Dispute Resolution Mechanisms in Merger and Acquisition Transactions

by

Kerim Bölten

A Thesis Submitted to the Graduate School of Social Sciences and Humanities Fulfilment of the Requirements for the Degree of Masters of Law

Koç University

April, 2016

Statement of Authorship

This thesis contains no material, which has been accepted for any award or any degree of diploma in any university or other institution. It is affirmed by the candidate that, to the best of his knowledge, the thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Kerim Bölten

ACKNOWLEGMENTS

There is no doubt that this thesis would never have been completed without everlasting support of my family, fiancée and, of course, guidance of all members of Koç University Law School. It is an indescribable pleasure for me to convey my gratitude to all whose contribution boosts my motivation to conduct my researches and conclude this thesis.

I would like to submit my gratitude to Associate Professor Zeynep Derya Tarman for her supervision, informative and kind approach through the course of the preparation of this thesis. It is an amazing pleasure for me to work with and under supervision of her.

I would like to express my sincere appreciation to my family. Especially, I would like to say thank you to my mother Yeşim Bölten and my father Seracettin Bölten who were always supporting me by keep on telling me that I have adequate power and knowledge to achieve everything in this life.

Finally, special thanks go to my fiancée Elif Pınar Başkaya for her smile and also sensitive approach which worth everything to me. Above all, she usually helps me to overcome all sorts of obstacles that I encountered throughout the work.

This thesis is dedicated to my family and fiancée.

Kerim Bölten

Istanbul, 2016

TABLE OF CONTENTS

ABBREVIATIONS

AAA	American Arbitration Association
AAA Rules	America Arbitration Association Rules
ADR	Alternative Dispute Resolution
Arb. Int.	Arbitration International
ASA	Association Suisse de L'arbitrage (Swiss Arbitration Association)
ASA Bulletin	Swiss Arbitration Association bulletin
Art.	Article
Art./Arts.	Article/Articles
Bull.	Bulletin
CIETAC	China International Economic Trade and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
DFT	Decision of the Swiss Federal Tribunal
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institute of Arbitration)
EC	European Commission
EEC	European Economic Community
EU	European Union
1961 European Convention	1961 European Convention on International Commercial Arbitration
Etc.	Et cetera

FIDIC	Fédération Internationale des ingénieurs-Conseils (International Federation of Consulting Engineers)
FR	France
Green Paper 2002	European Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law
HKIAC	Hong Kong International Arbitration Center
IBA	International Bar Association
ICC	International Chamber of Commerce
ICC Bulletin	International Chamber of Commerce International Court of Arbitration Bulletin
ICC Court of Arbitration	International Chamber of Commerce Court of Arbitration
ICC Rules	ICC Rules of Arbitration
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rules	ICSID Arbitration Rules
ILA	International Law Association
Int. ALR	International Arbitration Law Review
ITO	İstanbul Ticaret Odası (Istanbul Chamber of Commerce)
LCIA	London Court of International Arbitration
LCIA Rules	London Court of International Arbitration Rules
MLICC	The 2002 UNCITRAL Model Law on International Commercial Conciliation

Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NCCUSL	National Conference of Commissioners on Uniform State Laws
OECD	Organisation for Economic Co-operation and Development
PIL	5718 sayılı Milletlerarası Özel Hukuk Ve Usul Hukuku Hakkında Kanun (Private International Law No.5718)
Regulation No. 44/2001	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
RK	Rekabet Kurumu (Turkish Competition Authority)
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SPK	Sermaye Piyasası Kurulu (Capital Markets Board of Turkey)
Swiss Rules	Swiss Rules of International Arbitration
TCC	6102 sayılı Türk Ticaret Kanunu (Turkish Commercial Code No.6102)
TCO	6098 sayılı Türk Borçlar Kanunu (Turkish Code of Obligations No.6098)
TOBB	Türkiye Odalar ve Borsalar Birliği (The Union of Chambers and Commodity Exchanges of Turkey)
TR	Republic of Turkey
UK	United Kingdom

UMA	Uniform Mediation Act
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States
USA	United States of America
Washington Convention	1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States
2008 EC Directive	Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

TERMINOLOGY[1]

Prior to initiate detailed examination as to the dispute resolution mechanisms and their application in merger and acquisition (the "M&A") disputes, it is quite important to explain main terminologies that have been used through the course of the explanations herein.

- **Arbitration agreement- arbitration clause**

  Under this thesis the term "arbitration agreement" shall cover the term "arbitration clause" vice versa.

- **Merger and acquisition**

  Mergers and acquisitions are terms often used in conjunction with one another, however, the terms themselves are not synonymous. A merger is a legal term that refers to the absorption of one organization or corporation that ceases to exist into another that retains its own name and identity and that acquires the assets and liabilities of the former.

  Besides, Organisation for Economic Co-operation and Development (the "OECD") prefers to draw the distinction between the statutory mergers and subsidiary mergers by giving different definitions for them. A merger is the combination of two or more companies to achieve common objectives by pooling their resources into a single business. If the acquiring company assumes the assets and liabilities of the merged company and the merged company ceases to exist, it is called statutory merger. On the other hand, if the acquired company becomes a 100% subsidiary of the parent company, it is called subsidiary merger[2].In a reverse subsidiary merger, a subsidiary of the acquirer is merged into the target company in question.

---

[1] See PATRICK A. GAUGHAN, MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS (John Wiley & Sons. 2010)., p.13; see also ANDREW J. SHERMAN, MERGERS AND ACQUISITIONS FROM A TO Z (Amacom Div American Management Association. 2010)., p.1-3; see also DIETMAR ERNST & JOACHIM HÄCKER, APPLIED INTERNATIONAL CORPORATE FINANCE (Vahlen. 2012)., p. 1-7; see also EMANUEL GOMES, et al., MERGERS, ACQUISITIONS AND STRATEGIC ALLIANCES: UNDERSTANDING THE PROCESS (Palgrave Macmillan. 2011).,p. 5-9

[2]OECD, *New patterns of Industrial Globalisation: Cross Border Mergers and Acquisitions and Strategic Alliances, Paris,* (2001)., p. 14., see also PATRICK A. GAUGHAN, MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS ((John Wiley & Sons). 2002). p. 7

The term acquisition refers to gaining possession or control over a target company or its assets. The acquisition of a company is the purchase of all its assets or all its shares from its sole or main owner. A purchase of a company's shares may also be termed a take-over. Typically, however, take-overs refer to acquisitions where a listed company is the target and its shareholders are approached through a public take-over bid issued by a bidder, who attempts to induce them to sell their shares to him[3].

- **Forward merger**

A forward merger is a merger in which the target merges into the buyer, and the target shareholders exchange their stock for the agreed-upon purchase price.

- **Reverse merger**

A reverse merger is a merger in which the target corporation ab-sorbs the buyer.

- **Subsidiary merger**

A subsidiary merger (also known as a triangular merger or forward triangular merger) is a merger in which the target corporation is absorbed into the buyer's subsidiary, with the target's shareholders receiving stock in the parent corporation.

- **Reverse subsidiary merger**

A reverse subsidiary merger (also known as a reverse triangular merger) is a merger in which the buyer's subsidiary is absorbed into the target corporation, which becomes a new subsidiary of the acquiring corporation.

[3] NORBERT HORN, CROSS-BORDER MERGERS AND ACQUISITIONS AND THE LAW (Kluwer Law International. 2001)., p.4

- **Horizontal merger**[4]

A horizontal merger shall be deemed to be occurred when combining companies are in direct competition with another, sharing similar product lines and product markets. Horizontal merging is a quick way to expand into new markets. The new and the successful take-over the small, the old and the dying[5]. If a horizontal merger causes the combined firm to experience an increase in market power that will have anticompetitive effects, the merger may be opposed on antitrust grounds[6].

- **Vertical merger**

A vertical merger occurs when a company combines with a customer or supplier, forming an entity to create vertical integration. In vertical merger, companies participated in acquisition shall hold the leverage of coordinating the flow of products or services from one unit/company to another can reduce inventory cost, speed product development, increase capacity utilization, and improve market access[7]. A vertical merger shall not be subjected to the antitrust restrictions albeit such combination explicitly resulted in a more strong company. Surprisingly, antitrust regulators indicate that vertical mergers shall serve to increase competition, by lowering prices in the relevant market.

- **Conglomerate merger**

A conglomerate merger occurs when the companies, which are not competitors and do not have a purchase-seller relationship, determine to merger in order to create a synergy which will be examined below in Chapter I below.

[4] For the types of a merger please see GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings. 2010., p.13; see also GOMES, et al., Mergers, Acquisitions and Strategic Alliances: Understanding the Process. 2011., 9-13
[5]ALEXANDRA POST, ANATOMY OF A MERGER : THE CAUSES AND EFFECTS OF MERGERS AND ACQUISITIONS (Englewood Cliffs, NJ : Prentice Hall, 1994. 1994)., p.107
[6] Id. at.p.8
[7]Michael Goold & Campbell Andrew, *Desperately Seeking Synergy*, 76 HARVARD BUSINESS REVIEW (1998)., p.131-145

- **Consolidation**

There is no doubt that a merger differs from a consolidation, which means a business combination whereby at least two companies join to form an entirely new company. In consolidation, all of the combining companies are dissolved and only the new established company maintains to operate.

It is important to highlight that the shareholders of the combining companies, which shall cease following the duly completion of consolidation, either becomes shareholder of the new established company or leave the new established company by procuring a special monetary return.

Despite the significant distinction between merger and consolidation, such terms sometimes used interchangeably. In general, when the combining firms are approximately the same size, the term consolidation applies; when the two firm differ significantly by size, merger is the more appropriate term.

- **Take-over**

A take-over is the acquisition of control by one company over another, usually a smaller one, company. A take-over is typically accomplished by a purchase of shares or assets, a tender offer, or a merger.

- **Litigation and alternative dispute resolution[8]**

Judiciary power belongs to government and governments perform such judiciary power via its courts[9]. Litigation is a dispute resolution mechanism mainly consists of

[8] In its Green Paper 2002 the European Commission defined alternative methods of dispute resolution as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration; see also GÜLGÜN ILDIR, ALTERNATİF UYUŞMAZLIK ÇÖZÜMÜ : MEDENİ YARGIYA ALTERNATİF YÖNTEMLER (Ankara : Seçkin. 2003)., p.23-26, see also MUSTAFA SERDAR ÖZBEK, ALTERNATİF UYUŞMAZLIK ÇÖZÜMÜ (Ankara : Yetkin. 2009)., p. 127

[9] HAKAN PEKCANITEZ, et al., HUKUK MUHAKEMELERİ KANUNU HÜKÜMLERİNE GÖRE MEDENİ USUL HUKUKU (Ankara : Yetkin, 11. Bası. 2011)., p.734

prosecution, defence and decision authorities (notion of the "decision authority" is quite distinctive in common law system by virtue of the authority is provided for both jury and judge, than that of civil law systems) and to be conducted in accordance with the strict procedural rules hereof.

In light of the aforesaid explanations, it appears to be that there are two models of litigation systems which are used around the world: the adversarial (common law) model and the inquisitorial (civil law) model. The adversarial system, which is generally used in the United States ("US"), comprises the introduction of evidence in a process governed by extensive procedural rules following which a jury renders a judgment on the basis of legal instructions given by a judge[10].

The inquisitorial system considers evidence, as well as the adversarial system, but in distinctive ways and distinctive ends. It is possible to attribute distinctions between the adversarial and inquisitorial system on three bases, namely, source of law from which the systems draw their direction[11]; the process that used to resolve disputes[12]; and outcomes available under each system[13].

Even though there are other important alternative dispute resolution ("ADR") mechanisms currently available for disputants, this thesis hereby mainly focuses on the ADR mechanisms, namely, negotiation, conciliation, minitrial, mediation and arbitration.

[10]THOMAS D. CAVENAGH & LUCILLE M. PONTE, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS (Ohio : West Educational Publications. 1999)., p. 4

[11] The adversarial approach, which is adopted in common law systems such as US and UK, draws from many sources of legal regulation, including but not limited to: constitutional law, treaties, municipal ordinances, administrative regulations and precedential case law. These various sources of law are interpreted and applied by judges at both the trial and appellate levels. On the other hand, the inquisitorial approach, which is adopted in civil law systems, is based on relevant codes and/or regulations. These statutes attempt to distil all legal authority into an orderly and comprehensive code of law.

[12] Adversarial law countries rely heavily on the trial because the various sources of law have a common nexus in the judge, who applies the laws to individual litigants. In contrary, civil law countries use a wide range of ADR mechanisms which will be examined later in this thesis.

[13] Common law countries normally use juries in order to settle legal disputes and provide complete authority to jury in this regard. However, civil law system does not provide jury trial and empowers competent judge to determine on procedural and substantives issues of the dispute in question via applying the law indicated in the laws of the country. In common law countries, juries may award punitive damages and a fairly wide range of compensatory damages such as for pain and suffering. In civil law systems damages are much more limited, normally excluding punitive damages and very significantly restricting noneconomic compensatory damages.

Owing to that these ADR mechanisms are briefly indicated below and shall be further analysed in detail:

a) Negotiation

Negotiation is the most fundamental ADR mechanism to be willingly or unwillingly used while resolving both our simple daily disputes and most complex business transactions. Furthermore, Goldberg, Sander, and Rogers define negotiation as "*communication for the purpose of persuasion."*[14]

b) Conciliation

The 2002 UNCITRAL Model Law on International Commercial Conciliation (the "MLICC") defines conciliation as "… a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.[15]"

c) Mini-trial

Mini-trial is a process in which the parties' present arguments and evidence to a dispute resolution practitioner or a judge, who provides advice as to the facts of the dispute and regarding possible, probable and desirable outcomes and the means whereby these may be achieved[16].

---

[14] Stephen B. Goldberg, et al., *Dispute Resolution : Negotiation, Mediation, and Other Processes* Boston, Aspen Law & Business, 2nd Edition (1992).

[15] United Nations Commission on International Trade Law, *Model Law on International Commercial Conciliation*(2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

[16] Victorian Law Report Commission, *Civil Justice Review Report*(2002), *available at* http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf., p.222

d) Mediation

Mediation is a process in which a third party (usually neutral and unbiased) facilitates a negotiated consensual agreement among parties, without rendering a formal decision[17]. Furthermore, mediation is defined by Goldberg, Sander, and Rogers as an "assisted and facilitated negotiation carried out by a third party"[18].

e) *Arbitration*[19]

Arbitration is a device whereby disputants empower one (sole arbitrator) or more (arbitration panel) persons by private agreement in order to afford them an opportunity to proceed and render a binding decision as to the dispute(s) at stake on the basis of such private agreement.

[17]Carrie Menkel Meadow, *Mediation, arbitration, and alternative dispute resolution (ADR)*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES, ELSEVIER LTD (2015)., p.2

[18] Goldberg, et al., (1992).

[19] In France arbitration is defined as a "device whereby the settlement of a question, which is of interest for two or more person, is entrusted to one or more other persons- the arbitrator or arbitrators- who derive their powers from a private agreement, not form the authorities of a State, and who are to proceed and decide the case on the basis of such agreement." Besides in common law system, arbitration is defined similarly, as involving: "two or more parties faced with a dispute which they cannot resolve themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course … it will not be settled by a compromise, but by a decision."; see also PEKCANITEZ, et al., Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku. 2011., p.734; see also YAVUZ ALANGOYA, et al., MEDENİ USUL HUKUKU ESASLARI (İstanbul : Beta, 2011. Tıpkı 8. baskı. 2011)., p.595

INTRODUCTION

This thesis will separately examine standard M&A process, the notion of international arbitration and other types of alternative dispute resolution mechanisms and application of international arbitration and distinctive types of alternative dispute resolution mechanism so as to resolve relevant disputes stemming from an M&A transaction. In the final part, disputes settled through the course of arbitration are scrutinised separately in order to demonstrate the application of arbitration for each type of dispute that may arise during the M&A transaction.

Nowadays, the vast majority of the companies opt in cross-border merger or acquisition transactions so as to take advantage of, inter alia, resource integration to achieve expanded production capacity, greater market share and elimination of rivals. In order to support the idea mentioned herein, the volume of M&A transactions, especially for the years between 2013 and 2015, have been indicated below in detail.

In 2014, value of the worldwide M&A totalled US$3.5 trillion during full year 2014, a 47% increase from comparable 2013 levels[20]. Ninety-five deals with a value greater than $5 billion were announced during full year 2014, more than double the value and number of large-cap deals announced during 2013[21]. Furthermore, as per the half year report issued by Thomson Reuters, worldwide M&A totalled US$2.2 trillion during the first half of 2015[22], a 40% increase from comparable 2014 levels and the strongest opening half for worldwide deal making since 2007. Sixty-two deals with a value greater than $5 billion were announced during the first half of 2015, their combined value more than double the level seen during the first half of 2014.

As a natural consequence of the numerous complex cross-border merger and acquisition transactions, significant disputes between corporate entities engender and parties of the transaction in question would desire to settle such disputes with the fastest, safest and most

[20] Thomson Reuters, *Merger & Acquisition Review* Thomson Reuters(2013), *available at* http://dmi.thomsonreuters.com/Content/Files/4Q2013_Global_MandA_Financial_Advisory_Review.pdf.
[21] Thomson Reuters, *Merger & Acquisition Review*, Thomson Reuters(2014), *available at* http://dmi.thomsonreuters.com/Content/Files/4Q2014_Global_MandA_Financial_Advisory_Review.pdf.
[22] Thomson Reuters, *Merger & Acquisition Review*, Thomson Reuters(2015), *available at* http://dmi.thomsonreuters.com/Content/Files/2Q2015_Global_MandA_Financial_Advisory_Review.pdf.

confidential way of the dispute resolution mechanisms which directly tends towards the mechanism of arbitration.

As per the latest survey with regard to the improvements and innovations in international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London, and White&Case Law Firm in 2015 has been revealed that, 90% of the respondents who preferred international arbitration as their dispute resolution mechanism; either alone (56%) or in combination with ADR mechanism in a multi-tiered, or escalating, dispute resolution process (34%).

As a final note, arbitration in M&A disputes includes wide range of issues to be considered. Therefore, it is beneficial to indicate the main scope of the thesis. M&A transaction is a long-lasting and quite complex process and it concerns different fields of law such as competition law, company law, law of obligation, tax law, capital market law et cetera ("etc"). However, this thesis is not mainly a commercial law thesis and not focuses on directly M&A transactions.

This thesis comprehensively and at the same time separately scrutinise the notions of merger and acquisition, international arbitration, ADR mechanisms and application of the international arbitration and ADR mechanisms directly or indirectly to the disputes stemming from an M&A transactions.

However, it is noteworthy to mention in this thesis, the author mainly focuses on the role of international arbitration for resolving disputes stemming from M&A transactions, its advantages from other ways of dispute resolution, its effects and its procedural and natural characteristics.

On the other hand, through the course of the preparation of this thesis, the author usually tries to cover all practical issues together with the theoretical information that is necessary to understand the core of the thesis topic in question.

There are 3 (three) main parts in this thesis. Part I focus on the M&A process so as to afford an opportunity for readers to understand basic features of M&A process prior to enter into complex

matters as to the application of the litigation, ADR mechanisms and arbitration while resolving disputes stemming from the M&A process.

In Part II, main features as well as benefits and drawbacks of litigation and ADR mechanisms are explained separately and the question why these mechanisms remain weak for M&A disputes are examined in detail. In the final part (Part III), main features of arbitration and its application for distinctive types of M&A disputes of which the parties of an M&A transaction may encounter have been revealed out and examined in detail.

PART I: MERGER AND ACQUISITON PROCESS

I. Introduction

M&As are a common managerial strategy, whether used by firms to enter new markets, subdue a rival, or acquire valued resources such as technology, locations or people[23]. In a merger, companies contract directly with one another as opposed to contracting with their respective shareholders. Furthermore, assets and liabilities are not exchanged between the parties to the merger. Instead, the transfer of assets and liabilities occurs by operation of law when a certificate of merger is filed. When one corporation is merged with another, and one of the two corporations operates as the combined corporation, that company is referred to as the surviving corporation. Conversely, when two corporations are merged, and the merged corporations cease to exist in favor of a newly established corporation, the new corporation is referred to as the successor corporation.

Following to the general explanations with respect to the M&A process, it is noteworthy to mention about two distinctive type of foreign direct investment which are entitled as green field investment and brown field investment. Foreign investors may either establish a joint venture which may take various forms, inter alia, joint stock company, limited liability company; or enter into the market by conducting M&A transaction that may be accomplished via asset deal or share deal. In green field investment, parent company begins a new venture by constructing new facilities in a country outside of where the company is headquartered. In contrast, brown field investment occurs when a company or government purchases an existing facility to begin new production. In this respect brown field investment may be deemed as M&A transaction. There is no doubt that each of the investment method may bring distinctive outstanding achievements and can also develop and expand the company, nonetheless there are also some sort of differences between these two entry modes.

[23] Rachel Calipha, et al., *Mergers and Acquisitions: A Review of Phases, Motives, and Success Factors*, ADVANCES IN MERGERS AND ACQUISITIONS (2010).

There are several reasons why a company opts to build its own new facility rather than purchase or lease an existing one. The primary reason is that a new facility offers the maximum design flexibility and efficiency to meet the project's needs. An existing facility forces the company to adjust based on the present design. Additionally, all capital equipment needs to be maintained. New facilities are typically much less costly to maintain than used facilities. If the company wants to advertise its new operation or attract employees, new facilities also tend to be more favorable.

On the other hand, the clear advantage of a brown-field investment strategy is that the building is already constructed. The costs of starting up may be greatly reduced. The time devoted to construction can be avoided as well. If the existing national or municipal government requires licenses or approvals, the brown-field facility may already be "up to code." In cases where the facility previously supported a similar production process, brown-field investments can be a real coup for the right company. Brown-field investments run the risk of leading to buyer's remorse. It is rare that a company looking to engage in foreign direct investment finds a facility with the type of capital equipment and technology to suit its purposes completely. If the property is leased, there may be limitations on what kinds of improvements can be made.

When we consider the ground(s) standing behind every M&A transaction, it is quite possible to encounter distinctive and unique grounds which give a rise to the combination of these companies and such combination creates a considerable value which is termed as “synergy”.

According to Greek linguistics, the word “synergy” is derived from the Greek word “synergos”, which means “working together”.

There is no doubt that the driving forces for an M&A transaction for a strategic buyer are the anticipated synergies and the resulting perceived value enhancements of the combined entity. In contrary, financial buyers (i.e. private equity firms) acquire target assets or companies with the intent to realize value from an acquisition in excess of the purchase price. Typically,

financial buyers seek to earn a return on their investment. They transact because they perceive opportunities to invest, enhance cash flow generation, and exit at a profit.

Synergies, stemming from the integration of two or more business units in a combination, may include enhancements such as economies of scale derived from the transaction, overhead cost reductions, acquisition of new or improved technology or intellectual property, or improved market depth and visibility[24].

Prior to carry out in-depth analyze with respect to the synergies of an M&A transaction, it would be beneficial to reveal one of the most significant motive for an M&A transaction which directly refers to growth.

A company seeking for expand its operations may face with a choice between internal growth or external growth that may be accomplished via merger and acquisition. In this respect, a company may prefer to pursue internal growth which is slow and uncertain process while growth through an M&A transaction (external growth) may be a much more rapid process albeit it embodies its own uncertainties. Due to the aforesaid synergies, companies usually prefer to grow through an M&A transaction instead of internal growth.
Moreover, companies may prefer to grow within their own industry or such companies change their approach and expand outside their business category. If a company determines to enlarge its business category, it is called as diversification.

In diversification, the company grows outside of its main industry category. This motive played a major role in the conglomerate mergers and acquisitions[25]. For example, General Electric is no longer merely an electronic company. Through a pattern of acquisition and divestitures, the firm has become a diversified conglomerate with operations in insurance, television stations, plastics, medical equipment and so on[26].

[24]Mason A. Carpenter & William Gerard Sanders, *Strategic Management: A Dynamic Perspective, Concepts and Cases*, (2007).
[25]GAUGHAN, Mergers, Acquisitions, and Corporate Restructurings. 2010., p.123
[26]Id. at., p.123

II. Stages of an M&A transaction

Due to the fact that there is no specific or instructive provision in the Turkish Commercial Code No.6102 ("TCC") with regard to the stages of an M&A transaction and the vast majority of M&A deals do not indicate Turkish Law as a governing law, the author does not refer to TCC throughout the course of this part of the thesis.

In order for an M&A transaction to be duly finalized, it is required by the parties of the transaction to handle various sorts of stages hereof. These stages range from the target identification and preliminary negotiations to the closing of the transaction and the resolution of any post-closing disputes that may arise. It might be preferable to divide an M&A transaction into 5 (five) stages[27]. However, it is important to bear in mind that there is no precise approach as to the number of stages of an M&A transaction, thus, it is quite possible to encounter distinctive approaches in this respect.

As per the understanding adopted herein as to the stages of a prospective M&A transaction, M&A transaction consists of the stages namely, (A) target identification and preliminary negotiations, (B) negotiations and agreements, (C) signing, (D) official permission from the regulatory and (E) closing.

A. Target identification and preliminary negotiations

A buyer will typically identify and engage an acquisition target in one of two ways, namely, directly reaching out the target or invitation bid on a target.

In direct reach out to the target, a buyer, first, shall conduct a research so as to determine prospective acquisition targets (directly or through investment banker or other intermediary). After determining the acquisition target, a confidentiality agreement,

[27] For different approach as to the phases of the M&A transaction see ERNST & HÄCKER, Applied International Corporate Finance. 2012. , p. 21-42; see also DONALD DEPAMPHILIS, MERGERS AND ACQUISITIONS BASICS: ALL YOU NEED TO KNOW (Academic Press. 2010)., p.173-195; see also Carpenter & Sanders, (2007).

which legally binds the parties from not disclosing confidential information regarding the target company or the prospective transaction and executed by and between the buyer and the target company in this regard.

On the other hand, sometimes an investment bank or other intermediary that is acting as an exclusive intermediary to sell the target company's business on a confidential basis. This method is deemed as an invitation bid on a target. In this method, a competitive auction process with many potential strategic and financial buyers is conducted and the target company issues a brief summary commonly referred to as a "teaser" which provides brief written executive summary to the prospective buyers. Once interest is established from the buyer, the parties shall sign a confidentiality agreement and following the target company's identity is revealed to the buyer. After duly execution of the confidentiality agreement, investment banker or other intermediary shall send the buyer an "Information Memorandum" of which detailed information as to the target company is indicated.

1. Confidentiality agreement

An acquisition of a company imposes considerable financial burden for a prospective buyer by virtue of the economic resources to be used in this process. Owing to that, a prospective buyer usually seeks to conduct a detailed elaboration on certain documents of seller's company such as financial records, legal position of the company and other issues which may cause significant problems for a prospective buyer after completion of acquisition transaction. Instead, a seller is reluctant to disclose its confidential information with a prospective buyer. The reluctance is understandable when one considers that the acquisition, for one reason or another, may fall through and a prospective buyer may use the seller's information to its advantage and to the disadvantage of the seller[28].

[28]Gianfranco A. Pietrafesa, *The Importance of Confidentiality Agreement and Letters of Intent*, NEW JERSEY STATE BAR ASSOCIATION (2002)., p.1

A confidentiality agreement is a legally binding contract between the transaction parties. The confidentiality agreement details the confidentiality associated with the material and information provided to the prospective buyer, and it outlines the information provided and covered by the agreement, the term of the confidentiality period, the authorization of certain disclosures, employee solicitation restrictions, and other general restrictions regarding the prospective acquisition. The purpose of the confidentiality agreement is to allow the interested buyers access to as much non-public and sensitive information about the target company as the seller is willing to provide[29].

In light of the aforesaid explanations, in order to draft a comprehensive confidentiality agreement, it is required for the parties to consider, inter alia, definition of the confidential information, use of confidential information, legally required disclosures, return or destruction of materials, term, remedies and miscellaneous provisions applicable to providers and recipients[30].

2. Letter of intent and exclusivity agreement

A letter of intent is pre-contractual written instrument that defines the respective preliminary understanding of the parties about the engage in contractual negotiations[31]. Letter of intent mainly outlines the desired legal structure and general framework for the transactions which will be further subjected to oral negotiations between the parties.

