

TIME TO TRY MEDIATION OF INTERNATIONAL COMMERCIAL DISPUTES

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How many attorneys in the audience have ever participated in a domestic mediation? I see the hands of about four out of about a hundred people in attendance. How many attorneys in the audience have ever participated in an international mediation? I see two people raising their hands. This is a larger percentage of people than I had anticipated! (laughter)

This unscientific survey provides a segue for me to cite an amazing fact about international mediation: despite the fact that mediation works and that mechanisms for handling international mediations are in place, mediation is rarely used.

Mediation has proven itself as an extraordinarily successful settlement process when conducted by a skilled mediator. The impressive settlement record of domestic mediations has been documented. Disputes channeled into mediation settle at a very high overall rate of about seventy percent.¹

Mediation is much different from the more familiar settlement conferences conducted by judges. Mediation is a structured negotiation conducted by a specially trained expert known as a mediator. The mediator brings to the structured negotiation critical skills for managing the process, including the ability to diagnose impasses as the structured negotiation unfolds. The mediator guides the parties and their attorneys through each distinct stage in the mediation. Every step by the mediator has a purpose, beginning when the mediator requests each party to prepare a position paper,² a paper that is designed to orient the parties toward settlement. At

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1. See, e.g., Jeanne M. Brett, Zoe I. Barsness, & Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers* NEG. J., 259, 261 (July 1996) (overall settlement rate of 78%); Robert C. Meade & Philip Ferrara, Ph.D, *An Evaluation of the Alternative Dispute Resolution Program of the Commercial Division: Survey Results and Recommendations*, 4-5 (July 1997) (overall settlement rate of close to 70% for the Alternative Dispute Resolution Program of the Commercial Division of the Supreme Court, Civil Branch, New York County, New York State).

2. Information to be included in a position paper can vary. The type of information requested may include a party's definition of the critical factual and legal issues in dispute, a

the mediation, a mediator usually starts the session with an opening statement that is geared toward shaping the expectations of the disputants. The mediator then manages a structured discussion that encourages the disputants to collaborate in settling the dispute. The mediator guides the disputants by posing open-ended and focused questions, re-framing issues, and using strategies to defuse tensions and overcome impasses. The mediator may use private caucuses and brainstorming. The more skilled mediators will also assist parties in designing processes to resolve any unsettled issues.

For international mediations, a mechanism for conducting the process is in place. Virtually every major international arbitration organization offers the option of mediation. Each organization offers mediation rules, procedures for selecting mediators, and administrative support for conducting mediations. These organizations are very well known and well established. They include the International Chamber of Commerce (ICC), American Arbitration Association (AAA), International Center for Settlement of Investment Disputes (ICSID), Center for Public Resources (CPR), China International Economic and Trade Arbitration Commission (CIETAC), World Intellectual Property Organization (WIPO), Commercial Arbitration and Mediation Center of the Americas (CAMCA), and more. For non-administered international dispute resolution processes, even United Nations Commission on International Trade Law has issued (UNCITRAL) conciliation rules.

One important explanation for the little use of international mediation is that parties and attorneys without experience in mediation are reluctant to use it. In contrast, people with experience in mediation are much more receptive to trying mediation. Only when disputants gain more experience will we see greater use of mediation. The challenge is to break the cycle of no experience, no use. I hope that this panel today on international mediation will give attorneys a little more confidence to give mediation a try.

The propitious moment for discussing mediation is before you need it. Any experienced international business lawyer knows that the best time to discuss dispute resolution options is when parties are negotiating the business deal. Everyone is forward thinking and optimistic. However, this does not mean that parties want to discuss dispute resolution methods. They are not usually in the mood to think about what to do if the deal goes sour. Yet, deals go bad. Economic and political circumstances change. Personality conflicts emerge. Joint ventures are especially notorious for their short lives. Over fifty per cent of joint ventures terminate within five years, and most terminate within ten years.

In international business, it is especially important to negotiate a dispute resolution clause. Without the clause, parties must rely on the uncertainties of transnational litigation in foreign national courts. At least when a clause is omitted in a domestic business deal the court alternative is very much a known and stable method of dispute resolution. International litigation, in contrast, is fraught with uncertainties about procedure, substantive law, and enforcement, uncertainties that fortunately can be minimized with a well-crafted dispute resolution clause.

