements of "good faith" are honesty, faithfulness, fair dealing and no intent to defraud.

As mentioned above, various legal systems employ the concept of a "good faith" in different ways. Under international conventions and civil law countries legislation, the idea of "good faith" runs through their entire legislation and the majority of conventions.

For example, Article 7 of the United Nations Convention on Contracts for the International Sale of Goods of 1980 states that: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of *good faith* in international trade"[3] [*emphasis* added].

In addition, the German Civil Code provides that "Contracts are to be interpreted as required by *good faith*, taking customary practice into consideration"[4] [*emphasis* added].

English law approach does not have a concept named as "good faith"[5], but it operates with similar ideas, such as misrepresentation and unfair contract terms under consumer contracts.

Moreover, Lord Steyn compared two approaches regarding "good faith" in the following way:

"Compared to the civil law, English law shows a considerable hospitality to implied terms. In civil law countries the existence of generalized duty of good faith in the performance of contracts reduces the need for the implication of terms. In the absence of a doctrine of good faith English law has to resort to the implication of terms by reason of the nature of the contract...or by reason of special circumstances of a particular contract."[6]

However, common law approach in resisting good faith may be soften, for instance, provisions for good faith negotiation would probably be enforceable in cases where legal advisers participate in drafting of those terms[7].

As a result, parties with different legal background may not understand it in the same way.

Back to "good faith negotiations", bearing in mind the key elements arisen from "good faith" definition, parties to good faith negotiations should act honestly and with no intent to defraud.

To prevent commercial disputes from occurring in the future, both parties are obliged to honour the aforementioned principles. In particular, both of them are required to disclose any

[2] *Black's Law Dictionary* (8th edn, 2004).
[3] The United Nations Convention on Contracts for the International Sale of Goods of 1980 year <https://www.cisg.law.pace.edu/cisg/text/treaty.html> accessed 26 June 2017.
[4] The German Civil Code <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0461> accessed 26 June 2017.
[5] *Walford v Miles* [1992] 2 AC 128.
[6] Gerard McMeel, *The Construction of Contracts. Interpretation, Implication and Rectification* (Oxford University Press 2007). P. 200.
[7] Geoffrey Ma, Denis Brock, *Arbitration in Hong Kong: a practical guide* (Sweet & Maxwell 2014). P. 61.

information that may result in loss and damages. In contracts drafted under common law style, this sort of disclosure is made in the form of representation.

However, this kind of behaviour should not restrict parties from seeking ways on how to achieve the best deal conditions in their own interests.

Another question focuses on whether the parties acting in good faith are prohibited from conducting concurrent negotiations with someone else. Normally, "good faith" principle refers to the rules of negotiating of a particular deal and, hence, any party is free to discuss the same deal with a third party.

To sum up, "good faith negotiations" approach is common and well-recognized in civil law countries. However, to rely on it blindly would not provide a party to a contract enough guarantee that one's rights and interests are duly protected. Therefore, it is recommended to use lawyers and consultants during negotiations and try to insert into the contract express terms other than trust implied terms and doctrines.

Drafting appropriate provisions into the contract

Another way of preventing and avoiding potential disputes is a proper drafting of a contract. Drafting a contract is like an art. Parties to a contract are entitled and free to put in it almost anything they have agreed. Comparing to negotiations, breach of a contract would lead to serious and negative consequences, such as compensation of damages, thus, contract is very crucial as it grants the parties not only rights, but at the same time imposes certain obligations. Given that, parties should pay a great deal of attention to the provisions of the contract.

This subparagraph does not focus on a thorough research and analysis on drafting a contract, its goal is to provide a basic coverage on what aspects parties should take a notice.

First and foremost, parties to a contract must properly outline and define the subject matter of it. In some cases, there are strict requirements on how the subject ought to be described in the contract. For example, when dealing with real estate related contracts, it is necessary to describe it in more detail and specifically identify a targeted object of real estate. In the event parties fail to do so, then such a contract may be regarded as null and void.

Apart from the subject of the contract, parties are suggested to take into account other terms of it, such as main obligations of the parties (e.g. time for delivery, payment conditions), liability clause, force-majeure, governing law and dispute resolution so that the contract can be used as a roadmap for the deal between two contracting parties.

Many businessmen do not pay enough attention to drafting force-majeure and dispute resolution clauses, simply because no one expects their contracts could result in disputes. With regard to force-majeure, civil law and common law countries take different approaches. In general,

the former system recognizes it and the latter, in contrast, has adopted a frustration doctrine. Force-majeure clause should be written very precisely and, in case of conducting a contractual construction, parties and the court or arbitration will follow the exact wording used in the contract. Conversely, common law doctrine does not require parties to agree the frustration provisions in writing, and it will be applied automatically even if the parties do not specify it[8].

Our main focus should be given to a dispute resolution clause. Due to different circumstances and practices in a particular industry, dispute resolution clause may vary significantly. Recently, parties prefer to use arbitration as a method of resolving disputes arisen.

It is worth mentioning that arbitration agreement or arbitration clause is a basis for commencing arbitration proceedings. What must be included in arbitration clause and what are the requirements and forms of it? These questions generally occur whilst drafting an arbitration clause.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958[9] in Article II states that arbitration agreement must be in writing.

Moreover, in the majority of those countries that incorporated UNICTRAL Model Law on International Commercial Arbitration[10] into their domestic arbitration legislation, it stipulates the same requirements to the arbitration agreement, i.e. written form.

However, some countries impose additional requirements for the arbitration agreement. For instance, Arbitration Law of the People's Republic of China of 1994 in Article 16 provides that "arbitration agreement in writing shall contain the following elements:

- (1) an expression of intention to apply for arbitration;
- (2) matters for arbitration; and
- (3) a designated arbitration commission."[11]

As a result, the People's Republic of China does not recognize *ad hoc* arbitration conducted in the territory of the People's Republic of China.

To avoid any defects in arbitration clause, as a general rule, many parties choose to invoke model arbitration clauses recommended by arbitration institutions. In cases, where parties prefer to use hybrid arbitration clause, e.g. arbitration administered by arbitration institution under

[8]Damian McNair, Force Majeure Clauses <https://www.dlapiper.com/~/media/Files/Insights/Publications/2012/06/iForce%20majeurei%20clauses/Files/forcemajeureclauses/FileAttachment/forcemajeureclauses.pdf> accessed 01 July 2017.

[9] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> accessed 02 July 2017.

[10] The UNICTRAL Model Law on International Commercial Arbitration <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 02 July 2017.

[11] Arbitration Law of the People's Republic of China <http://en.pkulaw.cn.ezproxy.cityu.edu.hk/display.aspx?cgid=167108&lib=law> accessed 02 July 2017.

arbitration rules of another arbitration institution, the arbitration clause must drafted carefully in order not to be regarded as invalid.

As a good practice, parties that wish to modify model arbitration clauses to meet their needs usually refer to IBA Guidelines for Drafting International Arbitration Clauses adopted by International Bar Association[12]. IBA Guidelines introduce explanations and recommendations to drafting of arbitration clauses and how to modify them step by step in order to create a valid arbitration clause.

Finally, parties to a contract to minimize the risks of arising future disputes should use unambiguous and unequivocal language in their contracts and employ simple terms that can be easily understood by both parties and tribunal.

Mitigation measures

Further to the above mentioned suggestions on how to limit the risks relating to the default of an opposite parties and possible damages and losses incurred, another effective way to protect one's rights and interests is to properly conduct a preparation to conclusion of a future deal. There is a great amount of tools on how to do it. This subparagraph will cover a few, but most important of them.

Before starting to cooperate and discuss a deal with your proposed partner, one need to conduct a verification and credit check of one's partner. In particular, one can refer to different sources to get a necessary information, e.g. registration information of one's partner filed with a relevant registration authority, mass media, agencies, companies and law firms providing professional services from various perspectives (i.e. legal, financial etc.).

Moreover, whilst signing a sales contract, one should pay attention on how to avoid advance payments and other unsecured payments, because once a partner has received a prepayment and failed to perform his/her contractual obligations, it would cost extra costs and expenses to engage lawyers to assist in resolving disputes, and, even worse, if the amount of such advance payment is too small it would be unreasonable to spend a big budget on lawyers.

