Royal University of Law and Economics

Final Report on:

Methods of International Commercial Dispute Resolution Comparing International Commercial Arbitraiton Institutions in Cambodia and Singapore

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ABSTRACT

International commercial transactions, are in a sense, a form of a soft power, which is essential in enhancing a state's reputation and power in the global stage. The phenomenon of international commercial disputes continues to grow from day to day as part of the expansion and evolution of global business transactions. Conflicts in international business are normal occurrences, but they are not always so easy to solve as one might think. Commercial disputes are very complicated and can be costly. They require an immediate solution with specialized legal experts on problem-solving across multiple jurisdictions and who have a technical understanding of the often extremely complicated issues. From a general perspective, ADR has been most widely used and is an accepted means of resolving international commercial disputes. This does not mean that ADR is always the preferred method of dispute resolution. However, judicial proceedings are also an important option for the parties to settle all kind of dispute in the international commercial sector. A national commercial dispute can be easier to settle because both parties live in the same territory and having the same legislation system. In contrast, when the dispute arises between international parties, the complexity will occur because the flow of procedures in international law is more complicated and confusing which lead the parties of disputes to think carefully and consider conscientiously. Due to the main characteristic of cross border conflicts, these resolutions differ from domestic dispute resolutions as well.

In recent years, Cambodia has been considered as an attractive country for foreign investment and business transaction, but this does not mean that Cambodia is a state that has a high amount of resolving international commercial disputes. Traditionally, when any disputes between parties under the contract or having any others issues related to international business relations, most investors refuse to use arbitration in Cambodia and prefer to solve the issues in

foreign state such as in Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC). One of the big concerns for investors is that they do not believe or trust in the arbitration center in Cambodia. To improve the arbitration in Cambodia is not impossible, but it's also not as easy as one think. From our perspective, to address this problem, the Cambodian government should make a priority effort in training each local arbitrator in order to enhance their ability before becoming official arbitrators.

If Cambodia can demonstrate to foreign investors its strong capacity to professionally and fairly resolve disputes, then trust will be gained, and the NCAC will transform itself into a popular and reliable resource for business people to use to international commercial disputes. This is turn will encourage more foreign investment to come to Cambodia, which will contribute to the economic development of the nation.

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ABBREVIATIONS

ADR	Alternative Dispute resolution
UNCITRAL	United Nation Commission on International Trade Law
NCAC	National Commercial Arbitration Center
NYC	New York Convention
SIAC	Singapore International Arbitration Center
CISG	Contract for the International Sale of Goods
CPR	Conflict Prevention and Resolution
REFJA	Reciprocal Enforcement of Foreign Judgment Act
RECJA	Reciprocal Enforcement of Commonwealth Judgment Act
HKIAC	Hong Kong International Arbitration Center

INTRODUCTION

Commerce is an act of doing trade relations between two or more parties, and it is an essential sector for people in order to earn their income as well as improve their living standard. In the past, people only traded internally which we called intra-national but now because the effects of globalization, people can do more trade internationally. By engaging in international commerce, people have more opportunities to gain benefits and get more experiences rather than intra-national. In addition, international commercial transactions, are in a sense, a form of a soft power, which is essential in enhancing a state's reputation and power in the global stage.

In general, when two parties plan to cooperate on national or international commerce, they likely think of making a contract in order to prevent any dispute from happening as well as to resolve the dispute in a peaceful way in the future. Inserting a dispute resolution provision after making a contract and after the dispute has been arisen can be a significant danger.

What is an international commercial contract? The international commercial contract is a sale transaction agreement where both parties have their relevant place of business in different states.[1] However, even if the contract has been signed, in some cases disputes still happen for some reasons. Mostly, commercial disputes usually occurs when one side breaches the contract which they already signed and such an event includes natural disasters and unexpected events beyond parties control also known as force majeure clauses. Moreover, with the number of disputes between international parties increasing, it is easy for these disputes to broaden into major trade conflicts with serious political and economic repercussions.

When it comes to the term of an international commercial dispute, both parties need to realized how the rights and obligations in the contract will be enforced in their dispute resolution. There will be two possible methods which can be used in the disputes involving

[1] The Asia Foundation, *International Contract Law*, (Cambodia, 2001), P. 11

international commercial contracts. The first option would be using alternative dispute resolution which provides for negotiation, mediation and arbitration. The second alternative is going to court which provides for litigating the dispute. Normally in court, there is one justice magistrate who will rule on the case and both parties must obey and implement along with the judge's decision. By providing a potential mechanism of dispute resolution, both parties can definitely receive more efficient solutions as they wish. A court judge may delay certain civil proceedings for a period at least 28 days to allow parties to consider using negotiation, mediation, conciliation and arbitration or any other dispute resolution process to settle and determine the issue.[2]

There are several different types of dispute resolution in international commercial contracts but not all of them are effective; that is why parties must consider which alternative they should use in order to secure the relationship and reputation as well. This report will examine the various factors that international parties need to consider when choosing any method to resolve the international commercial dispute. This can involve choosing between alternative dispute resolution and litigation. More importantly, we will illustrate which is the best alternative that international parties should choose.

In addition, this paper will also examine the obligations of the contract, each step of the ADR process, and also the court process. Moreover it will consider the advantages and disadvantages of these settlement methods.

1. Research Objective

Commerce plays a significant role every country, even though it is not the primary role. However, a state actually cannot develop without the involvement of commerce. However, the

[2] John Doyle, "Mediation in Commercial Dispute," January, 2010, p. 1, http://www.dilloneustace.com/uploads/files/Mediation-in-Commercial-Disputes.pdf

issues in commercial relations are quite complicated both nationally and internationally because its concern with both parties' reputation, and the need to deal settle disputes quickly, efficiently and fairly. For our purposes in this research, we would like to explain about the resolution of international commercial contracts; more importantly we will attempt to provide and understanding of the important issues that arise when drafting the international commercial contract, along with comparing the arbitration mechanisms in Singapore and Cambodia.

2. Scope and Limitations

This paper, will provide an overview of international commercial disputes and focus on a dispute resolution mechanisms. This report does not cover all the concerning issues of international commercial disputes. However, we will focus on the instruments and the solution of international commercial disputes through the alternative dispute resolution and judicial processes. Moreover, we are going to compare the Singapore arbitration and Cambodia arbitration centers. The reason for choosing Singapore to compare with Cambodia is because the Singapore International Arbitration Center is the most popular and well known arbitration center in Southeast Asia region, and Singapore is also a member of ASEAN like Cambodia. SIAC seems to be a very developed and well established center for international dispute parties. Most of the international dispute parties always trust and bring their case to SIAC to settle because of the reliable arbitrators. The development of SIAC can lead Cambodia's National Commercial Arbitration Center (NCAC) to improve themselves in the future.

3. Research Methodology

In researching this report, we had spent almost four months since the second semester started. Regarding the research sources for this final paper, we did research at libraries of the Royal University of Law and Economics, the office of International Relations, some websites

from the internet as well as some other relevant documents from books and particularly, the basic ideas we got from our advisor.

4. Research Problem

In today's world economy, cross-border trade is rapidly increasing. An overwhelming amount of goods is constantly traveling throughout the world every single minute. International commercial began to increase shortly after World War II, and the negotiation of various multi-lateral international treaties which provided methods for trading goods. International commerce involves numerous transactions, which lead to conflicts and disputes. The concerning issues in international commercial dispute resolution is state often have different law as well as legislation.

5. Research Structure

The structure of our research covered three major issues, which are set forth in the chapters of this paper. They are:

- Chapters 1: The Obligation of Contract
- Chapter 2: Alternative Dispute Resolution
- Chapter 3: Judicial Dispute Resolution

Chapter 1 will briefly explain the important role of contracts in international business transactions, and elaborate on the key elements that lead to building an effective contract. Chapter 2: will provide a clarification of each ADR method and examine the most professional arbitration centers in the world and lastly, the chapter also includes a comparison between Cambodia arbitration and Singapore arbitration. Chapter 3: focuses on judicial dispute resolution and the process of litigation, following each step of the process, and then summarizing the advantages and disadvantages of using courts to resolve commercial disputes.

Chapter 1: The Obligation of Contract

1.1. Definition of Contract

A contract is a legally recognized agreement between two or more parties giving rise to obligations that may be enforced in the courts.[3] The contract usually is written but could be spoken or implied as well, and must be clearly created by the parties. In term of every contracts usually stated the legal purpose of parties involved and clearly expressed their intension of agreement. The origin of contract law came from commercial business law, which is the basic law of all international commercial management which includes the principle from merchants called the law of merchant.[4]

- Why do parties need contract?

The business relation is full of agreements, while the informal agreement was conduct in oral but most of the parties often make agreement in written form also known as contract when engaging in operation. The contract agreement was considered as necessary element for international commercial which provide an important evidence or legal document for both parties and also explain how to deal if negative situation happen.[5] Commonly, contracts are considered as legally enforceable in a court of law. Moreover, contracts often represent a tool that companies use to safeguard their resources.

