

NEWSLETTER

MEDIATION

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION



the global voice of
the legal profession

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FROM THE CHAIR

Worldwide acceptance of mediation rising

Siegfried H Elsing

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The IBA Annual Conference held in Singapore in October impressively confirmed what most of you have already known for a long time: mediation is receiving growing attention and recognition as an alternative dispute-resolution technique around the world, particularly in the countries appendant to the civil-law tradition which so far has shown a more hesitant attitude.

The sessions organised (or co-sponsored) by the Mediation Committee were not only well attended by many delegates from traditionally mediation-friendly jurisdictions but also by participants from continental Europe (and Asia of course). Excellent speakers and moderators provoked lively and open debates and many of us took home a basket well-filled with food for thought.

For the first time our committee was responsible (or shared responsibility) for four half-day sessions. In addition to a programme on 'Mediation in aircraft accidents' (sponsored by the Aviation Law Committee) and a session on 'Pursuing and defending discrimination claims in the workplace' (main sponsor Discrimination and Gender Equality Committee), a panel consisting of Miguel de Avillez Pereira, William H Baker, Nikolaus Pitkowitz, Patricia Barclay and Joseph Tirado with Birgit Sambeth Glasner as Chair explored 'Deal mediation: the use of mediation in the course of M&A transactions'.

A further half-day session dealt with 'Diversity of cultural perspectives on mediation: face-saving, attitudes, systems, relationship to courts and other considerations'. This session, which was chaired by Karen Mills, particularly benefited from the keynote address made by Dato' Mahadev Shankar. Participants on the panel were Louise Barrington, Juliet Blanch, Ajmalul Hossain, Bronwyn Lincoln, Adedoyin Rhodes-Vivour, Kathleen Scanlon, Mercedes Tarrazón and Claus von Wobeser. The keynote address of the

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session is reproduced in this newsletter.

The committee also held for the first time a Mediation Luncheon which was attended by some 60 participants. During the luncheon John Richardson gave a status report about the work of our subcommittee on the UNCITRAL Model Law on International Commercial Conciliation (MLICC). The results of a survey conducted by the subcommittee are available on the committee website at http://www.ibanet.org/legalpractice/Mediation_and_Conciliation.cfm along with the subcommittee report. Please turn to pages 49-63 for more details. It is proposed that the specific issues of confidentiality, statute of limitations and enforcement of settlements be further explored at next year's IBA Annual Conference in Buenos Aires in the context of a session on 'Hot topics in mediation' which will also deal with further aspects of current interest.

Thanks to our Vice-Chair, Jon Lang, the number of national representatives is growing (22 at the latest count) and we certainly hope that before too long we have all major countries covered and are in a position with the help of contributions from the national

representatives to provide more insights into interesting developments in the various jurisdictions in this newsletter.

A further important and positive development in our committee is the formation of a new Subcommittee on State Mediation under the leadership of Margrete Stevens and Jack Coe. The subcommittee plans to organise a half-day programme for Buenos Aires. Another project planned for next year's conference is a half-day workshop on mediation techniques and already now I would like to ask interested speakers to contact either Patricia Barclay (patricia@bonaccord.eu) or Nikolaus Pitkowitz (pitkowitz@gmp.at) who will take the lead on this project.

The Mediation Committee will continue the tradition commenced by our Past Chair, John Townsend, to hold a Mediation Breakfast on the occasion of the yearly IBA Arbitration Day. Next year's event will be on 1 February in New York. Visit http://www.ibanet.org/conferences/Conferences_home.cfm to find out more. Please mark the date in your calendars now! I hope to see many of you then.

EDITORIAL

Welcome to the newsletter

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In his opening note to readers, the Chair of the Mediation Committee, Siegfried Elsing, remarks that the IBA Annual Conference in Singapore confirmed (as many already knew) that mediation is receiving growing attention and recognition as an alternative dispute-resolution technique around the world, and in particular in civil law countries where a certain degree of reluctance was previously shown to it. This second issue of the committee's newsletter for 2007 is hopefully demonstrative of that gaining of popularity as it covers among other things topics such as settlement, enforcement and the use of mediation in labour and other disputes.

In this issue, contributions from both civil and common law jurisdictions offer the reader an interesting perspective on why mediation is gaining popularity and how it can be used effectively in commercial and other disputes. Finally, the contributions demonstrate a consistent dedication on the part of certain committee members and others, who so generously give their time and know-how to the continued development of this burgeoning field.

On behalf of the committee and myself, I thank these individuals for their generosity and commitment.

I hope this most interesting issue finds you well and take this opportunity to send you my best wishes for the holiday season.

Bonne fin d'année!

Contributions to this Newsletter are always welcome and should be sent to the Publications Officer, **Babak Barin**, at the address below:

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A Conference presented by the Arbitration Committee of the
International Bar Association in cooperation with the United Nations

United Nations New York Convention Day and the 11th IBA International Arbitration Day

The New York Convention: 50 years

1 February 2008

New York City

An exceptional opportunity to hear experts
review the most important treaty affecting
international arbitration

Topics will include:

- History and significance of the New York Convention
- Agreements – separability doctrine, writing requirement, non-signatories, parallel proceedings
- Awards – definition, jurisdictional obstacles, local annulment, public policy
- A view to the future – opportunities and challenges

Who should attend?

Arbitrators, litigators, judges, government officials,
and all those involved in alternative dispute resolution.

Venue

Waldorf-Astoria Hotel

Evening Reception in the
Delegates' Dining Room, United Nations Headquarters



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SINGAPORE CONFERENCE OCTOBER 2007

Diversity of cultural perspectives on mediation: face-saving, attitudes, relationship to courts and other considerations

Keynote speech

Dato' Mahadev Shankar

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'The old order changeth, yielding place to new,
And God fulfils himself in many ways,
Lest one good custom should corrupt the world.'

These lines from Alfred Lord Tennyson's poem *La Morte D'Arthur* have strong resonances, for who would dare disagree that the growing appeal of mediation is running parallel with the increasing disenchantment with litigation and arbitration?

Mortified as Sir Belvedere is at his sovereign's imminent departure he is even more terrified by the prospect of that unfamiliar no man's land which now awaits him. So he wails:

Ah! My Lord Arthur whither shall I go?
Where shall I hide my forehead and my eyes?
For now I see that the old times are dead,

And I, the last go companionless,
And the days darken round me, and the years,
Among new men, strange faces, and other minds.

In this Island Republic's early days the Right Honorable the Prime Minister Lee Kuan Yew (as he then was) likened corruption in the State to an infestation of termites which leaves the exterior of a building looking perfectly sound but only till it has been eroded enough to come crashing to the ground. The corruption he had in mind was not just fiscal but also the erosion of integrity.

The abuse of our courts and arbitral institutions has caused growing disillusionment with both these processes as a satisfactory method of resolving civil disputes.

The failure of the courts to live up to expectations in many countries has been systemic. By the late 80s the

drying up of the litigation water holes resulted in a great migration to the greener pastures of arbitration. And these migrants have brought with them all the uglier aspects of the adversary system.

This frenetic activity has been marked by such a proliferation of journals devoted to the exploration of the arbitral minefields that in the Tenth Annual Goff Lecture, 'The Spirit of Arbitration' by Dr Fali Nariman, he was all but left to lament the death of 'l' esprit de l'arbitrage'.¹

Paradoxically, practitioners who batten on commercial arbitration seem blissfully unaware that they are precipitating their own extinction by glorying in conflict. Their 'victories' are remembered in the red ink of their client's balance sheets, man-hours lost, trade secrets put at risk and negative publicity.

In sharp contrast the annals of mediation have to be found in the realms of anecdote.

His Excellency Effendi Zephyr Emir was the Honorary Consul for Turkey in Singapore and Malaysia. He traded in carpets and his monthly turnover must have run into the millions. So his need for debt collectors must have been a lawyer's dream.

I once asked him which legal firm he used.

'Dato Shankar I gave up on lawyers a long time ago!' he said.

'How then do you recover your trade debts?' I asked astonished.

'I send them flowers. I go to them with the deepest expressions of concern about their material welfare and convey my warmest good wishes for a speedy recovery.'

'Does it work?'

'Mostly like a charm. Sometimes not. But I have never lost a client. They always come back and buy some more.'

My second anecdote concerns the betrayed wife who came to me with all the fury of a woman scorned. The

husband was very contrite. The wife was obdurate. I asked the wife whether she would have stood by the husband if her husband's shortcoming was not adultery but medical insanity – she said yes. I then asked why she could not accept that the husband's infatuation was also a kind of madness. Thus was a marriage saved. *Pace Hilary and Bill Clinton!*

My third anecdote concerns the takeover of one subsidiary corporation by another. Both subsidiaries were substantially owned by a holding company. When the merger and acquisition lawyers could not agree terms after protracted and expensive negotiations, they were sacked and replaced by a chartered accountant acting as an adjudicator. After a due diligence exercise over a fortnight he imposed a unilateral solution and everybody moved on.

These are not isolated instances but a trend, and there is evidence to show this.

Since the mid-1990s the Malaysian insurance industry and the banking industry have each had their own mediation bureau. Both merged in 2004 to form The Malaysian Financial Mediation Bureau, a company limited by guarantee.

Only disputes between banks and insurers and their customers are referred to the in-house mediators. The entire process is deemed 'without prejudice' and the usual safeguards are all there.

In the year 2004 out of a total of 1254 cases referred, 1180 were completed. This huge success could be due to the following features – firstly the claimant does not have to pay any fees whatsoever, secondly lawyers are not permitted, and thirdly there is no compulsion on the part of the claimant to accept the mediator's overtures. If the parties are unable to agree, an adjudicator imposes a solution which is binding on the banker or insurer concerned but not on the claimant who can now compare what it will cost him to go to law or arbitration for an uncertain result in an even more uncertain time frame. So he invariably takes what he can and moves on.

The Malaysian Bar Council also set up a mediation centre with similar safeguards in 2000. Out of a total of 142 cases referred in the last eight years only 38 were successfully resolved, with 14 unsuccessful, and 56 more still pending.

Despite this dismal showing, the Bar Council has submitted a draft Mediation Act to the Attorney General with a view to legalising coercive mediation.

The process of mediator selection and the consequences of a refusal to agree to the solution proposed await further clarification.

There are echoes here of a provision in the Law Reform (Marriage and Divorce) Act, whereby neither party to a divorce petition was permitted to present a petition unless each had first attended three separate meetings before a conciliation tribunal who had to certify that the parties' differences were irreconcilable. That process could take up to a year with sporadic fall-outs arising from contested ancillary issues all of which

only added to the trauma.

The Malaysian story therefore is this. Where mediation has been unilaterally imposed upon the disputants the results have been very unpromising. But where the parties have initiated mediation on their own, without the legal intervention, the success rate has been very encouraging.

Since there will be other experts shortly addressing you on mediation's practical intricacies let me just say that successful mediation is an art which requires an intuitive 'feel' for the psychology of all concerned.

By way of a negative inducement his biggest 'stick' is the disproportionate quantum of costs both in terms of money, stress, and an irreparable loss of public esteem which an open contest would involve. His positive inducement or sweetest 'carrot' is inspiring far-reaching solutions not merely to resolve the immediate problem but provide a road map to rainbow's end by pragmatically demonstrating how what is saved can now be invested in more profitable ventures. 'A man's reach should exceed his grasp. Or what is heaven for?'²

An ever-growing number of clients prefer to shy away from litigation and arbitration because it eats into their valuable time to do the only thing they know best, ie running their business. Those who are running on a tight budget are very reluctant to set aside reserves for contingencies which could be deployed in fruitful activity. They have an even greater horror of being dragged into lawyers' offices to help prepare witnesses' statements, being bogged down in unending discovery processes and finally having to endure a hostile cross-examination designed only to discredit them.

They have long since learned that the surest way to lose valuable business partners is to sue them. Trade secrets as well as resource outlets could all become vulnerable. Furthermore a reputation for truculence does not encourage new business.

Those who have had the misfortune to go through the mill come away thinking the only persons who have profited from the exercise are the lawyers because the paper awards are only too often found to be barren or very difficult to enforce. And these recovery processes cost even more money, enmeshed as they are with appeals and reviews which have become commonplace in arbitrations which are supposed to be final.

For those warriors who have converted arbitration into a process better described as an Adversarial Dispute Resolution:

'Let me disclose the gifts reserved for age
To set a crown upon your lifetime's effort.
First, the cold friction of expiring sense
Without enchantment, offering no promise
But bitter tastelessness of shadow fruit
As body and soul begin to fall asunder.
Second, the conscious impotence of rage
At human folly, and the laceration
Of laughter which ceases to amuse.

And last, the rending pain of re-enactment
Of all that you have done, and been; the shame
Of motives late revealed, and the awareness
Of things ill done and done to others' harm
Which once you took for exercise of virtue."³

The introspection the poet prescribes must come sooner or later when it sinks in that neutrals who have a good working knowledge of a particular trade or business and the culture of the personalities involved in them, are far more useful in getting to the root of the problem and proposing pragmatic solutions. Those who come out second best in these situations are far more philosophical about the outcome because they can live with an evaluation which makes 'business sense'.

Some stronger words now follow for those predators who come into arbitration 'red in tooth and claw', and blind to the provision that an arbitration award is deemed to be final. They are determined to snatch victory out of the jaws of defeat by trawling for allegedly egregious errors to mount a personal attack on an arbitrator who in good faith has ruled against them. Alas they are now being overtaken by others who are even prepared to resort to corruption to achieve their ends.

As Tony Harrison said:

'The mortal patient in the bed
Hears their mating call with dread.
He hears the termite dancers tapping
tattoos that terminate in tugging,
the Deathwatch Beetle like Blind Pew
groping towards his rendezvous
And that dry staccato sound
Brings old institutions to the ground.

Beetle bonkers in the beams
spell the end of old regimes
down come the beams and joists and doors
to the foreplay of the xylovores.
Ancient truss and cruck
cracked by the fronsaphonic *uck
bluntly put, the bugger's *ucked yer
entire infested infrastructure.'

Let me not leave you with the feeling that my thesis is that all lawyers are shysters, and that all arbitrators are mendacious. Was it not Lord Atkin who once said 'Sweeping generalisations are the hallmark of ill-educated minds'? In these days of spin the perception has become the reality. The general public now judges the character of any institution by its most ill-behaved members. Whatever is done by those minded to be ethical tends to be cancelled out by those who are not.

So as Mark Antony said, 'The evil that men do lives after them, the good is oft interred with their bones.'

I do want to end on an optimistic note.

One fact that struck me, when I had just qualified as a lawyer in 1956, was that the Prime Minister of every

Commonwealth country then was a lawyer too.

In the last five decades, they have given way to generals, economists and despots of various shades. Their handmaidens are the Sovereign Investors. Today it is the State which is the biggest trading entity, in many cases the only trading entity. Their operating philosophy and justification for amoral behaviour is that nations don't have friends, only interests.

Is it any wonder that in line with how they conduct themselves on the stage of world trade, they are also capable of 'special pleading' without batting an eyelid for invading a country on the pretext that it is about to let loose 'weapons of mass destruction'. On the other side of this line are the multinational corporations whose interaction with nation states exemplifies Newton's third law of motion that to every action there is an equal and opposite reaction.

Carried to its logical conclusion the greatest danger of adopting adversarial techniques is that all the adversaries who matter now have nuclear weapons capable of annihilating the world many times over.

Every dispute, however small, solved by mediation will contribute to a much needed reservoir of universal goodwill.

The need for good mediators has never been greater so that social harmony may yet be restored. We need to globalise our skills so that we can move on from individual disputes to issues of global survival. Trust and goodwill at that level on all fronts is sorely lacking.

Let me go back to Tennyson's immortal lines. The 'one good custom' which now threatens to corrupt the world is the mindless application of the adversarial principle as a universal panacea to solve all ills. The 'new order' which is taking its place as if by divine intervention is the art of mediation.

Mediators – tomorrow belongs to you.

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Further reading: Sriram Panchu, 'Settle For More – The Why, How, and When of Mediation', East West Books, ISBN: 81-88661-57-0. www.landmarkonthenet.com.

Notes

- 1 See LCIA Arbitration International [2000] Vol 16 Number 3 pp 261-278
- 2 These lines are from Robert Browning's poem *Andrea del Sarto*.
- 3 From 'Little Gidding' in T S Eliot's *Four Quartets*.

SINGAPORE CONFERENCE OCTOBER 2007

Diversity of cultural perspectives on mediation: face-saving, attitudes, relationship to courts and other considerations

Mediation in Australia

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Mediation – a definition

Mediation is a well established process for the resolution of disputes in all jurisdictions in Australia. It is also now generally accepted (and in some cases even mandated) as an interlocutory step in most litigious proceedings. Its value in bringing the parties together to explore settlement of their disputes is such that even in the face of opposition by the parties themselves, judges in most Australian jurisdictions order mediation before trial.

Mediation is defined as an alternative dispute process whereby a neutral intermediary appointed by the parties facilitates discussions between or amongst the parties in an attempt to reach a consensual settlement. It is well understood that the mediation process emphasises the interests of the parties over the legal rights of the parties, although the legal position of each of the parties (particularly their prospects in litigation) may be taken into account in evaluating the value and aptness of a settlement in the terms offered by the other party.

Key features of the mediation process are the parties' entitlement to bring the mediation process to an end at any time and the fact that the mediator has no rights to impose a settlement or decision on the parties.

From time to time, the term 'mediation' is used interchangeably with the term 'conciliation', although the latter term is usually understood to refer to a more informal arrangement where parties enter into discussions or negotiations with the assistance of a facilitator, but without the framework of the steps required for mediation.

Is there a cultural history of mediation or is it a recent development?

Mediation, although now well entrenched in the legal culture in Australia, has developed substantially over the past 10–15 years.

This development has been accelerated by the introduction in most jurisdictions both at State and Federal levels of mandatory or court ordered mediation.¹ Courts are willing to order and do order parties to engage in mediation right up to the commencement of trial (and at times during lengthy litigation in the course of the trial) even where one of the parties opposes the process. In certain jurisdictions, the legislation goes further by proscribing guidelines for the mediation process² or imposing duties on the parties such as an obligation to participate in mediation in good faith.³

In Queensland, the legislation both defines mediation and sets out the matters a court may take into account when deciding whether to refer a matter to case appraisal.⁴ These matters include whether the costs of litigation are likely to be disproportionate to the benefit gained and the likelihood of an appraisal producing compromise.

Court-ordered mediation

There are limited reported cases on the issue of compulsory mediation as a result of a court order, although those which are available are useful in providing guidance as to the inclination of the courts. Given that many of the courts have only been empowered to refer proceedings to mediation in the

face of one party's opposition in the last five to ten years, this article has considered the case law which has developed during that period.

One of the earliest decisions of the Federal Court in relation to section 53A was that of *Kilthistle No 6 Pty Ltd v Austwide Homes Pty Ltd* (Fed C of A, Lehane J, NG 9 of 1996, 10 December 1997, unreported). The Court was asked to rule on an application that the matter be referred to mediation where several of the parties vigorously opposed the motion. Lehane J made the point that 'mediation is a consensual procedure. There can be little doubt that it is most likely to achieve results if all parties are willing participants.'

Lehane J continued:

In a case where a party to proceeding [...] is adamantly opposed to mediation [...] the Court is likely, I think, to be slow to order a referral to a mediator. The number and nature of issues in this case, the number of the parties, the course of the proceedings to date, the interlocutory matters remaining in dispute and the evidence of the applicants as to their attitude and its basis and as to their principal object in bringing these proceedings combine to convince me that mediation, at this stage, is unlikely to be either expeditious or effective...

and on this basis declined to make the orders sought. His Honour noted, however, that once certain interlocutory matters had been resolved, the application might be seen in a different light.

Subsequently, the Supreme Court of South Australia was asked to consider a similar application under the Supreme Court Act (SA) 1935. *Hopcroft & Anor v Olsen & Ors*⁵ concerned twelve actions in which similar claims were brought by parties involved in the fishing industry. Perry J noted that all of the actions involved 'complex questions of law and fact, both as to issues of liability and as to quantum' and set out some of the background to the application before the Court, emphasising that a number of the actions had been around for a number of years.

Perry J considered the power vested in the Court under the Supreme Court Act 1935 and, in the absence of any authority of the Supreme Court of South Australia on the issue of directed, as opposed to consensual mediation, referred to the transcript of proceedings in a case heard in the Supreme Court of Victoria in the previous November by Hedigan J (*Butcherv Commonwealth of Australia* Action No 4536 of 1996). Perry J observed that it appeared from the transcript that against the wishes of the defendant to the proceedings, the court had directed that a mediation take place before an external mediator. Perry J noted, however, that '[e]very case involves different circumstances. What may be an appropriate procedure in one case, may clearly be inappropriate in another'.

At the conclusion of this consideration, His Honour found that in the circumstances of this case (including in particular the fact that the earliest available date for trial was February 2000) it was proper to order mediation and to provide the parties against whose wishes the order was made the opportunity to be heard further on the identity of the mediator and the precise terms of the order.

The question of compulsory mediation was again the subject of a decision by Perry J in the Supreme Court of South Australia in the case of *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clark Pty Ltd* [2001] SASC 159. In this case, an application was made by one party for leave to appeal from an order referring the matter to mediation and directing the parties to attend.

Perry J said:

... it seems to me that although the relevant practice direction suggests that the Court should be circumspect about appointing an external mediator against the wishes of the parties, it is clearly a procedure which, in an appropriate case, may be adopted. I have seen no reason why I should not adopt that procedure in this case, and neither do I see that in doing so I have created an issue worthy of the attention of the Full Court.

In January 2001, Levine J of the New South Wales Supreme Court heard an application orders for compulsory mediation in the case of *Waterhouse v Perkins* [2001] NSWSC 13. The case involved defamation proceedings. The applicant submitted in this case that the complexity of the matter, the time taken since initiation of proceedings, the length of time and the costs to be incurred in litigating were all factors which pointed to the 'desirability of the exploration of the resolution of the issues between the parties other than by the trial itself'.

Levine J observed that the Court had power (at that time under section 110K of the Supreme Court Act 1970) to order mediation without the consent of the parties, however noted that since the defamation actions in this case related to publications before the coming into operation of the amendments to the Defamation Act in 1994, he did 'not consider the application made in these actions to be the proper vehicle for pronouncing authoritatively on the circumstances in which compulsory mediation should be ordered in defamation actions'.

It should be noted that the application in this case was made by the defendants to the proceedings who had undertaken, should the order be made, to pay the costs of the mediation. Since this is one of the first (if not the first) decision of the New South Wales Supreme Court on the issue of compulsory referral to mediation, it is worth setting out the comments made by Levine J in reaching his decision:

Thus it appears that the considerations relevant to the application in this litigation can be summarised as follows: a great deal of time has passed since the institution of each action (1991 and 1996). As at mid-2000 the parties were still engaged in the usual interlocutory squabbles there being little chance, upon the resolution of them, and assuming no further interlocutory disputes (an unsafe assumption in the general course of this litigation), of the matter being heard before the end of 2001. On present estimates that hearing will take at least six weeks and be constituted by the two actions being heard together by one jury. The defendants are clearly concerned about costs and this it may fairly be said 'their financial interests'. The plaintiff is clearly concerned with vindication. As I have mentioned above I reject the statement, as too simplistic, that a mediator cannot give vindication ... Further, the only costs in financial terms to the plaintiff will be his own legal costs. That expenditure by him, together with that of the defendants, cannot reasonably be viewed against the quantification of resources in all their aspects in the further prosecution of this litigation to trial and verdict. ... I am not persuaded that there is any rational reason for not ordering mediation in the peculiar circumstances of this litigation at this time. The issues are clear as between the parties, if not as refined as parties in defamation actions seem to insist upon, by reason of outstanding interlocutory disputes.

Shortly after the decision of Levine J in the Waterhouse case, Barrett J, also in the New South Wales Supreme Court, was asked to make an order for compulsory mediation under section 110K of the Supreme Court Act 1970 in the case of *Morrow v chinadotcom*.⁶ Barrett J did not refer to the *Waterhouse* decision. His Honour did refer to the two decisions of Perry J in the Supreme Court of South Australia in the two case mentioned earlier in this article, those being the *Hopcroft* case⁷ and the *Baulderstone Hornibrook* case⁸, however noted that these authorities did not provide any particular guidance.

Barrett J observed that:

The clearly stated preference of one party to continue with the litigation which that party sees as the most appropriate means of dispute resolution must cause a Court to think very carefully before compelling what, on the face of things, may well turn out to be an exercise in futility attended by delay and expense. There will no doubt be some cases where such a course will be justified. ... The present proceedings involve commercial parties engaged in a commercial transaction. They may be taken to possess a reasonable degree of business sophistication and acumen. Presumably they (and

certainly their respective solicitors) are well aware of the potential benefits, in many cases, of mediation and other non-curial resolution processes. If, with the benefit of that knowledge and the advice of their solicitors, they do not all see sufficient value in resorting to some alternative procedure of their own choosing there is, it seems to me, very little, if anything, that is likely to be gained by the Court compelling them to pay at least lip service to it. [...] My assessment in this case is that mediation forced upon one of the parties, rather than voluntarily embraced by all of them, would be unlikely to achieve anything useful."

