Important Considerations for ADR Clauses

ADR refers to Alternate forms of Dispute Resolution which may be used to resolve disputes more effectively, efficiently, confidentially and at a cheaper cost. It is an umbrella terms which refers to a large number of formal and informal processes which function successfully the world over.

The ADR processes available to Parties can be broadly split between two categories – adjudicative, that is, which result in a binding decision, and non-adjudicative, which are non-binding in nature. For example, arbitration and expert determination are adjudicative in nature whereas mediation and conciliation are non-adjudicative in nature.

While deciding which procedure is the most appropriate, Parties should consider the following:

- The nature of the dispute;
- Which process best explores and settles the dispute keeping in mind the underlying interests of the Parties (e.g. to maintain their professional relationship, or reputational or economic interests);
- Whether the Parties want the process to facilitate resolution or whether they prefer a more adjudicatory process which assesses the factual and legal merits of the dispute;
- Whether or not a neutral third Party is required to give a binding decision;
- The degree of control the Parties want to exercise over the ADR process;
- The speed of the ADR process;
- Whether or not the Parties want the outcome to be binding.

Each ADR process offers different advantages and the Parties need to assess and consider which advantages are most effective and suitable for their commercial relationship.

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The International Institute for Conflict Prevention & Resolution defines the different ADR processes in the following manner:

1. **Arbitration:** A voluntary adjudicative method of dispute resolution in which an independent, impartial and neutral third party (an arbitrator or arbitral panel) considers arguments and evidence from disputing parties, then renders a decision or award. Arbitration may be binding or non-binding, with levels of procedural formality varying according to the parties' contractual agreement. Almost without exception, arbitration is a creature of contract and both the powers of the arbitrator and the conduct of the arbitration process are determined by the parties at the time of their agreement. In the absence of an agreement to the contrary, arbitral awards cannot be judicially appealed except on very limited statutory grounds.

2. **Dispute Resolution Board:** A party-appointed panel chaired by a trained neutral, which generally is formed at the start of a construction project and meets regularly (usually at the site) to follow work progress and to provide guidance to the parties. Once the DRB is in place, is informed about the project, and follows its progress, it is able to guide the parties to a mutual resolution of differences before they become disputes. In the event that the DRB is called upon to hear a ripened dispute, it can make either recommendations, awards that are binding for a period of time, awards that are binding but appealable, or final and binding decisions, depending on the agreement of the parties involved in the project. DRBs have been successfully used in complex construction projects.

3. **Mediation:** Mediation is facilitated negotiation; whose object is the consensual resolution of a dispute on terms that the parties themselves agree upon. It is a form of alternative dispute resolution in which a neutral party (a mediator) selected by the parties seeks to determine the interests of the parties, discover which of these interests may be shared, and alert them to a resolution that may further those interests.

4. **Negotiation:** A method of exchanging interests and proposals through direct communication.

5. **Expert Determination:** A neutral, party appointed Expert adjudicates the dispute. The selection and appointment of the Expert is governed by the agreement of the Parties. This process is highly suited to technical disputes which need to be resolved quickly.

Parties may decide to use ADR either before or after a dispute arises. In case of the former, the ADR clause is incorporated in the relevant contract for resolutions of disputes that arise at a later stage. If the parties have not incorporated such a clause, they can agree upon one later, after the dispute has arisen, although it is difficult to do this in practice.

There are essentially three types of ADR clauses:

1. **Mandatory ADR:** This imposes an obligation on the Parties to use an ADR process before they resort to litigation or arbitration.

For example: "*The Parties shall attempt in good faith to resolve any and all disputes arising out of or in connection with the present contract by mediation before resorting to litigation/arbitration for resolution of the disputes.*"

2. **Escalation Clauses:** These clauses prescribe a multi-step procedure for resolution of disputes.

For example: "*If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration/litigation.*"

"*If a dispute arises from or relates to this contract, the parties agree that they will seek the advice of* [***a mutually selected engineer***] *and try in good faith to settle the dispute within 30 days, following which either party may submit the matter to mediation under the Commercial Mediation Procedures of the American Arbitration Association. If the matter is not resolved within 60 days after initiation of mediation, either party may demand arbitration.*"

3. **Non-Mandatory ADR:** This does not impose an obligation on the Parties to use an ADR process before they resort to litigation or arbitration, but incorporates the same nevertheless to preserve flexibility in the dispute resolution process.

4. **Unilateral ADR Clauses:** This type of clause prescribes a particular process for the resolution of disputes, and at the same time gives one of the Parties the right to choose a different process than the one prescribed. However, it is pertinent to mention herein that the validity and the enforceability of unilateral clauses is questionable in most jurisdictions because of lack of certainty, lack of mutuality or the doctrine of unconscionability.

For example: "*The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charter party but the Owner shall have the option of bringing any dispute hereunder to arbitration.*"

To conclude, the important considerations with respect to ADR clauses can be summed up as follows:

- **Scope:** the nature and extent of the disputes that will be covered.
- **Time-period:** The clause may prescribe specific time-line to ensure speedy dispute resolution. For example, the process should start 30 days from the date on which written notice of the dispute was issued. Furthermore, certain ADR processes are more time-consuming than others and this must be assessed and established.
- **Commencement of ADR Process:** The clause may prescribe how the process is to be commenced, for example, by written notice of disputes.
- **Selection of Expert or Arbitrator:** The procedure for selection and appointment of the Expert/Arbitrator needs to be specified. This also involves a decision regarding the use of ad-hoc or institutional arbitration.
- **Language, Venue and Governing Law:** These additional details make the ADR process, especially arbitration, more stream-lined.
- **Confidentiality:** This provision is very important with respect to non-binding ADR processes since the effectiveness of the process (such as mediation) depends on the disclosure of information subject to **"without prejudice"** privilege.
- **Costs:** The Parties may want to ascertain how the costs of the ADR process shall be apportioned.

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