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CMS guide to ADR

November 2003

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Preface

This guide has been prepared to describe to the businessman Alternative Dispute Resolution ("ADR") methods for resolving commercial disputes. Court proceedings and arbitration are both adjudicative methods of resolving disputes according to their particular legal issues; it is in respect of such methods that ADR is said to be an alternative.

Dealing with international disputes, often between parties from Common Law and Civil Law jurisdictions, is as close as I get to acting as a Civil Law lawyer. From the knowledge I have of the English legal system (and, by projection, other Common Law systems), coupled with my experience of international disputes, I believe that ADR techniques offer something worthy of consideration to any legal system considering how it should organise itself to meet the needs of its users.

The first part of this guide deals with ADR, before focusing on Mediation which is becoming the most familiar ADR method used in the commercial environment. ADR and Mediation are relatively new. In many jurisdictions in which I hope this work will be read, it is unknown, untried and untested. Since its "rebirth" in common law jurisdictions in the 1970's and 1980's, the idea of alternative dispute resolution has moved from a theoretical Utopia to respected and practical application in an increasing number of common law jurisdictions, and its use encouraged by the established Courts there. Interest in ADR techniques has developed and continues to do so in many European jurisdictions. While it does not provide a panacea for all disputes, it represents a valuable option for resolution which is capable of working in many disputes, whether or not formal Court or arbitral proceedings have commenced.

For that reason alone, all involved in business should be aware of what ADR is, what it offers and how it works, and how it may develop. To those who doubt it has any application in their own jurisdictions, as we did 20 years ago in common law countries, in your own or your clients' interests, keep an open mind.

"…keep an open mind."

Neil Aitken
Head of International Arbitration

London, November 2003

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CMS is a major transnational legal and tax services organisation with 1,800 lawyers and a total staff in excess of 3,500. CMS has been created to offer clients seamless services across Europe.

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Introduction

Even in the best regulated companies, with the most practical and carefully drafted agreements - disputes happen. Disputes are an unavoidable consequence of doing business. Most often, they are resolved between the parties themselves, pragmatically and without the need for outside assistance. But, if they are not resolved, they may escalate and the parties may then have to find some more structured means to resolve them.

Only a small proportion of the contracts executed and performed by the parties to them ever require the subsequent attention of lawyers. Commercial people are generally extremely capable of running their businesses, performing their contractual obligations, being practical, realistic and flexible when problems occur, making their own decisions and getting on with life.

But we all know someone who has been caught up in a wide-ranging, business-threatening and all-consuming dispute, and has had to live through the worry, anxiety and disruption that brings. We all hope that it won't happen to us. But, while we may all reasonably expect to be able to resolve issues which arise when doing business with others at a commercial level, the fact is that any contractual arrangement has the potential to develop disputes which are not susceptible to straightforward commercial resolution.

It might be argued that, because of their multi-cultural nature, such a dispute is more likely to occur in international business dealings than in domestic ones. There are no statistics to support any such proposition, and there is no particularly good reason why it should be so.

However, should disputes occur in international contracts, the levels of complexity involved in unravelling them can be greater than in disputes between contracting parties of the same state. This is because the resolution of disputes between international parties can involve the legal systems of more than one state, which can create serious traps for the unwary.

Let us think about a contract between a US party and an English party. The contract goes all wrong. At the time the parties entered into the contract they did not include in it a provision expressly stating the jurisdiction to which it would be subject should any dispute arise; nor did they include in it a clause to say how disputes were to be resolved.

The US party refers the dispute to a court in the USA and, in the end, obtains judgment and a substantial award of damages. All it has now to do is to enforce that judgment against the English party in England, where the English party is headquartered and where it has its major assets which would be easily sufficient to meet the damages. There is, however, no reciprocal enforcement treaty or other arrangement between the USA and England allowing for or enabling the ready enforcement of a US judgment against the English party in England.

At best, the US party will have to commence new proceedings in England in order to sue on the US judgment there. The US judgment will be useful evidence in those English proceedings of the fact that the debt is due from the English party to the US party, but it will not of itself ensure that the English Court proceedings are simply a formality which will necessarily produce the same outcome. The English party will be entitled fully to defend the English proceedings, the effect of which may amount to a complete re-hearing of the original claim, and may produce a different decision by the English Court.

Win or lose, the US party will have spent a considerable amount of time, effort and money on having to initiate and take part in two substantial pieces of litigation in pursuing its claims against the English party. Having succeeded in the USA, it then had to face the risk that it may not be so successful in England.

What could it have done differently? One way round the difficulties of enforcement may have been for the parties to have made an arbitration agreement at the time of the original deal - since arbitration awards are more widely enforceable because of the New York Convention.

Another way might have been to investigate whether ADR methods might have been available to short-circuit the legal dispute procedures and to bring about an outcome to benefit both parties.

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Resolving international disputes - the choices

The courts

International arbitration

Alternative methods of dispute resolution

Should a dispute arise between international contracting parties which the parties themselves cannot resolve, it might be referred to:

The Courts of any relevant jurisdiction

- Either because the parties agree on a particular court to which to refer their disputes, or by default in the sense that, in the absence of any specific choice of court, a court (or courts) capable of accepting jurisdiction for the dispute will be identified by application of the principles of private international law;

An International Arbitration Tribunal

- Provided the parties first agree between themselves that they will do so;

Or it might be subjected to one of the many methods of Alternative Dispute Resolution

- Again, provided the parties first agree between themselves to do so.

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Alternative dispute resolution

Definition

"Alternative to the adjudicative or imposed decision processes of litigation and arbitration"

(Sometimes defined as "Alternative to litigation", thereby bringing arbitration within the definition)

There is no precise definition of Alternative Dispute Resolution and it covers a wide variety of dispute resolution methods. Broadly, it means alternative to the more traditional and conventional methods of adjudicative dispute resolution. There is a view that arbitration is the original form of alternative dispute resolution. Some argue, however, that arbitration should not fall within the definition since it has become increasingly like litigation and is, indeed, a form of privatised litigation. With recent developments in arbitration procedures and practices, and the view that in choosing arbitration the parties are opting for a process distinct from court-based litigation, this latter view probably goes too far.

However, a number of commentators and practitioners treat the term "ADR" as being synonymous with mediation as a distinct form of the various alternatives to litigation and arbitration.

About ADR

Where does it come from?

What is the need for it?

What have we learned?

Where is it going?

Some 2,500 years ago Confucius believed in the superiority of mutual respect over confrontation and the resort to law. That is still the position in China and many countries in the Far East. But in Europe too the active encouragement of settlements has been a feature of the legal systems of a number of countries, including Germany, Switzerland and Scandinavia. In Russia, under the arbitral procedural code, it is the presiding Judge's duty to encourage the parties to reconcile their differences at a pre-trial preparation hearing. (Interestingly, no such duty exists under the Russian civil procedural code.) In Poland ADR is little used; similarly in Hungary and the Czech Republic. In fact, outside of the common law jurisdictions ADR remains largely unpracticed as a body of dispute resolution methodology. There are signs, however, that this is changing and more and more civil jurisdictions are beginning to express a real interest in ADR methods, not only in Western Europe, but also in Central and Eastern Europe as well (see "Mediation: experience by country" at page 30).

ADR is intended to encourage a spirit of co-operation and party participation in resolving relational difficulties. It aims to encourage the parties to address the wider issues between them, and not just the legal merits. It recognises the cost of losing law suits, as well as the cost of winning, and seeks to encourage disputing parties to consider other options to redress their differences in the anticipation that to do so will offer opportunities for mutual gain.

In the words of one commentator: "True negotiating skills are not displayed by those who launch an assault on every argument, but by those who show respect for the position of their adversaries and a willingness to respond to their concerns".

Representing a body of principles for resolving disputes, ADR is not new, as we have seen. The current renaissance of ADR occurred in the United States and the main progress in developing alternative forms of dispute resolution took place there in the last part of the 20th century. But is has been followed in a number of other common law jurisdictions notably England, Australia, New Zealand and Canada.

The first recorded "mini-trial" in the USA took place in 1977. But despite the general interest in the concept of ADR, it had a slow beginning. Various organisations were set up in the 1980s aiming to reduce the cost of disputes to the nation's major businesses and to promote the use of alternative methods.

As the United States judiciary gradually bought in to the possibility of settlement of court claims by the use of extra judicial procedures, so ADR began slowly to gain currency.