[29] ERNST & HÄCKER, Applied International Corporate Finance. 2012., p. 42, see also HASAN PULAŞLI, YENI ŞIRKETLER HUKUKU GENEL ESASLAR (2012)., p. 98

[30] See also EDWIN L MILLER JR, MERGERS AND ACQUISITIONS: A STEP-BY-STEP LEGAL AND PRACTICAL GUIDE (John Wiley & Sons. 2008)., p. 40-43; see also Henry Peter, *M&A Transactions: Process and Possible Disputes*, (2005)., p. 2; see also ERNST & HÄCKER, Applied International Corporate Finance. 2012., p. 42-46; see also Pietrafesa, NEW JERSEY STATE BAR ASSOCIATION, (2002).; see also Henry Peter & Jean-Christophe Liebeskind, *Letters of Intent in The M&A Context*, (2005)., p. 266

[31] STANLEY FOSTER REED, et al., THE ART OF M&A : A MERGER ACQUISITION BUYOUT GUIDE (Irwin Professional, 2nd Edition. 1995)., p. 454; see also SHERMAN, Mergers and Acquisitions from A to Z. 2010., p. 51-61

The question as to whether a letter of intent creates a binding legal obligation[32] between the parties is remained an open window for discussion due to the fact that distinctive law systems adopted different approaches in this regard[33]. Nonetheless, a vast majority of letter of intents indicate that the letter does not create a binding obligation to close the transaction. However, in practice, most letters of intent are usually intended to create binding obligations with respect to the provisions such as confidentiality (confidentiality issues are initially established in the nondisclosure agreement), cost and governing law[34].

On the other hand, buyers also sometimes insist on a letter of intent because it contains a binding no-shop agreement, or an agreement on the part of the target that it and its representatives will not seek, and will not enter into, discussions with other bidder for a specific period of time (in practice the target has to do is not shop the company for 30 (thirty) or 60 (sixty) days)[35].

B. Establishment of the data room and due diligence

Prior to initiation of the due diligence process, the prospective buyer shall prepare a due diligence check list in which the documents requested by the prospective buyer is indicated in detail. Following the receipt of due diligence check list[36], the prospective seller either establishes a data room and uploads requested documents thereto or delivers requested documents by hand. Nowadays, sellers usually prefer to proceed with the first alternative by establishing a data room which consists of the documents demanded by the prospective buyer.

---

[32] For detailed discussion as to the binding or non-binding nature of a letter of intent please see Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. Houston 1st Dist. 1987 and see also Turner Broadcasting System v. McDavid, et al., 303 Ga. App. 593, 693 S.E.2d 873, 2010

[33] For detailed discussion as to the binding nature of a letter of intent please see İSMAIL G. ESIN & S. TUNÇ LOKMANHEKIM, UYGULAMADA BIRLEŞME VE DEVRALMALAR (Seçkin. 2003)., see also Peter & Liebeskind, (2005).; see also Georg Von Segesser, Arbitrating Pre-Closing Disputes in Merger and Acquisition Transactions (ASA Swiss Arbitration Association Conference of January 21, 2005 in Basel, ASA Special Series 2005).

[34] MILLER JR, Mergers and Acquisitions: A Step-By-Step Legal and Practical Guide. 2008., p.44; see also DENNIS J. ROBERTS, MERGERS & ACQUISITIONS : AN INSIDER'S GUIDE TO THE PURCHASE AND SALE OF MIDDLE MARKET BUSINESS INTERESTS: THE MIDDLE MARKET IS DIFFERENT/TALES OF A DEAL JUNKIE AND THE BUSINESS OF MIDDLE MARKET INVESTMENT BANKING (Wiley. 2009)., p.177

[35]MILLER JR, Mergers and Acquisitions: A Step-By-Step Legal and Practical Guide. 2008., p. 44, see also Peter, (2005)., p. 2

[36] See also ESIN & LOKMANHEKIM, Uygulamada Birleşme ve Devralmalar. 2003., s.27

Information in the data room often includes, but is not limited to, organization charts, management presentations, operational documents, financial statements, tax returns, accounting policies and manuals, legal documents, environmental documents, and other related documents pertinent to the transaction. The confidentiality of such information is typically governed by the confidentiality agreement executed by the seller and prospective buyer. It is noteworthy to mention that, in transactions of a certain complexity or importance the parties often draw up a protocol which governs issues such as access to the data room and the right to copy documents[37].

In order to ease understandability of the upcoming explanations, with respect to what is due diligence and why prudent buyer will need to duly conduct a due diligence prior to determine whether target company worth to purchase, if yes on which price or render a final decision that the target company is not well suited to the prospective buyer's future plans, it is important to define what is the term due diligence means.

According to Henry Peter[38], the term due diligence is derived from an obligation or at least incumbency of the buyer: during this particular and by essence preliminary phase, the buyer must display the diligence reasonably required from (or "due" by) any potential purchaser in investigating, understanding, and therefore, knowing, the "object" which he envisages to buy. Due diligence is thus the part of the more global M&A process during which the potential buyer must be duly diligent about fully understanding the target, and is, or should be, put in the appropriate conditions to do so.

The due diligence process usually initiates following duly execution of letter of intent and confidentiality agreement(s)[39]. Due diligence process is mainly conducted in order to reveal out the risks associated with the M&A transaction and historical performance, and target company's potential future earnings. Due diligence shall be made in form of legal,

[37]Peter, (2005)., p. 4; see also ESIN & LOKMANHEKIM, Uygulamada Birleşme ve Devralmalar. 2003., s.28
[38]Peter, (2005)., p. 3
[39] See also ESIN & LOKMANHEKIM, Uygulamada Birleşme ve Devralmalar. 2003., s.23

operational, financial, and environmental and all of these types of due diligence mainly aims to evaluate the benefits and drawbacks of an M&A transaction.

There is no time limit to finalize due diligence process, therefore, such process may last only for a week or more than a year. Even though vast majority of board members reckon that in order not to encounter unexpected surprises after acquisition, the prospective buyer will need to conduct a detailed due diligence investigation so as to consider all edges of the seller's company. Fast-track due diligence embodies considerable benefits for buyers. The greatest benefit of speedy due diligence is minimal disruption to ongoing business activities and the minimization of out-of-pocket costs to both parties[40]. Another benefit of fast-track due diligence is to maintain sensitive relationship between the parties of an M&A transaction. Under some circumstances, a buyer does not have an opportunity to lengthy consider as to whether such acquisition is beneficial for its company or not, thus, such buyer is under obligation to render a quick decision in order to prevent such acquisition opportunity to slip through its hands. Owing to that the most valuable benefits of fast-track due diligence is timely information to the prospective buyer, who can quickly determine whether the acquisition is of interest and, if so, on what terms and conditions.

In a typical due diligence process, prospective buyer will need to conduct an evaluation with respect to the historical financial statements and management projections; an assessment of target management and operations; an evaluation of significant customers, contracts, and agreements; and an evaluation of contingencies, among other areas of financial, business, intellectual property and legal inquiry. Based on this due diligence, prospective buyers will conclude on a value of the target business and decide whether the acquisition aligns with their interests[41].

By enabling the buyer to better understand the target, due diligence also inevitably has a direct effect on the terms and conditions of the purchase agreement. It is, in fact, only

[40]REED, et al., The Art of M&A : A Merger Acquisition Buyout Guide. 1995., p. 394
[41] See also Peter, (2005)., p. 4

once he has better understood the subject matter of the deal that the purchaser and his advisors will be able to decide how the transaction should be structured and which conditions should be included in the agreement. This regards, in particular, the representations and warranties that the buyer will request. In many cases, the due diligence findings will, indeed, have a substantial influence on these provisions[42].

Sometimes, due diligence enables the parties to identify conditions that will have to be fulfilled before the execution, and/or completion, of the envisaged agreement can take place. These are sometimes called "signing", or "completion", conditions precedent. In any event, due diligence often leads parties to start or intensify their negotiations regarding the content of the actual purchase agreement[43].

As a final note, the driving force behind a vast majority of mergers completed through the last 2 (two) decades has been the acquirer's desire to obtain targets intellectual property rights. By doing so, companies can add significant value and revenue by exploiting the full potential of their valuable intangible rights. In many instances, this means obtaining the necessary financing to acquire established properties and intellectual property rights in order to expand their business or to simply improve their performance and competitiveness.

C. The acquisition agreement

After completion of due diligence process, if prospective buyer determines to proceed with the M&A transaction in question, parties will execute an agreement which is usually called "purchase agreement", or "share purchase agreement" in the case of a share deal as opposed to an asset deal[44].

A share purchase is the acquisition of a company that is consummated by purchasing a controlling interest of its outstanding shares directly from the company shareholders.

[42]Id. at., p. 4
[43]Id. at., p. 4
[44] See GAUGHAN, MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS 2002., p.16

In a share purchase, the seller will have no continuing interest in the assets and liabilities or operations of the target company, unless by seller minority interest or agreement of the parties. Asset purchase is the acquisition of a company that is consummated by purchasing a portion or all of the assets directly from the target company itself, rather than by purchasing shares from the company shareholders. Only assets and liabilities specifically identified in the acquisition agreement of an asset purchase are transferred to the buyer, and all non-identified assets and liabilities remain with the seller.

One also encounters "share swap agreements" (in case the consideration is not paid in cash but through shares of another entity) or "merger agreements" (in case of a merger as opposed to a plain acquisition)[45].

The acquisition agreement shall include almost all of the legal, financial and business understandings of the buyer and seller about the M&A transaction in question. Ideally, it accomplishes four basic goals such as it sets forth the structure and terms of the transaction; it disclose all the important legal, and many of the financial, aspects of the target, as well as pertinent information about the buyer and seller; it obligates both parties to do their best to complete the transaction and obligates the seller not to change the target in any significant way before the deal closes; and it governs what happens if, before or after the closing, the parties discover problems that should have been disclosed either in the agreement or before the closing but were not properly disclosed[46].

It is important to mention that, unlike a letter of intent, explained above in detail, an acquisition agreement is a legally binding agreement and if any party fails to consummate the transaction without a legally acceptable excuse might be hold liable for the damages occurred. Other words, an acquisition agreement is a contractual instrument pursuant to which the parties, in a binding manner, implement- or agree to implement- the transaction and list all terms and conditions thereof[47].

[45]Peter, (2005)., p. 4, see also REED, et al., The Art of M&A : A Merger Acquisition Buyout Guide. 1995., p. 457
[46]REED, et al., The Art of M&A : A Merger Acquisition Buyout Guide. 1995., p. 458, see also ESIN & LOKMANHEKIM, Uygulamada Birleşme ve Devralmalar. 2003., s.38
[47]Peter, (2005)., p. 4

In order to alleviate any sorts of risk, parties of an M&A transaction usually prefer to execute a comprehensive acquisition agreement. The major segments of a typical agreement are preamble; the price and mechanics of the transfer; representation and warranties of the buyer and seller; covenants of the buyer and seller; conditions to closing; indemnification; termination procedure and legal miscellany[48].

In preamble, company structures (mainly the name of the company, address, whether it is duly incorporated under the laws of the country of which the company is resident, capital structure, subject and purpose of the company etc.) of the buyer and seller and purpose of each party to execute the acquisition agreement are indicated in detail.

Following the preamble, an acquisition agreement sets forth the most significant substantive business points of the acquisition agreement in question, the price and the mechanics of transfer. This section identifies the structure of the transaction as a stock disposition, an asset disposition, or a merger and describes the mechanics to be utilized to transfer the property from seller to buyer[49]. In case of an asset disposition, it is utmost important to identify exactly which assets are to be conveyed to the buyer and which liabilities of the seller will be assumed by the buyer.

In representation and warranties[50], both seller and buyer are obliged to provide some specific warranty that what has been conveyed is complete and accurate. The representations and warranties reflect the situation as of the date of the signing of the agreement and, together with the exhibits or schedules, are intended to disclose all material legal, and man material financial, aspects of the business to the buyer.

From the buyer's point of view, complete and accurate disclosure is vital, if the buyer is to understand what is being acquired. On the other hand, from the seller point of view,

[48]REED, et al., The Art of M&A : A Merger Acquisition Buyout Guide. 1995., p. 462, see also Peter, (2005)., p. 4-5
[49]REED, et al., The Art of M&A : A Merger Acquisition Buyout Guide. 1995., p. 464
[50] See also ESIN & LOKMANHEKIM, Uygulamada Birleşme ve Devralmalar. 2003., s.46, see also Tschäni Rudolf, Post-Closing Disputes on Representations and Warranties (ASA Swiss Arbitration Association Conference of January 21, 2005 in Basel, ASA Special Series 2005)., p.4, see also Peter, (2005)., p.7

full disclosure requires extensive time and effort. Moreover, it might be difficult for seller to cover every possible representation as complete and accurate.

In other words, fundamentally representations and warranties serve the purposes, inter alia, definition of the seller's company and to what extent the seller holds liable, if the seller's company does not comply with the definition. The most significant covenant relates to the obligation of the seller to conduct the business in the ordinary course with such exceptions as are agreed upon by the parties between the time of signing and closing[51].

Condition precedents are usually refers to separate condition that must be satisfied by the parties before closing. In this respect, if the buyer's or seller's obligation to close is not satisfied, the buyer or the seller will be entitled to terminate the acquisition agreement without being subject to any liability to recover damages of another party in this regard. Under appropriate circumstances a condition might be established that applies to both parties, but that is the unusual case. One mutual condition might be the receipt of certain key governmental consents; another is the absence of litigation or any administrative ruling that precludes the closing[52].

In indemnity section, the circumstances under which either party can claim damages or take other remedial action in the event the other party to the agreement has breached a representation and warranty or failed to abide by its covenants[53].

Simply, in termination section of the acquisition agreement, the circumstances under which either party can terminate the acquisition agreement and what are the implications of these termination for the parties. As customary, this section usually includes an exact closing date for the M&A transaction in question. If the closing fails to occur by that date due to the actions and/or inactions of one party, the other party who was capable of

[51]REED, et al., The Art of M&A : A Merger Acquisition Buyout Guide. 1995., p. 471
[52]Id. at., p. 477, see also ESIN & LOKMANHEKIM, Uygulamada Birleşme ve Devralmalar. 2003., s.42
[53]REED, et al., The Art of M&A : A Merger Acquisition Buyout Guide. 1995., p. 483

closing typically can elect to terminate the contract and sue the other party for breach of contract.

As a final note, for the sake of the parties, the acquisition agreement will need to include a dispute resolution mechanism for the settlement of disputes stemming from the acquisition agreement in question. There is no doubt that, the parties have complete freedom to determine which dispute resolution mechanism shall apply to their agreement. One should consider the benefits as well as the drawbacks of each dispute resolution mechanism and decide on which fits best to their interest. Following chapter of this thesis, author focus on the dispute resolution mechanisms individually, namely; litigation, negotiation, conciliation, mini-trial, mediation and arbitration, in order to illustrate which dispute resolution fits best for their dispute. Owing to that, dispute resolution mechanisms shall not be examined under this section of the thesis.

D. Signing and closing the transaction

If a negotiation with respect to the M&A transaction is completed, parties will determine an exact day to sign[54] the acquisition agreement and other agreements, such as shareholders agreement, escrow agreements etc. (if necessary). Execution of these agreements shall burden to the buyer the obligation to pay agreed share and/or asset prices while it burdens for seller to transfer such shares and/or assets in question. When we consider M&A transactions, almost all of them stipulates a time period between signing and closing so as to afford an opportunity for parties to o carry out conditions precedents by procuring necessary permission etc.

As mentioned above, in the vast majority of cases the transaction is not actually implemented upon signing.

[54] In order for the signed agreements to be valid and binding between the parties, such agreements should be signed by the authorized person. As per Article 9 of the PIL, the capacity to have rights and duties and to act shall be governed by the national law of the person concerned.

There are many reasons for this, usually because the parties have provided for "condition precedent" of various kinds[55]. Some of the most common condition precedents are competition filings in order to obtain clearance from the relevant authorities before the transaction can be completed; restructuring the business in order to complete the M&A transaction, if necessary; satisfactory post-signing due diligence[56]; no material adverse change ("MAC") clause, the seller ensures that, at closing the business will not be materially different to that known to the buyer through the information memorandum, due diligence and/or share purchase agreement; and all representations and warranties shall be true on the date of closing. Accordingly, if these condition precedents are not met before closing, buyer or seller is entitled opt-out from the M&A transaction at stake.

If all conditions are met within the designated time period, the deal is then actually completed and the closing occurs. A closing agenda or completion list might be useful in such cases. It describes what has to be done, by whom and when. For instance shares must be endorsed, shareholders and board of directors meeting must be held, resignations must be tendered, retention (with key managers or employees) must be entered into, new auditors and directors must be appointed, wire transfer must be made, amounts must be paid into escrow accounts, deeds, titles, opinions or secret formula must be handed over, and other related agreements must be executed[57].

E. Post-closing activities

Subsequent to the closing of the transaction, several activities remain open with respect to both parties, including post-closing due diligence, the calculation and settlement of post-closing purchase price adjustments and earn outs, and business integration. Following the close of the transaction, post-closing due diligence is conducted by the buyer. This phase of due diligence is to ensure that the buyer has acquired a business consistent with its understanding and the acquisition agreement.

[55]Peter, (2005)., p.5
[56] The parties may recognise that due diligence has not been completed upon signing and that it has to be concluded thereafter. This can occur, for instance, when the buyer was deliberately not granted full access to very sensitive information before a truly binding agreement was executed.
[57]Peter, (2005)., p.6

As part of this process, the buyer may learn important information which directly affects its integration efforts and a material information that was previously undisclosed, or information impacting the preparation of the closing balance sheet. When acquisition agreements incorporate post-closing purchase price adjustment or earn out clauses, both the buyer and seller may have contractual obligations post-close with respect to the preparation of materials necessary to calculate contractual adjustments to the purchase price.

"Earn-out clauses" do give rise to an inherent conflict of interest: in order to avoid, or limit, any price increase, the buyer might endeavor to reduce (or defer) the success of the target at least to the extent that this shall be reflected in its financial statements; on the other hand, the seller might try to artificially improve, or accelerate, the relevant financial results in order to benefit from the highest possible adjustment. The seller often plays, or can be suspected to play, an active role in this respect, if he continues to manage the business for a certain time following the closing[58].

Post-acquisition disputes commonly arise regarding purchase price adjustments and earn outs or as a result of alleged breaches of representations, warranties, or covenants detected during the buyer's post-closing due diligence. With respect to the latter, most acquisition agreements provide for indemnification of losses arising from such breaches.

III. Conclusion of part I

An M&A transaction includes various complicated steps to be fulfilled so as to accomplish the desired outcome. In order for a company to create a synergy by, inter alia, expanding its range of products to be offered, mitigating costs of production and maintaining business, boosting company's performance and higher long-term revenues, all actions regarding an M&A transaction shall be dully and carefully carried out.

[58]Id. at., p.6-7

For a prospective buyer, an M&A transaction begins with monitoring potential targets, which embodies characteristics, inter alia, production capacity, type of facilities, number of employees, market share, and engage an acquisition target either directly reaching out or invitation bid on a target. Direct reach out to a company provides significant benefits for buyers, such as lack of competition, mitigating the risk of overpaying, more flexibility and leverage in dictating the terms and pace of consummating transaction, as well as considerable advantages for target companies such as shortened and more discrete transaction process, minimal risk of confidential strategic or competitive information being leaked into the market.

On the other hand, a buyer may engage in an M&A transaction by overriding its competitors on invitation bid process. However, when we compare pros and cons of both processes, one might agree that invitation bid process contains crucial drawbacks for both prospective buyers and a target company. For a buyer, an auction process may leads to overpaying for a target company and decreases buyers chance to acquire target company and for a target company such process causes long-lasting transaction process.

Following the aforesaid procedure the parties may execute distinctive agreements, among others, confidentiality agreement, exclusivity agreement and letter of intent prior to enter into a detailed due diligence process in order to assess all legal, business, environmental and financial aspects of a target company in question. It is important for the parties to bear in mind that these agreements have quite important nature, thus, should be drafted carefully and consciously.

By considering the nature and scope of a due diligence process, it may take a weak or years to complete and draft a report as to whether the target company embodies the characteristic that the buyer is looking for. If, after due diligence process, a buyer would like to proceed with such, transaction parties initiate detailed negotiations with regard to the terms and conditions of the acquisition agreement and other agreements, if necessary. Due to the fact that the mainly acquisition price and scope of the representations and warranties shall be determined in accordance with the due diligence examination, it is important for the

prospective buyer to handle such process by giving utmost importance and evaluating all collected and provided data cautiously.

Subsequent to drafting and negotiating phase of necessary agreements, the parties shall conduct a signing ceremony which includes determination of the exact date of closing and the list of items to be fulfilled (conditions precedent) by the parties either exclusively or jointly until the date of closing. If any party fails to perform its obligations until the closing date, other party shall be entitled to opt-out the M&A transaction and ask for compensation for its damages encountered due to the non-completion of the transaction in question. However, if all conditions precedents are fulfilled by the parties, parties may conduct all necessary transactions (transfer of shares and/or assets, transfer of money etc.) in order to finalize an M&A transaction at stake.

PART II: LITIGATION AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

I. Introduction

A variety of dispute resolution processes exist so as to settle disputes stemming from the business relationships and/or transactions. As a dating back tradition, some of the processes, such as litigation, are more familiar to the considerable amount of businesspersons, while ADR mechanisms may be less well understood. However, the latest survey with regard to the improvements and innovations in international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London, and White&Case Law Firm in 2015 has been revealed that, of the 90% of respondents who preferred international arbitration as their dispute resolution mechanism; either alone (56%) or in combination with ADR mechanisms in a multi-tiered, or escalating, dispute resolution process (34%). On the other hand, only one out of ten (10%) corporations prefers transnational litigation while resolving their disputes at stake[59].

After examination over the surveys which are conducted by School of International Arbitration, Queen Mary College, University of London together with PricewaterhouseCoopers or White&Case Law Firm and highlighted significant issues, inter alia, usage of arbitration as a preferred dispute resolution mechanism for international commercial and non-commercial disputes. Upon a detailed scrutiny over the surveys conducted between 2006 and 2015, it is crucial to mention that in 2006[60], 73% of participants identified international arbitration as their preferred mechanism for dispute resolution- either on a standalone basis (29%), or in combination with ADR mechanisms as part of a multi-tiered, or escalating, dispute resolution process (44%).

[59] Queen Mary University of London School of International Arbitration & White&Case Law Firm, *Improvements and Innovations in International Arbitration*(2015), *available at* http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

[60] Queen Mary University of London School of International Arbitration & PricewaterhouseCoopers, *Corporate Attitudes and Practices*(2006), *available at* http://www.arbitration.qmul.ac.uk/docs/123295.pdf.

On the other hand in 2015, as mentioned above, the usage of arbitration has experienced a spectacular increase and reached to 90%[61] (on a standalone basis (56%), or in combination with ADR mechanisms as part of a multi-tiered, or escalating, dispute resolution process (34%)).

As a final note, this part of the thesis mainly focuses on litigation and ADR mechanisms. Furthermore, throughout this part of the thesis the author based his explanations mainly on the EU regulations.

II. Detailed examination as to the distinctions between litigation and ADR mechanisms

A. Litigation

1. Introduction

Litigation includes a case, controversy, or lawsuit being brought in the court. The filing party is named as claimant or plaintiff while being sued in a civil case, or who is being prosecuted in a criminal case, is called the respondent or defendant. The trial is an adversarial process in which each party usually represented by its attorney/-ies, submit all necessary evidence and call witnesses in order to represent its case and convince the judge and/or jury for in favour of themselves.

The losing party is usually entitled to appeal to the relevant appellate court for seeking annulment of the verdict issued by the relevant court of first instance. Both trial/first instance courts and appellate courts are limited by the law in terms of the type of cases they can hear and the remedies that can be awarded.

[61] Especially sole usage of arbitration has been increased enormously beginning with 29% in 2006 and reached to peak in 2015 as 56%.

In addition to that the entire litigation process is subjected to the strict procedural rules of which the parties of the dispute at stake should abide. Litigation effectively delegates power and control of the dispute to a third party and the parties involved do not retain full control over the dispute. Some litigating parties become relatively passive, disempowered and often disillusioned by the entire process[62].

2. So-called advantages of litigation

Prior the determine the process which will be used to settle a dispute, parties shall consider all necessary advantages and disadvantages of the processes and also consider which mechanism fits best for their dispute at stake. Each dispute resolution mechanism has its own advantages and disadvantages. However, one might argue as to whether the below mentioned issues are really an advantage for the disputants or not.

In litigation, there is a significant body of substantive law and procedure that exists and automatically controls a lawsuit, therefore, the parties do not have to create the rules that will govern the lawsuit. Furthermore, it is important to bear in mind that the judge, by law, must be impartial and the judge's pay check is not dependent upon whether the parties ever use that particular judge in another matter. The judge is not personally affected by the outcome of the case. In addition to that either party of a dispute is entitled to appeal whole or any part of the decision issued by trial/court of first instances.

As a final note, pursuant to the surveys conducted by School of International Arbitration, Queen Mary College, University of London, and White&Case Law Firm and PricewaterhouseCoopers, one out of ten corporations prefers to rely on litigation instead of ADR mechanisms or arbitration. Those corporations that are preferred to rely on litigation tend to fall into one of two categories; corporations operate principally in developed countries, where they believe that they will have access to an independent, impartial judicial system, and corporations from developing countries that may be

[62]Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation*, (2010)., p.50

inexperienced with and apprehensive about the arbitration process or ADR mechanisms and feel more comfortable resolving disputes in their own court systems[63].

3. Why litigation remains weak for M&A disputes

As mentioned in Part I, the vast majority of M&A transactions have complex nature. Despite this complex and detailed nature of an M&A transactions, parties do not eager and careful to draft a comprehensive dispute resolution clause while entering into an exciting M&A transaction. The main idea standing behind this situation is the fact that neither party enters into an M&A transaction by considering the risk of facing controversy with respect to any complex ingredient of an M&A transaction.

Nowadays, there are still considerable amount of businesses which insist on determining litigation as a dispute resolution mechanism in their international commercial contracts. That's not because of the litigation is a superior mechanism for resolving international commercial disputes but such mechanism shall apply customarily. Furthermore, as mentioned above, the parties of an M&A transaction do not care too much about the dispute resolution mechanism indicated in acquisition agreement, thus, the most familiar mechanism, which directly refers to litigation, does not seem problematic at the outset.

Deficiencies of litigation as a dispute resolution mechanism for M&A disputes are (a) limited jurisdiction of courts with respect to dispute to be heard and type of compensation to be rendered; (b) lack of familiarity with local court procedures and language; (c) limited party control over the dispute; (d) determination of the applicable law and the application of "rules of law"; (e) admissibility of evidence; (f) difficulties with regard to

[63]Queen Mary University of London School of International Arbitration & PricewaterhouseCoopers, Corporate Attitudes and Practices. 2006.., see also Queen Mary University of London School of International Arbitration & PricewaterhouseCoopers, *Corporate Choices in International Arbitration-Industry Perspective*(2008), *available at* https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf., see also Queen Mary University of London School of International Arbitration & White&Case Law Firm, *Choices in International Arbitration*, (2010)., see also Queen Mary University of London School of International Arbitration & White&Case Law Firm, *Current and Preferred Practices in the Arbitral Process*, (2012)., see also Queen Mary University of London School of International Arbitration & Firm, Improvements and Innovations in International Arbitration. 2015.

the foreign judgements; (g) lack of confidentiality; (h) long-lasting procedures; (i) excessive cost of pursuing litigation; (j) lack of independent or impartial judiciary and corrupted system; (k) restrictions on judicial review of an arbitral award and (l) lack of specialized judges and ever-increasing docket numbers.

a) Limited jurisdiction of courts with respect to the dispute to be hear and type of compensation to be rendered

Even though each country stipulates its own procedural rules in their own laws and regulations, it might be possible to generalize that each procedural law foresees some sort of provisions that may prevent parties to file a lawsuit regarding their dispute in question. Furthermore both in common law and civil law type of compensations to be rendered is very limited. Indeed, in common law countries, juries may award punitive damages and a fairly wide range of compensatory damages such as for pain and suffering. In civil law systems damages are much more limited, normally excluding punitive damages and very significantly restricting noneconomic compensatory damages.

b) Lack of familiarity with local court procedures and language

In the event that the disputants established in different countries, they usually do not prefer to defend or submit their case to the local court which is unfamiliar with respect to the law governing, procedures and language.

c) Limited party control over the dispute

In a typical courtroom litigation, in which parties have little to no control over the judge to whom a case may randomly be assigned or, as a defendant, even the court in which it may be sued. What's worse? Especially in common law system, almost every judge applies its own rules and litigants must cope with a veritable forest of rules that differ from case to case, creating even more uncertainty and lack of control.

d) Determination of the applicable law and the application of "rules of law"

In case involving foreign element, the national judge usually under obligation to determine the law of which *country* will be applied for dispute or disputes before the court. For that purpose he is obliged to apply his own country's rules of private international law while determining the applicable law in question.

