

Chapter 1 Arbitration as a Dispute Settlement Mechanism

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1-1 International arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.

1-2 Disputes are an inevitable occurrence in many international commercial transactions. Different commercial and legal expectations, cultural approaches, political ramifications and geographic situations are all sources for disagreement and dispute between contracting parties. Genuine differences can concern the meaning of contract terms, the legal implications for a contract, and the respective rights and obligations of the parties. Sometimes parties agree to perform a contract where performance is just not possible. Extraneous factors and human frailties, whether through mismanagement or over-expectation, will also interfere with contractual performance. A major area of dispute is failure to pay moneys due under a contract: this may be because of an inability to pay or a wish *page "1"* not to pay and therefore one party is seeking an excuse or a justification to refuse to pay all or part of the contract price.

1-3 Where these disputes arise and they cannot be resolved by negotiation, they will need to be resolved in accordance with a legal process. This process should have the confidence of the parties or at least be in a forum that is acceptable to the parties. In these circumstances, parties to international commercial contracts frequently look to arbitration as a private, independent and neutral system.

1-4 This chapter deals with (1) the meaning of arbitration, its definition, advantages, disadvantages, and its fundamental characteristics, (2) what arbitration is not, and (3) other alternative dispute resolution mechanisms.

1. What is Arbitration?

1.1. Definitions of Arbitration

1-5 The various attempts to define arbitration have sought to reflect the evolving general understanding and essential legal forms of arbitration. For example:

- *Shorter Oxford English Dictionary*: “Uncontrolled decision”; “The

Source

Chapter 1 Arbitration as a Dispute Settlement Mechanism in Julian D. M. Lew , Loukas A. Mistelis , et al., *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) pp. 1 - 15

settlement of a question at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision.”⁽¹⁾

- *David*: “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.”⁽²⁾
- *Words and phrases judicially defined*: “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.”⁽³⁾ page “2”
- *Halsbury's Laws of England*: “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.”⁽⁴⁾
- *Domke “Commercial Arbitration”*: “[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.”⁽⁵⁾

1-6 As arbitration is a dynamic dispute resolution mechanism varying according to law and international practice, national laws do not attempt a final definition.⁽⁶⁾ Although it does not provide a definition, the English Arbitration Act 1996 did set out clear statements of principle of what was expected from arbitration. Section 1 provides

- (a) the object of arbitration is to obtain the fair resolution of disputes 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.

1.2. Fundamental Features of Arbitration

1-7 What is clear is that there are four fundamental features of arbitration:

- An alternative to national court;
- A private mechanism for dispute resolution;
- Selected and controlled by the parties;
- Final and binding determination of parties' rights and obligations.

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a. An alternative to national courts

1-8 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. It is a manifestation of state power and the responsibility of the state to ensure that courts exist, that

appropriately qualified judges are appointed, that there are procedural rules to regulate the basis of jurisdiction and the conduct of cases before the court.

1-9 Arbitration is not a national court procedure. When parties agree to arbitration they remove their relationships 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.

b. A private mechanism for dispute resolution

1-10 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.

c. Selected and controlled by the parties

1-11 The principal characteristic of arbitration is that it is chosen by the parties. However fulsome or simple the arbitration agreement, the parties have ultimate control of *their* dispute resolution system. 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. 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.

d. Final and binding determination of parties' rights and obligations

1-12 As the chosen alternative to a national court, the decision of the parties is for arbitrators to resolve the dispute finally. The parties have accepted that not [page "4"](#) 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 of 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.

1.3. Arbitration Compared with National Courts

1-13 National courts have, or are at least perceived to have, an inherent national prejudice. Judges are drawn from that nationality. They do not necessarily have the knowledge of, or ability to handle, disputes arising from international business transactions or even disputes between parties from different countries, *i.e.* with conflicting

legal, cultural, political and ethical systems. The procedure followed in national courts is in accordance with the laws set down by that state. National courts are generally open to the public; any one can enter to watch and listen to the proceedings.

1-14 A principal factor differentiating a national court from an arbitration tribunal is the rigidity of national court procedures. Whichever court one goes to, inevitably, there are civil procedural rules or codes or precedent as to the way in which cases are conducted. The procedural rules or code lay down the basis for the courts' jurisdiction, the circumstances in which an action can be brought, which particular national court has jurisdiction over a particular type of dispute, how to initiate proceedings, what documents must be filed, the rights of reply and how the case, generally, should be conducted. There are little or no areas on which the judge can, in his discretion, even with the agreement of the parties, move away from the strictures of the civil procedure rules or code.