Some say the popularity of ADR in the USA reflects the frustration of businessmen and citizens with the costs and delays associated with litigation, caused by the sheer onslaught of the adversarial process, severely inhibiting the parties from carrying on their ongoing business. Others say, more cynically, that lawyers have simply turned the ADR revolution into a practice development opportunity, but this may be taken to suggest that there is no value in the developing of expertise in encouraging parties to litigation to address their grievances in some less formal manner.

However, with growing experience, what has been learned is that ADR in its various forms is a valuable tool in the dispute resolution process. History also shows that, as it becomes more widely adopted by judicial systems in the development of their case management techniques, so its value becomes more widely appreciated, especially by commercial organisations.

But, ADR is no panacea. It will not resolve all disputes. But it helps solve a significant and increasing number. With increasing globalisation of trade, a greater need will develop for systems of dispute resolution which will transcend the world's different legal systems.

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The main forms of ADR

Mediation

- A neutral third party participates in a structured negotiation and assists the parties achieving agreement, while not seeking to offer an opinion or a decision on any issue.

Conciliation

- A neutral third party actively assists the parties as a facilitator in negotiating an agreement and will be likely to offer the parties his or her opinion on the issues.

If there is any distinction between Mediation and Conciliation, it is that the Conciliator is more pro-active than the Mediator. The Mediator causes the parties to structure their negotiations; the Conciliator goes further, and positively assists with negotiations.

Mediation is probably the most widely used form of ADR.

Other forms of ADR

Med-arb

The mediator acts as an arbitrator in the event that the process of mediation does not produce a settlement.

Some parties are reluctant to allow this. They have bared their souls to him. He knows too much. Alternatively, with the risk that he may sit in judgment on their dispute, they fear they will find themselves unable to make best use of his services during any mediation he conducts.

Early neutral evaluation

A non-binding case appraisal by a judge (or other appropriate neutral) of the parties' chances of success were the litigation to be pursued, thereby assisting the parties towards agreement.

The purpose of this process is to give the parties the opportunity at a stage earlier than trial to get some understanding of how their respective claims and defences are likely to be received by a court. Based on the premise that no claim is so strong as to be assured of 100% success, and similarly few defences may be absolutely certain to fail on all counts, the opinion of the third party neutral may assist the parties to take a more realistic view of their strengths and weaknesses, thereby fostering a basis for a negotiated resolution.

Mini trial/executive tribunal

A panel consisting of a neutral third party chair and one senior executive from each party, hears submissions on the issues in the dispute and together with the aid of the chair seek to settle the dispute by agreement.

This method observes the theory that when the decision-makers are brought together and hear their own and their opponents' cases they will obtain a more objective view of the respective merits; with the aid of the third party neutral they may then be able to formulate an agreement for settlement.

Rent - a - judge

A retired judge or other suitable neutral acts as a private judicial arbiter and will give the parties his non-binding view of the merits of the dispute should it go to a formal court or arbitration hearing.

This method is similar to Early Neutral Evaluation and aims to improve the environment for the development of settlement discussions.

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What does ADR bring to dispute resolution?

It aims to:

- Help save the parties the expense, delay, stress and diversion of executive time spent in bringing their case to a hearing.
- Avoid the culture of aggression in business and professional life.
- Avoid delay in achieving an outcome.
- Help preserve existing commercial relationships and market reputation.
- Provide a wider range of settlement solutions than those offered by litigation.
- Contribute to the efficient use of court time.

In common law jurisdictions over 90% of court cases which are started settle before they go to trial. Also, a majority of the remaining cases which do go to trial settle before judgment is delivered. These statistics go to support the theory that much of the time, effort and expense taken up in bringing or defending court claims is largely wasted. In what other area of business life would so great an investment be made on the basis of so small a prospect of completing the project?

ADR aims to bring forward the process of settlement, either so as to avoid formal dispute procedures altogether, or to cause settlement discussions to take place at a much earlier stage in the proceedings.

ADR recognises the damage done to commercial relationships by formal dispute procedures. It offers the opportunity for solutions which are simply not available to the parties from a court or tribunal whose duty is to determine any dispute purely on the basis of the parties' legal rights and remedies.

An example often used to describe this approach is as follows:

Two friends for many years shared the fruits of an orange grove. A dispute grows between them and becomes intractable. To their respective lawyers it is clear that they both have legitimate grounds for complaint. The dispute, analysed according to legal principles, is set out in Court proceedings. The main issue is which of the two owns the orange grove? The Court's task is to determine the legal issues; when it does, there will be a clear winner and a clear loser: one friend will have absolute rights over the land, the other will have none. And yet, the business of one friend is extracting the juice from the oranges and selling it; the business of the other is using the orange peel to make marmalade. In determining the legal issues, the business of one or other will be destroyed as it is not open to the Court to accommodate the claims of both parties.

It is not difficult to see that, when the dispute is taken out of the purely legal framework, there are possibilities for settlement which would allow each of the parties to maintain their livelihoods. It is in relation to disputes such as this that ADR techniques have been developed in the belief that, by exploring the real concerns and needs of the parties, rather than simply determining the legal issues, an outcome can be achieved which addresses those concerns and needs.

A real life example[1]:

For many years two parties shared in the successful exploitation of intellectual property rights throughout Europe through a complicated organisation of companies. Disputes arose and the parties agreed to split the companies equally between them. It soon emerged, however, that the split was far from equal.

Thirteen years of litigation followed, numerous interlocutory hearings had taken place and two applications had been made to the Court of Appeal. The trial of the main action was imminent. Before the trial took place, the parties agreed to refer the dispute to mediation. During the mediation, the Claimant revealed to the Mediator that it saw no option but to continue with the dispute as it was struggling to avoid insolvency; if it lost the case, the legal costs it would have to pay to the Defendant would cripple the company. On the other side, the Defendant told the Mediator that the Claimant's massive headline figure for the damages it claimed made it clear that the Defendant had no choice but to continue with the litigation.

Upon the parties indicating to the Mediator their deepest concerns in relation to the dispute, the Mediator was then able to assist the parties in achieving settlement and bringing to an end 13 years of litigation in one day. The Claimant accepted a payment sufficient to discharge the outstanding legal costs of its own lawyers, plus a small sum of damages in satisfaction of its claim. This way the parties were able to address their real commercial considerations and to agree an intelligent and pragmatic business solution.

[1] Based on an article appearing in 'Ymediate' Mediation Intelligence Bulletin 2001 published by the ADR Group, Bristol, England (www.adrgroup.co.uk)

What cases are not suitable for ADR

Need for an injunction or other court assistance

Need to set a precedent

Effective existing negotiations

Not every case is susceptible to the benefits of ADR methods.

- Cases which urgently require relief which only a court can provide, such as a preliminary injunction, will not be resolved by ADR methods.
- Issues which require a determination of an important issue of law cannot be assisted by ADR.
- Parties who show an implacable attitude to claimants, particularly in industries subjected to speculative claims, will find no use for ADR.
- And since ADR is an aid to settlement, it will not assist effective ongoing negotiations.
- Cases which will determine matters of public interest.

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What about ...

Multi-party disputes

Complex legal issues

$ multi-million disputes

In general there is no limit to the size of disputes which may be submitted to ADR, or the complexity of legal issues underlying any dispute. Nor need the number of parties limit the use of ADR methods. There is no limitation to the number of legitimate parties who can take part in the process. Indeed we have been involved in a multi million pound mediation which involved 14 separately represented parties; because of the complexities, two mediators were employed with complementary skills and the mediation, which lasted several days, resulted in a settlement which saved millions of pounds in legal fees.

Other issues

Lack of genuine interest in settlement

Publicity

Economic power

Summary or default judgment

What will be sure to kill off attempts at ADR will be the lack of genuine interest in one party in achieving settlement. There has to be a shared goodwill for the parties to want to settle. That shared goodwill may be, for example, the prospects of a continuing business relationship; it may also be a shared concern at the outcome of the dispute, and the risks associated with that outcome.

One of the values of the ADR process is that it is essentially private and confidential. Besides the parties themselves, no one need know of the existence of the dispute, or of its outcome, nor that one party won and the other lost. Confidentiality in this way can improve the prospects of successful resolution.

There has been some discussion about whether the relative economic power of the parties would cause unfairness in the ADR process, and whether a weaker party is not better protected by a judge. But there appears no reason why a third party neutral is not as capable as a judge in taking account of this imbalance.

