

UIA WORLD MEDIATION FORUM FLORENCE, 2-3 OCTOBER 2009

How to draft appropriate ADR clauses into commercial contracts.

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(brief report)

I need to split two situations: the lawyer representing the client and the ADR Provider. Sometimes they have the same necessities, sometimes the views are different.

FROM THE POINT OF VIEW OF A LAWYER

1) It is important to consider that an appropriate and well-done ADR contract clause **MUST** firstly and above all preserve the value of the deal his/her client is going to start with the other party, and manage business relationships.

2) Secondly, it's important that the clause avoid (or at least try to do so) costly and risky experiences later (as, f. example. the breaches of the other possible contracts and/or business relationships linked directly or indirectly to that contract; costly tribunal proceedings; inoperative negotiations; ,,,).

3) Third: must try to manage and solve unknown contingencies (must say what happens if...).

4) A real check-list for drafting appropriate ADR clauses in a contract is fundamental and necessary.

5) Absolute No to “midnight clauses”. The lawyer would need to prepare and mutually agree with the client ADR clauses before insert them into a contract.

The more the clause is correct and exhaustive, the more will be useful to preserve the value of the deal in the future, when a dispute is arisen.

6) Some issues must be necessarily examined:

a) issues related to the nature of the clause: **SINGLE ADR CLAUSE** or **MULTI-STEP CLAUSE**?

b) Which kind of ADR clause? Only mediation? Mediation and after an “x” period Arbitration? Negotiation and after an “x” period Mediation and after an “y” period Arbitration? Mediation and after an “x” period Tribunal? And if there's the provision of an arbitration: which kind of arbitration (ritual, not ritual)? And in case of multi-step clause, the same professional as mediator and, eventually after, as arbitrator or different professionals?

c) Who administers the proceeding (a public/private ADR body or the rules are chosen directly by the parties and or the mediator)?

d) What rules are applicable?

e) Who choose the mediator and or the arbitrator (or the arbitral tribunal)?

f) Which power for the mediator (facilitative mediator or evaluative mediator)? Which power for arbitrator?

g) Which location?

h) Time limitation. Is there some limitation of time? Or are the parties free to try to negotiate/mediate till when they want?



- i) Confidentiality, and who can breach (if yes) that rule?
- l) Power to agree of the representatives.
- m) Form of the agreement (in negotiation or in mediation) and/or form of award (in arbitration)?
- n) For Italian ADR rules: will the agreement be binding under the Italian law or not?

In Italy usually, after a positive mediation the parties can have two writings: the one is the mediation record (verbale) and the second, is the new contract that the parties have negotiated to solve the dispute and to preserve their future relationship. Only the mediation record can be binding when the law provides so; never the contract between the parties.

But in some cases if the parties mutually agreed they can give up the enforceability of the record.

FROM THE POINT OF VIEW OF AN ADR PROVIDER

When we manage ADR proceedings we need to start to evaluate the ADR clauses inserted into a contract and presented us by one party who wants to start an ADR proceeding.

Usually the party who wants to start an ADR proceeding send us a formal request upon our forms and, sometimes, adds to this request many documents, among which the contract which includes the ADR clause.

We have collected and seen in plus than 10 years of activity many unusable different clauses coming from different parties and with different style of drafting.

Some of them (don't smile please) are really ridiculous:

“Every dispute which may arise under this contract will be managed with an attempt of mediation or with an arbitration proceeding. At the moment of the dispute the parties decide which proceeding will be chosen and which rules will be used”.

“Every dispute arising under this contract will be directly decided by a mediator during a mediation procedure lasting at maximum 40 days. The mediator will not have the power to decide anything and to address the parties to one decision. He will only facilitate the process”.

What we would like to find are well-done ADR clauses which almost provide for everything and so we hope to find this main characteristics:

- 1) workable, clear and transparent ADR clause;
- 2) indication of what the parties want to reach with the ADR clause;
- 3) a clause linked to a certain period of time is preferable;
- 4) Identification of who will be the negotiating parties during the future ADR procedures;
- 5) Decision about the multi-step nature or not of the clause;
- 6) The power of the professional involved;
- 7) The obligation of the parties to accept the use of our “Mediation Rules”.