

**Primary Reference:**  
**ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION How to Settle International Business Disputes** (International Trade Center and Arellano Law Foundation, ©2001)

## I. Introduction

### A. What is Conflict?

(*noun*) a serious disagreement or argument, typically a protracted one; (*verb*) be incompatible or at variance. [<https://en.oxforddictionaries.com/definition/conflict>]

<i>Misunderstanding</i>	<i>Disagreement</i>
There is misappreciation of facts which does not necessarily lead to a disagreement or conflict	Parties are aware of the factual settings but they cannot arrive at unanimity or consensus

#### Conflict

- Perceived violation of right
- Against interest
- It may be internal or external

#### Sources of conflict

- Attitude
- Opinion
- Misunderstanding
- Personality

#### Nature of Conflict

- Dispute of right - JUDICIAL
- Dispute of interest (matter of opinion) - ADR

#### Effects of Conflict

<i>Positive Effects</i>	<i>Negative Effects</i>
<ul style="list-style-type: none"> <li>• Innovation</li> <li>• Learning</li> <li>• Low productivity</li> </ul>	<ul style="list-style-type: none"> <li>• Stress</li> <li>• Low moral</li> <li>• Low productivity</li> <li>• Other negative outcomes (frustration, etc.)</li> </ul>

### B. How to manage Conflict?

**Theoretical concept: limitation, mitigation of conflict**

#### Ways/Strategies in Resolving Conflict

*Avoidance* - indefinitely ignoring the resolution of problem; important to preserve relationship.

*Accommodation* - entails giving the other side what it wants; goodwill and reasonableness; must not be overused.

*Competition* - a zero sum game, win or lose; good for emergencies; winning is the name of the game; concerned on the needs of the person.

*Compromise* - calls for elements of position; needs are only partially met; uses negotiation.

*Collaboration* - integrating ideas in finding creative solution for everyone.

<http://www.wikihow.com/Manage-Conflict>

1. Identify the Issue
2. Identify the key players
3. Articulate your concerns
4. Be an active listener
5. Reflect
6. Work together to resolve
7. Agree to disagree
8. Know when to concede
9. Take some time
10. Maintain confidentiality
11. Forgive
12. If getting nowhere, ask third party for help

#### Types of ADR

*Adjudicative* - a neutral person is involved, e.g. arbitration (but parties need to give consent)

*Consensual* - consent of parties (capacity to give consent not required)

**N.B. in arbitration, the process cannot be terminated any time unless the parties give consent again.**

#### Features of ADR

- Consensual
- Win-win solution (owning the process, decision)
- Confidentiality (proceedings cannot be used in court)

**ADR is all about compromise and collaboration.**

## II. Common Types of Dispute Settlement

### Negotiation

- discusses face to face; 3rd person not necessary (if there is, merely advisory)

**Inquiry and Fact Finding**

- determination of facts in issue

**Mediation**

- similar to conciliation except that the 3rd party offers his service to settle conflict
- NOT binding but mere advisory

**Good Offices**

- when parties' relationship had already been severed

**Conciliation**

- similar to mediation, except that parties seek 3rd person to settle conflict
- NOT binding but mere advisory

**Arbitration**

- submission to a 3<sup>rd</sup> person for a final and binding decision

**Kinds of Arbitration**

**Voluntary** – parties, without stipulation in a contract, may agree thereafter to resolve their conflict with an arbitrator or panel of arbitrators.

**Compulsory** – parties have prior agreement, usually an arbitration clause in a contract, to resolve any conflict with an arbitrator or panel of arbitrators.

**Neutral Evaluation**

- assessment of pros and cons

**Advantages and Disadvantages of ADR**

<b>Advantages</b>	<b>Disadvantages</b>
<ul style="list-style-type: none"> <li>• Shorter period</li> <li>• Less expensive</li> <li>• More control of the process</li> </ul>	<ul style="list-style-type: none"> <li>• May still cause delay</li> <li>• Reduced means of discovery of facts</li> <li>• Bad faith</li> </ul>

**III. International Dispute Resolutions****A. Overview of International Law****Basic principles of international law**

International law, xxx consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical. (Restatement, Third, § 101)

**Sources of International Law**

(Restatement, Third, § 102)

(1) A rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law;

(b) by international agreement; or

(c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

**Doctrine of Incorporation**

*Constitution (1987), Article II, Section 2.* The Philippines renounces war as an instrument of national policy, **adopts the generally accepted principles of international law as part of the law of the land** and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

**Doctrine of Transformation**

*Constitution (1987), Article VII, Section 21.* No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

**Functions of Government**

*China National Machinery & Equipment Corporation, G.R. No. 185572, 07 February 2012*

This Court explained the doctrine of sovereign immunity in *Holy See v. Rosario*, to wit:

“There are two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory, a sovereign cannot, without its consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory, the immunity of the sovereign is recognized only with regard to public acts or acts *jure imperii* of a state, but not with regard to private acts or acts *jure gestionis*. (Emphasis supplied; citations omitted.)

