DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

Speaker's Notes
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Session 205: International ADR: The Future of Cross-Border Disputes.
5. International ADR: A View from Europe.

Arbitration

The LCIA in London, the ICC in Paris and institutions in Switzerland[1] are competing in an expanding international market for arbitration. London seems to be emerging as the winner of the recent competition. Why?

Whilst arbitration was used by merchants and traders to settle disputes since Anglo Saxon times, the modern milestone was the 1996 Arbitration Act which was designed to bring the UK into line with the Model Law and make the UK a more attractive venue. The need to do this was pressing at the time because arbitration has fallen out of favour amongst lawyers and clients because of poor arbitrators, slow and expensive procedures and too much judicial intervention to cure these ills. The 1996 Act restated the aim of arbitration thus:

"The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"

To this end the Act introduced the concept of party autonomy; the parties can design their own arbitration procedure (by agreement) but if they do not, a statutory scheme applies which essentially gives the arbitrators the powers and the discretion to meet the objective stated above. It has worked well in practice.

In the three years from 1996 to 1998 there was a 100% increase in the number of ICC administered arbitrations taking place in London and the trend has continued since more strongly. The LCIA is out-pacing the ICC, armed with a new set of rules[2] designed to work well in conjunction with the 1996 Act for International cases. Parties are also less inclined to opt for the administered style of ICC arbitrations, and prefer to leave it to less costly institutions like the LCIA or simply have ad hoc references, for example under UNCITRAL rules[3].

In the last year a new International Dispute Resolution Centre has opened providing good facilities for arbitration in London.[4]

Other ADR: Mediation

London has dominated the growth of mediation in the last 10 years, mainly due to the activities of CEDR (Centre for Dispute Resolution)[5], which was inspired by CPR; indeed the founders were trained in the US. There is now stiff competition from other US-inspired groups such as ADR Group[6] and to a lesser extent JAMS-Endispute.

Other European centres have not developed as quickly as those in the UK, but we are just seeing the opening of ADR centres in Paris (CMAP), Brussels (BBMC), Netherlands (NMI) and Rome (Union Camere). The driver for these has come from the chambers of commerce, from European multi-national companies which have experience of ADR, and from the European Commission which has put ADR at the heart of its strategy to develop e-commerce.

The volume of commercial ADR is still quite small, probably less than 1000 cases per annum. In the last year CEDR arranged 462 commercial mediations with a total value of £1.2bn and an average claim size of £2.6m. Construction/Engineering/Property and professional negligence dominate, but IT/telecoms, banking/finance and insurance are significant. 63 of the cases were international, a 66% increase on the year before. CEDR is now training other organisations throughout Europe, and in diverse places such as Russia and Israel.

It is significant that London has grown in strength as a financial centre in the last 5 years; deals that were done in New York 5 years ago are now done in London. US financial institutions (and lawyers!) have put people on the ground in London and as result English law and English dispute resolution is drafted into the contracts. It is natural therefore that the trends in ADR since 1996 will continue.

Developments in Court

There is a global trend away from national courts and in the UK government policy has been to make the courts the place of last resort. To that end the Civil Procedure Rules were completely revamped in April 1999.

The "overriding objective", placed on judges and parties alike is to enable the courts to deal with cases justly, ensuring the parties are on an equal footing, saving expense, dealing with cases in a way which is proportionate, expeditious and fair and allocating an appropriate share of the court's resources. Active case management includes encouraging the parties to co-operate, encouraging the use of ADR and helping the parties to settle.

Litigation in court as a business is rapidly declining in the UK. The figures are startling: Commercial Court cases have fallen from 1941 in 1997, to 1432 in 1998, to 1205 in 1999. This year the figure is probably under 1000. Total claims in the High Court have also declined from 53,931 in 1997 to 47,509 in 1999.

Greater use of technology is helping to modernise the process, but one effect of the changes is that parties are more prepared to embrace arbitration as the "traditional" litigation tool because it provides a more familiar battleground than judge-managed litigation in the courts.

8. International ADR in e-Commerce

An indication of the future comes from Singapore, a city foremost in its desire to become an e-commerce hub. The judiciary in Singapore launched an online mediation facility in September 2000 which enables commercial and e-business concerns to resolve disputes with going to court or indeed entering a physical presence in a court or hearing room. The scheme, known as e@dr operates as follows:

- A claimant visits the web-site at http://www.e-adr.org.sg

- The claimant gives particulars and those of the respondent in a form and proposes a solution to the dispute. The form is submitted electronically.

- The claimant receives an acknowledgement and a case number.

- On receiving the e-mail the respondent can either reject the whole process of e@dr, or accept it by completing a form and submitting it back by e-mail.