1-15 By contrast, the form, structure and procedure of every arbitration is different and will vary according to the characteristics of the case. The arbitrations may be under different rules, with different national or international laws applying, with one or three arbitrators and one or more claimants or respondents. In international arbitration, even the variants of the position of the arbitration tribunal can affect and influence how the arbitration will proceed. It is for these reasons that for many types of international commercial arrangements, arbitration is the preferred mechanism for dispute resolution.

1-16 *Flexible procedure:* With parties of different origins and from different parts of the world, with arbitrations being conducted under different legal [page "5"](#) systems and arbitration rules, with arbitrators coming from various jurisdictions, there can be no rigid arbitration procedure. A special procedure is needed for each arbitration. Due to the private nature of arbitration and that it is established by agreement of the parties, the procedure can be fixed by the parties and arbitrators to meet the characteristics of each case.

1-17 All of the major international arbitration rules give authority and power to the arbitrators to determine the procedure that they consider appropriate, subject always to party autonomy. For example, Article 15 ICC Rules provides

The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.⁽⁷⁾

1-18 National laws contain similar provisions. Section 34(1) English Arbitration Act 1996 provides that it is

... for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.⁽⁸⁾

1-19 *Suitability for international transactions:* Contracting parties from one country are generally unwilling to submit to the national courts of the other party or to any national courts. Justifiable or not,

there is often a distrust of foreign courts, as well as a question as to their suitability for certain types of international contracts. The neutrality and independence of the arbitration process, established within the context of a neutral venue, and not belonging to any national system, is a real attraction for the parties for international arbitration as a system to resolve disputes arising from international transactions. As parties are drawn from jurisdictions across the world, with very different legal, political, cultural and ethical systems, arbitration provides a forum in which all of these interests can be protected and respected, whilst determining the most appropriate way to resolve the dispute between the parties.

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1-20 *Final and binding:* As a general rule the decisions of arbitrators are to be final and binding. There are no or very limited grounds on which arbitrators' awards can be appealed to the courts on the basis that the arbitrators' conclusions are wrong. Equally, the grounds upon which the decisions of arbitrators can be challenged and set aside are limited to where the arbitrators have either exceeded the jurisdictional authority in the arbitration agreement or have committed some serious breach of natural justice.

1-21 *Easy enforcement:* Both domestic and international arbitration awards should be easily enforceable. In many countries, a domestic award can be enforced in the same way and as simply as a national court judgment. There is no review of the decision of the arbitrators and how they reached that conclusion. The legal system recognises that the parties have decided that arbitrators should make the final determination of their dispute as an alternative to the national court. The law therefore gives effect to the intention of the parties and enforces the award just as it would a national judgment.

1-22 In the international arena arbitration awards are more easily enforceable than national court judgments. As a result of the New York Convention there are now more than 130 countries which have accepted the obligation to give effect to arbitration awards made in other countries which are party to the New York Convention. There are limited grounds to refuse enforcement. This is far more effective than the enforcement of foreign judgments which are dependent on bilateral conventions (with limited exceptions, for example, within Europe where EC Regulation 44/2001 and the Brussels and Lugano Conventions apply).

1-23 *Neutrality:* By contrast to the perceived partiality of a national court, an arbitration tribunal is thought to be neutral. It can be established with its seat in a country with which neither party has any connection; arbitrators can be selected from different countries and with different nationalities, and the tribunal is independent of direct national influence. This neutrality gives arbitration an independence and a loyalty primarily to the parties. The neutrality also enables the tribunal to function in a non-national way reflecting the need for international developments.

1-24 This is also of particular importance where parties from different parts of the world would like to have an arbitrator on the tribunal who understands their background and thinking, and the circumstances and situations from which they come. It is often possible to balance a tribunal by selecting arbitrators with different skills and knowledge as well as experience and background.

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1-25 Expert arbitrators: Particularly for disputes that arise out of specialist industries or where there is a particular characteristic of the dispute, parties are able to select arbitrators with expert knowledge. Whilst, generally, arbitrators are not expected to use their relevant background experience for the purpose of making decisions (that is a function for an expert determination), having specific knowledge and an understanding of the subject-matter will often give increased confidence in the arbitration process.

