

English Courts Voice Strong ADR Support

BY CHRISTOPHER C. NEWMARK

This year the English High Court showed more of its enthusiasm for mediation and alternative dispute resolution. In 2002, the Court clarified the circumstances in which an English court will enforce an ADR clause.

Since the early 1990s, British courts have made it clear that they are, in principle, in favor of enforcing clauses that provide for alternative methods of resolving disputes in advance of arbitration or litigation.

A key example is the judgment of Lord Mustill in *Channel Tunnel Group Ltd. & Anor v. Balfour Beatty Construction Ltd. & Ors*, [1993] AC 334. The Court was concerned with the application for a stay of proceedings brought in the face of a contractual provision requiring disputes to be referred to a panel of experts and then, if necessary, to arbitration in Brussels.

Lord Mustill held that the Court had an inherent power to stay proceedings brought before it, "in breach of an agreement to decide disputes in some other way." He noted that where large commercial enterprises had agreed to a dispute resolution procedure, it was in the interests of the "orderly regulation of international commerce" for the Court to exercise its discretion and uphold the clause.

The *Channel Tunnel* case was decided under the Arbitration Act of 1975. A 1996 arbitration act gave legislative support to Lord Mustill's judgment by providing that a party's right to a stay of legal proceedings brought in the face of an arbitration agreement should not be affected by a provision that the dispute be referred to arbitration only after exhaustion of other dispute resolution procedures. Arbitration Act 1996, § 9(2). New civil procedure rules were introduced in 1998, and also reflected a policy of encouraging parties to settle disputes out of court.

The English courts' increasing support of ADR, however, conflicted with a preexisting common law principle that states that an agreement to negotiate will not be enforced because of a lack of certainty, and the practical and legal impossibility of monitoring and enforcing the process.

From the English courts' perspective, the

difficulty with clauses that provide that parties are to negotiate or mediate before referring their disputes to arbitration or litigation is that they commonly do not set out in express terms exactly what it is each party has to do in order to comply with the clause.

BINDING? OR A SUGGESTION?

The House of Lords confirmed this in *Walford & Ors v. Miles & Anor*, [1992] 1 All E.R. 453, when refusing to uphold an agreement to negotiate in good faith for an unspecified period. Lord Ackner explained that either party in this situation is entitled to withdraw from negotiations at any time and for any reason and that there can be "no obligation to continue to negotiate until there is a 'proper reason' to withdraw."

Similarly, in *Halifax Financial Services Ltd. v. Intuitive Systems Ltd.*, [1999] 1 All E.R. (Comm) 303, the Court refused to enforce a clause providing for the mere option of structured negotiations before commencement of litigation. Justice McKinnon stated that the relevant clause did no more than "make provision for the parties to negotiate, hopefully towards an agreement" and was not actually binding as to any method of determining a dispute.

Recently, in *Dunnett v. Railtrack plc*, [2002] 1 WLR 2434, (Feb. 22, 2002) the Court of Appeal reaffirmed its strong commitment to ADR by refusing to make the usual costs order in favor of the winning party, Railtrack, because it had refused an invitation to mediate. Lord Justice Brooke stated that "schooled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve."

A couple of months later, mediation supporters welcomed Justice Lightman's ruling in *Hurst v. Leeming*, [2002] CP Rep 59 (May 9, 2002). Lightman described ADR as being "at the heart of today's civil justice system." He noted that mediation often proves successful through producing a recognition of the strengths and weaknesses by each party of its own case and that of its opponent.

Although the court accepted that the defendant's refusal to mediate was reasonable, the hurdle the case established is high. In order to avoid possible sanctions for refusing

to mediate, it is now necessary to satisfy the court that the mediation had no real prospect of success.

In the more recent case of *Cable & Wireless plc v. IBM U.K. Ltd.* [2002] All E.R. (d) 277, [2002] EWHC 2059 (Comm) (Oct. 11, 2002) (available at www.bailii.org/ew/cases/EWHC/Comm/2002/2059.html), the Commercial Court confronted the problem of how to reconcile the general principle that only sufficiently clear and certain contractual provisions should be enforced with their pro-ADR stance, as evident in the *Dunnett* decision.

The court's pro-ADR policy took precedence and the result is a resounding victory for ADR.

In *Cable & Wireless*, Justice Colman stated:

"For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the Civil Procedure Rules and as reflected in the judgment of the Court of Appeal in *Dunnett v. Railtrack*."

The dispute concerned an agreement by IBM to supply information technology services to Cable & Wireless and, more specifically, the use of a benchmarking process by which IBM was to provide services and charges that were "equal to or better than that received by the top 10%" of other organizations receiving similar services.

The agreement contained an escalating dispute resolution clause requiring multistep ADR—providing first for negotiation, then ADR, then litigation. The ADR provision was in the following terms:

"If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. [See below.] However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings."