The Court of Appeal of New South Wales subsequently upheld the decision of Barrett J in the case of *chinadotcom v Morrow*⁹, noting that:

We are not persuaded that the learned judge erred in the exercise of his discretion under s 110K. Contrary to the claimant's submissions, the judge's reasons do not imply that the Court should never refer proceedings for mediation or neutral evaluation if one of the parties withholds consent. Rather, he made a finding that was well open on the material before him to the effect that the forced referral of this particular dispute to mediation or neutral evaluation was unlikely to be productive.

The issue of compulsory mediation was again before the New South Wales Supreme Court in May 2001. The case of *Idoport Pty Ltd v National Australia Bank Ltd*¹⁰ involved an application by a number of parties involved in three sets of proceedings for an order that the parties refer their disputes to mediation. Einstein J described the proceedings noting that because of its complexity, the 'litigation is in my view particularly difficult for the curial process'. Einstein J placed emphasis on the fact that the proceedings were commercial proceedings and that '[t]here can be no issue but that commercial proceedings before the Commercial list are regularly settled for all sorts of reasons and by utilising a myriad of approaches taken by businessmen and corporations to contested commercial litigation'.

With respect to the operation of section 110K (now superseded by provisions of the Civil Procedure Act 2005), Einstein J noted:

The amendments raised some debate surrounding the appropriateness of mandatory mediation. Some view this notion as a contradiction in terms, opposing the culture of ADR which generally encompasses a voluntary, consensual process. It is important to note however, that whilst parties may be compelled to attend mediation sessions, they are not forced to settle and may continue with litigation without penalty.

Einstein J referred to the *Waterhouse* case¹¹ and made the observation that whether an order should be made depended upon the circumstances of each particular case. Matters which His Honour identified as favouring an order for mediation included:

- (a) the fact that the principle issues between the parties had been identified, interlocutory disputes largely resolved, evidence and principal contentions of the parties known to the other parties;
- (b) mediation at this stage of the proceedings would be 'relatively expeditious' and more effective than at a later stage;
- (c) the issues on liability were relatively clearly defined and a substantial part of the matters in dispute concerned quantum, 'which are matters ripe for mediation';
- (d) the trial was expected to run for some years and early resolution would assist the availability of court and judicial resources for other litigants;
- (e) mediation could encompass matters which could not be the subject of relief by the Court; and
- (f) 'mediation may well effect a sensible and timely commercial compromise for all concerned, in a responsible and businesslike manner'.

Einstein J also cited statements made by the Chief Justice of the Supreme Court of New South Wales¹² in support of mandatory mediation:

No doubt it is true to say that at least some people, perhaps many people, compelled to mediate will not approach the process in a frame of mind likely to lead to a successful mediation. There is, however, a substantial body of opinion, albeit not unanimous, that some persons who do not agree to mediate, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute.

These comments are consistent with the view expressed by Boule and Nestic¹³ that surveys show relatively high success rates in certain mandatory schemes because even if parties are initially reluctant to participate in mediation, a skilled mediator may be able to assist them to reach agreement.

Einstein J ordered mediation, noting in doing so that:

Whilst I have clear reservations as to the utility of a court ordered mediation in circumstances in which the defendants so very strongly submit that:

- (A) the very measure of the plaintiff's claims, and
- (B) the chasm between the respective perceptions as to the plaintiff's prospects of success, combine to show that there is simply no room for negotiations in good faith, I have to take into account the whole of the unusual circumstances of this unusual litigation.

A few weeks before Einstein J heard the *Idoport* matter, Nicholson J in the Federal Court, Western Australian District Registry had had the opportunity to consider the circumstances when mediation was appropriate in the case of *Australian Competition and Consumer Commission v Lux Pty Ltd & Anor.*¹⁴ In this case the Court was asked to revoke an order for mediation on the application of one of the parties. The case is perhaps distinguishable from earlier decisions because the applicant was the Australian Competition and Consumer Commission.

As a first step, Nicholson J examined the relevant provisions of the Federal Court of Australia Act 1976 and confirmed that the order for mediation had been made within the power of the Court. His Honour then considered the circumstances in which the order had been made, observing that:

It being apparent that the mediation was to benefit from and advance if possible the reduction of points at issue by the experts [...], the purpose to be served by the order from mediation has not presently come to fruition.

There were, however, other considerations which arose from the submissions made by the parties. The applicant submitted that mediation was not appropriate for three reasons: first, that the complaint related to conduct affecting a vulnerable person; secondly, the nature of the applicant as an entity (its function being to ensure compliance with and enforcement of the Trade Practices Act); and, thirdly, that mediation was unsuited to matters involving many disputed facts and issues. The respondent opposed the application predominantly on the grounds that it could not be said that the mediation would not achieve the objectives of the applicant until the process had been gone through. The respondent also submitted that the requirement to mediate was not contrary to the objective of the applicant and the Trade Practices Act.

Nicholson J noted the observation by Lehane J in *Kilthistle*¹⁵, that mediation is ordinarily a consensual procedure, but added that:

... the amendment of the Federal Court Act to empower the Court to refer a proceeding to mediation even if all parties do not agree and consequential amendment of the rules to take account of that provision, reflect a view that mediation may be productive even if a party is initially a reluctant participant.

Nicholson J specifically rejected the applicant's submission that its public interest functions made it inappropriate for it to negotiate a settlement of the litigation, stating:

To conclude that the formation by the applicant of the view that the matter requires curial resolution in

a manner thought by the applicant to meet its public interest obligations would fail to recognise the competing public and curial interest in the mediation process as an important (if not vital) part of curial requirements. There is no necessary reason why the former public interest objective could not be met in the give and take of a true mediation. Whether or not that is the case, it is apparent there are other objectives open to be achieved by mediation in the particular circumstances of this proceeding.

Nicholson J refused the application for discharge of the order for mediation.

The final case worth mention is the decision of the Supreme Court of New South Wales in *Blake v John Fairfax Publications Pty Ltd* [2001] NSWSC 885. The application was made after the initial jury trial in a defamation matter and before the assessment of damages. Levine J referred to his decision in the *Waterhouse* case¹⁶ noting that the circumstances in which His Honour ordered compulsory mediation in that case were 'distinctly different' from the present case. Levine J concluded:

The present structure of the action listed for hearing in a couple of weeks time is that the only outstanding issue is the trial of the question of damages, any award of which would constitute a public vindication of the plaintiff. This plaintiff has the advantage of a hearing date fixed for a short trial. It would, in my view, be a disproportionate diversion of resources in those circumstances either to interfere with that trial in terms of it being part heard, to vacate it, or otherwise to make orders as to costs in relation to the mediation and I decline that application.

The above cases demonstrate that those courts which have the power to compel parties to attend mediation with or without the consent of all the parties to the proceedings, will clearly do so where the mediation process is likely to be productive. Productive in this context does not always mean that the dispute which is the subject of the proceedings will be settled. It may mean that the issues are narrowed or certain parts of the dispute are resolved. Where, however, the matter is very close to trial and mediation would divert resources and attention from the final stages of preparation, the courts will be more reluctant to compel the reference.

Perceptions in mediation

There were perhaps formerly perceptions that a party proposing mediation or any other form of alternative dispute resolution considered itself to be at risk of a judgment in the other party's favour. This perception has all but dissipated, particularly amongst commercial entities.

It is often the parties themselves (rather than their legal advisers) who first broach the subject of mediation when a dispute develops. These parties may also have considered mediation as a step in a dispute resolution clause in their transaction documents. There have been some interesting developments in the enforcement of mediation clauses in various jurisdictions.

Enforcement of mediation clauses

The obligation to mediate generally arises in the context of a multi-tiered dispute resolution clause.

A multi-tiered dispute resolution clause must conform with the requirements of an enforceable contract. In particular, it must be sufficiently certain to be capable of enforcement. This means that there is sufficient certainty to identify the various steps of the dispute resolution, when each starts and finishes, when the party is permitted to move to the next step and whether in fact steps such as mediation or negotiation are true conditions precedent to the commencement of arbitration or litigation.

The courts around the world, including the Australian courts, have the difficult role of reconciling the desire to uphold parties' agreements to engage in alternative dispute resolution procedures (driven by commercial and efficacy imperatives) and the need to ensure that those agreements are enforceable at law. This might be one reason why international dispute resolution clauses do not refer as often to mediation as one might expect having regard to the flexibility and apparent suitability of mediation to cross border disputes.

There have been distinct developments in this area in the past decade.

In Australia, a case of significance in the development of the law is that of *Aiton Australia Pty Ltd v Transfield Pty Ltd*¹⁷. This case concerned the enforceability of a dispute resolution clause in a construction contract. The relevant clause provided for the following tiers of dispute resolution:

- (2) diligent and good faith efforts to resolve all disputes before either party commences mediation, legal action or expert determination;
- (3) submission of the dispute to designated officers for negotiation;
- (4) mediation (with agreement between the parties that mediation 'shall be compulsory before either Party may commence legal action or initiate the Expert Resolution Process'); and
- (5) Expert Resolution.

Aiton commenced proceedings seeking damages for misleading and deceptive conduct by Transfield and delay and disruption to the project schedule. Transfield sought to stay the proceedings, claiming that Aiton had failed to follow the dispute resolution procedures set out in the contract before it had commenced legal action.

Justice Einstein, having considered the actions of the

parties leading to the commencement of proceedings, found that Aiton had made attempts to comply with the dispute resolution procedures, however those attempts had been frustrated by Transfield. His Honour also found that the procedures had not been followed with respect to all of Aiton's heads of claim.

As a starting point, His Honour noted that:

Equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the Court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable: see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 210. The Court may, however, effectively achieve enforcement of the clause by default, by ordering that proceedings commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed.

Aiton submitted that:

- (g) the procedures in the dispute resolution clause were not mandatory before commencement of legal action;
- (h) the dispute resolution clause did not apply to certain of its disputes, namely those arising under the Trade Practices Act and Fair Trading Act and for quantum meruit; and
- (i) the requirement of 'good faith' in the dispute resolution clause was not sufficiently certain so as to be legally recognised.

Justice Einstein did not accept either of the first or second submissions of Aiton.

With respect to the third, His Honour noted:

There is no legislative basis for enforcing dispute resolution clauses otherwise than those which provide for arbitration: Commercial Arbitration Act. However, it is clear that if parties have entered into an agreement to conciliate or mediate their dispute, the Court may, in principle, make orders achieving the enforcement of that agreement as a pre-condition to commencement of proceedings in relation to the dispute: *Hooper Bailie*. [...]

The Court will not adjourn or stay proceedings pending alternative dispute resolution procedures being followed, if the procedures are not sufficiently detailed to be meaningfully enforced: *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

Justice Giles of the New South Wales Supreme Court had delivered the judgments in both *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*¹⁸ and *Elizabeth Bay Developments*.

In *Hooper Bailie*, His Honour stated the following test

for enforcement of a dispute resolution clause:

An agreement to conciliate or mediate is not likened ... to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement.

In *Elizabeth Bay Developments*, disputes had arisen under a building contract and a construction management contract. Elizabeth Bay Developments commenced proceedings seeking a declaration that the contracts had come to an end.

Both contracts contained a dispute resolution clause, which included mediation administered by the Australian Commercial Dispute Centre (ACDC) prior to arbitration. Boral sought to compel Elizabeth Bay Developments to mediate and applied for an order that the court proceedings be stayed so as to enable the mediation to take place. Elizabeth Bay Developments declined to participate in the mediation.

ACDC administers mediations in accordance with its published guidelines. These guidelines were not referred to in the dispute resolution clause in either the building contract or the construction management contract. Giles J was concerned that neither Boral nor Elizabeth Bay Developments appeared to have sighted the guidelines prior to entry into their agreements, however the parties were prepared to proceed on that basis that this was not the case. Giles J had further concerns which arose from the inconsistency between the ACDC guidelines and the mediation agreement attached thereto and in the requirement contained in the agreement that the parties negotiate in good faith.

With respect to the mediation agreement, Giles J observed that by incorporation of the ACDC guidelines into their contracts, Boral and Elizabeth Bay Developments had agreed to enter into mediation agreements, the terms of which were uncertain, other than that they must be consistent with the guidelines. His Honour found that this deficiency could not be overcome by other provisions in the guidelines and that the conclusion was that the parties' agreement:

... fell down for lack of certainty in the process which they should follow in their mediation.

In relation to the requirement of good faith, Giles J felt unable to regard the parties as having undertaken to declare at a future time that they had a commitment to good faith negotiations, and concluded that:

In my opinion, to adjourn or stay the proceedings so that Elizabeth Bay would be required either to sign

an unknown agreement as an important step in the process of mediation, or to commit itself to attempting in good faith to negotiate towards achieving a settlement of the dispute, would require of Elizabeth Bay conduct of unacceptable uncertainty. In the alternative presently under consideration, the mediation clauses would go beyond requiring of the parties participation in the process of mediation by conduct of sufficient certainty for legal recognition of the agreement. Mediation is a valuable means of resolution of disputes, and agreements to mediate should be recognised and given effect in appropriate cases. Even assuming the incorporation of ACDC's guidelines, however, the contracts in this case do not in my opinion meet the requirements considered in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*.

Having considered the decisions in *Hooper Bailie, Elizabeth Bay Developments* and other authorities and drawing on the commentary of L Boulle and R Angyal¹⁹, Einstein J in *Aiton* set out the minimum requirements for enforceability of a mediation clause (adding that they ought be seen as applying at any stage, not simply mediation):

- (j) they must be in the form described in *Scott v Avery*²⁰ (meaning that completion of the mediation is a condition precedent to commencement of court proceedings);
- (k) the process established by the clause must be certain (in that there are no stages where further agreement is required);
- (l) the administrative processes for selecting a mediator and determining his or her remuneration should be included in the clause (or a mechanism for a third party to make the selection); and
- (m) the clause should set out in detail the process of mediation to be followed or incorporate rules by reference

In this case, consistent with the requirements set out above, and on the basis that the mediation agreement did not spell out how responsibility for payment of the mediators' costs was to be dealt with, His Honour held that the mediation clause was not enforceable and, it not being severable from the negotiation clause, the agreement to negotiate was also unenforceable.

As a final comment, Einstein J noted:

Notwithstanding the extensive judicial and academic comment on the appropriateness of requiring parties to adhere to dispute resolution clauses as a pre-condition to litigation in the face of evident reluctance on the part of certain players, it seems to me that strict compliance with a dispute resolution procedure by a party invoking the process (Transfield) is, subject to one matter, an essential pre-condition to being entitled to relief by way of enforcing, albeit indirectly, the other party to

comply with the procedure. The proviso is that where both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the contract is construed to oblige each party to do all that is necessary to be done on his or her part for the carrying out of that thing, although there were no express words to that effect: *Mackay v Dick* (at 263) per Lord Blackburn. Had Aiton persevered and regularly invoked the dispute resolution procedures with respect to all claims it sought to subject to those procedures, then Transfield's conduct in endeavouring to frustrate the invocation of those procedures is likely to have been the dominant consideration in the Court refusing to exercise its discretion to order the stay of proceedings.

Aiton was considered by Justice Hammerschlag in the recent decision of *Laing O'Rourke v Transport Infrastructure*²¹. The relevant dispute provisions did not refer to mediation, but required instead that the parties:

- (n) meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference; and
- (o) if they cannot resolve the dispute or difference, endeavour to agree upon a procedure to resolve the dispute or difference.

Hammerschlag J noted that in *Aiton*, while Einstein J:

would have held the agreement to negotiate in good faith otherwise to be enforceable, it was not enforceable because it was not severable from an unenforceable mediation clause. The holding concerning the good faith requirement was accordingly obiter.

Hammerschlag J preferred the analysis of Handley JA in *Coal Cliff Collieries Pty Limited v Sijehama Pty Limited*²²:

Negotiations are conducted at the discretion of the parties. They may withdraw or continue, accept, counter offer or reject, compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or as slow as they think fit.

To my good mind these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding.

These two cases provide some guidance on the direction of the courts in Australia. Courts in other jurisdictions are also grappling with the issues of enforceability of multi-tiered dispute clauses²³, particularly where it is apparent what the parties intended, however the relevant provision does not stand up to the scrutiny of contractual principles.

Confidentiality in mediation

Mediation in Australia amongst commercial entities is almost always conducted on a confidential basis. Most mediators require any person attending the mediation to sign a confidentiality agreement (in addition to the mediation agreement signed by the parties to the mediation and the mediator).

The confidentiality is preserved in part by the conduct of the discussions on a ‘without prejudice’ basis.

Mediation trends

Various commentators have suggested in recent times that there is merit in the parties to litigation or arbitration considering a break or window in the proceedings (meaning after commencement of the trial or hearing) in order to have the disputes mediated. This is sometimes referred to as window mediation.

There are some clear advantages in this process.

First, by the time the parties have embarked on litigation or arbitration and are part way through the process, the issues in dispute are often clearer than they were before the proceedings commenced. In addition, evidence might be suggesting that one or other of the parties has a better prospect of success in relation to certain issues. Other issues which were considered significant at the outset of the dispute may have become less important.

Secondly, the parties will have a far better appreciation of the resources required to conduct the proceedings, including financial resources and executive time. They will also recognise that the adversarial process takes time and that an opportunity to explore settlement in advance of the conclusion of the hearing is in the interests of all parties.

A variation on the window mediation which can be useful in arbitration is the appointment of a mediator to remain outside the arbitration process, but who is available at call by the parties or by the arbitrator to mediate certain aspects of the dispute during the arbitration proceedings.

Notes

1 For superior courts, refer as follows: Section 53A of the Federal

Court of Australia Act 1976 (Commonwealth); section 102 of the Supreme Court of Queensland Act 1991 (Queensland); section 26 of the Civil Procedure Act 2005 (NSW); Order 50.07 (1) of the Supreme Court (General Civil Procedure) Rules 2005 (Victoria); section 65 of the Supreme Court Act 1935 (South Australia); Pt 20 r 518 of the Supreme Court Rules 2000 (Tasmania)

2 Order 72 of the Federal Court Rules

3 s 27 of the Civil Procedure Act 2005 (NSW)

4 Section 96 of the Supreme Court of Queensland Act (QLD) 1991 defines mediation as “a process under the rules under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication”. Under section 102(1), the Court may require the parties or their representatives to attend before it to enable the court to decide whether the parties’ dispute should be referred to an ADR process. Under subsection 102(3), the court may refer the case to mediation or case appraisal. Subsection 102(4) sets out matters the court “may” take into account when deciding whether to refer the matter to case appraisal.

5 [1998] SASC S7009

6 [2001] NSWSC 209

7 *Hopcroft v Olsen*, 21 December 1998 [1998] SASC 7009

8 *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clarke Pty Ltd*, 7 June 2000 [2000] SASC 159

9 [2001] NSWCA 82

10 [2001] NSWSC 427

11 [2001] NSWSC 13

12 Law Society Journal, March 2001

13 Laurence Boulle and Miryana Nestic, “*Mediation: principles process practice*”, Butterworths, 2001, p.372

14 [2001] FCA 600

15 *Kilthistle No 6 Pty Ltd & Others (Receiver and Manager appointed) v Austwide Homes Pty Ltd & Ors* (Lehane J, 10 December 1997, unreported)

16 [2001] NSWSC 13

17 [1999] NSWSC 996

18 (1992) 28 NSWLR 194

19 His Honour refers to Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 25, June 1998, Chapter 6, par 6.20

20 A *Scott v Avery* clause is a contractual term which prevents the parties from suing on the contract until the dispute is submitted to arbitration and an award is obtained

21 [2007] NSWSC 723

22 (1991) 24 NSWLR 1, at 41-42

23 For recent New Zealand authority, see *Porter v Gullivers Travel Group Ltd* [2007] NZCA 345

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Using a third party to assist M&A negotiations

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The following article outlines three case studies discussed during the session on deal mediation at the IBA Annual Conference in Singapore in October.

In the first case the owners and management of the target were very elderly and the principal product highly controversial. The purchaser had expressed enthusiasm for the product but it transpired wished to make the purchase through a shell company and would not be selling the product in its own name. The owners of the target were very proud of the product and had felt betrayed by an earlier licensee whom they had felt had bowed too easily to ill informed external pressure.

The purchaser engaged a retired industry executive to assist in the negotiations and to build rapport and trust with the target. The person selected was well respected in the industry and of similar age and background to the sellers. He was by no means neutral as he was engaged by the purchaser, assisted in negotiations on their behalf and indeed had in the past been an employee of the purchaser for several years. Nonetheless, during a series of separate and joint meetings he rapidly won the trust of all concerned, persuaded the purchaser to reduce the size of its negotiating and due diligence teams and ensured each party's concerns were raised and addressed. He was also sensitive to pacing the meetings to meet the needs of the elderly negotiators and ensured the sellers' inexperienced lawyer was not embarrassed by his lack of knowledge in the face of the sellers' high-powered legal team.

In retrospect the same deal could probably have been done without the third party intervention, however this approach led to considerable savings in time and expense, a pleasant and cooperative negotiation and a very smooth transition.

In the second case the purchaser's board engaged a US lawyer of similar ethnicity and cultural background to build bridges with the target's management. This person had close friends on the board but did not respect the abilities of the purchaser's management. He was not as well informed as to the business as he believed and was perceived as biased towards the target. He raised expectations unrealistically amongst the target's management as to the importance of their business and future roles and offered a conduit for their concerns

directly to the board so continually undermining management. He met only with the target and reported back only to the board.

Obviously this person was a poor choice but the larger question is whether anyone else would have added value to the process. The purchaser's management team had extensive international experience and the target's management had worked and lived outside their home territory. The cultural issue was largely moot. The target was a subsidiary of a larger group with whom the negotiations were conducted: the target's management had no influence on that. The only issue was really the transition which of itself raised few concerns beyond those created by the third party 'bridge builder'. In the particular circumstances of this case it is hard to see what would have been served by the appointment of any third party, however, the negotiations with the sellers were protracted and bad tempered and clouded by a great deal of mistrust so perhaps a third party intervention in that part of the deal could have been helpful.

The third case was a more classical situation. The sellers were having difficulties working together and had a number of lawsuits and other disputes pending against each other. Some were separately legally represented although the extent of each lawyer's instructions was unclear. There were issues relating to the production of documents and information stemming from these disputes and other pending criminal actions which made customary valuation and risk assessment difficult.

The negotiations had reached stalemate primarily on the absence of material information. The purchaser's lawyer finally contacted a lawyer who had previously represented the target and remained an adviser to a member of one of the selling families. The sellers agreed to meet with her and she conducted a series of separate and joint meetings with all the parties. She took a strongly directive and evaluative approach, and using reality testing and inviting people to step into each others' shoes, an acceptable way forward gradually emerged.

A deal was done, but although the purchase price was greatly reduced and many safeguards were built in, it is questionable as to whether concluding this deal was in the long term interests of the purchaser.

So, what do we learn from these examples?

Clearly the intervention of the right person can be helpful and there can be measurable benefits in terms of time, costs and deal value. It may not be necessary that the person be 'neutral' and indeed prior experience with at least one party may be useful. The use of a third party can be particularly valuable where there are issues of trust. It is, however, important that the person chosen is able to work in an open and even-handed manner with everyone else involved and has a clear mandate. This

mandate should be focused on those issues that are likely to be most sensitive and care should be taken to ensure that the relevant individuals and interests are engaged in those discussions.

Finally, just because a deal can be done it does not mean it should be done! Commercial negotiations should be weighed against goals and options in just the same way as a proposal to settle a dispute. Going into the discussions the parties should have a clear idea of their BATNA and be prepared to walk if it is not bettered.

Mediation in India

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In times gone by, Indians settled disputes through a community based system called the Panchayat, where village elders would take up complaints, hear the parties (and often, their friends and relatives) and fashion solutions keeping individual and social needs in mind. British rule brought Anglo-Saxon law and courts, and traditional processes waned. Overburdened courts, interminable technical procedures, endless litigation caused serious search for alternatives.

Centuries later, mediation is coming back, this time in structured form. The impetus has come from the legislature and the judiciary. In 1996 Parliament amended the Code of Civil Procedure bringing in Section 89 which provided that judges may refer cases to ADR processes including mediation. India's first court-annexed mediation centre was set up in the Madras High Court in April 2005. Several other High Courts have followed suit. It is expected that soon every High Court in the country will have a mediation centre responsible for handling mediation in the respective States. The charter of such centres provide for the Chief Justice of the High Court as the Patron, a supervising Committee of three Judges of the High Court and an Organising Committee drawn from the Bar. These bodies are meant to create awareness, train mediators and administer schemes for referral.

The mediators are mostly lawyers and a few retired judges, all of whom have undergone training. The cases are referred by the court to the centre which appoints the mediators. The mediation sessions are held after court-working hours. The parties attend with their lawyers. The time limit is 60 days, extendable or shortened where required. On the conclusion of the mediation, a report is made to the Court attaching the agreement, if reached. The Court then passes orders in terms of the agreement, which thus becomes legally enforceable and free from appeal. If no agreement is

reached the case goes back to the court docket. The cases referred by the Courts to mediation include personal and family matters, contracts and civil disputes, property and partition suits, company petitions and arbitration cases. Several cases are complex and deal with large claims.

There appears to be a good degree of acceptance by the stakeholders of our legal system. Litigants are appreciative of the savings in time and cost, and the opportunity to participate at the round table. Court mediators function pro bono or are paid an honorarium. What draws them is that they are in charge of the process of moving parties from dispute to settlement, and see a new area of professional practice opening up for exercise of their skills and knowledge of law. When the need grows, these Court-trained and experienced mediators are going to be in demand. With exceptions, lawyers are supportive of the process, come with their clients to the mediation sessions and often aid settlement. They benefit by having satisfied clients and are also able to earn their professional fees upfront. However, it is not just the professional and monetary factor at work. The mediation process taps into a long-neglected need of the members of the legal profession to be recognised as resolvers of conflict, who bring about betterment and harmony.