- On receiving the respondent's e-mail the moderator decides which forum will be used to resolve the dispute, for example in the Small Claims Tribunal if it is a small claim of less than S$20,000, to a Court Mediator, or where the case is complex, to the Court Dispute Resolution International where settlement conferences are co-conducted by a Singapore Judge and a judge from a Foreign Jurisdiction. There are also links to the Singapore Mediation Centre and the Singapore International Arbitration Centre.

- The parties are informed and then the mediator contacts all parties by e-mail.

- The mediation process begins. Remarkably this service is provided free of charge to the Respondent which may devalue it in the eyes of some, but at least does not present any financial barriers to entry. The cost scale for the claimant varies up to 3% in business disputes. It will be very interesting to see how this service develops and whether it becomes as popular as the WIPO domain name dispute resolution service launched in January 2000 which within just 9 months is receiving over 250 cases per month.

The CPR Institute for Dispute Resolution launched on 25 September a new initiative and four tools to promote the use of ADR to settle business-to-business disputes in the internet marketplace[7]. Only last week, business leaders[8] meeting in Miami voiced strong support for the use of ADR in e-commerce.

In December 1999 the European Commission launched its "eEurope Initiative" at the Helsinki Summit since then the mood of the polticians and civil servants has changed markedly. Because of work which had started in 1998 and matured into a draft OECD recommendation for "guidelines for consumer protection in the context of electronic commerce" in September 1999, one of the key issues identified within the Initiative was the need to promote rapid and effective redress mechanisms to resolve potential disputes encountered by businesses and consumers buying goods and services across borders on the Internet.

The following extract on Article 17 is from the Common position adopted by the council (28 February 2000, 14263/1/99 REV 1)

"THE PROPOSAL OF A DIRECTIVE ON CERTAIN LEGAL ASPECTS OF ELECTRONIC COMMERCE IN THE INTERNAL MARKET 'OUT-OF-COURT DISPUTE SETTLEMENT SYSTEMS' AND THE PROPOSED DIRECTIVE

Article 17 - Out-of-Court Dispute Settlement

(1) Member States shall ensure that, in the event of disagreement between an Information Society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

(2) Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

(3) Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding Information Society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Recital 17

Whereas each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; whereas the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders; whereas the bodies responsible for such out-of-court settlement of consumer disputes must comply with certain essential principles, as set out in Commission

Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for such settlement of consumer disputes (O.J. 115, 17/04/98 at 31)

Recital 17a

Whereas in the context of this Directive, notwithstanding the rule on the control at the source of Information Society services, it would appear legitimate under certain circumstances for Member States to take measures to restrict the free movement of Information Society services; whereas, however, such measures must be taken in accordance with Community law and must be necessary to achieve one of the following public interest objectives pursued: public policy, in particular (...) consumer protection; whereas such measures must be strictly proportionate to their objective and must not go beyond what is necessary to achieve it."

The impetus in this regard increased at the extraordinary Lisbon European Council in March 2000, where the rapid deployment of ADR schemes to help create confidence in electronic commerce was identified as a priority. It is rare indeed for arbitration and ADR to be on the political map of Europe.

Upon the request of the European Commission DG Information Society, terms of reference for an exploratory study of Out-of-court settlement systems for e-commerce were prepared in January 2000 and the report of the EU Joint Research Centre was released on 20th April 2000[9]. This rapid work has revealed the new catch-phrase: "ODR", or "On-line Dispute Resolution". The results of this work will have a bearing on the regulatory process in Europe and we can expect to see its impact as directives are implemented.

The Issues examined in the JRC Study

There are two facets to the JRC study, which looked at settlement systems for resolving disputes related to e-commerce transactions, and second, the use of on-line means to support the operation of such dispute settlement systems. Whilst the focus of this work is on consumers and small and medium-sized entreprises purchasing relatively low value goods and services, the issues examined are much the same for larger business-to-business (B2B) transactions and it is likely that the developments in this arena will be mimicked in other spheres.

Issues peculiar to Arbitration

Whilst recognising that arbitration is predominantly used in the international B2B sector and the value of the New York Convention in enforcement of arbitral awards, the following are described by the JRC as the critical issues in cross-border e-commerce:

Are arbitration agreements valid which were concluded on-line, for example by the clicking of a screen button indicating consent?[10]

- The seat of the arbitration in cyberspace: where is the seat of the arbitration if the arbitrators "meet" and make their decision from different places online?

- Multi-party arbitration in cyperspace.

- The law applicable to the dispute and cross-border e-commerce; in circumstances where the Brussels and Rome Conventions do not apply; where there is no effective choice of law can the arbitrator choose a transnational law (a lex mercatoria of e-commerce)?

- The procedural law to be applied in cyberspace (electronic filing of documents, electronic evidence, audio and video conferencing).

- The making of an electronic award online: does an electronic award comply with the requirements of

international arbitration law? What recourse is there against an electronic award and would it be enforced and recognised.

