DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

The Future of International ADR

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The recent trend in the resolution of international and cross-border disputes indicates a rapid decline in the use of national courts and a rapid increase in the use of arbitration, mediation and other forms of ADR. This article explores the future of international dispute resolution and predicts the rapid growth of non-court-based systems, along with the possibility that these systems will be sponsored by supra-national bodies like the United Nations Commission on International Trade Law (UNCITRAL). To illustrate future trends, we examine some of the issues arising out of e-commerce disputes.

In the last 20 years, the trend towards using ADR emerged in disputes between international contractors and owners on infrastructure projects. Parties to such projects agreed to use mediation, expert adjudication and arbitration as alternatives to local courts. Innovative dispute resolution schemes arose in disputes involving the Channel Tunnel and the Hong Kong Airport projects. The Channel Tunnel resolution forged a compromise between English and French laws, and the Hong Kong Airport project resolution helped to keep a very large project in compliance with a politically driven timetable.

The accelerating move away from courts parallels the perceived development of a global economy. International investors are wary of trusting local laws and courts to protect their capital investments. Forums like the LCIA in London and the ICC in Paris have seen a rapid caseload increase. Hong Kong, Singapore, China and India have developed and expanded their arbitration centers in the last ten years. Likewise, mediation, exported from North America, has become more widespread. More enthusiastically accepted by countries with common law systems, mediation also has seen growth in countries like the Netherlands, Switzerland and Italy, all of which have been influenced by the business that they do abroad.

One stimulus, driven by the beneficial effects on trade, has been the gathering political will to harmonize international arbitration law and enforcement. Consequently, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) has been adopted by more than 130 countries. The ability to have arbitration awards enforced is an incentive for international parties to prefer arbitration to the courts. In addition, the UNCITRAL Model Law on International Commercial Arbitration (1994) has been adopted now by about 30 countries and several U.S. states (California, Connecticut, Oregon and Texas). The drafters of this code sought to provide a consistent approach in the face of concerns about the disparity in domestic arbitration laws.

ADR in E-Commerce: An illustration of the future

The rapid growth of e-business, involving companies from around the world, provides a glimpse into the future. The explosion of e-trade between businesses across borders will accelerate the growth of non-court-based dispute resolution. As lawyers and businesspeople develop contracts to govern these transactions, they will have to address some obvious concerns regarding the applicable law, forum and enforcement of judicial decisions. We suggest that the most elegant solution to the business risk surrounding these issues is to follow the "negotiate-mediate-arbitrate" model.

ADR as the Solution

The model solution that we propose responds to most of the key issues (law, forum and enforcement) in a predictable fashion. This model offers a practical approach for businesses involved in business to business e-commerce to use, until countries and states can agree upon new laws and conventions to meet the demands of e-commerce. The features of this model follow:

- At the point of contracting, the parties agree and identify which law governs their transaction.
- The parties agree to resort to arbitration to resolve all disputes.
- The parties agree on an arbitration forum to administer the arbitration according to internationally accepted rules (this is called the "seat" and imports the law governing the arbitration process). We suggest London as the seat for this model because the 1996 Arbitration Act in England and the judicial reluctance to interfere with arbitration provide a suitable environment.
- As a precursor to the commencement of the arbitration, the parties agree to set aside a period during which they will attempt to negotiate a resolution, either with our without the assistance of a third-party neutral using a process such as mediation.

Because the parties select their tribunal and the substantive law of their contract by agreement, use of the model prevents any confusion as to choice of law and forum. But the real advantage of this model becomes apparent when attempting to enforce arbitration awards, because of the widespread and growing adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This convention renders an arbitration award enforceable in signatory countries (over 133), provided a country complies with the convention. The model therefore comprises an effective global enforcement mechanism.

Keep in mind that parties must include appropriate wording to ensure that an arbitration clause is all-embracing in terms of the subject matter and that it proscribes applications for injunctions or interim payments prior to determination of the substantive dispute by the arbitrator. Also consider the fact that an opponent may circumvent even the most comprehensive wording. For example, in one of the EU countries, if an opponent can demonstrate that the dispute falls within the Brussels Convention and that it is entitled to make applications under Article 24, the arbitration clause may fail. Article 24 allows disputants to apply to a court, other than the court that has jurisdiction over the matter, for interim relief.