Furthermore, during execution of sales contracts, in many cases, product quality issues may occur. To prevent such problems from arising or to effectively control them, one should adopt in his/her contract precise rules and requirements on product quality, quality inspection procedure and liability for such quality breach.

[12]The IBA Guidelines for Drafting International Arbitration Clauses <https://www.ibanet.org/ENews_Archive/IBA_27October_2010_Arbitration_Clauses_Guidelines.aspx> accessed 02 July 2017.

Many businessmen who understand need of a better protection of their rights under the contracts often choose additional options, such as insurance and bank guarantees. Of course, it will increase costs of a contract, but these extra costs would indemnify one from losing huge amounts of money and, in some cases, even everything one has invested into the deal.

Another useful method to foresee and take precautions to secure the deal from risks is to carry out a preliminary analysis and overview of situation with arbitral awards and judgments (whether foreign or domestic) recognition and enforcement practice in the country where one's partner has a domicile or assets. Many people only focus on choosing a convenient place to resolve their potential disputes, but do not think and realize, that once arbitral award or judgment is rendered it must be recognized and enforced in other jurisdictions which may face problems, such local courts may not follow a pro-enforcement policy or the local legislation imposes certain restrictions and so forth. These features may lead to non-enforcement of arbitral awards and judgments and, thus, parties would lose funds invested into a project as well as costs incurred by them in court or arbitration proceedings.

As a result, parties wishing to successfully close a deal must set up a well-planned strategy on its every stage, including the preliminary analysis and overview of all aspects that may affect a proper performance of the deal by an opposite party.

2. Ways to resolve disputes

In the preceding paragraph we have discussed different ways how to prevent commercial disputes from arising and provide examples on what aspects of a deal (especially, prior to its conclusion) parties should pay a special attention. In this paragraph we will give an overview of what methods parties to an existing dispute can apply to resolve it in a more cost-effective and time-efficient way.

Costs and time are always key elements to consider for parties before making a decision on what methods of resolving disputes to choose. In recent years, alternative dispute resolution has been promoted throughout the world. Taking into account the fact that courts are too busy to handle increasing amounts of cases on a time efficient manner, such types of alternative dispute resolution as mediation, adjudication and arbitration have been introduced and applied more frequently by the parties.

This paragraph provides a brief introduction to negotiation, mediation, conciliation, adjudication, dispute resolution advisor, dispute resolution boards, expert determination, early neutral evaluation, partnering, arbitration, courts and tribunals.

Negotiation

Negotiation is "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter…but like other means, negotiation is easily converted into an end in itself."[13]

It is the first step of a dispute resolution. Many parties refer to it in order to endeavour to reach an agreement before initiating other ways of dispute resolution, such as mediation, arbitration or litigation.

In practice, negotiation process can be described in the following way: the parties identify one or more problems or opportunities and start to communicate with each other in the hope that it is better to have a joint agreement than nothing, the initial steps then turn to exchange of their views, questions, answers and consideration of points made about the parties' interests and perspectives on the situation[14].

Consequently, negotiation is a process of a so-called "dialogue between two partners" who aim to continue cooperating and doing business together other than simply stopping everything without any outcome that was initially expected to be obtained when the parties signed a contract. Nowadays, businessmen are more willing to cooperate than spending time and money to find out who is wrong and who is right.

Moreover, this form of resolving disputes can be conducted between parties themselves without hiring lawyers or consultants. Unlike other methods of dispute resolution that touch more complicated issues and require a certain knowledge of procedure, negotiation is more straightforward, parties to negotiation might need lawyers only to properly draft documents once they have reached an agreement on the main matters in controversy.

Furthermore, as we may see from the definition of the term "negotiation" above, negotiation does not involve a third party to assist, facilitate or make a decision on an issue between parties. Parties are normally given a chance to come to a joint consent by themselves.

Hiring lawyers, consultants or a third party to help or to make a decision will cause significant costs to parties in dispute and thus negotiation is regarded as a cost-effective method.

Furthermore, as an advantage, parties can reach a mutual agreement within a relatively short period of time, because negotiation, comparing with other methods, does not need to produce various evidences in accordance with the law (i.e. discovery procedure), file submissions and so forth. In some situations, negotiation can be held in one or two meetings or even via telephone calls between two conflicting parties.

[13] *Black's Law Dictionary* (8th edn. 2004).
[14] Michael R. Fowler, *Mastering Negotiation* (Carolina Academic Press 2017). P. 5.

In addition, negotiation is so flexible as it does not have any strict rules on how to hold meetings and discussions, this question is left to parties' consideration. Parties are free to choose time, place, agenda and procedure of conducting their meetings.

Negotiation also provides an opportunity to understand the issue and position of an opposite party without spending a considerable amount of money, time and effort, which will be useful if two parties fail to agree during negotiation and turn to other methods.

With regard to the scope of negotiation, unlike, for example, arbitration, negotiation does not have a problem of arbitrability, as parties to negotiation are not subject to any strict rule and can start to negotiate any matter they wish.

Unlike litigation, a negotiation is not open to the public and the matters discussed can be subject to confidentiality if parties sign an agreement to protect from its disclosure to third parties.

As disadvantage, a written agreement or, even worse, an oral agreement reached by the parties to a dispute is only an agreement and in case of a further default of one of the parties, parties should again start another round of negotiations or probably refer to other forms of dispute resolution to obtain a more effective relief.

There are two main styles of conducting negotiation which can be identified as competitive and cooperative. A competitive style is argumentative, using emphatic language, and attempts to wear the opponent down. Cooperative style, in contrast, is friendly, courteous, tactful, and conciliatory and attempts to gain trust by using good manners and charm[15]. It is obvious that the former style will more likely lead to litigation than to a mutual agreement between conflicting parties.

To sum up, negotiation is, on the one hand, time and cost-effective, flexible in terms of scope of negotiation, procedure, time and place of meetings, but, on the other hand, it lacks enough confidentiality protection, the relief given is not so effective and enforceable as, for example, a court judgment or arbitral award.

Mediation

Mediation is "a form of alternative dispute resolution in which an *independent third party (mediator) assists* the parties involved in a dispute or negotiation to achieve a mutually accepted resolution of the points of conflict. The mediator, who may be a lawyer or specially trained nonlawyer, has *no decision-making powers and cannot force the parties* to accept a settlement" [*emphasis* added].[16]

The definition provides the following key elements:

[15] Margot Taylor, *Negotiation* (Oxford University Press 2009). P.15
[16] *Oxford Dictionary of Law*. Ed. Elizabeth A. Martin and Jonathan Law (Oxford University Press 2006).

- An independent third party with no decision-making power;
- Mediator is not necessary a lawyer;
- Mediator cannot force parties to come to a mutual consent.

Unlike negotiation, which is a party-party way of resolving disputes, mediation involves a third party which, however, comparing with arbitration or litigation, has a power limited to normally facilitate the parties to reach an agreement (facilitative approach is common in Hong Kong which consists of six phases as preparatory phase, introductory phase, understanding phase, negotiation phase, agreement phase and concluding phase). In other words, mediator, unlike a judge or arbitrator, does not impose any form of settlement on the parties[17].

In many countries, mediation process and information or document exchanged thereunder are not under statutory protection. Some people say that "confidentiality is regarded as one of the important philosophical tenets of mediation"[18]. Others provide that: "confidentiality is one of the major aspects of mediation, and is often the reason why parties engage in mediation as opposed to public court proceedings. The mediation forum in which parties exchange information, thoughts, concerns, interests, fears, desires and so forth is confidential"[19].

Parties cannot rely on such information or document to further use them in litigation or arbitration. This feature is very important, otherwise parties to mediation would be reluctant to disclose information during joint or private sessions and it would be difficult, or even impossible, for a mediator to reveal interests of each conflicting party in order to help them to settle a dispute.

As the confidentiality protection issue is crucial for mediation, we need to dwell on this matter and take Hong Kong as an example.

Before the Mediation Ordinance came into force in Hong Kong (i.e. 01 January 2013), the confidentiality guarantee under mediation process was mostly provided by common law, i.e. court judgments.

People in many cases operate the notion of privilege which "covers legal professional privilege (which includes advice privilege and litigation privilege) and without prejudice privilege."[20]. No separate mediation privilege was introduced before, therefore, there was an uncertainty on how to define the scope of privilege in terms information, documents, discussions happen under mediation process. Case law position was not stable on that point.