It may be said that the use of ADR will prevent the claimant from exercising his natural right to a summary or default judgment so as to improve his bargaining position. But if a dispute can be successfully resolved before that stage, what has been lost? If it cannot be settled, those options are still open.

Mediation

- Mediation is safe: no ultimate outcome can be imposed on the parties.
- What is said or done cannot be used in court.
- The parties choose their own outcome with the assistance of the mediator.
- The power of the process comes from
  - joint representations
  - private meetings with the mediator
  - direct negotiations
  - the experience of the mediator
  - the skill and experience of the parties.
- The ultimate aim is a binding agreement, but it will only be binding if the parties agree is should be.

Mediation is the most common form of Alternative Dispute Resolution in many jurisdictions where ADR is practiced. It is a voluntary process. The parties cannot be forced to come to an agreement. In the jurisdictions where it is used mediation is often carried out according to the procedure of one of the bodies set up to administer mediation, such as the Centre for Dispute Resolution (CEDR) or the ADR Group, both based in England. The CEDR Model Mediation Procedure, for example, requires the parties to enter into an agreement based on the CEDR Model Mediation Agreement. This agreement will describe the nature of the dispute, the identity of the mediator and when and where the mediation will take place.

The mediation process is one which can be entered into at any time after a dispute has arisen, whether or not court proceedings or arbitration have been commenced or are being continued. Subject to the agreement of the parties, there is no requirement that any such proceedings are either stayed or adjourned until the outcome of the mediation. In this way, it is not open to one of the parties to seek to procure delay at the expense of the interests of the other; and since the mediation need not affect the continuing conduct of the court proceedings, the fact that they will not be delayed in any way may help persuade an otherwise reluctant party that he has little to lose (but possibly much to gain) in taking part in the process.

Routes to mediation

Contract

Court direction

Subsequent agreement

Mediation can be brought about by the parties either having agreed in their commercial contract that they will mediate any disputes, or at some time after the disputes have arisen, by agreeing to mediate those disputes.

In common law jurisdictions there is a growing tendency for the courts to suggest, recommend or even direct that mediation takes place. But even then, the parties will usually be required to sign a mediation agreement setting out the relevant terms upon which the mediation is to be held and the mediator is to be appointed. This interest by the courts is partly in recognition of the role mediation has to play in achieving an early resolution of some cases; at the same time, the courts take the view that if mediation reduces the number of cases they have to hear or prepare to hear, the greater their time and resources to deal with those cases which are simply incapable of settlement. Also, from the court user's point of view, the more cases that can be satisfactorily resolved without taking up the court's time, the greater will be the reduction in delays in the court system.

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How do you choose your mediator

CEDR

ADR Group

Intermediation

Academy of Experts

City Disputes Panel

Amsterdam ADR Institute

Own choice

The parties having agreed to mediate their dispute may select their own mediator and agree with the assistance of the mediator, or otherwise, the rules for the mediation. Alternatively, they may refer to one of the specialist mediation bodies to appoint a mediator. For this purpose the parties will be required to furnish the necessary information to enable the selection of an appropriate mediator. It is generally accepted that mediation, in this context, is a specialist skill and that the mediator will be required to have been trained appropriately; facilitative techniques are often alien to lawyers, especially those from adversarial traditions. (A list of organisations based in Europe and offering mediation services is contained in Appendix B).

The mediation itself

Location

Attendance

Documentation

Duration

Ideally, the mediation should take place at a convenient and neutral location - i.e. not at the premises of either party or its lawyers; and separate rooms should be provided for each of the parties and the mediator.

One of the most important requirements for a successful mediation is that a decision-maker from each of the parties should attend the mediation as it is important that the parties should be able to take decisive action so as to maintain the momentum of the mediation without having to refer to individuals not in attendance for instructions or authority to make decisions. It is also often revealing and helpful for the decision-maker to be present to learn, perhaps for the first time, of the real issues underlying the dispute.

The documentation presented by the parties for use at the mediation should be limited to what is strictly necessary. If proceedings are on hand, the mediator should be provided with a copy of the parties' claims and defences in advance, together with any witness statements and other relevant evidence.

It is important that the mediator should be given an adequate opportunity to assimilate the legal disputes between the parties in order to understand their grievances. However, he will be careful to ensure that the mediation does not become an alternative trial of the legal issues. It is the mediator's task to assist the parties to achieve a resolution which does not depend upon the purely legal merits of the respective parties' positions.

The mediation should last for as long as it takes either to reach agreement or for it to become clear that agreement will not be achieved. Normally a mediation will be expected to be completed within a maximum of three days, although depending on the nature of the dispute and other relevant factors it may be completed in one or two days. More complex issues and a greater number of parties may require the mediation to extend beyond three days, perhaps to a week. It is unusual for a mediation to last longer because during the period of the mediation it is the role of the mediator to cause the parties to work intensively in order to maintain momentum and the best climate for settlement. That climate is usually achieved when the parties are as fully aware of their own and their opponents' real complaints.

Indeed, arguably, the parties will be better informed of the true merits and values of each other's complaints as, unlike formal legal proceedings, the matters which may be covered in mediation may be more wide-ranging and less constrained by purely legal analysis.

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The structure of the mediation

Opening statements

Exploration

Negotiation

Settlement

It is important that the parties realise that mediation is not adversarial litigation, or indeed, litigation at all. Their opening statements should be succinct, concentrating on the key issues between them, which may not be the legal issues. They should not be inflammatory. The opening statements will be valuable in identifying to the mediator and the parties what are the real issues.

The mediation meeting is an opportunity for each party, with the assistance of the mediator, to explore the position of the other, free from concern that those discussions can be used against him in later court proceedings. Having heard the opening statements, the mediator will then commence the process of exploration of the possibilities for resolution, usually speaking to each party in the absence of the other. Through that process he will expect to encourage the parties to develop a basis upon which they can negotiate with a view to achieving an acceptable settlement for each other.

The mediation process

Mediator's opening

Opening statements by the parties

Questions and discussions

Meetings in caucus

Meetings between the parties

The mediator will explain his role to the parties. He will emphasise his neutrality and describe the process. He will encourage them to look for opportunities to resolve their disputes in a way which does not depend wholly upon legal merits and remedies. He will tell the parties that they should look for an outcome which will enable them both to win, against the risk of the uncertainty of litigation, which may mean that, to a greater or lesser extent, both may be harmed.

Following the parties' opening statements, if appropriate, the parties will be able to question and discuss with each other their respective positions.

Perhaps the most valuable aspect of mediation is what is known as "caucusing". The mediator will meet each of the parties privately to better understand their positions and concerns. He will be bound to keep that information confidential in the absence of the party's agreement to release it to the other. However, appraised of the respective parties' concerns and fears, he may be able to facilitate proposals thereby serving to reduce the areas of difference between the parties. When appropriate, the mediator will invite the parties to meet each other to discuss particular issues, or to negotiate terms as a whole.

It is important to appreciate that there is no element of coercion in these procedures. Neither party can be required or forced to agree.

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The role of the mediator

Neutrality

Specialism v expertise

Not required to give an opinion

To achieve a settlement

The neutrality of the mediator is a fundamental requirement to the process. It is important that he maintains his neutrality and that he is not persuaded to take sides or to appear to favour the position of one of the parties against the other. It is his neutrality which provides him with credibility in the process. In some cases there may be a requirement for the mediator to have specialist knowledge of an industry or of a process. But the prime requirement is that he maintains his neutral role as a mediator.

The parties may ask the mediator to give an opinion on various matters in relation to the dispute between them. But he should not venture an opinion on the merits of the parties' claims against each other or the respective positions they have adopted. This might wreck the process or impeach his neutrality. While maintaining his neutrality, it will be for him to do what he can to get the parties for themselves to explore avenues for resolution of their disputes which are imaginative, lateral, and address the real causes of the dispute.

The role of the parties

Not advocates

Principled negotiations

Authority to settle

Having made their opening statements, the parties are not to regard themselves as advocates of their cause. Having established their opening positions they should be flexible in their considerations of the position of the other party. Negotiations should be rational and principled. They should look for opportunities for mutual gain. First and foremost, the parties' representatives attending the mediation must be authorised to be able to settle the dispute should the opportunity arise.