With regard to the application of the "rules of law", the traditional conflict of laws doctrine is that only the law of a country can be selected to govern a transaction or issue. On this basis, unless otherwise designated in the relevant laws and regulations of the country, a national court cannot directly apply the lex mercatoria or rules based on a combination of national laws or non-binding rules of law, such as International Institute for the Unification of Private Law ("UNIDROIT")[64], United Nations Commission on International Trade Law ("UNCITRAL")[65] etc.

e) Admissibility of Evidence

One should note that the admissibility of evidence in proceedings before a court is governed by the law of evidence, which may impose constraints on what can be admitted. Therefore, parties of a dispute may encounter significant problems stemming from the question of what should be deemed as admissible evidence before the court in charge. Furthermore, almost in all country's civil procedure rules contains restricted admissibility of evidence, thus, parties sometimes face distinctive sorts of problems while submitting their case to the court.

[64] International Institute for the Unification of Private Law, *available at* http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf.
[65] United Nations Commission on International Trade Law, *available at* https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

f) Difficulties with regard to the foreign judgments

Each country has its own sovereignty right and may cause significant problems while enforcing and/or recognizing foreign court judgements. On the other hand, while there are only limited arrangements in force for the international recognition and enforcement of judgements in civil cases, the position is otherwise in the case of international commercial arbitration, which is governed by the 1958 New York Convention on the Recognition and Enforcement (the "New York Convention")[66]. The New York Convention has been ratified by 156 states[67] and the Republic of Turkey ("TR") has been accessed the New York Convention on July 2, 1992. Under the New York Convention, a party receiving an arbitral award in one of the signing countries is entitled to, on complying with the requisite formalities, have the reward recognized and enforced in another signatory state.

g) Lack of confidentiality surrounding proceedings

Although each jurisdiction stipulates distinctive rules as to the confidentiality of court proceedings, these proceedings are usually open to public and also media.

h) Long lasting trials and appeal processes

There is no doubt that court proceedings last longer than that of ADR mechanisms and arbitration due to the existence of wide range of appellate proceedings and high volume of docket numbers. This can be critical in commercial matters, where the parties have ongoing business relationships or need to cease such business relationship through the course of the dispute in question, or where the parties cannot delay in making all sorts of business decisions because of the ongoing dispute[68].

[66] United Nations, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.
[67] For the signatory countries please see http://www.newyorkconvention.org/countries (Last updated on March 1, 2016)
[68] See ILDIR, Alternatif uyuşmazlık çözümü : Medeni Yargıya Alternatif Yöntemler. 2003., p.56

i) Excessive cost of pursuing litigation overseas

Following a case in overseas may engender considerable amount of expenditures and also cause considerable wearing upon the foreign party.

j) Lack of independent or impartial judiciary and corrupted system

There is no doubt that local courts usually remained close to the local party and such unfair attitudes jeopardize their credibility before foreign parties.

k) Restrictions on judicial review of an arbitral award

In litigation, almost in all jurisdictions, parties of a dispute are entitled to appeal or ask for secondary with respect to the decision issued by the court of first instance.

l) Lack of specialized judges and ever-increasing docket numbers

There is no doubt that a controversy stemming from an acquisition agreement has quite complex nature. Therefore, it is necessary for the judge to have specific information regarding the M&A transaction and related agreements. Unfortunately, it is not possible for domestic judges to become an expert in one area because of the ever-increasing docket numbers[69] needed to be closed within the limited time period.

[69] See ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 619-626, see also http://www.adlisicil.adalet.gov.tr/# for the volume of dockets in courts in Turkey.

B. ADR mechanisms

1. Introduction

In this part, the author mainly focuses on ADR mechanisms which are used to resolve complex commercial disputes. In this respect, the author mainly considers EU regulations and UNCITRAL while making his explanations.

The question as to whether arbitration should be deemed as an ADR mechanism still being subjected to several discussion among practitioners and academicians. Owing to that, it is important to mention the author's approach with respect to the ever-increasing matter prior to enter into details of arbitration.

Having reviewed the notion and features of the arbitration in detail, it appears to the author that the arbitration should be deemed as a separate dispute resolution mechanism, therefore, arbitration shall not be explained under the ADR mechanisms within the context of this thesis[70]. Thus, arbitration shall be further explained in Part III below.

There are several mechanisms available for the settlement of a dispute between two parties. When a dispute arises between two parties belonging to the same country, these parties can get the said dispute resolved through the courts established by law in that country. There is no doubt that, this has been the most common and established mechanism applied by the citizens of a country for the resolution of their disputes with the fellow citizens[71]. Nonetheless, applying domestic courts shall not be deemed as the best option, if the dispute involves foreign elements such as workplace, nationality etc.

[70] See CEMAL ŞANLI, ULUSLARARASI TİCARİ AKİTLERİN HAZIRLANMASI VE UYUŞMAZLIKLARIN ÇÖZÜM YOLLARI (İstanbul : Beta, 2013. 5. Baskı. 2013).p.436; for adverse opinion please see ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009. P.146, see also KARL J. T. WACH & FRANK MECKES, TACTICS IN M & A ARBITRATION (Frankfurt am Main : German Law Publishers. 2008)., p.8

[71] VINOD K. AGARWAL & B. OWASANOYE, ALTERNATIVE DISPUTE RESOLUTION METHODS (2001)., see also Meadow, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES, ELSEVIER LTD, (2015)., p.5

At this stage, it is recommended for parties of a dispute to consider applying ADR mechanisms which fits best for their dispute at stake. Instead of adversarial dispute resolution processes, ADR mechanisms should aim at preserving the flexibility of the process and providing much more amicable settlement forum so as to maintain good relationship between the parties.

There are lots of different definitions of ADR. However, European Commission ("EC") stipulates an explicit definition as to the ADR in its Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (the "Green Paper 2002"):

"ADRs are flexible, that is, in principle the parties are free to have recourse to ADRs, to decide which organisation or person will be in charge of the proceedings, to determine the procedure that will be followed, to decide whether to take part in the proceedings in person or to be represented and, finally, to decide on the outcome of the proceedings[72]*."*

In light of the foregoing explanations and nature of ADR mechanisms, one might possibly illustrate some general features for all ADR mechanisms, inter alia, typically less formal than adversarial dispute resolution mechanims; provide a rapid, relatively inexpensive alternative to litigation; encourage negotiated settlement rather than adjudicated decisions; often highly confidential in relation to litigation; flexible enough to be adapted on a case-by-case basis, because they are not governed by legal rules; and typically provided by private practitioners for a fee, rather than by judges and lawyers[73].

Furthermore, each ADR mechanism contains specific characteristics, consequently differentiated from each other. Differences include: levels of formality, the presence of

[72] See European Commission, *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*(2002), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0196&from=EN., for definition see also ILDIR, Alternatif uyuşmazlık çözümü : Medeni Yargıya Alternatif Yöntemler. 2003., p.26

[73]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 28, see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p. 437, see also WACH & MECKES, Tactics in M & A arbitration. 2008., p.8

lawyers and other parties, the role of the third party (for instance the mediator), and the legal status of any agreement reached[74].

2. Advantages and disadvantages of ADR mechanisms

ADR mechanisms involve considerable benefits as well as significant drawbacks. Due to this reason, it is highly recommended for disputants to consider as to whether their case fits any of the ADR mechanisms and they would like proceed with any of them.

ADR mechanisms provide considerable benefits for disputants and these benefits are scrutinized below in detail:

a) Allow Access to Justice

ADR mechanisms can be more accessible to those who have limited economical sources.

b) Efficiency on Time and Cost[75]

Even though, there are still numerous discussions with regard to the efficiency of ADR mechanisms by means of time and cost. It might be possible to mention that, ADR mechanisms are more or less efficient than that of adjudicative dispute resolution mechanisms.

c) Flexible and Creative

The parties can choose the ADR mechanism that is best for them. For example, in mediation the parties may decide how to resolve their dispute. This may include remedies not available in litigation (e.g. a change in the policy or practice of a business)[76].

[74] Melissa Lewis & McCrimmon Les, *The Role of ADR Processes in the Criminal Justice System: A view from Australia* (2005).p.2
[75] See ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 205-207
[76]Commission, Civil Justice Review Report. 2002., p.214

d) Confidentiality[77]

Unlike the court system where everything is on the public record, ADR can remain confidential. This can be particularly useful, for example, for disputes over intellectual property which may demand confidentiality[78].

e) Win-Win Nature of the ADR Mechanisms[79]

ADR mechanisms are non-adversarial. In order to establish long-lasting business relationship, it is quite important to resolve dispute in amicable way and produce win-win outcomes.

f) Expert Review

The vast majority of ADR mechanisms afford an opportunity for disputants to apply an expert instead of an ordinary court judge who does not have any specific knowledge with regard to the dispute at stake.

Despite the fact that ADR mechanisms provide spectacular pros for disputants, these mechanisms are also have considerable drawbacks:

a) Suitability

ADR mechanisms sometimes do not fit well for the disputes at stake. For example, if a party wishes to have a legal precedent or it is a public interest case, judicial determination may be more appropriate.

[77] See ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 435-448
[78]Commission, Civil Justice Review Report. 2002., p.214
[79] See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p. 437

b) Lack of Court Protection

As the name implies, the ADR mechanisms do not provide protections of which should be granted in litigation.

c) Lack of Compulsion.

Parties are entitled to walk away from negotiations whenever they deem necessary. This possibility brings significant questions up to the mind with regard to the efficiency of ADR mechanisms.

d) Disclosure of Information

There is generally less opportunity to find out about the other side's case with ADR than with litigation. ADR may not be effective if it takes place before the parties have sufficient information about the strengths and weaknesses of their respective cases.

3. Types of ADR mechanisms

The major dispute resolution processes consist of two main classes: those that reserve authority for resolution to the parties themselves and those in which a third party decides the matter[80]. The first class compromise of, inter alia, negotiation, mediation, the summary jury trial and minitrial. The second class includes, among others, private judging and a hybrid mediation process entitled as med-arb. The ADR mechanisms indicated in second class empowers the competent authority to render a binding decision over the dispute at stake.

Despite the fact that there are numerous ADR mechanisms available for disputants, the author mainly focuses on (a) negotiation, (b) conciliation, (c) minitrial and (d) mediation. Each ADR mechanism lettered above shall be examined in detail below.

[80]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 29

a) Negotiation:

(1) Introduction

Negotiation is the most flexible approach to the resolution of business disputes and thus the most common. In other words, negotiation occurs in business, non-profit organizations, and government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life[81]. Therefore, there are lots of different views as to the definition of the term negotiation.
However, it might be possible to define negotiation as any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them.

Negotiation has also been characterized as the "preeminent mode of dispute resolution"[82], which is hardly surprising given its presence in virtually all aspects of everyday life, whether at the individual, institutional, national or global levels. In addition to that, each negotiation is unique, differing from one another in terms of subject matter, the number of participants and the process used.

However, nowadays the vast majority of conflicting parties prefer to apply litigation or arbitration instead of resolving disputes via negotiation. Still, even in these circumstances, the disputants had an opportunity to resolve some or all of the issues through negotiation.

Negotiation is a process of balancing one's own needs against the competing needs of another and arriving at an agreement that is mutually satisfying. Because negotiation involves asserting one's need while accounting for another's, it can lead to very

[81]Jelis Subhan, *Arbitration Conciliation and Mediation-Conflict Between Formal and Informal Setups*, (2010)., p.11
[82]Goldberg, et al., (1992)., see also W. MICHAEL REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION : CASES, MATERIALS, AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (Westbury, N.Y. : Foundation Press, 1997. 1997)., p.73

unproductive responses to conflict[83]. Unlike arbitration, negotiation does not require participation of a neutral third party with decisional authority. Instead, the parties themselves have the responsibility for deciding the terms of any resolution[84].

(2) Substantial notions in negotiation

Prior to explain main characteristics of negotiation process, it would be quite beneficial to explain fundamental notions as to the negotiation process. Owing to that the notion of "Interests", "Batna", "Bottom Lines" and "Zopa" are examined below.

Interests are the primary currency of negotiation- the things that guide negotiator's decisions- but they are often unspoken or masked[85]. Negotiators are sometimes solely focus on one or both side's negotiation positions, rather than on each side's interest. Owing to that it would be quite important for negotiators to obtain all necessary information from his client so as to reach an agreement within the shortest time.

Batna is originally developed in the book of *Getting to Yes*[86] and stands for best alternative to a negotiated agreement. In short, a negotiator should never settle for something that is worse than his or her Batna. Therefore, it would not be sensible to enter an agreement if it satisfies your interests less well than some other course of action you could take[87]. However, a party should take all necessary components into consideration (identifying the range of possible alternatives) while determining his or her Batna. After identifying the range of possible alternatives, the second phase in determining Batna is to compare the relative merits, risks and opportunities of each course of action. The alternative that presents the most attractive package, on balance, is your Batna.

[83]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 62
[84]Robert Mnookin, *Alternative Dispute Resolution*, 232 HARVARD LAW SCHOOL JOHN M. OLIN CENTER FOR LAW, ECONOMICS AND BUSINESS DISCUSSION PAPER SERIES (1998)., p.4
[85]MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, DISPUTE RESOLUTION : EXAMPLES & EXPLANATIONS (New York : Wolters Kluwer Law & Business, 2nd Edition. 2011)., p.2
[86] ROGER FISHER, et al., GETTING TO YES : NEGOTIATING AGREEMENT WITHOUT GIVING IN (New York : Penguin Books, 2nd Edition. 1991).
[87]MOFFITT & SCHNEIDER, Dispute Resolution : Examples & Explanations. 2011., p.3

Furthermore, in every negotiation, parties of a dispute have bottom lines that each party will not or cannot cross. Economists typically refer to these limits as each party's reservation value. Zopa, or zone of possible agreements, refers to the space between the two negotiator's bottom lines- the points at which a mutually satisfactory agreement is theoretically possible.

(3) Characteristics of negotiation

It might be possible to express characteristics of negotiation as voluntary, bilateral, non-adjudicative, less formal, confidential, flexible and less adversarial information exchange.

In negotiation, it is not possible to force parties of a dispute to participate in negotiation process. Moreover, parties of a dispute are entitled to either accept or reject the outcome acquired through the negotiation process and can withdraw at any point during the process. Parties may participate directly in the negotiations or they may choose to be represented by someone else.

Furthermore, negotiation process should involve at least two conflicting parties. However, there is no determined maximum limit of parties involved in negotiation.

On the other hand, there are different categories of ADR mechanisms. Negotiation is not a non-adjudicative ADR mechanism so the outcome of a negotiation is reached by the parties together without recourse to a third-party neutral. Besides, there are no compulsory rules applicable to negotiation process. Parties of a dispute are completely free to determine procedurals rules applicable to their dispute in question. However, generally parties determine the subject of negotiation process, location and time of the negotiation process. Additional matters such as confidentiality, the numbers of negotiation sessions the parties commit to, and which documents may be used, can also be addressed.

In the event that the esteemed parties are disputants and the subject of the disputes are, inter alia, trade secrets and intellectual property matters confidentiality issue reached utmost significance. In negotiation, parties of a dispute are entitled to opt in public and private negotiation process.

At the end of a day, confidentiality is vital for business parties in order to prevent disclosure of their trade secrets or any other sensitive information.

Last but not least, parties are free to determine the scope of the negotiation. Furthermore, parties can determine not only the topic or the topics that will be the subject of the negotiations, but also whether they will adopt a competitive-compromise bargaining approach or an interest-based approach. In other words, the most flexible mechanism would probably be negotiation, followed by mediation[88].
As a final note, negotiation involves less adversarial exchange of information, rather than structured presentation of evidence as may be the case in many negotiation-oriented, as well as all of the adjudicative ADR mechanisms[89].

(4) Negotiation models

There are two general models of negotiation. The first model is termed as *competitive-compromise model*. This model normally places the parties in opposition to one another so that outcomes are measured comparatively or in a win-lose fashion[90].

Furthermore this model usually maximizes winner party gains in a way that, concurrently, maximizes the losing party's losses. Owing to that outcomes achieved throughout the application of competitive-compromise model are often unilaterally satisfactory.

[88]Ogden Judith Stilz & Nickki McIntyre Finlay, *Strategies for Choosing a Dispute Resolution Method*., p.8
[89]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 62
[90]Id. at., p. 63

The second model is variously known as *interest-based negotiation*[91]. Interests are needs, desires, aspirations, fears, hopes, and concerns. Positions are what we want and demand. The interests are the reasons behind the position. In negotiating on the basis of interests, parties will need to distinguish between positions and interests; move from positions to interests; list all the interests according to priority; and think of positions as only one of many solutions to the problem[92].

This approach shifts the focus of the *discussion* from positions to *interests*. Because there are many interests underlying any position, a discussion based on interests opens up a range of possibilities and creative options, whereas positions very often cannot be reconciled and may therefore lead to a dead end[93].
Interest-based negotiation requires the parties to negotiate objectively and cooperatively and seeks to maximize the outcomes achieved for both parties. Consequently such approach avoids win-lose outcomes that are generally acquired in competitive-compromise negotiation.

Either approach has its own pros and cons. The competitive approach allows skilful advocate to achieve maximum gain in negotiation process irrespective of the needs and interest of their side. Thus "winning" party may receive highly satisfactory recoveries.

However, such approach embodies significant drawbacks as well. Competitive approach based on maximization of gain and consequently such outcome may or "can" jeopardize amicable long-term business relationship between parties. Furthermore, parties are more likely to involve unethical conducts so as to obtain desired outcome.

Finally, if the negotiators are not of equal ability, competitive negotiation may result in agreements that are unfair and inconsistent with the merits of the underlying case. In

[91] See Robert E Wells Jr, *Alternative Dispute Resolution-What Is It-Where Is It Now*, 28 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL (2003)., p.652
[92] YONA SHAMIR & RAN KUTNER, ALTERNATIVE DISPUTE RESOLUTION APPROACHES AND THEIR APPLICATION (Unesco. 2003)., p.8
[93]Id. at., p.6

short, a very good negotiator may obtain an agreement that exceeds the value of the case if the opposing negotiator is less skilled or less well-prepared[94].

The pros and cons of the interest-based model are opposite of those the competitive approach. Interest-based approach suppresses the opportunity of highly effective negotiators to procure excessive outcome with regard to the dispute at stake. However, unlikely the competitive approach, the interest-based approach is very beneficial to develop long-term relationship between parties. Finally, interest-based approach is less encouraging to ethical violations because such approach mainly focuses on win-win solutions for parties.

Nevertheless, negotiation is dynamic, evolving process, and the most skilled negotiators would never limit themselves to merely one approach[95].

(5) Advantages of negotiation

Negotiation, as a dispute resolution mechanism, provides considerable advantages for disputants when it is compared to other disputes resolution mechanisms. These advantages are, among others, flexibility, greater successful possibility, voluntary process, right to determine boundaries of the agreement, enhance business relationships and reduces expenses and delays.

Negotiation is the most flexible form of dispute resolution as it only involves relevant peoples of conflicting parties and their representatives. Parties have complete discretion with regard to process of negotiation and applicable procedural rules.

Furthermore, like all ADR mechanisms, negotiation does not provide precise successful guarantee to parties. However, the vast majority of commentators reckon that negotiations have a greater possibility of a successful outcome when the parties adopt an

[94]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 64
[95]MOFFITT & SCHNEIDER, Dispute Resolution : Examples & Explanations. 2011., p.10

interest-based approach as opposed to a competitive approach. Negotiation process mainly focuses on mutual interest and needs of each party and consequently such mechanisms afford and opportunity for conflicting parties to reach a win-win solution.

Besides, in negotiation, conflicting parties are not under any obligation to participate in negotiation process. Furthermore, conflicting parties are, at any time, free to opt out negotiation process without demonstrating any valid or justified reason.

In addition to aforesaid explanations, negotiation process provides substantial right to conflicting parties to determine terms and conditions of the agreement which will demonstrate common needs and interests of the parties.

Last but not least, unlike adjudicative ADR mechanisms, negotiation provides an opportunity for conflicting parties to reach a win-win solution while establishing long-term relationships.

Lastly, negotiation process is usually less expensive than litigation and considerably avoids delays in reaching a mutual agreement.

(6) Why negotiation remains week for M&A disputes

Despite all of the benefits listed above, negotiation contains considerable drawbacks that retain negotiation to become one of the leading dispute resolution mechanisms for highly complex M&A disputes.

At the beginning, negotiation embodies significant risk of inequitable process. In other words, one of the conflicting parties may have significantly more economical power to recruit high ranking negotiator(s). Where a party with an interest with regard to the dispute at stake is excluded or inadequately represented through the negotiation process with regard to the M&A dispute in question, the value of the reached agreement is diminished, thereby making it subject to future challenge.

Furthermore, in arbitration, parties of the disputes empower arbitrator or arbitrators to render a final and binding decision due to the fact that they are unable to understand each other's interest. As a natural consequence of this situation parties may encounter distinctive sorts of problems on reaching a mutual agreement. Contrary, in negotiation sometimes parties do not prefer to appoint third party in order to increase the level of communication. Nonetheless, in some cases, parties refrain from appointing a third party. In this respect, absence of a third party may cause for parties to get stuck in the dispute and cannot reach any resolution regarding the dispute in question.

In addition to that, there will be virtually no chance of an agreement where the parties are divided by opposing ideologies or beliefs which leave little or no room for mutual concessions and there is no willingness to make any such concessions. Furthermore, throughout the negotiation process parties of a dispute may infringe the notions of good faith or trustworthiness and negotiation may be used as a stalling tactic to prevent another party from asserting its rights.

Most importantly, parties of a dispute are completely free to opt out negotiation process and other party shall not be entitled to force other party to continue in negotiation process. Besides, it would be quite risky for any party to enforce such agreement achieved via negotiation in another country. Therefore, these situations may cause delays and monetary losses for the parties of the dispute.

b) Conciliation

(1) Introduction

Conciliation brings two opposing sides together so as to afford an opportunity for these parties to reach a compromise by the assistance of a conciliator, thus, avoiding them to take such dispute to trial.

Over the past few decades, the vast majority of parties tend to resolve their disputes via using ADR mechanisms instead of traditional court-based litigation model. UNCITRAL, one of the most important organizations[96], played a vital role with regard to the development of uniform rules for conciliation process by issuing the MLICC.

Conciliation has been used to resolve disputes on questions of law, the relevant facts, or a combination of both. It can be utilized in the settlement of disputes that involve "non-arbitrable" or "non-justiciable" issues and are generally not hindered by jurisdictional challenges[97]. In other words, conciliation is an effective means of ADR and can be usefully deployed for both international as well as domestic disputes.

During the 1980's and until late 1990's usage of conciliation as a dispute resolution mechanism for international commercial disputes experienced a magnificent increase while litigation remained silent in this regard. Considerable amount of businesses engaged in both international and domestic commercial transactions perceived that conciliation provides various benefits compared to litigation or other adjudicative dispute resolution mechanisms.

One might argue that, adjudicative dispute resolution mechanisms are too lengthy, too costly and too adversarial (win-lose outcome) for the parties who would prefer to establish long-term commercial relationship with other party of the dispute. In contrast, awareness grew that conciliation was neither costly, nor lengthy and much less adversarial than adjudicative dispute resolution mechanisms, and that, in addition, conciliation, being a process that is non-adjudicative, presented advantages such as parties' control over the outcome, opportunity for open dialogue between the disputants, minimal procedural issues and possibility of developing creative and mutually acceptable solutions[98].

[96]See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.415-419
[97]Reif C. Linda, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INTERNATIONAL LAW JOURNAL (1990)., p.583, see also REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., p.76
[98]Eric Van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation*, 21 JOURNAL OF INTERNATIONAL ARBITRATION (2004)., p. 2; see also Ivan Bernier & Nathalie Latulippe, *Conciliation as a Dispute*

In the early years of its use, conciliation was used together with other means of ADR mechanisms (escalation clauses[99])[100]. Parties usually prefer to apply conciliation in the first place and if parties cannot reach an agreement by using this mechanism, they are entitled to walk away from the table and apply arbitration or ADR mechanisms.

(2) Major distinction between conciliation and mediation

Nowadays, some authors still prefer to use mediation and conciliation interchangeably[101]. It is not possible to ignore the truth that the concept of conciliation stemmed from and resembles mediation, with both mechanisms using a third party to facilitate a non-binding result through the medium of communication with the disputants[102]. However, a distinction between these two ADR mechanisms can be easily made with respect to the degree of formality and level of initiative imposed on the third party.

A mediation is quite informal than that of conciliation and mediator constructs disputants based on purely on the information provided by the parties. In stark contrast, a conciliation process is formal in structure and procedure. The central objective of the conciliator is to facilitate an amicable settlement of the conflict by communicating with the parties, typically through structured conciliation proceedings, and by submitting written proposals for a resolution of dispute[103].

Moreover, the conciliator is entitled to determine format of the conciliation process while he or she is under obligation to act in accordance with the rules that are determined

---

Resolution Method in the Cultural Sector, THE INTERNATIONAL CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS., p.5, see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.411

[99] At present the vast majority of dispute Resolution clauses stipulate escalation clauses. Escalation clauses usually oblige parties to first apply ADR mechanism (parties always prefer mediation as a first step) so as to resolve the dispute within the limited time period. If parties cannot resolve the dispute in question via ADR mechanism within the designated time period, they can apply for arbitration to obtain final and binding decision for their dispute.

[100] See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p. 411-412

[101] See ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 153

[102] Reif C. Linda, FORDHAM INTERNATİONAL LAW JOURNAL, (1990)., p.584

[103] Id. at., p.584

between disputants. Investigation into the facts and the law will be undertaken by the conciliator, and both written and oral submissions from the parties' agents will usually be presented.

The conciliator may attempt to facilitate amicable settlement by determining precise needs of the disputants and creating productive solutions in this regard.

The conciliator shall record his recommendations in a report that will be provided to the disputants. Due to the non-binding nature of the proposals, is to give the report to the disputants for a period of time within which they must decide whether they can accept the recommendations or not[104]. If disputants agree on the recommendations, the conciliator shall draft a document which illustrates that the conciliation process is successful and outlines the terms of the agreement. However, it is crucial to mention that disputants are free to walk away from the negotiations at any time of the process. In this case, the conciliator shall indicate that the disputants did not accept the proposal.

(3) Considerable "necessity" as to the uniform rules on conciliation

Considerable amount of reputable institutions have been conducted or have being conducted lots of specific focus programs in order to determine and issue uniform set of rules for the conciliation process.

In the US, after many years and sweat buckets of labour, National Conference of Commission on Uniform State Laws ("NCCUSL") finalized a draft Uniform Mediation Act ("UMA")[105] which is approved on August 2011 and recommended for enactment in all states of US.

In Europe, EU published the Green Paper 2002. In June 2002, UNCITRAL published its final draft of the MLICC.

[104]Id. at., p.585

[105] National Conference of Commissioners on Uniform State Laws, *available at* http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf.

In August 2003, the NCCUSL adopted an amendment to the UMA regarding international commercial conciliation by adding an article incorporating by reference the Model Law on International Commercial Conciliation. In doing so, the UMA intends to give international mediation participants the option (as a default provision) to declare the Model Law on International Commercial Conciliation applicable to the mediation but apply the confidentiality provisions of the UMA[106]. After adoption of the Model Law on International Commercial Conciliation, the vast majority of the institutions published their own procedural rules with regard to the conciliation process.

(4) Conciliation process and main characteristics of the conciliation

Parties can resort to conciliation either insert a conciliation clause into a treaty or contract or consent to a discrete conciliation agreement which will usually address a specific dispute that has arisen. Parties have complete discretion to determine as to whether conciliation process shall be governed by institutional rules – such as ICC Conciliation Rules or the MLICC - or the rules (i.e. the number and identify of conciliator(s), the extent of conciliator duties and all aspects of procedure) determined by the disputants (Ad Hoc Conciliation).