E-International Arbitration

The suggested model raises the question of on-line arbitration because parties to an e-commerce transaction will desire on-line methods of dispute resolution. As an initial matter, can an exchange of e-mail messages negotiating an arbitration agreement satisfy the formal requirements of the New York Convention? The short answer is yes, because although technical differences do exist, faxing (which entails a similar process) has been used for some time and is an accepted method. While encryption provides secure communication, some simple steps provide additional security:

- Verify that the content of the e-mail is attributed to the sender. Forged letters and faxes pose just as much of a risk as forged e-mails, yet e-mail messages provide a considerable amount of routing

information, which allows for cross-checking.
- Print out copies of all e-mails.
- Use the return receipt facility found on most e-mail programs.

Suppose that a message from a seller is transmitted to a buyer. The message should state conspicuously the terms of the agreement being offered, and should include the arbitration clause. An example follows:

> "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause.
>
> The number of arbitrators shall be [*one* or *three*] [*consider whether to name potential arbitrators?*]
>
> The place of the arbitration shall be [*London, United Kingdom*]
>
> The language to be used in the arbitral proceedings shall be [*English*]
>
> The governing law of this contract shall be the substantive law of [*England & Wales*]"

At the end, the buyer is asked to signify acceptance by inserting data specific to the transaction and then clicking an "accept" button embedded within the message. At that point, the modified version of the message is transmitted to the seller. In these circumstances, parties have formed a valid arbitration agreement, in accordance with Article II(2) of the New York Convention.

The second part of this article will appear in the next issue of The ADR Advisor.

International ADR in the future — Part II

Conduct of arbitration on-line

Most international arbitrations entail a hearing where the parties present oral submissions and introduce evidence in person, before arbitrators. However, it is entirely feasible for the parties to agree to conduct proceedings on-line. In other words, communications with and between the arbitrators would be entirely electronic.

The Swiss Supreme Court has decided that arbitrators need not meet in person and are free to conduct deliberations by electronic means, including e-mail, provided precautions are taken:

". . . the only mandatory requirement . . . is that all the arbitrators must participate in a real way in each discussion and decision."

The Swiss law does not impose any mandatory procedure concerning the deliberations of the arbitrators or their decision-making process. It authorizes oral decisions made in the presence of all arbitrators, as well as written decisions made "amongst absent people." Thus, the arbitration contract can contain a clause that the arbitration be conducted electronically. Without such a clause, the procedure to be followed must be determined by agreement between the parties or, in the absence of agreement, by the arbitral tribunal. Where parties adopt institutional rules, the parties must modify provisions of the rules with a clear and explicit agreement. Such an agreement can help to avoid difficulties that may arise later when trying to enforce the judgment under Article V(1)(d) of the New York Convention.

Most jurisdictions currently require the award to be in writing, signed in ink and by hand, so the award will

have to be sent by registered post to the parties prior to enforcement. In due course, however, electronically signed awards likely will be introduced and accepted. Section 53 of the Arbitration Act of 1996 in England provides:

> "Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, dispatched or delivered to any of the parties."

Although the drafters of this section did not have on-line arbitration in mind, the section does address a question that may arise in on-line arbitration.

Not only does the ability to arbitrate on-line make arbitration highly attractive as a means of efficient adjudicative resolution of e-disputes, but it also allows parties to choose arbitrators from anywhere in the world, based on their qualifications to resolve the dispute. Because parties and arbitrators do not need to congregate in one place, they achieve substantial cost savings as well.