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[17] Stephen Walker, David Smith, *Advising and Representing Clients at Mediation* (Wildy, Simmonds & Hill Publishing 2013). P.12.
[18] Spencer D., Brogan M., *Mediation Law and Practice* (Cambridge University Press 2006). P. 312.
[19] Hilmer S.E., *Mediation International Commercial & Family Disputes* (The Chinese University Press 2011). P. 2.
[20] 'The Report of the Working Group on Mediation' <http://www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf> accessed 27 June 2017.

In most situations, the mediation confidentiality was covered by the "without prejudice" rule.

However, there were exceptions in privilege, where subject to certain circumstances the confidential information could be disclosed. To provide examples, there were several cases where confidentiality was circumvented.

In Unilever case[21], the court illustrates situations where the "without prejudice" rule can be circumvented, e.g. the relation to a *"cloak for perjury, blackmail or other "unambiguous impropriety"*, however the public policy was not mentioned among those exceptions to the "without prejudice" rule [*emphasis* added].

Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs case says: "In law, confidentiality is not a bar to disclosure of documents or information in the process of litigation, but the court will only compel such disclosure *if it considers it necessary for the fair disposal of the case*. Hence, the mere fact that the parties made provisions in their mediation agreement does not by itself prevent a party from giving evidence of such matters in court, nor does it prevent the court from ordering evidence to be disclosed…Evidence covered by such a duty of confidentiality may be given *if the court considers that it is in the interest of justice to do so* [*emphasis* added][22]".

Given above, the legislative body of Hong Kong in order to support the idea of using mediation in lieu of litigation in a more guaranteed and attractive way enacted the Mediation Ordinance which aimed to fill in the existing gaps.

According to the newly promulgated Mediation Ordinance provisions, there are three types of confidentiality: insider-outsider confidentiality, insider-insider confidentiality and insider-court confidentiality, where under insider-outsider type participants are called "insiders" and people outside the mediation are called "outsiders", insider-insider type is associated with so-called private "caucuses" (which are, in fact not regulated by the Mediation Ordinance) and insider-court type is a form of insider-outsider type where the court is an "outsider"[23].

As stated in the above provisions, "the definition of mediation communication is wide and does not specify who must take the statement or the document in order to be included in the definition"[24]. This, on the one hand, gives a protection and guarantee for those who participate in

[21] *Unilever PLC v. The Procter & Gamble Co.* [2000] 1 WLR 2436.
[22] *Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 1102 (TCC).
[23] Nadja Alexander, *Hong Kong Annotated Statutes: Mediation Ordinance (CAP 620)* (CCH Hong Kong Limited 2013). P. 67-68.
[24] Sala Sihombing, Christopher To, James S.P. Chiu, *Mediation in Hong Kong: Law and Practice* (Wolters Kluwer Hong Kong Limited 2014). P. 214.

mediation process, but, on the other hand, is very unclear and thus might lead to problems of a proper interpretation of what is really covered within the ambit of "mediation communication".

Furthermore, mediation is more advanced, but less cost-effective method of resolving disputes than negotiation. Unlike litigation, which is formal and has expense and cost regime making even the winner dissatisfied[25], under mediation parties need to spend more money to call for a mediator to assist them with a conflict. However, the parties are not required to pay various kinds of costs, e.g. management costs in arbitration; the only cost they need to pay is mediators' fees and mediation hearing room renting costs. The service fee of a mediator and time used by him/her would normally be reasonable and would not cause the parties to spend a huge budget. Moreover, parties to mediation can be represented by the counsels, but it will require extra costs.

In addition, as a practice, parties will normally meet a mediator once and, subject to various factors, the mediation process will end by a mutual consent and signing mediation agreement or failure to settle. Therefore, it is relatively time-efficient.

Moreover, mediation is flexible, i.e. parties are free to choose a mediator, to set up procedure rules and timeframe schedule, it also improves the communication between disputed parties. In case one of the parties does not want to proceed with mediation, it can withdraw from it any time.

With regard to the scope of mediation, parties are entitled to mediate almost any disputes. Mediation is very popular way for finding a solution in family disputes, trade disputes as well as IP disputes. In reality, there are many more cases suitable for mediation than people can expect. The acid test for when the case is suitable for mediation is to ask whether theoretically it is capable of a negotiated nature[26]. However, it is important to say that mediation is not so powerful as the court or tribunal, it cannot replace all its functions, for example, to grant an injunction to stop doing something.

In addition, unlike an arbitrator who can be liable only if he/she acts dishonestly, a mediator in order to be liable in contract or tort, he/she must be proven to have:

- A duty of care to the client;
- Breached that duty of care;
- Caused foreseeable loss to the client.[27]

As mentioned above, if mediation is successful and parties reach a mutual consent, they will sign a settlement agreement which, comparing with consent award, however, does not have

[25] Andrew Goodman, *Mediation Advocacy*. (2nd edn, Nova Law and Finance 2010).
[26] Karl Mackie, *The ABC of Mediation: Mediation as the First Choice of Dispute Resolution Process*. *Mediate First for a Win-Win Solution. Mediation Conference in Hong Kong* 20-21/03/2014. P.106.
[27] Wade John, 'Liability of Mediators for Pressure, Drafting and Advice: Tapoohi v Lewenberg' 16 Bond Dispute Resolution News 16' (2004).

the same finality, legal effect and enforceability. Settlement agreement is only a contract and if one of the parties commits a breach of any promises made in it, aggrieved party should still go through litigation or arbitration to resolve the dispute arisen from a settlement agreement as dispute resolution clause allows so. Therefore, the result of a successful mediation lacks its finality and binding enforceability as a court judgment or arbitral award grants.

As a result, mediation can be characterized as a method of dispute resolution which takes a position somewhere in the middle between negotiation and litigation or arbitration. The main features of mediation are an involvement of an intermediary, a statutory confidentiality protection, a relative cost-effectiveness and speed, a freedom of the parties, a low rate of enforceability.

Conciliation

Conciliation is "a settlement of a dispute in an agreeable manner, i.e. a process in which a *neutral person* meets with the parties to a dispute and *explores* how the dispute might be resolved" [*emphasis* added][28].

As we may see from the definition of conciliation, it looks very similar to mediation with involvement of a third party. However, unlike mediation, a third party in conciliation plays a role in resolution and advises parties of a solution. In other words, conciliator, not parties, develops and proposes terms of settlement.

Like mediation and other forms of alternative dispute resolution, conciliation is subject to parties' agreement.

Moreover, conciliation is more widespread in England and Wales, while in other jurisdictions conciliation can be understood as equal to mediation without any significant distinction.

In the course of conciliation, no party has an obligation to accept proposals by a third party and can ask the case goes to a formal hearing if it does not find the proposals acceptable. In case conciliation fails to reach to a settlement agreement, in many cases, it at least helps to identify the issues so that the court can deal with them more quickly and efficiently[29].

Conciliation seems to be a cost-effective and time-efficient way of resolving disputes as parties, for example, do not need to pay for expensive hearing facilities, and conciliation will end in one or two meetings.

As mentioned above, the process of conciliation is very similar to mediation. However, there are differences between them which can be summarized in the following:

- the parties will not usually select and appoint the conciliator themselves;

[28] *Black's Law Dictionary* (8th edn. 2004).
[29] Jo Ann Boylan-Kemp. *English Legal System*. (3rd edn, Sweet & Maxwell 2014). P. 278.

- the conciliator will hold private and joint meetings with the parties in much the same way as a mediator, although some conciliators will prefer to use joint meetings;
- the conciliator will perform the same function as a mediator in moving the parties towards settlement, although he or she may, in some cases, be more active in putting forward proposals for the consideration of the parties[30].

In addition, conciliation is also flexible in terms of choosing method and procedure of its conducting and whether to hire lawyers or consultants to assist in participation in conciliation procedure. Parties are free to choose any place and time to endevour to resolve the arisen disputes through conciliation.

In many jurisdictions, conciliation process is subject to confidentiality protection, but parties are recommended to sign an agreement to provide more precise provisions dealing with confidentiality.