[3] Lloyd Duhaime, "Legal Definition of Contract Law,"
http://www.duhaime.org/LegalDictionary/C/Contract.aspx (accessed April 10, 2018)

[4] ឥន្ទតេរ្យ៉ ជ័យ, *Contract Law* (Kingdom of Cambodia: Edition Angkor, 2015), p.1.

[5] Osmond Vitez, "What is the importance of Contracts to a Business?"
http://smallbusiness.chron.com/importance-contracts-business-906.html, (Updated June 30, 2018).

1.2. Important Issues in International Contract

The contract formation is essential for international parties. Therefore, parties must ensure those terms which are included in the contract are necessary and should be clear in order to avoid any confusion later on. There are so many terms of an important issues which parties should contain in the contract, but we would like to raise only major ones. This chapter will discuss on those five important terms and particularly the obligation of the contract in dispute settlement.

1.2.1. Languages

Languages count as the first necessary issue for parties when it comes to contract arrangement. People talk in order to communicate even though contract parties speak the same language there still can be the dispute about the meaning of the terms. International contracts usually have different native languages and may be difficult to translate and understand in other languages, so there could potentially be more serious and complicated problems. So, that is why contract parties must include languages as the main point in their contract in order to ensure both parties will understand the meaning of all conditions.

1.2.2. Currency

The other essential issue in the contract formation is currency. Generally, international business partners do not use the same currency as national business partner do because the fluctuation of the exchange rate and it can result in a depreciation of the currency in which assets are denominated.[6]

[6]. The Association of Corporate Counsel, "Contractual Limitation of Currency risks," *Washington, DC*, 1998, http://m.acc.com/legalresources/quickcounsel/contractual-limitation-of-currency-risks.cfm?

1.2.3. Legality

Legal trade is the most important thing which international contract parties must consider in performing the terms of a contract, in order to avoid any activity which is considered as against the law. Parties need to ensure not to trade illegal products as well as sign the contract with a person who does illegal business.

1.2.4. Difficulties in Performance and Force Majeure Clause

Doing international business can be riskier than national business and the most important problem that often occurs would be an accident or action that occurs beyond the human control. For this reason, parties should include this term, known as a force majeure clause. This term can adjust the issue that happens without an expectation such as terrorism, war, or earthquake.

1.2.5. Dispute Resolution

When it comes to a business transaction, disputes often exists and it is normal for the international partner. Solving the problem with the appropriate solution is definitely great for both parties in order to maintain a good relationship as well as good reputation. So, this term is extremely useful for parties because it allows the rights to the parties for choosing the best solution in order to solve their problem in a peaceful way and at the right time. Normally, this point often includes the choice of law, choice of forum, selection on dispute resolution procedure between court and ADR. Including dispute resolution in a contract before the dispute arises would be the best option for both parties in order to keep security stable and protecting their interests.

1.3. Contract Enforcement

The commission or performance of a contract plays an important role regarding dispute settlement, regardless whether the dispute is national or international. Parties utilize the rights and obligation that have been clearly written in the contract to settle the dispute. The written

contract always consists of a standard form of business agreement and more importantly, guidelines of dispute settlement. In general, there are two important terms that parties may include in the contract such as choice of law and choice of forum.

Choice of law clause provides in the contract the specific country law which will apply to interpret the agreement when the dispute arises in any reason. If the parties have the relevant place of business in the same country, so the law that will apply in the dispute settlement must be the national law. On the other hand, in terms of international contract parties, the law that apply will be govern by international contract law or international agreements such as the United Nation Convention on Contracts for the International Sale of Goods (CISG) or the Convention on the Law Applicable to Contractual Obligation 1980. Moreover, the parties can also choose the forum where both parties able to bring the case to settle. Generally, parties may choose a third party country as the main forum to settle the dispute in order to avoid any bias if one party choose their own country as the forum to settle the dispute. In addition, when a dispute occurs, international contract parties will likely think of the how the obligation of the contract is performed in terms of fulfilling the agreement which is already set in the contract.

Chapter 2: Alternative Dispute Resolutions

With the continuing rise of the economy and enormous growth in transnational business, the number of international commercial disputes are largely increasing, and that increased need requires a quick and logical method to resolve disputes. Obviously, resolving disputes between states and individuals or between parties residing in or doing business in different countries can be highly complex and the legal procedures of each country are different. One of the most satisfying and effective ways to settle an international commercial dispute and to avoid conflict and tension is using extrajudicial mechanisms rather than litigation in courts.

2.1. Definition

ADR stands for Alternative Dispute Resolution. It refers to the numerous ways, which parties can settle the dispute outside litigation.[7] Typically, ADR processes include negotiation, mediation, and arbitration. The procedure of ADR are generally confidential, less formal, and less stressful.

Dispute resolution outside of court is not so new, for a very long period the world society has used non-judicial and indigenous methods to resolve conflicts since thousands of years ago. What is new is the huge promotion and proliferation of ADR models, larger use of litigation connected ADR, and the expanded use of ADR is a tool to realize goals broader in dispute settlement.[8] Alternative Dispute Resolution has deep historical roots in many different countries and cultures. Moreover, in Cambodia, ADR has also played an essential role in the traditional village dispute resolution system.

[7] Steven M. Austermiller, *Alternative Dispute Resolution: Cambodia* (The American Bar Association's Rule of Law Initiative, January 2010), p.3.
[8] Practitioner's Guide, Centre for Democracy and Governance, "Alternative Dispute Resolution," *Washington*, 1998, http://www.usaid.gov/our_work/democracy _ and_ governance/publications/pdfs/pnacb895.pdf

2.2. Negotiation

With the growth of international consumer influence, the role of negotiation in international business is more important than ever. When an international commercial dispute arises, negotiation is usually the primary method used in settling those problems.

Negotiation is the process of back and forth communication, whereby parties submit and consider offers until an offer is made and accepted.[9] Negotiation is one of the basic forms of alternative dispute resolution, which the most common way to settle both large and small disputes with uncomplicated processes.

The negotiation situation involves two or more interdependent parties who have the conflict of interest, and who choose to address that conflict by striving to reach an agreement through a process of mutual adjustment of each party's demands and concessions.[10] It aims to craft satisfying outcomes to gain benefits for an individual or collective interests and maintaining a relationship between parties.

Negotiation can be conducted everywhere and regularly takes place whenever the parties plan to create something new or to fix a problem or dispute between them.[11] The performance of negotiation can be oral and also written in clearer form. In addition, it can be directly communicated between parties or through a parties' representative.

2.2.1. Two Basic Approaches of Negotiation

Generally, negotiation access involves two basic approaches such as distributive negotiation and integrative negotiation. During negotiation, parties work hard in seeking a solution that takes into account of each side's requirement and makes an effective outcome for both. Parties

[9] Supra note 7.
[10] Roy J. Lewicki, David M. Saunders and John W. Minton, "Summary of Negotiation," *Boston: Irwin McGraw-Hill*, 1999, https://www.beyondintractability.org/bksum/lewicki-negotiation (accessed May 2, 2018).
[11] Roy J. Lewicki, David M. Saunders and John W. Minton, "Negotiation, 3rd Edition," *San Francisco: Irwin McGraw-Hill*, 1999.

may find and choose the best method toward agreement and parties actually consider both distributive bargaining and integrative bargaining.

Distributive negotiation, also known as the zero-sum game and simply called win-lose strategy refers to the operation of splitting up the resources that parties have recognized.[12] In this kind of approach tends to more competitive bargaining, means that each side tried to gain the most benefit for themselves without concern for the other side's consequence. The goal of the distributive method is not to ensure that both parties win, but generally one side wins and receive as much as possible while another one side gains less. Therefore, the notable view of distributive bargaining is an attempt to distribute a fixed amount of resource between two or more parties while each party makes an effort to claim as much as possible.[13] Most importantly, the natural rule of zero-Sum mode rarely assumes the profits will be divided in half. However, the attitude of distributive negotiation technique can affect and destroy relationships between both, bringing mistrust and pressure and also miss the opportunity to create value by understanding each other's interests.

Integrative negotiation or interest-based bargaining and usually known as the win-win strategy is the process of the agreement which parties deal to create the collaborative problem solving with the better solution and developing mutually beneficial based on interests for all disputants.[14] This approach has played a significant body of negotiation method in settling the international commercial dispute by keeping relationships among each other because the result mostly produces more satisfaction situation for all negotiators.

[12] Katie Shonk, "Distributive Bargaining Strategies," November 20, 2017, https://www.pon.harvard.edu/daily/negotiation-skills-daily/distributive-bargaining-strategies/
[13] M. Ryan O'Connell, "Distributive Negotiation," February 5, 2012, https://www.google.com/amp/s/viaconflict.wordpress.com/2012/02/05/distributive-negotiation/amp/.
[14] Brad Spangler, "Integrative or Interest-Based Bargaining," *USA*, June 2003, https://www.beyondintractability.org/essay/interest-based_bargaining

The natural characteristic of interest-based negotiation tends to involve with cooperation and respect understanding, which necessary based on value creation concept. The viewpoints of disputants in integrative bargaining attempts to grow a twin expectation that leads to achieving a better outcome by helping the opponent to establish a powerful solution to their concerns. Furthermore, instead of demands and offers, parties work together to fulfill each other's interest and prove commitment to strengthen their relationships.[15] Additionally, integrative negotiation is more effective when both sides trust each other and agree to share information includes their concern and goal with a clear direct communication.