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The restrictive theory came about because of the entry of sovereign states into purely commercial activities remotely connected with the discharge of governmental functions. This is particularly true with respect to the Communist states which took control of nationalized business activities and international trading.”

#### Elements of a State

1. People
2. Territory
3. Government
4. *Sovereignty*
5. **Recognition**
6. *Degree of civilization*

#### Rights of States

- Self-defense
- Independence
- Equality in law
- Jurisdiction over its territory and persons and things therein

#### Article 33, par. 1 of UN Charter Pacific Settlement of Disputes

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

#### Default is mediation, not arbitration

#### International Court of Justice

([www.icj-cij.org](http://www.icj-cij.org))

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946.

The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York (United States of America).

The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

The Court is composed of 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. It is assisted by a Registry, its administrative organ. Its official languages are English and French.

#### Two fold-functions of the ICJ

1. Adjudicatory functions
2. Rendering advisory opinions

#### Compositions of ICJ

(from ICJ Statute)

##### Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law.

##### Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

**Nominations, Process of Selection***(from ICJ Statute)***Article 4**

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

**Article 5**

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

**Article 6**

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

**Article 7**

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

**Article 8**

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

**Article 9**

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

**Article 10**

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

**Article 11**

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

**Article 12**

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

**Article 13**

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for

transmission to the Secretary-General. This last notification makes the place vacant.

#### Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

#### Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

#### Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

#### Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

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#### Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

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#### Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

## B. Some of Alternative Dispute Settlement Institutions

### Permanent Court of Arbitration (PCA) (Hague Convention 1907)

<http://oca-cpa.org>

Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community.

The PCA is not a court in the traditional sense, but a permanent framework for arbitral tribunals constituted to resolve specific disputes.

#### Purpose of the 1907 Hague Convention

- Maintenance of general peace
- Obviating as far as possible recourse to force in relations between states
- Use best efforts to ensure pacific settlement of international differences

#### Good Offices

- relationship is severed; State at variance
- a third person offers to mediate and consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance
- not considered as an unfriendly act
- undertaken upon request of parties in dispute or on initiative of Powers

#### International Commissions of Inquiry

- international disputes not involving honour or vital interests
- dispute arising from a difference of opinion on points of facts
- elucidating facts by means of an impartial and conscientious investigation
- report is limited to statement of facts (not an award)
- each party pay its own expense and an equal share of expenses incurred by the commission

#### International Arbitration (PCA)

- settlement of disputes between States by Judges of their own choice
- on the basis of respect for law
- engagement to submit in good faith to the Award

#### 'Compromis'

- a formal agreement between nations submitting a dispute to arbitration and

defining the terms of the submission, the powers of the tribunal to serve as arbitrator, and the procedure to be followed (*merriam-webster*)

- signed by Powers which have recourse to arbitration

#### Arbitrators

- each contracting party selects four persons at most:
  - o of known competency in questions of international law
  - o of highest moral reputation
  - o disposed to accept the duties of Arbitrator
  - o appointed for a term of 6 years, renewable

#### Jurisdiction of PCA

(Articles 53 and 54)

The Permanent Court is competent to settle the 'Compromis', if the parties are agreed to have recourse to it for the purpose. It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general Treaty of Arbitration concluded or renewed after the present Convention has come into force, and providing for a 'Compromis' in all disputes and not either explicitly or implicitly excluding the settlement of the 'Compromis' from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the 'Compromis' should be settled in some other way.

In the cases contemplated in the preceding Article, the 'Compromis' shall be settled by a Commission consisting of five members selected in the manner arranged for in Article 45, paragraphs 3 to 6. The fifth member is President of the Commission ex officio.