With regard to disadvantages, it has the issue of finality and enforceability of the result of conciliation, i.e. settlement agreement. Unlike arbitration and litigation, settlement agreement entered into between parties is still an agreement without binding force like the judgment or award has and parties are unable to compel the opposite party to enforce it in the court. In particular, parties are required to apply to the court or arbitral tribunal for granting a final and binding decision over the disputes relating to the breach of obligations under the settlement agreement.

As a result, it is obvious that conciliation and mediation overlap. The difference between them is minor. Like mediation, conciliation involves a third neutral party, and is a speedy, cost-effective, confidential and flexible way of resolving disputes, but it lacks a finality, binding effect and enforceability.

Adjudication

Adjudication is "the legal process of resolving a dispute; the process of judicially deciding a case"[31].

The definition is a bit outdated. To be more precise, adjudication is a kind of *third-party processing* of disputes, in which disputants or their representatives present proofs and arguments to an impartial authoritative *decision-maker* who gives a *binding decision*, conferring a remedy or award on the basis of a preexisting general rule [*emphasis* added] [32].

[30] Susan Blake, Julie Brownse, Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2016). P.347-348.
[31] *Black's Law Dictionary* (8th edn. 2004).
[32] Mark Galanter, *Adjudication, Litigation and Related Phenomena* (1986). P.153.

In other words, under adjudication we have an independent third party, named as adjudicator, who makes a binding decision upon parties. Normally, adjudicator should have an expertise in the field where the dispute is arisen, and thus acts more like an expert than an arbitrator.

In brief, the procedure of adjudication can be described in the following way:

- in order to initiate adjudication parties must have an agreement to adjudicate certain types of dispute;
- like in arbitration, parties can jointly nominate an adjudicator or leave this matter to an appointing authority;
- if the procedure is not stipulated in the agreement entered between the parties, the adjudicator will have a discretion to set up rules and procedure;
- unlike arbitration and litigation, adjudication does not follow strict rules of evidence, such as discovery;
- adjudication process is more inquisitorial than adversarial;
- unlike negotiation, mediation or conciliation, the result of adjudication process is made in the form of decision in writing made by adjudicator;
- unlike arbitration or litigation, the decision issued by adjudicator can be subject to a further review of arbitrator or a court.

Adjudication is used in a limited scope of disputes which can be resolved by an expert. Recently, adjudication is very popular in construction cases, however, not all construction matters can be referred to adjudication.

As an example of construction disputes, which can be adjudicated, is a payment default issue. During the construction process, contractor may from time to time face a risk that a developer fails to pay contractor's services within the time specified in the contract, thus the contractor will have a cash flow problem, litigation and arbitration as more lengthy ways to resolve the disputes would not help a contractor to get funds quickly, thus adjudication would be a speedy method to resolve the possible problem if the applicant lacks a great amount of money.

Furthermore, in many countries the law does not provide a statutory protection for the confidentiality of information exchanged during the adjudication process, therefore, parties to adjudication are recommended to draft special provisions in their contracts to avoid the information being disclosed to third parties.

As mentioned above, the main disadvantages of adjudication are a lack of finality and problems with enforceability of the decision of adjudicator and a limited access of the parties to present their cases and be heard in adjudication (i.e. natural justice).

In some jurisdictions, adjudicator's decision is not granted a statutory court support in respect of enforcement. Unlike arbitral award, which can be turned into a judgment in the way of

applying for a court leave, in Hong Kong adjudicator's decision cannot be enforced. However, in England, under Housing, Grants, Construction and Regeneration Act 1996 a party with a benefit from an adjudicator's decision may launch enforcement proceedings and apply for summary judgment[33].

With regard to a limited access of the parties in adjudication to a natural justice as in arbitration or litigation, adjudicator ordinarily considers a case based on a limited amount of facts and evidence, because adjudication process, on the one hand, is supposed to be a speedy way of resolving disputes arises, but, on the other hand, as the time is limited, adjudicator will be unable to study the case from every quarter and hear the parties views and evidences.

As a result, adjudication is a process of dispute resolution where a third party with a decision-making power is involved, parties can agree on choosing and appointing adjudicator who is supposed to act as an expert and set up rules and procedure of adjudication process, any party can be represented by a lawyer, parties bear less costs and save time than in arbitration and litigation, confidentiality should be protected by the agreement entered between the parties, in many jurisdictions, adjudicator's decision is still not final and enforceable in the court and the parties, unlike in arbitration or litigation, are not given enough opportunity to present all facts and evidences.

Dispute resolution advisor and Dispute resolution boards

Dispute resolution advisor and Dispute resolution boards are very similar in nature, so the author will combine them together in this subparagraph.

One of the main differences between them is that the term "Dispute resolution advisor" implies that one person is involved while the term "Dispute resolution boards" indicates that three persons are to participate in resolving disputes.

The rationale why to use Dispute resolution advisor in lieu of Dispute resolution boards is sometimes simply depends on a project's size. Small and medium-sized projects would not need three persons on board to participate and the use of one person would be more cost-efficient and enough to effectively assist the parties if potential disputes arise.

For the purpose of convenience, the author will use Dispute resolution advisor to cover both Dispute resolution advisor and Dispute resolution boards.

Dispute resolution advisor is a method of dispute resolution between parties where a neutral third party with a special expertise is involved and ordinarily appointed by the conflicting parties

[33] Susan Blake, Julie Brownse, Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press 2016). P. 419.

throughout their contract period until its expiry to give the parties various advises and endevour to prevent disputes at their early stages and if they arise to facilitate the resolution of them.

Therefore, the "primary role of dispute resolution advisor is to foster co-operation amongst the employer, the contractor, their consultants as well as sub-contractors, so as to minimize the number of claims, to avoid conflicts in the first instance and to settle differences or disagreements as they emerge and before they become disputes which will need to be dealt with under the dispute resolution provisions in the contract"[34].

Dispute resolution advisor is more popular in construction and infrastructure projects industry, where the parties contribute a great amount of investment and a contractor concerns about having a stable cash flow to complete the project within the specified time period[35].

As mentioned above, unlike negotiation, dispute resolution advisor is a three parties process. The source of dispute resolution advisor's authority comes from a contract and normally starts from its conclusion by the parties.

As a practice, the advisor attends meetings, sites of construction to investigate whether the process of contract's execution runs in compliance with the provisions of the contract, conducts formal and informal hearings and provides with his/her expert consultancy and aims to achieve an effective management of a particular project and resolution of disputes once they occur.

As a result, to meet the demands of contemporary society in terms of developing and improving various ways of dispute resolution, "the traditional role of the engineers in international construction disputes, of evaluating and assessing technical issues, has evolved in today's Dispute resolution advisor"[36].

Furthermore, parties to contract are free to negotiate and stipulate in it special duties and the scope of advisor's involvement in dispute resolution. Once the dispute arises, parties or one of the parties, as the relevant provisions of a contract provide so, refers it to a dispute resolution advisor for his/her further consideration.

Advisor does not have a power to make a decision as arbitrator or judge is entitled, his/her role is more to act as an expert. Parties to a dispute provide him/her their positions and evidences, and it is important to say that dispute resolution advisor process is more inquisitorial than adversarial and parties are not bound by strict evidence rules as, for example, in litigation.

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[34] 'The Speech by the Honorary Rimsky Yuen, SC , JP, Secretary for Justice, Hong Kong Construction Centre & University of Hong Kong Joint Conference on Construction Dispute Resolution 2015 "Resolution of Construction Disputes" on 19 March 2015' <http://www.doj.gov.hk/eng/public/pdf/2015/sj20150319e.pdf> accessed 01 July 2017.

[35] 'Wider Adoption of Dispute Resolution Advisors in Public Works Projects' <https://www.devb.gov.hk/en/sdev/press/index_id_5650.html> accessed 01 July 2017.

[36] Bernardo M. Cremades 'Multi-tiered Dispute Resolution Clauses' <http://docplayer.net/34270146-Appendix-h-multi-tiered-dispute-resolution-clauses-bernardo-m-cremades.html> accessed 02 July 2017.

With regard to advisor's qualification, the law does not state any requirements, and thus the parties to contract are free to agree on one's qualifications to act as an advisor, but, of course, an advisor at least should have an expertise in the industry related to a project that parties will be engaged into.