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Strategy and planning

Careful preparation - know your case

Consider the interests and position of the other side

Decide on an opening position

Build credibility

Plan and control the flow of information

Look for hidden value

Begin drafting the agreement early

There is little here that you would not do in any principled negotiation. The point is that the mediation process is intended to bring about circumstances where the parties are able to open up negotiations in circumstances where the opportunity to negotiate may otherwise have disappeared.

The purpose of drafting the agreement at an early stage is two-fold. First, it is important that the agreement captures the intentions of the parties as they develop; it can always be amended as the matter progresses. Second, the draft will identify issues for further clarification while the process is still continuing, thus maintaining momentum.

At the end of the day

No agreement?

Agreement

If no agreement is achieved, the parties' positions are unlikely to be worse than they were before. What they have said during the course of the mediation cannot be used against them in any court. If no settlement has been achieved, what they have learned may well assist in bringing about circumstances for a negotiated settlement at some time in the future. Even if the mediation does not deliver a result, the parties should have a far better understanding of the real underlying issues in the dispute between them.

"It is better to have tried and failed than not to have tried at all ..."

Settlement agreement

Reduce terms to writing

Binding or non-binding

Detailed agreement required

Need for further documentation

Assuming resolution is achieved as a result of the process, the terms of the agreement, exactly recording the position of the parties, must be written down. This task should be undertaken with the assistance of the mediator, who will be careful to ensure that the settlement agreement truly reflects the agreement of the parties. This is a critical function of the mediator since the commitment of the settlement to writing is a time when the trust which has been built up between the parties can be irretrievably damaged in disputes on wording.

One issue upon which the parties will have to decide will be whether the agreement is intended to be legally binding or whether it is to be non-binding; that is, recording the parties' agreement and intent, but not in a form or manner which could be referred to a court for enforcement should either of the parties fail to comply with its terms, perhaps until the occurrence of some event or condition. If the latter, the parties will need to consider in what circumstances the agreement will become binding.

To make an agreement which is non-binding is argued by some to demonstrate how pointless the mediation process may become. This is a short-sighted view because it ignores the process which the parties have undergone to reach the stage of making any agreement at all; it also reflects a somewhat impatient view. In a sense, any agreement between the parties is likely to be better than no agreement at all. Furthermore, over a period of time the parties may get used to the idea of not fighting each other; with their knowledge of the real issues between them and their greater mutual understanding, a non-binding agreement may well become the first brick in the foundation for a complete settlement.

The agreement should record the full details of what the parties have agreed: in circumstances where the agreement covers only certain of the issues between the parties, but not all of them, particular care will be required to be taken to ensure the issues for settlement are ringfenced from the issues remaining in dispute. Consideration will also have to be given to what further documentation needs to be prepared or the steps which will have to been taken in order to implement the agreement. For example, will court documents be required to bring to an end any court proceedings or certain issues within those proceedings? Will other documents be required in order to give effect to and implement the terms of settlement (such as, for example, the grant of a lease to occupy a property or the drawing up of orders for further goods, the preparation and execution of long term contracts for the supply of goods or services, etc)?

Clearly, the overall objective is to attempt to reach an agreement which will bring to an end the disputes between the parties and to allow them to continue with their respective businesses without the burden of litigation and the expense and management time associated therewith. That agreement is not required to be binding, but it is obviously more satisfactory that it should be; if only a non-binding agreement is achieved, it is to be hoped that through that agreement and its performance the environment for a binding agreement will develop.

The point of achieving a binding agreement is that such agreement should be a contract which is legally enforceable, so that each party should have the comfort that the other is committed to performance of the agreement; ultimately, and should it become necessary, they will be able to secure assistance from a court (or any other dispute resolution process which may be agreed). This is not to anticipate automatically that the agreement will not be performed; it merely puts the parties back into the position of having their future dealings regulated by contract, the breach of which is subject to certain sanctions.

Where proceedings are on hand at the time of the mediation (whether court proceedings or arbitration), it is often the case that the parties will agree to their settlement agreement being formally adopted in appropriate terms by the court, for the purpose of any order it will make terminating the proceedings or relevant issues, or by the arbitral tribunal for inclusion in a Final Award concluding the arbitration or relevant issues. In these circumstances, these steps will have the advantage, in appropriate cases, of enabling the parties to secure the ready assistance of the court should the other party be in default of the court's order or the tribunal's terms.

Detailed settlement terms

Any settlement agreement will depend on the facts of the dispute it deals with for its precise terms. However, there are a number of more general and, perhaps, obvious considerations which should be addressed when preparing any settlement agreement.

Warranty of authority

Both parties should be required to warrant in the settlement agreement that their representatives taking part in the mediation and executing the agreement are properly authorised to do so.

Contractual formalities

Care must be taken to ensure that the contractual formalities have been properly complied with by both parties in order to ensure that any binding agreement will be properly enforceable by each against the other. Particular care may be required in this regard if the parties come from different jurisdictions and different systems of law.

Effect of breach of the Settlement Agreement

Consideration will also need to be given to what might be the intended effect of any breach. Will it terminate the agreement? Or will a breach render the party in breach liable in damages? Or will a breach have some other consequence, and if so what?

Existing proceedings

If the agreement is intended to be enforceable as a judgment or an arbitral award, have the necessary steps been taken to request either the court to make an order in the terms of the agreement, or the arbitrator to make an award in those terms? Might the agreement, order or award be required to be enforced in another jurisdiction? Can it be? What provisions might be included in the agreement in case of a disagreement as to its terms? Or will the parties expect to refer such disputes to the courts, or (where not functus officio), the arbitration tribunal?

Unresolved issues

If any issues between the parties are not resolved by the mediation process, the settlement agreement should record what steps are to be taken by the parties in relation to those issues. Is it intended that they should be or continue to be litigated? Or are they to be held over depending on whether the agreement is effective in resolving the issues which it covers?

Termination of the mediation agreement

Will the effect of finalising the settlement agreement between the parties, whether by execution by their authorised representatives, or by way of court order or arbitral award, serve to terminate and bring to an end the mediation process? Or will the mediation remain on foot pending the resolution of unresolved issues? Will the services of the mediator be retained against the possibility that some further disagreement may occur? Will the mediator be retained to assist in the practical implementation of the agreement, whether or not it is converted into a court order or an abitral award?

Any conflicting agreement?

Particularly where there exists ongoing business between the parties notwithstanding the existence of the dispute, great care must be taken to ensure that the terms of any settlement agreement do not conflict with any existing and continuing agreement regulating the parties business together.

Costs

Depending on the legal traditions from which the parties come, it may be that one or other of them may require the payment of a contribution to his costs incurred in the mediation and any litigation concerning the issues in dispute. The difficulty with negotiating which party should contribute to the costs of the other is that any such contribution may be perceived as acceptance or attribution of blame. This may cause difficulty to the negotiating process.

Barriers to the use of mediation

There are a number of reasons given by parties not wishing to become involved in examining the possibilities of having their disputes disposed of by mediation.

Novelty

The relative novelty of mediation as a structured settlement process is clearly an issue. Without experience of mediation in action, it is hard sometimes to make the decision to try something new in order to resolve an important dispute. For all the criticisms that can be made of court proceedings, parties may feel comforted by the familiarity of the procedures they can expect there.

Unwillingness of opposing party

If both parties are unable to agree to submit their disputes to mediation, this presents an obvious and significant difficulty in getting any mediation started, particularly as it requires an express agreement between the parties and the mediator before it can be commenced. There is only a limit to how far one party can go to attempt to persuade the other that mediation holds out the prospect of a better and more practical resolution of disputes.

Mediation results in compromise outcomes

This may well be an overly simplistic criticism made without any true appreciation of the mediation process. Its objective is not to be confined to the purely legal issues in dispute, but to encourage the parties to look at the wider picture and to try to find hidden value in alternative solutions to the dispute. Mediation recognises the damage which may be caused to the parties, their relationships and businesses by the risks and costs associated with formal legal disputes. The purpose of mediation is to look for a means of resolution which provides the parties with a workable solution (which might produce unexpected benefits to both parties: "win/win") instead of each party being damaged, more or less, by the legal process.