However, the benefits of interest-based bargaining can sometimes pose certain weaknesses if one side of dispute may seek the information or understand other side's interest and then use the information against or to threaten the opponent later.[16]

Ultimately, negotiation is considered as a decision-making process, which disputants stand on different needs, and different interests, but they agree to build a discussion on the problem to bring up with the best solution that is acceptable by the parties involved. Distributive bargaining is often connected with conflict because each negotiator maintains an intractable position and attempt to lose less than the other side. In contrast, integrative bargaining is typically involves less tension, as both sides enter the negotiation with the willingness to compromise to achieve a consensus. Additionally, what we should remember about the two basic approaches of negotiation is, when the relationship between parties does not have a high priority, distributive negotiation is possible, but if the parties have a very high priority and want to develop a long-term relationship, integrative negotiation is primarily important.

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[15] Bruce Patton, Negotiation, *HANDBOOK OF DISPUTE RESOLUTION* (Michael L.Moffitt, Robert C. Bordone ed., 2005), p.292-293.
[16] M. Ryan O'Connell, "Integrative Bargaining," February 12, 21012, https://www.google.com/amp/s/viaconflict.wordpress.com/2012/02/12/integrative-bargaining/amp/

2.2.2. The Stages of Negotiation Process

There is no magic or mystery for negotiators to get the productive result on negotiation, it just depend on the structure and principles they hold. In order to produce the better solution, each party needs to understand and follow on every single step in the negotiation proceeding. The negotiation process can essentially be divided into five stages: preparation, definition of the ground rule, clarification and justification, bargaining and problem solving, and the closing stage.

2.2.2.1. Preparation Stage

Preparation is the fundamental first step in a successful negotiation operation process; it is considered as an important instrument that negotiators need to understand and organize in a proper way. The purpose of the preparation step in the negotiation process is to ensure that everyone is ready for the actual negotiation proceeding. In this level, all negotiators carefully seek the relevant facts that are related to the case and make some basic conclusions before proceeding. Each party may start with setting a clearly personal goal or objective, verifying the dispute or conflict, conduct some research, write agenda for a meeting, and learn to accept the result.[17] Typically, in international commercial or business conflicts, it is important to include necessary items such as documentary evidence, contracts and relevant receipts. Next, the decision for drafting an agenda is also required, meaning that once disputants obtain all relevant information, they have to arrange for an appropriate time and place for their first meeting.

Being well prepared for the preparation stage will help to avoid any further conflict and unnecessarily wasting time during the meeting. Moreover, undertaking the basic step properly

[17] Dawson jenner, "The 5 Phases of a Successful Negotiation," *The Construction Lawyer*, March 09, 2016. https://www.google.com/amp/s/www.dawsonjenner.com/the-5-phases-of-a-successful-negotiation/amp/

help parties to feel confident and comfortable, no doubt, build trust and strengthen the relationship.

2.2.2.2. Definition of Ground Rules

Once the planning and preparation are developed, this means that the negotiators are reaching the next significant part of the negotiation process. The referred to defining the ground rules, which is the second step after the preparation stage. In this stage, both parties attempt to work together as a team and try defining a procedure to establish a better solution. One party in the dispute may have a high commitment and begin to draft the procedure or rule with the other party over their problem. Normally, the definition of ground rule differs from any other stages because every single step contains the many questions for disputants. Usually, The valuable questions that are associated with this stage which parties need to consider, including where will the negotiation take place?, Will time constraints exist?, Will there be any issues that are off limits?, Will there be a specific procedure to follow in an impasse is reached?, What happens if there is no any agreement after negotiated?.[18] During this situation, each party would try to find the answers to those questions and also work on exchanging their initial proposals or demands.

2.2.2.3. Clarification and Justification

The third stage of the negotiation process is clarification and justification, which is an important phase that leads to reaching a beneficial result. Without clarification, the proceeding is likely to run into misunderstanding which causes problems and obstacles in achieving an effective negation. More often, after a brief information has been exchanged, both parties might begin to actively negotiate, either directly or through their representative. Each side may start

[18] M. Wood, "Six Steps to Successful Negotiation*," Leadership Flagship*, August 24, 2017. https://www.google.com/amp/s/leadershipflagship.com/2017/08/24/6-steps-to-successful-negotiation/amp/

by clarifying their goals, interests, disagreement and also strongly support their personal requests.[19] During this phase, the arguments should not arise up anymore, but instead, negotiators should work on explaining and justifying the goals or demands and provide the opportunity for the opponent to be educated and informed about their position. One important note is that are many negotiations which collapse at this stage because the parties failed to address the arguments and details efficiently.

2.2.2.4. Bargaining and Problem Solving

Bargaining and problem solving is the only one phase which comes closer to the closing stage and also the only single step which is intended to end the negotiation process. After the parties have the chance of clarifying and understanding all the situations by doing analysis and fact-finding, they will follow on the next process, which refers to bargaining and problem-solving. The basic strategy in this phase is to convince the other side of the dispute with an appropriate offer or demand and persuade them to accept those offers or demands. Compromises often bring positive alternatives which can provide benefits for both parties. Actually, parties in this term will concentrate on making a selection of the two basic approaches of negotiation such as distributive bargaining and integrative bargaining. Negotiators mostly explore interest-based bargaining first, then, if not possible, pursue a distributive based solution.[20] Generally, the bargaining and problem solving is about the action of giving and taking, while creating a relationship value. If you think success means all take with no give, you won't capture the real view. When you do give and take, the outcome of negotiation will build satisfaction for both parties and also build a lasting relationship, but in order to capture the real value, it is important to manage the concessions of a giving and taking strategy.

[19] Charles B. Craver, "The Negotiation Process," http://negotiatormagazine.com/negotiation_process-charles_craver.doc (accessed June 1, 2018).
[20] Supra note 7.

2.2.2.5. Closing Stage

Once the parties feel satisfied with the outcome during negotiating, then the process turns into the closing stage. Before reaching this level, all disputants should take a little time to look and review on each element and find out what is good enough and what needs to be improved. The viewpoint in the closing stage is to write down the final term or release a comprehensive summary of the agreement soon after the agreement is confirmed.[21] Generally, the closing phase of negotiation finalizes the terms of the agreement to the satisfaction of both parties. However, even the result does not end satisfactorily, it is still better for both negotiators to thank each other or shake hands with their opponent for their willingness to negotiate.

2.2.3. Implementation

In the negotiation process, the term of implementation refers to the action of the negotiator to carry and complete the obligation through the final decision which has done in the closing stage. Just because the parties have accepted or signed on the agreement, does not mean the dispute is officially over. Also, time is needed by both parties to properly fulfill their responsibilities under the contract. Normally, the effectiveness of negotiation always involves cooperation from the parties, which means that after the agreement is entered into, both parties must make sure to keep their promises and are ready to implement their part of the agreement.

2.3. Mediation

Mediation is another method of Alternative Dispute Resolutions beside negotiation, which provide informal negotiation facilitated by a neutral third party, also known as mediator, who is selected by the parties. However, the process of mediation doesn't involve the decision making of a neutral third party. Instead this neutral third party only helps both parties to understand the important points of issue and seek the best solution by themselves.

[21] Supra note 7.

The two types of mediation include Court-Referred Mediation which is applied to a case pending in court and in which a court refers the case for mediation and another type, known as is Private Mediation which allows mediators offer their service in private.[22]

2.3.1. General Overview

Mediation is expected to become increasingly more common in Ireland as a commercial dispute settlement.[23] In 2009, a survey performance by the Irish Commercial Mediation Association reported that the number of commercial dispute which are settled by mediation was expected to double in 2010.[24] Moreover, the various types of cases entering the mediation process as ADR will largely increase in the same period.[25] The statistics indicate clearly that mediation has approximately 70% of success rate and the new Circuit Court Rules contain exact provisions for parties who use the Commercial Court which in the judge can guide parties to consider mediation because of shorter process, affordable cost, keeping business relations, maintaining privacy as well as confidentiality.[26] The International Institute for Conflict Prevention and Resolution (CPR) is an independent and non-profit organization located in New York, which helps international business parties and their counsel prevent and settle commercial dispute more efficiency both directly and indirectly and improving ADR global capacity.[27] The CPR also encourages parties to adopt suggested a protocol to suit the needs of disputants, and also established the ground rules for mediation that set a format which can be used as a proposal for mediating accountability disputes.[28] Lately, CPR has published

[22] Mediation and Conciliation Project Committee and Supreme Court, "Concept and Process of Mediation," *New Delhi*, http://mediationbhc.gov.in/PDF/concept_and_process.pdf (last visited June 27, 2018)
[23] Supra note 2.
[24] Supra note 2.
[25] Supra note 2.
[26] Supra note 2.
[27] International Institute for Conflict Prevention and Resolution, July 17, 2012, http://mobile.chinagoabroad.com/en/knowledge/show/id/19878
[28] Find Law, Mediation: An Effective Process to resolve Complex Commercial Dispute, https://corporate.findlaw.com/litigation-disputes/mediation-an-effective-process-to-resolve-complex-commercial.html

"Mediating Dispute between Chinese and American Businesses" which discusses the vital problems and issues to consider when acting as a mediator in complicated disputes involving Chinese and American companies.[29]

2.3.2. Role of Mediator

Mediators traditionally do not take a side on each party, and they generally stay neutral. Typically, their job is to listen on both side's argument then assist the proper solutions. However, when the process of negotiation fails to bring the successful solution, mediators have no authority to impose the decision on both parties. Furthermore, a mediator's role is to pursue another possible solution method and avoid bringing the case to the court because there is no benefit as well as being costly and taking time more time if compared to another solution process.

