ADR in international transactions: an introduction

What is Alternative Dispute Resolution? How can it apply in the international context? Markham Ball, of Morgan Lewis & Bockius, Washington, DC provides a primer

Alternative Dispute Resolution (ADR) is a shorthand term describing a variety of different methods for resolving disputes. Each of the methods is an alternative to court litigation. ADR methods do not necessarily eliminate litigation, however. Instead, they structure dispute resolution proceedings so that the parties need to go to court in fewer cases, and then generally only to enforce a decision produced by ADR, or to resolve issues that the parties failed to resolve by an alternative method.

ADR is a hot topic, particularly in the US, where it is currently the subject of seminars, meetings, articles and academic study. Both profit-making and non-profit organisations offer various forms of ADR services. Increasingly, when businessmen and their lawyers structure a deal, they also structure the resolution of disputes that may arise out of the deal through one form of ADR or another.

Flexibility

Because ADR methods can be fashioned *ad hoc* to meet individual situations, ADR can take many forms. The principal ADR mechanisms may be used singly or in varying combinations. The generally recognised forms of ADR of greatest relevance to international transactions are binding arbitration; negotiation; mediation; mini-trials; and neutral fact-finding.

Binding arbitration. Like other forms of ADR, arbitration is consensual. For all relevant purposes, there can be no arbitration to resolve a dispute unless the parties have agreed to arbitrate. Unlike the other principal forms of ADR, arbitration is designed to produce a final binding decision. If an arbitration is properly designed and executed, once a party has agreed to submit a dispute to arbitration, he is bound by the results, and, if he fails to comply, the arbitrator's award will be judicially enforceable.

Although its procedures are generally less formal and more flexible, in many respects arbitration can be much like litigation. It is likely to involve submissions of documentary evidence and briefs, and one or more hearings for the presentation of the oral testimony of witnesses and legal argument by counsel. The end result is a final, enforceable decision.

Arbitration may be quick and inexpensive. But if the dispute is an unusual one with large amounts at stake, it can be time consuming and costly. Just how an arbitration progresses depends on how the parties have structured it — on the rules they have chosen to govern the arbitration, and on the arbitral institution, if any, they have chosen to administer it. (These include the London Court of International Arbitration, the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), etc.) Perhaps most important in determining the course of an arbitration is the arbitrator or arbitrators that the parties or the arbitral institution have selected.

Arbitration is particularly appropriate in international transactions. It may, in fact, be the only procedure that both parties to an international transaction feel confident will produce a result that is both fair and legally enforceable. It provides a neutral forum for parties that may distrust the procedures or the impartiality of each others' national courts. Because it is generally private and often less confrontational, arbitration is often a welcome alternative to parties that seek to avoid the open conflict of litigation.

If the parties choose to arbitrate in a country that has ratified the New York Convention on the recognition and enforcement of foreign arbitral awards, the award, if properly rendered, will be enforceable in any other signatory state. When one party to a transaction is a government or a government-controlled entity, an agreement to arbitrate can limit or eliminate the government party's ability to resist dispute resolution procedures on grounds of sovereign immunity.

Negotiation. The process of negotiation — the oldest and most common means of dispute resolution — is without doubt the ADR method that both businessmen and their lawyers look to first when a dispute arises. It is the means through which all but the most intractable of disputes are resolved, and through which practical people put their differences behind them and get on with their work.

Significantly, each of the ADR procedures listed below is, in the end, a technique for making the

When to go for ADR

Decisions about the use of ADR should be made as early in the life of a transaction as possible. Certain basic decisions should be made at the time a transaction is put together. If the parties fail to make these decisions at that time, circumstances and the operation of law will make the decisions for them.

Consider, first, the role of ADR (and, in particular arbitration) as the tie-breaker in the event of a dispute. Every time two parties make a contract, they make a decision (changeable only if they later agree to change) about how disputes under the contract will be resolved. If they say nothing at all about dispute resolution, they have chosen litigation as the ultimate tie-breaker. Parties to an international transaction probably will not be able to predict at the outset what court, in what country, will hear their case, but they know they will have to go to court to resolve any disputes, unless they can agree on a settlement.

Increasingly, this prospect is not acceptable to parties starting out on international transactions. Perhaps more frequently than not, they are electing arbitration as the ultimate tie-breaker and are inserting arbitration clauses in the contracts governing their transactions.

These arbitration clauses may well provide that, before a party may commence an arbitration, he must submit the dispute to some other form of ADR. Clauses requiring good faith negotiations before arbitration may begin are common. Many parties that elect to arbitrate disputes under the rules of an arbitral institution require resort to mediation or conciliation under that institution's rules as a pre-condition to arbitration. It is not common for dispute resolution clauses to require mini-trial procedures.

Even if the parties choose litigation as the ultimate tie-breaker, they may require the parties to resort to one or more forms of ADR before either can sue. The enforceability of agreements to engage in such ADR procedures as good faith negotiation is a complex question, but there is authority to indicate that a well drafted contract clause setting out specific required ADR procedures is enforceable.

This is not to say that there is no place for agreement between the parties after a dispute has arisen on an *ad hoc* form of ADR. In fact, most ADR proceedings, other than arbitrations, probably are agreed in this way. It is not easy to predict just what sorts of disagreements will arise in a business relationship, and so it may not be feasible or wise to commit the parties in advance to excessively detailed procedures.