It is worth mentioning that, compared with an arbitral award or court judgment, the decision of an advisor lacks finality and binding enforceability, because parties or one of the parties that does not satisfy with advisor's decision can apply for arbitration or court, as the dispute resolution clause provides so, to review the decision issued by the advisor. Moreover, in most jurisdictions, the decision of the advisor cannot be enforceable by the court as an arbitral award. However, the court or arbitral tribunal may use the decision of the advisor to consider the case if the parties or one of the parties is not satisfied with it.

But again, it is important to stress that the role of a dispute resolution advisor is to eventually result in less arbitrations or litigations, and, therefore, dispute resolution advisor should be regarded as complementing arbitration or litigation[37].

As an advantage of dispute resolution advisor, it can save the costs of the parties to go to the court or arbitration, as the costs of a dispute resolution advisor are less expensive than the arbitration costs or litigation costs.

Finally, the confidentiality issue is subject to parties agreement regulation, as the law is silent on those issues.

Expert determination

Expert determination is a method of dispute resolution where two parties refer their dispute(s) to a neutral third party, an expert, whose duty is to issue a report. In addition, "expert determination is a determinative process, rather than a facilitative process (like mediation) or an advisory evaluative process (like early neutral evaluation)"[38].

Based on this definition, we may conclude that expert determination is a process of dispute resolution involving three parties and an expert, unlike a judge or arbitrator, is not given a power to issue a decision similar to court judgment or arbitral award.

Unlike dispute resolution advisor or dispute resolution boards, expert determination does not require an expert to conduct a supervision over the contract performance by the parties within its whole duration. Generally, parties, as the dispute resolution clause stipulates so, are to submit the disputes to an expert once such disputes have arisen.

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[37] Yasemin Cetinel, 'Dispute Resolution Boards: Lessons from Latin America' (22 June 2016) <http://kluwerarbitrationblog.com/2016/06/22/dispute-resolution-boards-lessons-from-latin-america/> accessed 02 July 2017.

[38] Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR handbook* (Oxford University Press 2013). P. 252.

Expert determination process can be introduced in the following way:

- After the dispute has emerged, the parties or one of the parties, as the agreement provides, invokes the dispute resolution clause and sends its submission with attachments, including evidences, to an expert;
- The other party to contract provides the expert with the documents stating its position;
- Expert determination is an inquisitorial way of dispute resolution;
- The general requirements for the rules of due process or natural justice which are an integral part of arbitration are not followed expert determination in order for an expert determination to be binding and valid between the parties[39].
- Expert determination, as the other types of alternative dispute resolution, is not bound by strict rules of procedure and evidences which is compulsory in litigation, therefore, the parties are flexible to provide any evidence they want to rely on and such distinctive feature enables the expert determination as a dispute resolution method to be conducted in a cost and time efficient manner compared with litigation.

To prove the idea that Expert determination is faster and cheaper than litigation or some other ways of alternative dispute resolution, for example, dispute resolution advisor or dispute resolution boards, we can refer to the description of Expert determination made by an Australian judge:

"…on a practical level, Expert Determination has apparently been attractive, largely because it is *less expensive and speedier, avoids the rigours of the application of the rules of evidence and procedure and offers a finality which avoids delays, potential re-hearings and appeals*, which is particularly suitable especially where an expert knowledge of the subject is required or where the parties may have a continuing relationship" [*emphasis* added]. [40]

But, the other side of the coin is that the result of Expert determination is a report, not a decision, which does not have a finality and binding enforceability as the court judgment or arbitral award has, especially in cases where two conflicting parties are located in different jurisdictions and, thus, the recognition of a decision will be mandatory to take an effect in such other jurisdiction.

As the New York on the Recognition and Enforcement of Foreign Arbitral Awards does not extend to the reports issued through Expert determination, and the winning party would not be able to enforce it outside the jurisdiction where such report is made.

[39] *Regulating dispute resolution: ADR and access to justice at the crossroads* / edited by Felix Steffek and Hannes Unberath in cooperation with Hazel Genn, Reinhard Greger and Carrie Menkel-Meadow. P. 161.
[40] *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646.

Of course, the parties can agree in their contract that the report of an expert will be final and binding, but the parties may still launch arbitration or court proceedings to review the report made under Expert determination procedure.

Furthermore, Expert determination can be used to resolve different types of disputes. Unlike litigation or arbitration, the scope of disputes that can be referred to the Expert determination is much broader, "the classic, and probably entirely academic example of such a non-justiciable issue is the decision about which colour to paint a fence between two adjoining properties with different owners: a dispute between the owners as to the colour to use could not be the subject of litigation, and it would be odd to refer it to arbitration"[41].

Lastly, Expert determination as many other types of alternative dispute resolution is not granted a statutory protection on confindentiality, and, thus, parties should pay a special attention on confidentiality clause covering expert determination process while drafting the contract provisions.

Early Neutral Evaluation

Early neutral evaluation is a "preliminary objective assessment by a disinterested expert about the strength of each party's case and the likely outcome if the parties go to trail"[42]. The evaluation of such a neutral third party usually does not have a binding force.

Under early neutral evaluation process, an independent expert, invited by the parties, gives his/her opinion on the actual circumstances of the case and provides his/her evaluation at the early stages of the conflict. As a practice, the evaluation is conducted on the basis of the submissions made by the parties. In addition, the conclusion on the dispute given by the expert involved becomes a basis for further negotiations of the parties.

This way of dispute resolution appears to be useful at the initial stages of conflict to clarify the circumstances of the case and try to come to an agreement on controversial issues without leading to a further escalation of the conflict.

Compared with negotiation, early neutral evaluation involves a third party, but such third party does not act as an intermediary as, for example, in mediation or conciliation process.

Unlike mediation, which is often used in facilitative form, early neutral evaluation is more advisory and evaluative process[43]. The neutral third party is not granted a power to urge the conflicting parties to come to a certain agreement.

[41] Kendall J., *Expert Determination* (4th edn Sweet & Maxwell 2008). P. 3.
[42] *Black's Law Dictionary* (10th edn, 2014).
[43] Susan Blake, Julie Browne, Stuart Sime, *The Jackson ADR handbook* (Oxford University Press 2013). P. 241.

The main disadvantage of early neutral evaluation is that its outcome does not have a finality and lacks binding enforceability in the courts as an arbitral award is given by the law. As mentioned above, the opinion presented by a neutral third party is not binding on the parties and cannot be taken into account by the judge or arbitrator in case of subsequent referral of the dispute to the court or arbitral tribunal. This process aims to support the parties to identify the strength and weakness of their positions in the dispute.

The neutral third party in early neutral evaluation, as a practice, is a lawyer, an experienced arbitrator, a person having expertise in the field where the conflict is emerged or even a judge who has been 'released' by the judiciary for the purpose of considering the issues and advising on the outcome. Should the judge acts a neutral evaluator, he/she will not further determine the action if it comes to the trial[44].

Furthermore, unlike adjudication or litigation, it is not an adjudicative process. A neutral third party does have a right to make a decision over the dispute referred to him/her by the parties.

The procedure of early neutral evaluation usually consists of the following features:

- The source of a neutral evaluator powers and duties to make an assessment over a dispute comes from a mutual consent of the parties;
- The parties to a dispute and the neutral evaluator are not bound by any strict procedure or evidence rules as it is required in litigation. Therefore, the process is flexible and a neutral evaluator can conduct the process and issue an opinion on documents only and in cases where he/she thinks appropriate conducts hearing(s);
- Unlike in arbitration or litigation, which subject to a limited amount of exceptions, requires judgment or award be reasoned, the assessment made by a neutral third party does not necessarily contain the reasons for the opinion.

One of the main advantages of early neutral evaluation is that it is a cost and time-effective way of resolving disputes. It was initially introduced in the United States District Courts to reduce the costs of litigation process. The courts intended the help the lawyers and their clients to effectively plan their case development[45]. As a result, compared with arbitration or litigation, early neutral evaluation incurs relatively small costs which will usually be borne by the parties in equal shares and provides the parties with the opportunity to understand the merits of the case and chances to win the case within the short period of time.

