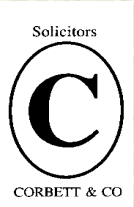


ADR IN FRANCE - ICC ADR



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Robert Knutson, Neutral

- # Canadian Member ICC Court
- # Canadian National member ICC ADR forum and Working Group on ICC ADR
- # Member ICC DRB Group
- # this is a personal view

French ADR is Old and New

- # The French have always used homogeneity in the business classes and private negotiations to solve most business disputes
 - # It has worked well (rupiah example)
 - # When the Americans introduced “ADR” to France, the French said “What’s new about this”?
-

French/Japanese similarity

- # Dislike, even of the word “Dispute”
- # Preference for dignified and quiet negotiation

French ADR is Old and New

- # Nonetheless, the 1992 conference at the ICC of the CPR Institute was a success
 - # The ICC had had conciliation Rules for over 20 years
 - # French policy makers quickly embraced (US) ADR as a useful international business tool
 - # As a premier organisation for international business in France, prestige and policy reasons adoption by the ICC of the “new” ADR was inevitable
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The story of ICC ADR?

- # A story of high intrigue, dogmatism, political infighting, and Euro- American rivalry
- # Who Won?

The Americans

What should the ICC ADR Philosophy be?

- # This was a matter of some debate
- # For historical/practical reasons the ICC Secretariat had to be involved
- # The range of potential appeal had to be broad
- # The mechanism had to be flexible and international

What Principles would be adopted?

- # Freedom of choice of methods (freedom of contract)
- # consensual nature of the process (no coercion)

After much debate

- # The ICC ADR Rules were adopted in July 2001
 - # They exist as a separate booklet, with Guidelines and Rules text
 - # They are separately administered at the ICC
 - # There were 14 cases in 2001
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Scope-Guidelines Art.5

- # The ADR settlement techniques that can be used include the following:
 -) Mediation;
 -) Neutral evaluation;
 -) Mini-trial;
 -) Any other settlement technique; or
 -) A combination of settlement techniques
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Scope - Guidelines

- # In order to commence ICC ADR proceedings, the parties must agree to submit their dispute to the Rules. Such agreement can occur:
 - in a prior agreement of the parties to submit their disputes to the Rules, either in their underlying contract or in a later agreement(art. 2A); or
 - through a Request for ADR submitted by one party to ICC and accepted by the other party(Art.2B).
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How does it work?(2A)

- # send a written Request for ADR to ICC, which shall include: a) the names, addresses, telephone and facsimile numbers and email addresses of the parties to the dispute and their authorized representatives, if any; b) a description of the dispute including, if possible, an assessment of its value;
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How does it Work (2A cont'd)

- c) any joint designation by all of the parties of a Neutral or any agreement of all of the parties upon the qualifications of a Neutral to be appointed by ICC where no joint designation has been made; d) a copy of any written agreement under which the Request for ADR is made; and the registration fee of the ADR proceedings, as set out in the Appendix hereto.
-

2B no pre-existing agreement

- # ... any party or parties wishing to commence ADR proceedings pursuant to the Rules shall send a written Request for ADR to ICC which shall include: a) the names, addresses, telephone and facsimile numbers and email addresses of the parties to the dispute and their authorized representatives, if any; b) a description of the dispute including, if possible, an assessment of its value; and c) the registration fee of the ADR proceedings, as set out in the Appendix hereto.
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2B no pre-existing agreement

- The Request for ADR may also include any proposal regarding the qualifications of a Neutral or any proposal of one or more Neutrals to be designated by all of the parties.

What were the Big Issues ?

- # Preamble as “Amicable Dispute Resolution” (ADR)
 - # Default mechanism
 - # The scope of the Rules - “disputes” v. “disputes and differences”
 - # Consensual nature/Role of the ICC
 - # Name and status of the “Neutral”
 - # confidentiality
-

Big Issues continued

Binding or non-binding settlement techniques?

ADR as “Amicable Dispute Resolution”

- # Hard fought point
- # removed from the Rules, it reappeared in the Guidelines text

Default Mechanism

- # (Preamble and Article 5.2) In the absence of an agreement of the parties on settlement techniques, mediation shall be the settlement technique used under the Rules.

“disputes and differences”

Rules Preamble

Amicable settlement is a desirable solution for business disputes and differences.

“disputes or differences”

Rules Article 1

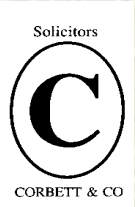
Scope of the ICC ADR Rules

All business disputes, whether or not of an international character, may be referred to ADR

Disputes and differences (French version)

- # **Rules Article 1**
- # **Champ d'application du Règlement ADR de la CCI**
- # « Tout différend d'ordre commercial, »

Consensus - Art 3.2 (no prior agreement to refer)



- # Such party or parties shall be asked to inform ICC in writing, within 15 days of receipt of the Request for ADR, as to whether they agree or decline to participate in the ADR proceedings.
-

Consensual nature - Article 6

- Parties cannot be forced to take part beyond a preliminary discussion - see 6.1.(b)

Role of the ICC

- # Following the receipt of a Request for ADR, ICC shall request the parties to pay a deposit in an amount likely to cover the administrative expenses of ICC and the fees and expenses of the Neutral for the ADR proceedings, ... The ADR proceedings shall not go forward until payment of such deposit has been received by ICC.
-

Name and status of “Neutral”

“President”, “Third Party”, “Mediator”

Name and status of “Neutral”

- # Every prospective Neutral shall promptly provide ICC with a *curriculum vitae* and a statement of independence, ... The prospective Neutral shall disclose to ICC in the statement of independence any facts or circumstances which might be of such nature as to call into question his or her independence in the eyes of the parties.

Name and status of “Neutral”

- # Where is the requirement of “neutrality”?
- # Institutional explanation - the ICC
Arbitration Rules do not call for impartiality

Status of “Neutral” - Art. 7.3

- # “Unless all of the parties agree otherwise in writing, a Neutral shall not act nor shall have acted in any judicial, arbitration or similar proceeding 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.” (China/Germany+contrary to ICC Arbitration Rules)

Confidentiality Art. 7.1

- # “In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law, the ADR proceedings, including their outcome, are private and confidential.” See also Art. 7.4

Binding or non-binding settlement techniques?

- # (Guidelines page 3) “ICC ADR thus differs from arbitration and judicial proceedings in that ADR does not lead to a binding decision or award.”
- # therefore, no DABs/DRBs, no New York Convention Awards. This is against the spirit of European trends

Other possible defects

- # No governing law provisions, or mention of respect or otherwise of mandatory rules of the forum
 - # no jurisdiction clause - what courts have jurisdiction?
 - # no easy use in long term contracts
 - # no settlement enforcement provisions
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On the other hand

- # ICC “stamp of acceptance” and administration
 - # flexibility within limits
 - # you will have a mediator if you agreed in advance on ICC ADR
 - # The mediator should be a good choice for international situations
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Conclusion

- # If you wish to use ICC ADR, tailor it to the requirements of your particular circumstances and contract