

# ALTERNATIVE DISPUTE RESOLUTION

Discussion by

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## **ALTERNATIVE DISPUTE RESOLUTION**

As arbitration becomes more popular and more common internationally, it has taken on too many of the attributes of litigation and has become, in many cases, nothing less than private litigation. This is primarily due to the growing participation in arbitration of litigators, particularly those from the United States. For the most part, these litigators have been introducing into the arbitral process many of the techniques utilised in common law litigation, such as extensive discovery, complicated rules of evidence and long drawn out hearings with a great numbers of witnesses. They even like to introduce witnesses on points of governing law - even when it is the law of the venue and appearing counsel and when the arbitrators are already familiar with that law. In such cases, unless you have really strong arbitrators who can control the parties, we are finding that these days arbitrations in many jurisdictions is becoming more costly, and often takes longer, than litigation. As a result there are now more and more efforts to find other means of resolving disputes, particularly means driven by the parties themselves, and these methods are generally referred to as “Alternative Dispute Resolution” or “ADR”. Where the parties can agree, there is really no limit to the ways that commercial disputes can be resolved. Thus we look more and more towards parties trying to resolve their disputes by themselves through alternative means.

### **ADR vs. Arbitration/Litigation**

Let us first go over some of the differences between ADR, or party-driven dispute resolution methods such as mediation, and third-party adjudicated methods such as arbitration and litigation. I am using “mediation” as a generic term, but this discussion can apply to almost any of the party-driven ADR processes.

- ❖ First of all, ADR in itself is not binding. The parties may try to settle the dispute through an ADR process, and if it doesn't work, and they cannot reach a resolution, then they may still resort to arbitration or litigation, depending on what has been agreed upon. Whereas, arbitration or litigation is binding. Once an arbitration or litigation is commenced, a third party will make the decision and the parties are stuck with it.

- ❖ The parties are in control of an ADR process, such as mediation, whereas they pretty much relinquish control to the arbitrators as soon as they go into arbitration, and even more so to the court where litigation is commenced. A mediator does not decide the case, he just facilitates the negotiations - sometimes evaluates and sometimes doesn't (I include evaluative mediation together with just facilitation here) whereas in arbitration or litigation the third party adjudicator makes virtually all decisions, so the parties lose control.
- ❖ Probably the most important difference is that when you go to the court or to arbitration, the arbitrators (or judges) are bound to decide the matter based solely upon the contract that you made in the first place and under the governing law. In mediation, on the other hand, almost any solution that the parties can live with, or be comfortable with, can be applied. The parties need not pay any attention to what they originally agreed in the contract. In cases where conditions, such as the market or exchange rate, have changed, or if there is some new or different business the parties can do together, they can bring in almost anything they like as a solution, as long as they can both (or all) agree with it and it's not illegal. Whatever makes them happy can be applied. Thus you can usually find a win/win situation in a successful mediation. In arbitration or litigation invariably one party wins and one party loses. And because of that, it's war. The business relationship is destroyed as soon as the arbitral reference or court case is commenced. Whereas as soon as a mediation is commenced, the parties begin to work together, and they find the resolution together, so that they can continue their business relationship. They may even go on into other business together.
- ❖ As mentioned earlier, if mediation fails, nothing is really lost, the parties can still institute third party adjudication, whereas, once arbitration or litigation has been commenced it can only be terminated by the claimant (or plaintiff), and then only where there has been no counterclaim by the respondent (defendant). And, while a court judgment can often be appealed, an arbitral award will, except in certain unusual circumstances, be final and binding. Even if a party is simply not happy with the course a mediation process is taking, they can opt out at any time, whereas, once a litigation or arbitration has commenced, they are stuck with it, no matter how bad it is going.