Non-binding

The non-binding nature of the mediation process is often considered as a barrier. If the parties are not committed to an outcome, how can they be committed to the process? Further, how can the parties possibly envisage arriving at an agreement which might not be binding? Those concerns miss the point: the fact that the process is non-binding and that any agreement will be binding only if the parties expressly agree that it will be is to assist the commencement of discussions between the parties at all, in circumstances where communications have broken down, or are very likely to do so. No progress is likely to be made in resolving disputes at an early date if the parties will not speak to each other. If they know that they cannot be bound by any outcome, unless they specifically agree to be so, should be seen as an opportunity to the parties to risk taking part in a novel procedure, without any significant cost besides the investment of their time over a relatively short period.

No desire by senior management to explore mediation

The disposition of senior management is an

important factor in whether mediation may successfully take place. In fact, under most mediation agreements it is a requirement that decision-makers attend the mediation. While being practical, this is also a device by which the dispute is brought to the attention of the decision-makers with each party at an early stage and they will require to be fully briefed and appraised of the disputed issues in the wider context of their business. On the basis of this fuller picture, it is not unusual for senior management to form different and more flexible views as to how the disputes should be disposed of. Nonetheless, a senior management which is not persuaded of the opportunities mediation may present will operate as a serious disincentive to any mediation successfully taking place.

Risk of exposing strategy

Clearly, in having informal discussions with the opposite party, one party revealing its strategy to the other is a risk. But such party/party discussions are unlikely to occur during the mediation process before some reasonably serious prospect of a breakthrough occurs. Further, one of the principal terms of the mediation agreement is that all that passes during the process shall be confidential to the parties and the mediator. Also, in the preliminary stages when the parties will mainly talk to the mediator in the absence of the other party, the mediator is bound by the mediation agreement to keep what he has been told by each party confidential to himself. It may be said that agreeing to mediation at all may be taken to expose a party's strategy, to some extent at least; but as mediation becomes more widely used, and especially in those jurisdictions where the ADR process receives positive support from the court systems, as time goes by no more than simply the exercise of common-sense can be read into any decision to agree to mediate.

Mediation is not confined to legal rules

For all that might be said about the comfort parties might obtain by having their disputes dealt with in a traditional and formal way before a court, at least in those jurisdictions in which ADR processes are developing, one of the principal reasons for their growing acceptability and application is precisely because they represent an alternative to those very court procedures which depend purely on legal analysis of the parties' rights for their outcomes. It is a strength of the mediation process that it is not bound by legal and procedural rules; with the help of the mediator the parties can explore any available avenues to resolution; if no satisfactory resolution is achieved, because of the confidentiality provisions and the non-binding nature of the process, neither of the parties should feel that their interests in relation to any ongoing legal disputes have been damaged.

The lack of qualified mediators

This is a disincentive to mediation for as long as this condition persists in some countries. It is a generally accepted fact that mediators require to be trained in their skills because the process is a subtle one and requires considerable understanding on behalf of the mediator: his task is to be neutral and impartial and to assist the parties themselves to achieve agreement, rather than to assert his will and tell them how agreement will be achieved. This is not perhaps the most natural environment for practising lawyers without training. However, in those jurisdictions in which mediation is becoming established, the various mediation institutions also provide training schemes and the numbers of trained mediators is rapidly growing. Also, while many jurisdictions are not yet converted to the benefits of mediation, there are a number of professionals convinced of the benefits of the process and they have or are readily able to obtain mediation training abroad.

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The advantages and disadvantages of mediation

Advantages

- The lack of rules
- No discovery/disclosure
- Results in compromise
- Speeds resolution, where successful
- Non-binding unless parties agree
- Documentation is limited
- Non-adversarial process
- At all times subject to the parties agreement
- A neutral as mediator
- Flexibility to address the real and commercial issues, rather than purely legal issues, between the parties
- The scope and ambit of any resolution is determined by the parties themselves, whereas a court judgment is determined by legal ratings on the legal issues

Disadvantages

- The lack of rules
- No discovery/disclosure (except by agreement)
- Results in compromise
- Non-binding, unless parties agree
- Delays litigation process, where unsuccessful
- Documentation is limited
- No examination of witnesses
- Proceeds and continues only with the parties' agreement
- A battle to get those unfamiliar to use it
- Not limited to the purely legal issues between the parties
- Outcome not dependent upon a solely legal determination of the issues in dispute

Mediation: experience by industry

In a study undertaken by CEDR in 2002/2003, it was found that the level of uptake for mediation varied according to the type of dispute.

Sale/Supply of goods	18%
Finance	15%
Professional negligence	13%
Construction and engineering	9%
Property	9%
Employment	7%
Partnership	7%
IT/Telecommunications	6%
Clinical negligence/personal injury	6%
Intellectual property	4%
Maritime	1%
Other	2%

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Mediation: experience by country

The extent of development of ADR varies from country to country. CMS is in a unique position to be able to provide a perspective on the stage of development reached in a number of jurisdictions.

AUSTRIA

ADR is at present fairly underdeveloped in Austria. It is certainly used in divorce and custody proceedings but there are no other regulations outside the field of family law. The courts do not actively support the use of ADR but judges are generally amenable to proposals for settling out of court. It is anticipated that the use of ADR will increase given the expectation that it will reduce the cost of court proceedings and court delays. A Mediators Act has been proposed but has yet to come into force.

Dr Thomas Frad
CMS Strommer Reich-Rohrwig Karasek Hainz
Vienna

BELGIUM

The development of ADR in Belgium still has some way to go. The attitude of the judiciary towards ADR varies from judge to judge. There are rules in place requiring or recommending parties to attempt mediation before they can issue proceedings at court. Proposed reforms of the civil procedure system will certainly encourage better use of ADR. A further incentive will be the current judicial backlog.

Bruno Duquesne
CMS Lexcelis
Brussels

CZECH REPUBLIC

It is still more common in the Czech Republic to resolve disputes through court proceedings or arbitration. ADR has been adopted in the public healthcare system and is supported by the Economic Chamber of the Czech Republic but the courts only support ADR informally. Proceedings can be suspended for up to a year to allow mediation to take place but this is not mandatory. The inefficiency of the court system means that the environment for the development of ADR clearly exists but it will only progress if there is a growth in confidence of business people.

Richard Bacek
CMS Cameron McKenna
Prague

ENGLAND

England has seen a considerable development in the use of ADR over the past 15 years. 2003 has seen the formation of the independent Civil Mediation Council that is charged with promoting ADR and providing a focal point for debate and education. The Civil Procedure Rules of England and Wales empower the court to encourage litigating parties to explore ADR during court proceedings. The court cannot force parties to attempt ADR but they can suspend court proceedings to allow mediation to take place. The large majority of judges are in favour of ADR and they have the power to impose cost sanctions on parties who fail to take part in mediation. The main drivers behind the increased use of ADR are the expense and length of court proceedings.

Tim Hardy
CMS Cameron McKenna
London

FRANCE

Despite the implementation in 1995 of a new law giving judges the option to appoint a third person to initiate negotiations between the parties, mediation has not progressed significantly. In 2001 the Commercial Court of Paris registered only 30-40 settlements through ADR out of 30,000 cases. This year the same court will begin routinely sending a letter to parties and their lawyers before pleadings are filed reminding them of the benefit of ADR. It is expected that ADR will develop given the reduction in time to achieve an outcome and the fact that the process is confidential.

Françoise Genot-Delbecque
CMS Bureau Francis Lefebvre
Paris

GERMANY

While there is a huge amount of interest in ADR in science and industry, the actual implementation of regulations encouraging ADR has yet to take place. It is an established practice in family law disputes and, in particular, divorce. However, the outlook for nationwide implementation of ADR in the field of economic conflict is not as favourable as in common law countries for two reasons; firstly, legal proceedings in Germany are dealt with quickly and efficiently and, secondly, given that there is no requirement to provide substantial amounts of evidence and the costs of proceedings are decidedly less. However, it is certain that ADR will establish itself in certain practice areas less suitable for judicial decision, such as international commercial conflicts, disputes among shareholders and conflicts arising from large-scale projects.

Dr Volkmar Wagner
CMS Hasche Sigle
Stuttgart

HUNGARY

ADR has taken its first steps in Hungary. A definite intention to support it may be perceived on the part of civil organisations and in state legislation. On 17th March 2003, the Act on Mediation came into force. It seeks to promote mediation in a number of ways, including outlining the procedure and setting up a registration system for prospective mediators. At the moment, however, it is favoured mainly within the family sector rather than the business sector. Judges can suggest out of court settlements but failure to settle is not necessarily considered to be an issue. ADR will undoubtedly grow in Hungary given the delays and cost of the court system. It is hoped that a mutual confidence in those involved in the business may encourage the continuing adoption of ADR in Hungary.