Conciliation begins with one party sending an invitation to another party to conciliate under the conciliation rules and briefly identifying the subject of the dispute. If the other party accepts, the conciliation begins. Subsequent phase is the appointment of the conciliator. Appointed conciliator has a duty to disclose conflict of interest. Furthermore, disclosure by a conciliator of any potential and actual conflict of interests fulfils the reasonable expectations of the parties to neutrality and impartiality[107].

After appointment, the conciliator will decide upon the format of the process and should act in accordance with the rules determined by the disputants. Parties' agents will submit

[106]Van Ginkel, JOURNAL OF INTERNATIONAL ARBITRATION, (2004)., p.5
[107]Commission, (2010)., p.62

their both written and oral submissions to the conciliator in order to afford an opportunity for conciliator to investigate into the facts and the law. The conciliator may attempt to facilitate an amicable settlement during the process and, in any event, will be clarifying the parties' positions and eliciting indications of their inclination to reach a settlement[108].

After completion of the aforesaid phase, the conciliator shall record his or her recommendations in a report and provide such report to the disputants. Conciliator usually determines the time period of which disputants should abide while determining whether they accept such recommendations or not. If the disputants agree to accept the recommendations, the conciliator will draft a document, often referred to as the process-verbal, which indicates that the conciliation has been successful and outlines the terms of the agreement. However, if any party rejects the recommendations, the conciliator shall record such outcome and consequently conciliation process ceases.

It is quite important to mention that continued willingness of the disputants to participate in the conciliation procedure is essential for its ultimate completion[109].

Main characteristics of the conciliation process are confidentiality; assistance of independent third party; willingness of the disputants and the notion of self-determination; capacity to participate; informed consent; cheaper, faster and less formal dispute resolution mechanism; adaptability; neutrality and impartiality of conciliator; and non-adversarial.

Unless otherwise determined by the parties, the entire procedure with respect to the conciliation process shall remain confidential.

Furthermore, with respect to the enforceability of conciliation agreement, the recommendations of the conciliation are not binding on the disputant due to the fact that parties are entitled to accept or reject these recommendations. However, if parties accept

[108]Reif C. Linda, FORDHAM INTERNATIONAL LAW JOURNAL, (1990)., p.585
[109]Id. at., p.587, see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.412

such recommendations and agree to enter into an agreement within this content, this agreement itself is *enforceable and binding*.

The Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters[110] (the "2008 EC Directive") obliges member states to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. Article 6 of the 2008 Directive states that:

"Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability."

As outlined in Article 6(2) of the 2008 EC Directive:

"The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made."

In addition to enforceability issues, conciliation has been defined as a "procedure to achieve an amicable settlement with the assistance of independent third party." The goal of this third party is to encourage parties to settle their own, by helping each party to appreciate better the difficulties perceived by his opposite number, so that they both cooperate towards a mutually acceptable resolution of their dispute[111].

[110] It is important to note that, within the context of the 2008 EC Directive mediation and conciliation were used interchangeably.
[111] A RIBICOFF, *Alternatives to Litigation: Their Application to International Business Disputes*, 38 ARBITRATION JOURNAL (1983).

Besides, the conciliation shall be used upon mutual intention of the parties in this regard. Conciliation is continuously dependent upon the willingness of both parties to participate; in contrast to arbitration, any party can withdraw at any stage of the proceedings and the self-enforcing nature of the process is underscored by the fact that the final settlement, if reached is not binding on the parties[112]. Such withdrawal right is permanent, and parties are entitled to cease negotiations even there is an agreement to conciliate or a conciliation clause in the contract from which their dispute arose.

The 2008 EC Directive also explicitly provides for the principle of self-determination where it states that:

"The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time."

Similarly, the MLICC addresses the principle of self-determination and the sets out that; (i) the parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted; and (ii) failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

In addition to the aforesaid explanations, party capacity to participate in a mediation or conciliation is an aspect of self-determination that extends to a continuum of potential obstacles to full participation by a broad range of persons. Mental illness, domestic violence, abuse, duress, fraud, and stress associated with conflict may impact a party's ability to use the process effectively and to make informed decisions which may have serious legal and personal consequences for them[113].

[112]ISAAK ISMAIL DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS (Martinus Nijhoff Publishers. 1986)., p.7
[113]Commission, (2010)., p.48

Parties to mediation or conciliation should be fully informed about the process by the neutral and independent mediator or conciliator before they consent to participate in it, that their continued participation in the process should be voluntary, and that they understand and consent to the outcomes reached in the process. The issue of informed consent is intrinsically linked with the issue of party capacity and the principle of self-determination[114].

Nowadays, arbitration is deemed as an expedited dispute resolution process. The 2008 EC Directive states that mediation and conciliation can provide cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties.

In the light of aforesaid explanation, it is clear that the conciliation is even cheaper and less formal dispute resolution mechanism instead of arbitration. There is, of course, the inherent risk exist in the event that the conciliation effort is unsuccessful, the parties will have lost of a good deal of time and money[115].

Arbitration and litigation sometimes do not fit to the dispute at stake and applications of these mechanisms are restricted. However, the conciliation process, by virtue of its potentially restriction-free scope of application, can and usually does remain free from jurisdictional challenges

The principles of neutrality and impartiality are fundamental to the success of ADR processes and conciliators should ensure that the principle of equality of arms be respected during the mediation and conciliation process[116].

In order to establish strong and long lasting commercial relationship, it is very important to resolve existing disputes in an amicable manner. In order to achieve this end, the

[114]Id. at., p.48
[115]DORE, Arbitration and Conciliation Under the Uncitral Rules: A Textual Analysis. 1986., p.7
[116]Commission, (2010)., p.60

outcome of the dispute should be deemed as a win-win solution for the disputants. Owing to that conciliation might be deemed as appropriate mechanism for resolving disputes.

(5) Why conciliation remains weak for M&A disputes

Despite the aforesaid advantages of conciliation, it might not possible to say that conciliation is the best mechanism for the resolution of complex M&A disputes.

The main basis of this view is the fact that there is no uniform convention or agreement ratified and approved all around the world for the recognition and enforcement of any agreement achieved through conciliation process.

Even though the 2008 EC Directive obliges member states to set up a mechanism, there is no uniform convention or agreement in this respect.

Furthermore, in conciliation, parties are entitled to walk away from the table while conciliation is in progress; therefore, there is a significant risk for disputants to encounter considerable loss in money and time. In the light of foregoing explanations, conciliation may be quite problematic for high value and complex M&A transactions.

As a final note, there is no appeal process in the event that the privately negotiated agreement is later determined by one of the parties to be flawed on some way. Unless otherwise agreed by the disputants, all conciliation process and conciliation agreement is strictly confidential, thus, it is never performed on the record or recorded by a clerk. Owing to that conciliation agreements are virtually impossible to appeal.

c) Minitrial

(1) Introduction

Minitrial embodies various characteristics of arbitration, negotiation and mediation. The typical minitrial process affords an opportunity for disputants to choose an impartial third-party (often a former judge, law professor or preeminent lawyer) and involves each party's attorney arguing the merits of their respective position on why they should prevail, while at the same time allowing the adverse attorney to expose the weaknesses of their case to adversarial inquiry[117].

The main aim of the minitrial is to convert legal disputes into business decisions by carefully structured non-binding settlement process. This voluntary, confidential settlement tool involves abbreviated, trial-like presentations of each party's perspective on a dispute before management executives of each party[118]. Furthermore, the minitrial approach is designed to combine the elements of adjudication with ADR mechanisms since it includes an adversarial presentation of proof and arguments but generally does not involve evidentiary rulings or a formal decision.

Rather, a minitrial can be utilized as a more formalized mechanism of evaluative mediation with a neutral party helping advise the parties of what might occur if the matter was to be litigated[119]. Furthermore, it is important to state that minitrial was originally conducted by institutions outside of the court system.

[117]Wells Jr, SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL, (2003). , p. 653, see also ILDIR, Alternatif uyuşmazlık çözümü : Medeni Yargıya Alternatif Yöntemler. 2003., p.109; see also ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p.286, see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p. 441, see also REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., p.85

[118]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 14; see also STEPHEN PATRICK DOYLE & ROGER S HAYDOCK, WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION (Equilaw Incorporation. 1991)., p.10

[119]Wells Jr, SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL, (2003)., p. 653

(2) Components of the minitrial

Unfortunately, there is no uniform set of procedural rules applicable to the minitrial process. Even though institutions publish some model procedures, parties are completely free to determine as to whether apply the set of procedural rules issued by institution or determine appropriate rules freely. However, minitrial process has some of the typical components such as initiation of the procedure; limited discovery; selection of natural advisor; information exchange; and settlement discussions with the neutral advisor.

Minitrial is based on consent of the parties. In a privately administrated minitrial, the parties enter into a written agreement in order to demonstrate their intention to resolve their dispute through a minitrial, with or without assistance of an institution. In court-supervised minitrial, the parties enter into an agreement of which procedural orders are demonstrated. Some courts have non-compulsory procedural order, but parties are entitled to amend such order in accordance with their needs and nature of a dispute at stake.

Furthermore, in order to maximise benefits of a minitrial, parties usually establish a limit for discovery.

In addition to the aforesaid explanations, parties of a dispute usually hire a neutral advisor to hear the minitrial presentations of the parties and to facilitate settlement talks. Neutral advisor shall be selected upon a mutual decision of parties. Neutral advisor usually moderates the minitrial sessions and moves the process forward in a timely manner. In court-supervised minitrial, the court usually requires parties to select neutral advisor or parties may determine to appoint trial judge as their neutral advisor.

Besides, at the information exchange, selected neutral advisor makes up minitrial panel together with the high-level executives or authorised persons of both conflicting parties. Parties of a dispute present their cases within reasonable time limits. Throughout the

information exchange period neutral advisor may ask question to the representatives of both parties in order to reveal realties with regard to the dispute.

Finally, after completion of information exchange and presentations of parties, high-level executives or authorised persons of both parties commence negotiations on settlement. Through the course of negotiation process, neutral advisor will assist parties to reach an agreement at the shortest time. Neutral advisor may issue nonbinding opinion upon a request of parties. If settlement is reached, neutral advisor shall outline the terms of the agreement.

In some court-annexed minitrial, the procedural order may stipulate a time limit for completion of negotiations and if parties reach an agreement within the determined time limit, the judge will review and approve the negotiated result, called judgment of acquiescence.

(3) Advantages of minitrial

Advantages of the minitrial are party control over the process; maintenance of business relationship; and expertise of the neutral advisor.

Unlike litigation, there are no established uniform procedural rules for a minitrial. In private minitrial, parties are entitled to either create their own procedural rules or apply procedural rules determined by institutions. In court-annexed minitrial, parties can operate with the competent judge to tailor a procedural order that reflects the concerns of the parties.

While resolving issues via minitrial, parties have a chance to establish long-term business relationships by resolving a dispute on a mutually satisfactory agreement.

Litigation cases are allocated to the competent judges randomly. Resolving a dispute under control of a judge who does not have any experience and knowledge about the

dispute at stake, may cause a significant loss of energy, money and time. However, in minitrial parties are completely free to select neutral advisor and such circumstance engenders an opportunity for parties to resolve their dispute faster and cheaper.

(4) Why minitrial remains weak for M&A disputes

Albeit the fact that minitrial is a well-structured dispute resolution mechanism, there are still significant points to consider prior to determine application of minitrial as a dispute resolution mechanism for complex M&A disputes. The vast majority of M&A disputes deal with quite big amounts and also reputation and future of the disputant companies or individuals. Therefore, it is necessary for disputants to apply the best dispute resolution mechanism in hand.

In light of the foregoing, a minitrial remains weak for M&A disputes due to the fact that the credibility of witness is questionable; it might be necessary to apply court's legal interpretation; and unequal bargaining power between the parties.

Sometime the success or failure of a case may hinge on the credibility of lay and expert witnesses. With limited discovery and summary presentations, a persuasive attorney outlining witness testimony can disguise problems with witness credibility that might arise in either direct or cross-examination of a witness[120].
Furthermore, under some cases, the conflicting parties may not disagree about the application of the law of these facts. In these cases, the disputants may need a judge to determine these purely legal issues, to deal with past conduct, and to guide future business behaviour.

Finally, it is important for parties to bear in mind that, despite all considerable drawbacks, litigation provides judicial review and approval of a settlement that means a safeguard for conflicting parties. However, in minitrial economically strong party may

[120]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 149

have slight or remarkable advantage (depends on the ability of neutral party) against the party who cannot employ a qualified representative.

d) Mediation

(1) Introduction

There is no single, uniform, accepted definition of mediation. It is not the fact that various people have not suggested definitions of mediation[121]. Instead, this lack of uniformity stems from the reality that mediation can mean many different things in different context[122]. Mediation is a much newer process than arbitration or litigation and it has been used to resolve labour, commercial[123], community disputes and divorce cases[124].

Although arbitration is probably the most common dispute resolution mechanism used outside of the court room, due to the relatively recent proliferation of arbitration contract clauses, mediation is being used with increasing frequency[125]. One area of concern arises out of the fact that the current interest in international commercial mediation appears to be based on the presumption that mediation will be faster, easier and less expensive than other forms of international dispute resolution, including international commercial

[121] For definition of mediation please see Wells Jr, SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL, (2003)., p. 652, see also JOHN G BRUHN & HOWARD M REBACH, HANDBOOK OF CLINICAL SOCIOLOGY (Springer Science & Business Media. 2012)., p.198, see also ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 492, see also ILDIR, Alternatif uyuşmazlık çözümü : Medeni Yargıya Alternatif Yöntemler. 2003., p.88

[122]MOFFITT & SCHNEIDER, Dispute Resolution : Examples & Explanations. 2011., p.83, see also REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., p.74

[123] There is no doubt that ccommercial disputes often arise between parties, who, out of necessity, must be able to maintain an amicable working relationship.

[124] See S. I. Strong, *Beyond International Commercial Arbitration: The Promise of International Commercial Mediation*, 45 WASHINGTON UNIVERSITY JOURNAL LAW & POLICY (2014)., p.12, see also Harold I Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 ILSA J. INT'L & COMP. L. (1997)., p.323; see also Steven J Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. (1994)., p.637

[125] See Strong, WASHINGTON UNIVERSITY JOURNAL LAW & POLICY, (2014)., p.11, see also ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 491, see also Eric M Runesson & Marie-Laurence Guy, Mediating Corporate Governance Conflicts and Disputes (Global Corporate Governance Forum 2007)., p.24

arbitration[126]. However, it is unclear whether and to what extent this presumption is defensible[127].

Furthermore, mediation's non adversarial approach to dispute resolution is an attractive option[128]. The successful application of mediation in the aforesaid areas has led to the broader use of mediation in order to settle commercial and/or non-commercial disputes among conflicting parties.

However, under some jurisdictions, parties of a dispute are occasionally obliged to participate in mediation so as to exhaust such mechanism in first place and afterwards may apply other types of dispute resolution mechanisms in order to obtain a final and binding decision with regard to the dispute in question.

Simply, mediation is an ADR mechanism in which third party natural assists conflicting parties in order to reach a mutually dreamed agreement. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine rather than accepting something imposed by a third party[129].

(2) Characteristics of mediation

Mediation is defined as a private, voluntary negotiation process using a trained neutral third party to facilitate final, contractually binding settlement between parties involved in a dispute[130].

[126] Strong, WASHINGTON UNIVERSITY JOURNAL LAW & POLICY, (2014)., p.15
[127] Some empirical research suggests that mediation actually decreases client costs in only about half of the disputes in which it is used. Savings of time and money may be even less likely to occur in international commercial matters, where there is a tendency for counsel to conduct mediators like "mini-arbitrations", see id. at., p.16
[128]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 90
[129]Subhan, (2010)., p.10
[130]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 93, see also BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.199, see also Meadow, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES, ELSEVIER LTD, (2015)., p.3, see also Runesson & Guy, Mediating Corporate Governance Conflicts and Disputes. 2007., p.25, see also PEKCANITEZ, et al., Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku. 2011., p.763

Mediation is a voluntary process[131]. The parties agree on the process, the content would be presented through the course of mediation, and the parties control over the resolution of the dispute.

Because the participation of the parties and the mediator is voluntary, the parties and/or the mediator have the freedom to leave the process at any time. The mediator may decide to stop the process for ethical or other reasons, and the parties may decide that they are not satisfied with the process. The agreement, which is reached between the parties, is voluntary; the parties own it and are responsible for implementing it. The agreement is validated and ratified by the courts[132].

As a final note, mediation is not an adversarial proceeding. There is no "plaintiff" or "defendant" as with arbitration, and the mediator does not seek to determine "who is wrong" and "who is right.[133]"

(3) Basic principles of mediation[134]

Basic principles of mediation are (a) impartiality, (b) self-determination and (c) informed consent.

a) Impartiality

Mediator should not have an interest in the substance or outcome of the dispute and also any relationship with the parties of the dispute at stake. Through the course of negotiation process, mediator should serve as a facilitator not as a supporter of any party. Owing to that mediator shall remain impartial and keep his or her distance between the parties of the dispute.

---

[131] See ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 151

[132] SHAMIR & KUTNER, Alternative Dispute Resolution Approaches and Their Application. 2003., p.30, see also BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.199

[133] Bernier & Latulippe, THE INTERNATIONAL CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS., p.4

[134] See ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p.496

b) Self-Determination

Self-determination, the idea that parties voluntarily determine the elements of an agreement, is hallmark of mediation in virtually all of the articulations of mediation's foundational principles[135].

c) Informed Consent

The main distinction between mediation and adjudicative dispute resolution processes is affording an opportunity to parties of a dispute to render a mutually satisfactory decision and satisfactory decisions depend on the parties having adequate information.

(4) Forms of mediation

From past to present, scholars and researchers have developed distinctive forms of mediation in order to describe and compare approaches in this respect.
The models of mediation described by those taxonomies demonstrate recurring patterns of mediation practice, many of which are often used in mediation literature as shorthand to describe different styles that combine key characteristics[136].

Forms of mediation are most commonly divided into three styles such as; (a) facilitative, (b) evaluative and (c) transformative[137].

a) Facilitative Mediation

The mediator manages the process by which the parties negotiate their case[138]. The mediator's position in facilitative mediation is motivated by three considerations. First,

[135]MOFFITT & SCHNEIDER, Dispute Resolution : Examples & Explanations. 2011., p.93
[136]Id. at., p.84
[137] See Wells Jr, SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL, (2003)., p.652

facilitative mediators see the parties as being the best situated to determine which outcome(s) best meet their needs. Second, facilitative mediators see a neutral stance as more likely to endanger the parties' trust. Finally, facilitative mediators believe that their approach maximizes the effectiveness of the mediator's interventions because the mediator is not simultaneously focused on other things (like the law or the merits of various options)[139]. In other words, in facilitative mediation, the mediator uses active listening, asks directive questions, tries to validate and normalize each party's point of view, identifies common concerns, and helps the parties develop alternatives[140].

In facilitative mediation the mediator rarely offers direct assessment of the merits of the cases, nor appraises the outcomes the parties suggest. Instead, he or she constructs a process that allows the parties to negotiate effectively, offering procedural assistance and nonbinding substantive input[141]. Facilitative mediation is an umbrella terms that encompasses a number of different variations[142].

One of these variations is termed as "understanding-based" mediation. Through application of understanding based mediation, mediator conducts private meetings with one of the disputants, without considering that such private meetings jeopardize his or her neutrality or impartiality.

b) Evaluative Mediation

While facilitative mediation focuses on exploring parties' interests and the possibility of creative settlement options, evaluative mediations focus primarily on the parties'

[138]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 97, see also Wells Jr, SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL, (2003)., p.652
[139]MOFFITT & SCHNEIDER, Dispute Resolution : Examples & Explanations. 2011., p.85, see also BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.200
[140]BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.201
[141]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 97
[142] Michael L. Moffitt, Andrea Kupfer Schneider, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.86

alternatives to settlement[143]. In evaluative mediation, the mediator offers advice about the strengths and weaknesses of each side's position and suggests possible outcomes[144]. Here, the role of the mediator provides few, if any, judgements on the case, the evaluative mediator is often an expert in the area of law or controversy confronting the parties and is called on to provide input from that perspective after hearing the case from both parties[145].

Briefly, in evaluative mediation, mediator use their own creativity, and come up with suggestions, ideas, and offers of their own and has a dominant role by explaining strengths and weaknesses of their cases and claims to the conflicting parties. Mediator has direct influence over the outcome reached in negotiation process. However, mediators do not have any binding authority, evaluative mediators may use the authority conferred by their experience to propose solutions or compromises and direct the parties towards them.

c) Transformative Mediation

Both facilitative and evaluative mediation have their focus the resolution of a particular dispute. Transformative mediation, by contrast, focuses on the disputants themselves and on their interactions, rather than on the specifics of a particular dispute (no matter how broadly defined)[146]. Transformative mediation approach based on the empowerment and recognition.

Transformative mediation empowers individuals in order to make them feel more confident and able them to listen, trust and respect to the other party for potentially build a more productive relationship and outcome. Thus, empowerment provides parties the ability to recognize and appreciate the values and perspectives of its counterparts.

[143]MOFFITT & SCHNEIDER, Dispute Resolution : Examples & Explanations. 2011., p.86, see also Wells Jr, SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL, (2003)., p.652, see also BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.200
[144]BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.200
[145]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 97
[146]MOFFITT & SCHNEIDER, Dispute Resolution : Examples & Explanations. 2011., p.89, see also BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.202

The parties have the ability to understand the other party's point of view, and why they proposed the solution that they did (without necessarily agreeing to it). A transformative mediation has an educational value for the parties. By gaining the ability to reflect on the process, the parties may be able to use the same techniques in order to avoid future disagreements and disputes. The parties learn to use the opportunity of a conflict as an event from which both parties may benefit[147].

(5) General overview of mediation process

As mentioned above, there is no uniform definition of mediation. Owing to that it would not possible to illustrate mediation process unquestionably. Nowadays, lots of scholars and practitioners try to categorise phases of mediation and some of these descriptions are instructive and helpful because they provide a fundamental information as to the processes which will generally be followed by the conflicting parties.

In other words, the actual conduct of a case for mediation will, of course, depend on the nature of the dispute- whether neighbours, employees and managements, divorcing spouses and so on. However, there are some key steps in practice that may be useful in providing a sense of how mediation proceeds[148].

Parties may be voluntarily or non-voluntarily, such as court-ordered mediation, participated in mediation. However, there is no doubt that nowadays, mediation usually commences upon a request of one party to solicit the participation of other parties to the dispute. Afterwards, parties will select a mediator upon their mutual will in this regard and informing the selected mediator with regard to the appointment.

Upon receiving the request of mediation, the prospective mediator shall declare that there is no conflict of interest exists between him or herself and parties of the dispute.

[147]SHAMIR & KUTNER, Alternative Dispute Resolution Approaches and Their Application. 2003., p.28
[148]BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.203, see also Runesson & Guy, Mediating Corporate Governance Conflicts and Disputes. 2007., p.26

Application of the conflict of interest restriction is quite sensitive issue and therefore there are lots of open doors for abuse. If no conflict of interest exists, the mediator will contact all relevant parties in order to explain the mediation process and secure participation of the parties.

After receiving consent of relevant parties to proceed with mediation, the mediator will send *agreement to* mediate[149] of which is a formal document and demonstrates the expectations of the parties and mediator when negotiation process begins. The agreement is normally in contractual form and contains, among other things, guarantees regarding the confidentiality of the process, the finality of any agreement reached, and the authority to settle[150]. The parties usually sign such agreement in the first mediation meeting. The mediator will confirm that all parties participating agree to do so with full authority to settle the case.

The mediation process compromises of several stages. Normally the mediation process initiates with a brief, to the point and informal mediator's opening statement. Opening statement includes details as to the mediation process and roles of both parties and the mediator. Following the mediator's opening statement, the party opening statements will be delivered to the mediator. Party opening statements involves a summary of the facts, issues and desired outcome.

Party opening statement affords an opportunity to mediator to examine parties' position in order to proceed in a productive manner. Subsequently, the mediation process will continue with facilitated negotiation. Through facilitated negotiation period, the mediator will attempt to facilitate incremental compromise from both parties toward settlement. This is accomplished most significantly by helping the parties to expand the sources by identifying assets not previously described by the parties, by redefining or reconfiguring

[149] See BRUHN & REBACH, Handbook of Clinical Sociology. 2012., p.207

[150] CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 99, see also CHRISTOPHER W MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (John Wiley & Sons. 2014).

certain assets, or by looking for noneconomic assets that may be of some value to the parties[151].

Mediator is entitled to conduct private meetings with each party together with the mediation meetings. These private meetings is termed as caucus and allow parties to address issues which are not appropriate to discuss or disclose in open sessions, such as strengths and weaknesses of particular aspects of the case. Caucus meetings are strictly confidential and thus parties of a dispute at stake are feeling significantly freer to disclose confidential information as to their case and claims.

Parties are entitled to walk away from mediation whenever they deem such process as insufficient. Nonetheless, if parties find common way to settle the dispute at stake, the mediator will assist parties with regard to the closure. At this stage, the mediator has two roles to play in the closure scene. First, the mediator will assist parties to reach a point of final, formal acceptance of the settlement. Furthermore, the mediator is under obligation to remind the parties of the finality of any agreement reached via mediation process. Second, the mediator will also assist the parties while crafting the agreement because most successful mediation meetings result with an agreement that is final, permanent and immediate.

(6) How to select appropriate mediator?

Unfortunately, there is no generally accepted prerequisite to become a mediator. In order to transmit our dispute into the safe hands, it would be utmost importance to select a mediator who has significant knowledge and experience with regard to the dispute in question. Mediators usually have social science or strong business background. The most important factor to consider while determining the mediator, of course, is the training and experience of the mediator, as well as any related professional training. Another important aspect to consider is the scope of the mediator services. All mediators do not

[151]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 99

provide all types of mediation services. For example, parties seeking conventional facilitative mediation should look for mediators trained in that type of mediation[152].

It is noteworthy to mention that, the Mediation Law for Legal Conflicts No.6325[153] (Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu) has been entered into force on June 22, 2013 and includes detailed provision as to the mediation process. As per Article 20 of the Mediation Law for Legal Conflicts No.6325, in order to be deemed as an arbitrator it is required to be a lawyer and has at least 5 (five) year practical experience. There are numerous debates as to whether this provision is beneficial or causes unnecessary obstacles for the parties who would like to appoint a mediator who is not a lawyer and/or does not have 5 (five) year practical experience in this regard.

(7) Advantages of mediation[154]

When we consider the fact that the complexity of the underlying contractual relationships in international commercial transactions reduces the likelihood of quick, informal and inexpensive mediations, then the next question is whether there are any good reasons to choose mediation as a dispute resolution mechanism for international commercial disputes like high level M&A transactions.

For example, ethnic conflicts and community disputes often involve moral, political or religious elements that are absent from commercial matters. These sorts of value- or structure- based disputes may derive particular benefits from mediation, while commercial disputes may focus primarily on monetary concerns[155] that are adequately addressed by adjudication[156].

[152]Id. at., p. 107, see also Gülgün Ildır, Alternatif Uyuşmazlık Çözümü- Medeni Yargıya Alternatif Yöntemler, 2003, İstanbul, Seçkin Yayıncılık, p.90
[153] Rules are , *available at* http://www.resmigazete.gov.tr/eskiler/2012/06/20120622-1.htm.
[154] See ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p. 493
[155] However, it is important to bear in mind that purely monetary conflicts may be addressed creatively through mediation, see MOORE, The Mediation Process: Practical Strategies for Resolving Conflict. 2014.
[156]Strong, WASHINGTON UNIVERSITY JOURNAL LAW & POLICY, (2014)., p.26

One and most special advantage of mediation come to the forefront when the parties have ongoing relations that must continue after the dispute is managed, since the agreement is by consent and none of the parties should have reason to feel they are the losers[157].

Mediation provides an opportunity for conflicting parties to maintain their current relationship by resolving dispute by a win-win solution and accordingly establish strong long-term business relationship.

Apart from the advantage mentioned above, additional advantages of mediation are examined below in detail:

a) Flexibility

Parties of a dispute are entitled to determine process of the mediation in accordance with the interest and needs of each party.

