

Kluwer Arbitration Blog

Anti-Arbitration: It's Not Hard to Mediate During Arbitral Proceedings

Michael McIlwrath (MDisputes) · Tuesday, September 13th, 2011

✘ This month marks two interesting developments in arb/med.

First, as Kluwer wants you to know, they have added a [mediation blog](#) in addition to the arbitration blog. Well, it's about time.

Second, September heralds the much celebrated debut of the ICC's new "[Arbitration and ADR Rules](#)", at least for people who celebrate such things.

As the name of the volume implies, the ICC is now linking its arbitration and mediation practices, described in the introduction as "two discrete but complementary dispute resolution procedures."

Again, it's about time.

From all that has been said and written about arb/med in the field of international dispute resolution, one could be forgiven for thinking that engaging in mediation during arbitral proceedings is a complex and difficult endeavor, fraught with the risks of prejudicing the tribunal and adding costs and delay.

Trust me, if mediation were either hard or added any serious costs, the last group on earth to promote it would be overworked in-house counsel managing our tight budgets. Yet we appear to be the main proponents.

It's Easy for an Arbitral Tribunal to Promote Mediation

The truth is, there's nothing particularly risky or difficult about mediating a dispute during a pending arbitration. On the contrary, the conditions are often ideally suited to mediation, even if past settlement efforts (or mediation attempts) have proven fruitless.

This point was brought home to me this past summer after we settled in mediation during pending arbitral proceedings, and the experience is worth sharing.

There had been a long-standing series of commercial disputes between the same parties under different contracts, all of which had gelled into two ad hoc arbitrations and a court proceeding in a southern European country. The disputes themselves were unremarkable in their nature. Unexpected things happened (as they can be expected to) causing each side to incur costs in three

different countries. Each side blamed the other, leading to claims and counterclaims totalling a bit less than \$1 million.

This is exactly the sort of dispute that makes in-house counsel gripe that the costs of arbitration are disproportionate to any amounts that might be recovered. In fact, when our joint tribunal (for both arbitrations) was constituted, our chair himself observed that, “the costs of these arbitrations are going to be disproportionate to the amounts that might be recovered”.

In truth, there was nothing unusual about his making this observation. Arbitrators will often tell parties, usually with a pitiful gaze over the top of their eyeglasses, that we would save money if we would just settle our dispute. I doubt the comment is genuinely intended to provoke a settlement, because it never does. I suspect tribunals just feel better about their jobs if they can be assured the parties appreciate what they are signing up for. “Yes,” they want us to say, “we understand how expensive this will be, but here we are anyway, come to waste company assets...”

But in our case the chair went a good deal further than offering a gratuitous (if sympathetic) comment. Having commented on the proportionality of things, he then asked the parties if they would permit him to discuss the possibility of subjecting all three pending disputes to mediation before one of the co-arbitrators, noting her qualifications in the field.

Both sides expressed interest.

The co-arbitrator (now a potential mediator) indicated she would accept such a joint appointment by the parties, subject to the condition that they would allow her to resign as arbitrator if a settlement was not reached or if she or either of the parties felt that her impartiality as arbitrator had been compromised by information she had received. In case of her resignation, the party that had nominated her (the respondent in this case) would be permitted to appoint a new co-arbitrator to replace her, without prejudice to its position or any delay in the arbitration.

In a nutshell, the only technical “difficulty” to be overcome was this: the need to safeguard the appointing party’s right to designate an arbitrator of choice should the mediation fail and there might exist any doubts about confidential information that had been shared.

The parties agreed to mediation under these conditions, and the hearing was thus adjourned. We reconvened the following week with the co-arbitrator now acting as mediator (and the arbitration’s procedural timetable unaffected).

All three disputes were rapidly settled.

Surprisingly, each side felt it had achieved a fair resolution considering the time that had lapsed since the start of our disputes. The parties’ business representatives used the good feelings of the settlement to re-establish relationships that had been lost. At the time of this writing, the claimant is receiving invitations to bid again on the respondent’s business.

Of course, one might say, parties settle commercial disputes every day. It’s the nature of business to resolve differences and move on. In this case, however, we had clearly been unable to resolve our disputes in the past, and proceedings had multiplied across three fronts. We all agreed that our settlement was made possible through the intervention of the chair of the arbitral tribunal in suggesting mediation.

One might argue this was a particularly altruistic chair or tribunal, willing to act against its own

financial interests, and without regard to the financial interests of the counsel who stood to earn fees from litigating the dispute. But I don't think that would be accurate.

While the tribunal may not earn all of the fees that would have been paid had these two cases proceeded to final awards, they still received compensation up to the point where settlements were reached. And all three arbitrators, and the counsel, are in the fortunate position of having earned significant respect from the parties who appointed them, which will undoubtedly foster future appointments and referrals.

A Point Not to Be Overlooked in the ICC Rules Booklet

The above case came to mind as my e-mail in-box began to fill up with commentary from law firms about what the new ICC rules will spell for arbitration practice. But I'd draw your attention, just briefly, to a page in the booklet that may not receive as much attention in the commentary as it deserves.

At page 57 of the new rules, in Appendix IV, Case Management Techniques, arbitrators are advised that they should be "informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules."

In other words, the ICC is now expressly encouraging arbitral tribunals to do exactly what the chair did in our two ad hoc proceedings: propose mediation during an arbitration that is already underway. It will be interesting to see if tribunals actually implement this sound guidance.

It wouldn't be hard for them to do.

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