Dr Péter Rézmovits
CMS Cameron McKenna
Budapest

ITALY

In Italy arbitration is more popular than ADR at the moment. Furthermore, while Italian procedural law requires a judge seised of an action to attempt to bring about an amicable settlement of the case at a hearing at the beginning of the action, the percentage of success for conciliations arising out of this procedure is very low. However, various bodies have produced procedural rules governing mediation and alternative settlement techniques (mainly non-ritual arbitration) are increasingly being used by lawyers and business people alike. Court delays are likely to be the main driver for the adoption of ADR in Italy.

Laura Opilio
CMS Adonnino Ascoli & Cavasola Scamoni
Rome

NETHERLANDS

Two types of mediation are popular in the Netherlands; firstly, "Bemiddeling" which involves a third party taking a non binding position and "Modern Mediation" in which the third party acts as facilitator in the negotiations. The Ministry of Justice is drafting specific legislation on ADR and in preparation for that has set up a project in which several courts are experimenting with court-annexed mediation. There has been a favourable response to the experiment and such a reaction may well bring about increased support for ADR. Furthermore the changing attitude of counsel and clients is likely to bring about increased interest and use.

John Bosnak
CMS Derks Star Busmann
Arnhem

POLAND

ADR methods are little known and not practised in Poland as a means of resolving commercial disputes. ADR is popular in criminal, labour, family and juvenile disputes where there are special provisions regulating these matters.
The Polish Chamber of Commerce has published mediation rules but real interest in ADR for commercial disputes is unlikely to grow significantly until changes are made to the Polish Civil Procedure Code to encourage its use.

Pawel Pietkiewicz
CMS Cameron McKenna
Warsaw

ROMANIA

The development of ADR is at its very beginning in Romania. Mediation clauses have begun to be inserted into commercial contracts only very recently. Parties will sometimes attempt to resolve their disputes through mediation prior to commencing court or arbitration proceedings. The Romanian Chamber of Commerce and Industry provides facilities for ADR so there is certainly a level of interest.

Adelina Elena Marin
CMS Cameron McKenna
Bucharest

RUSSIA

ADR has only recently started to emerge in Russia. There is a little scepticism but the draft of the new Arbitration Procedural Code which has been considered by the Russian Parliament will oblige the parties to use ADR in contractual disputes before resorting to legal action. The court will generally encourage parties to resolve their disputes using ADR where possible. There are also plans to establish a Russian Institution for ADR. There is no doubt that ADR has a promising future in Russia as it will no doubt allow parties to save time and money.

Pavel Nikitin
CMS Cameron McKenna
Moscow

SCOTLAND

ADR remains a comparative rarity in commercial disputes although it is an accepted feature of family law. Other than in commercial disputes the court has no express power to refer parties to mediation but it will often suspend a case to allow an ADR to take place. There is undoubtedly a place for ADR in Scotland and increased awareness, education and the sharing of positive ADR experiences may help to build the confidence necessary for more parties to overcome the shock of the new, and mediate. A real acceleration in the pace of ADR development is more likely to come from the courts being given power to compel parties to mediate.

Greg Gordon
CMS Cameron McKenna
Aberdeen

SWITZERLAND

At the moment ADR is not well supported in Switzerland. It is more common for matters to be referred to arbitration given that Switzerland is the centre of domestic and international arbitration. There is however a substantial market offering arbitration training in ADR and the ADR training courses are well attended. The courts are largely supportive of ADR. As regards the future, as more parties become acquainted with ADR, and more mediations prove successful, it will increase popularity, especially as it provides a fast, effective and cost-saving solution.

Beat von Rechenberg
CMS Von Erlach Klainguti Settler Wille
Zurich

Mediation clauses

Mediation clauses can take various forms. Set out in the following two sections are clauses which are of a common type. Clearly they must be carefully considered and amended to ensure that they are to meet the needs of the parties.

In a number of jurisdictions there is a serious question as to whether mediation clauses (or other ADR clauses) are, in principle, enforceable in the same way that an arbitration or jurisdiction clause will be. There is a range of views. But the most common criticism is that they do not amount to an enforceable obligation on the parties for their implementation because (unlike arbitration clauses) they do not yet have any statutory basis to require that they should be implemented. As a result, ADR clauses often have to be considered in terms of whether they impose any contractually enforceable obligation, and this then depends on the technical contractual requirements from jurisdiction to jurisdiction.

However, notwithstanding this area of apparent difficulty, one of the major purposes of mediation, (and other ADR processes), is to give parties to a dispute the opportunity to consider methods for settlement of disputes, other than ones which are purely legalistic. Accordingly, the very fact that the parties have agreed, say, at the time they have made their commercial agreement, that they will refer disputes to some alternative process for resolution creates the moral environment for one party or the other to request that disputes be so referred before they are formalised. The importance of this is that it overcomes the perceived risk that, without a foundation in the contract, should one party suggest such a process, that suggestion may be taken as a sign of weakness and thereby put the requesting party at a psychological disadvantage. Even if the parties cannot agree to adopt an ADR process at that stage, the fact that their commercial agreement records that they had done so at an earlier time may keep open the possibility that at some time during the conduct of the formal dispute the parties may yet agree, particularly when the full costs, expense and inconvenience of conducting a full-scale legal dispute becomes apparent.

Specimen combined negotiation/mediation/ arbitration clause[1]

If any dispute arises out of or in connection with this agreement, or the breach, termination and invalidity thereof, the parties will attempt to settle it by negotiation.

If the parties are unable to settle any such dispute by negotiation within 21 days, the parties will attempt to settle it by mediation in accordance with the Centre for Dispute Resolution (CEDR) Model Mediation Procedure.

To initiate mediation a party by its Managing Director must give notice in writing ("ADR Notice") to the other party to the dispute addressed to its Managing Director requesting mediation in accordance with clause 2.

If there is any point on the conduct of the mediation (including the nomination of the mediator) upon which the parties cannot agree within 14 days from the date of the ADR Notice, CEDR will, at the request of any party, decide that point for the parties, having consulted with them.

The mediation will start not later than 21 days after the date of the ADR Notice.

Neither party may terminate the mediation until each party has made its opening presentation and the mediator has met each party separately for at least 1 hour.

If the parties have not settled any dispute by mediation within 30 days from the date when the mediation was instituted/the date of the ADR Notice, the dispute shall be referred to and finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules. The number of arbitrators shall be [one/three]. The appointing authority for the purposes of the UNCITRAL Arbitration Rules shall be the London Court of International Arbitration. The place and seat of the arbitration shall be [London] and the language of the arbitration shall be English.

[1] This specimen clause has been adapted from the CEDR Model ADR Contract Clauses

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Specimen simple form negotiation/mediation/law and jurisdiction clause

Settlement of disputes

If there should be a dispute among the parties, or any of them, arising out of or relating to this Agreement, they will attempt in good faith to resolve the dispute promptly through discussions among senior managers having authority to settle it. If the dispute cannot be resolved through negotiation, the parties will attempt to resolve it through an agreed procedure such as mediation, conciliation or other dispute resolution technique. If the dispute is not resolved within 90 days of the start of the procedure, or such longer period as the parties agree, then it may be submitted for settlement to the court.

Governing law and jurisdiction

The rights and obligations created by this Agreement are governed by the laws of [England and Wales] and the courts of [England and Wales] shall have exclusive jurisdiction in respect of all disputes arising under or in relation to this Agreement.

Mediation/ADR: summary

Mediation and ADR processes are relatively new, even in those jurisdictions in which they have already obtained respect and currency. The most common form of ADR is mediation.

In the time these processes have been developing they have commanded respect for their efficacy, in particular, mediation. They are recognised as opening up the opportunities to achieve resolution of disputes by addressing the parties' real causes of complaint, rather than those complaints as articulated in a legal framework and subjected to legal analysis. Experience has shown that this more wide ranging and holistic approach to disputes can overcome the difficulties caused by purely legal processes which have a tendency to polarise the parties and their respective arguments.