Cable & Wireless had commenced proceedings and did not want to go through an ADR procedure. IBM sought to enforce the

(continued on following page)

GLOBAL
ADR

Christopher C. Newmark is a partner in the Dispute Resolution Department at Baker & McKenzie's London office, and is a commercial mediator.

English Courts Voice Strong ADR Support

(continued from previous page)

clause and applied for a stay of the litigation to enable the ADR procedure to take place. The key question for the Commercial Court was whether the dispute resolution clause required the parties to go through an ADR procedure and, if so, whether the Court proceedings should be stayed or adjourned.

Colman held that the clause was enforceable and adjourned the proceedings. He reached his decision on three bases:

(i) that it was the parties' mutual intention that litigation should be treated as the last resort;

(ii) that the ADR clause went much further than a simple agreement to negotiate; and

(iii) that there were good public policy reasons for enforcing the clause.

As noted, the key factor in the decision undoubtedly was the public policy in support of ADR processes that facilitate early out-of-court settlements.

As to the mutual intention that litigation should be treated as a last resort, Colman dismissed the claimant's argument that the clause's last sentence, which referred to the possibility of the parties commencing proceedings where an ADR procedure was being followed, was inconsistent with the concept that the parties had a mutual intention that the reference to ADR should have binding effect. Not only was Colman satisfied that the ADR clause should be given binding effect, but he also was satisfied that

the Court should exercise its discretion to stay the proceedings to give time for the mediation to be conducted.

A NEW BENCHMARK

A significant factor in the Court's conclusion that this clause went beyond a simple agreement to negotiate was the clause's reference to the Centre for Effective Dispute Resolution, or CEDR, a leading U.K. provider of ADR services, and its procedures. Colman concluded that CEDR's mediation procedure provided sufficient clarity as to what the parties had to do and when the process would be over. Although he praised CEDR, he took care to state that his decision would have been the same without the reference to an institutional procedure—provided that "the obligation to mediate was expressed in unqualified and mandatory terms." This phrase now stands as the benchmark by which the enforceability of mediation clauses will be judged by the English courts.

Interestingly, the clause in question actually made no reference to mediation, but Colman appears to have taken the reference to ADR procedures recommended by CEDR to be a reference to CEDR mediation. This illustrates the tendency of the English courts to equate ADR with mediation.

CEDR could well have recommended a different ADR procedure in this case (such as nonbinding evaluation), but Colman worked on the assumption that the CEDR mediation procedure would apply. Given the

predominance of mediation, it is perhaps unsurprising that the justice took this approach, but perhaps it renders the judgment vulnerable to some technical criticism.

Clearly, this decision represents a huge endorsement of ADR. The use of public policy arguments to overcome problems of contractual certainty confirms just how strongly the English courts support ADR use. Dispute resolution clauses that parties may have drafted in the expectation that they would not create a binding obligation to engage in ADR may now be binding.

This case also brings into focus the potential for litigation about dispute resolution clauses. The idea of such clauses is to make dispute resolution more effective. But when they are too complex and are poorly drafted, they can have the opposite effect.

Each time there is litigation concerning one of these clauses, it is because one of the parties no longer considers it to be in their best interests to abide by the procedure that they had endorsed when entering the contract. For this reason, in most cases, parties will be better placed if they retain the option of choosing an appropriate ADR procedure when a dispute arises, rather than committing to use ADR from the outset. This can be achieved by providing that the parties will consider using ADR, but will not be required to do so.

Such clauses maximize flexibility and minimize the risk of unwanted litigation about the meaning of the dispute resolution clause itself. ■

ABOUT THE CPR INSTITUTE FOR DISPUTE RESOLUTION

ORGANIZED BY PROMINENT CORPORATE COUNSEL, THE CPR INSTITUTE FOR DISPUTE RESOLUTION has become a leader in developing uses of private alternatives to the costly litigation confronting major corporations and public entities. The membership of CPR, a nonprofit organization, consists of more than 500 large companies, leading U.S. law firms, academics and judges. See "Membership" at our Web site, www.cpradr.org.

TO ITS MEMBERS, CPR OFFERS EXTENSIVE BENEFITS AND SERVICES, including research access to CPR's unique ADR database; training and counseling; a complete library of ADR practice tools and model procedures; and semi-annual conferences.

WOULD YOU LIKE FURTHER INFORMATION ABOUT CPR?

See our Web site at www.cpradr.org or complete the following form:

Name: _____

Organization: _____

Title: _____

Address: _____

Telephone: _____

RETURN TO: Membership and Administration, CPR Institute for Dispute Resolution, 366 Madison Avenue, New York, NY 10017. Telephone: (212) 949-6490. Fax: (212) 949-8859. Internet: info@cpradr.org