In parts of the Western world mediation started as community and private initiatives and was later adopted by the Courts. In countries such as India litigants and the general public will accept a new method of dispute resolution only when they see that the judiciary has embraced it. This aspect is relevant when we think of how mediation can be introduced in legal cultures. India's mediation movement has made considerable progress because it started under the umbrella of the Court.

With the Courts now taking to mediation in a big way, and with attendant press coverage, private mediation is starting to take off. The Arbitration and Conciliation Act 1996 deals with conciliation (also read mediation) in the field of private mediation. Agreements reached here have the status of an arbitral award by consent, and thus cannot be set aside. The UNCITRAL Conciliation Rules 1980 largely apply here and govern the appointment and role of conciliators, the procedure to be followed and the safeguards respecting confidentiality.

Institutes are being established to train mediators and offer mediation facilities including a panel of neutrals.

India's growing economy needs faster and more efficient dispute resolution, and mediation fits the bill. On the anvil are a Code of Ethics and a system of accreditation. Law Schools are moving to make mediation part of the curriculum so that students can learn to use litigation and consensual methods as appropriate. An Association of Indian Mediators (AIM) is taking shape.

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Enforcing mediated settlement agreements in England – where to from here?

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In the decade following the publication of Lord Woolf's Access to Justice reports,² developments in the field of mediation have gained significant momentum. Interest in mediation in England has arguably never been so great.

As both the use and the profile of mediation has increased, however, its relationship with litigation and arbitration proceedings has given rise to a number of questions and uncertainties. The discussion below focuses on the position parties find themselves in at the end of the mediation process and how mediated settlement agreements (MSAs) are enforced in England.

In the light of what appears to be a clear indication that support for mediation is growing and will continue to do so, we ask: where to from here? What enforcement options are currently available to a party when it finds it needs to take steps to enforce a MSA? Are those options adequate? Is a more predictable legal framework required to put the status of mediated outcomes on an equal enforcement footing with court orders and arbitration awards?

Momentum for mediation

Changes to the Civil Procedure Rules (CPR) subsequent to Lord Woolf's Access to Justice Reports have emphasised the encouragement of alternative dispute resolution (ADR) by the judiciary.³ Judicial support for ADR and the concept of litigation as a 'last

resort' has been further reinforced by the publication of nine pre-action protocols and an accompanying Practice Direction, aimed at encouraging parties to attempt to settle their disputes before commencing court proceedings.⁴

Pilot mediation schemes have been introduced in various different courts in England.⁵ While such court-annexed mediation schemes are not without their critics, the introduction of mediation into the court system is at the very least another indication that the judiciary understands the benefits, and supports the use, of mediation as a dispute resolution tool.

The courts have warned parties against refusing to mediate in cases such as *Dunnett v Railtrack* [2002] EWCA Civ 303 and *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576. Those authorities have confirmed that a refusal to participate in ADR is likely to result in unfavourable cost consequences. More recently, Ramsey J's deliberations in the case of *P4 Limited v Unite Integrated Solutions plc* [2006] EWHC 2640 (TCC) confirmed that judges in England support mediation and understand its utility in the maintenance of the 'overriding objective' underpinning the CPR.⁶

While it is clear that judicial enthusiasm for mediation is alive and well, however, the vast majority of judicial commentary has to date focussed on the encouragement of parties to consider mediation and to attempt to resolve their disputes by ADR. There has thus far been very little commentary from the judiciary on either the

conduct of the mediation process itself, or the product of a successful mediation - the MSA.

This can be contrasted with the court's role in the context of arbitration. The courts have had jurisdiction to support formally the arbitration process for some time through specific arbitration legislation. Perhaps the greatest supporting role the judiciary plays in this regard is its role in upholding and enforcing arbitration awards. How does this compare to the support that the judiciary is able to lend to the mediation process? Is it time for the courts to be given similar powers of enforcement in relation to MSAs?

The client's question: How do I enforce my MSA?

The three enforcement options that may be available to a party seeking to enforce a MSA in England are: (i) enforcement as an ordinary contract; (ii) enforcement as a court order; and (iii) enforcement as an arbitration award. We explore each of these options, and when they will apply below.

Enforcement as an ordinary contract

Provided that a MSA satisfies the legal requirements for a binding contract,⁷ it will (like any other contract) have legal force and be enforceable as such.

In the event that one of the parties to the mediation fails to comply with the terms of a legally binding settlement, the other party cannot pursue the original cause of action, but must instead bring an action based on a breach of the MSA.⁸

As with the enforcement of all contracts, where a MSA is breached, the primary remedy for the party seeking to enforce the contract will be in damages. Remedies of specific performance or an injunction may also be available where that is appropriate. In a clear cut case summary judgment may be available.

In the light of the support that the judiciary has shown for the process of mediation generally, it would be easy to conclude that the courts in England would be less receptive to arguments against the enforcement of a contract in the form of a MSA. Such an assumption, however, is entirely speculative and as a matter of law is unsupported by any judicial authority to that effect, or by statute, or the CPR.

Rules relating to causation, remoteness and the duty to mitigate loss will be just as relevant to a claim for the enforcement of a MSA, as they are to any other claim in contract. Equally, any party wishing to escape its obligations under a MSA may do so, on the same grounds as might be relied on in relation to any action for breach of contract. Arguments of fraud, undue influence, unconscionability, duress, lack of capacity or authority to contract, or illegality may be raised in an attempt to render the MSA ineffective and unenforceable.⁹

Issues of jurisdiction may also arise where a party seeks to enforce a MSA as an ordinary contract, although where parties are from different jurisdictions, it is always prudent to include governing law and jurisdiction clauses in the MSA.

Enforcement as a court order

If the parties engage in mediation after the commencement of litigation, the terms of any settlement reached can be given the force of a consent order.¹⁰ Such an order imposes a stay on the proceedings, except for the purposes of enforcing the terms of settlement.¹¹

The use of this procedure can enable a party to a MSA to enforce its terms through the court, as if it were a judgment, without the need to start a fresh action for a breach of the MSA. Under the current legislative regime and the CPR, however, the enforcement advantages of the consent order procedure are not available to parties that initiate mediation and reach agreement on the terms of a MSA before involving the courts in their dispute.

Parties could of course try to obtain the advantages of the consent order procedure by initiating proceedings either before commencing their mediation or before finalising their MSA.¹² The filing of proceedings merely for the purposes of securing the use of such an expedited procedure, however, not only adds additional cost and time to the dispute resolution process, but could also potentially constitute an abuse of the court process.

Even where a party to a MSA has obtained an English court's judgment as to the enforceability of a MSA as a matter of contract, or a court order relating to the enforcement of a MSA, in the context of an international dispute, whether, and the extent to which, the court's judgment or order will be enforceable outside England will depend on the applicable rules concerning mutual recognition and enforcement of judgments.¹³

The unfortunate reality is that recognition, enforcement and then execution of any judgment (relating to a MSA or otherwise) in another country is often complicated and will be dependent on the existence of an applicable convention relating to the mutual recognition and enforcement of judgments and the local law of the relevant enforcement country.

Enforcement as an arbitration award

Where a dispute is settled by mediation after an arbitration has been commenced, subject to any contrary indication in the arbitration rules adopted by the parties, an arbitral tribunal can, on the request of the parties, record their settlement in the form of an agreed award.¹⁴ An agreed award is afforded the same status and effect as if it were an award issued by the arbitral tribunal

based on its view of the merits of the case. There are obvious advantages to such an approach, particularly in the context of international disputes. Parties to cross-border contracts frequently opt for arbitration as their dispute resolution method of choice. This is primarily because arbitration offers significant recognition and enforcement advantages pursuant to international conventions such as the United Nations Convention on Recognition and Enforcement of Foreign Awards ('New York Convention').

So what is the position where arbitration proceedings are not commenced before the parties endeavour to settle their dispute by mediation? Where that mediation is successful and a MSA results, can an arbitral tribunal then be appointed for the sole purpose of endorsing that agreement as if it were an arbitral award? While there does not appear to be any direct case law on this point, it seems that under the current legislative regime in England (and pursuant to the New York Convention) the enforcement of an award made by an arbitrator in such circumstances is likely to be susceptible to challenge.¹⁵

The key difficulty with such an enforcement route is the lack of any "dispute or difference" prior to the commencement of the arbitration. It seems clear (either explicitly or implicitly) from following provisions in the Arbitration Act 1996 and the New York Convention that the arbitrability of a matter is dependent on the prior existence of a dispute or difference:

- Article 2 of the New York Convention refers to the recognition by Contracting States of arbitration agreements concerning '...all or any differences which have arisen or which may arise between...' parties.
- Section 6 of the Arbitration Act 1996 defines an 'arbitration agreement' as an agreement to submit 'present or future disputes' to arbitration.
- Article 5(2) of the New York Convention allows a Contracting State to refuse recognition and enforcement of an award where 'the subject matter of the difference' is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought.

It appears therefore, that an arbitration award based on a MSA agreed either before the arbitration agreement between the parties was entered into or before it was invoked could be challenged on the basis that the arbitrator appointed had no jurisdiction to issue the award.

Accordingly, as is the case with litigation, if parties want to ensure that their MSA will attract the same enforcement status as an arbitral award, they will need to appoint an arbitrator prior to commencing the mediation process.

The future of enforcement: where to from here?

One always hopes that the execution of a MSA will signal the end of any further disputes between the parties. Inevitably, however, that is not always the case and with mediation on the increase, courts in England and across the globe will continue to be asked to play a role in the enforcement of MSAs.

On the international front, moves are already afoot to develop legal uniformity in mediation. In 2002, UNCITRAL published the Model Law on International Commercial Conciliation (2002) ('MLICC'). This was followed by a draft directive in 2004 from the European Commission on aspects of mediation in civil and commercial matters ('the Directive'). Both of these initiatives address the issue of enforcement and suggest that reform is required on both an international and a domestic level as regards the methods of enforcement of MSAs.

The proposed model law

Article 14 of the MLICC provides that a settlement agreement (recording a concluded agreement settling a dispute) is binding and enforceable. In a note following the text of Article 14 it is suggested that an enacting State may insert a description of the method of enforcing settlement agreements or may even choose to make enforcement mandatory.

The Guidance Notes to Article 14 recognise that while easy and fast enforcement of settlement agreements should be promoted, the methods for achieving expedited enforcement vary greatly between legal systems and are dependent on the technicalities of domestic procedural law. It is acknowledged that these variances make harmonisation by way of uniform legislation difficult.

While few States have adopted the MLICC to date,¹⁶ it has most certainly prompted discussion and debate amongst the international mediation community. In September 2006 the IBA established a Mediation Subcommittee with a view to producing a short and 'ready to use' guideline on the adoption of the MLICC.¹⁷ Survey participants were notably invited to comment on whether MSAs should enjoy a regime of expedited enforcement.

The results of that survey were published in a report of the IBA Mediation Committee in October 2007 ('IBA Report'). With particular reference to enforcement, the Committee noted that Article 14 of the MLICC provides for binding and enforceable settlement agreements, but that it leaves open the method of enforcement. The IBA Report concludes that a judgment, an arbitral award or a notarial deed should be available if the parties want it in mediated settlements. It is acknowledged that such enforcement devices are even more likely to be sought in an international context where there is the potential for expensive and difficult cross-border litigation in the

event that disputes arise as to the implementation of a settlement.

The IBA Report acknowledges that the MLICC is 'a floor of lowest common denominator protection, not a ceiling, so that it might be expected that some countries would add to the protection of mediation as a special regime.' Having collated the results of the survey, it appears that the Committee has identified enforcement as an area where countries ought to consider adopting additional protective measures to supplement the enforcement provisions currently set out in Article 14 of the MLICC.

The European Directive

The original version of the Directive, which was promulgated on 22 October 2004, proposed that a straightforward procedure for enforcement be adopted by Member States whereby a MSA could be confirmed in a judgment, decision or authentic instrument by a court or public authority. The Directive stated that 'Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that settlement agreements are dependant on the good will of the parties for their enforcement.' It was hoped that international enforcement of MSAs could be achieved through the laying down of mutual recognition and enforcement instruments by Member States across the Union.

Since 2004, several versions of the Directive have been produced and debated. The most recent version was issued by a resolution of the European Parliament on 29 March 2007. That version amends the enforcement regime and makes the enforceability of a written MSA conditional on the parties first requesting that their agreement be made enforceable.

This 'request requirement' notably introduces a further hurdle between the conclusion of a MSA and enforcement. It is easy to see how such a requirement may be problematic in practice. Indeed, in circumstances where one party is either already in breach of a MSA, or intends to breach it, that party is unlikely to either make the relevant request or provide the consent necessary for the 'parties' to request enforcement. Where parties have knowledge of the 'request requirement', they could of course anticipate that difficulty and record their mutual consent and the request for enforcement in the MSA itself. The introduction of such a formal requirement, however, is arguably overly formalistic and clearly disadvantages parties that are not aware of the requirement at the time they enter into their MSA.

The Directive is presently progressing through the European Commission's co-decision procedure. Its application to MSAs in England in the immediate future is accordingly unclear.

A Mediation Act?

From a domestic perspective, under the current legal framework in England, the means of enforcement available to a party to a MSA will depend on whether court or arbitral proceedings have been commenced before that MSA is entered into. If parties wish to be sure that their MSA will have the same expedited enforcement status as either a court order or an arbitral award, they will need to initiate court or arbitral proceedings before commencing the mediation process, or at least before they reach agreement via mediation.

Such a state of affairs seems irreconcilable with the prevailing view that parties ought to be encouraged to consider mediation in the early stages of any dispute and before they incur the costs, and expend the time, associated with arbitration or litigation.

Should expedited enforcement of a MSA in England only be available to parties that choose to commence either litigation or arbitration proceedings before they mediate? No amount of judicial enthusiasm for mediation can answer that question. A regime that provides for expedited enforcement of all MSAs, whether court or arbitration proceedings have been initiated or not, can only be achieved through legislative intervention.

In considering whether legislative intervention is desirable and if so what form it ought take, legislators should be mindful of the fact that MSAs are not the same as decisions of an independent arbitral tribunal or court. A mediated outcome is reached as a result of a process that is consensual. Unlike a court's judgment or an arbitral tribunal's award, a MSA contains the product of the parties' own facilitated negotiations. The very fact that the resulting outcome has not been imposed on the parties by a third party ought to make the likelihood of disputes as to its implementation less likely. Indeed, the limited judicial authority on enforcement in the context of mediation is quite possibly illustrative of the fact that there has been very little opportunity for the courts to comment. Mediation may well be working so well that few disputes about the outcome of the process have found their way into the court system.

On the other hand, the fact that proceedings relating to the enforcement of MSAs are rare is also not reason alone to dismiss the need for an expedited enforcement regime. In those exceptional cases where one party does refuse to abide by the terms of the relevant MSA, the very fact that the mediation process was consensual and that the resulting MSA had (at least at the time it was entered into) the endorsement of each of the parties to it, may arguably make the case for an expedited enforcement regime even stronger than where a dispute has been imposed on the parties following litigation or arbitration.

Whether a Mediation Act is necessary or indeed desirable is a subject that justifies debate of its own and is well beyond the scope of this article. In the context of enforcement, however, it seems clear that until such time as Parliament intervenes, mediation in England will remain dependent on the support of parallel judicial or arbitral proceedings to achieve the same enforcement status as those methods of dispute resolution.

Notes

- 1 Joe Tirado is a solicitor-advocate, CEDR-Accredited mediator and Head of International Arbitration and ADR. Amanda Greenwood is a Senior Associate in the Construction and Engineering Dispute Resolution Team.
- 2 An Interim Report was released in 1995 and this was followed by a Final Report in 1996.
- 3 CPR 1.4(2) and CPR 26.4 allow judges to order a stay of proceedings to enable parties to attempt to settle their dispute by mediation or some other form of ADR and a failure to comply with judicial suggestions regarding mediation can result in cost penalties being awarded against the recalcitrant party.
- 4 In cases not covered by a specific pre-action protocol the Practice Direction that sits alongside the protocols requires parties to “act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings” (paragraph 4.1 of the Practice Direction). At paragraph 4.7 of the Practice Direction, parties whose disputes are not covered by a protocol are advised to consider whether some form of alternative dispute resolution would be more suitable than litigation. Parties are then warned that the courts take the view that litigation should be a last resort and that the court must have regard to a failure to follow paragraph 4.7 of the Practice Direction when determining costs.
- 5 Examples of court-annexed mediation pilots are: the Automatic Referral to Mediation (ARM) pilot conducted between April 2004 and March 2005; the Central London Voluntary Mediation Scheme (VOL) which has been running since 1996; and the Court Settlement Mediation Pilot that took place in the Technology and Construction Court (TCC) from June 2006 to July 2007.
- 6 See article by Andrew Cooke, Norton Rose in the July 2007 edition of the IBA Mediation Newsletter: ‘The overriding objective and the Halsey guidelines: a cautionary tale’.
- 7 The essential requirements are: intention to create legal relations; certainty of terms; consideration or a deed; and in some cases (for instance in agreements involving the disposition of land) other formalities are also required.
- 8 To avoid this result, parties will sometimes agree to include a term in their MSA that makes it clear that in the event of non-compliance, the parties’ rights to pursue the original cause of action are reinstated.
- 9 The recent case of *Crystal Decisions (UK) Ltd & Ors v Vedatech Corporation* and another [2007] EWHC 1062 (Ch) is illustrative of the difficulties that may arise when a party seeks to enforce a MSA.
- 10 Otherwise known in England as a Tomlin Order.
- 11 The Central London County Court Mediation Pilot Form MD9 Report to the Court sets out a range of options including the issuing of a judgment (by consent) for a specified sum with no order as to costs or specifying that costs are to be at a specific figure.
- 12 Even where litigation is already on foot and consent orders have been made relating to the outcome of a mediation, the enforcement of a MSA can be time consuming and difficult - see the *Crystal Decisions* case referred to in footnote 9, where the last judgment of the court upholding the terms of the MSA was issued almost 5 years after the relevant MSA was executed.
- 13 The Brussels Regulation and Lugano Convention govern the mutual recognition and enforcement of judgments between European States and since 21 October 2005, a streamlined procedure has existed for the enforcement of uncontested judgments in the EU (with the exception of Denmark) under Regulation 805/2004/EC (Enforcement Order Regulation). In addition, where judgments from other countries may be enforced in England pursuant to the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, nearly identical enforcement regimes (for English judgments) ought to also exist in such countries.
- 14 See section 51 of the Arbitration Act 1996, which provides that:
 - (1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.
 - (2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.
 - (3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.
 - (4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.
 - (5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.
- 15 See Newmark, C and Hill, R, ‘Can a Mediated Settlement Become an Enforceable Arbitration Award?’, *Arbitration International*, Vol 16, No. 1.
- 16 UNCITRAL’s website (as at 30 October 2007) stated that legislation based on the MLICC had been enacted in Canada (2005), Croatia (2003), Hungary (2002) and Nicaragua (2005). The website also notes that the uniform legislation influenced by the MLICC and the principles on which it is based has been prepared in the United States of America and has been enacted in the States of Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington. In the case of Canada, as is highlighted by the IBA Mediation Committee’s Report on the MLICC, the website’s statement is not entirely accurate. Not all of the Canadian provinces have adopted the elements of the MLICC which were adopted by the Uniform Law Conference of Canada.

Enforcement of mediation agreements in Italy

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The enforcement of mediation agreements is one of the most delicate features, and ‘weakest’ aspects of mediation. In Italy, like in other European countries, there is no general legislation on mediation¹. Nevertheless, since 1991 several laws and decrees have been enacted by the Italian parliament in order to promote, still unsuccessfully, the use of mediation. In order to understand the legal value of a mediation agreement we shall refer to these laws and decrees which compose a variegated, and not coordinated, legislative panorama.

A distinction between court-related mediation, on the one hand, and out of court mediation, on the other hand is necessary because it has important consequences over the enforceability of the mediation agreements.

Court-related mediation in civil matters is regulated by articles 183 and 185 of the Code of Civil Procedure (CCP), both dealing with a dispute already arisen between the parties. During the first hearing, the *juge d’instruction* (‘giudice istruttore’) has the power to try and settle the dispute. The mediation role of the judge may be played at any time during this first phase of trial. If parties reach an agreement, the judge has to write down a *procès verbal* (‘processo verbale’), containing the mediation agreement. The enforceability of this court related mediation agreement is established *ex lege*. Article 185 of the CCP states that the *procès-verbal* represents a *titre exécutoire* (‘titolo esecutivo’), empowering the parties to levy execution.

Another type of court-related mediation is set up by article 322 of the CCP that entitles the justice of the peace (*giudice di pace*) to settle minor civil disputes. In this case, parties may ask the judge, before issuing legal proceedings, to act as a mediator and try to settle their controversy. If the mediation has a positive result, the justice of the peace, like the *juge d’instruction*, has to write a *procès verbal* that contains the agreement of the parties. The *procès verbal* is an enforceable agreement only if it deals with matters where the amount in dispute does not exceed the competence of the justice of the peace (Article 322 CCP, 2nd paragraph). On all other matters outside the competence of the justice of the peace, the *procès verbal* has the value of a private agreement (Article 322 CCP, 3rd paragraph).

The enforceability of court related mediation agreements has been confirmed by the highest court in Italy. In 2002, the Constitutional Court (‘*Corte*

Costituzionale’) with sentence n° 336 of 12 July 2002 declared that the enforceability of mediation agreements joint during court proceedings, and reproduced in appropriate *procès-verbal*, is one of the characteristics that clearly demonstrate the favourable bias of the Italian Parliament towards mediation. A number of years ago, the highest civil court (‘*Corte di Cassazione*’) explained the content of the enforceability of the *procès-verbal*. A *procès-verbal* parties is a valid title for the enforcement of debt recovery, specific performance of the obligations and for the obligation to deliver or release goods or documents. But the *procès-verbal* does not entitle the parties to impose an obligation to do or not to do (Court of Cassation, sentence n° 258 of 13 January 1997 and sentence n° 10713 of 14 December 1994).

Beside mediation agreements joint during court proceedings or before the justice of the peace, both of them not practiced in Italy, we shall analyse agreements reached during mandatory or voluntary out-of-court mediation, covering different categories of disputes. Out-of-court mediation agreements may have the legal value of a private agreement or may be enforced by the party wishing to oblige the counterpart to respect the mediation agreement, when the other party does not do so voluntarily.

According to the legislative decree N° 165 of 2001, labour disputes are submitted to mandatory mediation carried out by mediation committees (*collegio di conciliazione*) established by the Ministry of Labour at his local offices (*Direzioni Provinciali del Lavoro*). If mediation is successful, fully or partially, parties and the members of the mediation committee will sign a *procès-verbal* which is an enforceable agreement (Article 66, paragraph 5, legislative decree n° 165/2001).

Mandatory out-of court mediation has been foreseen by the Italian Parliament to settle other types of disputes, whose common feature is represented, like in labour disputes, by the possibility of enforcing the mediation agreement.

This is the case of controversies between telecommunication organisations and their users regulated by Deliberation n. 182/02/CONS enacted by the Independent Authority for Communications. These disputes may be solved either by Regional Communication Committees (CoReCom) or by other mediation organisations. Like labour disputes, if mediation is successful, parties and the person

overseeing the proceeding shall sign the *procès-verbal* including the agreement reached during the mediation that is enforceable (Article 11 of Deliberation n. 182/02/CONS).

In the same perspective to promote the use of mediation in corporate and financial matters, the Italian Government has recently enacted Decree N° 5 of 2003, which entered into effect on 1 January 2004. Mediated settlements reached through the assistance of registered organisations are judicially enforceable, prior to homologation by the president of the Tribunal where the organisation has its main office, ensuring that the agreement complies with all relevant legal provisions (Article 40 of Decree N° 5 of 17 January 2003).

Other laws have been enacted to enhance the use of mediation, like for instance in the fields of consumer disputes (Legislative Decree N° 206 of 6 September 2005 – Consumer’s Code) and investor disputes (Law N° 262 of 28 December 2005).

The agreements reached during voluntary out-of-court mediation are considered, from a legal point of view, as private agreements that cannot be enforced directly, but may give rise to an action for breach of contract.

As quite aptly explained by C Mark Baker and A M Sabater²:

‘the breach of settlement agreement is not sufficient to institute enforcement proceedings against a debtor. Rather, creditors need to initiate procedures for breach of contract in hopes of obtaining a judgement that can be enforced (...) slow enforcement mechanism clearly serve to discourage use of the process’.

In order to overcome this weak aspect of mediation, the European Union has adopted a directive proposal focusing on that subject. According to that proposal a mediation outcome should now be directly enforceable ‘in the same manner as a judgment under national law’.

Notes

- 1 For a comparative study on the state of the art of legislation in Europe and the different approaches followed by the European States to improve the practice of mediation see. S Carmeli, G. De Palo, ‘Mediation in continental Europe: a meandering path towards efficient regulation’, in *Mediators on mediation: leading mediator perspectives on the commercial mediation*, Tottel Publishing, London, 2005, pp. 340-355.
- 2 C. Mark Baker and A. M. Sabater, ADR Continental, in *The National Law Journal*, www.nlj.com.

Mediation in employment and labour law in Germany – emerging opportunities?