ADR processes recognise that, in any event, most legal disputes settle before final judgment. Before settlement is achieved, often later rather than earlier, considerable effort has been expended by the parties on dealing with the dispute, often at not insignificant expense in the way of lawyer's and other fees; and the business of the parties has been affected, if not seriously disrupted, by the requirement to apply resources and management time to the dispute. The exigencies of these circumstances can also result in the irreparable fracture of relationships between the parties, often making it certain that trading links will never be re-opened. And all this in relation to litigation which carries something in the order of a 97% chance of being resolved at sometime before the court is called upon to deliver its judgment.

The existence and development of ADR processes question the wisdom of so much effort and resources being expended on formal legal disputes. Given that so few of them will actually run their course the theory is that ADR processes can be inserted early into the dispute in the hope that with the outside assistance provided by the chosen method polarisation of the parties' disputes can be avoided and resolution achieved on a basis upon which both or all of the parties positively benefit for the future. Hence the drive to encourage the inclusion of ADR clauses in commercial contracts. But ADR methods can be used, by agreement between the parties, at any time during a dispute.

Experience has shown that ADR methods have produced settlements to a variety of disputes, ranging from the small to the large and exceedingly complicated. Given the goodwill of the parties to examine the possibilities of a structured resolution to their disputes taking into account issues wider than the purely legal, the belief is that many disputes otherwise considered to be almost unresolvable, (short of a court judgment), can be resolved to the satisfaction of all parties.

It would be wrong, however, to expect ADR methods to make a clean sweep of all potential litigation. The success rate in relation to cases where legal proceedings have already commenced is reckoned to be about 30%. To settle at an early stage 1/3 of all cases irrespective of subject matter and complexity, is no mean achievement. It is no wonder that many of the largest national and multi-national companies in the western world are keen supporters of these methods.

Other areas in the world, including Western Europe, may not yet have become so exposed to litigation and the risks associated therewith. It is true that ADR in its present form stems from the USA, a system of civil justice where juries increase the risk of seriously expensive adverse decisions against commercial enterprises, and where the provision of legal services is not inexpensive.

However, since ADR processes are seen to work in the US and in other jurisdictions, in principle there is no reason why they should not be applied with equal success in other places as yet unfamiliar with them. Equally, there is no reason why citizens and companies in those other places have first to experience the extreme difficulties substantial litigation can cause before they will be persuaded that ADR has a valuable place in commercial disputes, whether domestic or international.

Conclusion: so what option should you choose?

First, you need to decide whether to take your chances with any Court which might become seised of any dispute or to specify a choice in your contract of the process by which any disputes which do arise will be determined. If you go for choice, should ADR play any part in your considerations?

Disputes which the parties fail to resolve themselves, (whether by negotiation or structured ADR methods), need to be submitted to Court or Arbitration where the legal rights and obligations of the parties shall be formally determined. So the real choice is between Court proceedings or Arbitration. The issue on ADR is not whether to use it in place of Arbitration or Court proceedings, but whether to supplement those formal proceedings with a process designed to foster commercial, quick and pragmatic agreement between disputants with a view to the future, not the past.

In the international context the challenge for ADR methods is that, outside Common Law Jurisdictions, they are largely unfamiliar, untried and untested; and even within Common Law Jurisdictions their growing use is only relatively recent. But they have shown themselves to be effective in a wide range of types of disputes where, given their built in safeguards and the available alternatives, the parties have decided they are worth exploring. As time goes by it seems increasingly likely that their value will be recognised and that they will become more widely used in international commercial disputes.

Your choice between Court proceedings and Arbitration depends, case by case, on the sorts of factors discussed earlier. There is no absolute rule of thumb. Court proceedings may have much to recommend them, but a choice of particular Court will be tied in to a particular jurisdiction and, very likely, a jurisdiction of one of the parties or the law governing the contract. That may not be seen as a neutral choice. And, where there are no special arrangements (such as exist between EU members), the judgments of the Courts in one jurisdiction may not be enforceable in many or any others. Arbitration is not without criticism, but Arbitration awards are more widely enforceable; where enforcement is an issue this may be seen as the ultimate test.

Disputes which cannot be resolved by the parties to a commercial agreement arise remarkably infrequently; but if they do, it is important that they can be resolved effectively and enforceably. For this reason alone, it is important that dispute resolution clauses should be designed to be effective and fair to the parties. It may appear attractive to attempt to secure some advantage over the other party by introducing a clause favouring one side rather than the other. This is a doubtful approach: first, it may cause distrust during negotiations; second, what may have been perceived as an advantage at the time of negotiation may turn out to be otherwise when a particular dispute arises; and third, the enforceability of any Judgment or Award resulting from a one-sided clause may be put in jeopardy, a state of affairs which may not become apparent until the time for enforcement is reached, when great expense may have been incurred by the successful party for no benefit.

The terms of the disputes clause you may agree will depend on the parties' approaches to the issues involved and their respective bargaining positions. The watchwords are neutrality, objectivity and fairness. Given the range of options arbitration clauses can embrace, it may be that (compared to Court proceedings) Arbitration offers the flexibility parties require to achieve satisfactory arrangements on how their disputes will be dealt with; and a careful selection of experienced arbitrators can ensure decisions of the highest quality and practicality.

But, whether Court or Arbitration, the eventual determination of the parties' disputes will be based on an analysis of the parties' legal rights and duties at law. So consider also including an agreement to refer disputes to ADR; that way opens the possibility of a creative, imaginative resolution being quickly achieved by the parties through structured negotiation and in terms which no Court or Arbitral Tribunal could order or determine.

Appendix A

CMS Cameron McKenna Pre-Action Protocol for ADR

The introduction of the new Civil Procedure Rules in England on 26 April 1999 brought with them many changes to English procedural law, one of which was the concept of Pre-Action Protocols setting out desirable practices to be undertaken by the parties or their lawyers before the issue of proceedings in certain types of dispute. We have developed the following Pre-Action Protocol for ADR:

Introduction

1.1 The objectives of pre-action protocols, as set out in paragraph 1.4 of the Civil Procedure Rules Practice Direction on Protocols, are:
- (1) to encourage the exchange of early and full information about the prospective legal claim;
- (2) to enable parties to avoid litigation wherever possible by agreeing a settlement of the claim before the commencement of proceedings;
- (3) to support the efficient management of proceedings where litigation cannot be avoided.

1.2 We are proposing to use this protocol to ensure that mediation is considered at every stage of the case in compliance with the objectives set out above.

2. Consideration of ADR

2.1 The parties should consider at regular stages whether mediation or other form of ADR at any stage would assist.

2.2 The parties can agree at any stage to take the dispute (or any part of the dispute) to mediation or some other form of alternative dispute resolution (ADR).

2.3 All the parties will be expected by the Court to provide evidence that alternative means of resolving their dispute were considered.

2.4 When approached by a party or an ADR agency with a proposal that ADR be used, the other party or parties should respond within 14 days stating that:
- (a) they agree to the proposal; or
- (b) they agree that ADR will or may be appropriate, but they believe it has been suggested prematurely. They should state when they anticipate it would or may become appropriate; or
- (c) they agree that ADR is appropriate, but not the form of ADR proposed (if any). They should state the form of ADR which they believe to be appropriate; or
- (d) they do not accept that any form of ADR is appropriate. They should state their reasons. This letter should be copied to the other party or parties and can be disclosed to the Court on the issue of costs.

2.5 If any party is unwilling to use ADR they should state in writing their reasons.

3. Appointment of Mediator

3.1 Where the parties agree to mediate they will endeavour to agree who will conduct the mediation and the terms of the mediation.

3.2 The parties will promptly enter into a formal agreement with the ADR body and the Mediator when requested to do so.

3.3 If the parties can not agree on the appointment of a Mediator the ADR body can appoint the Mediator of its choice.

4. Conduct of Mediation

4.1 The Mediator shall have complete discretion as to how to conduct the mediation.

4.2 Within 7 days (or such other time as agreed between the parties) of referral to mediation the parties shall submit to the Mediator a concise statement of the issues in dispute and the relevant facts. If possible, these instructions will be agreed between the parties before they are submitted to the mediator. The statement may be accompanied by copies of essential documents directly relevant to the dispute.

4.3 The Mediator may at any time request such information and documents from the parties as the Mediator considers appropriate. The parties will respond promptly to any such request.

4.4 The parties will attend all meetings as required by the Mediator.

4.5 The parties should endeavour to ensure that the mediation takes place within 42 days of the terms for the mediation being agreed.