- ❖ ADR processes can be fully private and confidential. Court actions are public record. Arbitration may theoretically be confidential, but it is not always so, and of course if an award needs to be enforced in the court, it becomes public record. Many arbitral awards are even published, and many more are reviewed in professional media.
- ❖ In a mediation the parties may tell the mediator things that they would never give in evidence, including confidential matters and the mediator may not communicate these to the other party. In an arbitration any communication from a party must be copied to the other party, as well as to all of the arbitrators, and in institutional arbitrations to the arbitral institution as well.
- ❖ The procedural rules in an arbitration are usually very strict, whereas the procedures can be quite flexible in mediation.
- ❖ Mediation is much quicker and much, much less expensive than arbitration or litigation. The mediation process rarely involves more than a few days of meeting, possibly spanning a few weeks at most. Normally only one mediator need be involved. An arbitration can take years and years to come to conclusion. At a recent seminar in Manila at which I was speaking, one of the other speakers was describing an arbitration that lasted seventeen years. You can imagine what the cost of such a long process must be, particularly where three top arbitrators are charging full rates throughout, to say nothing of the counsel's fees, hearing rooms, travel, accommodation and other related costs. Arbitration is often more expensive even than litigation, because many such costs are covered by the government in court litigation.

### **Mutual Agreement**

Don't forget: ADR being fully client driven, it can only be applied where both, or all, parties agree. The designation as to whether arbitration or any other form of ADR shall be employed may, but rarely can, be determined after the dispute has already

arisen, because once a dispute arises it is difficult for the parties to agree upon anything at all. If you want to use ADR or arbitration, the time to make the decision is when you enter into the contract in the first place: before you start the business relationship. Because if you don't designate the means of resolving disputes at the outset, then any disputes that may arise later, and cannot be resolved amicably, will almost invariably end up in court. So the parties need to give careful consideration to this when negotiating their contract.

### **Drafting the Contract**

At an ICC conference on ADR in Hong Kong in 2001 somebody asked me why it is that lawyers so rarely provide for mediation and other types of ADR in the contracts they draft for their clients. They will often put in an arbitration clause, but generally most lawyers who are writing these contracts, unless they're involved in ADR, don't really think about it. Either they don't address dispute resolution at all, or they might ask the client only whether they want to provide for arbitration or leave it to the courts. While some lawyers are not even familiar with ADR, but the unfortunate fact of the matter is that a lot of lawyers who are familiar with it don't wish to provide for it. One of the reasons is that while these lawyers are thinking about the bottom line, they are thinking about their own bottom line and not that of the client. The lawyers can earn much higher fees in a long drawn-out arbitral or litigation process than in a short and simple mediation. If you are really acting in the best interests of your client, you want to help them resolve any disputes quickly and inexpensively and let them continue with their business relationship. Unfortunately many lawyers are more interested in ensuring more work for themselves later on. This is what I refer to as the ubiquitous underlying potential conflict of interest between every lawyer and his/her client.

Another reason why ADR is not being embraced in many jurisdictions is simply a lack of education. Many lawyers still don't realize how many different types of dispute resolution are available: how one can even custom-design the dispute resolution mechanism to fit the dispute. When drafting the contract at the outset, one needs to think about what kind of disputes might arise in the future and how they might best be resolved. If it's a construction contract or one of a purely technical nature, disputes that arise rarely involve legal issues as much as technical factual ones. In such cases, the parties may be better off to provide for use of an

independent technical expert to make a prompt evaluation. That way you don't end up with dozens of technical expert witnesses trying to persuade one, or three, lawyer-arbitrators on a technical issue which they are otherwise not qualified to decide.

I don't know if the reader is a transactional lawyer who drafts contracts. If so, I would like to suggest that when you draft your dispute resolution provisions, you might wish to include a multi-tiered mechanism. The first approach should have the parties trying to negotiate among themselves, and then if it is a large corporation perhaps the second tier would have the executives trying to negotiate and find a solution rather than leaving it to the lower echelon people only. And if that doesn't work, then you use a third party facilitative type of ADR such as mediation or expert determination, and if only that fails within a certain time period, then they may go to arbitration or litigation, as a last resort.