Early neutral evaluation can be used almost in any kind of case regardless of its nature because usually this way of dispute resolution is not regulated on the legislation level and, thus, the parties are free to refer to it at any stage. However, early neutral evaluation is very popular in

[44] Susan Cunningham-Hill, Karen Elder, *Civil Litigation Handbook* (Oxford University Press 2014). P. 55.
[45] Robert Gaitskell, *Construction Dispute Resolution Handbook* (2nd edn ICE Publishing, 2011). P.133

construction cases where a certain expertise is needed to determine the possible prospects of succeeding or losing on one's claim.

Finally, the issue of confidentiality during the early neutral evaluation process should be addressed in the agreement between parties and a neutral evaluator to clearly outline its protection.

Partnering

As Partnering being a method of dispute resolution is widespread in construction industry, we can refer to the following definition of it:

"Project Partnering is a set of actions taken by the work teams that form a project team to help them cooperate in improving their joint performance. Specific actions are agreed by the project team taking account of the project's key characteristics, and their own experience and normal performance. The choice of actions is guided by a structured discussion of mutual objectives, decision-making process, performance improvements and feedback."[46]

Others describe the Partnering as a "voluntary, nonbinding process in which all participants come together as a team, focused on principles rather than rules, allowing trust to develop. Partnering has become much more than an ADR technique, by developing into an alternative method of operating a business relationship, a new philosophy in which two or more organisations make long-term commitments to achieve mutual goals by entering into an agreement that requires a team approach."[47]

In essence, Partnering is "a management approach used by two or more organisations to achieve specific business objectives by maximising the effectiveness of each participant's resources"[48].

As we may see from the definitions above, Partnering involves a joint search for a solution of a problem that meets the interests of all the conflicting parties. This is possible subject to timely and accurate investigation of the problem that gave rise to the conflict situation, the clarification of both external and internal causes of the conflict and the willingness of the parties to act together to achieve a common goal.

In conflict situations occurred, the possibility of cooperation appears in cases where:

- The problem that caused the conflict is important for all the conflicting parties, none of them does not intend to depart from its joint solution;
- The parties involved in the conflict act as partners in good faith and trust each other;

[46] John Bennett and Sarah Peace, *Partnering in the Construction Industry: a Code of Practice for Strategic Collaborative Working* (Butterworths-Heinemann Oxford 2006). P. 3.
[47] Feniosky Pena-Mora, Carlos E. Sosa, D. Sean McCone, *Introduction to Construction Dispute Resolution* (Prentice Hall 2003). P. 115.
48 Darshanie Taraka Perera, 'Partnering in the Construction Industry' (December 2010) SLQS Journal. P. 30.

- Each party wishes to discuss voluntarily the issues in dispute.

Unlike many ways of dispute resolution, Partnering does not involve a neutral third party to assist, facilitate, evaluate or make a decision over a particular dispute and, thus, it is very unique and regarded as a form of inter-firm collaboration[49].

With regard to the costs, the benefits of the Partnering are obvious, because each party can obtain a maximum of benefit with minimum costs to be incurred. From one side, parties do not employ external lawyers and consultants, intermediaries and other third parties, rent hearing rooms to assist them in dispute resolution, however, from the other side, each party should allocate its employees and rooms to hold meetings to jointly discuss and resolve the conflicting matters arisen or prevent them from arising.

With regard to the time, the Partnering requires time and patience, the ability to express and argue one's position, listen carefully to the opponent's explanation of its interests, propose alternatives in the course of negotiating a mutually acceptable solution.

Partnering is based on an agreement between the parties, they are free to establish any rules, procedure and stipulate the scope of matters for the effective mutual resolution between them in order to successfully complete their project.

The main weakness of the Partnering is a lack of finality and the binding enforceability of the outcome of it in the court, as the result of negotiation under the Partnering does have the same effect as, for example, an arbitral award has. Therefore, as mentioned above, two partners should have a trust and confidence on the counterparty while they agree to choose this form of dispute resolution.

Lastly, as the Partnering is based on parties' agreement, the confidentiality in exchanging information and documents between parties must be regulated by the agreement.

[49] Michael Latham, *Constructing the Team*. Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry, HMSO, London, 1994.

Arbitration

Arbitration is a "determination of a dispute by one or more independent third parties (the arbitrators) rather than by court. Arbitrators are appointed by the parties in accordance with the terms of the arbitration agreement or in default by a court…"[50]

Although this definition is not so detailed, but we may highlight some key elements of arbitration, such as, disputes are not resolved by the courts and arbitration agreement is a basis for arbitration commencement.

It is worth saying that arbitration is only based on a mutual consent of the parties which is recorded in arbitration agreement.

To be more specific, arbitration agreement is a source for commencing arbitration proceedings and parties should pay a certain attention on its drafting, as once it is deemed to have defects and regarded as void and null, parties will be unable to resolve their disputes through arbitration. There are so many disputes related to the validity of arbitration agreement, because parties, arbitrators, judges take different approaches to interpret it. In this regard, to get more clues on how to construct the arbitration agreement, it is worth mentioning the words of Longmore LJ in Fiona Trust case:

"Not all these authorities are readily reconcilable … For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect … that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause…as it seems to us any jurisdiction or arbitration clause in an international commercial contract *should be liberally construed*..." [*emphasis* added].[51]

To start with advantages, arbitration, first and foremost, is confidential. "Confidentiality is typically used to refer to the obligation not to disclose information concerning the arbitration to third parties"[52]. Confidentiality normally covers any information and document submitted in the course of arbitration process. It is especially crucial for those sensible disputes, such as IP disputes,

[50] *Oxford Dictionary of Law*. Ed. Elizabeth A. Martin and Jonathan Law (Oxford University Press 2006).
[51] *Fiona Trust & Holding Corporation and others v Privalov and others* - [2007] 1 All ER (Comm) 891.
[52] Born G., *International Arbitration: Law and Practice* (Second Edition) (2015).

where parties are not willing to disclose valuable information and materials to persons other than parties to arbitration and arbitrators.

Second, arbitral award is enforceable in more than 150 countries. Unlike judgment, which generally requires either a bilateral treaty between the country where a judgment is rendered and the country where the judgment is sought to be enforced or a reciprocity in judgment enforcement between such countries. To avoid these obstacles in obtaining relief to enforce arbitral award, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed in 1958 and now is applied in 157 countries[53], which grants to the parties to arbitration a unified system to protect them from abuse by countries.

Many countries have taken a pro-arbitration approach in enforcing arbitral awards. For example, Hong Kong Special Administrative Region of the People's Republic of China. KB v S and ORS case introduced the following ten principles of arbitral award enforcement:

"(1) The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.

(2) Under the Arbitration Ordinance ("Ordinance"), the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.

(3) Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.

(4) Enforcement of arbitral awards should be "almost a matter of administrative procedure" and the courts should be "as mechanistic as possible" (*Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604).

(5) The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).

(6) In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of "must be serious, even egregious", before the court would find that there was an error sufficiently serious so as to have undermined due process (Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 (CA)).

[53] The status of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 25 June 2017.

(7) In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited* [2009] 4 HKLRD 353 (CA)).

(8) Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111).

(9) Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 136A-B).

(10) The Court of Final Appeal clearly recognized in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act bona fide (p 120I and p 137B of the judgment).[54]"

Among these guidelines, it is worth of mentioning that the court in Hong Kong has a discretion to decide whether to enforce an award if there are grounds to refuse to enforce it.

Compared with Hong Kong, China followed a different approach. The Supreme People's Court of the People's Republic of China in its Notice of on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China stated that "…if the court deems that the arbitral award falls under any of the circumstances set out in paragraph 2 of Article V or the evidence provided by the party against whom the award is invoked proves that the award falls under any of the circumstances set out in paragraph 1 of Article V, it *shall* rule to dismiss the application and refuse recognition and enforcement of the arbitral award…" [*emphasis* added].[55] Therefore, the People's courts in China cannot deviate and are bound to refuse the enforcement of arbitral awards if they find that the grounds under Article 5 of the New York Convention do exist in a particular case.

