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Mediation of International Business Disputes:

The International Chamber of Commerce Adopts US-Style ADR Rules

In a significant breakthrough in international ADR policy development, the Paris-based International Chamber of Commerce ("ICC") recently adopted new rules for the amicable resolution of cross-border business disputes.

Two years in the making, the new rules (called "ICC ADR Rules") signal recognition by the ICC that mediation is co-equal with arbitration as a dispute resolution tool, and, as well, that US-style mediation practice is the order of the day.

To appreciate the impact of this development, it's useful to review a bit of history.

The Way We Were

The ICC's Court of Arbitration has operated a business dispute resolution program since its founding in 1923. It wasn't until 1988, though, that the Court adopted a set of "Optional Rules of Conciliation," intended to parallel its longstanding arbitration protocol.

While ICC's arbitration program has prospered over the years, with more than 500 new cases filed from around the globe in 2000, the newer conciliation program has remained something of a neglected stepchild.

The reason is simple. Whereas ICC's arbitration rules achieved over time a delicate balance between the competing Civil Code legal culture of continental Europe and the Common Law tradition of the English-speaking world, the Optional Rules of Conciliation remained, until now, firmly, and exclusively rooted in the continental system.

For example, the old rules provided for "conciliation" rather than mediation, thus preferring a mediation style identified with the most aggressive forms of the evaluative-directive model found in US practice. Likewise, the old rules provided for the appointment of a conciliator solely by ICC's secretariat, with no opportunity for the parties to object to its selection.

Moreover, the old rules allowed for involvement of but one conciliator in any case, thus rejecting the possibility of co-mediation. Those rules also made no provision for the modification of their provisions by the parties. Finally, the old rules required that a copy of any settlement agreement reached in the conciliation process be delivered to ICC at the close of the case. This last proviso of course represented a serious infringement on the confidentiality of mediation practice.

So, while mediation of business disputes was growing apace in the States over the last decade, ICC's conciliation program was largely ignored, especially by US lawyers and their clients.

What a Difference a Day Makes

But all that has changed with the adoption of the new ICC ADR Rules, which constitute a complete revamping of the ICC regime. The old rules have now been consigned to the dustbin of ADR history, replaced in their entirety by a modern program that scarcely resembles the old system, but closely replicates the best mediation systems in the US.

Here are some of the highlights of the new rules:

1. "ADR" Means "Amicable Dispute Resolution"

Here in the States, we're accustomed to using "ADR" to mean "alternative dispute resolution." ICC now has a different, and, many will say, more enlightened, view. Avoiding the contentiousness that inevitably attends discussions of arbitration and mediation as "alternatives" to litigation, ICC has opted for an approach that sees mediation as a complement to litigation, and, in particular, an approach that no longer sees mediation as an afterthought, but as a full partner to arbitration. Hence, "ADR" is now short for "amicable dispute resolution." The term is defined in the new rules to include such other techniques as "neutral evaluations" and mini-trials, but mediation is declared the favored, or default, mode of ADR.

2. The Scope of ADR Can Be Broader Than Arbitration Jurisdiction

The preamble to the new rules underscores an important departure from traditional restrictions on the scope of international commercial arbitration. It provides that the new regime may be invoked to deal not only with "disputes," but also with "differences" between the parties, as, for example, an incipient disagreement over contract language that has not yet ripened into a concrete dispute suitable for submission to arbitration. By this means, the new rules are intended to capture some cases for mediation before arbitration becomes necessary.

3. Party Appointment of Mediators Is Now the Rule

The new rules specifically provide for appointment of their mediator by the parties to a dispute. ICC may make an appointment from the rosters maintained by its national committees when the parties so request, or if they fail to agree on an appointment. And the parties are free to object to an ICC appointment, in which case a new appointment will be made.

4. Mediation Implies Facilitation

Under the new rules, there is an assumption that mediation, standing alone, means facilitation of the negotiation process, without evaluative intervention by the mediator. Perhaps for this reason, the new rules use the term "neutral" to apply to all mediators.

5. But ADR Techniques May Be Combined

However, since the new rules provide for ADR techniques to be used in any order or combination the parties might wish, they may have the benefit of an evaluative service by requesting a "neutral evaluation," or, instead, they can choose to have their mediator-Neutral apply a blend of facilitative and evaluative methods by electing to proceed with a combination of mediation and neutral evaluation.

6. Mediators May Be Screened For Their Facilitative or Evaluative Abilities

In a twist on the continuing debate within the mediation community over the relative merits of evaluative (or directive) and facilitative styles, ICC's new system recognizes that mediators may be selected for either, or both, their evaluative skills (described as: "the professional capabilities and experience needed to understand the various aspects of the dispute between the parties") and their facilitative talents (described as: "the human qualities needed to create an atmosphere of trust between the parties and encourage constructive discussions"). Accordingly, ICC now encourages parties to advise it of both those expert "qualifications" and/or special personal "attributes" they may desire in any mediator to be designated by its secretariat.

7. The Parties May Have Two Mediators

In an important concession to the developing use of co-mediators, especially where specific industry expertise is needed in addition to mediation process skills, or where familiarity with two differing business or national cultures is desired, the new rules expressly allow for the appointment of two mediators, at the option of the parties.

8. The Settlement Agreement Is Confidential

And, in what may be the single most important reform achieved by the new rules, there is no longer a requirement that a copy of any settlement agreement resulting from a mediation be shared with the ICC. This change is intended to ensure the confidentiality of both the mediative process and its outcome.

9. The Rules May Be Rewritten By the Parties

Moreover, to maximize the flexibility of the new rules, they are specifically permitted, with the consent of ICC, to be rewritten by the parties to meet the needs of a given case.

10. Added Attractions Include Suggested Contract Clauses and an Explanatory Guide

For the convenience of parties and counsel, ICC has appended to the new rules two helpful aids, one, a set of model ADR contract clauses to match those already in place for its arbitration rules, the other an extensive "Guide to ICC ADR" with section-by-section analysis. The complete package of rules, model clauses and Guide is available in pamphlet form from the ICC website at: www.iccadr.org.

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Implications of the New ICC ADR Rules for American Lawyers and Their Clients

ICC's new ADR rules were a long time coming, but the wait has been worth it. Because of its more modern and common-law-oriented view of mediation, the new ICC ADR protocol is decidedly friendlier to American lawyers and businesses than was its predecessor. And, because the new rules have corrected serious shortcomings in the old regime, US lawyers can now confidently recommend ICC ADR to their clients, especially those with continental European business partners.

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