1-26 Confidentiality: Due to the private nature of arbitration, many consider that arbitration is also a confidential process. As a result, what proceeds in the arbitration will not only be kept private between the parties but will remain absolutely confidential. This means that the existence of the arbitration, the subject matter, the evidence, the documents that are prepared for and exchanged in the arbitration, and the arbitrators' awards cannot be divulged to third parties. It also means that only parties to the arbitration, their legal representatives and those who are specifically authorised by each party, can attend the arbitration hearing. Each of those individuals are considered to be subject to the duty of confidentiality on behalf of the party they are representing.

1-27 Whilst the legal effectiveness of this confidentiality is in dispute, it is clearly a concept that many consider to be a fundamental and important advantage to arbitration.⁽⁹⁾

1-28 Expedition: It is often assumed that arbitration is, or at least should be, quicker than national courts. In theory and in many cases this is so. Due to party autonomy, the fact that arbitrators can be selected, and as each case stands on its own, there is no backlog of cases. In many countries, the national courts have such a long backlog that it can be years before a hearing date can be obtained. If the parties are agreed, they can seek the involvement of an arbitrator at very short notice; if they are able to present their cases to the arbitrator within a short period, the whole matter can be resolved with great expedition.

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1-29 However, in reality, major complicated international arbitrations frequently continue for lengthy periods. Nonetheless, in most such cases, they are still resolved more quickly than in national courts. Under the English Arbitration Act 1996 there is an obligation on arbitrators to ensure that there is no unnecessary delay in the conduct of the arbitration.⁽¹⁰⁾

1-30 Cost: Due to the inherent advantages discussed above, in principle arbitration should be less expensive than national courts. Again, in theory, this may be the case, but in practice it is not always so. Where arbitrations can be held quickly and the awards issued with little or no delay, the costs may be significantly reduced in contrast to those of a lengthy court procedure. However, for complicated international arbitrations, particularly before three arbitrators, this may not always be the case as in addition to the costs of the lawyers, the parties will also have to pay the significant fees of the arbitrators.

2. What Arbitration Is Not

1-31 It is important to be clear what arbitration is not:

- It is not a national court procedure;
- It is not an expert determination;
- It is not a mediation;
- It is not any of the alternative dispute systems discussed below.

3. Other Alternative Dispute Resolution Mechanisms⁽¹¹⁾

1-32 Essentially there are two forms of dispute resolution: one which imposes a decision and determines issues definitively, *e.g.* expert determinations and baseball arbitrations; the other provides the basis to help the parties reach an [page "9"](#) agreed solution or settlement, *i.e.* negotiation, mediation/conciliation, mini-trial, executive appraisal, neutral listener, early neutral or expert evaluation.

3.1. Definitive Determination

1-33 There are various mechanisms to achieve a final determination of the dispute by the intervention of a third party who imposes a decision. Once the mechanism is agreed upon neither party can unilaterally withdraw from the process. The parties can still settle the dispute themselves but if not, then a binding determination will be made which, in principle, is enforceable through the courts.

1-34 *Expert determination:*⁽¹²⁾ This is the referral of a dispute to an independent third party to resolve by using his own expertise. It is particularly useful for resolving valuation disputes, *e.g.* intellectual property, technical issues, accounting disputes and earn-outs under company accounts. It can be cheaper and quicker than arbitration as the expert can conduct his own investigations without relying upon, or waiting for, information to be provided by the parties. A decision of an expert cannot be directly enforced in the same way as an arbitration award. There is no appeal from the decision of an expert. Unlike an arbitrator, an expert can be sued for negligence. The main difference between expert determination and arbitration is that the expert can use his own knowledge to reach his conclusions and is not required to give reasons for his decision.

1-35 In civil law systems experts are frequently retained to determine the subject matter of the contract such as the price of sale agreements. The Italian Civil Code⁽¹³⁾ distinguishes two cases. First, if in the contract the parties do not specify that the third person should make his determination entirely upon his own discretion and the determination is clearly wrong or unfair, then the parties can appeal to the court for the expert's decision to be set aside. In these cases the party seeking to challenge the decision must prove, for instance, that the opinion of the expert is manifestly wrong or illogical. If the court decides that the determination is wrong or unfair then the court itself makes this determination. If, on the other hand, the parties specify expressly that they wish to rely totally on the discretion of the third person, and his decision is final, then the expert determination is binding as a contract and it can only be challenged on the [page "10"](#) ground of bad faith of the third person. The contract is void if the third person cannot for some reason determine the subject matter of the agreement and the parties do not agree to substitute the third person.⁽¹⁴⁾