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While elements of Alternative Dispute Resolution (ADR) traditionally form an important part of employment and labour law relationships in Germany, mediation as such has found its way into this field only recently. The different regulatory frameworks, the traditional interaction between the players involved and varying psychological contexts call for a critical assessment of whether all types of employment and labour law conflicts are equally suitable for dispute resolution through mediation.

Background: the current regulatory framework

In order to evaluate the existing and emerging opportunities for mediation in employment and labour relations in Germany, it is important to understand the regulatory framework, since it already bears considerable features of ADR.

The players in employment and labour relations

Employment and labour relations in Germany are shaped by different players on three levels: the first level is the individual relationship between employee and

employer. Additionally, there are two levels of collective labour relations. On the one hand, works councils (*Betriebsräte*), a distinct feature of German labour law, represent a group of employees vis-à-vis their employer. The formation of works councils in companies is not mandatory, but is widespread. The rights of works councils are laid down in the Works Constitution Act (*Betriebsverfassungsgesetz*). If a works council exists, the employer must involve it in certain decisions regarding individual employees such as hirings, transfers and dismissals, and in operational changes such as cutbacks in, or closure, relocation, split-up or amalgamation of operations, or fundamental organisational changes. Works councils can also demand the conclusion of works agreements (*Betriebsvereinbarungen*) regarding certain topics such as the distribution of working hours (eg shift work), and remuneration principles (eg the establishment of piecework and bonus rates). On the other hand, trade unions and employers' associations or individual employers conclude collective bargaining agreements, which regulate the general working conditions of an industry or a company, respectively.¹ Only they can use industrial action – strikes and lockouts – for the purpose of achieving their collective bargaining aims.

The existing conflict resolution mechanisms

The conflict resolution mechanisms regarding those relationships already contain strong elements of ADR that are either mandated by law or established by tradition.

In labour court proceedings concerning individual employees, a conciliation hearing (*Güteletermin*) is mandatory pursuant to section 54 of the Labour Courts Act (*Arbeitsgerichtsgesetz*). In court proceedings involving works councils it is optional (section 80 Labour Courts Act). The purpose of the conciliation hearing is to discuss the issues in dispute freely and to reach a consensual settlement. Statistics and the experience of the authors show that this goal is often achieved in labour court proceedings: about 80 per cent of lawsuits in German labour courts are settled in a way other than through judgment.²

The Works Constitution Act provides for co-determination of the works council with regard to specific matters, such as works agreements on shift work. If the employer and the works council cannot reach an agreement, either party is entitled to refer the matter to a conciliation board (*Einigungsstelle*). The conciliation board fulfils an arbitral function; it consists of an equal number of representatives appointed by each party and an impartial chairman who, absent an agreement of the parties, can be named by a labour court. The purpose of the conciliation board proceedings is to support the parties in reaching a mutually acceptable solution. If this fails, the conciliation board will decide in their place and even draft a regulation that is then binding on them.

In collective bargaining between trade unions and employers' associations or employers, conciliation (*Schlichtung*) traditionally plays an important role. Neither industrial action nor the conciliation process is regulated by statutory law. Most collective bargaining partners have a longstanding relationship and a history of collective bargaining agreements, which are re-negotiated at regular intervals. The majority of them have conciliation agreements (*Schlichtungsabkommen*) in place, which require them to go through a conciliation process before taking industrial action once negotiations failed. The conciliators (*Schlichter*), often former holders of public offices, can make a recommendation for an agreement. The recommendation is not binding as such, but only if the collective bargaining partners adopt it as binding, either in advance or afterwards.

Starting points for mediation in conflicts with individual employees

With regard to conflicts between employer and employee, mediation can serve as a substitute for labour court proceedings only to a limited extent. This is due to two rules limiting the time available for employees to bring proceedings against their employer. First, in the case of a unilateral termination of the employment contract by the employer, the employee must file suit within three weeks after receiving notice, if he or she wants to challenge the termination (section 4 Protection Against Unfair Dismissal Act (*Kündigungsschutzgesetz*)). Secondly, many collective bargaining agreements and employment contracts provide that claims arising from the employment relationship must be asserted in court within a certain number of months after they have become due; otherwise they are precluded. These two rules are applicable to a considerable number of claims an employee could raise against an employer. Thus, the employee is often required to file suit in a labour court quickly in order to protect his or her rights.

However, mediation can be an option parallel to a lawsuit once the lawsuit is filed.³ A pilot project has been under way in Hamburg since April 2006. The Hamburg local labour court offers mediation in proximity to pending court proceedings, with judges serving as mediators. If the mediation does not succeed, the court proceedings are resumed. Hence, the risk of preclusion is avoided by filing the lawsuit in a timely fashion. Continuation of the proceedings is guaranteed if the mediation fails. Both parties get the benefit of a mediation without foregoing any of their rights. The mediation process allows the parties to include issues in their discussion and negotiations that are not relevant to the dispute by legal standards, but that are possibly at the root of, or closely connected with, the conflict. According to the president of the Hamburg labour

court, in matters with undercurrents of personal controversies, such court-supported mediation has turned out to be a useful device to solve the conflict.⁴

Starting points for mediation within the company

Increasingly, companies in Germany realise the usefulness of internal conflict resolution mechanisms. To the employer, there is generally an intrinsic value in keeping internal conflicts inside the company and avoid any publicity in that regard.

Often the internal resolution mechanism for conflicts between or with individual employees will imply a multi-step process, by which the problem is first discussed between the employee and his or her immediate superior, then with an impartial authority from inside the company, possibly a member of the works council. If those steps fail, an external mediator can be brought in. Such internal mediation processes – ie anticipatory resolution of an emerging dispute before resorting to labour court proceedings – is slowly developing as a field of business for psychologists, management consultants, social workers and, to a lesser extent than one would expect, lawyers. Since the legal issues might still be in the background at such an early stage of the conflict, the involvement of other professions is understandable. Nonetheless, only a lawyer will be able to explain the legal implications of possible solutions and to face the parties with the consequences of a failure of the mediation.

Starting points for mediation in conflicts with works councils

The conciliation board proceedings as provided for by the Works Constitution Act have disadvantages, which are usually emphasized by the employers, but they can also work to the detriment of the works council, depending on the respective layout of interests. The party with the lesser interest in a solution – in the event of impending cutbacks or other operational changes this is usually the works council – can easily prolong and stall the negotiations by tactical moves, starting with the formalized process to find an impartial chairman. The very fact that the parties were unable to reach an agreement on their own and had to refer the matter to a conciliation board tends to encumber the relationship of the parties. Often, issues such as a struggle for respect or power as well as personal offences impair the parties' willingness to reach a compromise. In such a situation mediation is particularly suitable to overcome the deadlock. Despite being so well-suited, mediation seems to be hardly ever used in conflicts between employers and works councils.⁵ Lawyers in the field should start to

stake their claim in this regard, since the solution of contentious matters between employers and works councils requires not only the psychological competence of a mediator, but also profound knowledge of labour law and regulation drafting skills. The matters in dispute are often highly complex and have long-term effects both on the (financial) situation of the company and on the legal position of the affected employees.

Starting points for mediation in conflicts with management members

Recently, a mediator was brought in to resolve a conflict following the revocation of a CFO appointment by a major German high tech company. To the authors' knowledge, this was, however, a singular case. The practice of employing mediators in conflicts between companies and members of management is not (yet) widespread in Germany. However, as the fact that the case was dealt with by mediation caught public attention,⁶ discussion has increased in its aftermath as to whether mediation should be used more frequently in such instances.

Conclusion

The regulatory framework and the suitability for mediation differ depending on the relationship between the players in question. Hence, there is no single approach to taking mediation a step further in the field of employment and labour relations. This analysis has shown, however, that apart from collective bargaining agreements, each of the different relationships offers significant chances to resolve developing conflicts through mediation, be it parallel to pending litigation, within the company, in conflicts between employers and works councils or in conflicts between companies and management members. In each case, the complex regulatory framework calls for both legal expertise and mediation skills, making mediation-trained lawyers particularly qualified to take up the task.

Notes

- 1 For details on the players and the legal sources of employment and labour relations see S Lingemann, R von Steinau-Steinrück and A Mengel, *Employment and Labour Law in Germany*, (Munich: C H Beck, 2nd edition 2007), Chapter A.
- 2 See J P Francken, *Das Arbeitsgericht als Multi-Door Courthouse* (2006) NJW 1103 et seq.
- 3 For civil proceedings see G Wegen and C Gack, 'Mediation in pending civil proceedings in Germany: practical experiences to strengthen mediatory elements in pending court proceedings' (December 2006) IBA Mediation Committee Newsletter. See generally S Rützel, G Wegen and S Wilske, *Commercial Dispute Resolution in Germany: Litigation, Arbitration, Mediation* (Munich: C H Beck, 2005), Chapter 3.

- 4 Tenos-press release No. 05/06 of 29 September 2006; see also J P Francken, 'Weitere Optimierung des arbeitsgerichtlichen Verfahrens' (2007) NJW 1792 et seq.
- 5 To the same extent B Kramer, 'Mediation als Alternative zur Einigungsstelle im Arbeitsrecht?' (2005) NZA 135 et seq.
- 6 It was even discussed in the news magazine 'Der Spiegel', issue 33/2007 of 13 August 2007, page 68.

Foreign investors, executive bodies, and the resurrected Ukrainian Commission

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In January 2007, the Ukrainian Government re-established the Commission for Promotion of Pre-trial Settlement of Disputes Between Investors and Executive Bodies (the 'Commission')², a continuously functioning consulting body that, upon both parties' consent, will consider applications and promptly make recommendations to the Government on resolving controversies and/or amending regulations.

The Commission is chaired by the First Vice Prime Minister, who appoints the rest of its members from the pool of executive officials responsible for implementing investment policy. Organisational support to the Commission is provided by the State Agency of Ukraine for Investments and Innovations, an executive body with broad powers in these spheres (the 'Supporting Agency'). The Commission's activity takes the form of meetings, where it makes decisions by voting. The Commission can hear executive officials' reports on pending disputes as well as invite independent experts to opine on those disputes. It can also, in accordance with procedures set by law, request and obtain relevant documents and information from 'executive bodies, local authorities, enterprises, institutions and organisations of all forms of ownership.' The establishment of the Commission is obviously a part of the current wider effort by Ukrainian authorities to attract foreign investment into the country.³

The Commission's predecessor, which was in place from April 2004 until December 2005, was abolished because of a lack of interest from investors and 'the absence of an effective mechanism of commission's work in general and, specifically, of its cooperation with regional commissions.'⁴ The Government introduces

the following innovations, apparently in response to the investment community's earlier criticisms: the mention of regional-level commissions has been deleted from the regulations; thus the need to involve this extra link of bureaucracy has been dispensed with. And whereas the old commission's power was limited to disputes 'with respect to which there [was] a threat of legal claims in Ukrainian courts', no such limitation is present in the new regulations; thereby the new Commission can resolve disputes – including disputes that may be subject to international arbitration⁵ – at a very early stage.

General observations

The Commission is a forum where investors can communicate their concerns to high-level government officials at early stages of disputes. The Commission can resolve controversies through the formal mechanisms available to it and can influence decision making of state agencies at the origin of disputes. The latter's mid-level officials may justify the terms of achieved settlements to their superiors and the general public by reference to Commission's recommendations.⁶

Furthermore, the Commission may improve the investment climate by initiating regulatory changes in response to investors' complaints. This may generally address the sometimes-expressed concern that investment dispute settlements have less of a corrective influence on the host country than investment treaty awards.⁷

The Commission should probably be considered an extension of the Government rather than a neutral body; and it is not, if it matters, a part of the judiciary.

Consequently, some investors may expect the Commission ultimately to act in Ukraine's interests when requesting information or documents under its broad powers, whether from state agencies or investors. A possibility that their vulnerabilities may migrate into other processes or stages of dispute resolution may discourage investors.⁸

It should also be noted that the new regulations are silent on confidentiality. According to Professor Coe, in an investment dispute the investor 'may fear disclosure of trade secrets, or to litigation-prone shareholders' and the state agency 'may be concerned about the revelation of secrets bearing on national security, or the negative publicity generated by the investor's allegations'.⁹ If the new Commission addresses these confidentiality concerns, then the number of disputes referred to the Commission may well increase.

Furthermore, at least three state agencies will be involved in the Commission-assisted dispute resolution: the Commission itself, the Supporting Agency, and the body at the origin of the dispute. As Barton Legum explained in the September 2006 issue of this newsletter,¹⁰ multiplicity of decision-makers on the state's side could impede reaching an amicable settlement. Such factors as the slow flow of information about the dispute and the general complexity of interaction between state bodies may well obstruct the Commission's work and make settlements unlikely (and this will happen *before* initiation of investment treaty arbitration rather than *after*, as was generally the case in the Mr Legum's example). The communist heritage of inefficient state bureaucracy may be an additional aggravating factor.

Another observation is that the Commission's activity, being limited to investors' disputes with executive bodies, probably does not extend to cases of alleged denial of justice in Ukrainian courts, such as the recently settled case of *Western NIS Enterprise Fund v Ukraine*.¹¹

As to the possibility of a parallel mediation, the Commission's activity is likely to be compatible with such a process. Moreover, the new regulation allows the Commission to 'involve... specialists as independent experts for consultations.'

The Commission's authority probably does extend to the cooling off period, ie the period after the notice of investment treaty claim, but before the request for arbitration.¹² Furthermore, the submission of a dispute to the Commission is unlikely to constitute a notice letter or a request for arbitration because the Commission does not formally represent the Government.¹³

Sometimes there may be no investment treaty claim on the horizon at all, for such reasons as lack of facts to establish a *prima facie* case or the high costs of investment treaty arbitration. Will state agencies, including the Commission, in such cases be less prone to meet the investors' concerns?¹⁴ The Commission's success will of course much depend on the existence among its members of a genuine willingness to address needs of

foreign investors.

The Commission may help resolve disputes before they become significant bones of contention between investors and state agencies. It is an example of a structure moving away from dispute *resolution* towards dispute *avoidance*.¹⁵ The re-establishment of the Commission is at a minimum a step in the right direction.

Notes

- 1 LLB (ISTU, Kiev), LLM (LGU, London), LLM (Columbia, New York), English barrister. International Arbitration Law Clerk at Hughes Hubbard & Reed LLP, Washington, DC
- 2 See 'The Regulation on the Commission for Promotion of Pre-Trial Settlement of Disputes Between Investors and Executive Bodies Adopted by the Regulation of the Cabinet of Ministers of Ukraine' of 16 January 2007 # 19 (*Положення про комісію із сприяння досудовому врегулюванню спорів між інвесторами та органами виконавчої влади затверджене постановою Кабінету Міністрів України від 16 січня 2007 р. № 19*), available at: http://www.kmu.gov.ua/control/uk/publish/article?art_id=63184998&cat_id=103615 (accessed 6 November 2007).
- See also Markiyani Kliuchkovskiy & Olga Glukhovska, 'New Commission Offers Pre-trial Resolution of Investment Disputes', *Int'l Law Off News* (1 March, 2007).
- 3 See, eg, Press Service of the President of Ukraine, *Ukraine is Ready for Active Cooperation with International Business – Viktor Yushchenko* (May 23, 2007), available at: http://www.president.gov.ua/news/data/1_15984.html (accessed 6 November 2007).
- 4 Ukrainian Government's commentary to the new regulations, available at: http://www.kmu.gov.ua/control/uk/publish/article?art_id=63184998&cat_id=103615 (accessed 6 November 2007).
- See also Kliuchkovskiy & Glukhovska, *supra* note 1.
- 5 References to '*pretrial* settlement of disputes' (*досудове врегулювання спорів*) in the new regulations are unlikely to limit the Commission's authority to resolution of disputes capable of being litigated in domestic courts.
- 6 See Noah Rubins, 'Comment to Jack C Coe Jr.'s Article on Conciliation', 21-4 *Measley's Int'l Arb Rep* 21, 23 (2006). ('[G]overnment officials, particularly the mid-level bureaucrats who are typically charged with managing disputes with foreign investors, are subject to rather abstract pressures that tend to discourage settlement ... [T]he government official himself will have to take responsibility for any concessions included in a settlement agreement. This pressure is increased where public opinion has turned against the foreign investor, and therefore any compromise viewed as a betrayal of national interests.')
- 7 Jack J Coe, Jr, 'Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch', 12 *UC Davis J. of Int'l L. & Pol'y* 7, 27-28 (2005) ('Settlements divert attention from the legal merits of the underlying controversy and may thereby shroud dubious levels of treaty compliance in ambiguity, producing less incentive for the states to institute corrective measures ... [S]tates self regulate in light of the pronouncements of tribunals and any liability that might flow therefrom. Reasoned adjudications thus provide law-makers guidance and stimulation not found in mediated agreements, the very point of which might have been to avoid such corrective influences. It is therefore reasonable to question whether states might not find conciliation be too comfortable a blind, where bad habits might be perpetuated.')
- 8 See *ibid.*, p 17.
- 9 *Ibid.*, p 23.
- 10 See Barton Legum, 'The Difficulties of Mediation in Investment Treaty Cases', *IBA Mediation Committee Newsl.* 27 (September 2006).

- 11 See Sergei A Voitovich, 'Western NIS Enterprise Fund v Ukraine: Certain Issues of Denial of Justice in the Discontinued Investment Arbitration', *Ukrainian J. of Bus. Law* 26 (August 2006).
- 12 Also see *supra* note 4.
- 13 Kliuchkovskiy & Glukhovska, *supra* note 1.
- 14 The executive body may simply not consent to the Commission's involvement.
- 15 In the commercial context, see Martin Hunter, 'International Commercial Dispute Resolution: the Challenge of the Twenty-First Century', 16-4 *Arb Int'l* 379, 390 (2000) ('I foresee a new breed of lawyers becoming actively involved in preventing potential disputes getting 'out of hand' before they mature

into intractable situations. I envisage *dispute avoidance groups* being set up around the world, both as independent entities (not necessarily comprised wholly of lawyers) and also as teams with major law firms and in-house legal departments in large corporations. The investment required to design appropriate structures for individual industries, and to create the resources to implement such schemes, would surely be far exceeded by the direct and indirect costs of the litigation that could be averted; and the role of the lawyer would be at a much earlier stage of the process.')

Med-arb: Ontario's Appeal Court brings more effective dispute resolution one step closer

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An Ontario appeal court decision has advanced the pursuit of more efficient and cost-effective dispute resolution. The decision confirmed that despite natural justice and other concerns that are often raised, particularly in common law jurisdictions about a combined mediation/arbitration process (med-arb), courts in Ontario will enforce an agreement by the parties to engage in the process.

In *Marchese v Marchese*,¹ the Court of Appeal for Ontario held that an agreement between parties to submit to med-arb² was enforceable despite a provision in the province's domestic arbitration statute that prohibits arbitrators from conducting any part of an arbitration as a mediation.³

The Court reasoned that if the prohibition applied to med-arb (a point that the Court held it did not need to decide), the prohibition could be waived and a mutual decision by the parties to engage in med-arb would be considered a waiver.⁴

The decision is a welcome one for those in the dispute resolution world who believe that today's businesses are looking for greater innovation and flexibility in the methods used to resolve commercial disputes. They consider that in many cases neither the courts nor arbitration provides the efficient and cost-effective resolutions they want, and that mediation alone is not always capable of achieving a resolution. Med-arb

provides another option that in the right circumstances and conducted by a skilled mediator-arbitrator can achieve results that neither mediation nor arbitration alone could achieve.

Med-arb is a dispute resolution process that involves two steps: a mediation in which the parties attempt to resolve their dispute themselves with the assistance of a mediator, and if necessary, a subsequent arbitration stage in which any unresolved issues are subjected to binding adjudication by the same person, at that point acting as an arbitrator. The hybrid process can have many advantages over mediation or arbitration alone. Med-arb is often less costly and more efficient than arbitration because the procedural requirements are generally not as stringent. Since it keeps the adjudicative elements limited to the issues not resolved by the parties themselves, it is especially desirable where preservation of an ongoing relationship is important. At the same time, the arbitration aspect provides a final resolution to a dispute, a conclusion that is not assured in mediation. Even just the looming prospect of a binding arbitral decision may encourage parties to settle their disputes themselves for fear of an adverse decision. Using the same neutral party also provides considerable savings in cost and time, because he or she will already be familiar with the case and will therefore not need to be briefed on the issues in dispute at the second stage.

Med-arb, however, raises concerns, in particular about natural justice and impartiality. The mediation stage of med-arb often involves private caucusing between the mediator-arbitrator and each party. Normally the right to know and have a reasonable opportunity to respond to the other side's case is considered essential to our notions of fairness and due process in an adjudicative process. With med-arb, there is a danger that in the adjudicative stage of the proceedings, the mediator-arbitrator may consider and weigh information, obtained from one party during private caucusing in the mediation phase, to which the other party has not had a chance to respond. This information might be incomplete or even false, and prejudicial to the opposite party. Obviously the opposite party would not want this information to influence the arbitrator's decision. But even if by procedural and ethical rules the mediator-arbitrator is not permitted to consider or weigh information obtained during private caucus in the arbitration stage of the process, the parties may not be convinced that such information could be completely discounted in the adjudication. For these reasons, med-arb has been contentious among practitioners and commentators, particularly in common law jurisdictions.

There is also a practical concern about med-arb: it requires a neutral third party who is adept at both mediation and arbitration. It may be difficult to find someone who is capable of effectively handling the dual roles of the neutral third party in a med-arb.⁵

The *Marchese* decision makes it clear that disputing parties in Ontario can expressly opt for med-arb, in which case the prohibition in the domestic arbitration statute against conducting any part of an arbitration as a mediation is waived.

The Court recognised and confirmed that med-arb is 'a well recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing agreement, then proceeds to conduct an arbitration.' The fact that it is a hybrid process means, however, that the process, once agreed upon, must be followed. The Court distinguished a 2001 trial court decision, *Hercus v Hercus*,⁶ in which the decision of a mediator-arbitrator was set aside because he had proceeded directly to arbitration, bypassing the mediation step entirely. In *Marchese*, the parties did not skip mediation – they had an initial meeting that indicated that mediation would be unsuccessful.

Ontario's international arbitration statute, a Model Law statute, adds to the Model Law by expressly permitting the use of mediation during the arbitration proceedings for the purpose of encouraging settlement. The Act states:

For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, use mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties,

the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.⁷

The use of private caucusing, as discussed above, is a fundamental concern about med-arb. Even though the Court held that parties may agree to a med-arb process, Ontario courts have not determined the extent to which the mediation stage of a med-arb may involve private caucusing. This was not discussed in the *Marchese* decision. The extent to which private caucusing may be used also is an open question when mediation is used in connection with an arbitration under Ontario's international arbitration statute.

In *Marchese*, the parties had agreed to submit to med-arb but there is no indication that they had sought to, or could, waive their entitlement to procedural fairness. It had become evident after only an initial meeting with the mediator-arbitrator that mediation would be unsuccessful, and the appellant then tried, unsuccessfully, to deny the existence of an agreement to arbitrate in the event of failed mediation. So there was no need for the Court to consider the use of private caucusing or its potential compromise of the mediator-arbitrator's neutrality.

Ontario's domestic arbitration statute expressly provides, in section 19, that in an arbitration, 'the parties shall be treated equally and fairly' and that '[e]ach party shall be given an opportunity to present a case and to respond to the other parties' cases.' Section 19 is one of the six provisions of the Act that the parties cannot agree to vary or exclude. Likewise, Ontario's international arbitration statute (as noted above, the Model Law) contains the fundamental mandatory provision in Article 18 that 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case' and in Article 34 that an award can be set aside if a party was 'unable to present his case.'

It remains an open question whether these procedural fairness requirements may tie the hands of the mediator-arbitrator in the mediation phase and impede (or even preclude) the use of private caucusing, an important aspect of the mediation process.

Given the recognition by the Court of med-arb as a 'well recognized legal ... hybrid dispute resolution process', and the fact that private caucusing is fundamental to mediation, it seems likely that an Ontario court would find that the required procedural fairness can be achieved if the mediator-arbitrator, when acting as arbitrator, takes no account of material information obtained in private caucusing about which the other party has not been informed and to which it has not had an opportunity to respond.

In Canadian courts, most commercial (and other civil) cases are tried by a judge alone (that is, without a jury). Judges are called upon regularly to exclude evidence that they have heard already and to rule on the admissibility of evidence (including alleged settlement

discussions, privileged communications, and the like) that they must hear before they can rule.

However, the med-arb process presents greater challenges. Only the mediator-arbitrator, and not the party that may be affected, can know what information has come to the mediator-arbitrator from a private caucus, and only the mediator-arbitrator can ensure that such information is not considered unless the opposite party is told about it and has an opportunity to respond to it. This concern is exacerbated when there is no appeal process, as often is the case, in which the mediator-arbitrator's actions can be reviewed.

As a practical matter, these concerns point to the importance of any med-arb process being conducted by a mediator-arbitrator who is skilled in the process and who is accepted and trusted by the parties as a person of integrity and sound judgment.

Given that parties in Ontario are free to agree to med-arb, it is likely that courts in Ontario will enforce the result unless there is persuasive and cogent evidence that the mediator-arbitrator relied on material information obtained in a private caucus of which the opposite party was not aware and to which it did not have an opportunity to respond. Arbitral awards in Ontario receive a high degree of judicial deference. Cases such as *Corporacion Transnacional de Inversiones SA de CV v STET International SpA*⁸ have demonstrated that there is a powerful presumption in favour of an arbitral tribunal and a high bar for setting aside an arbitral award. In that case, for example, the Ontario Superior Court held that 'broad deference and respect' (para 22) should be accorded to arbitral tribunals under the Model Law and that 'the grounds for refusal of enforcement should be construed narrowly' (para 26).