This may involve the choice over location of the mediation, the time frame, the people who are to be involved, the selection of acceptable objective criteria, and many other choices related to the process[158]. Furthermore, mediation provides parties an access to a wide range of outcomes not available in litigation.

b) Less Costly

Albeit the fact that there are numerous debates as to whether mediation is less costly than that of adjudicative dispute resolution mechanisms, one might claim that mediation is less costly when compared adjudicative ADR mechanisms. Mediation can normally be completed in multiple conferences between conflicting parties. Furthermore, mediation is not a formal evidentiary process requiring extensive use of expert witnesses or

[157]SHAMIR & KUTNER, Alternative Dispute Resolution Approaches and Their Application. 2003., p.30
[158]Id. at., p.30

demonstrative proof. As a result, the costs associated with the use of expert witnesses, trial counsel and case preparation are substantially reduced or even eliminated[159].

c) Efficiency

Another charming feature of mediation is the speed of the proceedings of which parties can resolve their dispute faster than adjudicative mechanisms. There are various reasons of this circumstance; first, mediators are present to manage negotiation, not to represent a party or render a legal decision, they need not prepare extensively to conduct the conference[160]. Second, the vast majority of countries face a spectacular problem of overcrowded court dockets which cause considerable delay in trials.

d) Range of Settlement Options

Mediation process offers wide range of settlement options which is limited only by the imagination of the parties and the mediator. Although certain forms of injunctive relief are possible through litigation, most judges and juries think of the resolution of a civil case in dollar terms.

Conversely, mediation allows parties to consider a far wider range of remedies. Long-term structured payment schedules and annuities allow parties to treat economic outcomes more creatively.

In addition to that noneconomic remedies are also possible in mediation. Briefly, parties of dispute can craft outcomes which they deemed fits to their dispute and also significant to sustain important business relationships by avoiding the confrontation and acrimony associated with trial.

[159]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 94
[160]Id. at., p. 94

e) Informality

Mediation allows the parties to present their arguments in an informal manner, not bound by the procedures of the legal system. Mediation is a form of guided dialogue, where the parties have the ability to express their feelings, not only facts, so that venting anger can help in reaching an agreed solution[161].

f) Preserved to Apply Other Dispute Resolution Mechanisms

As mentioned above, parties are, at any time, free to opt out mediation proceedings without any valid or justified reason. Besides mediation process shall not preclude parties' main right to apply more formal dispute resolution mechanism such as arbitration or litigation. Parties may therefore free to strive for a settlement without jeopardizing their chances for or in a trial if mediation is unsuccessful[162].

g) Confidentiality

Litigation is usually open to public while all written and/or oral correspondences through the course of mediation are private. The confidentiality of mediation may encourage parties to speak more openly and allow the true reasons for the disputes to emerge more quickly[163].

h) Preserves Relationships

Mediation preserves relationship and can even make them stronger. Unlike more adversarial dispute resolution mechanisms, because mediation encourages parties to look for mutual solutions they are more likely to discover mutual interests.

---

[161]SHAMIR & KUTNER, Alternative Dispute Resolution Approaches and Their Application. 2003., p.30

[162]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 94, see also Runesson & Guy, Mediating Corporate Governance Conflicts and Disputes. 2007., p.26

[163]Mary F Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL (2012)., p.242

However, it is not uncommon for state statutes to prohibit the introduction of evidence that the parties have tried (unsuccessfully) to reach a settlement. Many state statutes and ADR rules require that mediations and other ADR proceedings be kept confidential[164].

(8) Why mediation remains week for M&A disputes

Like other ADR mechanisms, mediation also has its disadvantages. Most sensitive disadvantages of mediation are as follows:

a) Absence of due process protection

The formalized procedural and evidentiary rules of due process designed to protect parties and associated with the trial or arbitration of lawsuit are lacking in mediation[165].

b) Absence of appeal process

Parties of a dispute cannot apply to appeal process in the event that the privately negotiated agreement is later determined by one of the parties to be flawed on some way. All mediation process and agreement is strictly confidential and accordingly it is never performed on the record or recorded by a clerk. Owing to that, unlike arbitration and litigation, mediation agreements are virtually impossible to appeal. Consequently, parties of the mediation process are usually bound by the agreement reached mutually and in accordance with the interests and needs of conflicting parties. It is possible to argue that an agreement was tainted by fraud, duress or some other legal defence to a contract, but this is much different from formally appealing a court's judgement or an arbitrator's decision[166].

[164]Id. at., p.242.
[165]CAVENAGH & M. PONTE, Alternative Dispute Resolution in Business. 1999., p. 95
[166]Id. at., p. 95

c) Lack of standardized rules and process

Lack of standardized rules and process sometimes makes mediation inconsistent, haphazard, unpredictable and unreliable.

d) Additional cost if unsuccessful

If the mediation does not result in a settlement then the parties may encounter additional costs stemming from the need of following any other dispute resolution mechanism in order to procure a binding and valid decision as to the dispute at stake.

e) Voluntary and non-binding process

Due to the fact that mediation provides an opportunity for parties to take part in mediation process, there is nothing to prevent a party withdrawing part way through a mediation if they wish to do so.

f) Lack of set of rules for the enforceability of decisions

Unlike arbitration, there is no similar network of treaties relating to the enforcement of foreign judgments. International commercial arbitration is therefore distinguishable from both international litigation and international mediation with respect to the enforceability issues[167].

III. Conclusion of Part II

Each dispute resolution mechanism has distinctive benefits as well as drawbacks. Owing to that, it might be recommendable for the parties to consider nature of their relationship, of which the dispute arisen from, prior to select dispute resolution mechanism to be applied in

[167]Strong, WASHINGTON UNIVERSITY JOURNAL LAW & POLICY, (2014)., p.28, see also Peter Rutledge, *Convergence and Divergence in International Dispute Resolution*, J. DISP. RESOL. (2012)., see also Runesson & Guy, Mediating Corporate Governance Conflicts and Disputes. 2007., p.41

this regard. When we consider existing dispute resolution mechanisms, parties may follow adjudicative dispute resolution mechanisms or ADR mechanisms such as negotiation, conciliation, mini-trial, mediation etc. However, it is important to note that the procedure to be followed and the outcome to be achieved shall be quite different in adjudicative dispute resolution mechanisms and ADR mechanisms.

Unlike ADR mechanisms, adjudicative dispute resolution mechanisms provide parties to procure binding and final award after duly exhaustion of appellate or set-aside procedures. On the other hand ADR mechanisms provide flexible and creative, maybe even more creative and flexible than arbitration under some cases, dispute resolution process and also outcome for the parties. Despite the considerable differences between litigation and ADR mechanisms, both of these dispute resolution mechanisms remain absolutely week for complex M&A disputes.

One might argue that litigation, even it is deemed as an adjudicative dispute resolution mechanism, remains weak for M&A disputes and one of the most important reason for this is the fact that all litigation process is open to public and media. Therefore, disputants do not prefer to apply litigation when sensitive information is at stake. Even though ADR mechanisms provide confidentiality for disputants, these mechanisms remain inadequate for complex M&A transactions due to the aforesaid reasons. Like litigation, ADR mechanisms undoubtedly remain weak for complex M&A disputes, due to the fact that ADR mechanisms are lack of compulsion and there are no accepted uniform rules with regard to the recognition and enforcement of decisions achieved after ADR process. Parties are free to opt out negotiations at any time, therefore, such situation will cause significant delay in time and loss in money for the disputants. Furthermore, it is highly possible for the prevailing party to encounter significant risk of being rejected by the competent authority to which application with regard to the recognition or enforcement of decision achieved via ADR mechanism is requested.

These inadequacies reveal the necessity of a dispute resolution mechanism which covers all weaknesses of other dispute resolution mechanisms and satisfy disputants of a complex

M&A transactions. This method is deemed as an arbitration and shall be examined below in Part III below.

PART III: ARBITRATION FOR DIFFERENT STAGES OF M&A DISPUTES

I. Arbitration

A. Introduction

Prior to commence detailed explanations regarding the arbitration and its application in M&A disputes, it is important to note that, in this part the author base his explanations mainly on the New York Convention and Model Law. The main reason of this approach is the fact that the New York Convention is adopted by 156 countries all around the world, thus, shall be deemed as the most important convention with regard to the recognition and enforcement of arbitral decision. In addition to that, Model Law has been adopted by the vast majority of countries, therefore, has considerable necessity as guidance in this respect. Last but not least, despite the existence of various arbitration institutions, the author mainly focuses on ICC.

Nowadays, international arbitration has experienced significant market growth as a means of dispute resolution mechanism and has been using to resolve quite big number of complex commercial disputes like M&A[168]. There is no doubt that such growth can be attributed to the relative attractiveness of international arbitration as a means of resolving commercial disputes between parties from distinctive nationalities. Prior to enter into deep explanations with regard to what is the arbitration procedure and what are the benefits of using arbitration as a means of dispute resolution mechanism for M&A disputes, it is important to define what exactly arbitration is.

There are lots of distinctive definitions of arbitration. However, in general, it is possible to define arbitration as a consensual process in which a binding decision is taken- by arbitrator or arbitrators empowered by a private agreement- in accordance with the neutral procedures that gives each party the opportunity for a fair hearing and present its

[168] See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.243

case to the arbitrators. Furthermore some general definitions adopted in both civil and common law that are indicated below in detail:

In most civil law countries arbitration is traditionally defined as:

"Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons- the arbitrator or arbitrators- who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such agreement[169]*."*

However the notion of arbitration has been defined by common law practitioners and academicians as:

"Two or more parties faced with a dispute which they cannot resolve themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course… it will not be settled by a compromise, but by a decision[170]*."*

There is no doubt that dispute resolution mechanisms must fulfil difficult, often thankless, tasks, particularly in international disputes: parties who are often bent upon (mis-) using every available procedural and other opportunity to disadvantage one another simultaneously demand rapid, expert and objective results at minimal cost[171]. Despite the aforesaid nature of the arbitration process, at present, at least 90% of the businessperson prefer to use arbitration; either alone (56%) or in combination with other means of ADR mechanism (34%), as a dispute resolution mechanism. In other words, arbitration is "the ordinary and normal method of settling disputes of international trade.[172]"

[169]RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE (Kluwer. 1985).,see also PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (Dalloz. 1965)., p.11

[170]ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (Sweet & Maxwell. 2004)., p.3

[171]GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 2009. 2009)., p. 68

[172] See SANDERS PIETER, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (Kluwer Law International. 1987).

The number of disputes resolved via arbitration has enjoyed magnificent increase through the last six decades. Among other things, the International Chamber of Commerce Court of Arbitration (the "ICC Court of Arbitration") received requests for 32 new arbitrations in 1956, 210 arbitrations in 1976, 337 arbitrations in 1992, 452 arbitrations in 1997, 529 arbitrations in 1999 and 599 arbitrations in 2007- a roughly 20-fold increase over the past 50 years[173]. Furthermore, the ICC Court of Arbitration received 759 requests for arbitration in 2012 while such number is 767 in 2013 and 797 in 2014.

In the light of aforesaid information, arbitration may be deemed as a "dominant" dispute resolution mechanism for international disputes. Besides, the number of disputes that are settled by negotiation dwarfs those that are litigated or arbitrated. Parties frequently consider the relative advantages and disadvantages of international arbitration and forum selection agreements, not in frequently opting for the latter if their negotiating power permits[174].

In addition to the above-mentioned explanations, it is important to highlight that 90% of the international contracts stipulate arbitration as a dispute resolution mechanism, whilst only 10% of such contracts contain other means of dispute resolution or no dispute resolution provisions at all.

B. Institutional and ad hoc arbitration

International arbitration can be either "institutional" or "ad hoc". There are vital differences between these two alternatives. Institutional arbitration shall be conducted under and in accordance with the set of rules established by the selected arbitration institution. In contrast, under ad hoc arbitration, parties may choose to design an independent arbitral procedure not associated with any of the existing institutions. Alternatively, they may design an arbitral procedure and incorporate another institution only for a single matter, for example by designating the President of International Court

[173]BORN, International Commercial Arbitration. 2009., p. 69
[174]Id. at., p. 71

of Justice as the entity component to choose a third arbitrator or, on default of one of the parties, a second and third arbitrator[175].

1. Institutional arbitration

A number of organizations, located in different countries, provide institutional arbitration services, often tailored to particular commercial or other needs[176]. Arbitral institutions have well established procedural set of rules that will apply where parties have agreed to involve in arbitration pursuant to such set of rules. Institutional rules, inter alia, stipulates a fundamental procedural framework and timetable for the arbitral proceedings. Institutional rules also typically authorize the arbitral institutions to select arbitrators in particular disputes, to resolve challenges to arbitrators, to designate the place of arbitration, to fix or influence the fees payable to the arbitrators and to review the arbitrators' awards to reduce the risk of unenforceability on formal grounds[177].

As the survey with regard to the corporate attitudes and practices to international arbitration conducted by the School of International Arbitration, Queen Mary College, University of London, and White & Case Law Firm in 2008 have been revealed that 76% of the businesses opt for institutional arbitration instead of ad hoc arbitration. The main reasons for choosing institutional arbitration are reputation and recognition of the institution (62%), previous experience with the institution (52%), seat chosen for the arbitration (36%), particularities of the contract/type of dispute (likely to arise) (33%), corporate policy, standard terms and conditions (30%), law governing the substance of the dispute (23%), personal connection to the institution (19%), imposed by the counterparty (18%), recommendation of external counsel (13%) and other (7%).

Furthermore, as per the empirical data procured from the survey mentioned above, while resolving their dispute the vast majority of the businesses prefer to apply International

[175] REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., p.272
[176] BORN, International Commercial Arbitration. 2009., p. 148
[177] Id. at., p. 149, see also ERGIN NOMER, DEVLETLER HUSUSI HUKUKU : YENI TÜRK BORÇLAR KANUNU, TÜRK TICARET KANUNU VE HUKUK MUHAKEMELERI KANUNU'NA GÖRE YENILENMIŞ (Beta Yayın. 2011)., p.526

Chamber of Commerce ("ICC") (68%), London Court of International Arbitration ("LCIA") (37%), Hong Kong International Arbitration Centre ("HKIAC") (28%), Singapore International Arbitration Centre ("SIAC") (21%), Stockholm Chamber of Commerce ("SCC") (13%), International Centre for the Settlement of Investment Disputes ("ICSID") (11%) and American Arbitration Association ("AAA")(10%)[178].

2. Ad hoc arbitration

Ad hoc arbitrations are not conducted under the supervision of an arbitral institution. Parties, in ad hoc arbitration, are entitled to either determine all procedural rules on their complete discretion or select a pre-existing set of procedural rules (such as Model Law) designated to govern ad hoc arbitrations.

In ad hoc arbitration, the constitution of the arbitral tribunal is the exclusive domain of the parties. They are entirely free to determine its composition and to decide on the number of arbitrators, the qualifications required of them and the method for appointing them[179].

3. Benefits and drawbacks of institutional and ad hoc arbitration for M&A disputes

Both institutional and ad hoc arbitration have strengths as well as weaknesses for the resolution of a dispute stemming from the complex M&A transaction.

Institutional arbitration is conducted in accordance with the set of established rules and such position reduce the risk of procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitration proceedings and arbitral

[178] For detailed information Queen Mary University of London School of International Arbitration & Firm, Improvements and Innovations in International Arbitration. 2015.

[179] PHILIPPE FOUCHARD, et al., INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer law international. 1999)., p.535, see also BORN, International Commercial Arbitration. 2009., p. 149, see also STEVEN P FINIZIO & DUNCAN SPELLER, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION: ASSESSMENT, PLANNING AND STRATEGY (Sweet & Maxwell/Thomson Reuters. 2010)., p.24, see also CEMAL ŞANLI, et al., MILLETLERARASI ÖZEL HUKUK (Vedat Kitapçılık. 2013)., p.552

award. The institution's involvement may be precious, inter alia, while appointing arbitrators, determining arbitrator's fees, selection of an arbitrate seat. Furthermore, institution's established rules will be considerably more reliable and expeditious[180].

Due to the fact that such established rules includes specific rules as to the competence-competence, separability, provisional measures, disclosure and confidentiality, arbitrator impartiality, corrections and challenges to awards, replacement of arbitrators and truncated tribunals and costs. In addition to that it is clearly seen that parties are more likely to abide by arbitral awards issued under the supervision of any arbitration institution. As a final note, under some institutional rules, such as the ICC Rules of Arbitration (the "ICC Rules"), the institution will play a role in scrutinising appointment of arbitrators and awards. This scrutiny can provide an additional level of protection for the parties and ensure confidence in the arbitral process[181].

On the other hand, ad hoc arbitration is significantly less expensive and more flexible. However, in ad hoc arbitration, parties have two different choices to proceed with. Parties can either determine all procedural and substantive rules by their sole discretion or agree to apply some model rules established by reputable organizations. If parties prefer to opt for ad hoc arbitration without applying any established set of rules, it may take serious time for parties to agree on all edges of arbitration proceedings. Consequently, such circumstance may postpone the whole process and cause significant monetary and non-monetary losses for each party.

In light of the foregoing, when we consider the complex nature of M&A transaction, it might be possible to indicate that institutional arbitration is much more satisfactory instead of ad hoc arbitration. Disputants do not prefer to take the risk of procedural breakdowns and delays in ad hoc arbitration.

[180] See WACH & MECKES, Tactics in M & A arbitration. 2008., p.14
[181] FINIZIO & SPELLER, A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy. 2010., p.24

C. General elements of international arbitration agreements

Arbitration process generally occurs solely in accordance with an arbitration agreement between the parties[182]. Parties are, of course, entitled to agree on submitting an existing dispute to arbitration, pursuant to a "submission agreement" or "compromise".

Numerous articles analyse the essential ingredients for an arbitral clause and sometimes conclude with the presentation of the "miracle clause" that will solve almost every problem inherent in arbitration[183].

Parties are largely free to draft their arbitration agreements in whatever terms they wish and in practice this freedom is liberally exercised[184]. International arbitration agreements often- and advisedly- address a number of critical issues. These are the agreement to arbitrate; the scope of the disputes submitted to arbitration; the use of an arbitration institution and its rules; the seat of the arbitration; the method of appointment, number and qualifications of the arbitrators; the language of the arbitration; and a choice-of-law clause[185].

a) Arbitration agreement

Arbitration agreements or clauses shall explicitly refer to "arbitration" as a dispute resolution mechanism regarding all disputes arisen from or in connection with the agreement in question. As mentioned above there are distinctive types of ADR mechanisms, however these mechanisms are not categorized as "arbitration" under many international treaties and national arbitration statutes.

---

[182] See MATTI KURKELA, et al., DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION (Oxford University Press. 2010)., p. 67, see also ZIYA AKINCI, MILLETLERARASI TAHKIM (Seçkin. 2007)., p. 80

[183]REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., p.150

[184] There is a substantial body of commentary on drafting arbitration agreements. See PAUL D FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS (Juris Publishing, Inc. 2007).

[185]BORN, International Commercial Arbitration. 2009., p. 173, see also JULIAN D. M. LEW, et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International. 2003)., p.99

Accordingly, a fundamental element of any international arbitration agreement is the parties' undertaking that "all disputes shall be finally resolved by arbitration…..[186]".

Parties are complete discretion as to the determination of the scope of the arbitration agreement. Parties may, one by one, determine which disputes shall be resolved via arbitration or draft a comprehensive arbitration agreement or clause that covers all disputes arisen from or in connection with the agreement in question. There are handful of formulae that are frequently used to define the scope of arbitration clauses[187]. These formulae include "any" or "all" disputes "arising under this Agreement"; "arising out of this Agreement"; "in connection with this Agreement"; and "relating to this Agreement." Alternative formulations are also used, including: "all disputes relating to this Agreement, including any question regarding its existence, validity, breach or termination"; or "all disputes relating to this Agreement or the subject matter hereof.[188]"

b) Constitution of tribunal

It is essential for an arbitration agreement to include some method for selecting the arbitrators. The most common approach is for the parties to attempt to reach agreement on a sole arbitrator or to each appoint one member of a three member tribunal, with the third arbitrator chosen by the two party-appointed arbitrators or selected by an appointing authority[189]. However, it is important for parties to designate an alternative method in order to secure arbitration process and prohibit considerable delays and monetary and non-monetary losses.

c) Conduct of process

Place of arbitration has an important role in arbitration proceedings. The place of arbitrations' legislations determines the likelihood and extent of involvement of national

[186]BORN, International Commercial Arbitration. 2009., p. 211
[187]Id. at., p.39-44
[188]Id. at., p. 175
[189]Id. at., p. 177, see also FOUCHARD, et al., International Commercial Arbitration. 1999., p.456-460

courts in the conduct of the arbitration (either for judicial "assistance" or "interference"), the likelihood of enforceability of the arbitral award (depending on what international conventions the situs State is a party to), and the extent and nature of any mandatory procedural rules that you will have to adhere to in the conduct of arbitration[190].

As per the survey conducted by the School of International Arbitration, Queen Mary College, University of London, and White & Case Law Firm in 20015 has been revealed that London is the most preferred international arbitration venue which is followed by Paris, Hong Kong and Singapore respectively. When asked for the main reasons for their choice of venue, participators highlighted reputation and recognition of the seat, law governing the substance of the dispute, particularities of the contract/type of dispute (likely to arise), personal connection with the seat, corporate policy, standard terms and conditions, imposed by the counterparty, other and recommendation of external counsel[191].

Arbitration clause in international agreements usually include the language (or languages) of the arbitral proceedings and award.

Parties are free to determine the law applicable to the parties' underlying contract and related disputes. In addition to that a different law may apply to the arbitration agreement (as distinguished from the parties' underlying contact); that is because an arbitration clause will be deemed as a "separable" or "autonomous" contract in most legal systems, which may not be subjected to the same substantive law as the underlying contract[192]. Parties are also entitled to determine the law applicable for the procedural conduct of the arbitration itself, separate from that governing the arbitration agreement or underlying contract.

[190]REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., p.156, see also FOUCHARD, et al., International Commercial Arbitration. 1999., p.225
[191] Queen Mary University of London School of International Arbitration & Firm, Improvements and Innovations in International Arbitration. 2015.
[192]BORN, International Commercial Arbitration. 2009., p. 179

In the light of aforesaid explanations, it is possible to recommend the following model clause:

All disputes arising out of or in connection with the present contract shall be finally settled under the ……. [name of the Institution] by …. [number of arbitrator(s)] arbitrator(s) in accordance with the said Rules. The language(s) of the arbitration proceedings is …. [preferred language(s)]. … [State] law shall apply. The seat of arbitration is …… [preferred place].

D. The arbitration agreement

1. The autonomy of the arbitration agreement from the main contract

An international arbitration agreement is almost invariably treated as presumptively "separable" or "autonomous" from the underlying contract within which it is found. This result is generally referred to as and application of the "separability doctrine", or more accurately, the "separability presumption"[193]. In other words, what is traditionally meant by the autonomy of the arbitration agreement is its autonomy from the main contract in which it is found or to which it relates[194].

The doctrine of separability has been justified on four theoretical grounds: that it conforms to the parties' intentions, that it furthers the integrity of the arbitral process, that there is a legal presumption of the existence of two agreements, and that courts usually review only the arbitral award, not the merits, of the dispute[195].

[193]Id. at., p. 311-312, see also Janet A Rosen, *Arbitration under Private International Law: The doctrines of separability and Competence de la Competence*, 17 FORDHAM INT'L LJ (1993)., p.606, see also KURKELA, et al., Due Process in International Commercial Arbitration. 2010., p. 72, see also Steven H Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT'L ARB. (2009)., p.162

[194]FOUCHARD, et al., International Commercial Arbitration. 1999., p.199, see also Ikko Yoshida, *Interpretation of Separability of an Arbitration Agreement and its Practical Effects on Rules of Conflict of Laws in Arbitration in Russia*, 19 ARBITRATION INTERNATIONAL (2003)., p.105, see also Stephen J Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEVADA LAW JOURNAL (2007)., p.119

[195]Rosen, FORDHAM INT'L LJ, (1993)., p.607

Both common law and civil law authors prefer to deem the principle of autonomy as the principle of "severability" or "separability". The principle of that the arbitration agreement is separable from the main contract has long been established under civil law. For instance, in its 1963 Gosset decision[196], the cour de cassation held that:

"In international arbitration, the arbitration agreement, whether concluded separately or included in the contract to which it relates, shall, save in exceptional circumstances …., have full legal autonomy and shall not be affected by the fact that the aforementioned contract may be invalid."

2. Development of the autonomy of the arbitration agreement

a) Recognition of the principle in leading arbitration rules

ICC was the first leading arbitral institution that recognized the principle of the autonomy of arbitration agreements[197]. Article 6, paragraph 9 of the ICC Rules provides that:

"Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void."

A clear incidence of such rule demonstrates itself in a frequently-cited international arbitral award states the presumption as follows:

"The arbitral clause is autonomous and juridically independent from the main contract in which it is contained…."[198]

[196] Cass. 1e civ., May 7, 1963, Ets. Raymond Gosset v. Carapelli, JCP, Ed. G., Pt. II, No. 13,405 (1963)
[197] See Rosen, FORDHAM INT'L LJ, (1993)., p.602

On the other hand, Article 4 of the Model Law also explicitly addresses the autonomy of the arbitration agreement.

However, if the event causing the main contract to be void also affects the arbitration clause (invalid consent, for example), both must be declared void by the arbitrators who, as a result, will be unable to rule on the other aspects of the dispute. Besides, it is reckoned that the autonomy of the arbitration agreement approach has been well adopted in common law countries, especially in UK and US.

b) Recognition of the principle in international arbitration convention

The first modern international arbitration convention, the Protocol on Geneva Protocol, provided in Article IV (1) that the courts of contracting states, "on being seized of a dispute regarding a contract … including an arbitration agreement … which is valid … and capable of being carried into effect", shall refer the parties to arbitration[199]. Article IV (1) explicitly demonstrate both a textual and a substantive distinction between "arbitration agreement(s)" and underlying "contract(s)".

The Geneva Convention was similar, providing in Article I (a) for recognition of foreign awards "made in pursuance of a submission to arbitration which is valid under the law applicable thereto.[200]"

On the other hand the New York Convention makes no direct reference to the principle of separability[201]. Like the Geneva Protocol, however, the Convention does assume that international arbitration agreements are separable from the parties' underlying contract,

[198] Final award in ICC Case No. 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999)
[199] BORN, International Commercial Arbitration. 2009., p. 317
[200] Id. at., p. 317
[201] FOUCHARD, et al., International Commercial Arbitration. 1999., p.202, see also Rosen, FORDHAM INT'L LJ, (1993)., p.619-622

impliedly treats them as such and sets forth substantive rules applicable only to such agreements[202].

As per Article II (1) of the New York Convention stipulates that, "*Each Contracting State shall recognize* an agreement in writing *under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."* More explicitly, Article II (2) defines a written agreement to arbitrate as including *"... an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."* Both Article II (1) and II (2) of the New York Convention explicitly deem "arbitration clauses in a contract" as an "agreement."

Furthermore, Article V (1) (a) of the New York Convention, *"... is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."* Among other things, this Article provides for an exception to the enforceability of arbitral awards where "the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

Scholars and practitioners have reached divergent conclusions with regard to the question as to whether Article II (1) – (2) and Article V (1) (a) of the New York Convention compel recognition of the separability doctrine. According to Albert Jan van den Berg said provisions of the New York Convention are "indifferent" to the existence of the separability doctrine[203]. Other concludes that the New York Convention adopts or requires application of the separability doctrine "by implication"[204]. In reality, the New York Convention neither "adopts" nor is "indifferent to" the separability doctrine[205].

[202]BORN, International Commercial Arbitration. 2009., p. 317
[203]Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981) Erasmus Universiteit Rotterdam)., p.145-46
[204] Schwebel S. M., *International Arbitration: Three Salient Problems*, 35 NETHERLANDS INTERNATIONAL LAW REVIEW (1988).(1987)
[205]BORN, International Commercial Arbitration. 2009., p. 318

However, Article II (1) – (2) and V (1) (a) of the New York stipulates that arbitration agreements may be deemed as a separate agreement due to the fact that such agreements will usually be often treated differently from, and subject to distinctive rules of validity and different choice-of-law rules than, the parties' underlying contracts.

