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ADR Clause by Any Other Name Might Smell as Sweet: England's High Court of Justice Queens Bench Attempts and Fails to Define What Is Not an Enforceable ADR Clause - Cable 7 & (and) Wireless Plc v. IBM United Kingdom Ltd, An

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NOTES

An ADR Clause by Any Other Name Might Smell as Sweet: England's High Court of Justice Queens Bench Attempts and Fails to Define What is Not an Enforceable ADR Clause

Cable & Wireless Plc v. IBM United Kingdom Ltd.[1]

I. INTRODUCTION

The High Court of Justice Queens Bench Division in England issued a ruling that provides sweeping support for the use of Alternative Dispute Resolution (ADR) in private pre-dispute contract clauses.[2] While this support might seem to aid in developing the growing ADR movement in England, the judge may have put the cart before the horse by enforcing a non-descript and broad ADR contract clause that lacks the specificity needed to ensure a fair outcome. This decision could be detrimental for disputing parties and the future of the ADR movement itself.

II. FACTS AND HOLDING

On December 20, 2000, IBM[3] entered into a twelve-year Global Frameworking Agreement (GFA) with Cable & Wireless (C&W)[4] to provide C&W with information technology services.[5] The agreement set forth terms for recurring comparison analyses of IBM's services and charges with the services and charges of other like competitors to ensure competitiveness.[6] If the results of the analyses demonstrated a discrepancy in services provided by IBM as compared to those provided by like competitors, the GFA required IBM to initiate a plan of correc-

1. [2002] 2 All E.R. 1041 (Q.B. 2002); 2002 WL 31442553.

2. *See id.*

3. IBM develops and manufactures information technologies including computer systems, software, networking systems, storage devices, and microelectronics. IBM – United Kingdom, *About IBM*, *at* http://www.ibm.com/ibm/uk/ (last visited Oct. 20, 2003).

4. Cable & Wireless is a global telecommunications business providing high performance Internet platforms and data services. Cable & Wireless UK, *About Us*, *at* http://www.cw.com/about_us/index.html (last visited Oct. 20, 2003).

5. *C&W*, 2002 WL 31442553 at *1.

6. *Id.* at *2. The terms of the analyses are laid out in Schedule 10 of the GFA through a process known as "the benchmarking process." *Id.*

tive action meeting with C&W's approval.[7] If disputes arose as a result of these analyses, the proposed corrective plans of action, or any other aspect of the contract, the parties agreed to follow an accelerated ADR clause. Under the ADR clause, the parties first agreed to engage in good faith negotiations.[8] If these negotiations failed, then the parties were required to attempt resolution through an unspecified ADR process.[9]

On February 28, 2002, a third party company, Compass Management Consulting, commenced the first analysis of IBM services.[10] This resulted in a report showing that IBM's charges exceeded those of like competitors.[11] IBM denounced the validity of the analysis and refused to initiate corrective plans of action.[12] C&W thereafter brought a claim against IBM requesting compensation for the disparity between prices charged by IBM and their like competitors.[13] IBM counterclaimed asserting the analysis was fundamentally flawed and invalid,[14] and furthermore, that the court should stay the proceedings to allow the parties a chance to attempt resolution through an ADR process as required by the GFA.[15] The court chose to address the application for stay first, reasoning that any decision regarding the substantive issues claimed by both parties would be moot if the parties successfully resolved the issues through ADR.[16]

C&W asserted four theories for denying IBM's stay request. First, C&W claimed that the court should not enforce the ADR clause because the clause was analogous to an agreement to negotiate,[17] an unenforceable provision in English courts.[18] Second, C&W argued that the ADR clause was not binding because it allowed the Parties to initiate court proceedings before exhausting the ADR provisions.[19] Third, C&W reasoned that IBM should not have the opportunity to request a stay because it had not requested ADR before itself initiated the court

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7. *Id.* This is known as the "Benchmark Plan" and is laid out in paragraph 4 of Schedule 10 of the GFA. *Id.*

8. *Id.* at *3-4. The good faith negotiation clause is laid out in clause 41.1 of the GFA and states, "The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement . . . promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40." *Id.*

9. *Id.* at *4. The ADR clause is laid out in clause 41.2 of the GFA and states:

> 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. However, an ADR procedure which is being followed shall not prevent any Party . . . from issuing proceedings. *Id.*

10. *Id.* at *3.

11. *Id.*

12. *Id.*

13. *Id.* C&W claimed IBM owed it £ 31.5 million to £ 45 million according to C&W's reading of the GFA. *Id.*

14. *Id.*

15. *Id.* at *1.

16. *Id.* at *1.

17. *Id.* at *4.

18. *Id.* at *5. Under English law, courts cannot enforce a good faith negotiation clause due to its lack of certainty. Courtney & Fairbairn Ltd. v. Tolaini Bro. (Hotels) Ltd., [1975] 1 W.L.R. 297 (C.A. 1974); 1975 WL 41086. "If the law does not [recognize] a contract to enter into a contract . . . it seems to me it cannot [recognize] a contract to negotiate." *Id.*

19. *Id.* at *5. The pertinent part of the ADR clause states, "However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings." *Id.* at *4.

proceeding.[20] And fourth, C&W stated that IBM waited too long to bring forward the request.[21] IBM defended its request for a stay by asserting that the ADR clause resembled an arbitration clause, which unlike a good faith negotiation clause, is enforceable.[22]

The High Court of Justice Queens Bench Division in England ruled that the ADR clause was precise, clear, and enforceable, and therefore stayed the proceedings for referral of the dispute to ADR.[23] The court explained that to hold otherwise would undermine the general public policy of supporting contractual references to ADR.[24]

III. LEGAL BACKGROUND

A. Enforcement of ADR Clauses in England

Over the centuries, enforcement of ADR clauses in England has slowly progressed. During the eighteenth century, English courts did not look favorably upon private agreements to arbitrate disputes, reasoning that the court would otherwise lose rightful jurisdiction over the disputes.[25] England's parliament responded to this cynicism by passing the Arbitration Act of 1698, authorizing judicial enforcement of arbitration agreements, and providing the necessary authority to force courts to do so.[26] A number of other arbitration acts have passed since, developing a base for the enforcement of private arbitration agreements.[27] Under these numerous arbitration acts,[28] private agreements between parties to arbitrate disputes are now routinely enforced by the courts of England.[29]