## **Types of ADR**

Defining "ADR" as "alternative" dispute resolution may be a misnomer, as it brings up the question: "alternative" to what? Many of us would prefer to refer to "appropriate" dispute resolution, or at least "alternatives for" dispute resolution, so that the scope of the concept can encompass all methods, including arbitration and even litigation, which latter sometimes turns out to be the most cost- and time-effective after all. (An example is litigation in Singapore, where the courts have become so streamlined that litigation may in fact be the quickest and least costly method for some small or straightforward disputes, such as pure non-payment and similar.)

There are many different types of ADR available. One way to categorise them would be by who is making the decision. A third party adjudicator will decide the matter in litigation or arbitration, and the parties themselves in negotiation, mediation, mini-trials, Etc. In between there are a whole range of possible combinations.

- ❖ Perhaps the best known such combination is "mediation/arbitration" where you start with mediation and if the parties cannot reach an agreement, they automatically go to arbitration - in some cases, if the parties are comfortable about it, with the same mediator acting as arbitrator, although

this is not often recommended, and even prohibited under the rules of some institutions. But if both parties have learned to trust that mediator and they have made a fully cognizant decision that they both want the mediator to make decision for them, this kind of solution will be far less expensive than starting arbitration afresh because the mediator (now arbitrator) already knows the whole case. Naturally, in most situations the parties will not wish that at all because they may have told the mediator things that they would never disclose to an arbitrator. But in other situations it may work out much better.

There are a lot of variations of this kind of combined mediation/arbitration, all depending upon what the parties have devised in the first place. A lot of careful thought need be given to setting up the scheme that will work best for the interests of both parties.

Indonesia's chief Justice, Bagir Manan, who has long been interested in arbitration and ADR, recently issued a circular letter to the courts urging judges to seek to mediate disputes before launching upon the litigation process. If the parties agree, the judge acts as mediator in trying to assist the parties to resolve the dispute themselves. If this is not successful, they go back to court, but with a different judge, so that they are not prejudiced by the information shared with the mediating judge. This is a new facility but it has been successful in at least one case already.

- ❖ Another mechanism that can be very effective in technical matters would be expert determination. Here you may put the decision entirely into the hands of a technical or operative expert, or you can have an expert give a recommendation to an arbitrator or arbitral tribunal, who will then accept such determination at face value for the matters covered and make the award based upon that. Or, as has been suggested by Neil Kaplan, Q.C., C.B.E. in a recent note, using a combination of expert and lawyer-arbitrator, one may rule upon liability and another upon quantum.
- ❖ We hear a lot about mini-trials, but these have not been applied very widely as yet, at least not in Asia. In this mechanism, the parties and their counsel stage a "mock" trial, or arbitration, where top executives of the parties either observe, or may even act as the arbitrators. This will give

both sides a very good idea of the strengths and weaknesses of their own and the other party's case and evidence and may encourage them to find an amicable settlement rather than submit to a real trial before real adjudicators who shall make the decision for them.

- ❖ Then we have other party-driven mechanisms. Of course negotiation may have no third party participation at all. And then there's mediation/conciliation and so on.

Some ADR mechanisms can go into effect even before any dispute arises and thereby act more as preventative than curative measures. Perhaps the most successful of these is the Dispute Resolution Board. These boards have been established for a number of big infrastructure projects, such as the Channel Tunnel and the Hong Kong Airport, but smaller variations can be utilised for any kind of transaction or project. Before any work is even commenced on the project, the parties appoint a Board of Dispute Resolution, composed of legal and technical experts, who will meet periodically, view the project, talk to the personnel involved and generally familiarise themselves with all that is going on. At these times they will be advised of any problems, actual or potential, that may be arising, and attempt to resolve these then and there so that the projects can continue uninterrupted.

Certainly had there been on-going dispute resolution boards or similar appointed to work with the IPPs (Independent Power Projects), the telecommunications KSO's, and the clean water projects, when the situation of the economy changed they would at that time have been able to sit down and renegotiate the contracts before these disputes arose, thereby avoiding the disastrous arbitrations we have all read about, and Indonesia would be in a far stronger position today.

### **How Does Mediation Work?**

I would like briefly to go over a typical mediation process, although this summary can also apply to a certain extent to other forms of ADR.