1-36 It is also generally recognised that the parties can agree an *expertise-arbitrage*⁽¹⁵⁾ whereby they appoint an expert to determine

technical disputes and to evaluate assets or damage.⁽¹⁶⁾ The expert is empowered by the agreement reached by the parties and his decision is binding as a contract. It is doubtful that this expert's determination can be considered a binding decision even if the decision of the expert on the technical issue would settle the dispute.⁽¹⁷⁾

1-37 Parties can submit a dispute to the ICC's International Centre for Expertise to obtain an expert opinion as to contractual compliance or adjustments in performance in cases of great technical complexity.⁽¹⁸⁾ This Centre, established in 1976, co-operates with several professional organisations to obtain advice on an *ad hoc* basis taking into consideration the specific characteristics of each case. The expert is empowered to make findings within the limits set by the request for expertise, after giving the parties an opportunity to make submissions. Article 8 of the ICC Rules for Expertise provides that "the findings or recommendations of the expert shall not be binding upon the parties." Therefore the results of the technical expert will be binding only if the parties have made an express stipulation to that effect and in this case it is not clear if and how the determination of the expert can be challenged.

1-38 The ICC International Centre operates under the 2003 ICC Rules for Expertise. It deals with technical, financial or other questions calling for specialised knowledge. The expert's intervention can help the parties to resolve questions amicably or simply to establish certain facts. Recent cases concern assessing, for instance, the operational capacity of a product unit, the corrosion of materials, the financial audit of a company during a take-over and the revaluation of a contract price.⁽¹⁹⁾

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1-39 *Adjudication:*⁽²⁰⁾ This involves the binding, but not necessarily final, resolution of disputes on an expedited basis. It acts as a form of interim dispute resolution, although its effect may often be to dispose of disputes without further proceedings. In the UK it is required by statute for all contracts involving the carrying out of construction operations.⁽²¹⁾ However, it is also commonly included in contracts for construction or engineering work elsewhere, where it may also be referred to a Dispute Adjudication Board or a Dispute Review Board.⁽²²⁾

1-40 The adjudicator is required to reach his decision in a specified, short period of time. Under UK statute this is only 28 days from the reference of the dispute to him, extendable only by agreement of the parties or by up to 14 days with the agreement only of the referring party. Frequently, in large infrastructure projects a time for adjudication is expressly provided for in the agreement. Critically, once the adjudicator has made his decision it is binding on the parties and is immediately enforceable. However, it cannot be enforced as an award but must be sued upon for enforcement.

1-41 Whether or not a decision is enforced, unless the contract expressly provides that the adjudicator's decision is also final, the parties may have the dispute re-heard in its entirety by whatever ultimate dispute resolution method they have chosen, whether arbitration or national courts. The ultimate tribunal is in no way bound by the adjudicator's decision and it re-hears the dispute afresh, rather than reviewing or hearing an appeal from the adjudicator's decision. If the ultimate tribunal comes to a different

conclusion to the adjudicator's decision, its judgment or award will replace the decision, with money being repaid if necessary.

1-42 *Rent-a-judge or private judging:* This is a court-annexed or private ADR process. It is available where statutes or local court rules permit court referral of cases to neutral third parties, usually retired judges, for formal trials. The procedure followed by the retired judge or neutral is usually akin to that in a [page "12"](#) common court trial. The decision of the neutral is referred to the competent court, and is considered to be a judgment of the court. Generally the parties' rights to appellate review and enforcement of the decision are the same as if the judgment had been entered into by a court. It is also possible where parties wish to expedite or avoid the delay of the courts. It is especially common in the United States and appropriate primarily for domestic matters.

1-43 *Baseball arbitration:* This is also known as final or last offer or pendulum arbitration. This process involves the parties narrowing the risk themselves by the claims and admissions made and it ties the hand of the arbitrators as to the extent of the awards they can make. Following its submission in a binding arbitration, each party also submits its best offer to the tribunal in a sealed envelope. The tribunal's responsibility is to choose the best offer which comes nearest to its own assessment. The arbitrators do not have to make assessments as to the correct level of damages, but rather which party is nearer to the mark, and that is the amount awarded. The effect of this procedure is to compel the parties to narrow their demands because an over-stated claim will almost certainly result in the award going to the other side. Final offer arbitration is potentially unfair unless all parties have essentially equal access to the basic facts. This technique is also known as "baseball" arbitration because it is used in the negotiation of professional athletes' contracts in the US.