Arbitration is but one form of ADR.[30] However, in the last ten years, English courts have enforced a variety of other ADR processes based on case law relating solely to the enforcement of arbitration clauses.[31] These decisions have shown an attempt by the courts to promote the growing use and support of ADR by using

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20. *Id.* at *5.
21. *Id.*
22. *Id.* at *8.
23. *Id.* at *8-9.
24. *Id.* at *7.
25. Richard Reuben, *Public Justice: Toward A State Action Theory of Alternative Dispute Resolution*, 85 CAL. L.REV. 577, 599-601 (1997), *citing* Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746).
26. *Id.* For a discussion of a similar change of heart in the United States, see *infra* Part III.B.
27. *See* Arbitration Act 1996, c. 23 (Eng.) (repealing and replacing half of the 1950 Arbitration Act), Arbitration Act 1950, 14 Geo. 4, c. 23 (Eng.) (consolidating previous Arbitration Acts, including, but not limited to the Arbitration Act 1889, Arbitration Clauses (Protocol) Act 1924 and the Arbitration Act 1934).
28. *See* Arbitration Act 1950, 14 Geo. 4, c. 23 (Eng.); Arbitration Act 1975, c. 3 (Eng.) (addressing the specific use of international arbitration agreements); Arbitration Act 1979, c. 42 (Eng.) (addressing the specific area of judicial review of arbitration awards and opinions).
29. *See* Smith, Coney and Barrett v. Becker, Gray & Co., [1916] 2 Ch. 86 (C.A. 1915), 1915 WL 18791; W. Bruce, Ltd. v. J. Strong, [1951] 2 K.B. 447 (K.B. 1951), 1951 WL 11839.
30. ADR encompasses a large variety of processes including mediation, negotiation, early neutral evaluation, mini-trials, and arbitration. *See* THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE (Bette J. Roth et al. eds., 1993).
31. *See* Halifax Fin. Serv. Ltd., v. Intuitive Sys. Ltd., [1999] 1 All E.R 303 (Q.B. 1998), 1998 WL 1042283; Cott UK Ltd. v. Barber Ltd., [1997] 3 All E.R. 540 (Q.B. 1997), 1997 WL 1105628; Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd., [1993] A.C. 334 (H.L. 1993), 1993 WL 965536.

and expanding the definition of an arbitration agreement[32] to include other ADR processes as opposed to creating unique and definitive precedents for each process found under the broader, all-encompassing phrase ADR.

In the 1993 case, *Channel Tunnel*, the House of Lords expanded the definition of an arbitration agreement to include a "dispute resolution agreement which is *nearly* an immediately effective agreement to arbitrate, albeit not quite."[33] The court enforced a contract clause that required the parties to go before a panel of experts for a non-binding determination before proceeding to arbitration.[34] Three years later, in 1996, partly in reaction to the *Channel Tunnel* decision, Parliament passed a new arbitration act.[35] They amended the definition of "arbitration agreement,"[36] but did not differentiate arbitration from any other ADR proceeding by describing ground rules, powers of arbitrators, or any other logistics.

During this time, England was in the midst of examining its civil justice system by looking for ways to improve access to justice.[37] Under the direction of Lord Woolf, a committee identified a number of specific obstacles to justice faced by parties.[38] The committee published two reports known as the Woolf Reports,[39] which encouraged the use of ADR by parties.[40] Although the reports call on courts to encourage the use of ADR by parties, they caution against compelling parties to use ADR.[41] The final Woolf Report was encapsulated and adopted as part of the new Civil Procedure Act of 1997.[42]

One year later, in 1997, in *Cott UK*, a party attempted to use the broader definition of arbitration from *Channel Tunnel* to request a stay in the proceeding and enforce a private dispute resolution agreement requiring the parties to refer their dispute to an expert determination proceeding.[43] The court affirmatively stated that "even where there is no arbitration clause, in the light of . . . [*Channel Tunnel*]

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32. The statutory definition of an arbitration agreement states, "[A]n agreement to submit to arbitrations present or future disputes (whether contractual or not)." Arbitration Act 1996, c. 23 § 6(1) (Eng.).

33. *Channel Tunnel*, [1993] A.C. at 352 (*emphasis added*). The Court applied concepts from the Arbitration Act 1975 dealing with jurisdiction of international arbitration agreements to the Arbitration Act 1950 saying, "[i]f it is appropriate to enforce a foreign jurisdiction clause under the general powers of the court by analogy with the discretionary power under what is now [section] 4(1) of the 1950 Act to enforce an arbitration clause by means of a stay, it must surely be legitimate to use the same powers to enforce a dispute resolution agreement which is nearly an immediately effective agreement to arbitrate, albeit not quite." *Id.*

34. *Id.* at 353 (citing to the careful drafting executed by the parties when creating the two-tiered agreement).

35. Arbitration Act 1996, c. 23 (Eng.); Christopher Newmark, *In Praise of ADR*, 2002 NEW L.J. 1896.

36. Arbitration Act 1996. c. 23 § 6(1) (Eng.) ("In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).").

37. Dr. Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT'L ARB. 167, 173-81 (2001).

38. *Id.* at 178.

39. Lord Woolf, *Access to Justice-Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (June 1995), *at* http://www.lcd.gov.uk/civil/interfr.htm (last visited Oct. 20, 2003); Lord Woolf, *Access to Justice-Final Report* (July 1996), *at* http://www.lcd.gov.uk/civil/final/contents.htm (last visited Oct. 20, 2003).

40. *Access to Justice-Final Report*, *supra* note 39, at Chapter 5, ¶18.