2.3.3. The Mediation Process

Mediation is an acceptable method which is used by many common law jurisdiction countries.[30] In addition, the mediation process is non-binding and private, and basically not open to the public as it is in court proceedings.[31] In fact, any information given by parties to mediators during the mediation process is surely not revealed to the other party, unless specifically permitted by each party.[32] There are five functional stages of mediation such as:

- Mediator Selection
- Introduction and Opening Statement
- Joint Sessions

[29] Supra note 27.
[30] David J.A Cairns, "Mediating International Commercial Dispute: Differences in U.S and European Approaches,"
http://www.nysba.org/Sections/Dispute_Resolution/Materials/DRS_Fall_Meeting_Materials/Mediating_International_Commercial_Disputes__Differences_in_U_S__and_European_Approaches.html
[31] Supra note 22.
[32] Supra note 22.

- General Problem Solving Sessions
- Closing

2.3.3.1. Mediators Selection

By having a good mediator, the dispute can solve in a peaceful way and at the right time. There are two ways of choosing mediators. If the parties have an appointment with a mediation center, the center will determine the available mediators and the party can choose. In addition, the center will explain how the mediators are chosen.[33] In contrast, if the parties do not have an appointment, then they can choose a neutral third party which have a perspective, qualification, or background that they prefer.

If the parties want their dispute to be settled smoothly, they should choose mediators who:

- Totally stay neutral, and do not have any connection with either party
- Relevant professional qualification
- Highly experienced in mediation
- A good listener and persuasive speaker
- Proper education and training

2.3.3.2. Introduction and Opening Statement

The objectives of the opening statement and introduction session are to establish neutrality, build up the understanding of the process and enhance the confidence and trust of the parties as well as to inform the parties of the background of the mediators.[34] The arrangement of seating and break time of both parties and their counsels are also included during this session.[35] In the introduction part, mediators typically introduce themselves by giving exact information including name, and years of work experiences. More importantly, mediators will declare that

[33] Supra note 7, at 105.
[34] Supra note 22.
[35] Supra note 22.

they have no connection with either of the parties, and that way parties could have more confidence and trust on the mediators they had chosen.[36] Thereafter, mediators request each party and their counsel to introduce themselves, then together they will discuss any deadlines, time constraints, or scheduling issues.

After the introduction part is finished, the mediation moves on to the opening statement session. This part becomes an important phase of the mediation process, because the mediators will explain in clear language and manner to the parties and their counsel the following matters:

- How concept and process of mediation work
- The number of stages of mediation
- Role of mediator, advocates and parties
- Advantages of mediation
- The ground rules of mediation.

2.3.3.3. Joint Session

The actual purpose of this session is to collect all the information, provide the opportunity to both parties to hear the views of the other parties, understand the facts and obstacles.[37] During this stage, mediators will invite both parties to present their case without any interruption. The plaintiff has the right to present first, then their counsel will state the legal issue involved in the case. After that the respondent will then be allowed to explain their claim and the same as plaintiff, the respondent's counsel will state the legal issue of their side of the case. Thereafter, mediators must ensure that both parties and their counsel clearly understand the perspective by asking the relevant questions accordingly. The aggressive behavior of the party is prohibited in

[36] Supra note 22.
[37] Supra note 22.

the mediation process. Lastly, the mediator shall summarize the important point and clarify the areas of agreement and disagreement and relevant issues of parties.

2.3.3.4. General Problem Solving Session

In this session, the mediator and parties begin to explore the possible resolution depending on the facts of the case. The mediator will again summarize the important points and clarify the areas of agreement and disagreement and relevant issues of the parties.[38] Additionally, the mediator also helps the parties and their counsel to determine the difficulty if the dispute is totally not settled.[39] Generally, when the dispute is not settled properly when using any ADR method, parties will likely litigate the case to resolution. In general, in the problem-solving session mediator will explain about the disadvantages when parties choose litigation after the failure of mediation. This will allow parties to focus on the consequence of reaching a solution in mediation phase.

2.3.3.5. Private Sessions

Normally, all the parties involved in the dispute do not want to show their weakness in front of the other side. In the joint session, the mediator invitees all disputants to discuss the issue and seek resolution. But in some cases, the parties need some private session to settle the dispute, so the mediator invites one party per time to share private information when they might not be comfortable to share with the other side.[40]

2.3.3.6. Closing Statement

Whether the dispute is reached or not reached the solution, the mediator should come to the term of closing statement after passing all five phases mentioned above. There are three types of possible result:

[38] Supra note 7, P.109.
[39] Supra note 7, P.110.
[40] Supra note 7, P.116.

- The parties have reached the settlement
- The parties have not reached the settlement
- The parties have reached an impasse and the mediation is over.

The mediators should not sign the agreement, if the mediation between parties fails to bring the successful solution. The case should be referred back to the court and reporting failure to settle. In some case, party can end the mediation process early if one of the disputant is unwilling or feels uncomfortable to continue the discussion.

2.4. Arbitration

Resolving international commercial disputes demands a special skill, experience and cultural sensitivity. In the last few decades, the amount of international commercial disputes has been increasing, so the role of international arbitration has grown and transformed itself to become one of the most important factors business transactions. According to a recent survey of major global corporations, arbitration is the most favored dispute resolution mechanism for international matters, whether for claimants or respondents.[41] Globally, arbitration is one of the most appealing methods for the resolution of international commercial dispute. Most business transaction contracts contain dispute resolution clauses contain, which specifies that any dispute arising under the contract will be handled through arbitration rather than litigation.

Arbitration is the body of alternative dispute resolution, which refers to a way to settle the dispute outside the court which involves non-judicial third party decision makers, called arbitrators.[42]

[41] Stephenson Harwood, "An Introduction to International Arbitration: a guide from Stephenson Harwood LLP," *UK*: 2017, p.1. http://www.shlegal.com/flipbook/an-introduction-to-international-arbitration/files/asset/common/downloads/an%20introduction%20to%20international%20arbtration.pdf
[42] Supra note 7, P.137.

In business terms, international commercial arbitration is an alternative method between private parties used for resolving disputes that arise related to commercial transactions which are conducted across national boundaries and allows the parties to avoid litigation in courts.[43]

International arbitration is often used in international cases because it applies a single set of rule to multi-jurisdictional disputes; however it still relies on the national court to enforce the awards.[44] The conducting of arbitration can be either institutional or ad hoc, according to the state where the contract agreement is entered into between the parties. Institutional arbitration refers to a way that parties choose to have an arbitral institution administer the dispute, but if the parties agree to set up their own rules for arbitration, it is called ad hoc.

The arbitration can be binding or non-binding. Binding arbitration, means the arbitrator's ruling becomes a binding judgment and also indicates that the decision of arbitrator is always final and enforceable. Additionally, binding arbitration requires parties to an agreement to accept the decision of arbitrator.

Non-binding arbitration is a type of arbitration in which the arbitrators still issue a decision in the dispute, but there is no enforceable award. Although the arbitrator issues a ruling, the losing party retains a right to go to court and have the case decided by a judge. Even with the ability of the losing side to go to court, in practice, the vast majority of the case are resolved by non-binding arbitration without recourse to the court system.