Third, a speedy resolution of a dispute and award making. In many countries, litigation process may take several years to obtain a judgment, however, arbitration is supposed to be a faster way. Some arbitration rules provide a time period for an award making, for example, China International Economic and Trade Arbitration Commission Arbitration Rules effective as of 1 January 2015 in Article 48 provides that "the arbitral tribunal shall render an arbitral award within six (6) months from the date on which the arbitral tribunal is formed and upon the request of the

[54] *KB v S & ORS* - [2015] HKCU 2271.
[55] Article 4 of the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China <http://en.pkulaw.cn.ezproxy.cityu.edu.hk/display.aspx?cgid=3255&lib=law> accessed 05 July 2017.

arbitral tribunal, the President of the Arbitration Court may extend the time period if he/she considers it truly necessary and the reasons for the extension truly justified."[56]

In addition, arbitration is more flexible in terms of evidence rules and does not have a discovery in a sense as litigation has, which is a very lengthy procedure. Furthermore, arbitration award, unlike judgment, is final and mostly not subject to appeal on merits. In other words, arbitral award has a *res judicata* effect.

As per George Spencer Bower, *res judicata* is defined as: "where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign, *judicial tribunal of competent jurisdiction* over the parties to, and the *subject-matter* of, the litigation, any party or privy to such litigation, as against any other party or or privy thereto, and, in the a case of a decision *in rem*, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the *foundation of an action*, or relied upon as a bar to any *claim, indictment or complaint*, or to any affirmative defence, case or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner" [*emphasis* added][57].

International Law Association Meeting held in 2006 in Toronto endevoured to draft some principles regarding application of *res judicata* and finalized it in Report on *Res Judicata* and Arbitration. To be more specific, the Committee identified five traditional conditions for arbitral awards to have conclusive and preclusive effects:

- "the prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat;
- the arbitration proceedings in which the *res judicata* issue is raised, must pertain to the same legal order as the prior award;
- identity of the subject matter;
- identity of the cause of action;
- identity of the parties"[58].

The case law in various jurisdictions recognises *res judicata* of the arbitral award. For instance, in Bancol y Cia.S. en C. v. Bancolombia SA case[59]:

"It is well settled that [*res judicata*] serves to bar certain claims in federal court based on the binding effect of past determinations in arbitral proceedings. To prove that a claim if precluded

[56] China International Economic and Trade Arbitration Commission Arbitration Rules effective as of 1 January 2015 <http://cietac.org/index.php?m=Page&a=index&id=106&l=en> accessed 02 July 2017.
[57] G. Spencer Bower, Alexander Kingcome Turner, *The Doctrine of Res Judicata* (1969). P. 9-10.
[58] Filip De Ly, Audley Sheppard, 'ILA Final Report on Res Judicata and Arbitration'. Arbitration International. (2009). Volume 25. Issue 1. P. 73.
[59] *Bancol y Cia.S. en C. v. Bancolombia SA*, 208 F.Appx. 85,86 (2d Cir. 2008).

under the doctrine of res judicata, a party must show that (1) *the previous action involved the [parties] or those in privity with them*; [and] (2) *the claims asserted in the subsequent action were, or could have been, raised in the prior action*" [*emphasis* added].

In Fidelitas Shipping Co. v. V/O Exportchleb case[60]:

"*Issue estoppel applies to arbitration as it does to litigation*. The parties, having chosen the tribunal to determine the disputes between them as to their legal rights and duties, are *bound by the determination of the tribunal on any issue which is relevant to the decision of any dispute referred to that tribunal*." [*emphasis* added].

Forth, freedom of parties to determine qualification and nationality of arbitrators, to choose the seat and venue of arbitration, applicable law to the merits and arbitration clause, language of arbitration, the procedure of conducting arbitration and so forth. In other words, parties are entitled to agree on almost every aspect of arbitration in their arbitration clause.

As mentioned above, the notion of party autonomy provides the parties with the right to choose arbitrators that share their respective nationalities if they wish. In the case of Jurvaj v Hashwani[61], the English Court was requested to determine whether the nationality of an arbitrator can be a "genuine occupational requirement". The English Court of Appeal rejected such proposition. However, such proposition was reverted by the Supreme Court of the United Kingdom.

According to the case facts, the arbitration agreement specifically stated that the arbitrator had to be a respected member of Ismaili community. The Respondent argued that the requirement of an arbitrator as an being a member of Ismaili community was an infringement of the Employment Equality (Religion or Belief) Regulation 2003.

When the dispute arose, the Respondent gave his notice of his intention to appoint a retired judge, who was not a member of Ismaili community. The Claimant applied to the court for a declaration that the Respondent's appointment was void and was in breach of the arbitration agreement.

The Court of Appeal reinstated that at para [28]:

"… but the arbitrator's function … is to determine the dispute between the parties in accordance with the principle of English Law. This requires some knowledge of the law itself, including the provision of Arbitration Act 1996, and an ability to conduct the proceedings fairly in accordance with the rules of natural justice, but it does not call for particular ethos. *Membership of the Ismaili community is clearly not necessary for the discharge of the arbitrator's function*" [*emphasis* added].

[60] *Fidelitas Shipping Co. v. V/O Exportchleb* [1965] 1 Lloyd's Rep. 223, 231 (English Ct. App.).
[61] *Jurvaj v Hashwani* [2011] UKSC 40.

The Court of Appeal concluded that the arbitration clause was not an objective requirement. Also, the arbitration was "fundamentally different from that which had originally been contemplated".

The Supreme Court rejected the proposition as suggested by the Court of Appeal. Lord Clarke at paragraph [70] expressed that "the approach of the Court of Appeal seems to me too legalistic and technical. The parties could properly regard arbitration before three Ismaili as likely to involve a procedure in which *the parties have confidence and as likely to lead to conclusions of fact in which they could have particular confidence*" [*emphasis* added].

Fifth, representation in arbitration. The legislation in many countries, as a general rule, allows that any person can be a representative (whether foreign or local, whether local qualified lawyer or not) of a party in arbitration. However, in some jurisdictions, such as the People's Republic of China, in cases involving Chinese law foreign lawyers representing a party to arbitration should get an assistance of Chinese lawyers in giving opinions on Chinese law[62].

With regard to the disadvantages of arbitration, it is important that parties cannot arbitrate any dispute they agree in their arbitration clause. Each country, subject to its economic, political, cultural and social development, may prohibit from time to time certain types of disputes be resolved through arbitration, such as, criminal cases, tax related cases, immigration cases. As an example, in Venture Engineering v Satyam Computer Services Limited case[63], the court highlighted the link between the principle of "arbitrability" and "public policy":

"…different countries have different concepts of public policy. Say for instance, some countries which do not countenance gambling, an award arising out of a gambling dispute may be set aside on the ground that it offends public policy of the State. But in country where gambling is legalized in some form, the award will not offend the public policy. *Similarly a dispute between a producer of wine and its distributor is arbitrable in countries which are not governed by a strict Islamic Code. But a country with such a Code may hold the award [is not arbitrable or] contrary to the public policy*" [*emphasis* added].

However, Hong Kong enacted amendments to Arbitration Ordinance (CAP 609) to allow IP disputes be resolved through arbitration[64] and, thus, expanded the scope of arbitrability. In addition, in the United States of America the court in Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc. case held that international disputes concerning antitrust law are arbitrable[65].

[62] Yuen P., McDonald D., Dong A, *Chinese Arbitration Law* (LexisNexis 2015). P. 106-107.
[63] *Venture Engineering v Satyam Computer Services Ltd.,* AIR 2010 SC 3371.
[64] 'Hong Kong confirms IP Rights are arbitrable' <http://hsfnotes.com/arbitration/2017/06/16/hong-kong-confirms-ip-rights-are-arbitrable-2/> accessed 23 June 2017.
[65] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 U.S. 614 S Ct 3346

Furthermore, the belief that arbitration is cost-effective is questionable. Comparing with litigation, parties to arbitration should also pay for using hearing facilities which can be extremely expensive, for example, if arbitrators choose to hold hearings in a top hotel and such hearings take a very long time.

Moreover, arbitration depends on the courts. In some cases, parties or arbitrators still need to refer to the courts to apply for support of arbitration. For example, to file a jurisdictional challenge, determine arbitrators' costs, challenge and/or enforce arbitral awards and so forth.

As a result, arbitration appears to be a good alternative to litigation and other forms of dispute resolution and its advantages as protecting confidentiality, enforceability, relatively speedy way of conducting arbitration, finality of award, freedom of parties to agree on how to arbitrate their disputes and no limitation for representation of parties outweigh disadvantages as high costs and dependence on courts.