- ❖ Assuming the parties have agreed to try mediation, the first thing, of course, is to agree upon the mediator. Sometimes the parties are able to agree together, but otherwise you need, in the contract or afterwards, to designate an appointing authority or person who shall appoint the mediator.



Sometimes two mediators may be utilised, but it is much more common to have only one.

- ❖ A mediation may continue for several days or it may be able to be resolved after only a single day of meetings. Once appointed, the mediator will contact the parties to collect any preliminary documentation and go over the arrangements. Then an initial first meeting will be held, normally with both parties and their representatives, if they have any. It is a good idea for the parties' to include their counsel, particularly if there's any legal matters at issue at all.
- ❖ After meeting with the parties together, and certainly if the atmosphere becomes strained, the mediator will meet with the parties individually, all depending upon the situation. The parties are more likely to confide in the mediator where the other party is not present, and the mediator must not disclose information provided by one party to the other without the consent of the disclosing party.
- ❖ Jointly or separately, the mediator will ask each party to set out its respective position and try to narrow down the issues. There may be many facts and issues, but not all of them will be in contention. One of the things a mediator can do in the initial stage is to clarify the things that the parties agree upon, so that they may all concentrate on the things that they don't agree upon.
- ❖ The mediator should also try to get the parties to explain what is it that they really need. What is the most important thing for each of them to achieve in the determination of this dispute? If both parties can come to understand what the other side needs, what was the basis under which each entered into into this deal, and what they need as a bottom line now, in light of any changed circumstances for example, to avoid litigating, they may be able to come closer together, from both sides. Perhaps the lesser matters, or the parties' internal goals, are not so important to them, or they may have certain needs outside the contract that can be brought into the resolution which could never have been brought into that contract itself under an arbitration.
- ❖ It is the goal of the mediator to cause the parties to try to bring out their own suggested solutions, and to try to bring the parties closer together. If

the parties can reach an agreement, it should be rendered into a writing, which should also provide for how it can be enforced - usually by arbitration - so that it becomes enforceable. But experience has shown that where the parties have formulated the resolution themselves there is a much higher rate of compliance with the result of a mediation than there is with an arbitration award, which latter the parties have not created themselves. We see very few arbitrations to enforce settlement agreements resulting from mediations, whereas applications to court to enforce arbitral awards are commonplace.

### **How to choose a Mediator**

The qualifications for a good mediator are not always the same as for a good lawyer, and rarely should a litigator try to mediate because it is an entirely different mindset. A few points to look for are discussed below:

- ❖ One is the requisite expertise: you will want to ensure that the mediator has some technical understanding of the type of business concerned and/or the law governing the underlying contract (this latter in order to know what the likely bottom line might be were the mediation to fail and the parties go to arbitration or litigation).
- ❖ Mediators certainly need to be impartial and independent - and there are many degrees of independence and impartiality. You certainly want to be sure that the mediator has no interest in the outcome whatsoever. But then there are levels of this independence. If the mediator is a lawyer: has his/her firm represented one of the parties? Whoever the mediator is does he or she have certain personal prejudices relating to the race, religion, culture or type of business of either party? What level of impartiality do you want? Certainly it is essential that neither the mediator nor his or her company, firm or family, will derive any benefit from the outcome.
- ❖ Another extremely important consideration in international mediation, and particularly in Asia, is the cultural sensitivity of the mediator. This is very important also for arbitrators, although it is often ignored. I have seen too many arbitrations in which a western arbitrator is appointed in a reference

in an Asian jurisdiction, and he has no idea of the customs of the country in which the parties are operating, nor how to read the behavior or even the words of the Asian participants. He may not even understand what the Asians are saying because westerners expect everybody act and react the same as they do. They expect that when someone says something they mean exactly that. They do not understand the subtleties, the levels of meaning and intention, the levels of respect and similar. Furthermore, westerners tend to impose their own views directly; they order people around or embarrass one party in front of the other. This is totally unacceptable in most Asian cultures. Not only is cultural sensitivity so terribly important, but if there are any political ramifications related to the dispute, the mediator must educate himself or herself on what is going on in the country - the history, background and full facts surrounding the dispute and the environment in which it has arisen. Again, failure of arbitrators to understand this was one of the reasons we have seen such disastrous arbitration awards in certain of the infrastructure arbitrations that followed from the economic crisis of 1997.