This presumption of separability is not dictated or required by the New York Convention, nonetheless was instead accepted by the drafter of New York Convention based on the common needs and intentions of commercial parties and also objectives of the international arbitration process. Simply put the New York Convention rests on the premise that parties may, and ordinarily do, intend their arbitration agreements to be separable, and it therefore sets fort specialized legal rules (of substantive and formal validity, and governing choice-of-law issues) that operate on the basis of this premise and that apply specifically (and only) to arbitration agreements[206].

To sum up, pursuant to Article II (1) of the New York Convention, national courts are under obligation to treat parties' arbitration agreement or clause separable than underlying contract. In this manner, Article II does not mandate separability, but it does mandate recognition of agreements to treat arbitration clauses as separable[207].

3. Consequences of the autonomy of the arbitration agreement

The principle of autonomy has both direct and indirect consequences which are scrutinized below separately:

a) Direct consequences of the principle of autonomy

The direct consequences of the principle of autonomy are (i) *the arbitration agreement is not going to be affected from the status of the main contract* and (ii) *arbitration*

[206]Id. at., p. 319, see also Philippe Leboulanger, *The Arbitration Agreement: Still Autonomous?,* (2007).p.7
[207]BORN, International Commercial Arbitration. 2009., p. 319

agreement may be governed by a law distinctive from that governing to the main contract.

The validity of the arbitration agreement does not depend on that of the main contract. In other words "the existence, validity, and scope of the arbitration agreement are to be evaluated independently from the enforceability of the main contract[208], which results in the fact that "the invalidity of the main contract does not automatically extend to the arbitration clause contained therein, unless it is proven that the arbitration agreement itself is vitiated by fraud or initial lack of consent[209]. Therefore, although the English court in Union of India v. McDonnell Douglas Corp.[210] plausibly stated that arbitration clause is as "an agreement inside an agreement," today the two (clause and the main contract) are considered to be separate or separable[211].

The arbitration agreement will remain effective despite allegations that the main contract never came into existence, was avoided, was discharged or was repudiated[212]. However, there is still a considerable debate as to the extension of the rule that the arbitration agreement is unaffected by the status of the main contract. Some authors believe that even though arbitration agreement would not effected by the nullity of the main contract, it would be affected by the main contract's non-existence.

Nonetheless, such distinction between void and non-existent contract is rejected in the 1961 European Convention on International Commercial Arbitration (the "1961 European Convention") as well as domestic court decisions. As per Article V (3) of the 1961 European Convention, the arbitral tribunal is "entitled … to decide upon the existence or the validity … of the contract of which the [arbitration] agreement form part." It is also rejected in the Model Law, the American Arbitration Association Rules ("AAA Rules"), London Court of International Arbitration Rules ("LCIA Rules").

---

[208]LOUKAS A MISTELIS, CONCISE INTERNATIONAL ARBITRATION (Kluwer Law International. 2015)., p. 899
[209] KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION (Kluwer Law and Taxation Publishers. 1993)., p.119-121
[210] Union of India v. McDonnell Douglas Corp. [1993] 2 Lloyd's Rep. 48 (High Ct., Q.B (Com. Ct) 1992)
[211]Hossein Fazilatfar, *Characterizing International Arbitration Agreements as Truly Separable Clauses*, (2012)., p.3
[212]FOUCHARD, et al., International Commercial Arbitration. 1999., p.210

Furthermore, pursuant to Article 6(9) of the ICC Rules, "the arbitral tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that is non-existent."

The autonomy of the arbitration agreement also means that such agreements will not necessarily be governed by rules of the same nature and origin as those governing the main contract[213]. Main contract may be governed by a particular national law; however the existence and validity of the arbitration agreement shall be examined by appointed arbitrator(s) in accordance with rules applicable to the substantive of the dispute. However, parties are free to determine that the arbitration agreement and main contract both are governed by the same national law. In this case the validity and existence of the contract shall be subjected to the law which is applicable to the main contract.

b) Indirect Consequences of the Principle of Autonomy

Indirect consequence of party autonomy is competence-competence rule.

The principle of competence-competence[214] (Kompetenz-Kompetenz in German, and Comp´etence de la Comp´etence in French) is another fundamental principle of international arbitration law[215]. According to this principle, arbitrators are competent enough to rule on their own jurisdiction before intervention by national courts. It is thanks to the autonomy of the arbitration agreement that any claim that the main contract is in some way void or voidable will have no direct impact on the arbitration agreement and hence on the jurisdiction of the arbitrators[216].

[213]Id. at., p.212
[214]See Peter Schlosser, *The Competence of Arbitrators and of Courts*, 8 ARBITRATION INTERNATIONAL (1992)., see also George A Bermann, *The Gateway Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. (2012)., p.13-14, see also WILLIAM W PARK, THE ARBITRATOR'S JURISDICTION TO DETERMINE JURISDICTION (Kluwer Law International. 2007)., p.23
[215]Fazilatfar, (2012)., p.4
[216]FOUCHARD, et al., International Commercial Arbitration. 1999., p.214

The competence-competence doctrine has been justified on two grounds: first, there is a rebuttable presumption that such jurisdictional power has been conferred by the will of the parties when they entered into an arbitration agreement, and second, the competence-competence power is inherent in all judicial and essential to their ability to function[217].

As its clearly seen the aforesaid explanations that the autonomy of arbitration agreement and the "competence-competence" rule do overlap and are mutually supportive. However, these two fundamental rules should be distinguished from each other. In some respects, the principle of autonomy extends beyond the "competence-competence" rule. The competence-competence rule empowers arbitrator(s) to decide upon their own jurisdiction while principle of autonomy enables arbitrator(s) to declare that the main contract ineffective and therefore declining jurisdiction. In other words, the decision of an arbitrator to retain jurisdiction and then declare a disputed contract ineffective must be founded on the principle of autonomy, and not solely on the competence-competence rule.

In other respect, the competence-competence rule goes much further than the principle of autonomy. The principle of autonomy cannot serve as the basis for the arbitrator's jurisdiction over any direct challenge of the arbitration agreement rather than the main contract.

The competence-competence principle is now recognized by the main international conventions on arbitration, by most modern arbitration statutes, and by the majority of institutional arbitration rules[218].

The New York Convention only deals with the conditions for recognition and enforcement of arbitral awards, it does not cover the competence-competence principle, while 1961 European convention provides a clear regulation in Article V, paragraph 3:

[217]Rosen, FORDHAM INT'L LJ, (1993)., p.608
[218]FOUCHARD, et al., International Commercial Arbitration. 1999., p.397

Subject to any subsequent judicial control provided for under the lex fori (the law of the forum), the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.

Similarly, the Washington Convention establishing International Centre for the Settlement of Investment Disputes[219] ("ICSID") contains a rule as to the competence-competence principle. Furthermore, Model Law provides that "the arbitral tribunal may rule on [a plea that the arbitral tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits," and that, in the event of an action to set aside a partial award concerning jurisdiction, "the arbitral tribunal may continue the arbitral proceedings and make an award." Most recent laws on arbitration contain similar provisions[220].

4. Formation and validity of the international arbitration agreement

a) Presumptive validity and enforceability of international arbitration agreements under international conventions

Article II (1) of the New York Convention set forth a mandatory obligation that Contracting States "shall recognize" agreements in writing under which the parties undertake "to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration[221]. Again in line with the Geneva Protocol, the New York Convention provide an enforcement mechanism for agreements to arbitrate in Article II (3), requiring specific performance of such

[219] International Centre for Settlement of Investment Disputes, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.
[220] FOUCHARD, et al., International Commercial Arbitration. 1999., p.398
[221] The New York Convention Article II (1) reiterated the basic provisions of the Geneva Protocol Article I.

agreements, subject only to a limited set of enumerated exceptions based on generally-applicable contract principles[222].

The Model Law has adopted a rule of presumptive validity for international arbitration agreements, subject only limited exceptions, and required that such agreements be specifically enforced by referring the parties to arbitration. In the light of aforesaid statement, as per Article 8 (1) of the Model Law:

"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests ... refer the parties to arbitration unless it finds that the agreement is null or void, inoperative or incapable of being performed.[223]"

b) Form and proof of international arbitration agreements

The New York Convention, 1961 European Convention and the Model Law include significant provisions governing the form of arbitration agreements[224].

As per Article II (1) of the New York Convention[225], each contracting state is required to recognize "*an agreement in writing*" under which the parties agree to submit their disputes to arbitration. Paragraph (2) of the same Article further stipulates that, "the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Furthermore, as per Article I paragraph 2 of the 1961 European Convention the term "arbitration agreement" shall mean "either an arbitral clause in a contract or an arbitration

[222]BORN, International Commercial Arbitration. 2009., p. 567, see also LEW, et al., Comparative International Commercial Arbitration. 2003., p.159
[223] See BORN, International Commercial Arbitration. 2009., p. 567
[224] See Alan Uzelac, *ISSUES OF COMPARATIVE LAW: The Form of the Arbitration Agreement and the Fiction of Written Orality How Far Should We Go?*, 8 CROAT. ARBIT. YEARB. (2001)., p.84
[225] See Giuditta Cordero Moss, *Form of Arbitration Agreements: Current Developments within Uncitral and the Writing Requirement of the New York Convention*, 18 ICC INTERNATIONAL COURT OF ARBITRATION BULLETTIN (2007)., p.56-57

agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by tele printer and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws."

As a final note, pursuant to Article 7/2 of the Model Law, "The arbitration agreement shall be in writing'

The Model Law followed the New York Convention in requiring arbitration agreements *to be in writing*. It clarified this requirement so as to cover technological developments that were known at the time it was drafted, while at the same time allowing for future technological developments, so long as they provide a record of the agreement[226].

c) Capacity and power to conclude international arbitration agreement

The difference between party's capacity and power to conclude an international arbitration agreement usually intermingling with each other. The issue of capacity arises where an agreement is entered into in a person's own name and on that person's own account. The existence of capacity to conclude an arbitration agreement is a requirement under all international arbitration conventions and national arbitration statutes for validity of the resulting agreement[227].

The issue of power arises where an agreement is entered into other than in signatory's sole interest, be it in the interest of another individual, in that if a judicial person, or in that of an entity having no autonomous legal existence[228] .

[226]Id. at., p.54-55
[227]BORN, International Commercial Arbitration. 2009., p. 625
[228]FOUCHARD, et al., International Commercial Arbitration. 1999., p.242, see also Moss, ICC INTERNATIONAL COURT OF ARBITRATION BULLETTIN, (2007).

d) Consent

The existence of an arbitration agreement is whether the parties have consented to that agreement (to arbitrate), as distinguished from having consented to the underlying contract[229]. However, in practice, parties are entitled to give consent to both arbitration agreement and underlying contract or any of them solely. Nonetheless, in many cases, the only evidence of consent to an arbitration agreement will be a party's consent to the underlying contract, with no separate indications of consent to the arbitration clause specifically[230].

Despite the notion of separability, it is fundamental that a party's signature on the contract constitutes an explicit consent to the arbitration clause. However, parties are free to deprive arbitration clause of their consent via annotation in this regard. On the other hand, absent specific contrary evidence, a party's signature of or other consent to an underlying contract always constitutes assent to the arbitration clause contained in that contract.

e) Arbitrability

The notion of arbitrability demonstrates itself in two forms as (i) subjective Arbitrability (or Arbitrability ratione personae) and (ii) objective arbitrability. The issue of arbitrability may be claimed at any stage before arbitral tribunal or state courts in the context of post-award enforcement and setting-aside proceedings.

Subjective arbitrability mainly focuses on the entitlement of states and public entities to submit their disputes to arbitration. Whether, under an applicable law, a particular entity- typically a state or other public body- may be a party to an arbitration agreement and thus

[229]BORN, International Commercial Arbitration. 2009., p. 661
[230]Id. at., p. 661

whether a dispute to which such entity is a party may be submitted to arbitration is referred by commentators as subjective arbitrability[231].

In some legal systems (e.g. French and Belgian Law) public entities are prohibited to submit their disputes, especially domestic disputes, to arbitration. Besides, under some legal systems arbitration agreement executed by and/or between public entities shall be valid and binding on condition that certain prior authorization has been obtained from the competent authority (e.g. Iranian and Syrian Law).

However, Robert Briner, in 2001 Workshop of the Institute for Transnational Arbitration, explicitly mentioned that "It would seem that the issue of arbitrability of a dispute, when a state has signed an arbitration clause, is no longer a real issue.[232]"

Whether, under an applicable law, the particular subject matter of a dispute matter is capable of resolution by arbitration, in the light of the relevant public policy considerations, is referred to by commentators as "objective arbitrability"[233].

Furthermore, Article II (1) of the New York Convention provides a specific clause as to the objective arbitrability as:

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

The freedom of parties to apply arbitration as a dispute resolution mechanism extends broadly to "all or any … in respect of defined legal relationship, whether contractual or

[231] L. Yves Fortier, *Arbitrability of Disputes, Global Reflections on International Law, Commerce and Dispute Resolution*, (2005)., p. 270., see also Uzelac, CROAT. ARBIT. YEARB., (2001).
[232]Robert Briner, *Luncheon Talk: The Iran-United States Claims Tribunal and Disputes Involving Sovereigns*, 18 ARBITRATION INTERNATIONAL (2002).
[233] Fortier, (2005)., p.270

not", however that freedom is limited to a "*subject matter capable of settlement by arbitration*."

As a final note, countries are complete discretion to consider M&A disputes as non-arbitrable through drafting their laws and regulations in this respect. However, at present all types of disputes stemming from an M&A transaction is arbitrable.

5. Effects of the arbitration agreement[234]

A valid and binding arbitration agreement embodies significant legal effects for its parties, as well as for national courts and arbitrators. These effects are divided into two groups as positive and negative effects of arbitration agreements. Positive effects of arbitration agreement include (a) the obligation to participate and cooperate in good faith through the arbitration process, (b) the obligation to submit disputes covered by it to arbitration and provides (c) the basis for the jurisdiction of the arbitral tribunal, while negative effects include the obligation not to pursue dispute resolution in domestic courts or similar legal forums.

E. Composition of the arbitral tribunal

The principle of party autonomy is central to the selection of the number of arbitrators[235]. The New York Convention and other esteemed international conventions recognise that the parties' agreement as to the appointment of the arbitrators must be given effect. Parties are completely free to determine numbers of arbitrators. However, under some jurisdictions (e.g. France, Portugal, Italy and Belgium), it is prohibited to appoint an even number of arbitrators. The idea behind this restriction is that an even number of arbitrators may not render a final decision as to the dispute at stake.

---

[234] See PEKCANITEZ, et al., Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku. 2011., p.744, see also ALANGOYA, et al., Medeni Usul Hukuku Esasları. 2011., p.605

[235]BORN, International Commercial Arbitration. 2009., p. 1351, see also FINIZIO & SPELLER, A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy. 2010. , p.99, see also PEKCANITEZ, et al., Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku. 2011., p.746, see also ALANGOYA, et al., Medeni Usul Hukuku Esasları. 2011., p.610

Parties may either select their own arbitrator or empower arbitration institutions to appoint an arbitrator on their behalf. International arbitration conventions recognise parties' complete autonomy to select arbitrators who will resolve their dispute.

As per Article II of the Geneva Protocol *"the constitution of the arbitral tribunal shall be governed by the will of the parties and by the law of the country in whose territory the arbitration take place."*

Furthermore, as per Article V (1) (d) of the New York Convention *"the composition of the arbitral authority ... was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."*

Article V (1) (d) provides for recognition of the parties' agreement on the constitution of the arbitral tribunal, without reference to the law of the arbitral seat, save that the law of the arbitral seat is applicable as a supplementary or subsidiary source if (but only if) the parties reached no agreement concerning aspects of the constitution of the tribunal (in Article V (1) (d)'s phrase, "failing such agreement …")[236]. Moreover Article II (1) and II (3) of the New York Convention require contracting states to recognize valid and binding arbitration agreements and to refer the parties to arbitration in accordance with their terms- including terms regarding constitution of arbitral tribunal[237].

Although the principle of party autonomy has been adopted with regard to the selection of arbitrators, there are some considerable limits on the parties' freedom. These limits are derived from the parties' arbitration agreement, international arbitration conventions or national law. There is a wide range of restrictions with respect to arbitrators', inter alia, nationality, qualifications, experience, independence or impartiality and procedural

[236]BORN, International Commercial Arbitration. 2009., p. 1369, see also FOUCHARD, et al., International Commercial Arbitration. 1999., p.477
[237]BORN, International Commercial Arbitration. 2009., p. 1369

requirements concerning disclosure of possible conflicts affecting the arbitrator's independence and impartiality.

In case of a party of the dispute become dissatisfied from the arbitrator's impartiality and independence, such party is entitled to seek to challenge and remove the appointed arbitrator. Challenges can in principle be raised against any arbitrator, including arbitrators who have been selected by an appointing authority, by agreement between the parties, by another party, or (occasionally) by the challenging party itself[238]. As per the statistic procured by the relevant body of the ICC, 82 (eighty two) challenges to arbitrators were made arbitrators were made in the five years between 1995 and 1999, while 140 (one hundred and forty) challenges were made in the five years between 2000 and 2004.

There is an established rule with regard to the replacement of an arbitrator who is removed or resigned. Pursuant to Article 15 of the Model Law:

"Where the mandate of an arbitrator terminates under article 13 or 14 [of the Model Law, proving for institutional and judicial challenges] or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced."

F. The applicable law to the merits of the dispute[239]

1. Applicable law chosen by the parties

There is no doubt that the parties' determination with respect to the applicable law may be express or implied[240]. Nowadays, no modern arbitration statute includes requirements

[238]Id. at., p. 1553
[239] See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.252

as to the form of the parties' consent. Consequently, there is nothing to prevent the arbitrators from inferring from the conduct of the parties that there is an implied agreement as to the applicable law where, for example, the parties argue their case on the basis of the same law, even though they have not expressly agreed to apply it. However, the parties' intentions must be clear[241].

It is important to note that any designation as to the law or legal system of a given country shall be deemed, unless otherwise explicitly expressed by the parties, as a direct reference to the substantive law of that country and not to its conflict of law rules in the arbitration agreement. However, in practice in order to avoid doubts and misunderstandings, it might be recommendable for the parties to indicate the exclusion of determined country's conflict of law rules. Furthermore, parties have complete freedom to determine the applicable law at any time before or after the dispute has been arisen.

On the other hand, parties are entitled to choose not only a national law, with the different nuances that might entail, but also, if they see fit, transnational rules, often referred to as lex mercatoria. The parties can also empower the arbitrators to act as amiables compositeurs[242].

At present, parties may choose either the law having connection with the dispute or the law which has no connection with either parties of the subject matter of the contract. Furthermore, parties may also prefer to elect distinctive laws to govern different aspects of dispute that may arise between them[243].

---

[240] See Ole Lando, *The Law Applicable to The Merits of the Dispute*, 2 ARBITRATION INTERNATIONAL (1986)., p.135-136

[241] FOUCHARD, et al., International Commercial Arbitration. 1999., p. 788, see also Doug Jones, *Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties*, 26 SACLJ (2014)., p.911, see also Dimitrios Athanasakis, *Law Applicable to Merits of the Arbitration Dispute (An Overview of the English, Swiss And French Arbitration Laws)*, (2008)., p.2-3, see also REDFERN, Law and Practice of International Commercial Arbitration. 2004. , p.70

[242] FOUCHARD, et al., International Commercial Arbitration. 1999., p.791

[243] As further information, this situation is known as "depaçage" in international law literature. In this respect please see Craig M Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depecage*, 12 NW. J. INT'L L. & BUS. (1991).

As a following note, even though the validity of choosing transnational rules to govern an international commercial contract is now widely accepted in international arbitration, however, those rules, usually referred to under the heading lex mercatoria, remain as a highly controversial subject in international arbitration.

As mentioned above, parties also can instruct the selected arbitrators to act as amiable compositeurs. As per Article VII, paragraph 2 of the European Convention, which explicitly indicates that the arbitrators shall act as amiables compositeurs, if the parties so decide and if they may do so under the law applicable to the arbitration in question. In order to allow arbitrators to act as amiables compositeurs, it is required for parties to illustrate their intention in this regard. Following to European Convention, the Washington Convention adopts the same position, as do most international arbitration rules.

In practice, it is usually in the parties' interest to specify the applicable law as clearly as possible in their arbitration agreement, so as to avoid any sorts of difficulties which may cause delay and monetary loss for the parties.

2. Restrictions over the effectiveness of parties' choice of law

In the vast majority of cases, the arbitrators comply with the choice expressed by the parties as to the law governing the merits of the dispute, and simply apply that law. In a 1971 award made in ICC Case No. 1512, the arbitral tribunal held that[244]:
"… the arbitrator has no power to substitute his own choice to that of the parties, as soon as there exists an expressed, clear and unambiguous choice, and no sufficient reason has been put forward to refuse effects to such a choice."

However, there are several theories such as (i) unsatisfactory restrictions of the effectiveness of the parties' choice of governing law, which divided into three separate parts as the theory of incompleteness of the chosen law, the extensive understanding of

[244]FOUCHARD, et al., International Commercial Arbitration. 1999., p.842

international trade usages and the theory of international mandatory rules; and (ii) legitimate restrictions of the effectiveness of the parties' choice of governing law.

3. Applicable law chosen by the arbitrators

In the event that parties fail to determine the law governing the dispute, the arbitrators shall be deemed as responsible for doing so. Previously, the vast majority of institutions indicated in their rules that in absence of an indication by the parties as to the applicable law, the arbitrator shall apply the law designated by the rule of conflict which they consider appropriate. However, the new AAA, ICC, LCIA and Stockholm Chambers of Commerce Rules all depart from this approach, rejecting the requirement that arbitrators shall use a choice of law rule to choose the law or rules of law applicable to the dispute.

In the absence of any indication by the parties as to how arbitrators should determine the applicable law, the relevant arbitrators statutes do not always impose a specific method on the arbitrators. Like the AAA, LCIA or ICC Rules, they instead often allow the arbitrators to choose from a number if different methods used to select the rules of law applicable to the dispute[245].

G. The law governing the procedure

At present it is generally accepted that the law governing the arbitral procedure will not necessarily be the same as that governing the merits of the dispute. In the past, it was quite common for the arbitral procedure to be governed by the law of the seat of the arbitration but nowadays, such approach is almost abandoned. Similarly the Model Law adopted an approach of which the role of the seat in determining the law applicable to procedure was mitigated. Under the heading "Determination of rules of procedure", it provides in Article 19, paragraph 1 that "subject to the provisions of this Law", which in fact means subject to those provisions of the Model Law considered to be mandatory,

[245]Id. at., p.866, see also Lawrence Collins, *The Law Governing the Agreement and Procedure in International Arbitration in England*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (1987).

"the parties are free to agree on the procedure to be followed by the arbitral tribunal." The article then specifies that "failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.[246]"

The earliest international convention which includes specific provision as to the law governing to the arbitral procedure is Article 2 of the Geneva Protocol. As it is clearly seen from the explicit wording of Article 2 of the Geneva Protocol, the procedural rules of the seat shall be applicable to the dispute at stake. Article 2 stipulates that:

"the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place."

In order for the arbitral decisions to be recognized, it is required to comply with the provisions of the procedural law of the seat of arbitration. Furthermore, Article 3 of the Geneva Convention provides that the recognition or enforcement of an award may be refused or suspended:

"If the party against whom the award was made proves that, under the law governing the arbitration procedure, there is a ground … entitling him to contest the validity of the award in a court of law."

Although it does not impose compliance with the law of the seat, the Convention does thus require the parties to respect the mandatory provisions of a law chosen by applying a traditional choice of law rule which the Convention does not itself determine[247].

On the other hand Article V paragraph 1(d) of the New York Convention provides that recognition and enforcement of an award can be refused where the arbitral procedure was

[246]FOUCHARD, et al., International Commercial Arbitration. 1999., p.637, see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.251-252
[247]FOUCHARD, et al., International Commercial Arbitration. 1999., p.638

not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

In addition to Article V paragraph 1 (d), the competent authority of which enforcement or recognition of arbitral award is sought, is entitled to adjourn enforcement and recognition proceedings by virtue of Article VI of the New York Convention.

1961 European Convention Article IV paragraph 1 (b) (iii) provides the first modern provision, which is currently adopted, that the parties to an arbitration agreement shall be free "to lay down the procedure to be followed by arbitrators." If parties are refrained from doing so, the arbitrators themselves shall determine the procedural rules to be followed by virtue of Article IV, paragraph 4 (d). Failing that, the 1961 European Convention provides a fall-back whereby the authority responsible under the 1961 European Convention for organizing the arbitration can "establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrators."

ICSID Rules have also adopted a modern approach that provides wide range of party autonomy as to the determination of the law governing to the arbitral procedure. If parties failed to determine, appointed arbitrators are entitled to determine the law, which they deem as appropriate, applicable to the procedure.

Despite contrary information provided above, arbitrators cannot entirely ignore the mandatory rules of law of jurisdiction where the award is liable to be reviewed by the courts. This is the sole limitation for the party autonomy with regard to the procedural conduct of the arbitral proceedings. In most legal systems, an action to set aside will be brought before the courts of the country of the seat of arbitration, and it is there that a breach of certain procedural rules may provide a basis for the relevant courts to set aside the arbitral award in question by virtue of public policy concerns.

As a final note, in share purchase agreements under the law of countries which ratified the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), the parties should expressly exclude the application of the CISG in asset sales, as this might apply if the proportion of assets qualifying as goods bought within the meaning of the CISG is of greater value than that of assets not qualifying as goods within the meaning of CISG[248]. However, it is important for the parties to bear in mind that the CISG provisions are not suitable in acquisitions and recommended to be excluded along with any statutory warranty laws that may be applicable.

H. Parties to international arbitration

Presumptively, parties of an arbitration agreement are its formal signatories. Nonetheless, under some circumstances, non-signatories may be deemed as a party of the international arbitration agreement.

The principle that the rights and obligations of an arbitration agreement apply only to the agreement's parties is a straightforward application of the doctrine of privity of contract, recognized in both civil and common law jurisdictions[249]. Both international arbitration conventions and national arbitration legislation adopt the principle that an arbitration agreement binds only its signatories.

Article II of the New York Convention provides that Contracting States *"shall recognize an agreement to in writing under which the parties undertake to submit [their disputes] to arbitration."*

In addition to Article II of the New York Convention, Article 7 (1) of the Model Law defines an arbitration agreement as *"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them."*

[248]WACH & MECKES, Tactics in M & A arbitration. 2008., p.39
[249]BORN, International Commercial Arbitration. 2009., p. 1133

As per the ICC Case No. 5721, 117 J.D.I. 1019 (1990), *"arbitration is essentially based upon the principle of consent;" "clearly, an arbitral tribunal has power only with respect to the parties to the arbitration."*

It is quite important to mention that under most legal systems an agent or a representative of the company is entitled to execute an agreement on and for behalf of its principle. In this scenario, the principle is a party of the agreement while the agent and/or representative is not. Conversely, it is also clear that entity that has not formally executed an arbitration agreement, or the underlying contract containing an arbitration clause, may be bound by the agreement to arbitrate[250]. In the other words of a leading commentator, "persons other than the formal signatories may be parties to the arbitration agreement by application of the theory of apparent mandate or ostensible authority or because they are third-party beneficiaries.[251]"

In order to bind non-signatory entities that have not executed an arbitration agreement, there are significant theories developed under distinctive legal systems such as agency, alter ego, implied consent, "group of companies", estoppel, third-part beneficiary, guarantor, subrogation, legal succession and ratification or assumption theories.

I. Seat of the arbitral proceedings

The seat of the arbitration plays significant role in the vast majority of countries. First, it determines the scope of application of lex arbitri. The lex arbitri is a set of mandatory rules of law applicable to the arbitration at the seat of the arbitration[252]. It also can be defined that the juridical seat of arbitration. Lex arbitri also "determines the relationship between the arbitral tribunal and national courts."[253]

[250]Id. at., p. 1137
[251] BERNARD HANOTİAU, COMPLEX ARBİTRATİONS: MULTİPARTY, MULTİCONTRACT, MULTİ-ISSUE AND CLASS ACTİONS (Kluwer Law International. 2005).
[252]ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE (Oxford University Press. 2005)., Chap. 7.39
[253]REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., Page 691

Furthermore, it is important not to confuse the law governing the arbitration, or lex arbitri, with the proper law of the contract[254].

In light of the foregoing, the arbitrators must comply with the mandatory provisions of the lex arbitri of the seat. As a matter of principle, they should also abide by injunctions issued by the competent courts of the seat, unless such injunctions are clearly abusive[255].