It also is likely that Ontario courts will assess equality and fairness complaints arising from a med-arb in a flexible and pragmatic manner. That is, it is likely that a court will look at the whole picture to determine whether the complaining party knew the particular material information that had been provided to the mediator-arbitrator in a private caucus and had a reasonable opportunity to respond to it, rather than focusing on the particular manner in which the knowledge was obtained or the opportunity to respond was provided. The opportunity to respond probably will not need to be provided in the same manner as would be required under the court's rules of evidence and procedure. In a med-arb process, and even in an arbitration conducted under more innovative procedures (which the Ontario domestic arbitration statute permits), what should count is substance, not form.

Marchese is important because it recognises med-arb as a distinct process and confirms that Ontario courts will enforce parties' agreements to utilise it.

Everywhere one goes in the world of international dispute resolution, one hears concerns about a growing lack of efficiency and cost-effectiveness in international

arbitration. Arbitral institutions and arbitration organisations are looking for ways to deal with these concerns. For example, the International Chamber of Commerce Commission on Arbitration recently published 'Techniques for Controlling Time and Costs in Arbitration' (ICC Publication No 843) arising from its Task Force on Reducing Time and Costs in Arbitration; the Centre for Effective Dispute Resolution (CEDR) has constituted a Commission on Settlement in International Arbitration (composed of international arbitrators, corporate counsel, mediators and academics, and chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler) to consider current approaches to promoting settlement in international arbitration and make recommendations on how arbitral institutions and tribunals could give parties greater assistance in finding ways to settle their disputes. Major arbitral institutions are becoming increasingly active in promoting and providing mediation for international disputes, including in the context of arbitrations.

As the users of dispute resolution services – that is, the parties and corporate counsel managing their disputes – and international dispute resolution practitioners look for innovative ways to resolve commercial disputes more efficiently and cost-effectively, the recognition and acceptance of processes such as med-arb may be an important step forward.

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Notes

- 1 (2007), 219 OAC 257 (CA), MacPherson, Sharpe and Juriansz, JJA.
- 2 The clause, which was in an agreement for an alternative means of resolving a court proceeding, simply provided 'the parties shall attend for mediation/arbitration with Phil Epstein regarding all issues in the action.'
- 3 'The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially.' (*Arbitration Act*, SO 1991, c 17, s 35).
- 4 Section 3 of the *Arbitration Act* provides that 'parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except...' for six specified provisions, of which s 35 is not one.
- 5 See Claude R Thomson, 'Med-arb: a fresh look', newsletter of the Mediation Committee of the Legal Practice Division of the International Bar Association, July 2007, vol 3, no 1, page 27. This is an excellent recent article that more fully discusses med-arb.
- 6 [2001] OTC 108, [2001] OJ No 534 (Ont. Sup Ct J), Templeton J.
- 7 *International Commercial Arbitration Act*, RSO 1990, c I 9, s 3.
- 8 (1999), 45 OR (3d) 183 (Ont. Sup Ct J), Lax J, aff'd (2000) 49 OR (3d) 414 (CA) Catzman, Abella and Rosenberg JJ A, leave to appeal to SCC dismissed, SCC Bulletin of Proceedings, May 4, 2001, 821.

Can mediation become international?

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This is a pertinent question to ask in the newsletter of the IBA Mediation Committee. The focus of the IBA is the practice of law in the international field and the focus of the Mediation Committee is mediation in this context. Yet while mediation is being increasingly practised within individual states, thus far its application across the borders of states (where the parties are located in different states) is very limited.

Statistics on the use of mediation and arbitration

The evidence lies in the statistics. They show that in the major international dispute resolution institutions, that mediation plays, at present, a very small role in international dispute resolution. For example, the ICC Court of Arbitration statistics, for the year 2005, record 521 new arbitration cases but only six new mediation/conciliation cases under their ADR Rules. In 2006 a similar picture is obtained – 593 new arbitration cases but only 12 new mediation/conciliation cases.¹ The statistics from the LCIA paint the same picture: in 2005, 74 new arbitration cases against two new mediation cases and, in 2006, 89 new arbitration cases against 4 new mediation cases.² The statistics of the ICDR in New York paint a slightly different picture but still arbitration cases predominate over mediation cases. Their figures are for 2005: 544 new arbitrations against 36 mediations, and for 2006: 543 against 43 mediations.³ It should, however, be noted that a lot of the ICDR cases come from within North America where domestically mediation is well established.⁴

Further evidence can be obtained from the leading mediation provider in the UK, the Centre for Effective Dispute Resolution ('CEDR'). It conducted 661 major commercial mediations in 2005 – with sums in dispute of over £1 million – and, in 2006, 649 major commercial mediations. However, out of all of these mediations only about 10 per cent can be categorised (where one or more of the parties is based outside the United Kingdom) as 'international mediations'.⁵

While authors have argued, I believe rightly, that mediation or other forms of ADR should be more used in a variety of international dispute resolution processes, the evidence continues to be that this is not happening – at least to any significant extent. For

example, in a recent article, an author argued for the increased use of ADR in interstate investment disputes but despite the introduction of the ICSID Conciliation Rules, he could only find to date five ICSID conciliation

cases and in two of them the same two parties were involved.⁶

The ascendancy of international arbitration

It is not difficult to identify why arbitration, in the international scene, is so ascendant. It has been around for a very long time! As identified by Professor Derek Roebuck, arbitration, as a means of settling disputes, was well established under Roman law by the first century BC. Under Roman law the parties to a dispute entered into an agreement, called a *compromissum*, to submit to arbitration and abide by the award. Among the writings of Roman authors – Cato, Cicero, Livy, Ovid and Seneca – of the first century BC and the first century AD – there are found to be extensive references to arbitration.⁷ For a hundred years and more the great trade associations, covering worldwide trade, in shipping, coffee, cocoa, sugar, grain, cotton and many other commodities have all incorporated the arbitration process. We look, for example, in London to the Cocoa Association or the Coffee Trade Association or the Grain and Feed Trade Association – the last being an extensive user of arbitration. This has been further buttressed, in London, by the establishment of international exchanges such as the Baltic Exchange (for shipping) and the Exchanges for International Petroleum, for Metal, and more recently, for the International Financial Futures and Options – again, all users of arbitration. Thus trading associations and exchanges, throughout the world, have long used arbitration as the process for the settling of disputes between members of the same trade.

It should be noted that Professor Derek Roebuck, in another interesting work,⁸ just published, traced mediation back to before AD500 and particularly followed its history in England from the 12th century to the 20th century but as Professor Roebuck concedes, mediation, unlike arbitration, never has had a separate formal existence. Of course mankind has sensibly sought (although not always!) from our first existence on earth means to settle disputes, bargaining and arguing, with others (like mediators) intervening to help out. This, however, did not result in giving these activities any formal structure as was accorded in England to arbitration by the courts⁹ and by statute.¹⁰

The United Nations and the International Chamber of Commerce

Other factors have played a very important part in the establishment of international arbitration – a benefit not yet accorded to international mediation. For over 80 years the United Nations and the International Chamber of Commerce in Paris has been fostering the use of arbitration as the means for resolving disputes in the international forum. The International Chamber of Commerce in Paris founded its Court of Arbitration in the 1920s at which time the predecessor of the United Nations, the League of Nations in Geneva, established a protocol on ‘The Validity Of Arbitration Agreements’ (24 September 1923) and a convention on ‘The Enforcement Of Arbitral Awards’ (26 September 1927).¹¹

In passing it is amusing to note that the early intervention of the League of Nations into international dispute resolution was not without controversy. When the British Government proposed to enter into the League of Nations protocol on ‘The Validity of Arbitration Agreements’ both the English Lord Chancellor, Lord Cave, and the Attorney General, Douglas Hogg KC (later himself Lord Chancellor) threatened resignation rather than to have the League of Nations create laws to which English Courts would be bound!

The impact of the arbitration instruments of the United Nations

Therefore, for those who believe mediation should be in the arena of international dispute resolution, there should be recognition of the immense support given to arbitration by the United Nations. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Commercial Conference on International Arbitration in New York on 10 June 1958 (known as the ‘New York Convention’), the Arbitration Rules of the United Nations Commission on International Trade Law adopted by the UN General Assembly on 15 December 1976 (the ‘UNCITRAL Arbitration Rules’) and the Model Law on International Commercial Arbitration adopted by United Nations Commission on International Trade Law in Vienna on 21 June 1985 (the ‘UNCITRAL Model Law’) have each been standard bearers in the development of international arbitration.

The 1958 New York Convention

There has been no more important instrument in international dispute resolution than the New York Convention of 1958. No less than 142 countries have now ratified and entered into force the New York Convention.¹² It was the original intention that, following its adoption in New York in June 1958, all

countries which wanted to enter into the Convention should do so by 31 December of the same year. Fortunately that was not adhered to and countries such as Afghanistan (in February 2005) and the Marshall Islands (in March 2007) are still being permitted – indeed encouraged – to become a signatory to the Convention. So it is that almost every country in the world which indulges in trade has become a signatory to the New York Convention: from the Russian Federation to Bolivia and from Lithuania to Thailand.¹³

In assessing, in the international context, the ascendancy of arbitration over mediation, the sheer power of the New York Convention has to be recognised. Thus, as long as each party has entered into a written agreement ‘...to submit to arbitration all or any differences which have arisen or which may arise between them...’ (Article II 1) ‘...the court of a Contracting State *shall... refer* the parties to arbitration...’ [emphasis added] (Article II 3).

It cannot be said that there has been perfect compliance worldwide to the New York Convention – judges in India, Bangladesh and Indonesia, to mention a few countries where things have gone wrong, have not always properly followed the New York Convention, but overall it has underpinned international arbitration worldwide.

The UNCITRAL Arbitration Rules and Model Law

The UNCITRAL Arbitration Rules and Model Law further consolidated arbitration as the premier means of resolving international disputes. For example in the last twenty years there is not a single country in mainland Europe which has not introduced new arbitration laws based upon, or largely influenced by, the UNCITRAL Model Law.¹⁴ It has had a similar impact in many other countries around the world from Korea to Brazil, from India to Malaysia.

The ascendancy of arbitration over mediation is also fostered by the plethora of international arbitration conferences which, according to the ‘International Arbitration Planner’ issued by the London law firm Lovells, are now amounting to about a dozen international arbitration conferences per month – 144 such conferences per annum! This is not to state that mediation is being neglected – indeed some of these arbitration conferences ‘cover’ mediation – but it is to state that international mediation is having to grow under the great oak tree of international arbitration!

The diverse forms of mediation and other means of alternative dispute resolution

Another difficulty concerns the international adoption of mediation and other forms of dispute resolution. In its inchoate state the forms of mediation can greatly differ: there is, for example, facilitative mediation in contrast to evaluative mediation and then

there are a variety of ways in which mediations can be conducted: mediations with 'caucuses' and mediations without and so forth. Added to this, it has multiple cousins: adjudication, negotiation, brokered talks, conciliation, neutral evaluation, expert determination, neutral fact finding etc.

This is not to state that mediation – and its cousins – are not growing. One can cite the increasing success and growth of mediation in countries of high commercial activity – the leader being, of course, the United States of America. The growth and success of mediation, however, is not limited to the commercially powerful countries of the world. I read recently a paper by Steven Hendrix, about the growth and success of mediation in the Central American State of Guatemala.¹⁵ In the cultures of Central America midwives interestingly have had a key role in sorting out family disputes and other local conflicts. In urban areas Mayors and Assistant Mayors have played key roles as 'mediators' or problem solvers in community disputes. From their introduction in 1998 under a USAID programme, there were created in Guatemala seven community–mediation centres. In these centres the mediators have the record of resolving 73 per cent of all cases that enter their doors whether the disputes be of a civil, commercial, family or criminal nature. Moreover of the cases settled, over 70 per cent of the settlements were fully complied with – in no less than one month! Beyond the roles of Mayors and Assistant Mayors, Justices of the Peace, priests, policemen, even relatives of the disputants have played an active and successful part in the conduct of mediations in Guatemala!

As the speakers in the conference in Vilnius entitled 'Mediation in Europe: Present Challenges and Future Developments' in May 2007 were able to explain, mediation in one form or another is being developed in almost every country in the European Union. However, in the main, it is being used, albeit very successfully, in disputes concerning the family and children. Only two countries in the European Union were able to point to mediation statutes which had universal use in civil disputes.¹⁶ These countries are Hungary with its 'Act on Mediation' which came into force in March 2003¹⁷ and Austria with its 'Federal Act on Mediation in Civil Law Matters' which came into force on 1 May 2004.¹⁸ Good though these statutes may be covering the registration of mediators, the training of mediators, confidentiality and other important matters, the use of mediation in the European Union is still at an infant stage. Indeed Dr Webber from Austria confessed that the number of registered mediators (approximately 4,000) was far more than the number of mediation cases currently being conducted in Austria!

The role of the courts

Mediation does have an ally: the courts. For many years judges in German courts have actively involved themselves in the settlement of cases. In England the new Civil Procedure Rules concentrate on the active management by the court of cases and that active management includes 'encouraging the parties to use an Alternative Dispute Resolution Procedure if the court considers that appropriate and facilitating the use of such procedure' (English Civil Procedure Rule 1.4 (2) (e)). It is not the policy in English Civil Procedure to compel parties to enter into mediation but the English Courts are prepared to visit on the parties sanctions where parties should have, in the view of the court, entered into mediation but unreasonably refused to do so. Thus, in England, a party who does not enter into mediation, when it should have done, is exposed to adverse costs orders against it.¹⁹

UNCITRAL and the European Commission

Both UNCITRAL and the European Commission are working for the increased use of mediation for the settlement of disputes. On the former, I refer to the UNCITRAL Model Law on Mediation and, on the latter, I refer to the EU Green Paper on Mediation of April 2002, the European Code of Conduct for Mediators of July 2004 and the EU draft Directive on Mediation.²⁰ Here importantly the Code is looking to the competence and knowledge of mediators in the process of mediation including proper training and continuing education and practice in mediation skills. It is also looking to mediation accreditation schemes (paragraph 1.1 European Code of Conduct for Mediators). Agreement has not yet been reached on the EU draft Directive on Mediation but its proposals include the power of a court 'to require the parties to attend an information session on the use of mediation' (Article 3.1) and the suspension or interruption of the running of limitation periods during the mediation process (Article 7). This all adds up to improving the efficacy, and hence the use of mediation in the European theatre.

Unfortunately the proposed EU Mediation Directive has run into several difficulties with the European Parliament and Council of Ministers who want to limit its scope to 'cross-border cases'. Sadly the United Kingdom Government is one such opposed to this proposed Directive applying to all mediations whether or not they are 'cross-border' mediations.²¹ In the view of the Commission this limitation, particularly as being proposed to it by the European Parliament, damages enormously the efficacy of the proposed Directive and its aim to support and advance the use of mediation throughout the European Union. Until this difficulty over the scope of the Directive on Mediation, and one or two other matters are resolved, the Directive cannot be brought into being.

Advantages of mediation

There are other reasons for believing that mediation should be playing a greater role in dispute resolution in Europe and elsewhere round the world. First and foremost it is a process which does not focus on the legal rights of the parties and fault. On the contrary it is a process in which each party is being encouraged to focus upon its best interests. It is also a process in which results can be obtained which are not possible in arbitration or litigation. In the best result mediation can actually put right the wrongs out of which the dispute between the parties arose: for example by redefining the responsibilities disputed between the parties. Even such things as an apology can help the healing process in mediation.

Other factors running in favour of mediation are its greater speed, its greater simplicity, its greater cost saving and the stricter control of confidentiality than is possible to obtain in an arbitration where confidentiality (at least the enforcement of it) has been largely abandoned. Thus, in times, when some arbitrations are taking an absurd amount of time – years rather than months – at ever greater complexity and cost, there is a powerful case for much greater use of mediation in international dispute resolution.

Not necessarily the perfect solution

This is not to state, while mediation does have clear advantages over arbitration, that it is always the right means of dispute resolution – nor does it necessarily bring about the perfect solution. Sometimes it is very important, in disputes between parties, to obtain a binding ruling upon the contractual responsibilities of parties. While agreement can be reached between parties, as part of the mediation settlement, on the respective contractual responsibilities between them, it is not the same as an arbitrator or judge giving definitive rulings on these issues. Mediation is also not a process in which the weak can necessarily be protected from the strong. A party, powerful in the market place, can still use its weight in a mediation to bring out a settlement which runs more to its benefit than to the weaker party. Although mediators should do their best to steer parties in the mediation process away from ‘horse trading’ they cannot prevent it and in disputes, particularly relating to insurance companies, horse trading can take place and can wear down another party to a settlement to which it might not otherwise have agreed. Then there are parties in mediation who are not truly looking for settlement of the dispute but who are entering into ‘fishing expeditions’ into the weaknesses and strengths of the other party or generally sizing up the opponent. In such circumstances mediation can delay, and add costs to, the dispute resolution process. Of course when one party is stronger than another there is no process in which, as such, the weaker party can be made stronger but when a

dispute is decided, in the arbitration or litigation process, on its true merits, the respective strength of the parties in the market place is not, per se, the deciding factor.

Can mediation be better, and more extensively, used in the international dispute resolution process?

In order to seek an answer to this question regard should be had to the differences in the arbitration and mediation processes. In nearly all large arbitrations, the parties go for a three person tribunal in which they exercise the right, on each side, to choose an arbitrator of their choice. Thereafter, a chairman is chosen who should have total neutrality from the parties – not being chosen by one party or another and from a different country or jurisdiction from those of the parties. Thereafter in the arbitration process none of the arbitrators are being trusted with confidential information known to one party but not to another. Yes, parties in arbitration are trusting in the integrity of the arbitral tribunal to properly and fairly receive and decide the issues before them. They are not, however, entrusting it with secrets!

In mediations the usual choice is a sole mediator although mediations can be conducted with two or even three mediators. Whatever the quantity of mediators there is a vast amount of trust placed with the mediator when he or she is working in separate sessions with the parties and their counsel. The fundamental problem, therefore, in moving over mediation from the domestic forum to the international forum is that the parties, particularly when selecting a sole mediator, are having to find somebody, being wholly independent, who does not come from the same country and does not share the culture of either of the parties.

This is in marked difference to a domestic mediation where the mediator will be from the same country as the parties and share the same culture. There is now in international arbitration a core of international arbitrators who are all well known and who are trusted by the arbitral community. As such they have the trust of the parties albeit coming from different jurisdictions and different cultures. Moreover these arbitrators regularly meet at arbitration conferences and special symposia such as those of the LCIA. Is it possible to build up a similar fraternity for international mediators? Efforts are being made. For example, in this context the decision of the IBA to set up a separate Mediation Committee, alongside its Arbitration Committee, is a good step in this direction.

The European Commission in its Code for Mediators and in its draft Directive for Mediation has the potential to develop mediation across all countries of the European Union. Theoretically there is no reason why mediation should not enjoy internationally the same success as it is enjoying domestically in such countries as the USA and the UK. The need, however, is to educate

the international commercial community – and other communities – in the benefits of mediation and to engender greater trust in it and those who seek to act as international mediators.

What can the international arbitral community do to assist?

It is here that I believe the international arbitral community could and should assist more in the international dispute resolution process. Judges – apart from visiting on the parties mandatory mediation which is a different subject – in Germany, England and the USA engage pro-actively to assist parties to find a means of settling their disputes. In contrast arbitrators stand back from any such involvement. It is claimed that to become involved could make the award unenforceable under Article V 1 (b) of the New York Convention on basis that the parties were somehow prevented from ‘presenting’ their case. This cannot, in my view, stand up. Arbitrators who encourage or assist parties towards mediation or generally towards settlement are not, in any way, *preventing* a party presenting its case.

The use of the med-arb process, where the parties agree to the arbitrator suspending the arbitration while he seeks, acting as mediator, to assist the parties to settle their dispute by mediation, is taking the arbitrator significantly further into the settlement process and is a process which could bring about, in international disputes, the increased use of mediation. It is a process which I have used, with the agreement of the parties, in domestic arbitrations and is a process with which I am comfortable. Thus I believe a measured use of med-arb, in the international context, is another means by which mediation can be further developed. I would add that it is always possible, during the course of an arbitration, to hold a mediation as a separate exercise using a different person or persons than the arbitrator or arbitrators conducting the arbitration. Moreover it is perfectly proper for the mediation to take place without the arbitral tribunal having any knowledge of it. As I have learned later, in more than one arbitration in which I have been arbitrator, this is what has happened.

I know a Canadian international arbitrator, who conducts an arbitration, writes an award, seals it and then invites the parties to enter a mediation with him. If the mediation is successful, the Award is never issued. If the mediation is unsuccessful the seal on the award is broken and the award issued.²² I am not sure whether there is not doubling up of effort and whether I would commend this course of action but it does illustrate how mediation can be brought into the arbitration process.

Logically mediation should progressively spread its wings into international dispute resolution. In the course of time parties and their counsel should have increasing confidence in mediation and become comfortable with a mediator who comes from a different jurisdiction and possesses different culture values.

Ultimately it is all a question of building up knowledge of the mediation process and learning and valuing the advantages of it – the wider solutions it provides, its greater speed, its greater simplicity and its saving in costs.

The author, David Hacking, is a chartered arbitrator and an accredited mediator.

Notes

- 1 See *ICI Bulletins* Vol 17 No 1 and Vol 18 No 1.
- 2 See *LCIA News* Vol 12 Issue 1.
- 3 Statistics given to author by ICDR Secretariat.
- 4 See, for example, at Federal level, the Uniform Mediation Act of 16 August 2001 and, at State level, the California and Connecticut Mediation Statutes.
- 5 These statistics were provided to the author by the Secretariat of CEDR.
- 6 See article of Harris Bor ‘ADR Possibilities in Investment-State Disputes’, *The International Journal of Arbitration, Mediation and Dispute Management* Vol 71 No 1 p 90 and 95: February 2007.
- 7 See Roebuck & de Fumichon: *Roman Arbitration*, The Arbitration Press, 2004.
- 8 See ‘The Myth of Modern Mediation’, *The International Journal of Arbitration, Mediation and Dispute Management* Vol 73 No 1 p.105; February 2007.
- 9 The Chancellor in English Court of Star Chamber: ‘This dispute is brought by an alien merchant...and he ought not to be held to await trial by twelve men and other solemnities of the law of the land but ought to be able to sue here from hour to hour and day to day for the speed of merchants’: YB 13 Edward IV, p 96.
- 10 Viz: the English Arbitration Acts of 1698, 1889, 1950, 1979 and 1996.
- 11 See author’s article, ‘Arbitration Law Reform: the Impact of the UNCITRAL Model Law on the English Arbitration Act 1996’, *The Journal of the Chartered Institute of Arbitrators* Vol 63 No 4: Nov 1997.
- 12 See: UNCITRAL website: www.uncitral.org/NYConvention
- 13 *Ibid*
- 14 See author’s article, ‘Arbitration Law in Europe’: *The Journal of the Chartered Institute of Arbitrators* Vol 65 No 3, August 1999.
- 15 See ‘Empirical Data on Conflict Resolution and Strategies to Advance Access to Justice in Rural Areas’, *Sistemas Judiciales* 108: Dec 2003
- 16 It should be pointed out here that a number of countries in the European Union have established mediation institutes who, working with national courts, have set up court-annexed mediation programmes [see Netherlands: article by Shaun Conway, IBA *Mediation Committee Newsletter*, Vol 1 No 3, December 2005]. Similarly in other jurisdictions Chambers of Commerce, or the like, have prepared and published Mediation Rules [see Geneva Chamber of Commerce Rules on Civil and Commercial Mediation of 1 January 2005, Loi sur la mediation civile de la République et Canton de Genève]
- 17 See paper of Dr Szabolcs Németh, Counsellor, Ministry of Justice, Republic of Hungary, to be published by Vilnius University School of Law.
- 18 See paper of Dr Martin Webber, Judge, Federal Ministry of Justice, Federal Republic of Austria, to be published by Vilnius University School of Law.
- 19 See analysis of the role of the English Courts in mediation in Paper of Kate Williams of Shadbolt & Co: ‘The Growing Role of Mediation: the English Perspective’ at Spring Meeting 2007 of ABA International Law Section: www.abanet.org/intlaw/spring07/agenda.html.
- 20 See papers issued by European Commission and for draft Mediation Directive: 2004/0251 COD COM(2004) 718 final
- 21 This goes to the whole chestnut of ‘subsidiarity’ under which Member States seek to keep the European Union out of its domestic laws. The fear, therefore, of the UK is that a concession here on subsidiarity could be used as a precedent for the European Commission imposing other law into the domestic law of the United Kingdom.
- 22 See *Transnational Dispute Management* Vol 4 Issue 1, Feb 2007.

Amanda's corner

An imaginary dialogue between Gandalf and Prospero on the question of mediators – criteria for appointment ... and for reflection?

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Gandalf and Prospero: mythical men well acquainted with mindfulness and reflection on issues emerging from disputes, control, influence and risk, and also mediators. What might they say about the challenge of choosing a mediator to guide people to productive resolution and agreement?