41. *Id.*

42. Civ. P. R., 1998 (Eng.); Mistelis, *supra* note 37, at 179.

43. Cott UK Ltd. v. Barber Ltd., [1997] 3 All E.R. 540, 548 (Q.B. 1997), 1997 WL 1105628.

case, and in the light of the changing attitudes of our legal system, the court plainly has jurisdiction to stay under its inherent jurisdiction, where the parties have chosen some alternative means of dispute resolution."[44] Despite this firm attitude, the clause was not enforced.[45] The court in *Cott UK* imposed a higher standard than *Channel Tunnel*, requiring that the parties address a number of issues regarding the logistics of the expert determination proceedings (such as length or availability of evidence production and submission to the expert). Because the parties in *Cott UK* had failed to specify logistical issues, the Court refused to stay proceedings.[46] Thus the *Cott UK* court helped clarify the *Channel Tunnel* standard for enforcing ADR clauses by ensuring that only ADR clauses with a bare minimum of specified logistics would be enforced.

In 1999, with the Civil Procedure Rule of 1998 in place and the prior court decisions clarifying the scope of enforceable ADR clauses, a party asked the court to enforce an escalating ADR clause requiring the parties to first attempt settlement by negotiation in good faith, and if those negotiations failed to submit the dispute to mediation, and if the mediation failed to arbitrate the claim.[47] In *Halifax Financial Services Limited v. Intuitive Systems Limited*, the defendant attempted to apply the broad definition from *Channel Tunnel* as well as dicta in *Cott UK* to say that the escalating ADR clause was "nearly an immediately effective agreement to arbitrate,"[48] the kind that courts can enforce.[49] The court in *Halifax* did not agree.[50] The court stated that *Channel Tunnel* only refers to determinative procedures, differentiating determinative procedures from the non-determinative procedures found in *Halifax*.[51] The judge differentiated between these procedures by saying that determinative procedures provide a final and conclusive resolution by a third party and include such procedures as arbitration, binding expert valuation and third party certification.[52] Negotiation, mediation, expert appraisal and non-binding rulings fall in the category of non-determinative procedures that merely assist parties in resolving their own dispute but provide "no obligation to resolve the dispute in this way."[53] The court further stated that to enforce such clauses would be futile when the parties had previously failed at negotiating the matter, as was the case there.[54] The judicial standard for enforcing ADR clauses had grown to require *determinative* ADR clauses that specified a bare minimum of process logistics.

Based on the above cases, judicial support for the use of ADR proceedings seems strong. Although courts have not enforced agreements to mediate, courts have required other remedies demonstrating the public policy of supporting ADR

44. *Id.*
45. *Id.*
46. *Id.*
47. Halifax Fin. Serv. Ltd., v. Intuitive Sys. Ltd., [1999] 1 All E.R 303 (Q.B. 1998), 1998 WL 1042283, *2.
48. *Id.* at *6 (citing Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd., [1993] A.C. 334 , 353 (H.L. 1993), 1993 WL 965536.
49. *Id.*
50. *Id.*
51. *Id.* at *7.
52. *Id.*
53. *Id.*
54. *Id.* at *8.

clauses. Prior to the Woolf Reports, in 1996, Lord Woolf heard *Frank Cowl & Ors v. Plymouth City Council*, and called on courts to support the use of ADR whenever appropriate to minimize the involvement of the courts.[55] In his opinion, Lord Woolf scolded the complainants for not proceeding with an established "complaints procedure" outside the court system.[56] In dicta, the judge stated, "[C]ourts should not permit . . . proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process."[57]

Three months later, the Court of Appeals similarly reprimanded a defendant who, although he had rightfully requested an award of attorney's fees, was refused the award of costs because the defendant had refused to accept an offer to mediate prior to trial.[58] Even though the court agreed with the defendant in the case and dismissed the claim, the court 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."[59] Furthering this support of mediation, even when faced with the possibility of no settlement, the High Court of Justice Chancery Division noted that mediation can still assist parties on the path to resolution when the parties assess the strengths and weaknesses of their case during mediation.[60]

The public policy asserted now by judges characterizes the growing support for ADR in England.

B. Enforcement of ADR clauses in the United States

1. Binding Processes

A similar pattern of growing support for ADR exists in the United States. Since 1925, American courts have enforced arbitration clauses under the Federal Arbitration Act (FAA)[61] and its state counterparts.[62] Prior to the FAA, courts

55. Frank Cowl & Ors v. Plymouth City Council, [2002] 1 W.L.R. 803 (C.A. 2001), 2001 WL 1535414.

56. *Id.*

57. *Id.*

58. Dunnett v. Railtrack Plc, [2002] 1 W.L.R. 2434 (C.A. 2002), 2002 WL 45445.

59. *Id. But see* Societ Internationale de Telecommunications Aeronautiques S.C. v. The Wyatt Co. (UK), [2002] E.W.H.C. 2401 (Ch. 2002), 2002 WL 31599703 (holding that where refusal to mediate is reasonable, attorney's costs will still be awarded).

60. Hurst v. Leeming, [2003] 1 Lloyd's Rep. 379 (Ch. 2002), 2002 WL 1039525 (holding however that when faced with no real prospect of success, a party may refuse to proceed only in the face of high risk of severe penalization).

61. 9 U.S.C. § 2 (2000). Section 2 of the FAA provides for enforcement of arbitration agreements stating:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. *Id.*

62. *See* ARK. CODE ANN. § 16-108-212(a) (1987); COLO. REV. STAT. § 13-22-202 (1999); LA. REV. STAT. ANN. § 9:4202 (2000); MASS. GEN. LAWS ch. 251, §§ 1 - 19 (2000); MINN. STAT. § 572.19 (1998); N.C. GEN. STAT. §§ 1-567.1 - 20 (1999); TENN. CODE ANN. § 29-5-303(d) (2000). State

confined enforcement of arbitration clauses ostensibly in deference to contract law.[63] American courts parroted the English practice of not enforcing arbitration clauses. Thus, Congress passed the FAA to "overcome judicial reluctance to allow arbitration, rooted in an antiquated unwillingness to cede power to other decision-making tribunals."[64] For half a century, the U.S. Supreme Court remained reluctant, refusing to enforce arbitration clauses found in contracts dealing with certain substantive law areas. For example, in 1956, the Supreme Court held in *Wilko v. Swan* that pre-dispute agreements to arbitrate would not be enforced when the underlying issue dealt with statutory issues unique to the Securities Exchange Act.[65] The Court at that time invalidated the parties' agreement to arbitrate, holding that their right to a trial under the Securities Exchange Act is more important than their right to an "economical and adequate solution . . . through arbitration."[66]

In 1987, the Supreme Court issued an opinion in the case *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, decisively abandoning the previous attitude towards arbitration agreements by enforcing an arbitration agreement without concern for the statutory basis of the claim.[67] The Court now places responsibility on Congress to set forth guidelines as to when arbitration clauses should and should not be enforced.[68] Without such congressional waivers, the Court presumes the arbitrability of the clause.[69] Thirty-four years after *Wilko*, the Supreme Court ruled that arbitration agreements are merely choice of forum clauses, rather

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legislatures derive these statutes from the Uniform Arbitration Act. For extensive information about the development of the Uniform Arbitration Act, see *Recent Developments: The Uniform Arbitration Act*, 1988 J. DISP. RESOL. 247; *Recent Developments: The Uniform Arbitration Act*, 1989 J. DISP. RESOL. 237; *Recent Developments: The Uniform Arbitration Act*, 1990 J. DISP. RESOL. 471; *Recent Developments: The Uniform Arbitration Act*, 1991 J. DISP. RESOL. 417; *Recent Developments: The Uniform Arbitration Act*, 1992 J. DISP. RESOL. 411; *Recent Developments: The Uniform Arbitration Act*, 1993 J. DISP. RESOL. 397; *Recent Developments: The Uniform Arbitration Act*, 1994 J. DISP. RESOL. 311; *Recent Developments: The Uniform Arbitration Act*, 1995 J. DISP. RESOL. 389; *Recent Developments: The Uniform Arbitration Act*, 1996 J. DISP. RESOL. 477; *Recent Developments: The Uniform Arbitration Act*, 1997 J. DISP. RESOL. 281; *Recent Developments: The Uniform Arbitration Act*, 1998 J. DISP. RESOL. 233; *Recent Developments: The Uniform Arbitration Act*, 1999 J. DISP. RESOL. 219; *Recent Developments: The Uniform Arbitration Act*, 2000 J. DISP. RESOL. 459; *Recent Developments: The Uniform Arbitration Act*, 2001 J. DISP. RESOL. 387; *Recent Developments: The Uniform Arbitration Act*, 2002 J. DISP. RESOL. 469. However, in 1984, the Supreme Court ruled that Congress has "declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve be arbitration," therefore stating that the FAA preempts state law. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

63. Although courts can still enforce arbitration clauses under the general theory of contract law, the FAA was enacted to encourage reluctant courts to enforce private arbitration agreements. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

64. Westbrook Int'l, LLC v. Westbrook Tech., Inc., 17 F. Supp. 2d 681, 683 (E.D. Mich. 1998) (citing Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 932 (6th Cir. 1998)).

65. Wilko v. Swan, 346 U.S. 427, 430-38 (1953).

66. *Id.* at 438.

67. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (finding "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.").

68. *Id.* at 627.

69. *Id.* at 628.

than waivers of substantive rights, expressly overruling its previous decision in *Wilko*.[70]

In a series of cases over the last twenty years, the Supreme Court has enunciated its shift in attitude from apprehensive to outright favored status of arbitration.[71] In 1983, Justice Brennan wrote for the Supreme Court:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[72]

Although the precedent is clearly set for enforcing arbitration clauses, courts differ on exactly what an arbitration clause entails. Judge Posner constructed a broad definition of arbitration when he amusingly stated that "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes."[73] Although the FAA does not explicitly state what arbitration is, it does call for a process that "settle[s]" disputes,[74] which most commentators have read to imply the requirement of final and binding determination, excluding other non-binding ADR processes.[75]

2. *Non-Binding Processes*

The scope of the FAA has become so broad that other types of ADR processes have been enforced by analogy to arbitration despite others' call for the need of a binding element.[76] *AMF Inc. v. Brunswick Corp.* provides an example.[77] In

70. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

71. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

72. *Moses H. Cone*, 460 U.S. at 24-25. This favoritism has come with a lot of criticism questioning the extent courts enforce arbitration at the expense of certain rights including the right to a class action suit. *See, e.g.*, Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (questioning the Court's favoritism as a "myth that commercial arbitration served a substantial public purpose and should be favored regardless of the parties' intentions." *Id.* at 660.) [hereinafter Sternlight, *Panacea or Corporate Tool?*].

73. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

74. 9 U.S.C. § 2 (2000) (directing courts to enforce written agreements "to *settle* by arbitration") (emphasis added).

75. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.4, cmt. 5 (2002) (emphasizing the finality of arbitration as a distinguishing factor from other dispute resolution techniques); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 7 (1992) (describing arbitration awards as "binding" and akin to judgments); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 126, 178-89 (2002) (clearly stating that the arbitration's finality differentiates itself from other processes but questioning courts' naming of arbitration clauses as such when providing for expanded judicial review of the arbitration award or agreement); Wesley A. Sturges, *Arbitration – What Is It?*, 35 N.Y.U. L. REV. 1031, 1032 (1960) (describing arbitration as a conclusive process).

76. *Supra* note 75 and accompanying text.

77. 621 F. Supp. 456 (S.D.N.Y. 1985).

Brunswick the parties had agreed to submit disputes to a third party for an advisory opinion.[78] The court applied Section 2 of the FAA, defining arbitration loosely enough to include any submission of a dispute to a third party because, "viewed in light of reasonable commercial expectations," the non-binding process would settle the case.[79] Another district court extended this analysis by saying the FAA conceptually embraces *all* alternative means of dispute resolution, including mediation.[80]

The Third Circuit, however, refused to treat mediation clauses as arbitration clauses, reasoning that the specific statute governing the claim probably did not contemplate the enforcement of such a non-binding clause.[81] Additionally, a New York court has addressed this issue saying that parties who want a court to enforce such a non-binding procedure must be clear, explicit, and unequivocal in its language.[82] Therefore, in the United States it is unclear what type of ADR clauses courts will enforce and what must be included in a clause to ensure its enforceability.

IV. INSTANT DECISION

In *Cable & Wireless Plc v. IMB U.K. Ltd.*,[83] the High Court of Justice Queens Bench Division[84] had to decide whether to enforce an ADR clause found in the parties' Global Frameworking Agreement (GFA).[85] Although the parties brought two separate claims before the court, the court stated that the application for a stay in the proceedings in favor of enforcing the ADR clause must be decided first, as the other claim becomes moot upon granting a stay.[86]

The court began its investigation by addressing C&W's assertion that the contract language allowing parties' to initiate court proceedings whilst pursuing alternative procedural options demonstrates the parties' desire to pursue any and all legal options.[87] The court used a narrower reading of the language. Because the parties implemented an escalating ADR clause, the court inferred that there was a "mutual intention that litigation was to be resorted to as a last resort."[88] The court did not ignore the fact that the clause clearly states the possibility of both court

78. *Id.* at 459. One practice guide provides a definition for "advisory arbitration," clearly stating that it is non-binding. *See* EDWARD A. DAVER, MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE (1996).

79. Brunswik, 621 F. Supp. at 461. *See also* Wolsey Ltd. v. Foodmaker Inc., 144 F.3d 1205 (9th Cir. 1998) (enforcing a non-binding arbitration provision in a restaurant franchise agreement under the FAA); Russell County Sch. Bd. v. Conseco Life Ins. Co., 2001 WL 1593233 (W.D. Va. 2001) (enforcing a non-binding arbitration clause under the FAA); Cecala v. Moore, 982 F. Supp. 609 (N.D. Ill. 1997) (granting a stay in favor of contractual mediation clause based on the Illinois Uniform Arbitration Act).

80. Allied Sanitation Inc. v. Waste Mgmt. Holdings Inc., 97 F. Supp. 2d 320 (E.D.N.Y. 2000).

81. Harrison v. Nissan Motor Corp., 111 F.3d 343 (3d Cir. 1997).

82. Gen. Ry. Signal Corp. v. L.K. Comstock & Co., 678 N.Y.S.2d 208 (N.Y. App. Div. 1998).

83. [2002] 2 All E.R. 1041, 2002 WL 31442553.

84. The High Court of Justice Queens Bench Division is somewhat parallel to the district court level in the United States Federal Government. However, cases heard by the High Court can appeal directly to the House of Lords, England's highest court.

85. *C&W*, 2002 WL 31442553 at *1.

86. *Id.*

87. *Id.* at *5.

88. *Id.*

proceedings and ADR processes running simultaneously.[89] Instead, the court interpreted this language to allow "injunctive or other preservative or interim relief in cases so urgent that they cannot await the outcome of the various stages of negotiation."[90] By using this narrow interpretation, the court dismissed C&W's argument against a stay in the proceeding.[91]

Next, the court looked at the words of the escalating ADR clause to determine if the clause more closely resembled a negotiation clause, as posited by the plaintiff, or an arbitration clause, as argued by the defendant.[92] The court reasoned that, because the clause specified a process, in that it detailed the procedure for choosing a process, it was more focused and detailed than a simple good faith negotiation clause and therefore akin to an arbitration clause.[93] This "process choosing" portion of the clause specified an organization, the Centre for Effective Dispute Resolution (CEDR),[94] to recommend a process for the parties. The court placed a lot of faith in this portion of the clause because CEDR has developed model mediation procedures, standardizing the "terms upon which the parties may proceed" and therefore represented concrete standards a court could enforce.[95]

The court stated that the plaintiff's attempt to analogize the ADR clause to a negotiation clause simply did not apply to this situation. Historically, courts do not enforce negotiation clauses because of "insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision."[96] The court then focused on the ability to determine party compliance with the contract and therefore differentiated between a mere negotiation clause and this clause by focusing on the ability to discern party compliance by its ability to follow and abide by CEDR's hypothetical recommendation.[97]

The court expanded this rule by encouraging enforcement of ADR clauses *absent* detailed procedures.[98] Responding to future attempts to analogize ADR clauses to negotiation clauses, this court said ambiguous ADR clauses are still enforceable because "a sufficiently certain and definable minimum duty of participation should not be hard to find."[99]

The court recognized the delicacy of this distinction, but called on courts to become better acquainted with the more established ADR movement in England.[100] Judge Colman cited to four indicia of established practice: "[1] well-developed process, [2] sophisticated mediation techniques, [3] trained mediators,

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at *6.
94. Both the ADR clause and Court refer to the ADR provider as the Centre for Dispute Resolution, however, the center's website clearly demarcates itself as the Centre for *Effective* Dispute Resolution. *See* http://www.cedr.co.uk.org (*emphasis added*) (last visited Oct. 15, 2003).
95. *C&W*, 2002 WL 31442553 at *8.
96. *Id.* at *6-7.
97. *Id.* at *7. "[I]f one party simply fails to co-operate in the appointment of a mediator in accordance with CEDR's model procedure or to send documents to such mediator as is appointed or to attend upon the mediator when he has called for a first meeting, there will clearly be an ascertainable breach of the agreement." *Id.*
98. *Id.* at *8.
99. *Id.*
100. *Id.* at *7.

and [4] procedures designed to achieve settlement."[101] The court then highlighted public policy supporting enforcement and generalized support for ADR. Eight months earlier, Lord Justice Brooke, in *Dunnet v. Railtrack*, included lengthy passages of stories of mediation success "beyond the power of lawyers and courts."[102] The court pointed to the Civil Procedure Rule 1.4, which requires judges to engage in active case management by "encouraging the parties to use an alternative dispute resolution procedure,"[103] and other English court precedent showing strong support for ADR.[104] Furthermore, the court felt public policy demanded the enforcement of the ADR clause.[105]