The pre-eminence of the seat as connecting factor does not mean that a court confronted with a foreign award will always apply the lex arbitri of the seat. In certain cases, it will apply its own law instead. The New York Convention expressly provides so with regard to the arbitrability of the dispute and the reservation of public policy. Similarly, a court is not obliged to refuse recognition and enforcement of an award which has been set aside in the country of the seat. It is hence possible that an award set aside by the courts of the seat of the arbitration is nevertheless recognized and enforced abroad[256].

J. Interim measures in the course of arbitration proceedings

At the most fundamental level, interim measures of protection are forms of temporary relief[257] intended to safeguard the rights of the parties until the arbitral tribunal issues a final award[258].

Despite the principle of the autonomy of the arbitral proceedings, it is sometimes necessary for a court to intervene, not only in the constitution of the arbitral tribunal, but also the course of the proceedings in order to grant provisional or conservatory measures[259].

---

[254]Id. at., Page 692
[255]JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (Sweet & Maxwell. 2007)., p.89
[256]Id. at., p.89
[257] See John Charles Thomas, *Selected Issues: Interim Measures in International Arbitration: Finding the Best Answer*, 12 CROAT. ARBIT. YEARB. (2005).
[258] See Douglas Campbell Rennie & Peter Sherwin, *Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (2010).
[259]FOUCHARD, et al., International Commercial Arbitration. 1999., p. 709

In many cases, interim measures determine the efficacy of the arbitral award. Interim relief can have "final and significant consequences" without which an adverse party may easily render an award meaningless.

A party to the arbitration must make a request for a temporary or provisional protective measure under conditions demonstrating urgency and a risk of serious or irreparable harm. Additionally, interim measures are binding only on the parties to the arbitration and the issuing body may review and modify the order[260].

Furthermore, interim measures are generally divided into two categories; measures aimed at avoiding or minimizing loss, damage, or prejudice; and measures facilitating the enforcement of arbitral awards.

Following to aforesaid explanations, it is important to examine the question as to whether and to what context the arbitral tribunal and the courts have jurisdiction to issue an interim measure with regard to the case in question.

In this scenario, the principle that the courts and arbitrators have concurrent jurisdiction to take provisional or protective measures is increasingly recognized in modern arbitration law. However, the principle operates subject to certain limits[261].

The first outcome of the principle of concurrent jurisdiction is that the parties are entitled to apply to the courts instead of arbitral tribunal, despite the existence of an arbitration agreement, to procure interim measure. It appears to be that the second outcome of the principle of concurrent jurisdiction is that by applying to the courts for an interim measure, shall not mean for a party to waive its right to the application of the arbitration agreement to the merits of the dispute.

[260]Dana Renée Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT'L L. REV. (2010)., p. 585
[261]FOUCHARD, et al., International Commercial Arbitration. 1999., p.710

Final outcome of the principle of the concurrent jurisdiction is that the arbitrators themselves have jurisdiction to order interim measures, when they deem necessary for the dispute at stake.

Despite the abovementioned explanations as to the principle of concurrent jurisdiction, there are two limits exist for the principle of concurrent jurisdiction. First, the parties may agree to depart from the principle of concurrent jurisdiction and the second, there are areas where the courts have exclusive jurisdiction to render interim measures.

Although there are distinctive views exists in this regard, it might be possible to divide interim measures into three distinctive species as (a) conservatory measures which are intended to prevent irreparable harm, preserve evidence or facilitate the enforcement of the award; (b) measures designated to facilitate the production of evidence; and (c) the refere-provision procedure.

K. The arbitral award

The notion and scope of the arbitral award has been subject of significant and never ending debates. It might be possible to describe as final, preliminary, interim, interlocutory or partial, nonetheless, these terms are usually used without sufficient precision. For instance, as per Article 2 (iii) of the ICC Rules provides that in those rules "award" includes, inter alia, "an interim, partial or final award," again without elaborating on the distinction.

It is not easy to define the notion of "award" within the context of international arbitration. Defining an arbitral award is made more difficult by the fact that most instruments governing international arbitration themselves contain no such definition. For instance, the authors of Model Law decided not to give a specific definition of "award". Like the Model Law, the ICC working group on interim and partial awards likewise found it impossible to reach a consensus on the issue[262].

[262] See Martin Hunter, *Final Report on Interim and Partial Awards*, 1 ICC BULLETIN (1990).

In light of the foregoing, the concepts of final award, partial award, award by default and award by consent each of them requires further explanation.

It might be possible to define the final means an award which includes a decision on the last aspect of a dispute and which, as a result, terminates the arbitrators' jurisdiction over the dispute as a whole[263].

Furthermore, the parties may decide that the arbitrators shall rule on a particular aspect of a dispute (such as jurisdiction, the governing law or liability) by making a separate award, referred to as a partial award[264].

It is highly recommended for a party against whom arbitration has been commenced to participate in it and to present its case in this regard. In an earlier time it sometimes happened that a respondent would refuse to participate in the appointment of the arbitral tribunal and the rules that might have been applicable nor the relevant arbitration law provided a means to complete the tribunal[265].

Default by a party does not therefore prevent the making of a valid award. There is no obligation on the arbitrators neither to simply accept the arguments of the party which is present or represented, nor indeed to increase the burden of proof on that party so as to compensate for the other's failure to participate, provided the defaulting party has been properly invited to attend[266].

As a final note, at present, it is quite common for the parties to reach a settlement prior to the competent court render its final decision with regard to the dispute in question. If the parties reach a settlement, they may simply formalize their agreement in a contract and terminate the arbitral proceedings. Alternatively, they may want their decision to be

[263]FOUCHARD, et al., International Commercial Arbitration. 1999., p.741
[264]Id. at., p. 741
[265]United Nations, United Nations Conference on Trade and Development, Dispute Settlement International Commercial Arbitration: Making the Award and Termination of Proceedings (2005)., p.11
[266]FOUCHARD, et al., International Commercial Arbitration. 1999., p.744

recorded by the arbitral tribunal in the form of an award. This is referred to as a consent award[267].

L. Enforcement and set aside procedure of arbitral decisions

One of the most interesting aspects of the international arbitral process is the fact that arbitral awards as a whole enjoy a higher degree of transnational currency than judgements of national courts[268]. Unlike domestic court decisions, arbitral awards may, in principle, be recognized or enforced anywhere in the world under the New York Convention. The New York Convention provides obligations for the signatories, denying recognition or enforcement request under exceptional situations are reserved, to recognize or enforce foreign awards (irrespective of the nationality of the parties).

It is crystal clear that the New York Convention includes quite few numbers of rules governing the procedure for recognition and enforcement of foreign awards in the country where such recognition or enforcement is sought (the host country).

As per Article III of the New York Convention, "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon" on condition that such awards satisfy the conditions set forth in the New York Convention.

The New York Convention stipulates two significant rules concerning the burden of proof and the role of the courts. Such convention also specifies which documents are to be submitted by the applicant for recognition and enforcement.

When considering the aforesaid explanation, the first procedural rule concerns the burden of proving allegations which may prevent recognition and enforcement of the award.

[267]Id. at., p.744

[268]REISMAN, International Commercial Arbitration : Cases, Materials, and Notes On The Resolution of International Business Disputes. 1997., p.1215, see also Martin L Roth, *Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach*, 92 CORNELL L. REV. (2006).

Pursuant to Article V of the New York Convention, the party applying for enforcement is only required to submit a certain number of documents to establish the authenticity and content of the award, and the existence of the arbitration agreement on which the award is based. It is then "the party against whom the award is invoked" who must prove the existence of grounds for refusal of recognition and enforcement[269].

The second significant procedural rule contained in the New York Convention concerns the role of the courts of the host country. In this respect it is important to highlight that the New York Convention stipulates a distinction between two types of grounds on which recognition and enforcement may be refused: those which must be raised by the party resisting recognition or enforcement and those which can be raised by the courts of the host country on their own motion. There is no doubt that the list of grounds for refusal is exhaustive, and it of course excludes any revision of the merits of the award[270].

M. Grounds that must be raised by the party resisting recognition or enforcement

Article V, paragraph 1 (a), (b), (c) and (d) stipulates the grounds that must be raised by the party resisting recognition or enforcement request. Article V, paragraph 1 (a) deals with the "invalid arbitration agreements"; paragraph 1 (b) deals with the "breach of due process"; paragraph 1 (c) deals with "non-compliance with the terms of the arbitration agreement"; and paragraph 1 (d) deals with the "irregularities affecting the composition of the arbitral tribunal or the arbitral proceedings".

In the light of article V, paragraph 2 of the New York Convention,

"… recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: the subject-matter of the difference is not capable of settlement by arbitration under

[269]FOUCHARD, et al., International Commercial Arbitration. 1999., p.968, see also May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT'L & COMP. L. (2005)., p.755
[270]FOUCHARD, et al., International Commercial Arbitration. 1999., p.983

the law of that country; or the recognition or enforcement of the award would be contrary to the public policy of that country.

N. Why arbitration beats litigation?[271]

Despite the fact that arbitration and litigation have similarities in that both process typically involve a binding decision over the case rendered by the neutral decision maker(s) after each side has had reasonable opportunity present its case and submit necessary documents to these neutral decision maker(s).

However, arbitration embodies important differences that make arbitration as the most preferred dispute resolution method while litigation experienced spectacular decrease on its usage day by day. International commercial arbitration is superior to international litigation because arbitration (i) allows parties to tailor the procedural rules used to resolve the dispute; (ii) offers a neutral dispute resolution process, since no party is subject to the potential biases of a national court judges and prosecutors; (iii) provides complete freedom to parties to choose the substantive law that will govern the dispute at stake; (iv) allow parties to appoint an expert decision maker who may have significant qualification with respect to the dispute in hand; (v) affords an opportunity for parties to declare their commercial secrets and sensitive information by providing strict confidentiality precautions; and (vi) allows parties to determine the seat of hearings to be made, thus, create a time efficient dispute resolution process.

Most important benefit of international arbitration relates to the easy recognition and enforceability of arbitral awards. Furthermore, a strong pro-enforcement policy also exists with respect to arbitration agreements, which are given a high degree of respect in many jurisdictions[272].

[271] See BORN, International Commercial Arbitration. 2009., p. 219-223, see also ILDIR, Alternatif uyuşmazlık çözümü : Medeni Yargıya Alternatif Yöntemler. 2003., p.59-60

[272] Strong, WASHINGTON UNIVERSITY JOURNAL LAW & POLICY, (2014)., p.28, see also ILDIR, Alternatif uyuşmazlık çözümü : Medeni Yargıya Alternatif Yöntemler. 2003., p.60-61

In light of the aforesaid explanations, until the moment that the playing field is levelled with respect to enforceability, arbitration keeps on beating litigation by maintaining to be the most preferred dispute resolution mechanism for M&A dispute.

O. Why arbitration beats ADR mechanisms[273]

By considering the fact that arbitration is not an ADR mechanism, arbitration provides significant advantages when compared to ADR mechanisms. ADR mechanisms are remains weak when compared to international arbitration because ADR mechanisms cannot provide final and binding decision; may cause considerable delay and money loss and cannot provide certainty with regard to enforcement of an agreement achieved through ADR process.

In ADR mechanisms, a neutral third party usually attempts to facilitate a settlement between the disputants. A neutral third party can attempt to bring the parties together, serve as a bridge between the parties in order to enhance the quality of communication between the disputants and propose some solutions to the disputants, nonetheless, cannot impose a solution upon them or reach a final and binding determination of their dispute.

Furthermore, in the event that non-compulsory attempts are failed, parties may encounter considerable delay and accordingly loss in money. Finally, like litigation, there is no uniform convention or agreement with respect to recognition and enforcement of settlement agreements achieved upon application of ADR mechanism. Therefore, parties of a settlement agreement may embody the risk of being rejected by the competent authority of which recognition or enforcement of such agreement is requested.

P. Why arbitration is the best mechanism for the resolution of an M&A Disputes

In the light of the foregoing explanations, arbitration, as a dispute resolution mechanism, offers quite important advantages for its users. Owing to that, it is the most preferred

[273]BORN, International Commercial Arbitration. 2009., p. 241-243

dispute resolution mechanism for a long time. Due to its remarkable benefits, the vast majority of businesses prefer to add arbitration clause in their both domestic and international agreements. Having reviewed significant amount of international and domestic M&A agreements it appears to be that arbitration shines among other dispute resolution mechanism and became the most preferred dispute resolution mechanism in this respect.

In order to understand the main reason why arbitration is the most preferred dispute resolution mechanism for resolving M&A disputes, it is quite important to examine main objectives of arbitration in detail.

a) Neutrality of the Dispute Resolution Forum

One of the central objectives of international arbitration agreements is to provide a neutral forum for dispute resolution, detached from either the parties or their respective home state governments[274].

The discussion with regard to the impartiality and neutrality of the domestic courts is an ever-increasing issue and engenders significant problems for businesspersons who are usually a party of international contract. For instance, there is a commercial contract as to the manufacture of spare parts for various car models between Company A from Germany (manufacturer) and Company B from Italy (purchaser). There is no doubt that both parties would desire such agreement to be governed by their own jurisdiction. However, it is usually not possible for one party of the contract to accept jurisdiction of the other party. On the other hand arbitration, as a neutral dispute resolution forum, affords an opportunity for disputants to determine their own arbitrator and reduce the risk of procuring one sided outcomes.

[274]Id. at., p. 72, see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.244

b) Centralized Dispute Resolution Forum

International transactions inevitably involve parties from, and conduct in, two or more states. Under contemporary jurisdictional principles, this means that disputes arising from such transactions may potentially be resolved in different national courts[275]. Inevitably, parties will seek to litigate in the forum (or forums) which each considers most favourable to its respective individual interests. In turn, that results in recurrent, protracted disputes in and between national courts over jurisdiction, forum selection, choice of law, evidence and recognition of foreign judgements[276].

c) Enforceability of Awards[277]

In the event that any local court renders a decision as to the dispute arisen from or in connection with any international transaction, it is quite risky for the winning party to enforce such decision in any foreign country so as to attach losing party's properties in the said country.

Consequently, domestic litigation shall cause significant losses in time and cost because winning party should apply another dispute resolution mechanism in order to collect its receivables or use its rights.

There are some regional arrangements which aim to establish effective international enforcement regimes for decisions issued by local courts. The Council Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("The Regulation No. 44/2001") provides for the enforceability of the court decision issued by an EU member state's courts, which will only subject to limited restrictions. However, many states impose limitations on the enforceability of local court decisions, such as requiring a "reasonable relationship"

[275] BORN, International Commercial Arbitration. 2009., p. 72
[276] Gary Born & Peter B Rutledge, *International Civil Litigation in United States Courts*, (2007).
[277] See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.245, see also WACH & MECKES, Tactics in M & A arbitration. 2008., p.18, see also FINIZIO & SPELLER, A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy. 2010., p. 2

between the parties' contract and the forum or considering *forum non conveniens* objections to the parties' contractual forum.

Similarly, "public policy" and "mandatory law" limitations on forum selection mechanisms are usually less significant obstacles to enforcing arbitral decisions than local court decisions[278]. On the other hand, the New York Convention provides crucial enforceability feature for arbitral decisions due to the fact that all signatory countries are obliged to apply arbitral decision issued by another signatory country, except for the limitations designated in article V of the New York Convention.

d) Commercial Competence and Expertise of Tribunal

Local courts have slight experience or education in resolving international transactions or disputes and such lack of expertise may lead to inappropriate and harmful outcomes. On the other hand, disputants in arbitration process are completely free to appoint (except impartiality restrictions) an arbitrator who has significant knowledge and expertise as to the dispute at stake. Consequently the whole judgement process and outcome would be considerable more healthy and equitable.

Furthermore, this is confirmed by users of international arbitration who frequently cite "the possibility for the parties to select the members of the tribunal themselves," as compared to being provide a randomly-picked judge of uncertain experience and age, as one of the process's most substantial benefits[279].

e) Finality of Decision

Although considerable amount of practitioners interpret limited appellate possibilities as a disadvantage, such lack of appellate review brings a unique feature for arbitration.

[278] BORN, International Commercial Arbitration. 2009., p. 77

[279] See Queen Mary University of London School of International Arbitration & PricewaterhouseCoopers, Corporate Attitudes and Practices. 2006., see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.244, see also PEKCANITEZ, et al., Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku. 2011., p.734

Judicial review of arbitral awards in most developed countries is narrowly confined to issues of procedural fairness, jurisdiction and public policy: any judicial scrutiny of the arbitrator's substantive decisions is ordinarily highly deferential[280].

The vast majority of jurisdiction systems provide appellate review of first instance judgements and such opportunity may cause significant delays on reaching the final and binding outcome.

However, there are both benefits and drawbacks to the general lack of appellate review mechanism for arbitral awards. As a drawback appellate review significantly reduces both litigation costs and delays. Besides, appellate review affords an opportunity for wrong decisions to be corrected prior to cause considerable harm over the losing party. On balance, anecdotal evidence and empirical research indicate that business users generally consider the efficiency and finality of arbitral procedures favourably, even at the expense of foregoing appellate rights.

f) Party Control and Procedural Flexibility[281]

Although the choice of law method and the application of a particular national law retain some relevance in international arbitration, the principle of party autonomy is of more importance given to the contractual basis of arbitration[282]. Arbitration provides comprehensive right for parties to determine upon the substantive laws and procedures applicable to their arbitration.

[280]BORN, International Commercial Arbitration. 2009., p. 81, see also ILDIR, Alternatif uyuşmazlık çözümü : Medeni Yargıya Alternatif Yöntemler. 2003., p.58
[281] See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.248, see also WACH & MECKES, Tactics in M & A arbitration. 2008., p.15, see also PEKCANITEZ, et al., Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku. 2011., p.735
[282]FOUCHARD, et al., International Commercial Arbitration. 1999., p.31

g) Speed[283]

Unfortunately, it is a big fairy tale that arbitration is less expensive than other means of dispute resolution mechanisms. Nowadays, both ad hoc and institutional arbitration is significantly more expensive than that of other dispute resolution mechanism. However, it might be possible to say that arbitration proceedings are more or less faster than litigation.

Due to the ever-increasing docket numbers in the local courts, it may take more than 18 months (approximately) to procure a decision from the local court. However, appellate right of both parties is quite comprehensive and it also causes considerable delay on the process. Owing to that final and binding arbitration process may be deemed faster and efficient when compared to litigation.

Furthermore, it is important to mention that the speed of an arbitration proceeding can be enhanced by procuring necessary support from the national courts located in the seat of the arbitration.

h) Confidentiality

Most international businesses prefer, and affirmatively seek out, the privacy and confidentiality of the arbitral process.[284] However, parties are free to determine that their arbitral proceedings will be open to public. Unless otherwise agreed by parties, whole arbitration process and submitted documents are strictly confidential while hearings and court dockets in litigation are usually (except special cases) open to the public, competitors and press.

---

[283] See ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.244, see also WACH & MECKES, Tactics in M & A arbitration. 2008., p.13-14, see also FINIZIO & SPELLER, A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy. 2010., p.10

[284] See Queen Mary University of London School of International Arbitration & PricewaterhouseCoopers, Corporate Attitudes and Practices. 2006., see also ŞANLI, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları. 2013., p.246, see also ÖZBEK, Alternatif Uyuşmazlık Çözümü. 2009., p.440; see also WACH & MECKES, Tactics in M & A arbitration. 2008., p.15, see also ALANGOYA, et al., Medeni Usul Hukuku Esasları. 2011., p.595

i) Avoiding precedent decisions

If a party wishes to avoid the setting of precedents, arbitration proceedings or other ADR mechanisms are also the first choice[285].

II. Arbitration as a dispute resolution mechanism for M&A disputes

A. Introduction

As a natural consequence of the complex and lengthy nature of M&A transactions, it is quite possible for the parties to encounter distinctive types of disputes at all stages. This chapter focuses on the role of international arbitration in M&A disputes, its effects and its procedural particularities. Arbitration has indeed emerged as the preferred mechanism to resolve M&A related disputes and, today, mergers and acquisitions is one of the fields of international business law with the highest proportion of arbitration agreements[286]. The main ground for this is the inherent flexibility of arbitration, especially the fact that the process can be tailored and arbitrators selected by considering the criteria such as language, familiarity with the industry or commercial experience.

B. Arbitration at various stages of merger and acquisition transaction

As mentioned above, the vast majority of disputes stemming from an M&A transactions are increasingly being referred to arbitration. Therefore, disputes might arise during an M&A transaction, if a party considers the equivalence of performance and counter-performance defective. The ground for this may be erroneous assumptions or

[285]WACH & MECKES, Tactics in M & A arbitration. 2008., p.15
[286]Sachs Klaus, Schiedsgerichtsverfahren Über Unternehmenskaufverträge–Unter Besonderer Berücksichtigung Kartellrechtlicher Aspekte (SchiedsVZ 2004)., p.123

expectations with regard to the subject of the transaction caused by either the buyer's own incorrect assumptions or inappropriate information provided by the seller[287].

In light of the foregoing explanations, it is not possible to identify all types of disputes that may arise throughout the transaction. Therefore, this part of the thesis mainly focuses on the disputes arisen from the (i) negotiation stage; (ii) post-closing stages; (iii) ancillary agreements; and (iv) procedural particularities

1. Pre-closing disputes

M&A transactions usually begin with initial exploratory talks, an information memorandum, the signing of preliminary agreements and negotiation phase, including due diligence investigations and discussions about the framework of the transaction[288].

a) Letter of intent

If the parties agree on the essential terms of the transaction, they usually wish to record their common intentions with respect to the nature of the envisaged deal, its main conditions and the process which will lead to the execution of the actual purchase agreement. Unless otherwise explicitly determined by the parties, letter of intents are usually have non-binding nature, however, letter of intents create a quasi-legal relationship, which imposes certain obligations upon the parties, for example, the duty to act in good faith[289]. Non-compliance with such a duty may already give rise to disputes[290]. However, in order for disputes stemming from the letter of intent to be resolved via arbitration, it is required for the parties to refer arbitration as a dispute resolution mechanism in their agreement.

[287]WACH & MECKES, Tactics in M & A arbitration. 2008., p.5, see also Alice Broichmann, *M&A-Deals in Dispute: Settlement of M&A Disputes by Arbitration*, *available at* https://www.pplaw.com/sites/default/files/publications/2007/04/070420-ci-ma-deals-dispute.pdf., p.1

[288]Bernd D Ehle, *Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions*, COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS (2005)., p.288

[289]Id. at., p.291

[290]Klaus, Schiedsgerichtsverfahren Über Unternehmenskaufverträge–Unter Besonderer Berücksichtigung Kartellrechtlicher Aspekte. 2004., p.125, see also Von Segesser, Arbitrating Pre-Closing Disputes in Merger and Acquisition Transactions. 2005.

b) Confidentiality and exclusivity agreements

Letter of intents usually include exclusivity clause (always referred to as "no shop clause") which prohibits each party of the prospective M&A transaction to enter into negotiations with other party for a limited period. Furthermore, parties always execute a confidentiality agreement together with the letter of intent so as to provide confidentiality regarding the negotiations are being conducted and the information that is being exchanged, in particular, throughout due diligence investigations and if the prospective buyer is a competitor[291]. These agreements usually includes a contractual penalty, therefore, aggrieved party is entitled to ask for damages and/or rapid relief.

On the other hand, it is quite important for the parties to determine what is going to be deemed as confidential and what is not. As a final note, as mentioned above parties should refer to arbitration as a dispute resolution mechanism in their confidentiality and exclusivity agreements.

c) Due diligence

Following to duly completion of the execution of letter of intent, exclusivity agreement (parties may prefer to include exclusivity clause inside the letter of intent instead of executing an agreement in this regard) and confidentiality agreement, parties may agree on the procedure to be followed with regard to the disclosure of the information. Parties may either establish a virtual data room and share requested documents in this virtual area; deliver requested documents by hand or do not establish a virtual data room or deliver requested documents by hand but demanding the representative of the prospective buyer to examine all necessary documents inside the business place of the prospective seller and forbidden to obtain any copy in this regard. This method is usually preferred when there are significant trade secrets or sensitive information at stake.

[291] See Von Segesser, Arbitrating Pre-Closing Disputes in Merger and Acquisition Transactions. 2005., see also Broichmann, M&A-Deals in Dispute: Settlement of M&A Disputes by Arbitration., p.1

There is no doubt that the outcome of any due diligence examination is critical to the parties' further negotiations and generally has far-reaching consequences for the deal. Owing to that, the due diligence process usually gives rise to disputes. The most common area controversy is the scope of the pre-contractual duties of disclosure of the seller[292]. Questions that frequently come up concern the completeness of the information provided by the seller in the data room and the obligation of the seller to disclose sensitive information or certain difficulties at that early stage, without being expressly asked to do so by the buyer[293]. Besides, the seller may claim that the prospective buyer conducted the due diligence process erroneously and cause harm on the prospective seller in this respect.

2. Post-closing disputes

The majority of an M&A arbitrations occur after the parties have signed the merger or purchase agreement and closed the deal by the transfer of assets, that is, "post-M&A"[294]. However, it is important to indicate that the parties may encounter disputes in the time between the signing of the necessary agreements and the closing. Naturally, the question of the validity of an M&A agreement may also be a source of dispute, for example, arising from one party's lack of a power of attorney, missing approvals, unfulfilled conditions precedent, exercise of rights to withdraw or formal objections[295].

a) Representations and warranties

Many post M&A arbitrations result from claims of the acquiring company based on contractual representations and warranties, that is, statements of the seller concerning the

[292]Ehle, COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS, (2005)., p. 292, see also Julien Fouret & Alexis Mourre, *Pre-Closing Disputes*., p.312
[293]Klaus, Schiedsgerichtsverfahren Über Unternehmenskaufverträge–Unter Besonderer Berücksichtigung Kartellrechtlicher Aspekte. 2004., p.126
[294]Id. at., p. 125
[295]Ehle, COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS, (2005)., p. 292

state of the target at the time of the execution of the acquisition agreement[296]. Many of these "snapshot" statements concern the correctness of the company's financial statements, the absence of liabilities other than those reflected in its latest balance sheet, the seller's title to the assets part of the sale and compliance with applicable laws[297]. These representations and warranties in an M&A agreement thus serve three distinct objectives: obtaining disclosure and undertakings from a seller, being a mechanism for terminating the agreement prior to closing if they are proved to be wrong, and anticipating the buyers' indemnification in case of false representation or a breach of warranty[298].

One important source of disputes is vaguely, ambiguously or incompletely drafted representations and warranties, as the buyer may then more easily claim that the seller is liable for breach of contract and/or misrepresentation. On the other hand, if the buyer does not duly examine the representations presented by the target company, it might be quite possible to encounter unexpected surprises.

Besides, as these representations and warranties are made before signing the purchase agreement, the price agreed can sometimes be adjusted accordingly, before closing, if some of these representations and warranties appear to be incorrect as a result of, for instance, the non-existence of certain assets or the discovery of hidden liabilities[299]. In order to mitigate the risk with regard to the representations and warranties, it might be necessary for the parties to address the consequences of breaches of representations and warranties and mechanisms of dispute resolution in the acquisition agreement.

[296]Klaus, Schiedsgerichtsverfahren Über Unternehmenskaufverträge–Unter Besonderer Berücksichtigung Kartellrechtlicher Aspekte. 2004., p. 126, see also WACH & MECKES, Tactics in M & A arbitration. 2008., p.5
[297]Wolfgang Peter, *Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes*, 19 ARBITRATION INTERNATIONAL (2003)., p.492-493
[298] See Fouret & Mourre., p.317
[299]Peter, ARBİTRATİON INTERNATİONAL, (2003)., p.491

b) Earn-out clauses- price adjustment or indemnification

Indemnity is a promise of compensation for occurrence of a certain event to an indemnified person, without being obligated to decrease the value of the business by the amount caused by the breach[300]. The main purpose of the company is to protect the buyer from the loss related to the breach of representations and warranties provided in the acquisition agreement. Indemnities may provide an extra coverage for the buyer where representations and warranties would not provide adequate coverage for the buyer. Indemnities may cover specific identified risks such as litigation, environmental matters, and tax liabilities.

On the other hand, it is clear that the vast majority of the buyer side participated in an M&A transaction may seek to adjust determined purchase price due to the deficiencies and errors in the target company. Purchase agreements regularly state only a provisional price and, in addition to that, provide for "open-ended" adjustment mechanisms and procedures[301].