2.4.1. Arbitration Agreement

Commonly, when parties start doing business, they always include with the relevant issues in the contract provisions related to dispute resolution, and if a dispute arises, what method for resolution will be used by the parties. This could be either the court or ADR. If the contract

[43] Georgetown Law Library, "International Commercial Arbitration Research Guide," *Georgetown University Law Library*, http://guides.ll.georgetown.edu/InternationalCommercialArbitration (lasted update June 25, 2018).
[44] Supra note 41.

includes general provisions to settle a dispute via arbitration but does not clearly state specifics, then when the conflict happens, the parties firstly need to draft an appropriate arbitration agreement before proceeding. The arbitration agreement refers to a form of agreement that contains the specific elements for operating the arbitration, and it is established by discussion between parties. The formal arbitration agreement is only in writing. It is really important to carefully consider what is included in the arbitration agreement, because getting it wrong may cause bad circumstances and can be extremely costly. Here are some of the key questions to consider in the arbitration agreement: Will it be ad-hoc or administered? , Which arbitration center will the parties use? , Where will the arbitration take place? , How many arbitrators should be involved? , How will arbitrators be chosen? , What law or language is acceptable? Will it be binding or non-binding?[45]

2.4.2. Choice of Law in International Commercial Arbitration

In the context of international commercial arbitration, the choice of law can be quite complicated and it usually includes four sets of rules such as the substantive law governing the underlying contract or agreement that normally specifies the choice of law provision in the contract itself, the law governing the validity of the arbitration agreement parties, the law applicable to the actual arbitration proceeding and the law governing the enforcement of award.[46]

The substantive law is referred to the law which is provided in the contract or agreement of the parties. In case the parties fail to specify the substantive law in their contract, so the arbitrators that responsible for hearing their dispute will normally apply traditional conflict of law principle to determine the governing law.[47] Furthermore, the 1958 New York Convention

[45] Supra note 41, at 8.
[46] Gary Born, "International Commercial Arbitration in the United States," *Commentary & Materials*, p. 24.
[47] Rumu Sarkar, *Transnational Business Law: A Development Law Perspective* (Kluwer Law International: 2003), p. 357.

also addresses the law provision applicable to the substantive law which sentence through the arbitration proceeding.[48] According to article 28(2) of the UNCITRAL Model Law, when the parties fail to designate a specific governing law,, the arbitral tribunal shall apply the law by using the conflict of laws rules that is considers as applicable to the dispute.[49]

Generally speaking, the arbitration clause is totally different from the substantive law because the arbitration clause might be enforceable even though the underlying contract is rendered invalid.[50] According to the New York Convention in article V (1) (a), the parties choice of law governing the validity of the arbitration agreement is applied.[51] Moreover, the selection of law governing the arbitration agreement will not be enforced under article V (1) (a) if the arbitration is invalid under the party's choice of law governing the agreement.[52]

The arbitration proceeding is governed by the law of where the arbitration proceeding is held and also known as "the arbitral situs" and the proceedings are chosen by the parties.[53] In some cases, the substantive law governing the arbitration will be the law at the location where those arbitration take place.[54]

2.4.3. Process of Arbitration

The arbitration can begin at any time, depending if there has been a request for arbitration under an existing arbitration agreement, if the parties have agreed to arbitrate at the time a dispute arises, and if they are complying with court order arbitration.[55]

[48] Supra note 47, at 357.
[49] UNCITRAL Model Law on International Commercial Arbitration, article.28(2), available at https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf
[50] Supra note 47, at 358.
[51] New York Convention 1958, article V(1)(a), available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac_view=-1
[52] Supra note 47, at 359.
[53] Supra note 47, at 359.
[54] Supra note 47, at 359
[55] Supra note 7, at 159.

2.4.3.1. Initiation of Arbitration Process of Arbitration

Initiation is the opening statement of the arbitration process. In this phase, the claimant in the dispute needs to prepare a statement of claim, which includes specific demands and indicates supporting evidence to the arbitration center. Then, the arbitration center will send that submission to the respondent of the dispute. After the respondent receives those statement of claims, they immediately respond to that claim and submit defenses to that statement.

2.4.3.2. Selection of Arbitral Tribunal

After the initiation, the arbitration center must appoint the arbitral tribunal immediately. Selection of arbitral tribunal is the only process in which parties receive a chance to hold the list of potential arbitrators in their hand and select who they want to hear their case. In addition, the appointment of an arbitral tribunal must be include an odd number of arbitrators. If the parties have failed to agree on the number of arbitrators within 30 days after the receipt by the respondent of the notice of arbitration, then there shall be only one or three arbitrators shall be appointed.[56]

2.4.3.3. Pre-hearing Process

Once the panel is appointed, then the pre-hearing process begins. In this third stage, it is the first time that the parties and arbitrators meet to set the agenda for their case. During their first meeting, the arbitration panel will schedule the hearing dates, establish discovery deadlines, set briefing and motion deadlines, and address other preliminary matters.[57]

Discovery is a way that allows the parties to obtain facts and information from other parties to the arbitration in order to support their own case and prepare for the arbitration hearing.

[56] UNCITRAL Arbitration Rules, article.8(1), available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf
[57] Supra note 7, at 162.

The procedure of discovery requires the cooperation of parties to exchange information or document voluntary in order to accelerate the arbitration process. Each party of the dispute is required to inform the other party of their each witness and provide the copies of any document or other materials that they intend to use at the hearing as evidence.

2.4.3.4. Arbitration Hearing

After the parties of arbitration agree to exchange their information briefly, the first hearing process will be conducted according to the timetable, which has been set in the pre-hearing stage. Both disputants and witnesses are required to attend the arbitration hearing process. During the arbitration hearing, claimant seeks to prove on their alleged in the statement of claim, and respondent try to defenses themselves from those claim and also seek to prove any counterclaim.

Generally, the arbitrators rely on two types of proof, oral testimony by witnesses and documentary evidence. The arbitrators often start this process by asking each party to introduce themselves briefly, and then allow each party of the dispute to present all of their evidence, but in some cases if they do not have any further proof to offer or submission to make, then the tribunal will declare that the proceeding is closed. After closing the proceeding, the tribunal has 45 days to submit the draft award to the arbitration center, and lastly, the arbitration center will review the draft and come up with suggestions of revisions regarding the form of the award.[58]

2.4.3.5. Decision Making

Once the arbitration hearing has been completed, the tribunal has turned to the decision making. After closing the record, the arbitration panel starts to consider all of the evidence of both plaintiff and respondent, then releases the final decision, called an arbitration award.

[58] Youdy Bun, "Introductory Guide Commercial Arbitration in Cambodia," *Bun and Association Commercial Arbitrator*: 2014, p. 5, http://www.bun-associates.com/wp-content/uploads/2015/01/Introductory-Guide-Commercial-Arbitration-in-Cambodia.pdf

Generally, award of arbitration must be conducted in the written form, but arbitrators are not required to write a detailed explanation or reasons for their decision. However, the arbitration award must be conducted in written form and shall include, the name of parties or representatives and arbitrators, the summary of the issues and the based reasons, the date and location of the arbitration, a statement of the damages and other relief awarded, and the signatures of the majority of arbitrators and parties involved.[59] Typically, when there are three arbitrators, the decision of the award is based on the majority of the arbitrators.[60]

The arbitration award will directly go to both parties of the dispute, then the parties have only 30 days from the date that the record is closed, to issue or request any modification, correction, or interpretation of the award.[61]

2.4.3.6. Appeal and Enforcement

The appeal and enforcement of the arbitral award is a very important part of the process because it is the last step that follows the arbitral award. Under the Commercial Arbitration Law of the Kingdom of Cambodia and most international arbitration laws, the award usually is not possible to appeal, but it is possible if under some serious circumstances.[62]

An arbitral award shall be recognized as binding and must be conduct in writing application form to the competent court to enforce, which irrespective state that made it.[63] Additionally, getting a court to reverse the arbitrator's decision is rare to happen. However, some cases arbitral award still can be appeal, due to the statement in the contract of arbitration agreement that parties have agreed to enter into the arbitration process, and as required to show that the arbitral award was unfair and unreasonable.

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[59] Supra note 7, at 167.
[60] UNCITRAL Arbitration Rules, article.26(1), available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf#page17
[61] Supra note 58, at 6.
[62] Supra note 7, at 167.
[63] UNCITAL Arbitration Rules (Section 3: Recognition and Enforcement of awards), article.35

However, in practice enforcement of the arbitral award is considered as the hard and complex step of arbitration processes. Typically, the arbitration tribunal has no powers itself of enforcing the arbitral award. There is the only national court that has jurisdiction to enforce the arbitral award.[64] The New York Convention on the Recognition and Enforcement of Arbitral Award provides for the enforcement of arbitral awards from the 155 countries who are members of this convention. For instance, the United States is also a member of this convention, so the enforcement of foreign awards will be provided in the US court.[65] According to article V (2), the recognition and enforcement of arbitral award may be refused to be implemented if the subject matter is not capable of settlement by arbitration and if the recognition and enforcement could be contrary to the public policy of that country.[66] These two exceptions of the New York convention will be surely applied to the US court when the party asks to enforce such an award.[67] Moreover, in order to enforce the arbitral award in a US court, the integrity and fairness must be involved in the arbitration process.

2.4.4. The National Commercial Arbitration Center (NCAC)

The National Commercial Arbitration Center (NCAC) of Cambodia is a private institution and was established by the Ministry of Commerce and officially launched in 2013.[68] Their framework is set for alternative dispute resolutions through arbitration and mediation regarding commercial disputes between domestic and foreign investors.