It may be the case that an international tribunal forms, along the lines of the International Court of Justice, to meet the demands of e-disputes. This will require political reconciliation between the main trading blocks and will, therefore, probably take some time. Organizations in the EU already are examining the provision of mediation and arbitration services for electronic commerce through national chambers of commerce. In time, a body or system of law will develop to regulate and determine the bulk of e-disputes. But for the time being, an agreement to arbitrate, accompanied by an agreed upon choice of law and procedures, constitutes the best available mechanism to avoid the uncertainties created by cross-border disputes in this rapidly developing market.

Mediation and ADR

Because arbitration is an adjudicative process, the parties to the dispute delegate responsibility for resolution to a third party and, therefore, cede control to the arbitration panel. Before reaching that stage it may be sensible to exhaust consensual means of dispute resolution. At one end of the spectrum of possibilities is negotiation, which can be conducted through multiple media, including e-mail or videophone. If that fails then the introduction of a third-party neutral to help facilitate a resolution may be the next sensible option. In constructing a contractual scheme for dispute resolution, ADR can be inserted as a condition precedent to the commencement of arbitration. Such a condition will be enforced in some common law jurisdictions like England and Wales.

E-Mediation

On-line mediation allows the parties to tackle their dispute without the delays, cost and further disagreement associated with setting up a face-to-face meeting. Mediation in Cyberspace has occurred. In fact, several on-line mediation services have been established recently in the U.S. and Canada, including the CyberTribunal in Montreal, whose services are offered free of charge.

Mediation by electronic means will differ in character from in-person mediation. Indeed, as we become more relaxed about electronic communication, a new culture of on-line mediation may develop. Mediation using e-mail is intrinsically a much slower process than gathering the parties together physically. The parties and the mediator can take much longer to consider and phrase their responses. Absent the non-verbal communications (eye, hand, face and body movements, and speed and tone of voice), the written word is the only form of communication, unless they include video conferencing. By sending and receiving private messages, the mediator can act as a filter to communications, and hence steer the process in the right

direction. The process can, however, lack momentum and will proceed only at the rate of the slowest party. In order to help move the mediation along, the mediator can use skills such as "issue framing" to show the parties that he or she has received and understood their messages and to focus them on the more immediate matters, while side-lining certain issues that might cloud the big picture. E-mail mediation has obvious advantages where parties live in different time zones. But one downside is that there may be limited opportunity to dissipate the emotions fuelling the dispute.

Jeffrey Kravis (see footnote 4) lists his ten tips for on-line mediators :

1. Develop non-verbal ways through your keyboard of creating credibility without being arrogant. A short biography demonstrating your computer literacy knowledge and mediation skills is useful.

2. Create a confidentiality agreement that describes the online process. Include rules about responding to e-mail; the importance of disclosing information only to the mediator; managing delays in responding online; and notifying the mediator of travel plans to maintain uninterrupted communications over the Internet.
3. Set the agenda for online discussions early on, by instructing the parties to send you an e-mail with their suggested list of issues in dispute.
4. Develop a set of online "ground rules" which include artificial time limits.
5. When responding to e-mail messages, filter angry or emotional replies so that the other party receives a response that does not create further hostility.
6. Post no more than two or three short questions per e-mail that are like trial balloons in a mediation. Keep them short and make sure that you are not viewed as favouring one side or the other.
7. No matter how contentious the parties might become online, keep the conversation moving forward by reminding the parties of the goal of the mediation.
8. Be prepared to provide an evaluation of the case after the parties have exhausted their efforts at reaching an acceptable solution.
9. If you are providing an evaluation of the case, make sure that you have strong factual and legal support that cannot be overcome by the parties.
10. Know the correct e-mail address of the parties and make sure you know which ones are used regularly and which ones are rarely used.

Dispute resolution in the courts does offer an opportunity to forum shop, but it is fraught with uncertainty and inconsistency. Although this likely will change, judges tend to be unfamiliar, if not uncomfortable, with the principles and customs of e-commerce. Conversely, parties can select arbitrators and mediators for their experience and expertise in e-commerce. Combine this experience with on-line dispute resolution procedures and e-commerce disputes are likely to be resolved satisfactorily. Such outcomes generally will be enforced wherever the parties live in Cyberspace.

Hammond Suddards, London, 10 February 2000.

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