

Alternative dispute resolution mechanisms

Some thoughts from an in-house perspective
with a focus on mediation

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WHEN YOU NEED TO BE SURE





Why you should consider ADR

- Help preserve the client relationship
 - Winning a case... losing a client... paying to get the client back
- Cost reduction opportunities
- Reduction of time loss/mobilization of staff
- Length of disputes can be reduced
- Who says there is only one tool for one case?
 - You can combine ADR tools

Arbitration Pros/Cons & Tips

- Long ? Yes
 - Consider expedited procedure for disputes below €2.5mio
 - submit mere debt collection cases to litigation
 - Less appeal opportunities – check the arbitration laws of the arbitration seat - consider excluding appeal on the merits (UK)
 - Enforcement can be a problem – check locally & NY Convention
 - Consider hiring younger lawyers not only as counsel, but also as arbitrators
 - Ask the Institution to appoint the arbitrators
- Expensive? Yes
 - Set fee caps, lump sums, success fees
 - Hire younger lawyers as counsel
- Choice of language ? Yes → no need to translate the file!
- Selection of reliable and neutral arbitrators? Yes
- You keep your client? Not necessarily



Mediation Pros/Cons & Tips

- Long? No
 - Consider using it even to help speed up the arb/litigation proceedings
- Expensive? No
- Will you keep your client? More likely than not
- Can you uncover misunderstandings? More likely than not
- Can you assess your case early? More likely than not
- Is it confidential and privileged? It depends
- Can you step out anytime? Yes

Mediation Pros/Cons & Tips 2

- Can you still sue/file for arbitration/continue the proceedings? **Yes**
 - But beware of the statute of limitations
- Can you find creative and win/win solutions? **Yes**
- Will your business colleagues feel more implicated and interested? **Yes**
- Is enforcement a problem? **Should not be**
 - Parties tend to respect settlement agreements
 - Settlement agreement can be homologated by the courts ?
 - Geneva: yes
 - EU Countries : coming up – check local laws



When you are decided for mediation

- Check local mediation laws and rules
 - Are confidentiality, privilege and enforcement granted?
- Where can you find a good mediator?
 - Mediation institutions (Swiss Chambers of Comm., ICC, WIPO, ICDR, LCIA, CMAP)
 - Conferences on mediation/ADR
 - Lists of mediators registered with local authorities
- Mediation Agreement?
 - Usually proposed by mediator/mediation institution
 - Beware of the confidentiality clauses re: production of doc/evidence – ensure to have an agreement on this
 - Make it your own – who says you can't deviate?



The day of the mediation

- Failing to prepare is preparing to fail
 - Know the file as if going to a hearing
 - Make a list of good arguments
 - Be aware of negative points and ready to answer/propose
- Should lawyers participate?
 - Keep external counsel out
 - or ensure that they actively help finding solutions
 - And are open to and educated in ADR
 - Inhouse counsel must be in
 - To assess the case from a legal/strategy point of view
 - To draft the settlement agreement
 - To handle the external counsel of the other parties



The day of the mediation

- Have/bring full authority to agree on a settlement
 - or take the cell-phone number of the top management and warn them that you might call

- Bring a template settlement agreement with you

...Because mediation works!

...Are you ready?

Mediation - Some legal instruments in place

■ International

- EU Mediation Directive 2008/52/EC
- European Code of Conduct for Mediators
- Swiss Rules of Commercial Mediation

■ Switzerland

- Art. 213 -218 Code de Procédure Civile Suisse

■ Geneva:

- Art. 71A-J Loi de procédure civile E.3.05 (conciliation - homologation)
- Règlement relatif aux médiateurs pénaux et civils E.2 05.06 (tableau, commission, sanctions)
- Art. 156-161F LOJ (conditions d'exercice; confid./privilege)



The EU Mediation Directive 2008/52/EC

- For cross border disputes
- Has yet to be enacted in EU States
- Any agreement arising out of the mediation shall be enforceable in the EU States, with a status similar to a judgment
- A party using mediation shall not be prevented from filing legal or arbitration proceedings by reason of statute of limitations expiring during the mediation process (subject to any international agreement)
- The mediation process : confidential and privileged



In conclusion

- At least one ADR / litigation specialist in the legal team
- Basic education in ADR is a must
- In-house to keep the control and lead over the case
- Good selection of external counsel is key

Thank you for your attention!