- Institutional rules and the application of an sympathetic statute law (for example the English Arbitration Act 1996) can help to partly solve some of these issues, but as a generalisation the (perhaps unfair) perception that institutional arbitration is slow and costly will have to be changed. The JRC also considered mediation/conciliation and Consumer Complaints Boards/Ombudsmen as alternatives to arbitration.

Inventory of ODR now

ODR projects available at the moment.

Arbitration:

Virtual Magistrate (vmag.org)

EResolution (www.disputes.org)

I-Courthouse (www.i-courthouse.com)

Cybercourt (cybercourt.de). The above three are all North American, whereas this is the first European based arbitration ODR scheme. It is rooted in a private German law firm and uses e-mail combined with chatbox technology.

Identrus (US) www.identrus.com An interesting collaboration between Financial Institutions focussed on high value B2B transactions. Administration by LCIA.

Mediation:

IRIS Mediation (F) (www.iris.sgdg.org/mediation): Private initiative, with volunteers (no cost for consumer) [This was an interesting project by a French NGO. In the course of one year Iris received 288 requests, 125 mediations and 163 requests for advice. 61 mediations were held and 53 were successful. 31 were IP or trade mark claims, 19 privacy, libel or insult claims and 2 Domain Name disputes.]

InternetNeutral (US) (www.internetneutral.com)

Online Mediators (US) (www.onlinemediators.com)

Online Ombuds Office(US) (www.ombuds.org): Free of charge, sponsored by e-Bay

Transecure (www.transecure.org)

E-Mediation (Netherlands).(Secure site)

Internet Neutral (US) www.internetneutral.com

Online Resolution (US) www.onlineresolution.com

Trust Seals in combination with mediation

BBBOnline (US/CND) (www.bbbonline.org): Reliability seals and privacy seals, consumer complaints handling, industry sponsored.

Which?Webtrader (UK) (www.which.com/webtrader): Seal of Which? consumer association. Reimbursement

of first 50 pounds of loss in case of credit card fraud. European network for cross-border complaints in the making.

Trusted Shops (D) (www.trustedshops.org): Seal of Trusted Shops Guarantee. Reimbursement guarantee for on-line shoppers provided by insurance company. Consumer complaints handling.

SquareTrade (US) www.squaretrade.com

Automated settlement/negotiation of claims

SettleOnline (www.settleonline.com)

ClickNsettle.com (US) (www.clickNsettle.com): on-line negotiation of settlement amount

CyberSettle (US) (www.cybersettle.com): online computer assisted method for settling insurance claims.

In 1998 the Commission adopted a "Communication on the out-of-court settlement of consumer disputes" that included Recommendation 98/257/EC on the principles applicable to out-of-court settlement of consumer disputes. This established a number of minimum guarantees that out-of-court bodies should offer their users. There are seven principles:

1. Independence: The independence of the decision-making body or person should be ensured in order to guarantee the impartiality of its actions.

2. Transparency: Appropriate measures should be taken to ensure the transparency of the procedure.

3. Adversarial Principle: The procedure to be followed allows all the parties concerned to present their viewpoint before the responsible body and to hear the arguments and facts put forward by the other party, and any experts' statements.

4. Principle of effectiveness: The effectiveness of the procedure is ensured through measures guaranteeing that the consumer has access to the procedure without being obliged to use a legal representative, that the procedure is free of charges or moderate costs, that only short periods elapse between the referral of a matter and the decision, that the responsible body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.

5. Principle of legality: The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established.

6. Principle of Liberty: The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute where such commitment has the effect of depriving the consumer of the right to bring an action before the courts for the settlement of the dispute.

7. Principle of representation: The procedure should not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

Due to the increase in cross-border consumption, the Communication foresaw the need to create a cross-border network of out-of-court bodies to overcome the obstacles for a consumer to access the out-of-court bodies in other member states. The proposed solution is "EEJ-Net"; The European Extra-Judicial Network. A single contact point, a "Clearing House", will be established in each member state and these will work

together as the EEJ-Net.

Speaking to MEPs on the 18th September 2000, Commissioner Byrne made it clear that in his view to generate consumer confidence and avoid unnecessary litigation it will be important to encourage the development of all types of ADR, not just arbitration. Further developments are expected by November 2000.

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Notes

1. See for example the WIPO Arbitration and Mediation center in Geneva, established in 1994. www.arbiter.wipo.int
2. Available at www.lcia-arbitration.com
3. www.uncitral.org
4. See www.idrc.co.uk See also a report by British Invisibles: "Delivering Results Dispute Resolution in London. e-mail enquiries: enquiries@bi.org.uk.
5. www.cedr.co.uk
6. www.adrgroup.co.uk
7. See www.cpradr.org
8. The Global Business Dialogue on E-Commerce (GBDe) which has many global companies as members.
9. dsa-isis.jrc.it/ADR
10. See for example the Electronic Communications Act 2000 which allows a minister to issue an order modifying existing legislation such as the Arbitration Act 1996.