In of traditional courts, perception that adr imposes

In this complex world, disputes are also complex whether at national level or international level.

So, to resolve these disputes we normally say, ‘ see you in court’. But apart fromthis traditional mode of resolving disputes i. e. litigation, there arealternative means commonly known as alternative dispute resolution (ADR)mechanism. ADR includesdispute resolution processes and techniques that act as a means for disagreeingparties to come to an agreement short of litigation. The rising popularity ofADR can be explained by the increasing caseload of traditional courts, perceptionthat ADR imposes fewer costs than litigation, a preference of confidentialityand control over the process. The best and amicable methods of ADR arearbitration, conciliation, mediation and negotiation. Mostly, internationalnegotiations are preferred in Air disputes, water disputes, disputes betweencountries, climate change disputes and business transactions.

In this paper wewill discuss about the Negotiation at international level, particularly inbusiness transactions or in short we will discuss about the internationalbusiness negotiations with case studies. Why we need ADR in international disputes? International disputesgive rise to tensions and sometimes even cause outbreak of violence. In actualpractice, there has been modification of traditional techniques of conflictresolution and evolution of new techniques for resolving international disputes. There are several reasons1for evolution of ADR techniques which also explains reasons for having thesetechniques. These are as follows: 1.

Globalization: With the increase inglobalization, the states, individuals, communities, companies, etc. areinteracting at international levels which lead to the creation ofrelationships. As longthere is relation commercial or other, disputes will arise due to many differencesbetween the parties. So, it will be wise to look for effective means of disputesettlement for such kind of dispute where the outcome will get recognition fromall parties and be resolved at a faster rate. At this time ADR can be thoughtas a best alternative. 2. Limitationsof domestic courts: State courts might not have jurisdiction to matters raisedin international disputes as the other party is not clearly under thejurisdiction of the court so that enforcements of such kinds of court decisionwill be obstacles.

3. Topromote access to justice: It may happen that there is denial of the right tohave access to courts when none of the domestic courts of the disputants assumethe jurisdiction over the matter. In that case parties will not get access toany of the courts and the only alternative for them be to look for ADR based ontheir free consent. 4. Influenceof the UN charter: Article 33 of the UN Charter provides for resolving disputesthrough negotiation, enquiry, mediation, conciliation, arbitration, judicialsettlement etc.

5. Otherreasons: Tribunals like ICJ, CCJ try to cover most of the possible cases butthere are a lot more parties who do not have the right before these tribunalslike, individuals, NGOs, Companies etc. There are subject matters likeownership of property, tort claims etc. which are not covered by thesetribunals. ADR tries to fill these gapsand provides faster, amicable and cost efficient alternative. Negotiation atinternational levelNegotiations are

thesimplest method of peaceful settlement of disputes in the sense that in negotiationsthe parties to the dispute alone are involved in the procedure. In contrast, all other mechanism of dispute settlement brings other states or individualswho are not themselves parties to the dispute in the procedure. Negotiationsconsists of continuing dialogues between the parties and even in thecomplicated cases, it helps to narrow down the differences to more manageable proportions.

The success of the negotiation depends on the gap between the two opposingparties held by the disputing parties and diplomatic skill of the parties. Theinternational judicial pronouncements have also emphasized upon the importanceof the negotiation. For instance in the NorthSea Continental Shelf Cases2," the court held that negotiations are more than a formality; they must be pursuedwith an intention to resolve dispute... while there is no duty to reachagreement, negotiations must be meaningful. According to this standard, inflexible bargaining positions are unacceptable".

It is always fair tosay that international law has always considered its fundamental purpose to bethe maintenance of peace. Basically the techniques of conflict management fallinto two categories: diplomatic procedures and adjudication. The former involves an attemptto resolve differences either by the contending parties themselves or with theaid of other entities by the use of the discussion and the fact finding methods. Adjudication procedures involve the determination by a disinterested thirdparty of the legal and factual issues involved3. The international court in Georgia v. Russian federation4has observed that negotiations are distinct from mere protests or disputationsand require at the least, ' a genuine

attempt by one of the disputing parties toengage in discussions with the other disputing party with a view to resolvingthe dispute’. In certain circumstances there may exist a duty toenter into negotiations arising out of particular bilateral or multilateralagreements’.

