Opting the Mediation Window in the Arbitration House

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Overview

Throughout the 20th century the arbitration house has dominated the scene of commercial dispute resolution. In the 21st century foundations were laid for the construction of a mediation house in the dispute resolution practice.

Many lawyers and commercial parties have recognized the benefits of mediation such as flexibility, confidentiality, time and cost effectiveness, capacity for creative outcomes and opportunities for a renewed business relationship between the parties. This is reflected in the remarkable and increased use of mediation around the world in relation to domestic disputes.

International Arena

Arbitration is the process of choice in international disputes. The results of a 2008 Price Waterhouse Coopers survey shows relatively high levels of usage, effectiveness and user satisfaction with international arbitration.[1]

A closer look at the survey data, however, highlights the significant role of assisted negotiation and settlement in international arbitration, with 92 percent of matters resolving at some stage of the arbitral proceedings. So it seems that survey respondents may not always have been making their comments in relation to arbitration procedures in its strict sense. In many cases respondents may have actually been articulating satisfaction with negotiation or mediation processes that led to settlement within the parameters of arbitration.

However, in relation to international disputes, users remain cautious about mediation's effectiveness in the absence of a mature international legal framework to regulate issues such as the admissibility of mediation evidence, the impact of mediation on statutory limitations and the enforceability of foreign mediated settlements.

International arbitration has been chartered as a formal dispute resolution process for a much longer period of time; it has established sophisticated procedures and is accompanied by a significant body of case law. International arbitration enjoys the benefits of a well-developed international legal framework largely based on two instruments: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and UNCITRAL Model Law on International Commercial Arbitration.

The New York Convention has 146 signatories and, as a result, foreign arbitral awards are recognized and *prima facie* enforceable in many domestic courts.

[1] See G Lagerberg and L Mistelis, *International Arbitration: Corporate Attitudes and Practices 2008* (PWC: London 2008) available at www.pwc.co.uk.

In a survey conducted on the perceived advantages of arbitration for continental European and US lawyers, the existence of an enforcement mechanism was praised and rated as one of arbitration's strong advantages, second only to its perceived neutrality.[2] In the absence of an equivalent regulatory regime, foreign mediated settlements are not able to enjoy the same level of foreign recognition and enforceability.

The following table provides an overview of the characteristics of international arbitration and mediation.

Comparative Features of International Arbitration and Mediation

Characteristic	Arbitration	Mediation
International framework	Established international legal framework adopted by 66 countries[3]: UNCITRAL Model Law on International Commercial Arbitration.	International framework in its nascent stage and adopted by only 10 countries[4]: UNCITRAL Model Law on International Commercial Conciliation.
Enforceability of outcomes	International framework for enforceability of outcomes: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which has 146 signatories.	No international framework for enforceability of mediated outcomes. Diverse approaches to enforceability depending upon jurisdiction
Jurisprudence and case law	Significant body of cases interpreting arbitration law,[5] giving arbitration strong legal backing and arguably a degree of legal certainty	Limited, but growing, number of cases interpreting mediation law, resulting in lack of legal certainty and predictability
Cost	Generally high costs associated with arbitration	Generally lower costs associated with mediation
Time	Lengthy process over months or years	Shorter duration of process over days, weeks or months
Nature of presentations	Highly legalistic and technical arguments	Highly flexible and can move beyond legal issues

[2] C Bühring-Uhle, L Kirchhoff and G Scherer*Arbitration and Mediation in International Business* (2nd ed, Alphen aan den Rijn: Kluwer Law International 2006) at 108–109 and C Bühring-Uhle, G Scherer and L Kirchhoff, 'The Arbitrator as Mediator: Some Empirical Insights' (2003) 20 *Journal of International Arbitration* 81–88. See also the findings of G Lagerberg and L Mistelis, *International Arbitration: Corporate Attitudes and Practices 2008* (PWC: London 2008) available at www.pwc.co.uk.

[3] Figures are available on the UNCITRAL website: www.uncitral.org.

[4] Figures are available on the UNCITRAL website: www.uncitral.org.

[5] See, for example, the CLOUT database on the UNCITRAL website: www.uncitral.org.

Decision-making	By arbitrator on the basis of legal arguments presented	By parties on whatever basis they choose, whether it be legal rights, commercial, financial and personal interests or a combination of factors.

The above table suggests that in spite of the obvious advantages of mediation, potential users of mediation may lack enthusiasm for the process due to the absence of a legal framework on enforcement.

Looking Forward

The UNCITRAL's Working Group II (Arbitration and Conciliation) is considering the proposal for a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation, on the same footing as arbitral awards.