Drafting Effective Arbitration/ADR Clauses

Dr. Annette M. Schüller
Legal Director
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Content

- Arbitration and ADR clauses: mutual goal but different focus
- Arbitration clauses: KISS and right choices
- ADR clauses: Ensure party cooperation
- Ensuring confidentiality in ADR
- Links to Standard ADR Clauses

Mutual goal of arbitration and ADR clauses

- Speedy, cost-effective, private and lasting resolution of disputes
- Solving the issue while saving the relationship

Good arbitration / ADR clauses lead a long way towards these goals.

Different focus of arbitration and ADR clauses

Arbitration clauses:

- Prescribe binding third party decision making process on specific contractual disputes
- Replaces litigation

ADR clauses:

- Prescribes non-binding third party (neutral) moderated decision making process by business decision makers on specific contractual disputes or broader issues
- In addition to arbitration or litigation
- Main proponents: mediation clauses

Arbitration clauses: KISS and right choices

KISS (*Keep it short and simple*): Stick to model clauses:

- Consider all claims (contractual and non-contractual)
- Consider need for fast temporary relief
- Fitted to contract (no “copy paste” without review)
- Personal choice: institutional over ad hoc (saves time)

Make choices wisely:

- Most importantly: **Place of arbitration** (determines procedural law - “Keep tourism for the holidays!”)
- Number of arbitrators: Best to leave to institution to decide (may vary depending on value in question; e.g. Swiss arbitration rules)

Do not forget to stipulate governing law

ADR clauses: Ensure party cooperation

Oblige counterparty to follow chosen process

- Create real obligation to submit disputes to ADR (e.g. mediation):
Never use “may”!
- Advisable to use model ADR clauses
- Include provision on who bears costs

Guard against abuse of process / waste of time

- Determine the decision makers you want involved (with escalation?)
- Put time limits on ADR and clear trigger for start of ADR process
- Determine what type and procedure of ADR you want
 - single-step or multi-step? (e.g negotiation followed by mediation)
 - pre-litigation (“med-arb” or “arb/med”?)
- Don’t be afraid to call it quits

Confidentiality in ADR

- ADR involves potentially disclosure of very sensitive information (e.g. in early neutral evaluation of disputed situation)
- No automatic confidentiality, privacy or “without prejudice”
- Confidentiality/privacy needs to be specifically provided for
- Needs to include the neutral moderator/evaluator
- Beware: Depending on value under dispute and nature of counterparty, confidentiality may not be complete (e.g. publicly quoted company may need to make statements in annual accounts)

Links to Standard ADR Clauses

- ICC: <http://www.iccwbo.org/court/adr/id4424/index.html>
- LCIA: <http://www.lcia-arbitration.com/> (then go to “ADR”)
- CEDR:
[http://www.cedr.com/library/documents/
contract_clauses.pdf](http://www.cedr.com/library/documents/contract_clauses.pdf)

Any questions, please?

Alternative Dispute Resolution Mechanisms

A Practical Approach

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Zürich / Switzerland



Negotiation *„get the lawyer in early“*

- Identify Commercial Issues (what is „key“ for succes“)
- Assure Succes of Business
- Think Ahead (practical aspects)

In negotiation / drafting

- Provide for mechanism to resolve among businessmen commercial issues
- Define appropriate governance/dispute resolution boards
- Consider expert determination for objektive aspects



Drafting

1. Purpose / Scope
- 2. Governance** (JV, co-promotion etc.)
3. ... other ...
4. Term Termination
5. Dispute Resolution
 - 5.1 Mediation, Terms of Reference**
 - 5.2 Jurisdiction / Arbitration
6. Miscellaneous



Problem arises „keep the lawyers out“

- Use contractually agreed governance rules
- Possibly resort to expert examination/opinion/decision
- **Use committees to find business solution**
- **Escalate to higher management level**
- **Force „business“ (each party) to analyse and argue the case internally before getting into adverse legal argumentation**