The downside of this approach is that if this the soledispute resolution provision in the agreement, the complaining party willeither have no other legal recourse to force the breachingparty to honor its obligation, or it will be forced to litigate or to pursuealternative dispute resolution in foreign and unfriendly jurisdiction. The Principles ofnegotiation5The fact thatnegotiations are flexible and free from extensive formality does not mean thatthere is no system to negotiation. There are widely accepted principles ofnegotiation which are enumerated as follows: 1. Separation of interest from position2. Application of objective criteria3. Readiness to make concessions4. The identification of common groundsNorthSea Continental Shelf Cases6areoften cite as an authority for stating that an obligation to negotiate impliesan obligation to reach an agreement.

But this is not so. All the court said wasthat once the parties agree to negotiate, then they do so in fairness and witha view to arrive at an agreement. The obligation is to pursue negotiation withthe intention of possibly, not mandatorily, reaching an agreement. 7Negotiation incommercial or business transactions: Business people andcorporate counsel often seem not to pay much attention towards their choice of disputeresolution when negotiating a contract. This means that any disputes whicharise will be reso.

ve by the litigation, which is often the worst possiblealternative. Hence, the business people should try to consider carefully thekinds of dispute which are likely to arise during the course of business and tochoose a method of dispute resolution. Business negotiationsare deliberations that ensue from different motivating factors and whose agendahave a common ground. Such a phenomenon brings the conflicting sides togetherin the aim of seeking a lasting solution to the conflict. The issue of businessnegotiation is a common phenomenon these days especially on the matters ofpatents and royalties. Mostly the private international disputes areregarding the matters of trade and commerce. These matters are concerned withthe business transactions between the trading and investment entities fromdifferent countries, private individuals, MNCs and governments.

Areas ofdisputes in international transactions can be the international sale of goods, carriage of goods, baking and finance, licensing agreements, construction workand foreign investments. 8These commercial disputes usually occurs due to the breakdown of commercialrelationship between the parties for example, an argument over the payment forgoods that were alleged o be defective by the purchaser. 9Litigation is thetradition method of resolving commercial disputes at international level and aformal approach of resolving the disputes by going to court with counsels but, in recent times increasingly, ADR methods are being used. This may be becauseof the disadvantages of the litigation like, huge backlog of cases, delay in decidingthe disputes, huger costs. The advantages of ADRare many, the obvious question arises will the litigation disappear? The answerto this is NO because of the following reasons: 1. Litigation is an automatic right

becausewhen the interests of the parties are adversely affected then he/she can haveaccess to the court.

2. Courts do more than just resolving thedisputes. They can refer the matter to any ADR mode which finds suitable andcan have the judicial control over arbitrators.

Negotiation atinternational level is considered as the quickest way of resolving Commercial disputesbecause the parties themselves are in the best position to know the strengthsand weaknesses of their own cases. It is more preferred because of having softapproach as its characteristic and having the ability of maintain harmoniousand good business relationship between people. Although negotiation has provento be the best method of resolving commercial disputes but there are certaindifficulties faced by the parties to international commercial disputes. Challenges ordifficulties in international commercial disputes: 1. Compromise and Cooperation: For asuccessful negotiation parties need to be detached and be objective about the issues.

It is also essential that the parties are willing to compromise and have thefeeling of cooperation. However, there qualities are not easy to find and hencenegotiation is always not possible. 2. Culture as a barrier: Commercialdisputes at international level involve the difficulty of culture as theparties involved are from different cultures. Negotiator’s culture is expressedin their negotiating styles. Hence, the different negotiating styles due todifferent cultural influences may make the parties more difficult to

reach toan agreement. 3. Language as a barrier: Commercialdisputes at the international level also involve the difficulty in the form oflanguage.

Most international businesses are conducted in the English, which ishelpful for English speakers but can be difficult for non-native Englishspeakers. English in international disputes can be at different levels, different vocabulary and phrases, accent dialects etc...this can add toobstructions in negotiation process when the negotiators do not have efficienttranslators.