Given the accelerated pace of usage of mediation in countries around the world, it is only a matter of time before mediation in international or cross-border settings matures in terms of institutionalization, regulation and professionalization.

The International Mediation Institute (IMI) at the Hague, Netherlands has already taken steps to enhance professionalism in mediation by introducing Mediator Certification Process, Code of Professional Conduct for Mediators and Professional Conduct Assessment Process. In the Asia-Pacific region, such accreditation and Code of Conduct are being adopted by organisations like the Asian Mediation Association (AMA) and the Singapore International Mediation Institute (SIMI).

But, in the meanwhile, what could be done to offer potential users of international mediation greater confidence in the process?

The Best of Both Worlds: Opening Mediation Windows in the Arbitral House

Many of the Arbitration statutes and procedural rules envisage a provision to facilitate settlement discussions or mediation during the arbitration proceedings. This can be found in numerous jurisdictions including Australia, England, Germany, Hong Kong, Singapore, India, Taiwan and Japan.[6]

Thus contemporary arbitration regulation seems increasingly to be attempting to harmonize different approaches by providing for mediation or other settlement opportunities within the framework of arbitration.

[6] See s 27 of the Commercial Arbitration Act 1984 (NSW), s 51 of the English Arbitration Act (1996), § 1053 of the German Code of Civil Procedure (ZPO), s 33 of the Hong Kong Arbitration Ordinance 1996, ss 16–17 of the Singapore International Arbitration Act 1995, s 30 of the Indian Arbitration and Conciliation Act 1996, articles 44 and 45 of the Taiwanese Arbitration Act, and s 38(4) of the Japanese Arbitration Act (2003). In England see the 2009 Draft Report of the CEDR Commission on Settlement in International Arbitration, which considers the opportunities and risks involved in arbitrators engaging in mediation and other settlement attempts and has established draft rules in relation to the practice: available at www.cedr.com.

But such a facilitated mediation effort by arbitrators acting as mediators, who have not been appropriately trained and credentialed, and thereby lacking appropriate facilitative skills will not understand the nuances of the mediation process. As a result the opportunities for the parties to experience the benefits of mediation and achieve a mediated settlement are severely curtailed.

The best option would be to engage in the process of Med-Arb or Arb-Med-Arb or opening up a mediation window in arbitration, which is recognized as procedurally acceptable.

The mediated settlements may be issued in the form of consent arbitral awards and thereby enjoying the benefits of arbitration's enforceability regime. If the mediation is unsuccessful, the arbitration can continue and the parties are assured of a final outcome in the form of an arbitral award.

There are many process design options that dispute resolution practitioners can employ to avoid potential breaches of procedural fairness. Some examples are as follows:

1. Mediation early in the arbitral procedure with a mediator who is not a member of the arbitral tribunal. If settlement is made, the settlement would be referred to the arbitrator and the arbitrator continues with arbitration and a consent award is passed. If not settlement is made in mediation, it will be reported to the arbitrator and the arbitrator will continue with the arbitral process.

2. 'Med-Arb simultanés' – A process by which an arbitration process runs simultaneously with, and independently from, a mediation process. Generally the parties set a time frame for the completion of the mediation. If the mediation does not result in a mediated settlement then the arbitration will result in an award binding on the parties eight days after the mediation deadline has expired.

Here it is also relevant to note the voting made by Users or Business groups and Legal Advisors at the "Convention on Shaping the Future of International Dispute Resolution" on 29th October 2014 at London, where over 150 delegates from over 20 countries in North America, Europe, Asia, Australasia, the Middle East and Africa participated.

- Over three quarters of users think mediation should be used as early as possible in a dispute's life cycle.

- Almost 80% of users desire arbitration institutions and tribunals to explore, in a first meeting, what other forms of dispute resolution may be appropriate to resolve a given case.

- Over two thirds of users desire cooling-off periods in arbitration proceedings to make a good faith attempt to settle using a mediator.

- Almost all users (92%) wish that mediators, conciliators and arbitrators should be certified and held accountable to transparent standards of conduct set and applied by professional bodies.

- Three quarters of all delegates, with broad agreement in all stakeholder groups, believed that there should be an Investor-State dispute resolution clause in all international investment treaties, which provides for mediation.

So there is a clear demand for mediation at the international dispute resolution arena by the Business Community. It is an opportunity for dispute resolution practitioners to play a more active role in the arbitration house and not leave it to arbitrators alone to open mediation window. They can contribute as dispute system designers and strategists, shaping procedurally fair hybrid processes tailored to specific client needs.

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