Courts

According to Blacks' Law Dictionary, "litigation is the process of carrying on a lawsuit or a lawsuit itself"[66]. This definition is very uncertain. In more details, litigation is a process of resolving disputes by filing a suit to the court.

Litigation is method of resolving disputes where a third party is involved, the court. The mode of conducting litigation differs from jurisdiction to jurisdiction. In common law jurisdictions, judges use an adversarial system which is "a procedural system…involving active and unhindered parties contesting each other to put forth a case before an independent decision-maker, i.e. judge"[67]; while in civil law countries, inquisitorial system is common, "whereby the judge conducts the trial, determines what questions to ask, and defines the scope and the extent of the inquiry"[68].

First and foremost, unlike other forms of dispute resolution, to launch court proceedings parties are not required to have an agreement, because the courts have a statutory jurisdiction to consider disputes.

Second, the litigation process is very structured as it is based on the law. Parties cannot deviate from the statutory procedure and must strictly follow it. In general, the litigation process in common law countries, for example, in Hong Kong SAR, consists of the following stages[69]:

- Pre-action Letter by the Plaintiff;

[66] *Black's Law Dictionary* (10th edn, 2014).
[67] *Black's Law Dictionary* (10th edn, 2014).
[68] *Black's Law Dictionary* (10th edn, 2014).
[69] 'Leaflet 3 - What are the stages in a civil action' <http://rcul.judiciary.hk/rc/index.jsp> accessed 15 July 2017.

- Issue of a Writ of summons by the Plaintiff;
- Service of the Writ by the Plaintiff within 12 months of Issue of Writ;
- Acknowledgment of Service of Writ by the Defendant within 14 days of Writ being served on Defendant (failing to do so, the Plaintiff can apply for Default judgment);
- Service of a Defence by the Defendant within 42 days of Defence served on Defendant (and Counterclaim at Defendant's option);
- Service of a Reply by the Plaintiff (optional) within 14 days of Defence served on the Plaintiff;
- Discovery of documentary evidence by both parties within 42 days of the Reply served on Defendant;
- Filling of timetabling questionnaires by both parties;
- Interlocutory applications by both parties (optional);
- Exchange of witness statements by both parties;
- Trial;
- Judgment.

As a result, parties to litigation do not have freedom to negotiate about procedure and are bound by strict rules of evidence.

Third, the litigation process is lengthy and requires a relatively large budget. Unlike arbitration, it has several instances and parties are required to go through all of those instance to get a final judgment. To be more specific, we can show different instances in litigation in the following example of the court structure in Hong Kong SAR (tribunals and other courts are excluded in the list below in order not to make it complicated):

- District Courts;
- High Court (Court of First Instance);
- High Court (Court of Appeal);
- Court of Final Appeal.

Forth, unlike in various forms alternative dispute resolution where anyone can represent a party, legal representation in litigation is restricted in many jurisdictions, only admitted lawyers can represent parties. However, in Russia Federation, anyone can be a representative in civil litigation cases.

Fifth, as an advantage, the judgment has a finality (i.e. *res judicata*) and enforceability. In case of failure losing party to voluntarily enforce the judgment, the winning party can apply for compulsory enforcement.

Sixth, unlike arbitral award which is enforceable in 157 countries under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, for those cases which involve parties from different jurisdictions choosing litigation as a method of resolving disputes may lead to the problems of enforcing judgment outside of jurisdiction where it is made as those two jurisdictions may not have a treaty governing the mutual enforcement of judgments.

Seventh, the scope of disputes which can litigated is very broad and parties if they cannot use other means of dispute resolution can refer them to the courts.

Eight, litigation, unlike many means of alternative dispute resolution, allows parties to apply for various remedies, such as injunctions to command or prevent from actions.

Finally, confidentiality issue is very sensitive if the parties refer their disputes to the courts as in many cases the proceedings are open to the public and information and documents exchanged during the litigation process would be available to any third party who is interested in it.

Tribunals

According to Black's Law Dictionary, tribunal is "a court of justice or other adjudicatory body, which can be administrative, commercial or domestic. Administrative tribunal is a court-like decision-making authority that resolves disputes, especially those in which one disputant is a government agency or department; an administrative agency exercising a quasi-judicial function. Commercial tribunal is a court or division of a court whose judges hear primarily or exclusively business-related cases because of their experience and expertise. Domestic tribunal is a disciplinary body that has jurisdiction over internal affairs of an organisation, profession, or association with powers conferred by the contract with the members or under a statute."[70]

As we may see from the definition, Tribunals are very similar to the courts, but have certain distinct features.

The advantages of the Tribunals over the courts are obvious: a speedy process as the amount of the claims is small (for example, Small Claims Tribunal was established in Hong Kong SAR for the claims amount less than 50,000 Hong Kong Dollar), the relative cheapness of the process, the accessibility for a wide range of people, the absence of legal difficulties inherent in the judicial process, the availability of a special knowledge and experience in a certain field.

The procedure conducted by the Tribunal is less formal than in the court. The Tribunal has the right to manage the process in such a way that it considers it appropriate for a speed and fair resolution of the case. It is also not bound by rigid rules of evidence compared with the litigation.

[70] *Black's Law Dictionary* (10th edn, 2014).

Moreover, the Tribunal plays a more active role in the conducting the process than the court and, thus, has a right to ask questions to the witnesses and representatives of the parties.

Furthermore, the parties can act through lawyers (however, the legal costs incurred in tribunal cases may not be recoverable even if one wins the case) or represent their interests by themselves.

Moreover, while the courts are bound by the precedents of superior courts, tribunals are generally not. In practice, however, many tribunals follow the precedent.

The judgment of the Tribunal is final subject to the review by the Tribunal or appeal to the court. Normally, the court grants a leave to appeal of it involves the question of law. As an example, we can refer to the table below to highlight the differences between the review and appeal of Tribunal's judgment systems established in Hong Kong SAR[71]:

Review	**Appeal**
The forum is the Tribunal.	The forum is the Court of First Instance.
Review will normally be heard by the same Adjudicator who presided over the trial.	Review will normally be heard by the same Adjudicator who presided over the trial.
No legal representation is permitted.	Parties may engage lawyers to conduct the appeal.
Costs are generally insignificant.	Legal costs can be substantial.
The Adjudicator is not bound by his previous finding of facts.	The Judge has no power to reverse or vary the Tribunal's finding of facts
Appeal is to the Court of First Instance.	Further appeal is to the Court of Appeal.

In conclusion, the confidentiality issue is also sensitive like in the courts which hearings are open to the public, but due to relatively small sizes of the cases the parties would not be so concerned about the protection of privileged information exchanged in the course of Tribunal proceedings.

[71] 'The Review or Appeal of the Tribunal's judgment in Hong Kong SAR' http://www.judiciary.hk/en/crt_services/pphlt/html/sc.htm#2 accessed 16 July 2017

3. Conclusion

As a conclusion, we provide with the table below summarizing the key features of each method of dispute resolution overviewed above (where "Y" stands for "yes", "N" stands for "no", "R" stands for "requires", "NR" stands for "not required", "H" stands for "high level", "M" stands for "medium level" and "L" stands for "low level", "BS" stands for "broad scope", "LS" stands for "limited scope").

	Freedom of parties to set up rules and procedure	**Legal Representation**	**Cost-effectiveness**	**Time-effectiveness**	**The amount of parties involved**	**Scope of disputes**	**Decision over dispute**	**Finality and enforceability**	**Confidentiality protection**
Negotiation	Y	NR	H	H	Two	BS	N	N	M
Mediation	Y	NR	H	H	Three	BS	N	N	H
Conciliation	Y	NR	H	H	Three	BS	N	N	M
Adjudication	Y	NR	M	H	Three	LS	Y	Y and N	M
DRA & DRB	Y	NR	M	M	Three	LS	N	N	M
Expert Determination	Y	NR	H	H	Three	LS	N	N	M
ENA	Y	NR	H	H	Three	LS	N	N	M
Partnering	Y	NR	M	H	Two	LS	N	N	M
Arbitration	Y	NR	M	M	Three	LS	Y	Y	H
Courts	N	R	L	L	Three	BS	Y	Y	L
Tribunals	N	NR	M	L	Three	LS	Y	Y	L