3.2. Mechanisms Requiring Parties' Agreement for Resolution of Dispute

1-44 *Negotiation:* Straightforward negotiations between the parties or their advisors are always the most obvious but not the easiest way of reaching a consensus and to compromise the controversy. Negotiation is the most flexible, informal, and party-directed method; it is the closest to the parties' circumstances and control, and can be geared to each party's own concerns. Parties choose location, timing, agenda, subject matter and participants. Negotiation should normally be the first approach at resolution of any dispute. However, negotiations may fail because of previous poor relations, intransigent positions of the parties, neither party being prepared to "lose face" and the fact that a party cannot be pressured against its wishes from adopting an unreasonable position.

1-45 *Mediation/conciliation:* 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 mediation and conciliation in public international law, they were perceived as different [page "13"](#) 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).

1-46 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 recognise weaknesses in their cases. The mediator may, if required, evaluate the merits of the parties' cases 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.

1-47 *Mediation/arbitration (med-arb):*⁽²³⁾ This can happen where parties agree that if mediation does not result in a negotiated settlement, the dispute will be 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 a normal situation in arbitrations 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.

1-48 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.

1-49 *Mini-trial/executive appraisal:* In mini-trials, voluntary court-style procedures are adopted which involve the parties presenting a summarised version of their case (including calling evidence and making submissions) before a tribunal. The tribunal may ask questions and comment on evidence and arguments. The tribunal can be a neutral advisor who, following the presentation, [page "14"](#) advises the parties on how he sees the strengths and weaknesses of their case. Where the tribunal consists of neutrals, it can render a non-binding decision, which is intended as an aid to the parties' further negotiation toward settlement.

1-50 Alternatively, the tribunal can consist of senior executives of the companies in dispute perhaps with a neutral chairman, who use the mini-trial as a springboard for settlement discussions (executive appraisal). Parties to a mini-trial may agree that the neutral advisor will not act as an arbitrator or mediator.

1-51 A mini-trial aims at facilitating a prompt and cost effective resolution of a complex litigation case concerning mixed questions of fact and law. Its goal is to keep the problem on a purely commercial basis, to narrow the area of controversy, to dispose of collateral issues, and to encourage a fair and equitable settlement.

1-52 *Neutral listener arrangements:* In this case, each party submits its best offer in settlement to a neutral third party. This "neutral listener" informs the parties whether their offers are either substantially similar or within a range which looks negotiable. With the agreement of the parties, the neutral listener may try to assist them to bridge the gap.

1-53 *Early neutral evaluation/expert evaluation/non-binding appraisal:* Parties present their cases in the early stages of a

dispute to a neutral evaluator. The evaluator, following an oral presentation by each party, confidentially assesses the arguments and submissions. The assessment is not binding on the parties. No records of assessment are kept and the evaluation is considered “off the record”. The aim is to demonstrate to each party the strengths and weaknesses of its case. This is intended to help parties to settle their differences by subsequent negotiation or perhaps with an independent mediator.

1-54 All of the above mechanisms require the parties to conclude the settlement agreement between themselves. These procedures aim to bring the parties closer, to understand the respective position of the other side, and to help the parties see the weaknesses of their own case. This should, in principle, with or without the assistance of a third party, enable the parties to agree the terms for the settlement of their differences. If no agreement is possible, the parties can resort to arbitration or the courts for the determination of their dispute. [page "15"](#)

¹ *The Shorter Oxford English Dictionary* (3rd ed, 1969).

² David, *Arbitration in International Trade*, 5.

³ Saunders (ed), *Words and Phrases Legally Defined* (3rd ed, Butterworths 1988), 105.

⁴ Halsbury's *Laws of England* (4th ed, Butterworths 1991), para 601, 332.

⁵ Domke, *Arbitration*, 1.

⁶ By contrast some national laws define arbitration agreements. See, e.g., Model Law, Article 7.

⁷ See also, e.g., AAA ICDR Rules Article 16(1); LCIA Article 14(2); NAI Arbitration Rules Article 23(2); UNCITRAL Arbitration Rules Article 15(1); WIPO Arbitration Rules Article 38(a).