Because it found that the parties had identified a specific procedure for detailing an ADR process within which they would engage, and public policy beckons judges to encourage the use of ADR, the court enforced the GFA between IBM and C&W and granted a stay of the proceedings.[106]

V. COMMENT

A number of English authors hail the *C&W* decision as decisive support and encouragement for ADR in England. David Miles, a solicitor with Glovers Solicitors, London,[107] cites to *C&W* as a "ringing endorsement" of ADR in contract clauses.[108] Likewise, CEDR published an article calling the *C&W* decision "the latest piece of evidence to demonstrate the courts' firm commitment to mediation."[109] One author even salutes the *C&W* decision for resolving "a tension that has existed . . . [in] the English courts . . . since the early 1990s, [making] it clear that they are, in principle, in [favor] of the enforcement of clauses which provide for alternative methods of resolving disputes in advance of arbitration or litigation."[110] If, as these authors indicate, then the *C&W* decision shows great support for ADR, the question becomes, ADR at what cost?

A. Overconfidence of the Court

If the court attempted to show support of and acceptance of ADR by enforcing the *C&W* ADR clause, then it did so by going outside the scope of case law precedent. Based on *Channel Tunnel*,[111] *Cott UK*,[112] and *Halifax*,[113] one would

101. *Id.*
102. *Id., quoting* Dunnett v. Railtrack Plc, [2002] 1 W.L.R. 2434, 2436-37 (C.A. 2002), 2002 WL 45445 at*3.
103. Civ. P. R. 1.4, 1998 (Eng.).
104. *C&W*, 2002 WL 31442553 at *7-8.
105. *Id.* at *7.
106. *Id.*
107. *See* Glovers Solicitors, *Alternative Dispute Resolution, at* http://www.glovers.co.uk (last visited Oct. 9, 2003).
108. David Miles, *News Updates, Courts Endorse ADR and Mediation – January 2003, at* http://www.glovers.co.uk/news.arch.asp (last visited Oct. 14, 2003).
109. Ctr. for Effective Disp. Resol., *Cable & Wireless v. IBM: Court Enforces Contractual Commitment to Mediate, at* http://www.cedr.co.uk/index.php?location=/news/archive/20021017.htm (last visited Oct. 9, 2003).
110. Newmark, *supra* note 35.
111. Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd., [1993] A.C. 334 (H.L. 1993), 1993 WL 965536.

not expect the court to enforce the broad ADR clause drafted in *C&W*. The clause itself did not provide specifics of any kind about the logistics of the ADR procedure. Whether the process would be binding or non-binding, or whether a panel of neutrals or a single neutral would preside over the process was not even discussed.[114] By failing to provide even a bare minimum of specified logistics, this clause fails the test set forth in *Cott*. Furthermore, *Halifax* requires that the procedure be a determinative proceeding. This clause fails to even mention a specific process by which a judge could ascertain the determinative element of the process. Therefore, it fails to meet the *Halifax* test as well. Although restricted by later opinions, *Channel Tunnel* allows the *C&W* court the greatest latitude by way of its expansive standard of enforceability. *Channel Tunnel* requires only that the ADR clause include a "dispute resolution agreement which is *nearly* an immediate effective agreement to arbitrate, albeit not quite."[115] Still, under this expansive standard, the *C&W* ADR clause should fail because in *Channel Tunnel* the parties at least defined a process by which the judge could enforce participation. In *C&W* the parties merely agreed to a preliminary process by which a dispute resolution process would be picked.

In *C&W*, the judge enforced the ADR clause in an overzealous attempt to encourage the use of ADR in a manner intimated by the Civil Procedure Rules. The judge held too much confidence in, and placed too much responsibility on, the reputation of the CEDR.[116] Although the Civil Procedure Rules explicitly encourage the use of ADR,[117] the Rule defines this as a discretionary measure.[118] The judge presumed that the CEDR would recommend mediation for the parties if he enforced the clause. However, CEDR offers a variety of ADR services ranging from arbitration to mediation.[119] The judge based his assumption on the fact that CEDR has published a list of well known model mediation rules.[120] If the *C&W* ADR clause had in fact contemplated or required the specific use of mediation in addition to requiring the use of a CEDR trained and certified mediator, why did it not say so?[121] The drafters of the *C&W* ADR clause need not have looked far for suggested model language to clarify their ADR clause. CEDR has a set of model contract language readily available for attorneys specifying suggested procedures

112. Cott UK Ltd. v. Barber Ltd., [1997] 3 All E.R. 540 (Q.B. 1997), 1997 WL 1105628.

113. Halifax Fin. Serv. Ltd. v. Intuitive Sys. Ltd., [1999] 1 All E.R. 303 (Q.B. 1998), 1998 WL 1042283.

114. *C&W*, 2002 WL 31442553 at *2.

115. *Channel Tunnel*, [1993] A.C. at 352.

116. *C&W*, 2002 WL 31442552 at *6.

117. Civ. P. R. 1.4(e), 1998 (Eng.) (urging courts to "[encourage] the parties to use an alternative dispute resolution procedure").

118. *Id.* (stating that ADR procedures should be encouraged "if the court considers that appropriate and facilitat[es] the use of such procedure").

119. CEDR offers a "range of professional dispute resolution, training and consultancy solutions using the foremost practitioners in the field." Ctr. For Effective Disp. Resol., *What is CEDR?*, *at* http://www.cedr.co.uk/index.php?location=/about/default.htm (last visited Oct. 14, 2003).

120. *C&W*, 2002 WL 31442553 at *6. CEDR published an 8th Edition of these rules in October 2002. *See Model Mediation Procedure and Agreement.* (8th ed. 2002), *at* http://www.cedr.co.uk/library/documents/MMPA_8thEdition.pdf (last visited Oct. 19, 2003).

121. *See supra* Part II.

and rules.[122] It seems the drafters simply failed to consult this readily available source.

More troubling, the parties risk CEDR going out of business at some point during the twelve-year term of the contract. A court may find it difficult to enforce an ADR clause when the organization assigned to recommend the ADR procedure is no longer available. This is especially true when the court has limited enforceability of the clause based on the reputation of the service provider.

