

Mediation on the Heels of Arbitration - Competition or Peaceful Coexistence?

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Arbitration has long been the favorite of the ADR family. Mediation, however, has established an increasingly relevant position for itself when it comes to resolving (international) commercial disputes quickly, cost-efficiently, and successfully. Efforts to render mediated settlement agreements enforceable persist and will likely further bolster mediation as an independent and, possibly, even superior alternative to arbitration. Yet, as a closer analysis suggests, mediation, just as arbitration, has its place and purpose.

Commercial mediation offers many advantages, such as, in particular, a broad scope of application, flexibility of procedure, compatibility with other dispute resolution methods, time and cost-efficiency, and confidentiality. For all these benefits, many commercial agreements even require efforts to mediate before arbitration may be commenced.

The statistics are also straightforward. According to the International Chamber of Commerce ('ICC'), over three quarters of its mediation cases are settled successfully – on average in only 4 months and for about just 1 % of the amount in dispute. A simple analysis of costs, risks, and benefits easily explains why mediation was chosen for amounts in dispute ranging from below US\$ 20,000 to well above US\$ 500 million.

The international trend towards mediation has been duly recognized:

- Adapting to an increased demand for mediation, several institutions have added mediation to their portfolio of services. The revised ICC Mediation Rules entered into force in January 2014; and the new Mediation Rules of the Vienna International Arbitration Center ('VIAC') in January 2016.
- Moreover, mediation is not limited to commercial disputes, but has also conquered the territory of investor-state disputes. For instance, yet another request for conciliation under the ICSID Convention Conciliation Rules was recently registered in May 2016 (Xenofon Karagiannis v. Republic of Albania, ICSID Case No. CONC/16/1).
- The European Union ('EU') is also aware of the trend; hence, the Free Trade Agreements negotiated and signed by the EU provide for mediation as an investor-state dispute settlement mechanism.

Still, one essential disadvantage of mediation remains. For all its benefits, mediated settlements are currently not enforceable in a manner similar to the enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Instead, to benefit from the privilege of international enforceability, mediated settlement agreements

must be transformed into arbitral awards. In this regard, it could be said that mediation still depends on arbitration. Yet, if mediated settlement agreements were equally enforceable as arbitral awards, mediation would become a truly independent method of dispute resolution.

To remedy that disadvantage, the 65th session of the Working Group II of the United Nations Commission on International Trade Law ('UNCITRAL') continued its efforts to prepare an instrument on enforcement of mediated settlement agreements this September in Vienna; by way of a convention, model legislative provisions, or guidance text. On the occasion thereof, UNCITRAL, the VIAC, and the International Mediation Institute, held a Joint Conference on 21 September 2016.

At the Joint Conference, two panels, one chaired by Ms Anne-Karin Grill, Partner at the Vienna-based international law firm Schoenherr, and the other chaired by Mr Harold Abramson, Professor of Law, Touro Law Center, New York, offered their views on the ongoing efforts to provide for internationally enforceable mediated settlement agreements and shared their respective experiences as practitioners.

In particular, the panelists contrasted the advantages of mediation and arbitration:

It appears that, indeed, mediation impresses with what was once appreciated as the advantages of arbitration over court litigation (less expensive, faster, and more flexible). Mediation often seems less expensive and faster than arbitration, and as control always remains with the parties, it is, arguably, also more flexible.

Further, the panelists also shared their experience that, overall, issues of enforcement of mediated settlement agreements would mostly arise in only a handful of instances (e.g. illiquidity of a party who agreed to pay in installments; or a parent company's disapproval of a settlement agreed by its subsidiary). At the same time, some compliance issues could be avoided by taking precautions, such as requesting securities or withholding title until fully paid.

Finally, and quite importantly, the panelists also highlighted how party representatives play very different roles in arbitration and mediation. A successful mediation thus also depends on whether counsel understands its role.

Competition or coexistence - will arbitration have to yield to mediation? Arbitration, of course, has its place and purpose. Where parties are not willing to negotiate or settle, mediation, despite its numerous advantages, is unlikely to satisfy users. This, regardless of whether mediated settlement agreements are internationally enforceable or not.

However, in particular in commercial settings, there may be important reasons for the parties to opt for mediation (e.g. creating long-term solutions that safeguard existing business relationships; escaping litigation or arbitration; avoiding legal fees, downtimes, and stress in general). Thus, depending on the circumstances, clients may well be better off choosing mediation, and counsel thus may advise clients to consider mediation in appropriate cases - either as an alternative or a precursor to arbitration.

Faced with the increasing popularity of mediation, arbitration practitioners face an important challenge: to stay on top as regards the workings and benefits of the various existing ADR methods and, if the option to mediate were pursued by the client, to understand how to best represent their client in the mediation. In the end, the key to a peaceful coexistence of two independent forms of ADR will also lie in counsel correctly identifying whether a commercial dispute should be referred to arbitration or mediation - and to apply the correct set of skills in the chosen procedure.