**N.B. When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitration procedure is settled by him. (Article 56)**

**The Umpire is President of the Tribunal ex officio. When the Tribunal does not include an Umpire, it appoints its own President. (Article 57)**

#### International Court of Arbitration (International Chamber of Commerce)

[\(www.iccwbo.org/\)](http://www.iccwbo.org/)

The International Court of Arbitration® is the world's leading body for the resolution of international disputes by arbitration.

The universal scope of the International Court of Arbitration, commonly known as "the Court", is evidenced by the fact that each year, numerous parties, arbitrators and lawyers from countries of every economic, political and social system are present in ICC arbitrations.

The Court members' diverse professional, legal and cultural backgrounds brings a richness to the Court's daily work and decision making processes.

The Court is one of the world's most experienced and renowned international arbitration institutions. Working closely with its Secretariat, the Court's primary role is to administer ICC Arbitrations. It performs the functions entrusted to it under the ICC Rules of Arbitration and continually strives to assist parties and arbitrators to overcome any procedural obstacles that arise.

#### Main Activities of ICC

- Rule setting
- Dispute resolution
- Policy advocacy

**How to be a member:** apply to be a member of the umbrella organization of ICC

**ICC as specialized agency has now observer status in the UN to resolve disputes**

**International Court of Arbitration is not a court.**

#### ADR System cognizable by ICA:

- **Mediation (*preferred mode*)**
- mini trial (*submission of memoranda*)
- neutral evaluation (*reports will be given to parties*)
- combination of any

**Enforcement: with aid of regular courts**

#### Advantages

- Flexible
- Minimum time and resources
- Allow members to choose
- Confidential

**How to file a case with the ICA:**

1. Parties must agree to submit themselves to the rules of the ICA;
2. The request of the ADR must be submitted by one party to the ICC (must be members of the ICC)

**Determination: (not referring to arbitration)**

1. Signing by party
2. Written notification by the neutral to parties that they no longer wish to pursue; will not result in the amicable settlement of disputes
3. Expiration of time; ICC terminates due to non payment of fees
4. Designation of neutral is not possible
5. Limitations: issues brought are not included in the stipulation

**United Nations Commission on International Trade Law  
(1985 UNCITRAL Model Law on International Commercial Arbitration)**

[\(www.uncitral.org/\)](http://www.uncitral.org/)

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.

Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form requirement of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.

**Model Law** - not a law but a suggestion for states to adopt a national law for it.

**Kinds of Arbitration Agreement**

1. Arbitral clause (*included in the contract*)
2. Submission agreement (*supplement*)

**Interim measure**- special order by arbitral tribunal to protect the right of the party seeking relief (*akin to provisional remedies*)

**Kompetenz-Kompetenz**

A doctrine that recognizes the competence of a court, body, or tribunal to rule on the issue pertaining to its jurisdiction or authority to hear and decide the case before it.

- Qualifications of arbitrators
- Jurisdiction over the subject matter

**N.B. In the UNCITRAL Model, parties are free to determine the number of arbitrators; the default number is three (3) arbitrators.**

**How to terminate the proceedings**

- The claimant withdraws
- Mutual withdrawal
- Unnecessary (in case of compromise)

**1958 New York Convention**

[\(www.uncitral.org/\)](http://www.uncitral.org/)

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

**GENERAL RULE:** NO APPEAL of Award**EXCEPTION:** Awards may be challenged based on **Article V of the 1958 New York Convention.**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

**Article II**

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

**C. How to Settle International Business Dispute****Type of Arbitration**

Institutional arbitration vs. ad hoc arbitration  
In case of conflict between institutional rules and stipulation: the former prevails  
Reason: it is their intention from the beginning to be bound by the rules

**Arbitral Tribunal****Arbitration Proceedings**

*Amiable compositeur* - power to derogate from strict compliance with the rules if it will result in injustice; only applicable if parties agreed

Interim/conservatory measures

**Lex Arbitri and the law of the subject matter****Award (rendering, recognition, enforcement, etc.)****Different Awards**

- final award
- Interim measure (only in arbitration; not available in mediation, conciliation, etc.)
- consented award (compromise arrived at during arbitration)

Party Autonomy

**IV. Domestic Dispute Resolutions**

*Arbitration Law (R.A. No. 876)*

*Alternative Dispute resolution Act of 2004 (R.A. No. 9285)*

*DOJ Department Circular No. 98 s.2009 (IRR of RA 9285)*

*A.M. No. 07-11-08-SC (Special Rules of Court on ADR)*

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