[64] Supra note 47, at 362.
[65] Supra note 47, at 362.
[66] New York Convention 1958, article V(2), available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac_view=-1
[67] Supra note 47, at 362.
[68] Vuochhun Seng, "National Commercial Arbitration Centre," *Ministry of Commerce*: May 18, 2015, https://www.moc.gov.kh/tradeswap/userfiles/file/uploadedfiles/Gallery/NCAC%20presentation_.18May2015.Eng5_18_2015_11_15_16.pdf

2.4.4.1. The Creation of NCAC

Since 1994, Cambodia has been considered as one of the most attractive destinations for foreign investment in the Southeast Asia region.[69] The rise of foreign investment has resulted in a stable annual macroeconomic growth rate of 7% and those rates have remained constant for over 10 years.[70] Economic growth e means that the business transactions have significantly increased and various types of complex disputes occur according to the transactions between domestic and foreign investors. Since there are some disadvantages of dispute resolution in the national court system such as time-consuming, cost, and harm to the parties' relationship, most of the business parties are unlikely to bring their dispute to be solved through litigation. In response to these challenges, the government of Cambodia decided to adopt the Law on Commercial Arbitration and then established an independent arbitration center also known as the National Commercial Arbitration Center (NCAC) which provides the alternative dispute resolution to litigation, incompliance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as New York Convention. Cambodia became a member of this convention in 1960.[71]

In Cambodia, arbitration may be conducted by the local arbitration institution, also known as the NCAC. The United Nation Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the sector of international trade law and was established in 1969. Its goal is to promote the progressive harmonization and unification of t international trade law.[72] The rules of NCAC are based on UNCITRAL's rules as a template

[69] Darwim Hem and Chankoulika Bo, "Commercial Arbitration in Cambodia," *Phnom Penh*: February 2017, p.1, http://bnglegal.com/cn/wp-content/uploads/2017/02/170206-Commercial-arbitration-in-Cambodia.pdf-February.pdf
[70] Ibid.
[71] Supra note 69.
[72] New York Arbitration Convention, *United Nations Commission on International Trade Law,* http://www.newyorkconvention.org/uncitral

for arbitration procedures. On July 11, 2014, NCAC also created their own procedures in order to provide both parties options on their arbitration process.[73] If the parties decide to submit their dispute to the NCAC, the rules and procedures of NCAC will therefore apply to all of the arbitration process.[74]

2.4.4.2. The Annual Report of NCAC

NCAC seems to be a weak and small arbitration center if compared to another center such as the Singapore International Arbitration Center or United States Arbitration Association. But the creation of NCAC in Cambodia was a good and helpful first step for business parties in Cambodia who do not want to settle their dispute through litigation. Even though NCAC has just been created, the speed of development has increased dramatically. In 2015, NCAC received its first case between a foreign national who rented a factory building in Phnom Penh and the building's owner; unfortunately that case was dropped because it did not fit the center's criteria.[75]

Then in the year after 2016, NCAC got their second and third case in June and December, ultimately both of the cases were settled peacefully.[76]

2.4.5. Singapore International Arbitration Center (SIAC)

The Singapore International Arbitration Center (SIAC) was established in July 1991 as a not for profit non-governmental organization.[77] SIAC is amongst the top five arbitration institutions in the world. They provide alternative dispute resolution with efficiency and reliability through

[73] Supra note 68.
[74] Sovath Phin, "Introductory Guide on Commercial Arbitration in Cambodia," *Phnom Penh*: 2014, http://www.bun-associates.com/wp-content/uploads/2015/01/Introductory-Guide-Commercial-Arbitration-in-Cambodia.pdf
[75] The National Commercial Arbitration, "The National Commercial Arbitration Center," *Phnom Penh*: April 19, 2016, https://www.b2b-cambodia.com/articles/first-case-for-the-national-commercial-arbitration-center/
[76] Supra note 75.
[77] Singapore Academy Law, "Singapore International Arbitration Centre," *Singapore*, http://www.singaporelaw.sg/sglaw/arbitration-adr/arbitration-adr-institutions/singapore-international-arbitration-centre

an arbitration system for international commercial disputes. The SIAC is committed to complete neutrality and independence in its role as an international arbitral institution.[78] Their arbitral tribunals use their own rules and UNCITRAL arbitration rules. SIAC also a member of 1958 New York Convention.

2.4.5.1. The Creation of SIAC

After 27 years after its creation, the SIAC is widely acknowledged to be a truly international arbitration institution and is considered to be the number one alternative for arbitration in the world.[79] It claims to provide t reliable quality and high-class service as well as promoting arbitration as one of the ADR methods and as the most successful arbitration center for international commercial dispute.

2.4.5.2. The Annual Report of SIAC

SIAC has an experienced international panel of over 400 expert arbitrators from over 40 jurisdictions.[80] Furthermore, SIAC is a premier global arbitral institution with one of the highest caseloads in the world. It has also set a new record for the highest number of the new case filings, and administered cases continue to grow year by year. In 2017, SIAC received 452 new cases from 58 countries in 6 continents, this figures increased about 32% from 343 in 2016 and 67% from 271 in 2015.[81]

[78] Ibid.
[79] Singapore International Arbitration Center, "Our Vision, Missions and Core Values," *February 1, 2016* , http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/our-vision-mission-core-values
[80] Singapore International Arbitration Center, "Annual Report," 2017, http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf
[81] Ibid.

The table illustrate the amount of cases that SIAC received in the last 10 years.

Year	Handle Case	Administer
2007	86	67
2008	99	85
2009	160	132
2010	197	165
2011	188	160
2012	235	191
2013	259	220
2014	222	197
2015	271	244
2016	343	307
2017	452	421

2.4.6. Comparison between NCAC and SIAC

Singapore and Cambodia are members of ASEAN. As we know, Singapore is one the world's fastest-growing economies and a developed country. Accordingly, the gap in economic development between Cambodia and Singapore still huge. Together, both Singapore and Cambodia have developed the commercial arbitration centers, but Singapore is far more advanced in commercial arbitration at this stage than Cambodia. This is understandable since SIAC has been in existence since 1991, while NCAC has only been around since 2013.

The table below show the comparison between NCAC and SIAC.

	SIAC	NCAC
Arbitrator	380 independent arbitrators	43 individual arbitrators
Member	22 members	None
Office	In Seoul, India and Shanghai	Only in Cambodia
Service	SIAC administers on commercial dispute, trade and investment, construction or engineering, shipping or maritime, insurance, intellectual property, banking and finance	NCAC handles commercial dispute only
Rule	SIAC's rule, SIAC investment Arbitration Rules, UNCITRAL's rule, SIAC SGX-DT Arbitration Rules and SIAC-SIMC Arb-Med-Arb Protocol	NCAC's procedures and UNCITRAL's rule

Overall, SIAC is a senior arbitration center of NCAC, so all of the experiences and results which SIAC got from their hard work and best practices can be a good model for NCAC to follow as a junior arbitration center.

2.5. Advantages and Disadvantages of ADR

While the amount of international commerce continues to expand, the volume of cross-border dispute regarding global commerce will also increase dramatically. Even though, arbitration is an excellent alternative for commercial disputes, advantages and disadvantages still exist. Some parties still think going to court is more reliable and positive, and in some cases the subject matter of those disputes are prohibited to be settled through arbitration. That is why arbitration still has some challenges even if most disputants are likely to settle their commercial cases using the arbitration process.

Here are some Advantages and Disadvantages of Arbitration:

- Advantages
    - Less formal process than litigation
    - Conducted in private
    - Maintains the confidentiality for arbitration proceeding and award
    - Free to appoint own arbitrator or mediator
    - Parties choose own procedure and rule
    - More efficient than court
    - Party autonomy
    - Flexibility in the process
    - Neutrality
    - Take less time to reach a final resolution than court
    - Not too costly
- Disadvantages
    - Limits on award (Mostly resolve disputes that involve money)
    - No safeguards designed to protect parties as court
    - The decision usually final and binding
    - No guaranteed resolution
    - Arbitration is not appropriate in some cases

Chapter 3: Judicial Dispute Resolution

When it comes to international commercial disputes, litigation can be an appealing method to settle the conflict. There are some possible reasons that dispute parties do not want to handle their case to the court system as a resolution could be costly, time-consuming, and also breach the relationship between the parties. Commonly, the choice of where to litigate the dispute is the first problem that international commercial parties face.[82] Traditionally, the parties always want to bring the dispute to their own national court, but this way is completely impossible because the other parties will surely reject this suggestion. Mostly, dispute parties often choose the court which located in a third country or the international commercial court to resolve their conflict, in term of avoiding any impartiality. Some contracting parties decide to have their case heard in commercial court because of the specific expertise of the commercial court and its efficient result. For instance, the commercial court (England and Wales) is a division of the High Court and the world's largest business center set to provide efficient and effective dispute resolution in commercial cases both national and international businesses dispute.[83] Normally, when contracting parties decide to resolve their dispute through litigation, the judge often adjourns proceeding for up to 28 days to provide the opportunity for the parties to go through some form of ADR such as negotiation, mediation and arbitration as a dispute resolution[84], but in case the parties still consider to handle their lawsuit to court, so the court rules and procedures will be applied accordingly.