4. Distance as a barrier: Distance betweenthe parties can cause difficulties in determining the place or venue for thediscussion. Phyllis E. Bernard, inhis article Bringing Soul tointernational negotiation10, discussed a shift in training for international commercial negotiation, awayfrom standard western linear, rational, fact-oriented style towards trainingthat makes room for " soul". Here soul represents three components: emption andsubjectivity; deep narratives rooted in faith and ethnic traditions; andcultural intelligence. Negotiation strategiesfor creating value when dealing with difficult people1.

Make multiple offers simultaneously: ItSignals your willingness to be accommodating and flexible, and your desire tounderstand the other party's preferences and needs. 2. Search for post settlement settlements: When a deal is over, consider asking the other side whether he would be willingto take another look at the agreement to see if it can be improved. Because youmight find new sources of value to divide between you. 3. Avoid cultural conflicts by avoidingstereotypes when negotiating across cultures: Instead of relying onstereotypes, try to focus on Prototypes-cultural averages on dimensions of behavioror values. 4. Try not to interpret other's

behaviors, Valuesand beliefs through lens of your own culture, rather research on other party’sculture with understanding why people follow those customs and exhibit these behaviorsin the first place.

Case StudiesIn recent years thereare number of disputes among businesses, organizations and individuals madeheadlines in all over the world and demonstrated the importance of negotiationin business world. As we earlier stated that negotiation does not mean thedefinite success. Hence, following are the examples of combination of bothsuccessful and unsuccessful negotiations. Case Study 1: Apple andSamsung’s dispute resolution over patent issues11In April 2011, Applefiled a suit accusing Samsung of Copying the “ look and feel” feature of the iPhonewhen the Samsung created its series of Galaxy phones. Samsung also accusedApple for not paying royalties for using its wireless transmission technology.

Since then, the dispute over the patent issues increased as has the number ofcourts involved in various countries. They repeatedly accused each other ofcopying the appearances and functions of each other’s smart phones and tabletdevices. At the Californiacourt’s suggestion for negotiation/mediation between the two CEOs in 2012 endedin impasse. And the disputants continued to fight in courts worldwide. Innegotiation, Apple argued that it has lost significant profits in Smartphonemarket to its competitor, Samsung due to blatantly copied features. But Samsungcontended that consumers had purchased its phones for other reasons such as Samsung’sbigger screens and cheaper price. Ultimately, the battle was won by Apple inthe form of advantage going to Apple in U.

S. Hence, in August 2012, aCalifornia jury ruled that Samsung would have to pay Apple more than $1 billionin damages for patent violations. The judge eventually reduced the payout to$600 million. In November 2013, another jury ruled that Samsung would have topay Apple $290 million of the amount overruled by the judge in the 2012 case. Lesson: when theparties are grudging participants the negotiation/mediation is less likely tosucceed than when they are actively engaged in finding a solution. The longerthey spend in finding each other, the more contentious and uncooperative theybecome. Case Study 2: MichaelBloomberg versus the New York Teacher's Union12In 2010, New Yorkpasses a law which stated that old teachers will be replaced and evaluationsystems with more stringent systems.

It was assumed that if new agreementreached then the New York City will gain about $ 250 million in aid and $200million in Grants. But as 2012 drew to a close, talks between both weredeadlocked. On the deadline date, on which school districts and their unionswere required to submit certain aspects of their new system, both announcedthat a final late night negotiating talks had been unsuccessful. Unfortunately, both hadmuch to gain in form of better teachers and more state funding but the failednegotiations hindered this agreement. Lesson: businessnegotiations, seeking to resolve a dispute should foster a cooperative spirit, framing negotiations around gains rather than losses.

And when businessnegotiators are far apart, it may take a professional mediator or otherindependent party to help bridge the divide. Case Study 3: Fiat's 2009, the U. S. Government negotiated with Chrysler to save it from extinction. It wastentative that Chrysler would go into bankruptcy and its

ownership would bedivided with majority stake going to Chrysler’s union welfare healthcare trust, Fiat, US Government and Canadian government. Chrysler also gave a $4.