By far the most common post M&A disputes center on earn-out provisions and purchase price adjustment calculations[302]. Earn-out clauses are designated so as to provide an additional purchase price for the seller, based on the future earning of the target over a stipulated period. Typical issues concern the type of performance indicator that is to be taken into consideration or the seller's contention that the buyer tried to "manipulate" earnings, for example, by changing the accounting policies or by altering the operations of the business after the purchase, making it difficult to prepare accurate earn-out calculations consistent with the terms of the agreement[303].Furthermore, the parties' different cultural backgrounds and accounting or reporting practices may produce additional complications[304].

[300]Maia Mishveladze, Arbitration of Purchase Price Adjustment Disputes in M&A Transaction (2012) Bucerius Law School)., p.31
[301]Peter, ARBİTRATİON INTERNATİONAL, (2003)., p.494
[302]Id. at., p.491-505
[303]Ehle, COMPARATİVE LAW YEARBOOK OF INTERNATİONAL BUSİNESS, (2005)., p. 295
[304]Peter, ARBİTRATİON INTERNATİONAL, (2003)., p.494

Whether the SPA is an asset purchase agreement (APA) or a merger agreement, the usual sequence of events in determining the final purchase price involves the negotiation and agreement of the SPA terms, conditions, representations, and warranties based on "benchmark" date financial information[305]. In case of delay between signing and closing the deal, it might be possible to encounter changes in the acquired operations' balance sheet or results of operations and cash flows may occur that require an adjustment of previously agreed on consideration, sometimes by a large amount, thus, it might be necessary for the parties to adjust the purchase price in accordance with the outcomes of such changes.

The changes giving rise to an adjustment of the final purchase price consideration are identified in the SPA and may be calculated based on, for example, the book values of net worth, working capital, specific individual financial statement line items, or other specific formulae—for example, earnings before interest, taxes, depreciation and amortization or (EBITDA)—based on the acquired entity's results of operations. After the conditions for closing are satisfied, consideration may then be exchanged based on an estimate of the closing date financial results just prior (often within a day or two) to the actual closing date[306].

However, almost in all cases the parties cannot find out a mutual way on which both parties are benefitted, therefore, such dispute is subjected to the dispute resolution process.

c) Put and sale options

The vast majority of shareholders agreements contain put and sale options in order to provide exit opportunity for the parties. Usually put and sale options are linked to

[305]Ranallo F. Lawrance, *Resolution of Purchase Price Disputes: Issues, Outcomes and Recommendations,* (2009)., p.3

[306]Id. at., p.4, see also ALEXANDER W NÜRK, DRAFTING PURCHASE PRICE ADJUSTMENT CLAUSES IN M&A: GUARANTEES, RETROSPECTIVE AND FUTURE ORIENTED PURCHASE PRICE ADJUSTMENT TOOLS (BoD–Books on Demand. 2009)., p.95-96

deadlock provisions, and if the deadlock event is occurred, parties may be entitled to use put or call option under complying with some conditions that depend on the nature of the agreement in question. As a natural consequence of the freedom of contract, parties of a shareholders and/or joint venture agreement are free to determine the procedure of the put and sale options, thus, it might be quite problematic when a dispute arise in this regard.

d) Anti-trust and competition

Competition filing is usually indicated in the conditions precedent and should be made until the exact date of closing. A dispute can arise when the parties disagree on who should bear the risk of such a refusal or if one party accuses the other of not having made best efforts to obtain the approval[307]. Since the Eco Swiss decision[308] rendered by the European Court of Justice, it is undisputed within the European Union that EU competition law provisions fall within the notion of the public policy in terms of the New York Convention and that arbitrators, therefore, must apply such law in order to make sure that their award will not be set-aside[309].

III. Conclusion of Part III

The vast majority of M&A transactions have quite complicated nature, thus, it is usual to deal with one or more dispute so as to duly close an M&A transaction. An M&A transaction embody lots of complex stages. Owing to that parties burden significant risk of crashing the wall at each stage which may, at the end of a day, cause significant delay in time and loss on money for buyer and seller.

As a human nature, parties usually do not enter into an M&A process by considering the risk of encountering obstacles with regard to the representation and warranties and/or any other significant issue indicated in agreements such as confidentiality, exclusivity etc.

[307]Klaus, Schiedsgerichtsverfahren Über Unternehmenskaufverträge–Unter Besonderer Berücksichtigung Kartellrechtlicher Aspekte. 2004., p. 125
[308] For details see http://curia.europa.eu/juris/liste.jsf?language=en&num=C-126/97
[309]Ehle, COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS, (2005)., p. 303

Due to this reason, dispute resolution clauses in these agreements are generally drafted inadequately and insufficiently.

At present, the vast majority of disputes stemming from an M&A transactions are increasingly being referred to arbitration. The main reasons of this trend are very simple and examined below under a different perspective.

As indicated in the Chapter I of this thesis, like M&A transaction itself, each disputes stemming from an M&A transaction has a complex nature, therefore, it needs to be assessed by an expert who has significant experience in this regard. As a crucial benefit, in arbitration, parties have complete freedom to appoint (except circumstances with regard to the impartiality) arbitrators who have considerable experience with respect to the dispute in question.

Furthermore, one half of M&A disputes are stemming from the application of earn-out process and/or price adjustment procedure designated in the acquisition agreement. Disputes and/or conflicts as to the earn-out calculations and/or price adjustments are needed to be evaluated by an expert who has necessary qualifications for this evaluation. However, in litigation, due to the high volume of docket numbers, it is not possible for judges to have expertise one of these certain areas. In order to circumvent such situation court judges usually appoint an expert and requesting an expert report as to the earn-out calculations and/or price adjustment issues. There are two significant risks that may arise under this circumstance; (i) court-appointed expert does not have adequate knowledge to conduct necessary calculations, therefore, court judge may need to reassign the case to another expert which causes delay on the case; or (ii) render a decision by considering wrong assessments that cause significant loss on money for one party and engender unfair outcome.

CONCLUSION

The purpose of this thesis was to examine dispute resolution mechanisms, namely, litigation, negotiation, conciliation, mini-trial, mediation and arbitration, for the resolution of each type of dispute stemming from M&A transactions and focus particularly on the question why arbitration is deemed as the best dispute resolution mechanisms for complex M&A disputes.

The introduction chapter of the author's research mainly focused on the theoretical approaches and general information as to the increased number of M&A transactions.

The first chapter dealt with the phases of M&A transaction so as to create of foundation and prepare readers for the following chapters. Albeit the fact that there are numerous debates as to the number of phases in M&A transaction, the author preferred to divide M&A transaction into 5 (five) stages:

a) Target identification and preliminary negotiations
b) Negotiations and agreements
c) Signing
d) Official permission from the regulatory
e) Closing

Target identification can be done in one of two ways, namely, directly reaching out the target or invitation bid on a target. Prior to initiate due diligence process, which would be conducted by the prospective buyer with respect to the legal, financial, business and environmental position of the seller's company, parties usually execute letter of intent and confidentiality agreements. The main aim of letter of intent is to outline the desired legal structure and general framework for the M&A transaction, while the main aim of confidentiality agreements is to provide security for the parties, especially for the seller, by detailing the confidentiality associated with the material and information provided and covered by the agreement and stipulating a compensation in case of a breach in this regard.

Following to duly execution of these agreements, parties may establish a virtual data room and upload all documents requested by the prospective buyer with the context of due diligence process; or parties may prefer to delivery such documents by hand.

The prospective buyer usually conducts a detailed and long-lasting research in order to determine as to whether proceed with this transaction or not. Due diligence process has significant importance while determining the first price offer to be submitted to the seller. If parties are willing to continue, they will usually draft a detailed acquisition agreement in which the fundamental issues of the M&A transaction, inter alia, representations and warranties, earn-out clauses, price adjustment procedures, conditions precedents, are indicated.

After completion of all necessary agreements and their annexes parties shall arrange a meeting and conduct execution ceremony. In this ceremony, parties usually issue a closing agenda which enumerates the issues to be completed until the date of closing. If all conditions indicated in the closing agenda are met within the designated time period, the deal then actually completed and the closing occurs. After duly completion of the closing phase, there are several activities remain open with respect to both parties, including but not limited to, post-closing due diligence, the calculation and settlement of post-closing purchase price adjustments and earn outs and business integration.

At present, parties enjoyed a variety of dispute resolution processes exist in order to resolve disputes stemming from their business and/or commercial relationship. However, pursuant to the latest survey with regard to the improvements and innovations in international arbitration, 90% of the respondents indicated arbitration as their dispute resolution mechanism for business and/or commercial disputes. On the other hand, only one out o ten respondents prefers litigation while resolving their business and/or commercial disputes.

In addition to the aforesaid explanations, there is utmost importance to mention that nowadays, significant number of business persons prefer ADR mechanisms such as negotiation, conciliation, mini-trial and mediation for the resolution of their disputes. ADR mechanisms users are experienced considerable benefits such as allow access to justice for everyone; efficiency in

time and cost under some circumstances; flexible and creative outcomes and procedures, confidentiality; win-win nature of the ADR mechanisms; and expert review.

At present, albeit the fact that, there are numerous debates are being made in order to determine which dispute resolution mechanism fits best for M&A disputes, there is no generally accepted decision in this regard. However, as its explicitly seen from the aforesaid explanations unlike arbitration, litigation and ADR mechanisms are remain week for complex M&A disputes.

The main bases of the view that litigation, as a dispute resolution mechanism, is deemed as inadequate for complex M&A transactions are limited jurisdiction of courts with respect to dispute to be heard and type of compensation to be rendered; lack of familiarity with local court procedures and language; limited party control over the dispute; determination of the applicable law and the application of "rules of law"; admissibility of evidence; difficulties with regard to the foreign judgements; lack of confidentiality; long-lasting procedures; excessive cost of pursuing litigation; lack of independent or impartial judiciary and corrupted system; restrictions on judicial review of an arbitral award and lack of specialized judges and ever-increasing docket numbers.

Like litigation, ADR mechanisms remain weak for M&A disputes by virtue of suitability problems; lack of compulsion and most importantly lack of generally accepted convention or regulation with respect to the recognition and enforcement of decision procured via ADR mechanisms.

Following the explanations why litigation and ADR mechanisms remain weak for M&A disputes, it is important to illustrate the strengths of arbitration, as a dispute resolution mechanism, for complex M&A disputes. Most simply, arbitration fits best for M&A disputes because of the expertise of tribunal; finality of decision; party control and procedural flexibility; cost and speed (under some circumstances); confidentiality; avoiding precedent decisions; and the most importantly the New York Convention for the recognition and enforcement of arbitral decision in other signatory countries.

In addition to the aforesaid explanations regarding arbitration, it is quite important to mention that arbitration can be either institutional or ad hoc. In institutional arbitration, parties empower an institution, thus, arbitration shall be conducted under and in accordance with the set of rules established by the selected arbitration institution. On the other hand, in ad hoc arbitration, parties will mutually determine all edges of the procedure without adopting any set of rules issued by any arbitration institution. Moreover, parties are also entitled to design an arbitral procedure and incorporate another institution only for a single matter.

At present, at least %76 of business persons prefer to apply institutional arbitration instead of ad hoc arbitration and the most preferred arbitration institutions are ICC, LCIA, HKIAC, SIAC, SCC, ICSID and AAA.

Nowadays, arbitration is the most preferred mechanism to settle M&A related disputes and, today, mergers and acquisitions is one of the fields of international business law with the highest proportion of arbitration agreements. As indicated above, the main ground for this is the inherent flexibility of arbitration, especially the fact that the process can be tailored and arbitrators selected by considering the criteria such as language, familiarity with the industry or commercial experience.

In M&A transaction prospective disputes may arise through the course of the pre closing phase such as preliminary contact, confidentiality, exclusivity and/or letter of intent, due diligence process; post closing phase most importantly ear-out calculations, business integration and/or price adjustments or ancillary agreements executed so as to duly finalize the M&A transaction. In light of the aforesaid advantages, arbitration shall be deemed as the most suitable dispute resolution mechanism for M&A disputes and it appears to be that this trend keeps on experiencing significant increases in the following years.

BIBLIOGRAPHY

Books and thesis

ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (Sweet & Maxwell. 2004).

ALEXANDER W. NÜRK, DRAFTING PURCHASE PRICE ADJUSTMENT CLAUSES IN M&A: GUARANTEES, RETROSPECTIVE AND FUTURE ORIENTED PURCHASE PRICE ADJUSTMENT TOOLS (BoD–Books on Demand. 2009).

ALEXANDRA POST, ANATOMY OF A MERGER : THE CAUSES AND EFFECTS OF MERGERS AND ACQUISITIONS (Englewood Cliffs, NJ : Prentice Hall, 1994. 1994).

ANDREW J. SHERMAN, MERGERS AND ACQUISITIONS FROM A TO Z (Amacom Div American Management Association. 2010).

ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE (Oxford University Press. 2005).

BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS (Kluwer Law International. 2005).

CEMAL ŞANLI, et al., MILLETLERARASI ÖZEL HUKUK (Vedat Kitapçılık. 2013).

CEMAL ŞANLI, ULUSLARARASI TICARI AKITLERIN HAZIRLANMASI VE UYUŞMAZLIKLARIN ÇÖZÜM YOLLARI (İstanbul : Beta, 2013. 5. Baskı. 2013).

CHRISTOPHER W MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (John Wiley & Sons. 2014).

DENNIS J. ROBERTS, MERGERS & ACQUISITIONS : AN INSIDER'S GUIDE TO THE PURCHASE AND SALE OF MIDDLE MARKET BUSINESS INTERESTS: THE MIDDLE MARKET IS DIFFERENT/TALES OF A DEAL JUNKIE AND THE BUSINESS OF MIDDLE MARKET INVESTMENT BANKING (Wiley. 2009).

DIETMAR ERNST & JOACHIM HÄCKER, APPLIED INTERNATIONAL CORPORATE FINANCE (Vahlen. 2012).

DONALD DEPAMPHILIS, MERGERS AND ACQUISITIONS BASICS: ALL YOU NEED TO KNOW (Academic Press. 2010).

EDWIN L MILLER JR, MERGERS AND ACQUISITIONS: A STEP-BY-STEP LEGAL AND PRACTICAL GUIDE (John Wiley & Sons. 2008).

EMANUEL GOMES, et al., MERGERS, ACQUISITIONS AND STRATEGIC ALLIANCES: UNDERSTANDING THE PROCESS (Palgrave Macmillan. 2011).

ERGIN NOMER, DEVLETLER HUSUSI HUKUKU : YENI TÜRK BORÇLAR KANUNU, TÜRK TICARET KANUNU VE HUKUK MUHAKEMELERI KANUNU'NA GÖRE YENILENMIŞ (Beta Yayın. 2011).

GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 2009).

GÜLGÜN ILDIR, ALTERNATIF UYUŞMAZLIK ÇÖZÜMÜ : MEDENI YARGIYA ALTERNATIF YÖNTEMLER (Ankara : Seçkin. 2003).

HAKAN PEKCANITEZ, et al., HUKUK MUHAKEMELERI KANUNU HÜKÜMLERINE GÖRE MEDENI USUL HUKUKU (Ankara : Yetkin, 11. Bası. 2011).

HASAN PULAŞLI, YENI ŞIRKETLER HUKUKU GENEL ESASLAR (2012).

ISAAK ISMAIL DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS (Martinus Nijhoff Publishers. 1986).

İSMAIL G. ESIN & S. TUNÇ LOKMANHEKIM, UYGULAMADA BIRLEŞME VE DEVRALMALAR (Seçkin. 2003).

JEAN-FRANÇOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (Sweet & Maxwell. 2007).

JULIAN D. M. LEW, et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International. 2003).

JOHN G BRUHN & HOWARD M REBACH, HANDBOOK OF CLINICAL SOCIOLOGY (Springer Science & Business Media. 2012).

KARL J. T. WACH & FRANK MECKES, TACTICS IN M & A ARBITRATION (Frankfurt am Main : German Law Publishers. 2008).

KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION (Kluwer Law and Taxation Publishers. 1993).

LOUKAS A MISTELIS, CONCISE INTERNATIONAL ARBITRATION (Kluwer Law International. 2015).

MATTI KURKELA, et al., DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION (Oxford University Press. 2010).

MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, DISPUTE RESOLUTION : EXAMPLES & EXPLANATIONS (New York : Wolters Kluwer Law & Business, 2nd Edition. 2011).

MUSTAFA SERDAR ÖZBEK, ALTERNATIF UYUŞMAZLIK ÇÖZÜMÜ (Ankara : Yetkin. 2009).

NORBERT HORN, CROSS-BORDER MERGERS AND ACQUISITIONS AND THE LAW (Kluwer Law International. 2001).

PAUL D FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS (Juris Publishing, Inc. 2007).

PATRICK A. GAUGHAN, MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS (John Wiley & Sons. 2010).

PHILIPPE FOUCHARD, et al., INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer law international. 1999).

PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (Dalloz. 1965).

RENE DAVID, ARBITRATION IN INTERNATIONAL TRADE (Kluwer. 1985).

ROGER FISHER, et al., GETTING TO YES : NEGOTIATING AGREEMENT WITHOUT GIVING IN (New York : Penguin Books, 2nd Edition. 1991).

SANDERS PIETER, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (Kluwer Law International. 1987).

STANLEY FOSTER REED, et al., THE ART OF M&A : A MERGER ACQUISITION BUYOUT GUIDE (Irwin Professional, 2nd Edition. 1995).

STEPHEN B. GOLDBERG, et al., DISPUTE RESOLUTION : NEGOTIATION, MEDIATION, AND OTHER PROCESSES (Boston, Aspen Law & Business, 2nd Edition, 1992).

STEPHEN PATRICK DOYLE & ROGER S HAYDOCK, WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION (Equilaw Incorporation. 1991).

STEVEN P FINIZIO & DUNCAN SPELLER, A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION: ASSESSMENT, PLANNING AND STRATEGY (Sweet & Maxwell/Thomson Reuters. 2010).

THOMAS D. CAVENAGH & LUCILLE M. PONTE, ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS (Ohio : West Educational Publications. 1999).

VINOD K. AGARWAL & B. OWASANOYE, ALTERNATIVE DISPUTE RESOLUTION METHODS (2001).

W. MICHAEL REISMAN, INTERNATIONAL COMMERCIAL ARBITRATION : CASES, MATERIALS, AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (Westbury, N.Y. : Foundation Press, 1997. 1997).

WILLIAM W PARK, THE ARBITRATOR'S JURISDICTION TO DETERMINE JURISDICTION (Kluwer Law International. 2007).

YAVUZ ALANGOYA, et al., MEDENI USUL HUKUKU ESASLARI (İstanbul : Beta, 2011. Tıpkı 8. baskı. 2011).

YONA SHAMIR & RAN KUTNER, ALTERNATIVE DISPUTE RESOLUTION APPROACHES AND THEIR APPLICATION (Unesco. 2003).

ZIYA AKINCI, MILLETLERARASI TAHKIM (Seçkin. 2007).

Articles

Alan Uzelac, *ISSUES OF COMPARATIVE LAW: The Form of the Arbitration Agreement and the Fiction of Written Orality How Far Should We Go?*, 8 CROAT. ARBIT. YEARB. (2001).

Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981) Erasmus Universiteit Rotterdam).

A. Ribicoff, *Alternatives to Litigation: Their Application to International Business Disputes*, 38 ARBITRATION JOURNAL (1983).

Bernd D Ehle, *Arbitration as a Dispute Resolution Mechanism in Mergers and Acquisitions*, COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS (2005).

Carrie Menkel Meadow, *Mediation, arbitration, and alternative dispute resolution (ADR)*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES, ELSEVIER LTD (2015).

Craig M Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depecage*, 12 NW. J. INT'L L. & BUS. (1991).

Dana Renée Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT'L L. REV. (2010).

Dimitrios Athanasakis, *Law Applicable to Merits of the Arbitration Dispute (An Overview of the English, Swiss And French Arbitration Laws),* (2008).

Doug Jones, *Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties*, 26 SACLJ (2014).

Douglas Campbell Rennie & Peter Sherwin, *Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (2010).

Eric M Runesson & Marie-Laurence Guy, Mediating Corporate Governance Conflicts and Disputes (Global Corporate Governance Forum 2007).

Eric Van Ginkel, *The UNCITRAL Model Law on International Commercial Conciliation*, 21 JOURNAL OF INTERNATIONAL ARBITRATION (2004).

Gary Born & Peter B Rutledge, *International Civil Litigation in United States Courts*, (2007).

George A Bermann, *The Gateway Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. (2012).

Georg Von Segesser, Arbitrating Pre-Closing Disputes in Merger and Acquisition Transactions (ASA Swiss Arbitration Association Conference of January 21, 2005 in Basel, ASA Special Series 2005).

Gianfranco A. Pietrafesa, *The Importance of Confidentiality Agreement and Letters of Intent*, NEW JERSEY STATE BAR ASSOCIATION (2002).

Giuditta Cordero Moss, *Form of Arbitration Agreements: Current Developments within Uncitral and the Writing Requirement of the New York Convention*, 18 ICC INTERNATIONAL COURT OF ARBITRATION BULLETTIN (2007).

Harold I Abramson, *Time to Try Mediation of International Commercial Disputes*, 4 ILSA J. INT'L & COMP. L. (1997).

Henry Peter, *M&A Transactions: Process and Possible Disputes*, (2005).

Henry Peter & Jean-Christophe Liebeskind, *Letters of Intent in The M&A Context*, (2005).

Hossein Fazilatfar, *Characterizing International Arbitration Agreements as Truly Separable Clauses*, (2012).

Ikko Yoshida, *Interpretation of Separability of an Arbitration Agreement and its Practical Effects on Rules of Conflict of Laws in Arbitration in Russia*, 19 ARBITRATION INTERNATIONAL (2003).

Ivan Bernier & Nathalie Latulippe, *Conciliation as a Dispute Resolution Method in the Cultural Sector*, THE INTERNATIONAL CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS.

Janet A Rosen, *Arbitration under Private International Law: The doctrines of separability and Competence de la Competence*, 17 FORDHAM INT'L LJ (1993).

Jelis Subhan, *Arbitration Conciliation and Mediation-Conflict Between Formal and Informal Setups*, (2010).

John Charles Thomas, *Selected Issues: Interim Measures in International Arbitration: Finding the Best Answer*, 12 CROAT. ARBIT. YEARB. (2005).

Julien Fouret & Alexis Mourre, *Pre-Closing Disputes*.

L. Yves Fortier, *Arbitrability of Disputes, Global Reflections on International Law, Commerce and Dispute Resolution*, (2005).

Law Reform Commission, *Report on Alternative Dispute Resolution: Mediation and Conciliation*, (2010).

Lawrence Collins, *The Law Governing the Agreement and Procedure in International Arbitration in England*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (1987).

Maia Mishveladze, Arbitration of Purchase Price Adjustment Disputes in M&A Transaction (2012) Bucerius Law School).

Martin Hunter, *Final Report on Interim and Partial Awards*, 1 ICC BULLETIN (1990).

Martin L Roth, *Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach*, 92 CORNELL L. REV. (2006).

Mary F Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL (2012).

Mason A. Carpenter & William Gerard Sanders, *Strategic Management: A Dynamic Perspective, Concepts and Cases,* (2007).

May Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT'L & COMP. L. (2005).

Melissa Lewis & McCrimmon Les, *The Role of ADR Processes in the Criminal Justice System: A view from Australia* (2005).

Michael Goold & Campbell Andrew, *Desperately Seeking Synergy*, 76 HARVARD BUSINESS REVIEW (1998).

United Nations, United Nations Conference on Trade and Development, Dispute Settlement International Commercial Arbitration: Making the Award and Termination of Proceedings (2005).

OECD, *New patterns of Industrial Globalisation: Cross Border Mergers and Acquisitions and Strategic Alliances, Paris,* (2001).

Ogden Judith Stilz & Nickki McIntyre Finlay, *Strategies for Choosing a Dispute Resolution Method*.

Ole Lando, *The Law Applicable to The Merits of the Dispute*, 2 ARBITRATION INTERNATIONAL (1986).

Peter Rutledge, *Convergence and Divergence in International Dispute Resolution*, J. DISP. RESOL. (2012).

Peter Schlosser, *The Competence of Arbitrators and of Courts*, 8 ARBITRATION INTERNATIONAL (1992).

Philippe Leboulanger, *The Arbitration Agreement: Still Autonomous?,* (2007).

Rachel Calipha, et al., *Mergers and Acquisitions: A Review of Phases, Motives, and Success Factors*, ADVANCES IN MERGERS AND ACQUISITIONS (2010).

Ranallo F. Lawrance, *Resolution of Purchase Price Disputes: Issues, Outcomes and Recommendations*, (2009).

Reif C. Linda, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INTERNATIONAL LAW JOURNAL (1990).

Robert Briner, *Luncheon Talk: The Iran-United States Claims Tribunal and Disputes Involving Sovereigns*, 18 ARBITRATION INTERNATIONAL (2002).

Robert E Wells Jr, *Alternative Dispute Resolution-What Is It-Where Is It Now*, 28 SOUTHERN ILLINOIS UNIVERSITY LAW JOURNAL (2003).

Robert Mnookin, *Alternative Dispute Resolution*, 232 HARVARD LAW SCHOOL JOHN M. OLIN CENTER FOR LAW, ECONOMICS AND BUSINESS DISCUSSION PAPER SERIES (1998).

Sachs Klaus, Schiedsgerichtsverfahren Über Unternehmenskaufverträge–Unter Besonderer Berücksichtigung Kartellrechtlicher Aspekte (SchiedsVZ 2004).

Schwebel S. M., *International Arbitration: Three Salient Problems*, 35 NETHERLANDS INTERNATIONAL LAW REVIEW (1988).

S. I. Strong, *Beyond International Commercial Arbitration: The Promise of International Commercial Mediation*, 45 WASHINGTON UNIVERSITY JOURNAL LAW & POLICY (2014).

Stephen J Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEVADA LAW JOURNAL (2007).

Steven H Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. INT'L ARB. (2009).

Steven J Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT'L & COMP. L. REV. (1994).

Tschäni Rudolf, Post-Closing Disputes on Representations and Warranties (ASA Swiss Arbitration Association Conference of January 21, 2005 in Basel, ASA Special Series 2005).

Wolfgang Peter, *Arbitration of Mergers and Acquisitions: Purchase Price Adjustment Disputes*, 19 ARBITRATION INTERNATIONAL (2003).

WEB SITES

Alice Broichmann, *M&A-Deals in Dispute: Settlement of M&A Disputes by Arbitration*, *available at* https://www.pplaw.com/sites/default/files/publications/2007/04/070420-ci-ma-deals-dispute.pdf.

European Commission, *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*(2002), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0196&from=EN.

International Centre for Settlement of Investment Disputes, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

International Institute for the Unification of Private Law, *available at* http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf.

National Conference of Commissioners on Uniform State Laws, *available at* http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf.

Queen Mary University of London School of International Arbitration & PricewaterhouseCoopers, *Corporate Attitudes and Practices*(2006), *available at* http://www.arbitration.qmul.ac.uk/docs/123295.pdf.

Queen Mary University of London School of International Arbitration & PricewaterhouseCoopers, *Corporate Choices in International Arbitration-Industry Perspective*(2008), *available at* https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf.

Queen Mary University of London School of International Arbitration & White&Case Law Firm, *Improvements and Innovations in International Arbitration*(2015), *available at* http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

Thomson Reuters, *Merger & Acquisition Review* Thomson Reuters(2013), *available at* http://dmi.thomsonreuters.com/Content/Files/4Q2013_Global_MandA_Financial_Advisory_Review.pdf.

Thomson Reuters, *Merger & Acquisition Review*, Thomson Reuters(2014), *available at* http://dmi.thomsonreuters.com/Content/Files/4Q2014_Global_MandA_Financial_Advisory_Review.pdf.

Thomson Reuters, *Merger & Acquisition Review*, Thomson Reuters(2015), *available at* http://dmi.thomsonreuters.com/Content/Files/2Q2015_Global_MandA_Financial_Advisory_Review.pdf.

United Nations, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

United Nations Commission on International Trade Law, *available at* https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

United Nations Commission on International Trade Law, *Model Law on International Commercial Conciliation*(2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

Victorian Law Report Commission, *Civil Justice Review Report*(2002), *available at* http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf.