19 Alternative Dispute Resolution

1) Introduction

"God did not decree that the job of a litigator is to lay waste to the adversaries and win all for client.

"Our system of civil litigation was crafted by men, incorporating a Hegelian dialectic of thesis – antithesis – synthesis; both sides beat themselves bloody, and a judge or jury decides what truths have emerged from the process.

"In the economic and cultural milieu in which this system was developed hundreds of years ago, it worked reasonably well. Times change. Today it can be described as functional only by a definition of 'functional' that countenances clients routinely billed more in transactional costs for the litigation process than the amount of the settlement or judgement, and society taxed with the collateral costs and disruption of protracted and proliferating litigation.

"We might want to pause before we drag this time-hallowed system with us – or let it drag us with it – into the new millennium."

This quotation is taken from an article by Antonio C Piazza, a partner in the San Francisco firm of Gregorio, Haldeman and Piazza.[91] His telling and graphic description of what many see as the defects in the litigation system serves as a fitting introduction to this chapter of the Manual on alternative dispute resolution (ADR).[92]

The chapter looks at what ADR is, its development and types; ADR in an international context; ADR as a pre-arbitral dispute mechanism; using a combination of mediation and arbitration; institutions offering ADR systems, including the Netherlands Arbitration Institute's Minitrial Rules; the UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation and the UNCITRAL Conciliation Rules; ADR in action; and the future development of international ADR.

2) ADR: An Overview

What is ADR?

ADR is generally taken to cover all forms of dispute resolution other than litigation and arbitration. The reason for this is clear: both litigation and arbitration operate regardless of the will of the parties and result in a binding and enforceable outcome. The Defendant / Respondent against whom litigation / arbitration proceedings are launched has no

91 CPR Institute for Dispute Resolution, *Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR*, CPR Institute for Dispute Resolution, New York, 2001.

92 Some now prefer to refer to it as *amicable dispute resolution*. As noted later in the chapter, the International Chamber of Commerce (ICC) uses this latter description so as to distinguish mediation and other forms of non-binding dispute resolution from binding systems such as arbitration.

choice as to whether to participate and may be faced with a judgment / award that can be enforced in the national courts. In litigation the process is imposed by the State. In arbitration the result follows from the parties' agreement to arbitrate, coupled with the State's support of the arbitral system.

But ADR in its various forms – the most familiar being mediation and conciliation – is a consensual process: The parties do not have to take part in it. And if they do, they do not have to abide by the outcome. Generally speaking, national courts will not enforce ADR agreements and the ADR process – unlike arbitration – is not subject to any statutory code (in England at any rate).

The development of ADR

There is nothing new in the concept of ADR: Mediation and conciliation have been used in the East for centuries. What is new is the kind of techniques that have been developed in the United States, which has led the way in developing new methods of dispute resolution other than by way of litigation and arbitration.

This writer's view on the topic was set out in an article entitled 'The Role of ADR in the Resolution of International Disputes', published in 1996 in *Arbitration International*, the Journal of the London Court of International Arbitration (LCIA):

> *"Alternative Dispute Resolution (ADR) has developed alongside litigation and arbitration as a means of resolving commercial disputes in accordance with procedures aimed at avoiding the inherent costs and delays of the adversarial process. Those costs and delays have been felt most acutely in the United States, where pre trial obligations are the most burdensome. The United States has accordingly led the way in developing innovative ways of keeping parties away from the courts and arbitration.... But the methods used are not always new. The philosophy of the East has always been in favour of a non-contentious approach to dispute resolution.... The pressures resulting from litigation and arbitration are far from unique to the United States and recent years have seen the English courts take active steps to promote the use of ADR alongside the formal court system."*

This writer's conclusions in that article were that ADR

> *"in its various forms is emerging as a genuine complement to arbitration and litigation, both through increasing support in domestic courts for its active consideration and, more significantly, through increasing initial recourse to non-binding dispute resolution techniques in major international contracts. Whilst recourse to ADR in contracts is likely to lead to a multi-stage process which may, in certain circumstances, lead to increased delay, the hope is that the vast majority of disputes will be filtered out at the ADR stage of the process, thereby saving the costs, time and antagonism which usually accompany formal litigation or arbitration."*[93]

Since 1996 when that article was published there has been an increasing interest in ADR in England, particularly by the English courts. Lord Woolf's reform of the Civil Procedure Rules in 1998 laid great emphasis on ADR.

93 [1996] 12 Arbitration International 47-55.

Types of ADR

Mediation and conciliation

The terms 'mediation' and 'conciliation' tend to be used interchangeably, notwithstanding the fact that some commentators have sought to give them different meanings. It will be seen later that the UNCITRAL Model Conciliation Law attributes the same meaning to both terms, as does the CPR Institute for Dispute Resolution. The Permanent Court of Arbitration (PCA) – considered in Part III of the Manual – also takes the view that there is no real difference between the two.

Both expressions refer to a system that involves the use of a third party neutral who seeks to bring the parties to a settlement, but who has no power to impose this. The use of the term 'mediation' would seem to be taking the lead, at any rate in the commercial context in countries like England and the United States.

The process of 'caucusing' is perhaps (at any rate in the experience of this writer) the most significant feature of mediation and is the mechanism that is most likely to produce a successful outcome. The mediator holds a series of separate meetings with the parties in dispute in order to identify any hidden agendas and explore problem-solving proposals. The mediator may only divulge what has been said to him by one party in a caucus session if express permission is given. As the American Arbitration Association (AAA) explains, caucusing enables the mediator to *"selectively use the information derived from each side to:*

- *reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;*
- *open discussions into areas not previously considered or inadequately developed;*
- *communicate positions or proposals in understandable or more palatable terms;*
- *probe and uncover additional facts and the real interests of parties;*
- *help each party to better understand the other parties' views and evaluations of a particular issue, without violating confidences;*
- *narrow the issues and each party's positions, and deflate extreme demands;*
- *gauge the receptiveness for a proposal or suggestion;*
- *explore alternatives and search for solutions;*
- *identify what is important and what is expendable;*
- *prevent regression or raising of surprise issues; and*
- *structure a settlement to resolve current problems and future parties' needs."*[94]

Minitrials

The minitrial is often used in disputes between corporations. A 'hearing' takes place before a neutral third party and senior executives of the business organisations involved. Those executives will not have been concerned in the dispute itself. Each side presents its case. It is open to the third party neutral to indicate the consequences in terms of time and

94 www.adr.org/

money should the minitrial process fail. This system has enjoyed considerable success in the United States.

The CPR Institute and the Netherlands Arbitration Institute both have a set of Minitrial Rules, which are considered later in this chapter.

ADR in an international context

Although ADR in its present form developed in the United States, it is now in use worldwide. ADR in the context of international dispute resolution was considered in the *Arbitration International* article.

Many of the major international arbitration institutions, such as the LCIA, the ICC and the American Arbitration Association (AAA), offer a wide range of dispute resolution processes that include both arbitration and ADR.

ADR as a pre-arbitral dispute mechanism

Construction projects

ADR has been used with great success as a pre-arbitral dispute mechanism in major construction projects around the world since it is of particular use in contracts involving a considerable number of parties. Disputes on such projects need to be settled swiftly in order to avoid disrupting the progress of the works.

The kind of contractual provision that is likely to be found in connection with such projects will require disputes to go through some form of ADR 'filter' before proceeding to arbitration. The obvious hope is that the ADR process will in fact render arbitration unnecessary. The types of ADR mechanisms that are used as 'filters' are likely to comprise such processes as adjudication by a panel of experts or by a Dispute Review Board. It was this kind of procedure that was used in the *Channel Tunnel Group Limited v Balfour Beattie Construction Limited* case.[95]

Similar ADR mechanisms have been used in the Boston Central Artery / Tunnel Project (see Box 1) and in the Hong Kong Airport Core Programme.

These projects and the ADR filter mechanisms were also considered in the *Arbitration International* article mentioned earlier.

An ICC scheme

In late 2004 the ICC produced a set of Dispute Board (DB) Rules, in force as from 1 September 2004. DBs *"are normally set up at the outset of a contract and remain in place and are remunerated throughout its duration"*. The members of the DB – one or three members – are thoroughly acquainted with the contract and assist the parties to resolve disagreements that arise. They make recommendations or decisions regarding disputes referred to the Board.

95 [1993] 2 WLR 262 HL.

There are various types of DBs – Dispute Review Board, Dispute Adjudication Board and Combined Dispute Board – and the DB process can be followed by ICC arbitration if required. More information on this new ICC scheme is available from the Dispute Boards Centre's website.[96]

Combining mediation and arbitration

In addition to using ADR as a filter mechanism, it is possible to use a mixture of arbitration and mediation or mediation and arbitration – indeed, whatever combination of mechanisms the parties choose.

The notion of switching from arbitration to mediation may be difficult for Western lawyers and arbitrators to accept, since this must always involve the prospect of a mediator having to revert to the role of arbitrator. But such a course would be regarded as perfectly natural in, say, China. For example, provision is made in the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules for an arbitral tribunal to switch to acting as conciliator.

3) Institutions Offering ADR systems

Introduction

ADR is not the answer to every dispute. There are some circumstances in which an order made by a national court may be the only realistic option. In other circumstances, however, ADR – say in the form of mediation / conciliation – is a sensible and practical option that has much to offer as a dispute resolution process. Examples are where the costs of litigation or arbitration may be out of all proportion to what is at stake or where the parties need to work together in the future.

It is difficult to know the extent to which ADR is being used worldwide. It is still viewed with suspicion by many. However, its use is likely to increase as the nature of ADR begins to be better understood and its benefits thus more appreciated – not least the financial benefits of using it as opposed to litigation or arbitration.

There are many international institutions that offer ADR systems, only a handful of which can be considered in the Manual. Some of these institutions are primarily ADR bodies: for example, the CPR Institute for Dispute Resolution. Others are primarily arbitration bodies that offer ADR systems as part of a broad menu of dispute resolution processes: for example, the LCIA and the AAA. The World Intellectual Property Organization (WIPO) is a specialist body that offers a wide variety of dispute resolution procedures, including online dispute resolution.

Some of the institutions were considered in the earlier chapter on international commercial arbitral institutions. Others, like the CPR, are considered for the first time in this chapter. Fairly extensive references are made to the descriptions by some of the institutions of the mediation / conciliation process, and the views set out should give a clear understanding of the nature of ADR and how it works.

96 www-old.iccwbo.org/drs/english/dispute_boards/all_topics.asp.

Since the chapter began with the quote from Antonio Piazza, it is perhaps appropriate to start with the CPR Institute.

i) The CPR Institute for Dispute Resolution

Introduction

The CPR Institute for Dispute Resolution is a non-profit organisation based in New York and made up of 500 major corporations and law firms.[97] Its aim is to *"resolve business and public disputes through innovative forms of alternative dispute resolution. The CPR seeks to develop ADR by involving the best of the profession and academia in its agenda of problem-solving, research, education and ADR advocacy, and in the dispute resolution services it provides through its Distinguished CPR Panels of Neutrals."*

CPR's mission is to *"spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes. To fulfil its mission, CPR is engaged in an integrated agenda of research and development, education, advocacy and dispute resolution. It is the leading proponent of ADR that is managed by the parties and a highly qualified neutral, or self-administered ADR."*

The CPR European Mediation Procedure

The CPR European Mediation Procedure is an informal process in which the mediator *"facilitates negotiation among the parties and their lawyers to help them reach settlement .... [It] is designed to provide a model for the format and procedure of a mediation, although the emphasis is on flexibility and minimising the imposition of rules on the parties."*

The mediator *"can help the parties identify interests, develop settlement options and overcome barriers to settlement."* He or she is *"a third party neutral"* who *"sits down with the disputing parties and actively assists them in reaching a settlement. CPR uses the expression 'mediation' to cover both the concepts of mediation and conciliation. The process is designed to assist parties in reaching a commercially attractive settlement, with minimum time and cost.*

The Procedure is in nine sections:

1 Proposing mediation,
2 Selecting the mediator,
3 Ground rules of proceeding,
4 Exchange of information,
5 Presentation to the mediator,
6 Negotiation of terms,
7 Settlement,
8 Failure to agree and
9 Confidentiality.

97 Detailed information is available on the CPRs website: www.cpradr.org.

Subject to any changes on which the parties and the mediator agree, the Section 3 Ground Rules include the following provisions, which give a clear overview of the mediation process:

"3.1The process is voluntary and depends on the co-operation of the parties. The mediator does not issue a binding decision.

3.2 Each party may withdraw at any time by written notice to the mediator and the other party or parties.

3.3 The mediator is neutral, independent and impartial.

3.4 The mediator controls the procedural aspects of the mediation. The parties cooperate fully with the mediator.

(a) The mediator is free to meet and communicate separately with each party.

(b) The mediator decides when to hold joint meetings with the parties and when to hold separate meetings. The mediator fixes the time and place of each session and its agenda in consultation with the parties. There is no formal written, audio or video record of any meeting. Formal rules of evidence or procedure do not apply.

(c) Unless otherwise agreed by the parties, the mediator decides, if necessary, the language in which the mediation is to be conducted and whether any documents should be translated.

3.5 Each party is represented at each mediation conference by a business executive authorized to negotiate a resolution of the dispute and to execute a settlement agreement. Each party may be represented by more than one person, e.g. a business executive and a lawyer. The mediator may limit the number of persons representing each party.

3.6 The process is to be conducted expeditiously. Each representative undertakes to make every effort to be available for meetings.

3.7 The mediator does not transmit information received in confidence from any party to any other party or any third party, unless authorised to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.

3.8 The mediator and any persons assisting the mediator is disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation).

3.9 If the dispute goes into arbitration, the mediator will not serve to as an arbitrator."

Section 5 dealing with Presentation to the Mediator includes the following provisions concerning the submission of written statements:

"At least five business days before the first substantive mediation conference, unless otherwise agreed, each party submits to the mediator a written statement summarising the background and present status of the dispute and such other material and information as it deems helpful to familiarise the mediator with the

dispute. The parties may agree to submit jointly certain other materials. The mediator may request any party to provide clarification and additional information. The mediator may limit the length of written statements and supporting material. The mediator may direct the parties to exchange concise written statements and other materials they submit to the mediator to further each party's understanding of the other party's viewpoints."

The Negotiation of Terms provisions in Section 6 state that the mediator

"may promote settlement in any manner the mediator believes is appropriate. The mediator helps the parties focus on their underlying interests and concerns, explore resolution alternatives and develop settlement options. The mediator decides when to hold joint meetings, and when to confer separately with each party. The mediator expects the parties to make settlement proposals. Finally, if the parties fail to develop mutually acceptable settlement terms, before terminating the procedure, and only with the consent of the parties, (a) the mediator may submit to the parties a final settlement proposal which the mediator considers fair and equitable to all parties; and (b) if the mediator believes he/she is qualified to do so, the mediator may give the parties an evaluation (which if the parties choose will be in writing) of the likely outcome of the case if it were tried to final judgment."

If a settlement is reached, Section 8 provides that the representatives of the parties are to draft terms of settlement: *"Initially, a preliminary memorandum of understanding may be prepared at the mediation and executed by the parties; the memorandum should make it expressly clear whether it is intended to be binding or not. If litigation is pending, the settlement may provide that the parties will request the court to make an appropriate order disposing of the case promptly upon execution of the settlement agreement. The settlement agreement may also be entered as a consent judgment."*

If the ADR process fails to produce a settlement, the mediator discusses with the parties the possibility of agreeing on arbitration or another form of dispute resolution.

ii) The American Arbitration Association

Introduction

On its website[98] the AAA looks at the difference between mediation and arbitration:

"Arbitration is less formal than litigation, and mediation is even less formal than arbitration. Unlike an arbitrator, a mediator does not have the power to render a binding decision. A mediator does not hold evidentiary hearings as would an arbitrator but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties. The separate meetings are known as caucuses. In contrast, arbitrators hear testimony and receive evidence in a joint hearing, on which they render a final and binding decision known as an award."

98 www.adr.org/

The AAA describes the process of the mediation as follows:

> *"The parties should come to the mediation conference prepared with all of the evidence and documentation they feel will be necessary to discuss their respective cases. Parties are, of course, entitled to representation by counsel.*
>
> *"At the outset, mediators describe the procedures and ground rules covering each party's opportunity to talk, order of presentation, decorum, discussion of unresolved issues, use of caucuses, and confidentiality of proceedings.*
>
> *"After these preliminaries, each party describes respective views of the dispute. The initiating party discusses his/her understanding of the issues, the facts surrounding the dispute, what he/she wants, and why. The other party then responds and makes similar presentations to the mediator. In this initial session, the mediator gathers as many facts as possible and clarifies discrepancies. The mediator tries to understand the perceptions of each party, their interests, and their positions on the issues.*
>
> *"When joint discussions have reached a stage where no further progress is being made, the mediator often meets with each party in caucuses. While holding separate sessions with each party, the mediator may shuttle back and forth between parties and bring them back to joint sessions at appropriate intervals. During each caucus, the mediator attempts to clarify each party's version of the facts, priorities, and positions, loosen rigid stances, explore alternative solutions, and seek possible tradeoffs. The mediator probes, tests, and challenges the validity of each party's positions. The mediator serves not as an advocate but as an 'agent of reality.' The mediator must make each party think through demands, priorities, and views, and deal with the other party's arguments.*
>
> *"An effective mediator knows that demands and priorities shift as ideas meet opposition, different facts are considered, and underlying circumstances change as parties reappraise and modify positions. In effect, the mediator increases the parties' perceptions of their cases in order to construct a settlement range within which the parties can assess the consequences of continuing or resolving the dispute. By having parties focus on the risks and burdens of litigation, the mediator creates in the minds of the parties the idea that there are alternatives to seek. The parties articulate these possibilities by moving toward tradeoffs and acceptable accommodations.*
>
> *"During the final caucuses and joint sessions, the mediator narrows the differences between the parties and obtains agreement on major and minor issues. The mediator reduces a disagreement into a workable solution. At appropriate times, the mediator makes suggestions about a final settlement, stresses the consequences of failure to reach agreement, emphasizes the progress which has been made, and formalizes offers to gain an agreement.*
>
> *"The mediator acts as a facilitator to keep discussions focused and avoid new outbreaks of disagreement. The mediator will often have the parties negotiate the final terms of a settlement in a joint session. The mediator will then verify the specifics of an agreement and make sure that the terms are comprehensive, specific, and clear in the final session."*

The AAA's International Mediation Rules

The AAA's International Mediation Rules may be used for mediation or conciliation of international disputes under the auspices of their International Centres for Dispute Resolution (ICDR) in New York and Dublin. There are 18 Rules.

Rule M-1 deals with the agreement to mediate. Provisions for the initiation of the mediation process are contained in Rules M-2 and 3, and the request for mediation is to contain a brief statement of the nature of the dispute. Rule M-4 provides for the appointment of the mediator: *"Upon receipt of a request for mediation, the ICDR will appoint a qualified mediator to serve. Normally, a single mediator will be appointed unless the parties agree otherwise or the ICDR determines otherwise. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation or method shall be followed."*

Rules M-5 and 6 deal with qualifications of the mediator and the filling of vacancies, and Rules M-7 and 8 with representation for the parties and the date, time and place of mediation. At least 10 days prior to the mediation session, each party is to provide the mediator with a brief memorandum, setting out their position with regard to the issues to be resolved: *"at the discretion of the mediator, such memoranda may be mutually exchanged by the parties"*. At the first session, the parties are expected to produce all information reasonably required for the mediator to understand the issues.

Rule M-10 contains important provisions setting out the authority of the mediator. These are at the heart of the mediation process:

> *"The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine.*
>
> *"The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties."*

Rules M-11, 12 and 13 deal with privacy and confidentiality.

The process is to be terminated:

> *"(a) by the execution of a settlement agreement by the parties;*
>
> *(b) by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or*
>
> *(c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated."*

The remaining Rules deal with matters such as exclusion of liability, interpretation and expenses.

iii) The International Chamber of Commerce

Introduction

Among the various dispute resolution processes available from the ICC are the ICC ADR Rules.[99] The ICC states that these Rules:

> *"offer a framework for the amicable settlement of commercial disputes with the assistance of a neutral. They were launched in 2001 to replace the 1988 Rules of Conciliation. Under the ICC ADR Rules, parties may freely choose the settlement technique they consider most appropriate to their situation. This may be mediation, whereby a neutral helps the parties to settle their differences through negotiation; a mini-trial, in which a panel comprising a neutral and a manager from each party proposes a solution or gives an opinion; or a neutral evaluation of a point of law or fact. Common to all these techniques is the fact that the decision reached by or in collaboration with the neutral is not binding upon the parties, unless they agree otherwise. The success of the chosen technique will depend largely on the qualities of the neutral. He or she may be designated directly by the parties or appointed by ICC. In the latter case, the parties may specify certain requirements as to the qualifications or attributes the neutral should possess. Lastly, the parties are not limited to a single technique, but may find it useful to apply a combination of settlement techniques."*

The ICC ADR Rules

The first particularity of the ICC ADR Rules is that the acronym ADR stand for 'amicable dispute resolution' rather than the traditional 'alternative dispute resolution'. This was done in order to avoid confusion with arbitration. The intention is to clearly separate arbitration and other binding techniques from techniques such as mediation and neutral evaluation, which do not result in a decision or award that can be enforced at law.

The parties are free to choose any ADR technique that is best adapted to their particular dispute. Thus, the parties may choose mediation, neutral evaluation or minitrial, or may also choose a combination of techniques. For example, mediation could be chosen, but the Neutral could be asked to give his or her evaluation of a particular issue. The ICC Rules are flexible and are party-controlled to the largest extent possible.

Article 1 of the ICC ADR Rules states that all business disputes, whether or not of an international character, may be referred to ADR proceedings under the Rules. Where the parties agree to refer their dispute to the ICC ADR Rules, the process is commenced by written request to the ICC that describes the dispute.

Article 3 deals with the selection of the Neutral. The Neutral discusses with the parties the settlement technique to be used and the specific ADR procedure to be followed: *"in the absence of an agreement of the parties on the settlement technique to be used, mediation shall be used"*. The Neutral is to conduct the procedure *"in such manner as the Neutral sees fit. In all cases the Neutral shall be guided by the principles of fairness and impartiality and by the wishes of parties."* Each party is to cooperate in good faith with the Neutral.

99 See www.iccadr.org.

The circumstances in which the ADR proceedings terminate include the signing by the parties of a settlement agreement and notification by the Neutral to the parties that in his/her opinion the process will not lead to settlement.

Article 7 provides that the ADR process (subject to the applicable law) is private and confidential and any settlement agreement between the parties is likewise confidential, save to the extent that disclosure is required for the purposes of implementation or enforcement. Furthermore *"Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitration or similar proceedings:*

a) any documents, statements or communications which are submitted by another party or by the Neutral in the ADR proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitration or similar proceedings;

b) any views expressed or suggestions made by any party within the ADR proceedings with regard to the possible settlement of the dispute;

c) any admissions made by another party within the ADR proceedings;

d) any views or proposals put forward by the Neutral; or

e) the fact that any party had indicated within the ADR proceedings that it was ready to accept a proposal for a settlement."

Additionally, unless the parties otherwise agree, a Neutral *"shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party"*.

And, unless required by the applicable law or otherwise agreed by the parties, a Neutral shall not *"give testimony in any judicial, arbitration or similar proceedings concerning any aspect of the ADR proceedings"*.

iv) The London Court of International Arbitration

The first two Articles of the LCIA Mediation Rules deal with the commencement of the mediation, both where there is a prior agreement to mediate and where there is no such prior agreement. Article 3 deals with the appointment of the mediator and the impartiality and independence of that mediator.

The parties are free to agree how they will inform the mediator of their respective cases. But unless they have agreed otherwise, each party is to submit to the mediator, no less than seven days before the date of the first mediation session, a brief written statement summarising their case, the background to the dispute and the issues to be resolved. Each written statement is to be accompanied by copies of any documents referred to, and a copy of the statement and supporting documents is to be submitted to the other party or parties (Article 4).

Article 5 contains the provisions dealing with the conduct of the mediation:

> *"The mediator may communicate with the parties orally or in writing, together, or individually, and may convene a meeting or meetings at a venue to be determined by the mediator after consultations with the parties.*
>
> *"Nothing which is communicated to the mediator in private during the course of the mediation shall be repeated to the other party or parties, without the express consent of the party making the communication."*

Article 6 deals with the conclusion of mediation, which will end when either:

> *"(a) a settlement agreement is signed by the parties; or*
>
> *(b) the parties advise the mediator that it is their view that a settlement cannot be reached and that it is their wish to terminate the mediation; or*
>
> *(c) the mediator advises the parties that, in his or her judgement, the mediation process will not resolve the issues in dispute; or*
>
> *(d) the time limit for mediation provided in a Prior Agreement has expired and the parties have not agreed to extend that time limit."*

Article 7 deals with the settlement. If terms of settlement are agreed, the parties (with the assistance of the mediator if desired) are to draw up a settlement agreement setting out the terms. By signing this agreement *"the parties agree to be bound by its terms".*

Article 9 states that, unless the parties have agreed otherwise *"and notwithstanding the mediation, the parties may initiate or continue any arbitration or judicial proceedings in respect of the dispute which is the subject of the mediation".*

Article 10 deals with confidentiality and privacy.

v) The China Council for the Promotion of International Trade / China Chamber of International Commerce

The Conciliation Rules of the CCPIT / CCOIC were formulated *"with a view to settling by means of conciliation (mediation) disputes arising from the fields of economy, trade, maritime business, etc, so as to promote the development of international and domestic economic exchanges".*

The Conciliation Centres of CCPIT / CCOIC accept cases in accordance with a Conciliation Agreement. Conciliation is to be conducted *"on the basis of ascertaining facts, distinguishing right from wrong and determining liabilities while respecting the terms of the contract, abiding by the law, following international practice and adhering to the principle of being just, fair and reasonable in order to bring about mutual understanding and neutral concession between the parties and help the parties to reach an amicable settlement agreement thereof "* (Articles 1, 3 and 5).

The party applying for conciliation must submit a written Application for Conciliation that is to include the facts of the case, evidential materials and the claim. The Applicant is to appoint, or authorise the Conciliation Centre to appoint, a conciliator from the Centre's Panel of Conciliators (Article 9).

If the Application for Conciliation and the annexed documents are found to be in order, the Centre forwards a copy to the Respondent. The Respondent is to confirm his/her agreement to the conciliation within 30 days and is to appoint, or authorise the Centre to appoint, one conciliator from the Panel. Failing confirmation of agreement, the conciliation proposal is deemed to have been rejected (Articles 10 and 11).

The conciliators may conduct the conciliation in the manner they deem appropriate. Experts may be invited to participate and assist in the conciliation. If the parties reach an amicable settlement they are to affix their signatures to an agreement. The conciliators are then to prepare a written Conciliation Statement in accordance with the terms of that agreement. The Statement is to be signed by the conciliators and sealed by the Conciliation Centre (Articles 14-16).

The conciliation proceedings are to terminate in any one of the following circumstances set out in Article 17:

1 the conciliation is successful and a Conciliation Statement is signed and sealed;
2 the conciliators consider that a successful conciliation is impossible;
3 the parties (or one of them) declares in writing to the conciliators that the proceedings are to be terminated.

Supplementary Provisions provide that the conciliators may meet or communicate with the parties in the manner they think appropriate. Where one party gives information and requests that such information be kept confidential, this is to be respected. The parties are to cooperate in good faith with the conciliators. If the conciliation fails, the parties are not to invoke any statements, views, opinions or proposals in any subsequent arbitration proceedings or litigation proceedings (Articles 18, 19, 20 and 22).

Article 21 provides that *"if conciliation fails, the conciliators may be appointed by one of the parties as arbitrators in the subsequent arbitration proceedings, unless such appointment is opposed by the other parties"*.

The idea of a conciliator in an unsuccessful conciliation going on to sit as arbitrator in the same dispute – a dispute in which confidential information may have been given to the conciliator in the caucus sessions – may be difficult for many lawyers to accept. An even more difficult issue may be whether an arbitrator can switch to acting as conciliator / mediator (possibly receiving information in confidence in the caucus sessions) and then switch back again to acting as arbitrator if the conciliation fails.

However, the concept of conciliation and arbitration operating together is one with which the Chinese are perfectly happy. And they have considerable experience of conciliation. Further, the idea has obvious practical benefits – and in any event the parties have the final say as the arbitration will only take place with the former conciliator acting as arbitrator provided all parties agree.

It is interesting to note that the Mediation Institute of the Stockholm Chamber of Commerce – considered next – has almost the same provision in its Mediation Rules. So does the UNCITRAL Model Conciliation Law – but not the UNCITRAL Conciliation Rules. Those Rules, enacted some 20 years before the Model Law, provide in Article 19 that:

"The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings."

vi) The Mediation Institute of the Stockholm Chamber of Commerce

The SCC Mediation Institute was established in 1999 to assist in the settlement of domestic and international disputes in accordance with the SCC Mediation Rules. The Mediation Institute is part of the SCC's Arbitration Institute.

Article 1 states that the Mediator must be impartial and independent, and may not act as arbitrator in any future arbitration relating to the subject matter of the dispute, unless the parties otherwise agree (a similar provision to that in the CCPIT / CCOIC Conciliation Rules). A potential Mediator is to disclose any circumstances likely to give rise to *"justifiable doubts as to his impartiality and independence"* (Article 2).

Confidentiality, on the part of the parties and the Institute, is dealt with in Article 3. In particular *"A party may not introduce as evidence in any judicial or arbitration proceeding any views expressed or statements made in the course of the Mediation. A party may not involve as witness in any judicial or arbitration proceeding the Mediator or any expert that has participated in the Mediation."*

The mediation process is initiated by a Request for Mediation, which is to include a summary of the dispute. Where one party only submits the Request, the Institute is to communicate the Request of the other party and enquire whether or not that party agrees to participate in the mediation.

Articles 6 and 7 deal with the appointment and removal of mediators.

Article 10 deals with the proceedings before the mediator:

"(1) Giving consideration to the wishes of the parties, the Mediator shall determine the conduct of the Mediation, with a view for reaching an expeditious and efficient resolution of the dispute.

(2) Each party shall be given sufficient opportunity to present its case.

(3) Where the Mediator believes that the dispute between the parties is not likely to be resolved through mediation, the Mediator may propose other means of resolving the dispute, for the consideration of the parties."

Unless otherwise agreed, the mediation is to be terminated within two months of the date of being referred to the Mediator (Artivle 11(1)). Otherwise, the mediation is to be terminated:

"(2)(i) by a settlement agreement between the parties,

(ii) by a declaration of the Mediator to the parties and the SCC Mediation Institute, to the effect that further efforts of Mediation are unlikely to lead to the resolution of the dispute, or

(iii) by a written request from a party to the Mediator that the Mediation shall be terminated.

(3) Upon the termination of the Mediation, the Mediator shall notify the SCC Mediation Institute."

Article 12 provides: *"Upon reaching a settlement agreement the parties may, subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award."*

That provision would seem to have the New York Convention in mind. An agreement between the parties reached as a result of a mediation process would not fall within the Convention, which applies only to the recognition and enforcement of *arbitral* awards (Article I of the New York Convention).

Many of the institutional arbitration Rules provide that, where a settlement is reached during the course of the arbitral process, the terms of the settlement may be made the subject of an arbitral award, thus probably ensuring that the settlement agreement becomes enforceable as a New York Convention arbitration award. Here, the Stockholm Mediation Institute appears to be going a stage further by providing that a settlement in a *mediation* can be made the subject of an *arbitral* award.

vii) The Netherlands Arbitration Institute: Minitrials

Introduction

The difference between Minitrial and mediation / conciliation lies in the make-up of the tribunal. The Minitrial tribunal comprises representatives of the parties together with a 'neutral'.

It may be useful to look first at some definitions in the CPR Minitrial rules. The Commentary on the CPR Institute for Dispute Resolution Minitrial procedure describes the 'management representatives' and the 'Neutral Adviser '. Referring to the former, the Commentary states that:

"The negotiations are more likely to succeed if the negotiators have not been directly involved in the dispute and therefore do not feel a need to defend past actions. The settlement may well entail a new business deal in which neither party loses. The more senior the management representatives, the greater the range of options they are likely to perceive for a constructive solution. In some circumstances negotiations will be more productive if more than one representative of each party participates. The prospects for success of the process are likely to be enhanced if the management representatives are evenly matched and command the respect of the other party. Therefore, the parties should consult on the selection of their management representatives."

Referring to the Neutral Adviser the Commentary suggests that:

"A highly qualified Neutral Adviser, in whose impartiality and judgment the parties have confidence, can significantly enhance the prospects for success. It may well be

desirable to select as the Neutral Adviser a respected former judge, senior lawyer or legal scholar with a thorough knowledge of the applicable law and the ability to facilitate the conduct of the process including, if necessary, mediation between the parties. Such a person can give the executives educated, objective views on the legal issues and on the likely outcome of a lawsuit or arbitration. The Neutral Adviser could also be a person experienced in the field to which the dispute relates.

"With the concurrence of the executives, the Neutral Adviser can also play a mediating role in their negotiations and make settlement proposals. If need be, CPR can assist in the selection of a Neutral Adviser. The parties have the option of dispensing with a Neutral Adviser."

The NAI Minitrial Rules

In the case of the NAI Minitrial Rules, the references are to a "Minitrial Board". The Third Section of Rules in Article 7 states that the Minitrial Board shall preferably consist of three members, namely a mediator and *"a director of each of the parties. If there are more than two parties and neither the applicants nor the respondents can agree on the appointment of a single director, each party shall nominate one director as a member of the Minitrial Board."* The 'director' is defined as a representative of a party having authority to reach a settlement in relation to the existing dispute between the parties.

"International minitrial proceedings" are defined in Article 1 as proceedings in which *"at the moment of commencement, at least one of the parties is domiciled, has its seat or, in absence thereof, its actual residence outside the Netherlands".*

Article 5 deals with the commencement of proceedings by the filing by the applicant of a request that is to include a description of the dispute and of the claim, together with, if possible *"the name of the director who is appointed by the applicant in accordance with article 7 (2) as a member of the Minitrial Board..."*.

The respondent is to file a 'short answer' that similarly, if possible, is to contain the name of a director appointed by the respondent as a member of the Minitrial Board. The Mediator, who is chairman of the Minitrial Board and who is to conduct the proceedings, is to be appointed by the parties acting jointly (failing which he/she will be appointed by the NAI).

When the Minitrial Board has been appointed, the parties are to serve written submissions. They are to send a *"memorial elaborating their points of view"*, which should be accompanied by the documentary evidence relied on.

The Mediator, in consultation with the other members of the Minitrial Board, is to determine the date of a meeting at which the parties are to be given the opportunity to elaborate on their contentions orally. The Mediator *"may ask questions of the representatives of the parties during the hearing with a view to clarifying any issues. The Mediator may also have private and, if thought appropriate, separate discussions with the directors representing each of the parties with a view to clarifying any observations they may have about the issues."*

Following the meeting *"the Minitrial Board shall meet with the intention of achieving a settlement to the dispute. The Mediator, if he thinks it appropriate, may see members of the Minitrial Board, together or separately, in order to try to facilitate settlement negotiations and subject to the maintenance of strict confidentiality in respect of communications received from each party separately."*

If a settlement is not reached, the Mediator can indicate to the Board *"the outcome that he would expect from a trial or arbitration of the dispute or the manner in which the dispute, in his opinion, can be resolved. In particular, the Mediator may at his discretion provide a non-binding written opinion as to the likely outcome of the case on trial or arbitration and, if he considers it helpful to do so, may propose settlement terms to the other members of the Minitrial Board. In such event a second settlement meeting between the Mediator and the other members of the Minitrial Board shall be held within 14 days."*

A settlement reached shall be recorded in a written agreement by the Minitrial Board.

Article 11 (7) makes clear the wide discretion vested in the Mediator: *"In the exercise of his functions and duties as described above, the Mediator shall in the exercise of his judgement as to how best to facilitate a settlement be at liberty to do all things which he considers appropriate to that end. The Mediator shall have therefore the widest possible discretion in the conduct of any hearing and any subsequent discussions with and between the parties."*

Article 12 states that a settlement can be recorded in an arbitral award.

Article 20(1) deals with confidentiality and Article 20(2) states that, unless the parties have agreed otherwise, the Mediator shall not act as judge, arbitrator, legal counsel or adviser in any court or arbitration proceedings relating to the dispute.

viii) The World Intellectual Property Organization

Introduction

WIPO states that ADR offers several advantages for the resolution of intellectual property disputes. In particular, mediation

> *"... is an attractive option for parties that place a premium on the preservation or enhancement of their relationship, seek to maintain control over the dispute settlement process, value confidentiality, or want to reach a speedy settlement without damage to their reputations.*
>
> *"Parties to contracts or relationships involving the exploitation of intellectual property often share these goals when a dispute arises. Common examples of such contracts include patent, know how and trademark licenses, franchises, computer contracts, multimedia contracts, distribution contracts, joint ventures, research and development contracts, technology-sensitive employment contracts, mergers and acquisitions where intellectual property assets assume importance, sports marketing agreements, and publishing, music and film contracts."*[100]

100 http://arbiter.wipo.int/mediation/why-mediation.html.

The WIPO Mediation Rules

The WIPO Mediation Rules comprise 15 Sections and 27 Articles.

Article 1 concerns 'Abbreviated Expressions'; Article 2 deals with Scope of Application of the Rules; and Articles 3-5 cover Commencement of the Mediation. The Appointment of the Mediator is dealt with in Articles 6 and 7, and Representation of the Parties and Participation in Meetings in Article 8. The Conduct of the Mediation and the Role of the Mediator are covered in Articles 9 to 13.

The parties are to cooperate in good faith with the mediator. The mediator is free to meet and to communicate separately with a party *"on the clear understanding that information given at such meetings and in such communications shall not be disclosed to the other party without the express authorization of the party giving the information"*.

The mediator is to establish a timetable for the submission by each party to the mediator and to the other party of *"a statement summarizing the background of the dispute, the party's interests and contentions in relation to the dispute and the present status of the dispute, together with such other information and materials as the party considers necessary for the purposes of the mediation and, in particular, to enable the issues in dispute to be identified"*.

The role of the mediator is to *"promote the settlement of the issues in dispute between the parties in any manner that the mediator believes to be appropriate"*. But he or she *"shall have no authority to impose a settlement on the parties"*.

The WIPO Rules contain interesting provisions in Article 13 that allow the mediator to make proposals for the resolution of the dispute by means other than mediation, including expert determination and arbitration – and that includes arbitration in which the mediator is to act as arbitrator.

> *"Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the mediator may propose, for the consideration of the parties, procedures or means for resolving those issues which the mediator considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues.*
>
> *"In particular, the mediator may so propose:*
>
> *(i) an expert determination of one or more particular issues;*
>
> *(ii) arbitration;*
>
> *(iii) the submission of last offers of settlement by each party and, in the absence of a settlement through mediation, arbitration conducted on the basis of those last offers pursuant to an arbitral procedure in which the mission of the arbitral tribunal is confined to determining which of the last offers shall prevail; or*
>
> *(iv) arbitration in which the mediator will, with the express consent of the parties, act as sole arbitrator, it being understood that the mediator may, in the arbitral proceedings, take into account information received during the mediation."*

Compare that with the provisions in Article 21 of the CCPIT / CCOIC Rules and Article 1 of the Stockholm Rules (see above).

The remaining Articles deal with confidentiality, termination, fees deposits and costs, the exclusion of liability, the suspension of running of limitation period under the Statute of Limitations, and waiver of defamation: *"The parties and, by accepting appointment, the mediator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the mediation shall not be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this Article may be pleaded as a bar to any such action."*[101]

ix) Other Organisations at the International Dispute Resolution Centre

The International Dispute Resolution Centre (IDRC) in Fleet Street, London was set up specifically as a venue providing dispute resolution facilities. It is not only where the LCIA is based but has also been the home of two dispute resolution organisations: the Centre for Effective Dispute Resolution (CEDR) and the City Disputes Panel (CDP).[102]

The IDRC is supported by the major bodies in London concerned with dispute resolution. Support for the Centre has also come from the Corporation of London. The IDRC has 34 rooms, of which 16 are suitable for arbitrations or meetings of various sizes, with 18 designed as retiring rooms.

The Centre for Effective Dispute Resolution

CEDR's mission is to encourage and develop mediation *"and other cost-effective dispute resolution and prevention techniques in commercial and public-sector disputes"*. It is *"an independent non-profit organisation supported by multinational business and leading professional bodies"*.

City Disputes Panel

CDP describes itself as a leading provider of UK mediation services *"and tailored ADR solutions"*.

> *"Our mediators provide expert facilitation skills that offer tangible benefits and genuine alternatives to litigation.*
>
> *"One of our key aims is to promote the use and benefits of ADR in business throughout the UK and internationally.*
>
> *"Our approach is tailor-made and inherently flexible, bringing together the optimum combination of process with people who have the experience to ensure that dispute resolution is achieved efficiently, to the satisfaction of all parties."*

101 http://arbiter.wipo.int/mediation/rules/index.html.

102 The CDP has recently moved to Bloomsbury Square, the London HQ of the Chartered Institute of Arbitrators. Further information on the three organisations referred to in this Section can be found on their websites: www.idrc.co.uk, www.cedr.co.uk and www.citydisputespanel.org.

4) United Nations Commission on International Trade Law (UNCITRAL)

This section looks again at UNCITRAL, this time at the Model Conciliation Law and the UNCITRAL Conciliation Rules.

i) Resolution of the UN General Assembly

In January 2003 the General Assembly of the United Nations adopted a resolution on the Model Law on International Commercial Conciliation. This stated that the General Assembly recognised the value for international trade law of methods of settling commercial disputes *"in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably"* and noted that such dispute settlement methods *"referred to by expressions such as conciliation and mediation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation".*

The General Assembly considered that the use of such dispute settlement methods *"results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States".*

The General Assembly was convinced that *"the establishment of model legislation on these methods that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations"* and noted the completion and adoption by UNCITRAL of the Model Law on International Commercial Conciliation.

ii) UNCITRAL Model Law on International Commercial Conciliation

Article 1 of the Model Law deals with scope of application and contains definitions. As mentioned earlier, it is interesting to note that the Model Law treats the terms 'mediation' and 'conciliation' as having the same meaning. Article 1 defines conciliation as *"a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."*

The Article also states that a conciliation is international if:

"(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected."

However, the Article states that the Law also applies to a commercial conciliation where the parties agree that the conciliation is international or where they agree to the applicability of the Conciliation Law.

Article 2 states that, in the interpretation of the Law, regard is to be had to "*its international origin and to the need to promote uniformity in its application and the observance of good faith*".

Articles 4 and 5 deal with the commencement of the conciliation proceedings and the number and appointment of conciliators (one, unless the parties agree otherwise). The parties may seek the assistance of an institution, which should have regard to such considerations as are likely to secure *"the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of the nationality other than the nationality of the parties"*.

Article 6 contains the vital provisions dealing with the conduct of the conciliation. It states that the parties are free to agree *"by reference to a set of rules or otherwise"* on the manner in which the conciliation is to be conducted. Failing such agreement, the conciliator may conduct the conciliation proceedings in such manner as he or she considers appropriate *"taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute. In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case."* The conciliator is entitled at any stage to make proposals for a settlement of the dispute.

Articles 7 to 10 contain provisions dealing with communications between the conciliator and the parties; disclosure of information; confidentiality; and the admissibility of evidence in other proceedings:

> *"A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:*
>
> *(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;*
>
> *(b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;*
>
> *(c) Statements or admissions made by a party in the course of the conciliation proceedings;*
>
> *(d) Proposals made by the conciliator;*
>
> *(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;*
>
> *(f) A document prepared solely for purposes of the conciliation proceedings."*

The conciliation proceedings terminate in four circumstances: at the conclusion of a settlement agreement; by a declaration of the conciliator that further efforts to conciliate are no longer justified; by a declaration of the parties that the proceedings are terminated; or by a declaration of one party to the other party or parties to the same effect (Article 11).