B. General Implications of the Decision

The United States has experienced a boom in the use of pre-dispute ADR contract clauses fueled by the certainty that nearly all types of clauses will be enforced by the court.[123] However, courts have enforced or disregarded virtually identical ADR clauses in both the United States and England.[124] So when drafting a pre-dispute ADR contract clause, how is an attorney to ensure court enforcement of the clause?[125] At the very least, a reasonably specific clause stands a greater chance of enforcement under general contract theory. With this in mind, a number of American ADR organizations provide suggested contract language for attorney use.[126] Each sample clause is highly specific and tailored to the unique aspects of the ADR procedure contemplated in the event of a dispute. For example, JAMS[127] sets out ten different process combinations for an attorney to use in

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122. *See Model ADR Contract Clauses, at* http://www.cedr.co.uk/library/documents/contract_clauses.pdf (last visited Oct. 19, 2003).

123. *See* Lisa Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002); Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001); Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905 (1996); Sternlight, *Panacea or Corporate Tool?*, *supra* note 72.

124. *See supra* Part III.

125. There are many other issues to consider when drafting an ADR clause besides the process specified. *See* Lawrence R. Mills & Thomas J. Brewer, *ADR Drafting Tips: Courts may Refuse to Enforce 'Incoherent Hybrids' and Overreaching Provisions*, DISP. RESOL. MAG. Spring 2002, at 23 (examining issues such as 1) preconditions to arbitration, 2) illusory arbitration clauses, 3) limitation of remedies, and 4) one-sided and 'overreaching' procedural provisions.) This Note, however, focuses just on the process specified by the parties, not the scope of the clause.

126. *See* Am. Arb. Ass'n, *Drafting Dispute Resolution Clauses – A Practical Guide, at* http://www.adr.org (last visited Oct. 14, 2003) [hereinafter AAA, *Practical Guide*]; JAMS, *JAMS Guide to Dispute Resolution Clauses for Commercial Contracts, at* http://www.jamsadr.com (last visited Oct. 15, 2003) [hereinafter JAMS, *Commercial Contracts*]. Interestingly, the English ADR provider CEDR offers similar model language in its publication *Model ADR Contract Clauses*, *supra* note 122. Many practitioners and professors have also written articles suggesting language for attorneys and identifying problems in different dispute resolution clauses. *See* Miles, *supra* note 108; Jean Sternlight, *Drafting a "Bulletproof" Consumer Arbitration Agreement: Is it Possible?*, *in* ARBITRATION OF CONSUMER FINANCIAL DISPUTES, at 763 (PLI Corp. Law & Practice Course, Handbook Series No. B0-00C2, 1999); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831; David K. Taylor, *Avoiding Unnecessary Punches: Skillful Crafting of Alternative Dispute Resolution Contract Clauses*, TENN. B.J., April 2000, at 20; David E. Wagoner, *Tailoring the ADR Clause in International Contracts*, ARB. J., June 1993, at 77.

127. JAMS provides dispute resolution services, including arbitration, mediation, private judging, mini-trials, neutral fact finding, and ADR training to clients and their local, national, and global communities. JAMS, *Who We Are, at* http://www.jamsadr.com/who_we_are.asp (last visited Oct. 9, 2003).

drafting a detailed plan of action.[128] Similarly, the American Arbitration Association (AAA)[129] provides model language for three processes; arbitration, negotiation, and mediation.[130] Two broad similarities between these suggested contract language models are: 1) the naming of process (even if more than one allowed) and 2) rules of each process. JAMS stresses the need for absolute clarity and specificity suggesting clauses that cite to such details as the number of persons on an arbitration panel.[131] Recognizing the importance of drafting clear and precise ADR clauses, a California court recently stated:

> [W]e spend too much time trying to make sense out of arbitration agreements precisely because litigants spend too little time in drafting them. Increasingly, we have been presented with incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. Oftentimes the 'remedy' is worse than the disease.[132]

It is important to know what factors a court will look at when deciding whether or not to enforce an ADR contract clause. In the United States, broad enforcement of ADR clauses by the courts is derivative of the FAA. Section 2 of the FAA says "settle by arbitration."[133] What constitutes "arbitration" when courts have enforced a variety of ADR clauses using different named processes?[134] Courts seem to look to see if the process is geared toward a final settlement.[135] In reality, only binding arbitration can guarantee a dispositive outcome. Non-binding arbitration and early neutral evaluation essentially provide advisory opinions which parties may or may not follow. Mediation and good-faith negotiation do not even provide an opinion, advisory or otherwise, but provide structures that encourage settlement, in no way guaranteeing a final resolution of the dispute. Nonetheless, courts continue to use the FAA to enforce ADR clauses calling for non-binding processes.

The ADR movement is nearing a watershed. It has experienced considerable growth in the last twenty years due to mounting support in the legal community. However, its acceptance has gone nearly unchecked by empirical research.[136]

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128. JAMS sets forth the following headings for its ADR contract clauses; Negotiation Only, Mediation Only, Streamlined Arbitration Only, Comprehensive Arbitration Only, Negotiation/Mediation/Arbitration, Negotiation/Mediation, Negotiation/Arbitration, and Mediation/Arbitration. *See* JAMS, *Commercial Contracts*, *supra* note 126.

129. AAA has provided dispute resolution services since 1926. AAA provides arbitration, mediation, fact-finding, mini-trial, and partnering, as well as ADR systems design, education and training. *See* Am. Arb. Ass'n, *About Us Overview*, *at* http://www.adr.org/index (last visited Oct. 14, 2003).

130. AAA details these three specific procedures, then it lays out model clauses for specific contexts, including International Disputes, Construction Disputes, Employment Disputes, Patent Disputes, Textile Disputes, and Financial Disputes. *See* AAA, *Practical Guide*, *supra* note 126.