⁸ See, e.g., Belgium, Judicial Code Article 1693; Germany, ZPO section 1042; Italy, CCP Article 816; Netherlands, CCP Article 1036; Sweden, Arbitration Act section 21; Switzerland, PIL Article 182; Model Law Article 19.

⁹ See expert reports by Bond, Boyd, Lew and Smit in 11 *Arb Int* 231 (1995), in the case of *Esso Australia Resources Ltd and others v The Hon Sidney James Plowman, The Minister for Energy and Minerals and others*, 183 Commonwealth Law Reports 10 (1995). See also Collins, “Privacy and Confidentiality in Arbitration Proceedings”, 11 *Arb Int* 321 (1995); Neill, “Confidentiality in Arbitration”, 12 *Arb Int* 287 (1996); Fortier, “The Occasional Unwarranted Assumption of Confidentiality”, 15 *Arb Int* 131 (1999). See also Supreme Court of Sweden, 27 October 2000, *Bulgarian Foreign Trade Bank Limited v AI Trade Finance Inc*, 13(1) WTAM 147 (2001); *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] UKPC 11 (PC, 29 January 2003).

¹⁰ Section 33(1)(b). See also ICC Rules Article 24(1).

¹¹ See generally Brown & Marriott, *ADR Principles and Practice* (2d ed, Sweet & Maxwell 1999); Bernstein, *Handbook*, 585-601; Stipanowich & Kneekell, *Commercial Arbitration*; Hoellering, “Comments on the Growing Inter-Action of Arbitration and Mediation”, in van den Berg, *ICCA Congress Series no 8*, 121-124; Mackie, Miles & Marsh, *Commercial Disputes Resolution – an ADR Practice Guide* (2nd ed, Butterworths 2000); Freeman, *Alternative*

Dispute Resolution (Dartmouth 1995); Nolan-Haley, *Alternative Dispute Resolution in a Nutshell* (2d ed, West 2001); Carroll & Mackie, *International Mediation – The Art of Business Diplomacy* (Kluwer 2000); Mistelis, “ADR in England and Wales”, 13 *Am Rev Int'l Arb* 167 (2002); de Boissesson, “Thoughts on the Future of ADR in Europe: A Critical Approach”, 15(4) *Arb Int* 349 (1999).

¹² See Kendall, *Expert Determination* (3rd ed, Sweet & Maxwell 2001).

¹³ Article 1349.

¹⁴ See similarly France, NCPC Article 1592; Germany, BGB sections 317-319. See also Kröll, *Ergänzung und Anpassung von Verträgen durch Schiedsgerichte* (Haymanns 1998), 248 *et seq.*

¹⁵ *Schiedsgutachten* in German, *arbitraggio* in Italian, *bindend advies* in Dutch.

¹⁶ Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 26. See also Berger, *International Economic Arbitration*, 73 *et seq.*

¹⁷ Fouchard Gaillard Goldman *on International Commercial Arbitration*, para 25.

¹⁸ Craig, Park, Paulsson, *ICC Arbitration*, 701-705.

¹⁹ <www.iccwbo.org.drs.english.Expertise/all_topics.asp>.

²⁰ See Stevenson Chapman, *Construction Adjudication* (Jordan 1999); McInnis, *The New Engineering Contract* (Thomas Telford 2001), 545-552; Seppala, “The New FIDIC Provision for a Dispute Adjudication Board”, 8 *RDAl/IBL* 967 (1997); Morris, “Adjudication as Operated on the Construction of the Dartford River Crossing (The Queen Elizabeth II Bridge)”, 60 *Arbitration* 13 (1994).

²¹ Housing Grants, Construction and Regeneration Act 1996. See also Davies, “Section 9 of the English Arbitration Act 1996 and Section 108 of the Housing Grants, Construction and Regeneration Act 1996: A Conflict Waiting to be Exploited”, 13 *Arb Int* 411 (1997).

²² See, e.g., *FIDIC Conditions of Contract for Construction* 1999 (1st ed), clause 20(4); *FIDIC Conditions of Contract for EPC/Turnkey Projects* 1999 (1st ed), clause 20(4).

²³ See Hill, “MED-ARB: New Coke or Swatch?”, 13 *Arb Int* 105 (1997); Motiwal, “Alternative Dispute Resolution in India”, 15(2) *J Int'l Arb* 117 (1998).

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