

# Kluwer Arbitration Blog

## International Arbitration and Mediation: A Practical Guide

Michael McIlwrath (MDisputes) · Tuesday, March 16th, 2010

We've been asked by Kluwer to say a few words about our new book, [International Arbitration and Mediation: A Practical Guide](#). Before explaining what we tried to accomplish, it may be worth noting what we did not set out to do, which was to write a learned treatise about international arbitration (or mediation). For that, there are plenty of admirable texts on the market that we admire and would strongly recommend.

What we decided to do instead was provide a book that complements the learned treatises, based on how the two of us have lived international dispute resolution, one as an in-house lawyer and the other as an external counsel. And we have given special attention to our mistakes. The chapters are punctuated with illustrative anecdotes taken from our own experiences, called, for lack of a better phrase that we could agree on, "Not That This Ever Really Happens....." These vignettes are sanitized so as not to reveal our counter-parties, but we are certain there are several readers of this blog who will recognize having shared one or more of these moments with us, often from the opposing side of a table.

Our joint authorship is another matter. From our respective positions as internal and external counsel, we do not always share the same views. As our friendship and professional relationship extends back nearly a dozen years, we felt comfortable highlighting the reasons for our differences rather than trying to reconcile them. For example, John believes that parties should negotiate dispute resolution clauses to include language that provides a strategic advantage to their side in the event of a dispute. Mike prefers simplicity and balance in drafting, as he is skeptical about the ability to predict at the time a contract is being negotiated what future disputes might arise. Neither of us is likely to be convinced by the other to change our view anytime soon.

Some of the book's "practical" features include:

- Answers to common questions, such as "how much will it cost?" and "how long will it take?" through the entire lifecycle of a dispute and the decision-points at different stages that can radically alter both costs and outcomes.
- Charts and checklists to assist parties as, for example, the steps they should consider taking when a dispute first arises, before formal proceedings are commenced.
- Measures that can help keep party expectations and legal strategies aligned, such as the use of early case assessments.
- Discussion of how to optimize commercial outcomes through international

negotiation and mediation, including considerations about financial accounting rules that can apply to disputes and the impact different taxation regimes can have on outcomes achieved through settlement, arbitration, and enforcement.

– Practical considerations of how an international arbitration can be conducted, as well as an entire chapter “After the Arbitration” about what parties should expect in the way of challenge, recognition, and enforcement proceedings.

Most of all, we have attempted to make this reading about international arbitration and mediation interesting and at times even entertaining (we hope). Below are some examples from our book that highlight one of the book’s features of using illustrative vignettes:

### **From Chapter 3: When the Dispute Arises:**

A party’s determination that an unfavorable outcome is probable will often create an obligation to make a financial reserve (provision) on its balance sheet. For companies that establish their balance sheets under the Generally Accepted Accounting Standards (GAAP), the applicable standard for setting litigation risk reserves is Financial Accounting Standard 5, or FAS 5. Under FAS 5, a pending or threatened litigation must be disclosed on a company’s financial statement if it is “reasonably possible” that there will be a loss. The level of required disclosure depends upon whether the loss is both “probable” and can be “reasonably estimated.” If both elements are satisfied, the loss must be recognized in the setting aside of a financial reserve (or provision or accrual) on the company’s financial statements.

### **Not that this ever really happens: how not to advise clients on dispute reserves.**

Actually, this happens quite a lot. Counsel who are not experienced in GAAP accounting may take a view that clients and their auditors will want to know the maximum hypothetical risk from a dispute, rather than the most probable amount of risk. Thus, one of the authors (the in-house counsel) has occasionally had to address the letter sent by an inexperienced external counsel to auditors expressing an improbably high degree of risk from a dispute. For example, external counsel for one domestic litigation involving claims totalling over EUR 5 million informed the in-house litigation lawyer that a negative outcome was highly unlikely, given that the claims all appeared to be baseless, and the requested damages significantly inflated. But the same counsel then responded to an inquiry from the company’s external auditors, recommending a financial reserve of EUR 5 million, i.e., the full value of the claim. This created some amount of embarrassment for the in-house legal team, which had not advised the business of a need to post such a large financial reserve. The external counsel subsequently explained that in their own opinion, large companies would want to reserve the maximum potential exposure for disputes, and that is what they provided. Again, when applying FAS 5, the key concepts are probability and ‘estimability’, not a worst-case scenario.

### **From Chapter 4: International Settlement Negotiation and Mediation: How mediators charge and are paid?**

There is no standard approach, either in domestic or international practice, as to how mediators charge. Common methods are by the hour, by the day, or via a fixed-fee inclusive of any preparatory work. As for how these costs are allocated, the commonly accepted rule is that, absent different agreement, the parties share equally the costs of the mediator (as well as any mediation facilities). The exception is when one party, for whatever reason, must cancel or reschedule the

mediation. In such events, the cancelling party is responsible for the entirety of any charges incurred.

Moreover, parties should not confuse the rates a mediator quotes as reflecting that person's qualifications, level of experience, or suitability for a particular dispute. Rather, quoted rates may reflect nothing more than what a mediator believes the market will bear, or simply what the parties in a particular dispute might be prepared to pay. It is not unheard of (and in fact may be relatively commonplace) for an inexperienced mediator in one country to charge several times the quoted rates of a highly skilled and experienced mediator in another country.

**Not that this ever really happens: fees of USD 500 to USD 60,000 for the same dispute.**

The parties sought a mediator who understood English law (the law of the contract) but who would also be sensitive to cultural expectations of a dispute taking place involving parties from both South-East Asia and Europe. Because the dispute involved total claims of less than USD 4 million, and the main purpose of the mediation was to avoid the costs of arbitration, the rates of proposed mediators quickly became an important consideration. The claimant initially contacted an English mediator, a barrister with experience as an arbitrator and mediator in construction disputes, who proposed to conduct a three-day mediation for USD 60,000 plus his costs for first class travel to Asia and five days in a hotel. The respondent rejected this, and contacted different mediation centers in Asia and Europe, and was quoted rates from USD 500 to USD 15,000 for a single day. The claimant then contacted an international arbitration institution (not the one provided for in the contract), which conducted a search and proposed mediators based in Hong Kong and Singapore with qualifications in English law. The parties settled on one of these candidates, whose fee for a one-day mediation (after it was renegotiated by the institution at the request of the parties) was USD 10,000, inclusive of preparation time, plus travel costs.

**From Chapter 5: The Conduct of the Arbitration: Not that this ever really happens: putting jurisdiction to the tribunal despite the institution's contrary ruling.**

In institutional arbitrations systems other than the ICC and ICSID, the institution may in practice carry out a similar gatekeeper role to that found in the rules of the ICC and ICSID. This is not always welcome. For example, in one SIAC case in which one of the authors was involved, the claimant sued not only the signatory of the arbitration agreement but also its non-signatory parent, on the basis that the parties intended the non-signatory to be bound by the arbitration agreement. The SIAC refused to "accept" the claims against the parent company, on the grounds that the parent had not signed the arbitration agreement, despite vociferous protests by the claimant that this was a matter for the tribunal, not the institution. However, the claimant then ignored the institution's position and put its claims against the parent directly before the tribunal, when it had been constituted. The tribunal permitted the claimant to assert its claims against the parent in this way, ultimately dismissing the parent's ensuing objection to jurisdiction and proceeding to hear the merits of those claims against the parent.

Michael McIlwrath and John Savage

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The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with a horizontal line above the main heading.

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