59 billionnot the health care trust. The fiat negotiated a plan to acquire all Chryslerby buying the health care trust and the stake of us government. But when thefiat started buying the health care trust’s stake, the voluntary employeebeneficiary association and fiat reached altogether different calculations ofChrysler’s value. When hastily drawing up their contract to save Chrysler, thelawyers failed to take note of the $4. 59 billion note issued to the health caretrust and errorred in specifying whether that note should be calculated whiledetermining the value of Chrysler. Lesson: The above errorpoints out the risks involved in the negotiating deals. Business negotiatorsshould not wrap up the deal in hurry but to work carefully.

Case Study 4: Apple’s Defeat in price fixing14In 2007, when Apple wasabout to launch its iPad, unhappy with the low prices by Amazon, the 5 U. S. publishers negotiated a new model of e-book pricing with Apple.

They adopted theso called agency model in which the publishers can set their own prices with30% commission of Apple. After threatening Amazon that there will delay ine-book edition to Amazon, it reluctantly agreed and prices of books was rose acrossthe industry. The U. S. Department accused the parties of artificiallyincreasing the prices. The five publishers reached a settlement with the U. S.

Government but Apple did not. In us district court, the parties demonstratedtheir discussion as a negotiation in which each side pushed

hard forconcessions. On July 10, 2013, the court ruled that Apple and publishers hadindeed engaged in price fixing conspiracy that resulted in consumers payingmore for e-books. Lesson: The negotiatorin reaching mutually beneficial agreements often forgets to think about theparties which are away from the negotiating tables for example, consumers. Case Study 5: JP Morganand Its C.

E. O, Dimon and its DOJ settlement15In July, 2013, U. S.

AssociateAttorney General Tony West outlined the civil and criminal investigations of JPMorgan Chase, the nation’s largest bank related to its sale of troubled mortgagedinvestments during financial crisis. Dimon was anxious to head off the formalcharges, which can be fatal for its reputation. At 8: 00 a. m. on 24. 09.

2013, fewhours before announcing of charges by Department of justice (DoJ) called westand asked him to meet in person. Dimon backed down and negotiated settlement inthe form of payment of $13 billion to the DOJ. Lesson: when thenegotiation stalls, “ sending in the big guns” can be an effective means ofmoving forward. Case Study 6: Simon & Schuster versus Barnes &Noble16In 2013, when themonths of negotiation with publishing house Simon & Schuster reached astandoff, Barnes & Noble tried to gain leverage by reducing its orders of Simonand Schuster title. The largest retail bookstore chain asked the publishers togive steep concession and charging high to display its title in the book stores, in order to service against Amazon. The publishers simply said that they cannotafford to abide by the terms of

Barnes and noble. In August, the two issued ajoint statement saying that they had resolved their dispute.

Lesson: in this case, the details of agreement are missing, but any gains they achieved would beundercut by the profits each side lost during the negotiation period, whenbooks were missing from display tables and shelves. Such penalties often end upundercutting both parties to a negotiation. Case study 7: NHLlockout17In July 2012, theNational hockey league (NHL) opened negotiations for a new collectivebargaining agreement with a proposal to reduce the player's percentage ofhockey-related revenue from 57% to 43% among other demands.

After a month, theNHL players association (NHLPA) put forth an offer that separated playersalaries from the league revenue, slowing the growth of player salaries anddividing revenues saved among financially struggling teams. After heatednegotiations, the final deal hinged on the issue of player pension that whosecareers are often short, to concede on the short term issue of salary in returnfor peace of mind regarding their long term financial future. Lesson: Consideroffering a long term gain for the other side in return for a short termconcession. By looking beyond the immediate future, you may be able to identifynew sources of leverage and resolve your dispute. ConclusionWhen compared tolitigation, ADR methods are more superior in resolving commercial disputesbecause of their low cost, speed of resolution, flexibility privacy and theability to allow the parties to maintain the business relationships to becontinued.

The international negotiations are much more complex than thenegotiations which are conducted domestically. The above enumerated casestudies illustrate the importance of negotiation in business transactions bygiving us lessons. Negotiations are the best possible ways of resolvingcommercial disputes and a good negotiator should always keep in mind the abovelessons and make the like strategies as enumerated above for the best possibleresults of negotiation for overcoming the challenges like cultural differences, language barrier etc. 1TeferaEshetu and Mulugeta Getu, The need for ADR in international Disputes, (lastupdated Feb 18, 2012) http://www.

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