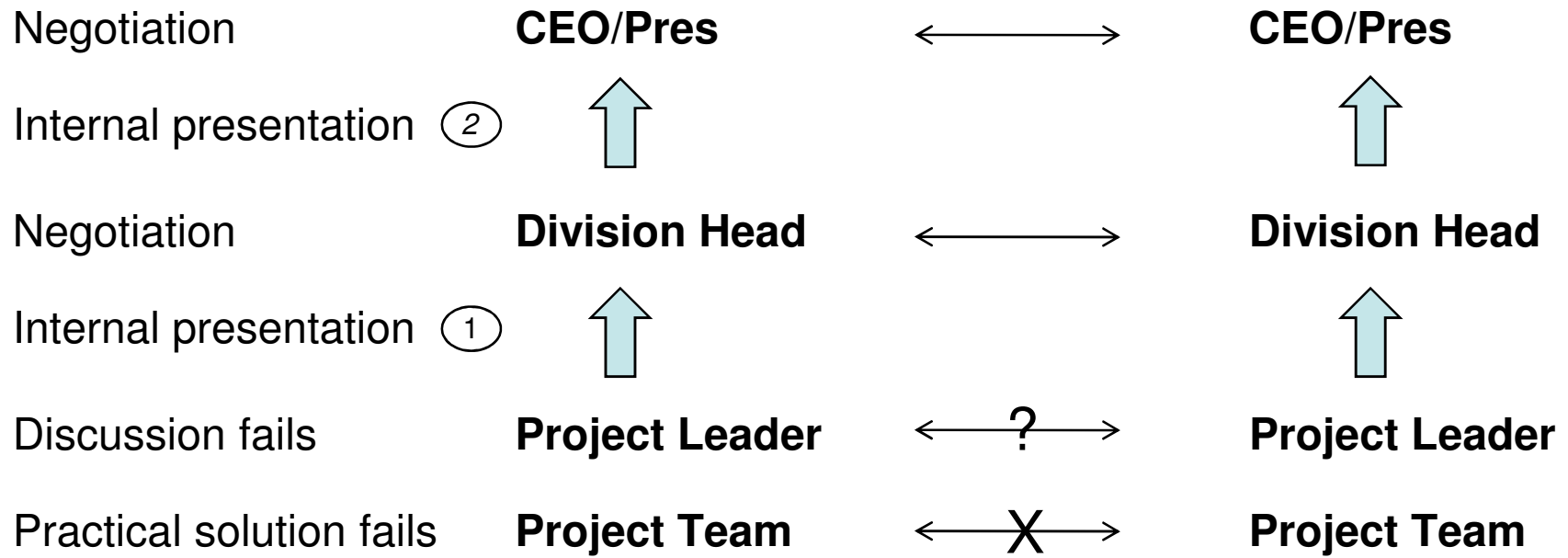


Governance / Escalation - Model

1. Project Manager
Project Coordination Team
 2. Division Responsibility (Project/Expert Committee)
 3. CEO / President (Executive Committee)
- Limitation of time
 - Written case presentation
 - Financial aspects with „pros“/„ cons“