The most widely adopted method of international dispute resolution is arbitration. However, international arbitration is not viewed as an alternative dispute resolution process (ADR).³ Instead, international lawyers and arbitrators view arbitration for international disputes as attorneys view courts for domestic disputes. International arbitration appears to be the equivalent of going to court for domestic disputes, with many of the same advantages and disadvantages. As with domestic courts, international arbitration is expensive, lengthy, formal and adversarial. So what is ADR in the international arena? It is not arbitration. One ADR method is surely the use of mediation, which is informal, quicker, less costly, and gives the parties control over the outcome of the process.

What should be included in a mediation clause? There are a number of key features that should be addressed in a mediation clause. Today, I will consider five provisions.

First, the definition of mediation should be given special attention in order to avoid a cross-cultural misunderstanding. Parties from different countries may envision different variations of mediation. This is a familiar problem in domestic mediations where many variations also can be found. However, much effort is being made these days to draw sharper distinctions among different styles of domestic mediation. Different styles have been labeled as facilitative, evaluative, transformative, bargaining, therapeutic and non-caucus.⁴ All these styles at least fall within a range of familiar possibilities. In international mediations, more commonly referred to as conciliations, the ranges of possibilities are broader and less familiar. One unusual variation envisions each party appointing a conciliator and the conciliators meeting to negotiate a settlement. As international norms of dispute resolution evolve, the risk of parties discovering a startling variation

3. CHRISTIAN BUHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 141-42 (1996) (survey of practitioners with extensive experience in international business disputes - respondents consisted of arbitrators, attorneys, and in-house counsel from 17 countries).

4. See S. Silbey & S. Merry, *Mediator Settlement Strategies*, 8 *LAW & POLICY* 7 (1986); L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTERNATIVES* 111 (1994); R. BARUCH BUSH & J. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

is falling. Nevertheless, it is prudent to discuss the style of mediation envisioned when drafting an international mediation clause.

Second, parties should establish a clear obligation to try mediation before resorting to an adjudicatory option such as arbitration. This provision should be drafted in a way to guard against at least two problems: a reluctant party who is trying to avoid mediation and a party using mediation to unduly delay resorting to adjudication. One approach is to draft an obligation clause with clear, objective benchmarks against which it is easy to assess compliance. The provision also should be designed to promote meaningful participation without unduly delaying the arbitration. One obvious solution, *to agree to participate in good faith*, will likely generate collateral litigation over whether a party acted in good faith. Instead, other devices should be considered. For example, a clause could establish a clear and complete procedure for selecting a mediator; each party could agree to participate in at least one mediation session; each institutional party could agree to select a client representative with settlement authority; a timetable could be established for initiating and completing the mediation process; and clear consequences for breach should be formulated such as a liquidated damage clause and recovery of legal fees.

Third, parties should consider whether the mediator can also serve as an arbitrator in the same dispute. International mediation rules generally prohibit mediators from serving as arbitrators in the same dispute unless the parties agree to this arrangement. This is a complicated issue because the function of a mediator is radically different from the function of an arbitrator. The concern is that when the same person serves both roles, the third-party neutral may not be able to keep the two roles separate, making it difficult for the neutral to maintain the integrity of each process. The parties' confidence in the neutral also may be undermined by the confusion created by the same person switching between two different roles. On the other hand, a more efficient process may be possible when the same person moves from one role to the other instead of the parties losing time and momentum in retaining and educating a second person. Two of the other panelists will elaborate on the risks and opportunities offered by the same person serving as mediator and arbitrator.

Fourth, parties are prudent to study and adapt an off the shelf set of mediation rules to serve the needs of the parties. One of the advantages of creating your own private dispute resolution system is the opportunity it gives you to create a system that best suits your needs. However, starting from scratch can take an enormous amount of time and effort to end up creating a private system which others have already done and tested. It is more efficient to select a pre-packaged process and then adapt it to your special needs. The parties also may want to select an institution to administer the process to ensure the smooth running of the mediation.

Fifth, a mediation provision should be part of a broader dispute resolution clause that includes a compulsory back up dispute resolution process. This is important in order to assist parties in enforcing a settlement agreement. When arbitration is the back up, the settlement agreement can be incorporated into a "consent arbitration award" which can then be enforced under the relatively reliable New York Convention which establishes procedures for enforcing arbitral awards in foreign courts.⁵ The back-up system is also needed in case the mediation does not settle all the issues. Your private dispute resolution system needs to establish the next step in the process of dispute resolution.

In conclusion, mediation works. I tried today to present the contours of a path to greater use of mediation. This session did not provide sufficient time to illuminate the full path. However, I hope we were able to shed enough light on the path to encourage attorneys to give mediation a try. You might even like it!

5. The New York Convention is formally the United Nations Convention on Recognition and Enforcement of Arbitral Awards.