Gandalf: I was asked a very interesting question recently by a lawyer about choosing mediators. He told me how it had all seemed very straightforward until a recent mediation which had been very disappointing. He had looked foolish in front of his client who he had persuaded with some difficulty to attend the mediation in the first place. After the mediation, his client had said 'I thought you said this guy was the bee's knees!' This has resulted in an atmosphere between them.

Prospero: How did you answer him?

Gandalf: I asked him what was good about the mediator – which surprised him a bit. He said that he had a good name, everyone says he is wonderful, he is a very busy, well-known senior lawyer and has been involved in some pretty amazing cases. The mediator is 'smart, charming and earns a fortune'.

To which I said 'is this someone you admire?'

'Absolutely!' said he, slightly missing the point, and went on to say 'I thought he would manage my client, who can be such a pain!' To which I said 'were you hoping for someone to help you control your client?'

Prospero: Hmmm!

Gandalf: To give him his due, he stopped to consider for a moment and then I asked him 'what went wrong?' He said that the mediator was pushy and seemed irritable, impatient and a little too frank about the strength of the case, and whilst his client had seemed quite well behaved in the opening session he soon complained once they returned to their room. The lawyer knew it was going downhill when his client said 'who does he think he is?'

Then I asked him how he came to choose that mediator in particular? Before I tell you what he said, what do you think? What are the criteria on which representatives appoint mediators? I have a strong sense that there may not be a full interconnection between those criteria and the positive contribution which the mediator actually makes on the day or perhaps more importantly, the experience that the parties have on the day.

Prospero: I expect there are some criteria of which the appointor is aware when making the choice and some that sit well below the surface of conscious choice.

I imagine the predominant ones are that the mediator has a strong presence in the market place; that she or he is already known to the appointor either through previous experience in a mediation or through recommendation by a colleague.

I think the question of profile may be important but I suspect that is as much about their legal expertise in a specific field as their expertise in mediation and the former might indeed be more influential in the selection process.

Profile is likely to be important to an appointor and that must include success or track record. So I suggest the predominant indicators of a good mediator might be profile, expertise in the relevant legal field, reputation and track record.

Gandalf: Yes, but what do we mean by that? What are the sources of such a perception? Perhaps this relates to coverage in the Legal 500 and/or Chambers Directory – these are based on independent research after all. But we should bear in mind that even though the researcher will indeed conduct confidential enquiries the mediators themselves are likely to have submitted material, which is - quite naturally - self-serving. Also, the researchers can vary from year to year between experienced journalists specialising in the field and less experienced researchers in terms of their knowledge of the mediation sector. It might be fair to say that positive listings over some years in both directories would create a fair expectation of quality. Would you agree?

Prospero: In a sense, yes. But this is a narrow view, some might even say lazy, if the expectation is that by going for particular individuals a stellar performance is virtually guaranteed, thus reducing the risk that the party/client may react badly to the appointor's choice. So it's an insurance policy.

Gandalf: Indeed so. However, a careful reading of the editorial copy in these publications makes it clear that each mediator is valued for particular reasons of an individual nature. So it simply cannot be sufficient to guarantee a good experience to select on that basis only.

Prospero: Another point which occurs to me in this area of mediator selection is the reputation in other fields, not just as a mediator, which any individual may have. So if the mediator is

- a lawyer;
- a barrister;
- a QC; or
- a (retired or former) judge;

might that bring further comfort/security/insurance of the kind we have mentioned? And, is there a scale which increases exponentially as one goes down the list?

Gandalf: I think you are touching on some of the unconscious criteria that influence the choice of mediator. I wonder if my questioner was influenced in this way since he so admired his choice? It is somewhat understandable to seek to engage someone who is more experienced and with a higher profile especially if you have in mind that they should give opinion. I suspect there is a cost issue underneath that somewhere too.

Prospero: What do you mean?

Gandalf: That you only have to pay half for 'an opinion' and can't possibly afford someone more expensive and for a whole day. If you think about it, it is quite a good deal. And if you get a retired judge then perhaps you might think you have a very cheap 'day in court'.

It also raises the question of just how much of a good/specialised lawyer a mediator needs to be. There seems to be an increasing impression that appointors think they want a mediator especially knowledgeable in/qualified in the area of law in question. The appointor perhaps has a strong sense of conviction in his own legal analysis and believes that a specialised mediator will agree with him and 'lean' on the other side.

Prospero: So an appointor with a strong case, or who thinks she has a strong case, will want a legal specialist mediator, and vice versa?

Gandalf: I suppose that may happen. But of course the specialist mediator may very easily take a different view, in which case the strategy has backfired, and may also decline to express a view at all!

Prospero: So it would seem that a more effective approach – so far as the process of mediation is concerned – might be simply to ensure that the mediator is able to understand the issues between the parties, and that it doesn't really matter whether the mediator is able to be in the position of a judge having heard all the evidence and the legal submissions in any dispute. It would be odd if parties having agreed to mediate actually thought they wanted that 'judge' persona.

Gandalf: Very odd indeed but undoubtedly many parties do. We have seen how they may be sorely disappointed. If the 'understanding' mediator is appointed and a settlement is reached, what will the appointor value at that

point? We will be coming to that I expect in a while.

Prospero: Yes, but let's just first of all look at any other factors which tend to affect mediator appointment. One obvious one is prior experience – the lawyer in question has used the mediator before, knows him – this can see off a lot of the 'insurance policy' worries which we have referred to.

Gandalf: I understand that, and it is hard to fault it, because the decision to re-appoint must follow a positive experience and reaction to what the mediator actually did rather than what the expectation was. But in practice it very often happens that a mediator proposed by one side will be rejected out of hand as a tactical manoeuvre by the other side or worse for them – in the mistaken belief that expertise is a better insurance than experience in mediation. Old adversarial habits die hard! I also think the issue of habit is a dangerous one if the re-appointment of the same mediators is only because of familiarity. For sure, it will become a problem. If you seriously want an insurance policy then you need to pay attention to the leading negotiation theory which says 'separate the people from the problem.' (Ury & Fisher) If you constantly choose a mediator to suit the legal problem then there will be times when he or she doesn't suit the people in the room. In fact it might be said that it will be more by luck than judgement that a mediator is a good choice for the people. That is a very big risk as my young friend found out.

Prospero: Are you saying that the mediator should be matched to the people?

Gandalf: I would have thought it would reduce the risk of many things going wrong. The latest research asks 'what if the people are the problem?' We know that in the end it is the people who agree to the deal. I would have thought it was very risky indeed to ignore that – there is enough evidence to say it is very real one.

Prospero: Your point about tactical manoeuvring is a good one. Yes it is true that there remain party representatives who include that sort of game playing in the appointment process. But let's look at another positive criterion. Let's continue with the matching the mediator to the people idea and particularly

the notion of style. I think this gets more to the heart of what mediation is all about – most of the factors we have referred to already sound more familiar in the litigation rather than the mediation context. I'm not sure you really want to think about mediator appointment in the same way as you would the appointment of a leading Counsel to present your important case at trial – in that case the legal reputation would be paramount, and it would be a bonus if the participants hit it off on a human level.

Gandalf: That seems to be part of the people/problem consideration. I also think that style goes with tone. Are you saying that style is the most important factor in mediation appointment? Or perhaps more that it isn't and should be? Perhaps even to combine some of the safety factors with giving yourself the best chance of getting the mediator behaviour that you will later look back on as valuable.

Prospero: Yes, I think that's right. But first I've thought of another of the 'safety' factors, which lead to preference at the appointment stage. This is the notion of the settlement rate or percentage. Actually, I think this is a bit of a red herring in practice but it is often spoken of. It seems to have real importance in the way US mediators market themselves, but less so in my experience. In fact I can't think of a time when I have been asked this directly! Perhaps the English reserve ... but just as well, as I am a believer in the proposition that if the mediator cares too much about settlement or not settlement, the parties soon get wind of this and feel no responsibility themselves to find a settlement. So, in a sense, caring about settlement rate is counterproductive for everyone. And of course, we know of parties who were incredibly pleased and appreciative of the job the mediator has done even when there has been no settlement! So just what are those nebulous characteristics/ways of behaving that cause people to say that they made a good choice in retrospect?

Gandalf: I think this might be a good point to talk about the notion of 'tone' because although I think it is part of the mediator's style it is more about what they do rather than what or who they are. Would you agree?

Prospero: Indeed.

Gandalf: Infinitely flexible?

Prospero: Yes.

Gandalf: To your mind does it include choosing the right environment, the way you mix people, adjusting the approach to suit the people in the room and that might mean being different in each room whilst remaining constant?

Prospero: I think that is very important. And had your questioner's mediator been more alive to 'tone' he might have had more success.

Gandalf: What else does it mean? Choice of language? Knowing when to use expert knowledge and when to keep it out of the conversation? Pushing things along at the same time as slowing things down – a bit like syncopation.

Prospero: I like that. Don't you think it might be a bit nebulous for some though?

Gandalf: It might be new for many but I think we are going to hear a lot more about tone and style and how important they are and how to manage them.

Prospero: Do you think that is something parties actually experience? Do you think it is reflected in the feedback, for example?

Gandalf: Now there's a point! OK, let's think of a few things that parties might identify as influential when looking back at how a mediator performed. It is absolutely clear that it is quite hard to identify these in advance. So if the mediator feels that this or that style factor might be likely to produce good feedback the problem is somehow to get that into the minds of the appointors. To some extent the directories are helpful here, but they would be more help if they could produce more detail than the few lines they have space for. Perhaps any idea of expanding access to feedback may be helpful; at present there are the directories, and then the mediators' own biographies, which often include feedback sections. I think my argument would tend to be that appointors would do well to have regard to style and feedback factors as being more likely to influence how they will view their experience in retrospect than any apparent qualifications.

Prospero: I agree. Here's an example – hugely important in my view. (So simple, it might be overlooked whilst people concentrate on the

rarefied detail of legal analysis and perhaps become more entrenched as a stuffy day drags on).

'the mediator succeeded in getting people to actually talk about money and terms of settlement at a reasonable stage in the day rather than at 6pm.'

There is so much implied into such a statement, but particularly:

- an improved experience for the client;
- a better settlement;
- a better relationship with the client.

Gandalf: I think we need to be more specific about criteria if we want people to use them. And we should remember that we do have some leading research on the topic* I am not sure that appointors have taken on board how important the experience of mediation can be to keeping clients and encouraging them to put more business their way. They only need to remember that even clients who win in litigation are frequently very unhappy either about the experience or about the level of costs they have to bear even when they have won! I suspect that denied or acknowledged, it must have a bearing on future business with that client. Just imagine if win or lose the experience of settling disputes was always a positive experience and how much that might affect client loyalty? It is such a shame that this is not sufficiently appreciated.

So, can I suggest a useful criterion arising out of that feedback as I see it?

Prospero: Please do!

Gandalf: The feedback suggests a few things as you say. Principally, a better settlement and a better experience. It also implies, managing momentum, rapport building and getting people to start talking to each other sooner than later.

Prospero: Indeed!

Gandalf: And to achieve progress in that way I suggest the mediator needs to have a good understanding of the people in the room, the commercial issues and therefore be able to quickly convince the parties that the mediator has understood their points of view so that the parties can move to negotiation sooner. Patience, persistence and a sense of what will

satisfy the parties so that they can move to talking about a deal. Some people call it 'quick on the uptake' which is frequently mistaken for expert knowledge.

Prospero: I am certain those skills are essential.

Gandalf: So in this case simply by facilitating a momentum of communication, by presence and paying attention, attracting the trust and commitment of both sides, by discouraging game playing by the example set, by avoiding settlement by exhaustion, the mediator has succeeded and will understandably be re-appointed. This success has nothing to do with legal track record – it is about commitment, energy, enthusiasm, persistence, patience and persuasion. Perhaps a little humour has been required to lighten moods into optimistic visualisation of life without the dispute!

Prospero: Absolutely so. Shame they don't teach those things in Law School.

Gandalf: So what shall I tell my lawyer? How do you know if a mediator has those skills? Are you saying that you have to look beneath the superficial meaning of sound bites of feedback?

Prospero: Well you might tell him that if he wants to impress his client next time he is more likely to succeed if he chooses a mediator who has the skills to engage his client on his or her own terms – that is highly unlikely to be with just legal nous especially for a commercial client. And the best way he might do that is to look at the feedback from previous mediations carried out by the mediator. Does the feedback concur with independent sources such as Legal 500 and Chambers Directory? If the mediator has been recommended, then ask the referee about the style of the mediator and how everyone felt at the end of the mediation. What amazes me is why no one ever rings a mediator to ask important questions. Even more surprising, very few mediators are keen to speak with the clients prior to the mediation.

Gandalf: Why do you think that is so?

Prospero: Possibly some echo of legal etiquette and possibly lack of time. That is what is so refreshing about mediators who spend time in preparation – of themselves and everyone attending the mediation. It helps momentum on the day and helps the mediator identify the issues; to plan the day.

Gandalf: What if you have twenty people around the table?

Prospero: Then talk to the decision makers and those of whom you get a hint that they might need more 'attention' from their lawyers.

Gandalf: You mean focus on the people not the problem?

Prospero: Exactly!

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*In 2006 Amanda published the results of the first research project into the skills, attributes and behaviours of effective mediators, a qualitative study which took two years to complete and based on data from senior mediators and appointors with joint experience of over 2500 commercial mediations.

CORRIGENDUM – In the last issue of Amanda's Corner, certain references to the United Kingdom should have read as England & Wales. For more details in that regard, please contact Amanda Bucklow at the address above.

This Newsletter is intended for lawyers interested in, or involved in, laws and regulations as they apply to mediation. Views expressed are not necessarily those of the International Bar Association or its officers.

Mediation – back to basics

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Every once in a while, we should stop and do a reality check. We do this with people in the course of mediations. Why not do it in relation to mediations on the whole?

Now that we are well into the first decade of the 21st century, we can see that in many countries, acceptance of mediation has come a long way. This is particularly true in domestic matters, but is finding its way in international matters as well.

Some countries started using mediation techniques earlier than others. Some are still sceptical about its application. Earlier this year, I had occasion to be speaking on a panel in Mexico City to an audience composed largely of Latin American lawyers. One of them raised what he said was a problem that I probably did not understand, coming from Canada; that is, the parties to litigation do not trust each other, so mediation likely would not work.

I responded by telling the audience that in all my 15 years of practicing as a mediator, and indeed as counsel for 37 years, I had yet to meet parties to litigation who trusted each other. The audience went silent. Why? Was there an expectation that somehow when parties come to the mediation table, they are suddenly going to trust each other?

One of the functions of the mediator is to build consensus on the issues, to work with the facts and the people to find a basis for compromise. These are skills which a mediator must bring to the table.

The need for these skills of the mediator, and many other such skills, is apparent to any party or counsel who attends a mediation. If they are lacking, it becomes equally apparent. Mediators, like many other professional or business people, vary widely in their skillset. If their skills or training are weak, what can be done?

In a voluntary ad hoc mediation, if there is a problem you can discuss it privately with the mediator even in the course of the mediation. If this does not work, you can choose not to use that mediator again.

But what if you cannot choose the mediator? There are many associations and particularly, tribunals, which have mediation as part of their procedures today. They may even have their own set of rules governing their mediation process. All this is very good. But the bottom line for parties and their counsel is the matter of the effectiveness of the mediator.

Effectiveness is a somewhat relative term. One party may feel the mediator was more effective than the other party thought. But effectiveness comes from training

and experience, and maybe a little from personality. If a tribunal does not post on the web the CV of its mediators, how are you to know their training and experience?

Moreover, if a tribunal assigns the mediator and you cannot determine who that will be in advance, nor know of their credentials, your mediation is no more than the proverbial shot in the dark. I know of a case where the parties and their counsel spent an entire day with the mediator and the responding party did not put a dollar on the table. The mediator did not appear to have the skillset to deal with that problem, notwithstanding all the representations made by the claimant's counsel.

What can we do about such cases? Perhaps not much in the individual case, but perhaps a great deal in the bigger picture.

When mediators are starting out, they should be required to take minimal training of one solid week. They should be required to conduct voluntary mediations on minor matters until their skills build up. They should be required to co-mediate with experienced mediators in order to become more sophisticated and able to deal with more complex cases. They should learn something about the field(s) in which they want to mediate if they have not practised in that field.

And what of those who recognise the deficits? These are usually experienced counsel, or other mediators. Who better to make the representations needed to have tribunals ensure their sitting mediators are adequately trained? And who better to train them than well-experienced mediators?

This is where associations like the IBA, and others, can call upon their members to volunteer for purposes of training mediators in tribunals which may not have their own training programmes. This is where senior mediators can come to the rescue, help improve the quality of mediation as a widespread process, and better the prospects of peaceful settlement for those in conflict.

Let it never be said of mediators that those who can, do, and those who cannot, teach.

The mediation of international business disputes*

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International business ('IB') disputes, like all rights-based differences, are predisposed to competitive bargaining practices. Conscious efforts are therefore required to make such negotiations more interest-based and collaborative. One key way to do so is to involve a neutral third party mediator. Mediation enhances problem-solving communications between parties in conflict. This is particularly important in IB disputes where the scale of the affected organisations and potential cross-cultural differences can impede effective dialogue and a healthy exchange of perspectives. International protocols, contracts and centres for conflict resolution in recent years have all recognised the added value of mediation by making this dispute resolution device available to parties in addition to the existing mainstream opportunities to arbitrate. The arbitration of IB disputes, however, constitutes the driving force behind mediated talks with its mandatory framing of the issues in dispute, pre-hearing information exchanges and real deadlines which require the parties to focus on trial risk.

IB disputes

By definition, transnational business disputes are more complicated than their domestic counterparts. Geographic distance, organisational size, quite different legal and political domestic regimes and related cross-cultural factors can all converge to complicate international business resolution strategies. Indeed, these very elements led to the rise of commercial arbitration as the preferred method for resolving IB disputes.

Commercial arbitration

Existing international protocols for dispute resolution are usually adopted in IB contracts. These protocols provide the arbitral or adjudicative ground rules and often the arbitrators much like but in substitution for the domestic courts in the parties' home jurisdictions. International commercial arbitration with its longstanding pedigree fills an important institutional need by providing an expert, reliable and neutral enforcement of IB transactions. But commercial arbitrations come with many of the transactional costs of conventional litigation and, too often, the added

complexity of vexing enforcement challenges involving follow-on domestic proceedings. These costs plus the risk of losing make settlement discussions sensible. However, the transnational character of a commercial dispute sometimes makes authentic or effective talk difficult.

IB settlement discussions

Global companies are often not sufficiently nimble to identify and resolve transnational contractual differences quickly. Authority at a local level may be lacking. Different political regimes in home countries can create structural barriers to resolution discussions between the contracting parties. The personnel responsible for implementing the contract may not be the people who negotiated it. The dispute may be so material that neither side is willing to participate in a settlement that will require financial statements to be restated. Cultural differences can also distort perspectives when having to 'read' an opposing party's actions. The end result is sometimes that no real talk will take place at an appropriate level until the dispute is escalated into a complaint to be arbitrated. Indeed, in some instances no real talk occurs until after an arbitration award is rendered! By these times, however, disputes may be more difficult to resolve because positions have hardened or there has been irreversible change on the ground. Thus, to respond to such realities parties should consider contract provisions requiring early talk by officials with authority and with the assistance of a mutually acceptable mediator.

Mediation

Focus

Importantly, a mediation requires a face-to-face meeting of the parties. But a mediation is not just a meeting. It is a process. Indeed, it is a problem-solving process defined by the intervention of a neutral third party. Everyone understands that this type of meeting requires planning, trial-like preparation and the involvement of informed and credible representatives. A mediation, therefore, assembles all the informed parties and their trusted advisors at a single location and with all having the solitary focus of dispute resolution. This state

of affairs cannot be replicated by other customary settlement efforts such as written correspondence, telephone exchanges or even episodic bilateral face-to-face meetings.

In the context of IB disputes, these features of mediated meetings respond to the barriers of geography, authority to settle and organizational inertia. In a word, mediations require the parties to focus on the problem and its resolution.

Planning

Most parties understand the advantages of joint planning for a mediation. A planning meeting, by telephone or preferably in person, can agree on the number of days to allot to the process, who should attend, how to frame the issues in dispute, any needed exchange of information, the timing and form of briefs to be filed, the use of experts or expert reports and the style or form the mediation will take. These pre-mediation meetings create confidence in the process or buy-in and their occurrence constitute important dispute resolution milestones.

Communication and culture

Once a legal dispute arises in any context, effective communication between the parties is usually compromised. Lawyers advise caution in speaking to the other side fearing such talk will be used against their clients. Disputes in themselves can produce distrust and positional instincts take over as parties are confronted with losses. Unlike future oriented gain-sharing or deal-making talks which create contracts, legal dispute negotiations are retrospective and about loss allocation. The latter type of negotiations brings out the aggressive, secretive and competitive tendencies in all of us. These inherent communication barriers, however, may even be magnified in IB disputes where significantly different cultures are engaged. Without the kind of direct communications which led to the contract in the first place, parties in distrustful legal dispute negotiations are left to interpret each other's conduct. As we are socialised, we learn to make judgments based on values and expectations common to our culture. But in the context of cultural differences, these acquired perceptions and related judgments can be in error unless the representatives are fluent in all pertinent cultures. While everyone can enhance their cultural competency by training and experience, disputes can arise before such knowledge is fully acquired. Mediation inherently responds to such barriers by its rational problem-solving method which downplays the need to make inferences based on one's cultural expectations through the facilitation of authentic communications. This is so even if the mediator is not particularly fluent in either party's culture because of the direct and relatively trusted communications the parties will need to have

with the neutral third party. Empathy and active listening, the non-contingent activities of all effective mediators, will usually identify and correct misperceptions as the mediation process naturally unfolds.

Problem-solving

The added value of mediation is its problem-solving focus. By helping the parties manage the tension between competition and collaboration, mediators produce huge dispute resolution value. Parties are encouraged to explore all options before locking into particular approaches and when they do make specific proposals they are urged to give underlying reasons. Mediator's activities thereby imbue discussions with rationality and produce bargaining momentum. Even the inevitable distributive bargaining is moderated and made more efficient.

Preserving and strengthening ongoing relationships

This approach to settlement discussions builds understanding which in turn permits partners to move forward together and preserve the capital investments they have made in their relationships. Such mutual understanding also allows parties to learn from their differences and thereby avoid or reduce the incidence of future disputes. Parties actually enhance their dispute resolution competency by participating in a well managed mediation process – a form of on-the-job training if you will.

Conclusion

Mediation is becoming an important IB dispute resolution tool. With its reduced transaction costs, its potential to produce creative solutions and its capacity to preserve relationships, mediation is increasingly being resorted to in transnational disputes. However, mediation is dependent on the existence of credible and accessible binding arbitration procedures to which the parties will default if a mediated agreement is not forthcoming. The pressures of such realities cause parties to engage in meaningful discussions and to make the necessary difficult decisions. In other words, mediation is a parasitic or dependent dispute resolution tool which contributes to effective negotiations. It does not replace the need for robust commercial arbitration procedures. Commercial arbitration and mediation work in partnership to produce international dispute resolution justice.

*See generally George W Adams, *Mediating Justice: Legal Dispute Negotiations* (CCH Canadian: Toronto, 2003)

Our legal system is flawed

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Do any of you believe that litigation is the crowning achievement of a great civilisation because it represents the abandonment of conflict resolved through force, violence, and trial by ordeal and embraces principle and reason to reach a just outcome? If so, I remind you of an old gypsy curse that says, 'May you be involved in a lawsuit in which you know you are in the right.' Litigation is designed for the litigators and not the parties who have the real stake in the outcome.

Every case in court has some aspects of interpersonal dealings and with the person comes the emotions, but courts were created to focus on the facts and not the feelings. The bias against dealing with emotions is strong but experience has taught us that patients and families with healthcare concerns want a straight explanation of unexpected occurrences, acknowledgment of their suffering, an apology if warranted, and some assurance that processes or policies are being implemented to ensure that the adverse event does not recur with another patient. It is not about receiving money in the beginning, but it soon comes to that when courts offer this as the remedy of choice and attorneys weigh the amount of justice rendered by the dollars recovered. Apology once meant a defence, justification, or excuse, but its more modern usage may be to acknowledge and express regret for the fault without defense. Apology is a ritual exchange including a statement expressing regret and acknowledging injury with an acceptance of responsibility. What makes an apology work well is the exchange of shame and power between the offender and the offended. Both apologising and forgiving are healthy acts of emotional resolution when genuinely completed. Our system of jurisprudence is preoccupied with defence of individual rights and fear of laying blame; it is precisely this fear of admitting culpability that can effectively preclude apology.

The professions within healthcare face escalating problems and changes that directly affect the experiences of patients and the interactions of those who work within the system. Conflicts within these systems and within individuals as a result can reduce the quality of patient care and complicate efforts to reduce costs as conflict itself becomes a distraction from delivering quality care.