Article 12 deals with a situation that many find difficult, and that was referred to above: Can a conciliator go on to act as arbitrator in the same dispute? Article 12 states that, unless otherwise agreed by the parties, the conciliator *"shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship"*. As mentioned earlier, the UNCITRAL Conciliation Rules, pre-dating the Conciliation Law by some 20 years, do not permit the conciliator to go on to act as arbitrator either (under Article 19 of the Rules, see below).

Article 13 deals with the significant question of the stay of litigation or arbitration where parties have agreed to conciliate: *"Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings."*

Finally, Article 14 deals with the enforceability of any settlement reached during the course of the conciliation process, leaving it open to enacting States how such enforcement is to take place: *"If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable... [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]."*

iii) UNCITRAL Conciliation Rules

The UNCITRAL Conciliation Rules were adopted by the UN General Assembly in December 1980. The General Assembly stated its conviction that *"the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations"*.

The Model Conciliation Clause provides:

> *"Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force."*

The Rules contain 20 Articles, which are broadly along the lines of the provisions of the Model Conciliation Law:

Article 1: Application of the Rules

Article 2: Commencement of conciliation proceedings

Article 3: Number of conciliators

Article 4: Appointment of conciliators

Article 5: Submission of statements to conciliators

Article 6: Representation and assistance

Article 7: Role of the conciliator:

"(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor."

Article 8: Administrative assistance

Article 9: Communication between conciliator and parties

Article 10: Disclosure of information

Article 11: Co-operation of parties with conciliator

Article 12: Suggestions by parties for settlement of dispute:

"Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute."

Article 13: Settlement agreement:

"(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement."

Article 14: Confidentiality

Article15: Termination of conciliation proceedings

Article 16: Resort to arbitral or judicial proceedings

Article 17: Costs

Article 18: Deposits

Article 19: Role of conciliator in other proceedings (referred to earlier)

"The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings...."

Article 20: Admissibility of evidence in other proceedings

5) ADR in Action

An example of mediation in action is provided by a case that came before the City Disputes Panel (CDP). The ADR tribunal was chaired by Lord Browne-Wilkinson, a former senior Law Lord.

In an article published in *The Times* on 20 September 2004, Lord Browne-Wilkinson described the situation:

> *"A multiparty action brought by 300 claimants against a well-known City institution was recently concluded successfully by the City Disputes Panel. The resolution of the disputes took less than 18 months from beginning to end and was achieved at a fraction of the cost of litigating through the courts."*

The dispute in question related to the collapse of a foreign exchange business that maintained accounts with various high-street banks and whose *modus operandi* was to *"bulk up smaller orders and take a turn on the rate benefits, thereby offering consumers a better rate than the high-street and at the same time making a profit for themselves"*. When the business failed, many of its clients lost substantial sums. The deposits were held in client accounts in euros, US dollars, and so on. More than 500 potential claimants were identified.

CDP was appointed to establish a scheme for the review and determination of the claims. Lord Browne-Wilkinson was asked to be chairman of the review board: *"From the judicial point of view the advantages of dealing with a large number of claims in what was effectively one managed mass arbitration were speed and having the expertise required to resolve these disputes available within the tribunal."*

There were points of law to be resolved and a hearing was held, which lasted three days. Once those points of law had been decided, and the tribunal had written its judgement, *"the rest was largely resolved by agreement. There were perhaps 30 cases that needed to be adjudicated individually on the facts, but they took very little time – just over a day."*

Lord Browne-Wilkinson said that the most difficult part of the process was persuading claimants to join the scheme. But had the matter been litigated through the courts *"such litigation would have taken many years and cost millions of pounds"*.

One of the keys to the success of the scheme, and indeed to resolving other claims, was the efficiency of a multidisciplinary tribunal model: *"Contrast the weeks of expert evidence you might normally expect a court to hear in a case such as this, with having the expertise within the tribunal. The experts sitting on the tribunal, in this case an accountant and a banker, can educate the lawyer as you go along. This is extremely valuable."*

Lord Browne-Wilkinson concluded his article in *The Times* by saying that *"having spent years in court reading the papers for a case, only to be told at the last minute that the parties have come to terms, I am persuaded that it ought to be possible to convince people that alternative dispute resolution is something worth trying first."*

This is no doubt a view that Antonio Piazza would endorse.

6) International ADR – Future Developments

Nearly 20 years ago the distinguished international practitioners and authors, Alan Redfern and Martin Hunter, in the first edition of their leading work *Law and Practice of International Commercial Arbitration,* questioned

> *"... whether or not ADR, or any particular form of ADR, will ultimately be exported from the USA in the sense of developing into a system for resolving international trade disputes, where the outcome may have to be enforced against the reluctant loser by the courts of a foreign country, remains to be seen. In the short term, at least, for the practitioner who regards the New York Convention as an essential element for the resolution of disputes in international trade, it seems unlikely that ADR methods which fall short of the type of process required for enforcement under the New York Convention will hold much attraction. International commercial arbitration, which produces a legally binding decision which is enforceable internationally, is to be preferred."*[103]

Their view was expressed to be in the short term. Now, some 20 years later, ADR has developed considerably. The view that it has a role to play in dispute resolution – a role that offers a viable and cost-effective alternative to litigation and arbitration – has spread from the United States to other countries around the world. Most of the major international commercial arbitral bodies provide various types of ADR processes such as mediation / conciliation. The United Nations, through the work of UNCITRAL, has also adopted a Model Law on Conciliation.

Picking up again the Redfern and Hunter line, a settlement reached through mediation / conciliation – which may not even be enforceable in a domestic context, let alone in an international context – clearly cannot be compared with an arbitral award enforceable under the New York Convention. However, the Mediation Institute of the SCC may have come up with a solution in Article 12 of their Mediation Rules. This provides that the parties may request the mediator to assume the role of arbitrator and then to make an arbitral award in the terms of the settlement agreement.

International arbitration and international mediation / conciliation are clearly two different animals. But what ADR in an international context does seem to be able to offer, through organisations like UNCITRAL and the major international commercial arbitral institutions, is the possibility of resolving international disputes before they reach the stage of a full-scale international commercial arbitration battle. One particular example is the use of ADR as a filter process aimed at resolving disputes at an early stage: Only if the ADR process fails does the dispute then proceed to arbitration.

The use of ADR in its various forms, particularly mediation / conciliation, must surely increase both in the domestic sphere and internationally. It has too much to offer for it to fail.

103 Sweet and Maxwell, 1986.