[82] Andrew Sagartz, "Resolution of International Commercial Dispute: Surmounting Barriers of Culture without Going to Court*,"* (Vol.13:2, 1998), p.678.
https://kb.osu.edu/dspace/bitstream/handle/1811/79806/OSJDR_V13N2_0675.pdf?sequence=1
[83] High Court of Justice, "Business and Property Court of England and Wales," *Commercial Court* (QBD), https://www.justice.gov.uk/courts/court-lists/list-cause-rolls2/commercial-court (Updated: July 11, 2018)
[84] Danilevich, "Recognition and Enforcement of Foreign Arbitral Awards (Belarus)," http://dplaw.by/en/what-we-do/recognition-rcial_court.html

In terms of the settlement of international commercial disputes in court, the complexity often exists because the parties have different territories and rules. In order to resolve the issue in the court system, parties must follow the contract agreement. If in the contract, parties already set and agree to settle the dispute in a specific court, so when the conflict occurs, the parties must follow the terms of their contract. However, if the parties did not sign in this term then the determination on jurisdiction will take place.

3.1. Determination of Jurisdiction

Jurisdiction has traditionally been considered in international law as purely a question of the right of the right and power of states. Generally, jurisdiction is the authority of the court to hear and decide the case. Without jurisdiction, the judge still can issue and order the case, but legally it has no effect. Jurisdiction can be divided into the internal or domestic jurisdiction and international jurisdiction. Internal jurisdiction is refers to the exclusive internal competence of the highest legislative, judicial, and administrative authorities of the country.[85] International jurisdiction refers to the capacity of court to hear the cases and regulate matter between different countries or between individual of the different state.[86] International jurisdiction is concerned with the division of power between different states or other international entities.[87]

Importantly, the international judicial jurisdiction is based on two basic principles in order to create an effective judgment: jurisdiction in personam and jurisdiction in rem.

3.1.1. Jurisdiction in Personam

In personam jurisdiction, is the Latin term and it is referred to the court's jurisdiction over the person, though it also applies to an entity, and the legal action must be filled in a court that

[85] Marek St. Korowicz, "Sovereignty in the Practice of International Law. Domestic Jurisdiction," (Introduction to International Law), p. 157-225, https://link.springer.com/chapter/10.1007%2F978-94-011-9226-2_6
[86] US Legal, "International Jurisdiction Law and Legal Definition," https://definitions.uslegal.com/i/international-jurisdiction/
[87] Trevor C. Hartley, *International Commercial Litigation* (Cambridge University Press: 2015), p.11.

has some connection to the event and the parties involved.[88] Jurisdiction in personam or personal jurisdiction, is a judgment that binds only a specific person and requires that person to do or not to do something.[89]

Commonly, the court always has the power to hear the case and enforce its judgment over the parties in the dispute, but in the principle of jurisdiction in personam said, if the court wants to get the defendant into the litigation process, unless it must be accessible to the three condition, such as, consent, presence, and citizenship.[90]

Consent: means an agreement when parties come into a jurisdiction and essentially agree to sue there. For example, a foreign company registers in state as a condition of doing business domiciled as well, then they consent to be sued there, if any dispute arises or if the contract was breached.[91] Presence: means that the defendant needs to be present in the state of the court when they have jurisdiction or at the time jurisdiction is served.[92]

Citizenship: is related to nationality of the defendant. Typically, the court has jurisdiction over the dispute, unless the defendant is a citizen of the state.[93] In Europe, there are three basic principles that justify the court in taking jurisdiction in personam, this includes if there is an appropriate connection between the defendant and the forum, if there is an appropriate connection between claim and forum, and if the defendant consents to the jurisdiction.[94] All of these are the main jurisdictional grounds regarded as acceptable in international commercial disputes.

[88] Legal Dictionary, "Definition of Jurisdiction*,"* https://legaldictionary.net/jurisdiction
[89] Supra note 87, at 12.
[90] Civil Procedure Outline, p.1, https://law.wustl.edu/sba/firstyearoutlines/civilprocedure/Levin/levin7.pdf
[91] Ibid.
[92] Ibid
[93] Ibid.
[94] Supra note 87, at 15.

In the first of three principles, the plaintiff needs to claim the lawsuit in the defendant's court, in this way, indicates that there is a well-established and widely recognized rule of jurisdiction.[95] The most relevant part to the jurisdiction in personam is about the domicile and residence, but sometimes nationality is related. Commonly, the presence of the defendant within the territory of the forum is also considered as a traditional way to establish jurisdiction.[96]

In the second principle, the court is entitled to hear the action, if in the appropriate connection between the claim and forum. In this principle, jurisdiction is justified, if the main facts giving rise to the issues or injuries occurred within the territory of the forum[97]

In the third principle, a court will definitely have jurisdiction in a condition in which the defendant consented or agreed. Under this type of basic principle of personam jurisdiction, the consent may be given in advance by an agreement in the contract which sets the conditions in which the parties conduct business with each other.[98]

3.1.2. Jurisdiction in Rem

Jurisdiction in rem refers to the legal term used to describe the exercise of power by a court over property or a type of jurisdiction over the property, which leads to a judgment in rem, and additionally, this kind of jurisdiction is binding on every dispute in the globe.[99]

The lawsuit in rem proceeding refers to the legal action directed toward the assets, rather than toward a particular person. The action of the proceeding must be brought into the court, which has authority over the location of the property. Usually, the asset or property must be located in the same country of the court that has jurisdiction in rem, as means that the state

[95] Supra note 87, at 15.
[96] Supra note 87, at 15
[97] Supra note 87, at 16.
[98] Supra note 87, at 15.
[99] Supra note 87, at 12.

court has the power to determine legal ownership of any real property or personal property within the state's boundaries.

3.2. Litigation Process

The court process seems to be very complicated and requires many steps before the outcome or judgment made. Parties are usually advised by the court to consider precisely before choosing litigation as the commercial settlement.

There are three stages in litigation:

- Before litigation starts
- Preparing the cases
- Trial and enforcement

3.2.1. Before Litigation Starts

In all disputes, the court requires parties to exchange some information and documents and behave reasonably in order to avoid litigation.[100] In addition, at this step the plaintiff should write the detailed letter of his claim to the respondent, setting out the basis of the claim and providing the respondent enough time to provide information as well as to respond in the detail of the claim.[101] With the view of settling claims, parties must conduct negotiation if possible. Before the proceeding starts, parties are encouraged by the court to consider some form of ADR because it is can be more suitable than litigation. The cost of litigation proceedings also important. Parties shall seek advice on how much the court proceedings cost; parties might also know that litigation is unpredictable, so it can be hard to predict the cost if the work by lawyers is charged on hours.[102] An interim measure is often needed as an urgent assistance from the

[100] Stephenson Harwood, "A guide to commercial litigation: a step by step approach," *United Kingdom*, http://www.shlegal.com/docs/default-source/news-insights-documents/stephenson-harwood-commercial-litigation-guide-(may-2016).pdf?sfvrsn=2
[101] Ibid.
[102] Ibid.

court such as freezing assets. Freezing assets prohibit the removal of assets from the jurisdiction and also forbid dealing with those assets in a way that prevents the creditor from enforcing the judgment. In England, a freezing order was not possible until 1975.[103] In 1975, the Court of Appeal allowed freezing assets order under section 45 of the Supreme Court of Judicature (Consolidation) Act 1925. Currently, they are known as "freezing assets" in England, but in British Commonwealth countries they are still called "Mareva injunction".[104]

3.2.2. Preparing the Cases

A claim starts when the plaintiff issues a claim form to the court and the claim should set out the alleged facts.[105] Generally, the respondent has 14 days from the date of service of process to file a defense responding to the claim and the due date will be extended by the agreement between parties. In case the respondent fails to file a defense within the given time, the plaintiff can obtain a default judgment which means that a plaintiff automatically wins a judgment as a result of the defendant failing to respond to the claim.

After the respondents are served with the claim documents, they then can file a response, which provides the court information about the cases and then the court can schedule a hearing and fix the trial date. Sometimes, it can take one to three years after the start of litigation to reach the final judgment if the case is complicated.[106] Before the trial, the parties might exchange written statements containing the evidence of their witnesses and witnesses are often cross-examined on the statements during the trial.

[103] Supra note 87, at 455.
[104] Supra note 87, at 455.
[105] Supra note 100.
[106] Supra note 100.

3.2.3. Trial and Enforcement

Before the trial session, parties are allowed to provide a written outline of their case to the court. Typically, there is one judge in the court proceeding and his or her job is not to investigate the case but to listen to the facts and evidence, and may ask some relevant questions to both parties. In the opening submission, the court allows the plaintiff to present their case and then the respondent will be advocate after and in the closing submission, both parties will provide the opportunity to summarize their cases. Following the action of the trial process, the judge often takes time to write his or her judgment and when the judgment is out, it is typically delivered to the court and read by the judge and that judgment will be totally released to the public. When the judgment is released and the losing party does not agree or is not satisfied for the outcome, they can then appeal to the higher courts, such as an Appeal Court, and ultimately a Supreme Court or court of highest jurisdiction.[107] The Appellate court is part of the judicial system that responsible for hearing and reviewing the appeal from the previous case which has been settled in the other trial court. The appellant must show that the trial court made a wrong legal ruling that impacted the judgment of the case, and the appellant will prepare and submit a written statement that should explain to the appeal court that the trial court made the wrong judgment and the decision should be reversed.[108]

There are 5 procedures of Appeal Court:

- Notice of Appeal
- Written Submissions
- Oral Hearing
- Exchange of Views

[107] Supra note 100.
[108] Ritter Grey and P.C Graham, "The Appeal Process," *The Judicial Leaning Center*: 2015, https://judiciallearningcenter.org/the-appeal-process/

- Circulation of the Report

When the final judgment is released, if the plaintiff wins the case they will get the judgment and then if the respondent does not pay or ignore the judge's decision, the winning party can take steps to enforce the judgment as they wish.