The current medical-legal system for resolving medical malpractice disputes is lengthy, inefficient, and expensive. Escalating liability insurance premiums compromise medical care delivery and negatively affect the patient-provider relationship. The US healthcare

system will benefit, practically and economically, from earlier and less adversarial conflict resolution techniques than are currently practiced, particularly between patients and providers. The healthcare industry is under great pressure to contain costs in every possible way. Concurrently, federal, state, and local governments, organisations, and consumers of healthcare services are demanding quality healthcare be provided, healthcare providers operate efficiently, and the patient be the highest priority. The use of litigation to resolve disputes in a healthcare setting can be inconsistent with these goals. The rights-based process of litigation creates a divisive atmosphere and increases the cost of resolution and even healthcare, while diverting managers and providers of care from the primary task of providing quality healthcare to patients. The expense is significant, delays can be interminable, results are uncertain and remedies are often inappropriate. There has to be a better method of finding fault, laying blame, or resolving disputes. We must stop practicing paternalistic law and allow our clients to experience self-determination and decision-making in finding redress or remedy for wrongs. We must stop measuring success in numbers and seek other calibrations for satisfaction. Facilitative mediation may be a forum where success is defined by more humanistic measurements.

No matter how diligent to task or knowledge, indicators for satisfaction among parties to mediation may focus on different variables. Often, the most frequently given party response for satisfaction with the mediation process depended upon how important the participants were made to feel during the mediation. Parties complimented mediation when allowed to present their views fully and when given a sense of being heard, while helping them to understand each other. Parties' favourable attitudes toward mediation came from their perception of how the process worked, with two features in particular being most responsible:

1. The greater degree of participation in decision-making that parties experience in mediation;
2. The fuller opportunity to express themselves and communicate their views, both to the mediator and each other.

Conversely, when mediators denied parties real process control, party satisfaction levels were very low, to the conclusion that despite what might have been thought, parties to mediation do not place the most

value on a process that provides expediency, efficiency, or finality of resolution. According to the Federal Mediation and Conciliation Service, the likelihood of a favourable substantive outcome is not most important to parties; rather, an equally or more highly-valued feature of mediation is procedural justice or fairness, which in practice means the greatest possible opportunity for party participation in determining outcome, compared with the assurance of a favourable outcome, and for party self-expression and communication.

Party characteristics, traits and attributes are of equal importance to mediator traits for a successful outcome. Of most importance to parties in mediation are the following items such that participants need to feel:

- Their own issues are important
- They can present their views fully
- They are being heard
- They understand each other
- They are highly participatory
- They can express themselves to each other and to the neutral
- They perceive fairness in the system
- They can achieve self-expression

Healthcare organisations' complex conflicts typically result in protracted litigation, less than favourable media attention, and a sense of repetition without substantial progress. The use of experienced clinicians, well trained in the disciplines of mediation and ombuds practice, has been demonstrated to improve patient safety, reduce medical malpractice costs, enhance both staff and patient satisfaction, and create an informal feedback loop that identifies and fosters systemic improvements within the hospital. Furthermore, healthcare institutions are beginning to recognise the need to design and establish a culture that will enable professionals to disclose errors in a blame-free environment. (*Risk Management: Extreme Honesty May Be the Best Policy*, Steve Kraman, MD, Ginny Hamm, JD, Annals of Internal Medicine, 21 December 1999, Volume 131, Number 12).

The following questions all have adequate answers – what can they be?

- What prevents healthcare professionals from communicating clearly with each other?
- Are there better mechanisms to have patient concerns heard and for health care providers to respond to those concerns without the fear of litigation?
- How can we focus on what's important and create a community of like minds in the chaos of daily healthcare operations?
- Does the increased demand for patient safety require better methods for improving teamwork and communication?
- How can we manage the environment of care to improve retention of experienced and capable

clinicians?

- How can healthcare organisations more effectively combine work groups following a closure or merger?
- What's the best way to handle conflicts within a work team?
- How can complex organisations begin to manipulate disputes into manageable and resolvable portions?
- Are there effective ways to decrease costs associated with conflict?
- What do patients lack or need that makes them want to sue a healthcare provider or organisation?
- This is not the same job it was when I began; do I want to be a healthcare professional anymore?

Conclusion

The shared reality of any workplace requires individuals to perform and act autonomously yet cooperatively. In a collaborative workplace the individual shifts from merely learning skills and gaining knowledge to a context where skills, combined with appropriate attitudes, behaviours and knowledge merge into the culture with which the individual identifies. Consequently, the communities comprising the culture combine with one another into the greater community, underpinned by shared values, beliefs, and goals. Senior leaders and policy makers generally effect change first in strategy (externally perceived competencies and customer perceived value) and structure (internal changes in forms, process and reporting relationships). They tend to undervalue the importance of culture and consequently the 'people' component of change. When culture is seen in this way transformation to a culture of collaboration cannot satisfactorily be accomplished. Leadership shortcomings in this area stem from a lack of understanding of how cultural considerations connect with other approaches, such as education and behaviour change. Without addressing the existing culture there is a tendency to set unrealistic expectations and a change in attitudes or behaviour might be a long time coming. A collaborative workforce programme is built around principles and skills common to mediation, coaching, and other conflict resolution disciplines applied to the workplace and focused on relationships as contrasted with processes and procedures. The results of relating to and working within a collaborative workplace are seen in authentic relationships between people freed from the bonds of deceit and dishonesty and empowered to engage in courageous conversations. The traditional litigation process encourages none of this.

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Settlement in international arbitration (and what this might mean for ADR)

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As international arbitration embraces the new millennium arbitrators and in-house lawyers are engaged in seeking new pathways to keep arbitration fresh, effective and relevant. Modern arbitration run by a proactive arbitral tribunal has what has been described as new windows of opportunity to assist parties reach an amicable settlement during the arbitration¹. In order to explore these new opportunities practitioners and parties will need to keep an open mind. It may well need a change of perception especially by Anglo-American practitioners with regard to the types of settlement techniques used by their civil law colleagues.

Many believe there are no real obstacles to the synergies that can be achieved by the combining of the best features of mediation and arbitration.² However it is not simply about reworking the pure mediation/conciliation/arbitration versus med-arb debate but challenging practitioners to re-examine their own practices in encouraging settlement.

The current arbitration climate

Today international arbitration is still seen as the default method for resolving disputes around cross-border commercial contracts³ but it is attracting increasing amounts of criticism worldwide for being slow and expensive. Settlement rates in international arbitration are reputed to be significantly lower than they are in most state commercial court proceedings, where, in many jurisdictions, the judges now use a variety of tools to promote early settlement.

It is clear that the international arbitration community is aware of the criticisms and is concerned to improve the product. Papers such as the UNCITRAL Notes on Organising Arbitral Proceedings, the IBA Rules on the Taking of Evidence in International Commercial Arbitration and Guidelines on Conflicts of Interest in International Arbitration are all documents aimed at making international arbitration work better.

Although some of these papers refer to the role of the tribunal in encouraging settlement, at present the approach to this taken by tribunals varies very significantly from jurisdiction to jurisdiction. In all jurisdictions it is rare for arbitral tribunals to recommend that the parties try using formal mediation.

Whilst many courts in Europe now generally enforce ADR clauses and decline jurisdiction where these are not observed, arbitral tribunals tend to find reasons to accept jurisdiction and proceed with the arbitration, even where one party may have breached an obligation to mediate before commencing arbitral proceedings.

This reluctance to embrace mediation contrasts with jurisdictions like Australia where reinsurance contracts, for example, exhibit a proportionately higher use of mediation or expert determination clauses than their international counterparts and the parties are more likely to insist that mediation be attempted before arbitration. This trend, not as yet seen elsewhere, is due to the fact that the Australian courts have proven to be more likely to refer a dispute to mediation or expert determination.⁴ European jurisdictions are also seeking innovative solutions to combine the best of mediation and adjudicative proceedings. In Germany, for example, in order to promote the acceptance of mediation a model project has been introduced to trial the use of judge mediators who act as mediators, but if the case does not settle the case is handed back to the referring judge.⁵

Commission on settlement in international arbitration

This summer CEDR established a Commission that will investigate the different approaches currently taken to promote settlement in international arbitration and make recommendations as to how arbitral institutions and tribunals might give parties greater assistance in finding ways to settle their disputes earlier and more cost effectively.

The first meeting of the CEDR Commission on Settlement in International Arbitration, with over 25 international jurisdictions represented by 70 members, took place in London in July. The Commission is co-chaired by Lord Woolf of Barnes (former Lord Chief Justice of England and Wales) and Prof Gabrielle Kaufmann Kohler (partner of Schellenberg Wittmer).

At the initial meeting the Co-Chairs set out the Commission's role to investigate approaches to settlement within the framework of international arbitration. An important part of the investigation will be the inputs and comments submitted by the world's

leading arbitration bodies. The Commission has identified 45 consulting ADR organisations to input into research that will help determine its findings next year. The organisations cover a wide range of national and international jurisdictions.

The Commission will be supported by a select group of rapporteurs who will be responsible for research, drafting the early discussion paper and the final report. The Commission will meet again during 2007 and early 2008 to produce a 'White Paper' for publication to be launched at an international conference to be held in 2008.

At the first Commission meeting

There was broad agreement that there is a need for a robust debate about the topics raised by the Commission because it is focusing on areas where minds still differ and there are diverging views, which are often grounded in civil law and common law traditions. The Commission members who come from diverse international jurisdictions agreed that there is a compelling case for the best practices of different international arbitral bodies and countries to be considered in order to draw up innovative ways of achieving settlement. This should lead to tribunals considering adopting a more holistic approach to case management and settlement.

The views of in-house counsel representing some of Europe's largest corporation were particularly interesting and revealed that it is often the case that corporate clients do not feel their needs are being met by arbitration as it is now practiced. They called for more emphasis to be given to addressing arbitration problems and warned that many corporate clients are now reluctant to use or choose arbitration to resolve their disputes.

Lord Woolf stated that the responses to the Commission survey struck him most for highlighting cultural differences. He thought it would be valuable to identify through the Commission the different role of arbitrators in different countries. He went on to say that he hoped the Commission could address the apparent lack of confidence arbitrators have in involving mediation in the process.⁶

The Commission drawing from the issues raised during the meeting resolved to broaden the scope of the debate to look at ways to conduct empirical research and to continue to invite the views of the international arbitration community. The next meeting scheduled to meet in the autumn promises to be both stimulating and informative with the goal of producing draft recommendations for a final report to be published in 2008.

Notes

- 1 See Hilmar Raeschke Kessler, *The Arbitrator as Settlement Facilitator*, *Arbitration International*, Vol 21. No4 p523.
- 2 See Renate Dendorfer and Jeremy Lack, *The Interaction between Arbitration and Mediation: Vision and Reality*, *IBA Dispute Resolution International*, Vol No 1 June 2007, p76
- 3 Chris Newmark, Mediator and Partner at Spenser Underhill Newmark, commenting at the first meeting of the CEDR Commission on Settlement in International Arbitration on 10 July 2007
- 4 Peter Mann and Raymond Giblett, Clayton Utz, Australia: *Mediation - A Rival To Arbitration In Reinsurance Disputes?* 31 October 2006
- 5 Gerhard Wegen and Christine Gack, *Mediation in pending civil proceedings in Germany: practical experiences to strengthen mediatory elements in pending court proceedings*, *IBA Legal Practice Division Newsletter*, December 2006 pp8-9.
- 6 Lord Woolf, Meeting Commission on Settlement in International Arbitration, 10 July 2007 London

IBA Mediation Subcommittee on the UNCITRAL Model Law on International Commercial Conciliation (MLICC)

At the IBA Annual Conference in Chicago in September 2006, the Mediation Committee agreed to constitute a Subcommittee to investigate and report on the MLICC with a view to providing members with a useful guide.

The Subcommittee limited its inquiry to the MLICC provisions on (a) statute of limitations, (b) confidentiality of mediation & admissibility of mediation communications as evidence in subsequent legal or arbitral proceedings, and (c) enforcement of settlements.

A questionnaire was circulated which produced responses from 17 countries and an initial report was distributed at the IBA Annual Conference in Singapore. The report and questionnaire can be found in the following pages of this newsletter and at http://www.ibanet.org/legalpractice/Mediation_and_Conciliation.cfm. The country responses can be found at this web address.

If you wish to contribute to the investigation, please do complete the questionnaire and send it to anurag.bana@int-bar.org.

While there are important local details to be resolved as to implementation of the MLICC as to tolling of the statute of limitations and the method of enforcing settlements reached in mediation, the concept has been accepted by, for example, the EC Commission and the European Parliament and does not present a serious issue of principle even though the implementation may be less than uniform given the competing sources of law and regulation mentioned in the report.

The MLICC provisions as to confidentiality in general (Articles 8 & 9), that is, as to mediator and parties in a mediation, and disclosures by any of them to family, friends, business associates, competitors, or the media are not conceptually difficult to understand or enforce, even though some jurisdictions will not default to confidentiality but will require party and mediator agreement.

The MLICC provisions as to admissibility of mediation communications, written or oral, in subsequent legal proceedings (Article 10) are fair ground for reflection and discussion by members of the Mediation Committee because there is the potential for a fundamental misunderstandings as to what 'confidentiality' in mediation means when it comes to what might be

offered as evidence in a legal or arbitral proceedings after a failed mediation. Parties cannot determine by mere private contract what the courts will be entitled to accept as evidence. The circumstances in which a mediator or a party could be compelled to provide evidence as to what happened in a mediation, and the distinctions which might be made between what is offered in evidence for the truth of what is asserted compared with what may be offered for some other purpose, are not generally understood and agreed.

The UNCITRAL provisions as to admissibility are a reasonable compromise between competing views but the Mediation Committee should look carefully at the issues raised in the report under this heading – most current mediation is probably not international nor 'commercial', nor undertaken by lawyers, the differences in points of view are considerable, and lawyers should be careful to understand the origins and practices of the culture of mediation as an alternative to litigation.

The difficulties inherent in adopting the MLICC are well illustrated by the proposal made by the EC Commission in 2004 and the amendments made by the European Parliament in March 2007, which are discussed and footnoted in the report. By the time of the IBA Annual Conference in Buenos Aires in 2008 there will hopefully be some evolution on this front.

Report of the Mediation Subcommittee on the UNCITRAL Model Law on International Commercial Conciliation (MLICC)

Singapore, October 2007

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Introduction

1. An ad hoc Subcommittee was created at the IBA meeting in Chicago in 2006 for the purpose of working on a short and 'ready to use' guideline on the adoption of the MLICC. In this purpose, the UNCITRAL MLICC Subcommittee developed a questionnaire on three key aspects of the MLICC – statute of limitations, confidentiality, admissibility and privilege, and enforcement of settlements – which was circulated in July and August 2007 and published in the Newsletter (Vol 3 No 1) (*also available at www.ibanet.org/legalpractice/Mediation_and_Conciliation.cfm*). See p56.
2. Responses were received from national reporters in 17 countries, namely Argentina, Belgium, Canada, Finland, France, Germany (4 responses), Indonesia, Israel, Italy, Netherlands, Poland, Romania, Spain, Sweden, Switzerland, the United States and the United Kingdom (2 responses).
3. A user friendly spreadsheet of all answers to the questionnaire received is available on the IBA Mediation Committee website (www.ibanet.org/legalpractice/Mediation_and_Conciliation.cfm). A thorough look at the answers of a specific country may provide some interesting and useful solutions to problems. It is however not the intention of the Subcommittee to compare and contrast the answers to the Questionnaire, since, as pointed out below,

the vast majority of countries have not implemented the MLICC. Rather the objective is (a) to facilitate an understanding and exchange of views as to what the UNCITRAL provisions in question are trying to accomplish and why, and (b) to produce a short but useful guide as to certain of the most important aspects of the UNCITRAL proposal.

4. The UNCITRAL web site http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html (last visited October 4, 2007) claims that there have been enactments of the MLICC in a total of *five* countries so far, namely: Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005), and in the United States, via the Uniform Mediation Act ('UMA'), in six states. This indicates a slow acceptance. Furthermore, in the case of Canada, it is an exaggeration since it refers in fact only to enactment by at least one of the 10 provinces of those elements of the MLICC which were adopted by the Uniform Law Conference of Canada.
5. The fact that the MLICC is presently not widely enacted in whole or in part provides considerable room for discussion, commentary and interpretation. For example, The EC Commission proposal adopted some of the MLICC, for example Article 10, and the European Parliament has already made significant amendments.¹

Scope

6. The questionnaire was directed to international commercial conciliation or mediation – as that term is defined in the MLICC² – which means that the parties have their places of business in different countries at the point in time when they agree to conciliate, or, the jurisdiction in which the parties have their place of business is different from either (i) the country in which a substantial part of the obligations of the commercial relationship is to be performed; or (ii) the country with which the subject matter of the dispute is most closely connected.
7. This may exclude vast areas of well established mediation practice and experience such as family mediation, workplace mediation, or any purely domestic commercial dispute – however, as a practical matter, mediation procedures, techniques and experience often turn out to be transferable across the board. The deliberations on the MLICC suggest that many delegates thought that it should apply to all commercial conciliations and not only to the international arena but UNCITRAL accepted that it would enhance adoption if domestic conciliation was left out³.
8. The MLICC is a floor of lowest common denominator protection, not a ceiling, so that it might be expected that some countries would add to the protection of mediation as a special regime.
9. Indeed, UNCITRAL’s own deliberations on the MLICC excluded final provisions on the statute of limitations (Article 4, footnote 3) due to extensive controversy as summarized in the extremely long paragraph 48 of the Guide to Enactment and Use 2002 (‘Guide’), and, the provision on enforceability (Article 14.) provides only that an eventual settlement agreement ‘is binding and enforceable’ which paragraph 88 of the Guide laconically observes ‘... reflects the smallest common denominator between the various legal systems’.
10. As a practical matter, the UNCITRAL initiative on conciliation faces more competition from other agencies or legislatures than in the 1970s & 1980s, when the UNCITRAL Model Law on International Commercial Arbitration [1985] and related Arbitration Rules [1976] were adopted. Today, UNCITRAL must compete with multiple initiatives throughout the world, for example: a growing number of service providers with their own rules and regulations; existing national legislation; the Uniform Mediation Act in the United States and the Uniform [International] Commercial Mediation Act in Canada, which are influenced by the MLICC

but have not adopted all of its provisions and will face state by state or province by province variations; the European Commission and the European Parliament, which are also similarly influenced by the MLICC but do not propose its enactment as such; and, generally in federal systems, the tendency of states, provinces, cantons and the like to adopt their own legislation on mediation.

11. Thus, the chances for a uniform template for mediation across the ‘globalised’ world of commerce are limited with the result that private international law and conflicts of law analysis will remain important points of reference for the lawyers and parties involved in international commercial mediations. One size will not fit all.

Key issues analysed

Statute of limitations (Article 4 footnote 3 MLICC)

12. The MLICC footnote 3 to Article 4⁴ is a welcome suggestion for suspension or tolling of the statute of limitations when mediation commences and resumption of the running of the statute after mediation ends without a settlement. Just as a matter of policy it is desirable to avoid burdening the mediation process with uncertainty about the parties risking the loss of effective access to the courts or arbitration, and, to avoid giving encouragement to delaying tactics in mediation and the like – but as the UNCITRAL staff have clearly shown its implementation is likely to be controversial due to different concepts of the statute of limitations in various countries. The EC Commission proposal follows the MLICC footnote and the Commission Staff Working Paper annexed to the proposal comments very favorably on the statute of limitations provision in Article 7 of the Commission proposal.⁵
13. It is not useful here to compare and contrast all the differences as to the application of the statute of limitations on a country by country basis since it is likely that in most mediations lasting days rather than months, the issue will not be of concern. The more so if proceedings have already been timely commenced. However, some key points as to the limitations issue in international mediation *must* be understood by lawyers, clients and mediators contemplating mediation if it is desired to avoid any surprises.
14. An international conciliation will require a determination, or an agreement if permitted, as to which statute of limitations is to be controlling because it may be a matter of procedure or substance⁶ depending on the jurisdiction where an

eventual arbitration or suit might be commenced in the event that a mediation fails.

15. The law of the forum may not be the local domestic law which is applied to purely national disputes because a conflict of laws analysis in an international dispute could cause the forum to apply the law of another jurisdiction. For instance, there will invariably be these conflicts of law analysis if the statute of limitations is considered to be a matter of substance rather than procedure. In other words, some jurisdictions will just look only to the domestic *lex fori* but others will 'borrow' from another jurisdiction the statute of limitations deemed most relevant to the dispute. In countries with federal and regional or state law systems there may be multiple levels of inquiry.⁷
16. Thus, the applicable statute of limitation may well depend on the law applicable to the dispute according to International Private Law rules.
17. When in doubt about the status of the statute of limitations, reliance on the concept of 'party autonomy' should be investigated thoroughly. A written agreement may take care of any concern about the running of the statute because the parties can agree not to assert the expiration of the statute in any reference to arbitration or litigation commenced within an agreed period after an unsuccessful conciliation. Countries with strong public policy law or jurisprudence may not uphold such 'party autonomy' in every case but an agreement between the parties is nevertheless desirable to try to avoid doubt by recording the intention and understanding of the parties at the time they commenced mediation.
18. One should bear in mind that in some countries some time limits cannot be suspended and/or extended freely by the parties as they provide for so called 'statute of expiration', whereby the right expires if not formally exercised at court within a certain period of time.
19. Last but not least, to the extent that conciliation or mediation takes place *after* commencement of an arbitration or litigation, the issue of the expiration of the statute of limitations is effectively removed except for those instances where an *amended claim or counterclaim* is asserted later in the proceedings and arguably does not 'relate back' to the date of the relevant original pleading. This may suggest that, unless there is a specific clause providing for a suspension of the limitations period, it will be difficult to avoid the bias of forcing people to the courts, when they should be given every encouragement to settle privately.

20. In this context, court mandated mediation or voluntary mediation after commencement of suit might be a safer but certainly not the exclusive choice for lawyers and parties.

Confidentiality, admissibility and privilege (Articles 8, 9 and 10 MLICC)

21. MLICC Articles 8⁸ and 9,⁹ which deal with mediation confidentiality in general, outside of the admissibility or not of mediation communications in subsequent legal proceedings, are probably not very controversial because most people assume that confidentiality and discretion is the cornerstone of mediation. However they are not necessarily generally accepted as default provisions because some authorities hold that the parties should determine the confidentiality or not of mediation as between themselves and the mediator, and between themselves and their relatives, friends and business associates. Under this approach, default provisions are necessary only to preserve confidentiality in subsequent legal proceedings (MLICC Article 10) since, as a matter of public policy, private parties cannot agree to keep evidence from the courts and specific statutory authority is necessary. Notably, the EC Commission proposal left out the equivalent of these Articles 8 and 9 on confidentiality because they were deemed best left to the Members States and/or the parties as being inextricably linked with mediation procedures and mediation quality. The UMA is similarly drafted to provide for the parties or local law to determine the level of confidentiality outside of subsequent proceedings for which a special 'privilege' is created.
22. Article 8 is effectively an 'internal to the mediation' rule which is made for a practical solution: if you tell the mediator something make it clear if you don't want the other side to be told, bearing in mind that the context of the mediation negotiations is that, after all, mediation is supposed to be about communicating as fully as possible and not holding back.
23. Article 9 provides for overall confidentiality except as otherwise agreed by the parties or as the law may require disclosure or for purposes of implementation or enforcement of a settlement. The instances in which Article 9 confidentiality may be overcome by local law will likely include such considerations as the protection of minors or the prevention of crime. An example is the EC Parliament's amendment to the Commission proposal [now new Article 6a] which, after lumping confidentiality and admissibility together, permits in certain circumstances, disclosure and introduction

into evidence of 'information arising out of or in connection with a mediation'.¹⁰

24. Article 10¹¹ is a lengthy statement, as to non-admissibility, in later court or arbitral proceedings, of what went on in the mediation, again with exception of what may be required by law or to implement or enforce a settlement agreement. It is difficult to imagine a party refusing to implement a settlement agreement and then relying on confidentiality to prevent a court or arbitrator or even subsequent mediator from understanding what the settlement agreement was intended to achieve.
25. The extension of the Article 10 protection to 'third persons' should not be read to include 'any' third person because it is fundamental that parties who contract with each other cannot bind an independent third party. The Guide offers the example of witnesses or experts.¹²
26. As such Article 10 is sound but will not satisfy those who want to create a 'privilege' for mediation (see below).
27. The EC proposal follows the MLICC Article 10 (proposal Article 6) [but the European Parliament has amended this proposal], whereas the Uniform Mediation Act ('UMA') in the United States creates a mediation privilege (UMA Section 4) akin to an attorney client privilege and expressly mentions that nothing in MLICC Article 10 derogates from the privilege sections of the UMA (UMA Section 11). Whether the subsequent legal proceedings take place in a common law or civil law country, and whether the parties had legal counsel in the mediation, may affect the admissibility of mediation communications and documents in those proceedings but the particular details of such instances are better dealt with, for present purposes, in specialist legal articles.¹³ Ultimately there may be differences between jurisdictions as to admissibility of evidence which is invariably involves a balancing between probative value and potential for unreasonable prejudice.
28. The answers to the questionnaire seem to suggest that some civil law jurisdictions regard an agreement on mediation confidentiality as a blanket covering any subsequent reference to communications and/or documents which figured in the mediation. This makes for potential problems for two reasons. First a subsequent judge, arbitrator or mediator may need to know what went on in the mediation in order to understand and to try to give effect to what may have been agreed – the MLICC Articles 9 and 10 take care of this by allowing, for this purpose, disclosure of confidential information & documents and their

admissibility in a subsequent proceeding. Secondly, there is a strong public policy argument that a party, who refuses an offer to settle and after pursuing litigation or arbitration obtains less than, or no more than, what was offered at the outset, should be penalized on costs and fees incurred by the party who made the offer (counsel might wisely make separate mention of this in any mediation agreement).

