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ICC READIES NEW ADR RULES

Few practitioners pay much attention to the ICC's Rules of Conciliation, gathering dust at the back of the Arbitration Rule Book. The ICC Court has been receiving about a dozen requests annually for conciliation, compared with nearly 600 arbitration files per year. Now, following decades with the spotlight on arbitration overshadowing interest in other forms of dispute resolution, the International Chamber of Commerce is about to release its new ADR Rules. The trusted ICC "brand name" on the system will provide assurance to those wishing to use mediation or other ADR techniques as an alternative - or as a prelude - to instituting arbitration proceedings.

After nearly two years of world-wide consultations and months of debate, the ICC's Commission on International Arbitration has finally reached consensus on the format of its new ADR Rules. Working Party Chairman Peter Wolrich presented the "third and final reading" of the Rules to the Commission members in Paris on 30 November 2000.

An in-depth study of business needs and the various available techniques led the Working Party to adopt m a broad set of rules for "the amicable settlement" of business disputes using a third party "Neutral". The rules permit the parties to agree on whatever settlement techniques they deem appropriate, but absent agreement, mediation is method to be used.

Although the ICC is primarily known for international arbitration, the ADR Rules explicitly allow their use for all disputes, whether or not of an international character. In a few short Articles, the Rules provide for

the commencement of proceedings (by a Request for ADR to the ICC Court Secretariat) the selection of the Neutral, conduct and termination of the procedure, and fees and costs. In the General Provisions, the Rules cover confidentiality and immunity of the Neutral, as well as stipulating that a Neutral "shall not act or have acted in any judicial, arbitration or similar proceeding relating to the dispute…whether as a judge, arbitrator, expert, representative, or advisor of a party." A schedule of costs accompanies the Rules as an Appendix, and four different model ADR clauses are suggested for incorporating an ICC ADR reference into contracts.

The entry of ICC into the field of ADR comes at a time when the legal community in continental Europe is at last coming to terms with the concept of neutrally-assisted negotiations to solve commercial international commercial disputes. In the middle of the twentieth century, arbitration, which had long been popular in Europe, also became the "solution of choice" for Americans looking to resolve international disputes. It was billed as "faster, cheaper and more convenient" than litigation.

As the stakes got higher, arbitration began to take on some of the undesirable characteristics of litigation, including "fishing-expedition" discoveries and brutal cross-examinations. By the late 1980's, ADR had found a ready market among U.S. and English business operators disillusioned with the length, complexity and expense of arbitration. Operations like CPR, CEDR and ENDISPUTE sprang up and soon had their hands full.

On the continent however, resistance was palpable. In the first half of the 1990's, ADR was dismissed within the ICC as an American invention, responding to problems inherent in American litigation, with no particular interest for Europeans. Somewhat illogically, European arbitrators argued that ADR was just a passing fad from America that would not work in an intercultural situation; or else that they in fact, were already using mediation techniques in their role as arbitrators, so didn't need a new name for it. Underlying the objections was an unspoken concern that ADR, if successful, would reduce the need for arbitration.

Finally in 1994, spurred on by American and English members, whose clients were already insisting on ADR, the ICC Arbitration Commission struck a Working Party to investigate ADR[7]. It was not until much later, in 1999 that the Wolrich Working Party received its mandate to create a set of ADR Rules for the ICC.

One interesting feature of the Rules is its versatile approach, permitting literally any technique imaginable, provided the parties agree to it. This allows the parties for example, to agree that the opinion of a neutral expert will – or will not - bind them legally.

The advantage of this flexibility is that it allows scope for new solutions, or for using techniques in one jurisdiction that might not be acceptable in another. In some Asian countries, a mediator is expected to offer a "recommended" solution, while elsewhere, mediators refuse (or are not allowed) to express an opinion about what the "right solution" might be.

However, this versatility may also lead to problems. As the Rules provide for both binding and non-binding results, there is a substantial risk of the parties getting it wrong. If the parties choose binding expert determination as a first step, and if that fails, arbitration, and they neglect to agree expressly that the expert determination can to be used later in the arbitration, the confidentiality provisions of the Rules may prohibit reference to the expert's opinion in the subsequent arbitration proceedings. This may not be the effect the parties (or one of them) had expected. Confidentiality is admittedly a very good thing for mediation proceedings, but not necessarily useful in the case of an expert's evaluation.

The new Rules will overwrite the old Rules of Conciliation, but leave intact other ICC ADR services such as Expertise, and DOCDEX. The format of the Rules, once approved by the ICC Executive Board on behalf of the World Council, should be translated and published for use sometime this year.

For more information about the new ADR Rules or other ICC services, contact Louise Barrington.

[7] The Working Party, headed by Maitre Jean-Claude Goldsmith, reported on 21 April 1995.