



## **Practice Guideline 7: Guidelines for Arbitrators on the use of ADR procedures**

### **1. Introduction**

1.1 It is increasingly accepted, both in the United Kingdom and abroad, that it is not incompatible with the function of an arbitrator for him or her to raise with the parties the possible use of ADR techniques.

1.2 The expression ADR is taken to include private mediation and conciliation, whether facilitative or evaluative. Though some would say that arbitration itself is included within the concept of ADR techniques, the Guideline proceeds on the alternative, more traditional, assumption that arbitration is a separate method of dispute resolution governed by its own rules and procedures which have been laid down or recognised by specific legislation in force in different countries.

1.3 Despite much academic discussion on the subject, there is little practical guidance for arbitrators. This Guideline, therefore, seeks to set out the circumstances in which an arbitrator can, with advantage, make use of ADR techniques, and the manner in which he should do so.

### **2. Basic Requirements of Arbitration**

2.1 So long as the arbitrator acts or intends to act as arbitrator, there must be compliance with certain basic principles. Thus the tribunal must do the following under the mandatory Section 33 of the English Arbitration Act 1996:

- (1) act fairly and impartially as between the parties;
- (2) give each party a reasonable opportunity of putting its case;
- (3) give each party a reasonable opportunity of dealing with the case of its opponent;
- (4) provide a fair means for the resolution of the matters falling to be determined.

2.2 While, under the doctrine of party autonomy, the parties generally have the right to agree on procedural and evidential matters, this does not extend to diminishing or undermining the basic duty of an arbitrator under Section 33.

2.3 While the UNCITRAL Rules are silent on the subject of mediation and other forms of ADR, Appendix IV of the new ICC Rules does have some material in this area. It encourages arbitrators to identify issues that can be resolved by agreement between the parties or their experts (paragraph (b)) and to inform the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules (paragraph (h)(i)). It also adds cautiously (at paragraph (h)(ii):

“where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.”

### **3. Facilitative Mediation/Conciliation**

3.1 The essence of these processes is that the mediator or conciliator endeavours to promote an agreed settlement of the dispute or of issues within the dispute. No particular difficulty arises where an arbitrator attempts to promote an agreed settlement without meeting with one party in the absence of the other and without receiving information from one party which is not also given to the other. For example, it is very common for arbitrators to direct the parties to seek to agree "figures as figures" or to give specific directions for experts to meet and to report upon matters of agreement and disagreement.

3.2 Nor is there any theoretical difficulty in the arbitrator holding what may be called a "settlement conference" at which all parties are present. The conference can be directed towards enabling the parties to settle particular issues or even the whole dispute. Timing however is all important. Such a conference may achieve little unless the parties are themselves moving towards an agreement when the intervention of the arbitrator can sometimes help to bridge any gap.

3.3 In any such discussions the arbitrator may use ADR techniques to promote agreement. These may include appealing to the interests of one or both parties in reaching non-adversarial outcome to the dispute, in avoiding the further expenditure of time and

costs, and in preserving what remains of the commercial relationship. It can help if the principals involved in the dispute (and not merely their representatives) are present at the conference.

3.4 None of this need involve "caucusing" procedures or receiving information from one party which is unknown to the other. Nothing that has so far been said involves the arbitrator in departing from the "basic requirements of arbitration" referred to above.

3.5 Arbitrators can and frequently do use techniques which may fall short of being alternative dispute resolution but which are definitely designed to facilitate settlement. There is considerable tradition, in which London maritime arbitration has played a considerable role, of encouraging the parties to have their refreshments together while not discussing the case. Doing things like this that breakdown the atmosphere of confrontation without in any way interfering with the arbitral process is something that arbitrators have long done to encourage settlement or at least the continuation of trading relationships between parties.

#### **4. Evaluative Mediation/Conciliation**

4.1 An arbitrator can also, subject to proper safeguards, assist the parties in evaluating the merits of the dispute. An arbitrator who attempts to promote settlement may be called upon by one side or the other to give a preliminary indication as to his present views on the issues. In response, an arbitrator may give an indication as to what in his view are the more important issues to be decided and as to which party appears to have the stronger case on any issue. An arbitrator may properly take the initiative in doing this but should take care not to give the impression of an eagerness to pre-judge the dispute.

4.2 As a general principle an arbitrator should only give an evaluation of the merits of any issue or dispute where (i) the parties agree to his doing so and (ii) the status of the "view" is clearly understood. The arbitrator should usually state that, on the issues in question, his mind remains open. If a view is given, it should be on the basis that the arbitrator is ready and able to continue with the case, in the absence of settlement.

4.3 The arbitrator may give a view at any stage of the case. It is not necessary to wait until both sides have presented their cases. For example, an arbitrator may serve the

interests of the parties by indicating, at the end of the claimant's formal case, that some aspects of it do not at that stage seem persuasive. The arbitrator must bear in mind that the parties will not then have had an opportunity of putting their cases, but it is not objectionable to comment on the case which has been put. In general, an arbitrator should seek to avoid the extremes of on the one hand, sitting passively throughout a hearing without displaying any reaction and, on the other, of appearing to have made up his mind against one of the parties prematurely.