131. *Id.* at Part IV.C. Empl 2 (naming one or three persons to be on the arbitration panel); JAMS, *Commercial Contracts*, *supra* note 126, at Part C-1 (specifying the arbitration is to be heard by a "sole arbitrator").

132. Nat'l Union Ins. Co. v. Nationwide Ins. Co., 82 Cal. Rptr. 2d 16 (Cal. Ct. App. 1999).

133. 9 U.S.C. § 2 (2000) (stating that "a contract evidencing a transaction involving commerce to settle by arbitration").

134. *See supra* Part III.

135. *See supra* Part III.

136. Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 81.

Articles trumpeting means of improvement have inundated the canon,[137] such as sociological studies that have shown people are more satisfied with mediation than litigation. However, Professor Deborah Hensler claims that these studies are flawed in that they were conducted under the process of non-binding arbitration, not mediation.[138] This stems from a dearth of concrete definitions for, or understanding of, the panoply of ADR procedures available.[139] If courts continue to enforce broad undefined ADR clauses such as the one found in *C&W*, this problem will persist.

Professor Amy Schmitz explains the drawbacks of the new expansive approach to defining ADR, writing that,

> the irony is that the same pro-arbitration impulses that have driven expansion of arbitration are also fueling courts' misapplication of arbitration remedies, which actually dilutes the significance of arbitration and threatens the integrity of the functional scheme underlying arbitration statutes.[140]

Fear does not make the blood of big litigation firms representing large corporations run cold; they can regulate and shape the processes to which they agreed. The proliferation of corporate adhesion contracts including pre-dispute arbitration clauses is astounding.[141] This could be hailed as a brilliant show of support and acceptance by companies; however, it should also be met with inquiry and debate.[142] When ADR is blindly and broadly enforced, the impact and benefits of ADR might be lessened. Unchecked, this growth turns into a meaningless and institutionalized enforcement system lacking the flexibility and uniqueness that exists at the heart of ADR.[143]

Professor Carrie Menkel-Meadow, expounding on the ideas of Laura Nader, discusses the United States' blanket exportation of Americanized ideas of alternative dispute resolution to other countries.[144] England has looked to the United

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137. *Id.*

138. *Id* at 86-87.

139. *See, e.g.*, Alison E. Gerencser, *Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed*, 50 FLA. L. REV. 843 (1998) (arguing that the term "mediation" has come to be used to describe everything from mandatory arbitration to pre-trial settlement conferences, and that as a result professional standards of conduct are needed to provide an accurate view of mediation both to practitioners and the public). Some look at the ADR movement through a Darwinian lens; allow the different processes to flourish unchecked, and in time the legal jungle will contract away the unfit processes that lurk among us. Nancy A. Welsh, *All in the Family: Darwin and the Evolution of Mediation*, DISP. RESOL. MAG., Winter 2001, at 20. But, "there is little hard evidence, few statistics, and limited systematic public policy research to prove that any of the proposed ways is the right way, or even an effective way." Bingham, *supra* note 123, at 879.

140. *See* Schmitz, *supra* note 75, at 124.

141. *See* Sternlight, *Panacea or Corporate Tool?*, *supra* note 72.

142. *Id.*

143. One English solicitor even said, "Such a strong endorsement by the Court is leading many commentators to suggest that the "alternative" in ADR should mean litigation or arbitration, making mediation and related procedures the main means of resolving disputes." Miles, *supra* note 108.

144. Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 339 (questioning the use of a universal theory of ADR), referring to Laura Nader & Elisabetta Grande,

States for guidance in developing ADR within its court system.[145] In an attempt to rival the United States' dominance in the ADR field, England may have expanded the scope of their enforcement too broadly.

When drafting a dispute resolution clause, attorneys should lay out as many details of the procedure as possible to ensure court enforcement, and more importantly to match the desired procedure envisioned by the parties for whom the agreement is drafted. Court uncertainty as to what is and what is not an arbitration/mediation/advisory opinion clause makes clarity and specificity imperative. Clearly, what is considered arbitration to one judge is not arbitration to another. The confusion facing the ADR community concerning process definition, demarcating where one begins and another ends, may lead to ebb of support for ADR, for one should not support what one cannot clearly define. Haphazard enforcement by the courts does not help alleviate the situation. For the practicing attorney, it is most important to use clear and specific language in drafting the logistical elements of the ADR procedure agreed to in an ADR clause. Through better drafting, the legal community may come to a bright line standard for what is or is not a specific ADR clause.

For the benefit of the client as well as the betterment of ADR, setting forth the process to be used, defining the process clearly, and referring to established rules when drafting an ADR clause are paramount. Even though the High Court of Justice Queens Bench enforced a broad and undefined ADR clause, one cannot ensure such a clause will be enforced again. As courts become more educated on the various ADR processes encompassed under the umbrella of 'ADR,' they should be less likely to enforce poorly drafted clauses with unspecified terms. The public policy interest in supporting ADR will be greatly outweighed by the unjust enforcement of vague and undefined terms.

VI. CONCLUSION

The High Court of Justice Queens Bench provided needed support for ADR by enforcing a very broad ADR clause in *C&W*. However, in so doing, the court may have interrupted the long term development of the movement in that country. By enforcing such a broad ADR clause, the concept of specificity loses significance and impact. This type of clause is not recommended by experts in the field and probably would not be enforced in American courts. Attorneys drafting ADR clauses for their clients, whether in England or in the United States, should spell out the actual procedure to be used in the event of a future dispute. This not only encourages court enforcement, but client understanding as well. Even if a court enforces the procedure, it may be far more important for the client to understand the parameters of the procedure prior to court involvement.

Current Illusions and Delusions about Conflict Management – In Africa and Elsewhere, 27 LAW & SOC. INQUIRY 573 (2002).

145. *See* Lord Woolf's recommendations at the end of Chapter 18 of *Access to Justice-Interim Report*, *supra* note 39. (suggesting that "developments abroad, particularly those in the United States . . . in relation to ADR should be monitored").

Despite the Court's enforcement of the ADR clause in *C&W*, attorneys in England and the United States should not rely on it as model language for a feasible pre-dispute ADR contract clause.

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