29. Notwithstanding the efforts of UNCITRAL or the EC Commission or the various uniform law conferences, the common law concept of a 'without prejudice' negotiation or discussion or offer still has substantial merit, and jurisprudence in both common law and civil law countries often seems to unite in excluding admission of such 'settlement negotiation' evidence in subsequent proceedings.

Enforcement of settlement agreements (Article 14 MLICC)

30. Article 14¹⁴ provides for binding and enforceable settlement agreements but leaves open the method of enforcement. The starting point is invariably an agreement which should be in writing in order to serve as a proof and, notably, as enforceable debt recognition.
31. The EC Commission proposed that incorporation in a judgment be available in the EC at the request of the parties (Proposal Article 5) but the Parliament has amended the provision in a manner which seems to make it less clear what form of enforcement will be available¹⁵
32. It is not always the case that parties who settle litigation or pay arbitral awards want to have a judgment – and mediation settlements should be no different because at least some parties will want to keep the confidentiality and privacy at a maximum and do what they agreed to do without the need for court sanctions.
33. Availability of a judgment (homologation decision), an arbitral award or a notarial deed (similarly security devices such as letters of credit, bonds or guarantees) is useful and fair ground for negotiation between the parties as to the form and content of any settlement agreement, and it should be available if the parties want it in mediation settlements.
34. In international mediation such reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.
35. In national and international commercial conciliation, the enforceability of a settlement

agreement is generally of the utmost important and is often further guaranteed by performance damages and other contractual guarantees (e.g. delivery of an immediately callable bank guarantee).

Conclusion

36. The Subcommittee has taken account of the answers to the questionnaire and the actual progress to date in implementing the MLICC and will seek to determine the consensus of the Mediation Committee as to adoption or not of the MLICC. There are some tensions to be examined: lawyers do not necessarily want to promote mediation when there is no accepted standard for mediator competence¹⁶; mediators who come from many different backgrounds are wary of standard setting in mediation especially only by or for lawyers; service providers are protective of their own rules and procedures as well as rosters of mediators.

Notes

- 1 Proposal for a Directive Of The European Parliament And Of The Council on certain aspects of mediation in civil and commercial matters, Brussels 22.10.2004, COM(2004) 718 final, OJ C49, 28.2.2004; European Parliament, first reading with amendments, 29.3.2007 (<http://europa.eu/bulletin/en/200703/p120006.htm> <http://europa.eu/bulletin/en/200703/p120006.htm>) (last visited October 3, 2007)
 - 2 Article 1 (3) MLICC indicates: ‘conciliation means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (‘the conciliator’) to assist them in their attempts to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute’)
 - 3 See Guide at p. 22, paragraph 34
 - 4 The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period :[Guide at p. 29 paragraph 42]
- Article X. Suspension of limitation period
- 1. When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
 - 2. Where the conciliation proceedings have terminated without a settlement the limitation period resumes running from the time the conciliation ended without a settlement agreement.
 - 5 This should also avoid that the parties launch judicial proceedings at the same time for no other reason than to stop the limitation period from running, which may be counterproductive for an amicable resolution of the dispute itself or represent a potential waste of resources of the competent court, which may never be called upon to decide the case
 - 6 One of the UK reporters mentions the following specific legislation: Foreign Limitations Periods Act 1984. An Act to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure
 - 7 See for example the following extract [edited with comments] from a recent decision by Judge Miriam Cedarbaum in the Southern District of New York (Chrobak v. Hilton Group et al.. 06 Civ. 1916, August 15, 2007) Because subject matter jurisdiction over this suit is based on diversity of citizenship, New York state law determines the applicable statute of limitations [a federal court sitting in the state of New York in a

- case between citizens of different states or between an alien and a citizen of a state, looks to that forum state’s law on limitations rather than relying on any relevant federal law but then it is necessary to determine what law the forum state, New York, will apply in the circumstances]—An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either New York or the place without New York where the cause of action accrued, except where the cause of action accrued in favor of a resident of New York the time limited by the laws of New York shall apply [under the law of the forum, if the cause of action arose outside of New York, a ‘foreign’ limitations period might apply if shorter]—Plaintiff is not a resident of New York—Thus her claims are time barred if they are untimely under the shorter of either New York’s limitation period or the limitation period of the Dominican Republic—Because neither party provides the statute of limitations of the Dominican Republic, nor asserts that the law of the Dominican Republic should apply, New York’s statute of limitations applies [if the court cannot determine the foreign law, or none of the parties rely on it, then the purely domestic law of the forum will apply]
- 8 Article 8. Disclosure of Information
When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any party. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation
- 9 Article 9. Confidentiality
Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for he purposes of implementation or enforcement of a settlement agreement.
- 10 ...[new Article 6a]... for overriding considerations of public policy or other substantial reasons, in particular where necessary in order to ensure the protection of the best interests of children or to prevent harm to the physical or mental integrity of a person
- 11 Article 10. Admissibility of evidence in other proceedings
 - 1. A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:
 - (a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
 - (b) Views expressed or suggestions made by a party to the conciliation in respect of possible settlement of the dispute;
 - (c) Statements or admissions made by a party in the course of the conciliation proceedings;
 - (d) Proposals made by the conciliator;
 - (e) The fact that a party to a conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator;
 - (f) A document prepared solely for the purposes of the conciliation proceedings.
 - 2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.
 - 3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.
 - 4. The provisions of paragraphs 1,2, and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings.
 - 5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or court proceedings does not become inadmissible as a consequence of having been used in a conciliation.
- 12 Guide at p. 44, paragraph 64
- 13 The UMA’s insistence on a mediation privilege (UMA Article 4) and its exceptions (UMA Articles 5 and 6) reflects perceived differences

between common law and civil law approaches to confidentiality in subsequent legal proceedings which may or may not be of any practical significance. Technically there are differences between attorney client type 'privilege' in the common law and civil law professional secrecy which are beyond the scope of the present report. See generally (2007) 73 Arbitration 2 (May 2007) [published by the Chartered Institute of Arbitrators], Attorney Secrecy v Attorney Client Privilege in International Commercial Arbitration, Bernhard F. Meyer-Hauser and Philipp Sieber. The argument of Meyer-Hauser and Sieber is that in Switzerland, attorney secrecy is considered to be part of the procedural law and imposes a personal secrecy obligation on the attorney who must claim it during judicial proceedings unless the client waives it — the client may not invoke attorney secrecy to prevent his or her testimony or production of documents (but under Swiss federal and cantonal civil procedure, complainant and respondent, as opposed to third parties, may not be ordered to actively support the proceedings in any way although failure to do so may jeopardize their case) [emphasis added]

14 Article 14. Enforceability of settlement agreement

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable... [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].

Footnote 4 : When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory

15 European Parliament first reading as amended 29 March 2007:

Article 5 Paragraph 1. Member States shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of a written agreement resulting from a mediation be made enforceable to the extent that enforceability of the content of the agreement is possible under and not contrary to the law of the Member State where the request is made.

Paragraph 1a. The content of the agreement may be made enforceable in a judgment or a decision or by an authentic act by a court or other competent authority in accordance with the law of the Member State where the request is made.

Paragraph 2. Member States shall inform the Commission of the courts or other authorities that are competent to receive a request in accordance with paragraphs 1 and 1a .

Paragraph 2a. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of agreements resulting from mediation which have been made enforceable in accordance with paragraph 1.

16 The UMA has failed to be adopted so far in the State of New York in large measure because lawyers groups have argued that there were no generally accepted standards for mediators so why should there be a law on mediation.

Questionnaire

1. Statute of limitations

(MLICC Article 4, footnote 3)

The MLICC includes a footnote 3 to Article 4 containing text 'suggested' for states that might wish to adopt a provision on the suspension of the statute of limitations (typically from the commencement of conciliation proceedings until they end without a settlement agreement).

The Guide to Enactment and Use of the UNCITRAL Model Law 2002 ('Guide'), paragraph 48 at p 31, has a lengthy commentary on the pre-enactment debate for and against a provision in the MLICC on the suspension of the statute of limitations.

The premise of these questions is that, first and foremost, parties and mediators should be aware of, and understand, the impact that the statute of limitations might have in a particular case. Also, it is vitally important, where possible, not to burden conciliation with concerns about procedural consequences or loss of rights but rather to make the parties fully comfortable and confident in undertaking mediation.

The questions assume that an international conciliation or mediation is to take place in your country between a party resident in your country and a party resident in another country and the issue of the applicable statute of limitations has not been otherwise resolved, for example, by a permissible agreement between the parties or by the commencement of a timely action which has led to voluntary or court mandated mediation in an attempt to settle a pending lawsuit.

(a) *In international commercial conciliation or mediation in your country how easy or difficult is it to determine the applicable statute of limitations?*

Notes:

- (1) Include if relevant the impact of choice of law provisions on the statute of limitations which is applicable:
 - as to a cause of action arising in your country?
 - as to a cause of action arising in another country?
- (2) If relevant in determining which statute of limitations to apply to an international mediation in your country, what distinctions will be made between the procedural law and rules of the forum on the one hand and the substantive law applicable to a cause of action on the other (such as, eg an underlying agreement as to governing law or as to conditions for notifying and resolving disputes)?

(b) *What should the mediator and the parties be aware of as regards relevant law and rules as to permitted shortening, tolling (suspending), or extending the applicable statute of limitations in general, or, if relevant, with particular reference to international commercial conciliation (including any special requirements or formalities as to dates of commencement and ending and/or positive or negative results of the process)?*

Notes:

- (1) The Guide, at paragraph 48 on p 31, summarises an evidently intense debate which reflects widely differing national regimes including, for example, whether the impact of any special rules for conciliation on existing procedural rules is or would be overly technical, whether extensions (or waivers?) are possible at all, whether interruptions or suspensions set the clock back to zero at the end of an unsuccessful conciliation and started the running all over again, whether anything more was needed than the right to start an action in court or in arbitration as provided in MLICC Article 13, whether dates of commencement and ending of permitted interruptions or suspensions could be readily determined without formalities such as a specific writing

(c) *If relevant, irrespective of the law and rules as to the statute of limitations as such, is there a way of eliminating any statute of limitations issue by simple waiver, for example, can the parties make a written promise not to plead the statute of limitations?*

Notes

- (1) In New York there is such a statute as to a written promise but only in respect of a pre-existing, contractual claim (General Obligations Law, §17-103, Agreements Waiving the Statute of Limitations).

(d) *Does your country make a distinction between a statute of limitations as such and a condition precedent attaching to a right, which provides a shorter time, without reference to the statute of limitations, in which to commence an action?*

Notes:

- (1) Some causes of action are created with a built-in deadline for having or exercising the right at all. For example, government agencies in limited waivers of sovereign immunity may grant a right of action only if a proceeding is commenced or some formal notice given within (say) one year of an event with the result that conciliation before commencement of an action may be difficult.

2. Confidentiality, admissibility and privilege

(MLICC Articles 8–10)

The MLICC provides for confidentiality between one or other of the parties and mediator as to what is disclosed to the mediator *ex parte* during the conciliation [Article 8], for confidentiality *vis-à-vis* third parties as to all information relating to the conciliation proceedings [Article 9], for the non-admissibility of evidence or testimony as to enumerated categories of information (invitations, facts, views, statements, admissions, proposals, and documents) from a conciliation and which are not independently admissible without reference to the conciliation [Article 10].

However such protections are qualified if disclosure is required 'under the law' or for the purposes of implementation or enforcement of a settlement agreement

The questions are designed to determine if there is sufficient assurance in your country that confidential subject matter related to an international conciliation or mediation will be protected and that what was said or disclosed in a mediation will not be evidence in any subsequent proceeding. In the alternative, it may be that a special law or regime will be necessary in your country to achieve the purposes of the MLICC.

In particular, the questions are designed to highlight any perceived differences between common law and civil law jurisdictions in the matter of confidentiality and admissibility, both as to terminology and substance, in the expectation that, by clear articulation and analysis, a fair amount of misunderstanding may be revealed and corrected.

- (a) *Are there statutory or common law provisions of general application as to confidentiality with respect to an international commercial conciliation which are sufficient to safeguard the desired degree of legal protection against unwanted disclosure expressed in MLICC Article 9, or is it necessary to refer to, or to await, some special legislation or rules of procedure?*
- (b) *Are there nevertheless statutory requirements or rules of court which would oblige a party or mediator or witness to disclose confidential information in certain situations with the result that MLICC Article 9 offers only a relative protection?*
- (c) *Does your country follow the rule in MLICC Article 8 as to the need for a party to specify that information being given ex parte to a mediator is confidential?*
- (d) *Is the very fact that a mediation has commenced or ended, with or without a resolution, confidential per se or is an agreement necessary between parties, mediator, and/or a service provider such as ICC or AAA?*
- (e) *To what extent may the parties agree upon consequences in the event of a breach of confidentiality, for example, liquidated damages, contractual penalties, or contempt proceedings, or, for example, in anticipation of a disclosure, provide for an expedited injunction proceeding, the right to intervene in an action or other requirements such as the posting of a bond?*

Notes:

- (1) Balancing the need for the truth against the prejudice that might be suffered by a particular disclosure is a constant source of tension in resolving disputes. We need to understand how the practice in your country deals with this tension.
- (2) For example, are there laws or rules in the nature of public policy or 'ordre public' which can require disclosure of confidential information to a court or government authority, or are there rules of procedure in litigation, such as discovery, that may require, without resolving issues as to later admissibility, disclosure of confidential information subject only to a protective order or, as may be necessary, subject to various hierarchies of restricted access to confidential subject matter, such as to the judge only, to a specified level of a party's management, for 'attorneys' eyes only', or for 'outside experts' eyes only'?
- (3) May claims as to confidentiality be avoided by showing, for example, a waiver, or a pre-existing or prospective public availability without a breach of any relevant agreement?
- (4) Would the identity of a prospective witness be something that could be kept confidential if learned of in an international mediation in your country and/or could such a witness be made to testify in a subsequent proceeding (for example, there is a saying common in Anglo-American practice that 'nobody owns a witness')?

- (f) *Are there laws or rules of general application, sufficient to satisfy MLICC Article 10, as to the admissibility or use in a court or in an arbitration of information obtained in a conciliation, including any specific 'privileged' communications in the nature of or conceptually similar to attorney-client privilege, or is a special law or regime necessary?*
- (g) *In view of the answer to (f) above, what can a party, mediator, witness or other relevant third party testify to or introduce in a later proceeding, whether the conciliation was successful or unsuccessful?*
- (h) *Is there any rule that arguments as to admissibility and/or privilege are waived if a document or communication is relied on in litigation and does it make any difference if such a reliance was made in the context of a prior conciliation solely to facilitate a possible settlement?*
- (i) *To what extent does the answer to (e) above as to a penalty or injunction for a breach in respect of confidential information protected by MLICC Article 8 apply to use or admission of the categories of information protected by MLICC Article 10 in a court proceeding or an arbitration?*

Notes:

- (1) In Anglo-American law the attorney-client privilege is essentially absolute but narrowly construed as being limited to communications and documents made strictly in the course of a client seeking legal advice from an attorney. It doesn't matter that the truth would be helpful to a court or litigant, a 'privileged' communication is privileged absolutely (unless vitiated by some inherent illegality) and may be waived only by the client. It may be deemed waived in litigation, if it is necessary to be fair to an adversary, when a party relies on an opinion of counsel to protect itself from claims which cannot be properly evaluated without examining the opinion – for example in claims for enhanced damages due to wilful conduct where an attorney has opined that an adversary's right is not infringed or not valid.
 - (2) US courts routinely distinguish in international litigations between civil law professional secrecy obligations and attorney-client privilege, which may or may not be a useful distinction. As a practical matter, discovery is available in respect of civil law professional secrecy documents but not in respect of attorney-client privileged documents on the theory that a civil law court can in certain circumstance override the professional secrecy obligation with the result that it is not an absolute 'privilege'.
- (j) *To the extent not otherwise addressed above, if a settlement agreement is made following an international conciliation, can a court or arbitrator or subsequent mediator hear witnesses or receive documents which are otherwise subject to a restriction arising out of the prior conciliation as being non-admissible and/or confidential, and in particular in order to (i) understand what the parties intended, (ii) implement the agreement, or (iii) enforce the agreement*
 - (k) *How would an 'offer of settlement' be treated in the context of an unsuccessful conciliation when a party obtains less in a litigation or arbitration than it was offered by its adversary during the conciliation?*

3. Enforcement of settlement agreement

(MLICC Article 14)

The MLICC Article 14 provides that an eventual settlement agreement is binding and enforceable – leaving it to enacting states to set out a description of any particular method or governing provisions of law.

There is room for discussion as to whether the attractiveness of conciliation would be increased if an eventual settlement would enjoy a regime of expedited enforcement or would, for the purpose of enforcement, be treated as or similar to an arbitral award (Guide, paragraph 87 at p 55)

- (a) How are settlement agreements generally arrived at and enforced following an international conciliation in your country – such as by ordinary contract or agreement and/or by some exceptional regime including specialised courts and procedures?*
- (b) In addition, are there special agreements, procedures or tactics which can enhance recognition and enforcement – such as by bonds, letters or credit or security agreements, deeds, summary proceedings, incorporation in a judgment or as an arbitral award made with the consent of the parties, or is there some other sui generis system of expedited enforcement?*
- (c) Are there any defences ordinarily or exceptionally available against enforcement of post-conciliation settlement agreements?*
- (d) What law or rules apply as to such items as costs, interest and attorney fees in the enforcement of a settlement agreement?*

Response sheet for questionnaire for MLICC project

This response sheet can be found online at
<http://www.ibanet.org/images/downloads/lpd/answersheet.doc>

1. Statute of limitations

(a) In international commercial conciliation or mediation in your country how easy or difficult is it to determine the applicable statute of limitations?

(b) What should the mediator and the parties be aware of as regards relevant law and rules as to permitted shortening, tolling (suspending), or extending the applicable statute of limitations in general, or, if relevant, with particular reference to international commercial conciliation (including any special requirements or formalities as to dates of commencement and ending and/or positive or negative results of the process)?

(c) If relevant, irrespective of the law and rules as to the statute of limitations as such, is there a way of eliminating any statute of limitations issue by simple waiver, for example, can the parties make a written promise not to plead the statute of limitations?

(d) Does your country make a distinction between a statute of limitations as such and a condition precedent attaching to a right, which provides a shorter time, without reference to the statute of limitations, in which to commence an action?

2. Confidentiality, admissibility and privilege

(a) Are there statutory or common law provisions of general application as to confidentiality with respect to an international commercial conciliation which are sufficient to safeguard the desired degree of legal protection against unwanted disclosure expressed in MLICC Article 9, or is it necessary to refer to, or to await, some special legislation or rules of procedure?

(b) Are there nevertheless statutory requirements or rules of court which would oblige a party or mediator or witness to disclose confidential information in certain situations with the result that MLICC Article 9 offers only a relative protection?

(c) Does your country follow the rule in MLICC Article 8 as to the need for a party to specify that information being given *ex parte* to a mediator is confidential?

(d) Is the very fact that a mediation has commenced or ended, with or without a resolution, confidential *per se* or is an agreement necessary between parties, mediator, and/or a service provider such as ICC or AAA?

(e) To what extent may the parties agree upon consequences in the event of a breach of confidentiality, for example, liquidated damages, contractual penalties, or contempt proceedings, or, for example, in anticipation of a disclosure, provide for an expedited injunction proceeding, the right to intervene in an action or other requirements such as the posting of a bond?

(f) Are there laws or rules of general application, sufficient to satisfy MLICC Article 10, as to the admissibility or use in a court or in an arbitration of information obtained in a conciliation, including any specific 'privileged' communications in the nature of or conceptually similar to attorney-client privilege, or is a special law or regime necessary?

(g) In view of the answer to (f) above, what can a party, mediator, witness or other relevant third party testify to or introduce in a later proceeding, whether the conciliation was successful or unsuccessful?

(h) Is there any rule that arguments as to admissibility and/or privilege are waived if a document or communication is relied on in litigation and does it make any difference if such a reliance was made in the context of a prior conciliation solely to facilitate a possible settlement?

(i) To what extent does the answer to (e) above as to a penalty or injunction for a breach in respect of confidential information protected by MLICC Article 8 apply to use or admission of the categories of information protected by MLICC Article 10 in a court proceeding or an arbitration?

(j) To the extent not otherwise addressed above, if a settlement agreement is made following an international conciliation, can a court or arbitrator or subsequent mediator hear witnesses or receive documents which are otherwise subject to a restriction arising out of the prior conciliation as being non-admissible and/or confidential, and in particular in order to (i) understand what the parties intended, (ii) implement the agreement, or (iii) enforce the agreement

(k) How would an 'offer of settlement' be treated in the context of an unsuccessful conciliation when a party obtains less in a litigation or arbitration than it was offered by its adversary during the conciliation?

3. Enforcement of settlement agreement

(a) How are settlement agreements generally arrived at and enforced following an international conciliation in your country – such as by ordinary contract or agreement and/or by some exceptional regime including specialised courts and procedures?

(b) In addition, are there special agreements, procedures or tactics which can enhance recognition and enforcement – such as by bonds, letters or credit or security agreements, deeds, summary proceedings, incorporation in a judgment or as an arbitral award made with the consent of the parties, or is there some other *sui generis* system of expedited enforcement?

(c) Are there any defences ordinarily or exceptionally available against enforcement of post-conciliation settlement agreements?

(d) What law or rules apply as to such items as costs, interest and attorney fees in the enforcement of a settlement agreement?

Sent by:

Name & Title: _____

Law Firm/Company/Affiliation: _____

Mailing Address and Postal Code: _____

Country: _____

Telephone: _____

E-mail: _____



IBA Conferences 2008

1 February 2008 **New York City, USA**

11th IBA International Arbitration Day: New York Convention – 50 Years

A conference presented by the United Nations and the IBA Arbitration Committee and supported by the IBA North American Regional Forum

17-19 February 2008 **Frankfurt am Main, Germany**

7th Annual International Corporate Counsel Conference

A conference presented by the IBA Corporate Counsel Forum and supported by the IBA European Forum

27-29 February 2008 **Mexico City, Mexico**

First Conference of the Americas

A conference co-presented by the IBA Latin American Regional Forum, the IBA North American Regional Forum and the IBA Bar Issues Commission

27 February 2008

Bar Leaders' Day

Presented by the IBA Bar Issues Commission

3-4 March 2008 **London, England**

13th IWTP Conference 'Latest planning techniques for international private clients: trust, tax, insurance, succession and other issues'

A conference presented by the IBA Individual Tax and Private Client Committee and supported by the Real Property Probate and Trust Section of the American Bar Association and the IBA European Regional Forum

9-11 March 2008 **London, England**

9th Annual Private Investment Funds Conference

A conference presented by the IBA Private Investment Funds Subcommittee of the Financial Services Section, the Subcommittee on Private Investment Entities of the Committee on Federal Regulation of Securities of the American Bar Association of Business Law and supported by the IBA European Regional Forum

7-8 April 2008 **Sydney, Australia**

The Global Impact of Private Equity

A conference co-presented by the Legal Practice Division of the International Bar Association and the Business Law Section of the Law Council of Australia and supported by the IBA Asia Pacific Regional Forum

10-11 April 2008 **London, England**

Globalisation – Ramifications for Employment and Discrimination Law

A conference co-presented by the IBA Employment and Industrial Relations Law Committee and the Discrimination and Gender Equality Committee and supported by the IBA European Regional Forum

11 April 2008 **Barcelona, Spain**

Corporate Social Responsibility and the Business Lawyer

A conference presented by the IBA Corporate Social Responsibility Committee and supported by the IBA European Regional Forum

17 April 2008 **Tokyo, Japan**

International Competition Conference

A conference presented by the IBA Antitrust Committee in collaboration with the Global Competition Law Forum and supported by the IBA Asia Pacific Regional Forum

23-25 April 2008 **Paris, France**

6th Annual Anti-Corruption Conference – The Awakening Giant of Anti-Corruption Enforcement

Presented by the IBA Public and Professional Interest Division and supported by the IBA European Regional Forum

28-30 April 2008 **Copenhagen, Denmark**

Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law

A conference presented by the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law and supported by the IBA European Regional Forum

12-13 May 2008 **Amsterdam, Netherlands**

Technology and Sourcing in the Financial Services Sector: New Challenges and Solutions

A conference presented by the IBA Technology Law Committee and supported by the IBA European Regional Forum

18-20 May 2008 **Stockholm, Sweden**

14th Annual Global Insolvency and Restructuring Conference

The conference is being presented by the IBA Section on Insolvency, Restructuring and Creditors Rights (SIRC) and supported by the IBA European Regional Forum

19-20 May 2008 **Munich, Germany**

19th Annual Communications and Competition Law Conference

A conference presented by the IBA Communications Law Committee and the Antitrust Committee and supported by the IBA European Regional Forum

28-30 May 2008 **Stockholm, Sweden**

25th International Financial Law Conference

A conference co-presented by the IBA Banking Law Committee and Securities Law Committee and supported by the IBA European Regional Forum



IBA Annual Conferences

12-17 October 2008 **Buenos Aires, Argentina**

IBA Annual Conference 2008

(further details to follow)

4-9 October 2009 **Madrid, Spain**

IBA Annual Conference 2009

(further details to follow)

3-8 October 2010 **Vancouver, Canada**

IBA Annual Conference 2010

(further details to follow)

Further information

The IBA website – www.ibanet.org – lists details of all forthcoming IBA conferences, including programme and registration information.

To receive a printed programme by mail, please contact:

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