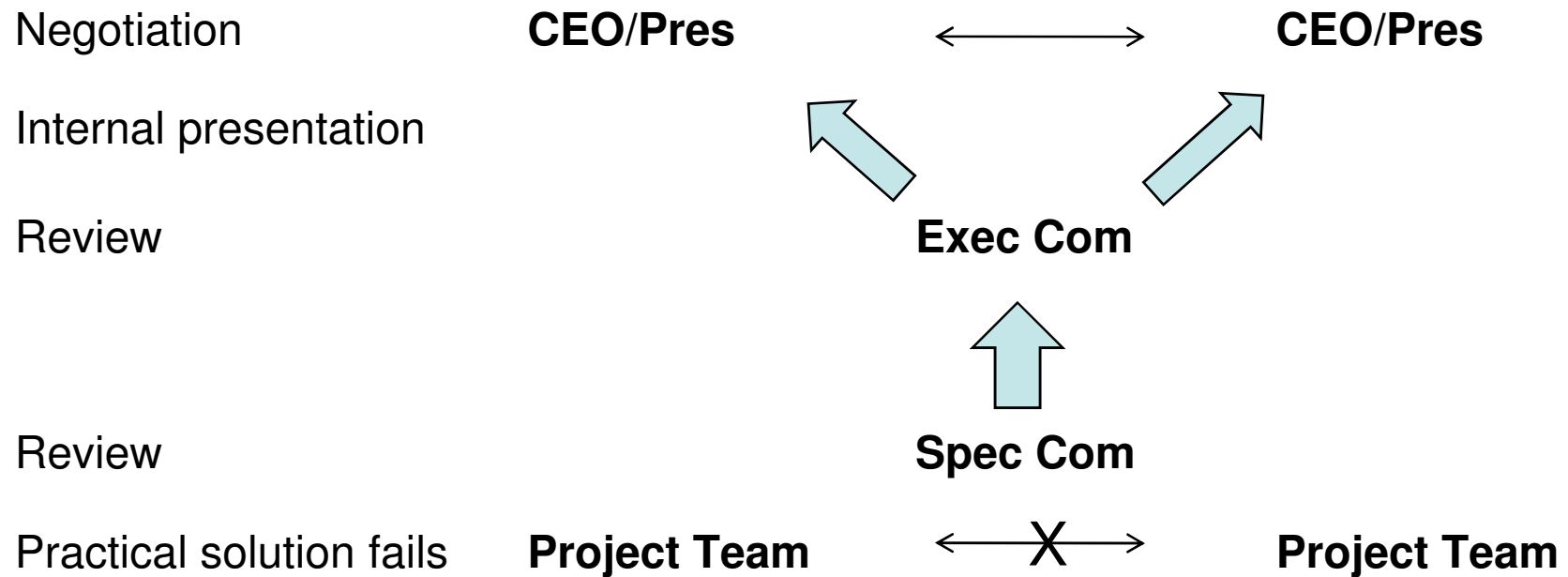


Structure 1 of Mechanism





Structure 2 of Mechanism





Contract – Clauses

Final decision re particular aspect

- „Party A decides finally re ... “
- „Committee X decides finally re ...“

*Topical approach:
development,
marketing, finance,
regulatory, QM etc.*

Negotiation in expert group

- „Committee in good faith negotiates ...“

Escalation to Senior Officers

- „If within 15 days no solution found, either Party may submit to to Senior Officers ... if within 15 days no solution, arbitration ...“

No litigation unless dispute resolution mechanism failed

- „No dispute shall be resolved other than ... , and the Parties agree not to resort to litigation unless ...“



Contract – Governance Clause

Final decision re particular aspect

- „Party A [or Committee 1] shall have final decision-making authority regarding all disputes as to ... [quality, development, regulatory, promotion, marketing] ... ; provided, that no such decision shall violate any provision of this Agreement and provided, further, that no such disputes shall be subject to any dispute resolution mechanism or procedure other than pursuant to this Section.“
- „Party B [or Committee] shall “



Contract – Governance Clause

Escalation to Senior Officers

- „ In the event that the Committee [or Parties] is, after a period of fifteen (15) days, unable to make a decision, either Party may submit the matter being considered to the [Senior Officers] for a joint decision. In such event, the [Committee/Party], by written notice to each Party, shall formally request the dispute be resolved by the Senior Officers, specifying the nature of the dispute with sufficient specificity to permit adequate consideration by such Senior Officers. The Senior Officers shall diligently and in good faith, attempt to resolve the referred dispute within fifteen (15) days of receiving such written notification. Pending resolution by the Senior Officers of any referred dispute, and the Parties may not resort to arbitration/litigation [or: shall not be subject to any dispute resolution mechanism or procedure other than pursuant to this Section] ...“



Contract – Litigation Clause

No litigation unless dispute resolution mechanism failed

- „The Parties agree that no dispute, controversy or claim arising out of or in connection with this Agreement or the Parties’ activities hereunder shall be resolved other than pursuant to this Section, and the Parties further agree that in no event shall any such dispute, controversy or claim be the subject of private litigation between the Parties, unless ... “

Alternative dispute resolution mechanisms

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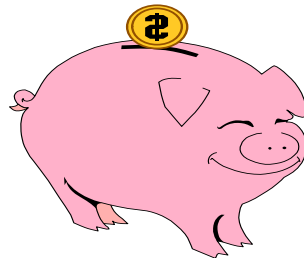
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How companies facing a dispute may avoid this feeling?

"a machine in which you go in as a pig



and come out as a sausage."





Resolve a dispute in a cost-efficient way

- Choose the most adapted resolution process and identify alternatives

"Early Dispute Resolution – the earlier ADR processes are implemented in the conflict cycle, the less risk there is of the dispute escalating out of control."

Hans Peter Frick, Group General Counsel, Nestlé SA

- Evaluate related time and costs (external and internal)
- Ensure being actively involved at all steps of the process(es)
- Be flexible and creative



Many tools at disposal for resolving a dispute

Negotiation of course...

- **Mediation**
- Early Neutral Evaluation (ENE)
- Others : negotiation/conciliation/minitrial...

Non-binding techniques

- Arbitration
- Litigation
- Others : expertise...

Binding techniques



Advantages of Mediation

- Confidential process
- Can be terminated at any time by a party
- Mediator – Neutral third party (chosen by the parties) who facilitates exchange of opinions and exploration of options
- Settlement meeting the current and future interests of the parties
- Maintain a long-term commercial relationship
- Parties are motivated to perform their settlement
- Geneva Courts can grant the settlement a status similar to that of a Court judgement
- Quick and moderate costs



Main steps of mediation

Introduction and exchange of information



Exploration of interests



Identification of options and alternatives



Settlement



Chambers of Commerce
and Industry of

Basel
Berne
Geneva
Lausanne
Lugano
Neuchâtel
Zurich

Mediation helps to deal with hidden sides of conflicts



The "objective"
side of the conflict
seems obvious ...

... but the
"subjective" side
remains to be
discovered ...



