

## ***THE ENFORCEABILITY OF ADR CLAUSES***

*BY:*

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The major method of resolving disputes in Commercial International Business Transactions is via Arbitration. If the parties have failed to enter into an Arbitration Agreement or a Submission Agreement, then litigation in the national courts of one of the parties is the fallback method of resolution. In the past decade a growing trend has been to use methods of Alternative Dispute Resolution (ADR) including Mediation, Early Neutral Evaluation, or Case Appraisal. There has been some hesitation to insert an ADR clause in a contract, rather than an arbitration clause, for a number of reasons, not the least of which has been a fear that the clause will not be enforced by a national court. As a result of recent decisions, this fear now appears misplaced.

Why are commercial entities increasingly turning to Mediation as the favoured method of dispute resolution? When compared to either Arbitration or Litigation, there are a number of advantages. Mediation is simply a form of assisted or facilitated negotiation, allowing the parties to reach a commercial resolution to their dispute. A mediation usually lasts hours or, at most, days. It is therefore much faster, costs less and is highly flexible. The location, the date and time, the language and the degree of formality is completely within the choice of the parties. The solution to the dispute remains with the parties who may not have a resolution imposed upon them. In instances where the parties hail from different cultures – business, legal, or otherwise – the choice of an appropriate mediator or mediators may help bridge the differences and open up avenues of communication. The solution reached need not be a solution which could be reached by a Court. Creativity and commercial reality may feature in a way not possible before a judge. Especially in the case of an ongoing relationship, mediation is not confrontational in the way that both arbitration and litigation are, leaving the possibility of continuing cooperation between the parties in the future. Finally, mediation is held in private and the matters are kept in confidence between the parties and the mediator, rather than held publicly where the affairs of the parties may be the subject of media comment.

Why in the light of these advantages are ADR or mediation clauses not used more by commercial entities, especially by European corporations? A simple answer may be simple lack of familiarity with the process. Another may well be that entities are seeking the enforceability of an arbitral award or a judicial decision, rather than another contractual agreement. For a successful mediation, the parties have to take an open approach, divulging information and sharing documents. Should a mediation session fail to reach a complete agreement, this may both add another level of costs and delay ultimate resolution. There may also be doubt as to whether the clause itself would be given effect before the national courts in many countries.

Arbitration is a much more familiar method of resolving disputes. It shares with mediation the feature of allowing the parties to have a say in the selection of the neutral,

in this case, the arbitrator. It also allows the parties to choose location, hours, and the rules which are to be used to decide the dispute. Those factors surely explain the preference by many international commercial concerns for arbitration over litigation. Arbitration suffers some of the disadvantages of litigation. The decision is taken out of the hands of the parties and turned over to the arbitrator. Arbitration, like litigation, tends to require months or years to reach an award. The costs of arbitration reflect the time consumed, the presence of trained legal professionals, and the fees of the arbitral panel. Of course both arbitration and litigation are intended to produce an enforceable decision. Arbitration through the New York Convention has the advantage of both finality and the great likelihood of enforceability. Litigation depends more upon bilateral or multilateral treaties for enforcement, and the availability of means of review, such as appeals or recourse to cassation, may mean that a final decision may not be reached for a considerable period of time.

In Common Law countries, one of the fears of the use of ADR clauses calling for mediation was that they might not be given recognition or enforcement by national courts. A number of decisions were reached that held that “an agreement to negotiate” was too uncertain and would not be enforced against an unwilling party. Where parties used a staged or escalating clause which called for mediation, and then, should the mediation session fail to produce a complete settlement, recourse to arbitration, if the ADR part of the agreement was held to be unenforceable, the whole clause was held unenforceable. Parties then had no alternative but recourse to a national court. For reasons of language, fear of preferential treatment of the local party, foreign law and the like, being forced to litigate rather than to arbitrate was certainly a result to avoid.

Within this decade, the danger of lack of enforcement of a properly drafted ADR clause has receded. The decision of the High Court in England in *Cable & Wireless v IBM (2002)* demonstrated a common sense judicial acceptance of mediation. The Court found that there was a contractual clause committing the parties to mediation and ordered them to mediation before any litigation could be held. This decision is in line with contemporary notions of case management. Courts throughout the Common Law world have followed this commendable step.

The decision has shown that a competently drawn ADR clause will be given effect, minimizing the danger that an escalating clause will fail for uncertainty. The ingredients for such a clause now appear relatively clear. The clause must be in the form of a *Scott - Avery clause*, that is, the jurisdiction of a court or an arbitration is not ousted. The holding of a mediation session is a condition precedent to bringing a matter to arbitration or to the court. Secondly, there must be an unqualified reference to mediation with sufficient certainty, and with a definable minimum duty of participation. The mechanism of holding the mediation must be clearly defined both as to the way in which the mediator is to be chosen and the rules which will govern the mediation, including rules regarding mediator remuneration. Most major mediation organisations provide a standard mediation clause on their websites which will satisfy the requirements for enforceability.

The ADR clause will be enforced by the court either by staying its proceedings if a party attempts to bring litigation, or by granting an injunction if litigation or arbitration is attempted before the mediation session is held.

The frequency of mediation clauses and the practice of mediation is not yet uniform globally. Many organisations throughout the Common Law world promote the insertion

of ADR clauses in international contracts as a matter of course. Even in contracts where no ADR clause has been included, the Rules of Court may provide for routine compulsory reference to mediation before either a private mediator or a court official. Only after an attempt at mediation will the hearing of the case take place. On the European continent, the process of mediation is well known but concepts of jurisdiction and tradition have limited its widespread acceptance. The insertion of an ADR clause in international contracts is not prohibited but its frequency is not common. The attitude of continental courts to the enforcement of ADR clauses is considerably less clear than in the Courts of England, the United States and Australia.

Globally, the goal of quick, efficient and inexpensive resolution of disputes is widely shared. The use of arbitration and/or litigation to resolve disputes will continue to be a major method of the disposition of conflict. Mediation is not a panacea. With resolution rates approaching 80% , its user friendly nature, and with its acceptance by a previously sceptical judiciary, mediation is likely to further spread. A diminution of doubt regarding the enforceability of ADR clauses is a strong step in favour of its wider dissemination.