### **Setting the Rules for the Mediation**

Normally you will want to set out the ground rules. If the process is administered through an institution, that institution will provide their own rules, but if it's an *ad hoc* mediation then the mediator should discuss with the parties what will be the ground rules, and set those either in written terms of reference or just verbally.

- ❖ You may wish to identify, and perhaps limit, what kind of documentary evidence will be considered, and who may attend and/or participate in the mediation. Usually it will only be the parties and their representative, but the parties may wish to bring in other persons as well - executives, experts, or even witnesses of fact, and the guidelines for that will have to be agreed upon.
- ❖ The cost of the mediator, and other attendant costs of the process, as well as who is responsible to cover these, need to be discussed openly.
- ❖ Meetings must be scheduled, and normally these will be much quicker than will arbitration hearings. Most arbitrations are heard before three arbitrators, all of whom have busy schedules, which makes it difficult to find

dates when they are all available, whereas, mediation generally involves only a single mediator, it being assumed that the parties will make every effort to comply with his or her schedule in order to expedite things in order to finish the process and get on with the job.

- ❖ Another thing to be decided is whether the result shall be rendered into a written agreement, and how that will be enforceable. Law No. 30 of 1999 supports the execution of a written agreement and gives these stronger enforcement status than that of a normal contract. New legislation is also being considered in Parliament which will give a settlement agreement drawn up by a mediator the same executory effect as a final arbitration award or final and binding court decision. That would mean in case one party defaults in performance of the settlement agreement the other party can directly enforce the agreement without having to bring a new case in the court to prove the obligations under the agreement.
- ❖ Finally, it is a good idea to agree in advance what will be the next step if the mediation fails to resolve the dispute. Will the parties go on to arbitration or what?

### **Mediation Techniques**

Perhaps the most important quality a mediator requires is to be a good listener. Mediators should listen attentively to each party. Very often, there's a lot of ego and personal emotion involved in the dispute. Mediators may want to allow the parties to talk them out together, yell at each other; have their little temper tantrum and spill out the vitriol, because once they have had a chance to vent their hostility, maybe they will be able to be more reasonable and think more pragmatically towards the resolution. If a party is of Asian ethnicity, perhaps such outpouring can only be done away from the other party, or perhaps not at all. The mediator has to decide whether it's better to let them do that within the presence of each other or separately. Ambassador Sedfrey Ordoñez put it quite succinctly, in his address in a seminar on ADR in Manila last year: his perception is that mediation is more behavioral science than it is a matter of law. One must be sensitive to what the parties need to get them comfortable with the process, as well seeking a solution.

It is also important to ensure that there is a person in attendance on behalf of each of the parties who has authority to bind that party. Nothing can be resolved if the parties send only an underling who must go back to the principal to obtain authorisation for anything to be agreed upon. Unless there is someone with authority to bind each party, no settlement agreement can ever be effected.

The mediator should ascertain whether the parties want, or need, to do continue to do business together. If so, the chances of success are considerably greater. There maybe other business possibilities that may be able to be applied in order to level out the losses. The mediator can subtly lead the parties towards an innovative solution, which may include business prospects completely outside the scope of their original agreement or project.

And deadlock, how do you break deadlock? Again, we must apply behavioral science. Can you make a joke out of it? Can you get them laughing, so that they might almost step out of themselves and see the matter bit more objectively? If a deadlock persists, the mediator may suggest that the parties send in different personnel from their companies, so that personal animosities will not interfere in the resolution process. Sometimes the new personnel will have fresh ideas not thought of by the initial ones. Or the mediator may say: well, we're at a deadlock and what do you suggest that we do about it because you know, we'd like to resolve this thing? Put the problem upon the parties themselves to solve, thereby assigning them a joint task to face together.

I hope we have provided some food for thought when it comes to designing efficient dispute resolution mechanisms. We would be happy to address any questions you may have at any time.

Thank You

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