Many tools at disposal for resolving a dispute

- Mediation
- **Early Neutral Evaluation (ENE)**
- Others : negotiation/conciliation/minitrial...

Non-binding techniques

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- Others : expertise...

Binding techniques



Advantages of an Early Neutral Evaluation (ENE)

- Confidential process
- Independent evaluator appointed by the parties
- Preliminary assessment of facts, evidence or legal merits
- Evaluator expresses a non-binding opinion on the merits of the issues specified by the parties
- Basis for negotiations

More information: http://www.cedr.com/library/documents/ene_agreement.pdf



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Binding techniques

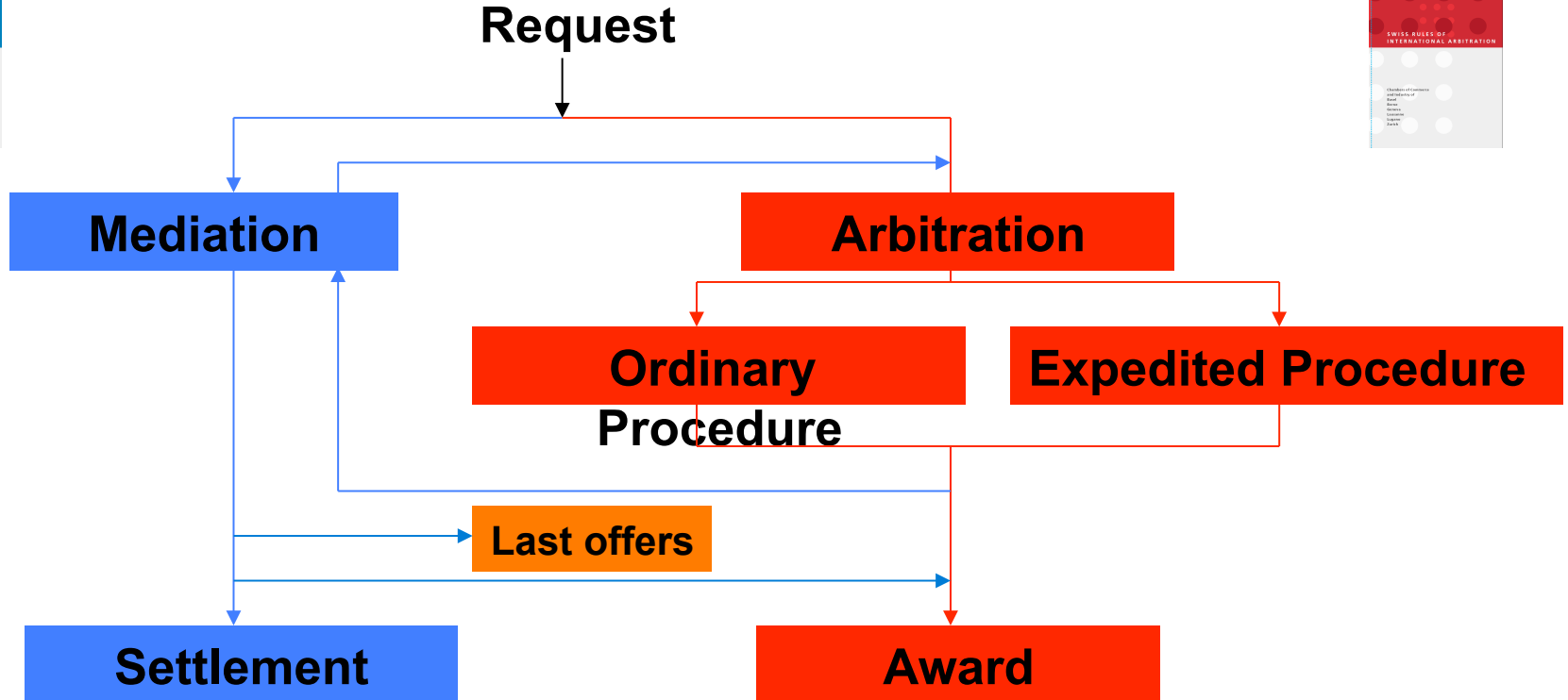


Advantages of arbitration compared with litigation before Courts

- Choice of rules – Flexibility
- Choice of seat - Neutrality
- Choice of language – No need of translation
- Choice of specialized judges – Highly qualified arbitrators
- Costs may be reduced
 - Sole arbitrator
 - Expedited Procedure (Award made **within 6 months** (Art. 42 of Swiss Rules))
- Restricted possibilities to challenge the award
- Award easily enforceable around the world



ADR under the “Swiss Rules“: quick and flexible





Thank you for your attention.

Questions are welcome...

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