3.3. Recognition and Enforcement of Foreign Judgment

Every State has their own sovereignty and legislation, so any foreign judgments cannot be enforced in the other states unless the states recognized those judgments. There is a distinction between the recognition of a foreign judgment and its enforcement in term of international law. Recognition means accepting the determination of the rights and obligations made by the original court and enforcement means ensuring that the judgment debtor obeys the order of the court of origin.[109] Only the court has authority to enforce the foreign judgment on the losing parties and there must be recognition before the enforcement. There is no equivalent to the New York Convention as an international treaty for enforcing the arbitral award in the realm of enforcing judgments issued by national courts.[110] There are two methods of why foreign judgment should be recognized and enforced. The first one is, foreign states) often require reciprocity (Comity Theory or there is a bi-lateral treaty that has been signed between the states and the second reason is, for the sake of justice and out of recognition that a judgment is an obligation or a debt like any other (Obligation Theory).[111] In contrast, procedural irregularities include those related to a lack of adequate notice or jurisdictional questions based on improper personal or subject matter of jurisdiction might deny the enforcement of foreign judgment or discretionary grounds, such as forum non-convenience or lack of comity in enforcing a foreign

[109] Supra note 87, at 349.
[110] Gary Born, *International Arbitration and Forum Selection Agreements: Planning, Drafting and Enforcing* (Kluwer Law: 1999), p.105.
[111] Supra note 87, at 349-350.

judgment also can be raised as legal arguments to reject enforcement.[112] However, these reasons apply only of the foreign judgment proceeding that justify and fair.

Singapore is also a country which implements the enforcement of foreign court judgments. Currently, there are two paths to enforcing the foreign judgment in Singapore such as under one of the country's reciprocal enforcement act and a common law action.[113] The foreign judgment can be registered either under the Reciprocal Enforcement of Commonwealth Judgment Act (RECJA) or the Reciprocal Enforcement of Foreign Judgment Act (REFJA). These methods allow the enforcement of foreign judgments in some specific countries such as UK, New Zealand, Sri Lanka, Malaysia, Pakistan, Brunei, Papua New Guinea, India, Australia, Hong Kong and the Windward Island.[114] Enforcement can be a problem if the foreign court acted without jurisdiction or the judgment can be shown to obtain by fraud. In some case, enforcement also can be denied if there was a breach of natural justice or if the judgment was falsely procured or if the enforcement would be contrary to Singapore public policy. In Cambodia, the current practice is that Cambodian courts will not enforce a foreign court judgment unless there is a reciprocity agreement between Cambodia and the country of the foreign court.

3.4. Advantages and Disadvantages of Court

In term of resolving the international commercial dispute through the litigation process, commonly disadvantages will exist more than advantages. Generally speaking, parties involved in this dispute always want to resolve their dispute as fast as possible in order to keep their reputation and expect their business will work smoothly as before after the judgment. However,

[112] Supra note 47, at 382-383.
[113] Pinsent Masons, "Enforcement of Foreign Judgments and Arbitration Awards in Singapore," *Out Law*, https://www.out-law.com/en/topics/dispute-resolution-and-litigation/enforcement/enforcement-of-foreign-judgments-and-arbitration-awards-in-singapore/
[114] Ibid.

litigation often contains so many procedures which lead to time-consuming. In the Cambodian courts, it typically takes 483 days to resolve a dispute which follow about 44 procedures. In addition, the litigation process is very complicated and need to go through many steps and stages before the trial starts.

Here are some advantages and disadvantages of dispute resolution on international commercial through litigation:

- Advantages
    - Judges of the Commercial Court have established commercial expertise and have ability to deal with the complexity of commercial cases
    - The commercial court has owns administrative office
    - Each case will include a ruling following strict time deadlines
    - A court judgment could be more powerful than arbitral award
- Disadvantages
    - Publicity
    - Judges are assigned, not chosen by the parties
    - Can be very costly and financially
    - Litigation mostly provides the benefit to wealthier parties
    - Can impose a solution that is only acceptable to one of the parties
    - Can harm or destroy parties' relationship
    - Lack of common jurisdiction for interstate and international disputes
    - Trial court verdicts are not easily reversed

Conclusion

Currently, international commerce has become an important sector for all counties around the world, especially in the developing countries which usually choose the commercial and private sector as the main sector to develop their nation. . When the number of merchants increase dramatically, then the number of disputes will also going to rise up accordingly. By the growing importance and positive aspects towards the international business transaction as a key element for the global community as well as for the every single state, there is a need to address the concerns in choosing a proper method to deal with international commercial disputes. The national commercial disputes can be easier to settle because both parties live in the same territory and have the same legislation system. In contrast, when the dispute arises between international parties, the complexity will occur because the flow of procedures in international law are more complicated and confusing, which lead the parties in disputes think carefully and consider matters conscientiously. Due to the main characteristic of cross border conflicts, the resolutions differ from domestic dispute resolutions as well.

In the past, parties to disputes in international commerce paid less attention while choosing an option of resolution, but in today's world economy depends on business transaction factors, so people concentrate and pay particular attention to handle their commercial disputes in a proper way. There are two available methods in terms of international commercial dispute resolution: one is judicial litigation and another one is alternative dispute resolution, which consists of negotiation, mediation and arbitration. Although, even the procedure and processes of ADR and court litigation are different from each other, the objective of both strategies is to bring a better settlement to handle the conflict in an effective way for all sides. Furthermore, both ADR and court decision also bring much similar benefits as well by removing obstacles to trade. It is important to consider better mechanisms to resolve disputes, which are key to

preserving existing business relationships as well as in facilitating and encouraging international commerce. Additionally, assessing the subject matter of the dispute first, and then start resolving it in the right way could strengthen global business relations and encourage more cooperative modes in the future.

Recommendation

After studying and researching the topic of resolution of international commercial disputes we have learned a lot from this topic, This topic has showed us the various types of international commercial dispute resolution, the choice of law which is use to implement in arbitration, as well as how the international parties involved in the dispute settle their issue accordingly. As students in the Royal University of Law and Economics, majoring in International Relations in year 4, we would like to recommend some of our ideas in terms of international commercial disputes.

Choosing the great resolution mechanism for international commercial dispute is really necessary. It not only provides a better settlement but will preserve both party's relationships that are in place. According to our opinion, we would like suggest the international commercial dispute parties to choose ADR over litigation. Arbitration is one of the ADR methods and the most reliable, and which is used by many international parties around the world. Before the invention of arbitration, international parties used courts as their place to settle their disputes but most of the final judgments were not reliable and unsuccessful parties were often left unsatisfied with the judge decision. Arbitration is often used for the resolution of commercial disputes. For international commercial disputes, arbitration has become a popular method for dispute resolution because the parties can choose their arbitrators and languages, and also have confidentiality, neutrality, predictability, and flexibility in the process, along with lower costs, fewer procedures and the ability to choose their own law and forum as well as taking shorter time than using a court. According to these benefits, by choosing arbitration as the dispute resolution, international parties will be more pleased with the arbitral award and the arbitration proceeding than if they used a court process.

In recent years, Cambodia has been considered as an attractive country for foreign investment and business transactions, but it does not indicate that Cambodia is a state that has a high amount of international commercial dispute resolution. Traditionally, when any dispute arises between parties under the contract or any other issues related to international business relations, most foreign investors in Cambodia refuse to use local arbitration and prefer to solve the issues in a foreign state forum, such as the Singapore International Arbitration Centre (SIAC) or Hong Kong International Arbitration Centre (HKIAC). One of the biggest concerns for investors is that they do not have confidence in the arbitration center in Cambodia, particularly with regards to its neutrality and professional competence. To improve international commercial arbitration in Cambodia is not impossible, but it's also not as easy as one might think. From our perspective, to address this problem, the Cambodian government should participate and put a priority effort in training each arbitrator in order to enhance their ability before becoming official arbitrators. Moreover, the arbitral panel must be completely neutral and have a high technical skill in resolving all kinds of disputes, especially those related to commercial issues. If Cambodia can demonstrate to foreign investors its strong capacity to professionally and fairly resolve disputes, then trust will be gained, and the NCAC will transform itself into a popular and reliable resource for business people to use to international commercial disputes. This is turn will encourage more foreign investment to come to Cambodia, which will contribute to the economic development of the nation.

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