5. Confidentiality

5.1 The mediation takes place on a without prejudice basis.

5.2 The Mediator will not pass on to the other party information which is confidential, unless he is given permission to do so.

6. Settlement

6.1 Once the Mediator has discussed with the parties all the issues in full and has identified the real areas of disagreement and the points most important to the respective parties, the Mediator should suggest a constructive solution to the parties.

6.2 The solution reached by the Mediator can be rejected by either or both parties and the parties can adopt their own solution.

6.3 The mediation is non-binding until settlement of the dispute is reached and confirmed in writing by the parties in a form similar to the attached Model Settlement Agreement.

7. Model Settlement Agreement

Date . . . . . .

Parties

. . . . . .("Party A")

[Address][1] . . . . . .

. . . . . .("Party B")

[Address][2] . . . . . .

. . . . . .("Party C")etc.] (jointly "the Parties")

[Background][3]

The Parties have agreed to settle "the Dispute" which:

- has been the subject of a mediation today ("the Mediation")

Terms

It is agreed as follows:

1. [A will deliver to B at by not later than 4 o'clock on 25 December][4]
2. [B will pay £ to A by not later than 4 o'clock on 25 December by direct bank transfer to Barclays Bank sort code account number]
3.

4a. The Action will be stayed and the parties will consent to an order as attached [attach order].

OR

4b. The Action will be dismissed with no order as to costs

5. This Agreement is in full and final settlement of any causes of action whatsoever which the Parties [and any subsidiaries of the Parties] have against each other.
6. This agreement supersedes all previous agreements between the parties [in respect of matters the subject of the Mediation].[5]
7. If any dispute arises out of this Agreement, the Parties will attempt to settle it by mediation[6] before resorting to any other means of dispute resolution. To institute any such mediation a party must give notice to the mediator of the mediation. If no legally binding settlement of this dispute is reached within [28] days from the date of the notice to the mediator, either party may [institute court proceedings / refer the dispute to arbitration under the rules of ...].
8. The Parties will keep confidential and not use for any collateral or ulterior purpose the terms of this Agreement [except insofar as is necessary to implement and enforce any of its terms].

9. This Agreement shall be governed by, construed and take effect in accordance with [English] law. The courts of [England] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with this agreement.[7]

Signed

. . . . . .

for and on behalf of . . . . . .[8]

for and on behalf of . . . . . .[9]

1 Not strictly necessary
2 Not strictly necessary
3 Not strictly necessary but may be useful for setting up definitions
4 Be as specific as possible, for example, how, by when, etc.
5 Only necessary if there have been previous agreements
6 Alternatively, negotiation at Chief Executive level, followed by mediation if negotiations do not result in settlement within a specific time
7 Usually not necessary where parties are located in same country and subject matter of agreement relates to one country
8 Not necessary where party signing is an individual
9 Not necessary where party signing is an individual

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Appendix B

ADR Institutions in Europe

Austria
Anwaltliche Vereinigung für Mediation und kooperatives Verhandeln
A-1010 Vienna
Postgasse 2/1/16
Tel: +43 (0) 1 513 1201
http://www.avm.co.at

Institut für Mediation und Konfliktmanagement
A-1160 Vienna
Ottakringerstrasse 107
Tel: +43 (0) 1 485 4000
http://www.mediation-update.com

Belgium
CEPANI (Belgian Centre of Arbitration and Mediation)
rue des Sols 8 Stuiversstraat
B-1000 Brussels
Tel: +32 2 515 08 35
http://www.cepani.be

BBMC (Brussels Business Mediation Centre)
CCIB (Brussels Chamber of Commerce and Industry)
Avenue Louise 500
B – 1050 Brussels
Tel: +32 2 643 78 15
http://www.ccib.be/fr/bbmc/SiteBBMC.html

Croatia
Zagreb
CMS d.o.o.
Jurisiceva 24
1000 Zagreb
T +385 91 40 44 000
F +385 91 40 44 001

Czech Republic
Hospodarska komora Ceske republiky
(Economic Chamber of the Czech Republic)
Seifertova 22
130 00 Praha 3
Tel: +420-2-24096204
http://www.komora.cz

England
Centre for Effective Dispute Resolution (CEDR)
Exchange Tower
1 Harbour Exchange Square
London E14 9GB
Tel: +44 (0) 20 7536 6000
http://www.cedr.co.uk

ADR Group
Grove House
Grove Road
Redland
Bristol BS6 6UN
Tel: +44 (0) 117 946 7180
http://www.adrgroup.co.uk

ADR Chambers (UK) Limited
2 Heron Gate
Hankiridge Way
Taunton DA1 2LR
Tel: +44 (0) 845 083 3000
http://www.adrchambers.co.uk

France
(created by the Paris Bar Association)
Union des Médiateurs Européens
Ordre des Avocats à la Cour de Paris
Bureau des Associations
11, Place Dauphine
75053 Paris Louvre RP SP
Tél: +33 (1) 44 32 49 94
http://www.paris.barreau.fr

(created by the Paris Chamber of Commerce and Industry)
Centre de Médiation et d'Arbitrage de Paris (CMAP)
39 Avenue Franklin Roosevelt
75008 Paris
Tél: +33 (1) 44 95 11 40
http://www.cmap.asso.fr

Germany
Centrale für Mediation
Unter den Ulmen 96 – 98
D-50968 Köln
Tel: +49 (0) 221 93738-801
http://www.centrale-fuer-mediation.de

Gwmk
Gesellschaft für Wirtschaftsmediation und Konflictmanagement e.V.
Briennerstraße 9
D-80333 München
Tel: +49 (0) 89 290970
http://www.gwmk.org

Hungary
Partners Hungary Alapítvány
Budapest
Keleti Károly u. 15/B 11. 10.
1024
Tel: +36 1 315 0168
http://www.partnershungary.hu

Italy
ICC – ITALIA (Italian Section of the International Chamber of Commerce)
00187 Roma - Via Venti Settembre n. 5
Tel: +39 6 420343.01
http:// www.cciitalia.org

Curia Mercatorum Treviso
31100 Trevisi – Piazza Borsa 3/B
Tel: +39 422 5951
http://www.curiamercatorum.com

Risolvionline
Camera Arbitrale di Milano
20123 Milano – Piazza Affari n. 6
Palazzo Mezzanote
Tel: +39 28 515 4511
http://www.risolvionline.com

Centro Studi Europeo di Conciliazione e Resoluzione dei Conflitti
Bologna – Piazza S. Francesco n. 10
Tel: +39 51 238 645
http://www.conciliazione.org

The Netherlands
Nederlands Mediation Instituut
Postbus 30137
3001 DC Rotterdam
Tel: +31 (0) 10-405 69 89
http://www.nmi-mediation.nl

ACB Conflict Management for Business and Industry
Beznidenhouteseweg 12
Postbus 93002
2509 AA
Den Haag
Tel: + 31 70-3490 493
Fax: + 31 70-3490 295
http://www.mediation-bedrijfsleven.nl

Poland
Arbitration Court
Sąd Arbitrażowy Trębacka przy Krjowej Izbie Gospodarczej
(Polish Chamber of Commerce)
4 Trebacka Street
Warsaw
Tel + 48 22 827 47 54
http://www.kig.pol

Romania
Court of International Commercial Arbitration
(attached to the Chamber of Commerce and Industry of Romania and Bucharest)
2 Octavian Goga Blvd
Sector 3
Bucharest
Tel: (40) 1-322 95 50
http://www.ccir.ro/ccir/departs/eng/arbitration/Index.html

Russia
The St Petersburg Conflict Resolution Center (CRC)
196 – 191 St Petersburg
Ul.Bassejnaya 21
Tel: (812) 210-9720
Fax: (812) 307-0918
http://www.conflictology.com/English/crk.html

The Association of Practising Specialists on ADR (Southern Russia)
344 007 Rostovon-Don
Budnovsky Prospect
3/3
Office 405
Tel/Fax (8632) 99-02-10
Email: yaf@yaf.ru

Scotland
Core Mediation and Core Consulting
22 Fountainhall Road
Edinburgh
EH9 2LW
Tel: + 44 (0) 131 667 883
http://www.core-mediation.com

Switzerland
The Swiss Chamber of Commercial Mediation
Bollwerk 21
Postfach 6624
CH-3001 Bern
Tel: + 31 325 35 35
Fax +31 328 35 40
http://www.mediationchamber.ch

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00-113
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