

# **Tools and Methods of ADR in Commercial Disputes**

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## A. The Cases:

- a) Bank B refuses the originally agreed extension of a credit-line in favour of A-Ltd. A cannot purchase goods for re-sale as commercially envisaged.
- b) Consumer X buys a brand-new motorbike from dealer D. The bike has a permanent engine failure. X wishes to go to a famous biker's meeting.



## **B. The Illusion of Win-Win**

Interests of the Parties (Orange-Peel-Cases)



## **C. The Goal: Cost-Effective Settlement of the Dispute**

# D. Forms of ADR ("Options, Tools and Methods")

## a) General:

All forms of ADR require an agreement between the parties of the dispute –

Otherwise: good will, going to court or foregoing any position (giving up / accepting the loss)

Fundamental right of (efficient) access to (state-backed) justice (independent judicial proceedings) and a fair trial: Art. 6 ECHR



## **b) Contractual Agreement between the Parties in Favour of ADR**

### **aa) Re-Negotiation (Domestic / International Contract Law)**

Between the Parties only or with the help of an expert

1) Voluntarily ad hoc

2) As part of a contractual clause



bb) **Mediation** (Domestic Law, EU Mediation Directive)

1) Ad hoc

2) Institutional

3) Court Assisted, e.g. Germany

cc) **Mediation in conjunction with Court Proceedings**

1) Interlocutory Proceedings or Injunctions

2) Temporarily staying the proceedings



dd) **Arbitration** (Domestic Law of Civil Procedure / 1957 NY Convention)

1) Ad hoc

2) Institutional

3) Arbitrator (expert) just for deciding technical issues





**c) Contractual Agreement in Favour of a  
3<sup>rd</sup> Party: Ombudsman**

(e.g. Association of Private Banks in  
Germany)



## **E. The Legal and Practical Issues**

- a) How and when to agree to ADR?
- b) How to find a skilled and independent mediator or arbitrator?
- c) 1993 Unfair Contract Terms Directive:  
Void clauses as depriving a consumer to access to justice (Art. 3 (3) + Annex q)?



# D. Conclusion

1. Cases suitable for ADR:
  - a) Yes!, b) Maybe.
  
1. First things first: let's agree!