Nevertheless, it is important, if not essential, that the parties decide at the outset whether they will rely on litigation or arbitration as the ultimate tie-breaker. It is possible in theory for parties to agree to arbitration after a dispute has arisen. As a practical matter, however, once a dispute has arisen, one party or the other may well find it tactically advantageous not to subject itself to proceedings likely to result in a binding award.

negotiation process more effective and for assisting the parties to reach a negotiated agreement that settles their dispute.

Mediation. An impartial mediator (or conciliator) serves as a trusted go-between to assist the parties to reach agreement. Although in certain limited circumstances the obligation to participate in mediation may be imposed by law (eg national or local laws on labour or family disputes), in most contexts parties must participate in the mediation process only if they have agreed to do so.

Most of the institutions that have published rules for the arbitration of international disputes have also published rules establishing mediation or conciliation procedures. Parties may agree, for instance, that they will submit disputes under a particular contract to mediation under such rules, and to turn to binding arbitration only if mediation does not produce resolution by agreement.

UNCITRAL rules

The Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL) are illustrative of the structured but flexible approach that is followed under most mediation or conciliation rules. Under the UNCITRAL Rules, either party may initiate a request for conciliation. The other party is free to reject the invitation, but, if he accepts it, he is bound to proceed with conciliation in good faith. Each party may present his side of the case to the conciliator, who may communicate with the parties together or separately, and who may offer settlement proposals at any stage of the proceedings. All matters relating to the conciliation are to be kept confidential. If the parties reach agreement, they sign a settlement agreement that terminates the dispute.

Mini-trials. These are carried out under procedures, typically rather detailed, agreed to by the parties. The crux of the mini-trial process is that counsel for the parties present their best cases over a short period of time to senior management officials of the two parties who have the power to settle the case, and to a neutral adviser. Immediately after this, the two officials attempt to negotiate a settlement. If they do not succeed, the adviser renders a non-binding opinion stating his views on the issues of fact and law in contention, and on the likely outcome of court action. The officials then try again to negotiate a settlement. The proceedings are confidential.

The mini-trial procedure has been increasingly used in the US within the last decade. Indeed, some US government agencies have adopted policies favouring resolution of disputes with contractors by ADR whenever possible. The US Army Corps of Engineers has successfully used the mini-trial technique to settle a number of disputes.

Detailed written procedures for mini-trials are available from various US sources including the AAA. In 1985, the Zürich Chamber of Commerce announced that it would offer mini-trial procedures for the resolution of international disputes. Profit-making and non-profit organisations in the dispute resolution field offer not only written procedures but also advisers who can assist in structuring and carrying out proceedings in individual cases.

Neutral fact finding. The parties may agree to submit key questions of fact that are in dispute, particu-

larly questions of technical difficulty, to an independent expert. The parties may agree on whether the expert's finding is to be binding or non-binding, and on whether it may be introduced in evidence in litigation or arbitration. Fact finding procedures may be as formal or informal as the parties choose. The ICC has published *Rules for Technical Expertise* under which the parties may elect to submit questions to experts chosen by the parties or appointed by the ICC.

Other ADR methods. Omitted from this brief discussion of ADR methods are certain procedures under the rules of some US courts (court annexed arbitration), and under US state statutes providing for the 'rent-a-judge' variant on the arbitration process. Also omitted are procedures that are designed, not to resolve justiciable disputes, but to help the parties make a deal when no deal exists, such as 'last-offer arbitration' in labour contract negotiations.

ADR offers the parties two basic approaches to out-of-court dispute resolution. Most ADR methods focus on bringing disputing parties together so that they can themselves agree on a resolution of their differences. One method, arbitration, focuses on the definitive resolution of disputes by a neutral third party when the parties themselves cannot agree.

Those ADR methods that focus on bringing parties into agreement emphasise, in varying degrees, two techniques, which may be identified (in over-simple terms) as brokering and truth-telling.

The brokering process, through which a neutral intermediary helps the parties come to agreement, is seen in its purest form in mediation. The mini-trial is a more elaborate brokering mechanism that also builds in a high measure of truth-telling. Negotiation too can lead to brokered settlements, with counsel for the parties serving not only as advocates, but also as brokers who temper their partisanship with objective professional judgement.

As for the truth-telling function, ADR encourages settlement by the simple strategy of getting the facts and arguments fully on the table, and testing the parties' theories by subjecting them to consideration by a neutral person. Mini-trials, neutral fact-finding and mediation all offer the possibility that a neutral non-party will render a non-binding, but objective, assessment of what the result of a dispute would be if submitted to litigation or arbitration. Such an assessment can shape the assessments of the case by the parties themselves, and bring them toward a realistic common ground. If the parties develop similar views of how a litigation or arbitration would be likely to come out, they are in an excellent position to reach a comparable result much more quickly and inexpensively by agreement.

Binding arbitration has a different basic objective. Arbitration, like litigation, is a tie-breaker — a means of declaring the parties' rights, in a binding, enforceable way, in the event that the parties cannot determine those rights for themselves by agreement.

The dichotomy between arbitration and other kinds of ADR should not be pushed too far, however. Arbitrators (and judges as well) are often able to assist the parties to reach negotiated settlements in the course of the arbitral process. Recently, in an arbitration between IBM and Fujitsu under AAA rules, the two party-appointed arbitrators took the lead in brokering a settlement that included a complex long-term scheme for the transfer of information. □