## **5. "Caucusing" Procedures**

5.1 The inherent difficulty in an arbitrator making use of ADR techniques arises principally because mediation and conciliation usually involve the mediator or conciliator communicating separately with the parties. This may involve receiving information from one party which is not to be communicated to the other. Whether the process is "facilitative" or "evaluative", such caucusing procedures are seen as an essential tool of successful mediation and conciliation. Under English arbitration law, "caucusing" is not generally available to an arbitrator who wishes to make use of ADR techniques to facilitate a settlement. There are two reasons for this; one practical, the other deriving from the mandatory nature of an arbitrator's duties.

5.2 From a practical viewpoint, in order to preserve the status of arbitrator, there would have to be an agreement by the parties that, if the mediation fails, all information imparted to the arbitrator by any party material to the arbitration would have to be disclosed to the other party. In the light of this requirement parties may be less forthcoming in the mediation process. The parties may also be concerned that the arbitrator might be influenced by what he has learned of the positions taken by the parties in the negotiations.

5.3 The legal objection to an arbitrator taking part in "caucusing" procedures arises from the mandatory duties of an arbitrator under Section 33 of the Arbitration Act 1996 discussed above. The difficult issue is as to whether hearing one sides' view in the absence of the other and without handing over any information collected during caucusing prevents each party from having a reasonable opportunity to put his case and deal with that of his opponent. If this is the case, the mandatory nature of Section 33 precludes a mediator who has conducted private caucusing with one or both of the parties from acting subsequently as an arbitrator in the same case.

## **6. Appointing an Independent Facilitator**

6.1 One way in which an arbitrator can safely make use of ADR techniques is to appoint, with agreement of the parties, an independent neutral to act as mediator or conciliator and to adjust the procedural time-table to allow the mediation process to take place. Since the arbitrator does not take part in the mediation process his independence is in no way compromised and he remains available to act as arbitrator to the extent the mediation fails to produce an agreed settlement. The role of mediator can also, if the parties so agree, be undertaken by a tribunal-appointed expert or single joint expert appointed by the parties.

6.2 If the mediation is successful the arbitrator may, if the parties so request, record the settlement in the form of an agreed award ( under section 51(2) of the 1996 Act). The Tribunal should decline to do this if it suspects that the settlement is being used to assist in the transmission of the proceeds of crime.

6.3 There is no need for the arbitrator to appoint a mediator (he or she may not have the necessary resources or knowledge of suitably qualified individuals) and this can anyway only be done with the parties' consent. An arbitrator could suggest to the parties that they appoint their own mediator or refer the matter to a reputable organization which appoints mediators.

6.4 If the mediation is unsuccessful a problem may arise as to whether the costs of the parties in pursuing ADR procedures, together with the charges of the mediator, can be included in the recoverable costs of the arbitration. Rather than allow this problem to remain unsolved it is generally preferable to encourage the parties to agree when appointing the mediator that, if the mediation should fail, the costs incurred in connection with it will form the part of the recoverable costs of the arbitration. Section 63(1) of the 1996 Act specifically allows such an agreement to be made.

## **7. The Arbitrator/Mediator in practice**

7.1 For the reasons explained above, the safest technique for the arbitrator is normally to encourage the parties to mediate outside the arbitration before an agreed mediator, rather than for the arbitrator to engage in caucusing procedures or to receive confidential information from one party which is not communicated to the other.

7.2 There are however some situations where an experienced arbitrator may exceptionally consider that the potential benefit of engaging in caucusing procedures outweighs the risk. It is then important that the arbitrator should proceed in an agreed and transparent manner, preferably arranging for the intended steps and procedures to be agreed between the parties and recorded in writing. Where the mediation is successful, no problem of course arises. This risk will only materialise if the mediation is unsuccessful, the arbitrator then resumes the arbitration and makes an award and one or other party then challenges the award on the ground of serious irregularity affecting the tribunal, the parties or the award under section 68 of the 1996 Act. Since this risk cannot be wholly discounted, it has to be emphasised that for an arbitrator to engage in caucusing techniques requires considerable experience and does involve some degree of risk.

7.3 In view of the potential risk, it is strongly recommended that the parties adopt a written agreement which sets out what will occur if the mediation should fail. The agreement may embody terms for:

(1) the parties expressly to waive any right of challenge to the award based on the use by the arbitrator of ADR procedures, or

(2) the arbitrator not to proceed to act as arbitrator after failure of mediation or conciliation without a fresh agreement of the parties and the arbitrator.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to [nmcnamee@ciarb.org](mailto:nmcnamee@ciarb.org). Thank you in advance.

06 December 2011