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Mediation news

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ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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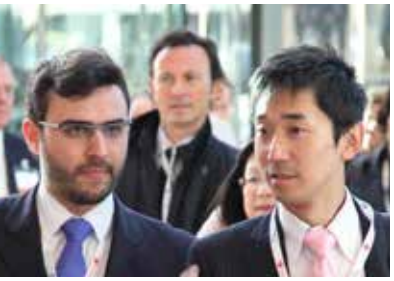


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From the Chair

Mauro Rubino-Sammartano
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Shortly after the many sessions of our Committee in Boston, the Committee Officers selected the topics for next year's Tokyo Conference, which are:

- real estate disputes and mediation, jointly with the Real Estate Committee;
- corporate disputes and mediation, jointly with the Closely Held and Growing Business Enterprises Committee;
- IP disputes and licensing: mediation for dispute resolution, jointly with the IP Committee;
- different advocacy required in mediation, jointly with Corporate Counsel;
- a showcase on disputes resolution: litigation, arbitration and mediation, jointly by such Committees; and
- the Committee's business organisational meeting.

In Tokyo, we will cooperate with other Committees that will contribute with their experiences of substantive law.

We are in contact with the International Centre for Settlement of Investment Disputes (ICSID), the International Mediation Institute (IMI) and the UN Commission on International Trade Law (UNCITRAL), and there is the possibility of joint initiatives, such as on mediation advocacy.

We have not forgotten mediation competitions and we are working on that.

The terms of office of some of your Committee Officers have come to an end. That unfortunately applies to Jane Player and Ana Reyes. Patrick Green and Anna Maxwell, both very busy professionally, have stepped down. We count on our two Senior Vice Chairs, Jil Ahdab and Joe Tirado, as well as Jawad Sarwana and Andrea Maia. John Siwiec should join us as Co-Editor of the newsletter and Cosmin Vasile as Website Officer.

We should also have the opportunity to experience the active support of Gary Birnberg (United States), Oluwole Dawodu (Nigeria) and Cosmin Vasile (Romania).

We also need, in my opinion, a strong team of very learned trainers in negotiations and psychology in mediation.

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Mediator Mentorship Program

The Mediation Committee, in cooperation with the Young Mediators Sub-Committee, is launching a Mentorship Programme to pair its more experienced members with younger lawyers and mediators.

As a first step, we are looking for mentors who would be willing to share their experiences with a mentee. Mentors should have at least seven to ten years' experience in mediation, whether as counsel or mediator. Mentors would likely be paired with at least two mentees for a period of two years.

It is envisaged that mentorships would be fairly informal and left to the mentor and mentee to cultivate. Mentors and mentees would be expected to communicate at least twice per year. Mentors and mentees could determine how best to communicate, whether in person, through scheduled chat sessions, Skype, telephone, email, etc.

During the two-year mentorship, mentors can offer career advice, mediation know-how and help with any other reasonable requests from their mentees.

There will be no fee charged for the Mentorship Programme and the Mediation Committee and Young Mediators Sub-Committee will not be able to provide funding to facilitate the programme.

If you are interested in becoming a mentor, please contact Efeomo Olotu, Vice-Chair of the Young Mediators Sub-Committee, at efeolotu@yahoo.com.

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Freedom, prohibition or obstacles to the settlement of employment disputes through mediation in Argentina

Report on the joint session of the Mediation Committee and the IBA Employment Committee at the IBA Annual Conference in Boston

Tuesday 8 October 2013

Introduction

The possibility of settling labour law disputes has encountered two main hurdles during the last decade, and is involved in a general process where the judicial precedents and legal doctrine are in line with the distinctive pro-employee tone of the labour law regime in place in Argentina.

The first obstacle is more a general set of provisions related to circumstances that affect the free will of the employee to engage in negotiations, and specifically regarding the terms and conditions of a settlement to close a dispute.

On the other hand, there are certain specific circumstances that a labour law conciliator, as appointed by the Ministry of Labour, or even a judge, will consider when determining if the employee has entered into an agreement that affects essential rights that, according to the labour regime, cannot be waived by the worker.

In both cases, the entire agreement will be null and void, and the administrative authority or the labour law judge will reject its approval, a basic condition to definitively close the matter by the applicability of *res judicata*.

We will analyse briefly the conditions that a settlement filed for approval with the administrative authority shall meet, based on the legal doctrine and judicial precedents ruling this type of agreement.

Legal regime

Conciliation as a special mediation procedure for employment litigation

There is a special procedure for conciliation related to employment litigation in Argentina. Technically speaking, employment claims are subject to conciliation (with mediation applicable to civil and commercial matters). This is the out-of-court process for individual claims that involves an administrative agency (Servicio de Conciliación Laboural Obligatoria (SECLO)), which is part of the Ministry of Labour.

Law 24635 was enacted on 1 September 1997 in Buenos Aires and it set forth a regime of mandatory conciliation prior to the judicial instance for employees' claims. This law also created SECLO and the Registry of Labour Conciliators, which depends on the Ministry of Justice. Conciliators are lawyers with expertise in labour law.

The involvement of SECLO pretends to reduce the judicial conflicts through a mandatory mechanism of an administrative instance that may solve a dispute with a final agreement granting the effect of *res judicata*, unless specific circumstances that entitle the worker to have the agreement, approved by SECLO, are undergoing judicial revision.

The worker may file a claim before SECLO by a simple form in which the parties are identified and the claim is explained briefly. Parties are not required to submit any other kind of document or evidence.

The proceeding is simple. Once the claim is filed, a mediator is appointed and the parties are summoned to a conciliation hearing. At this hearing, the worker shall appear personally, especially to reach a conciliation agreement, with a legal counsel or a union representative. The employer shall appear with a legal counsel, and with sufficient power the latter may represent the employer. The conciliator, trained and authorised thereto, has the capacity of reconciling the parties, looking for understanding and approximation of formulas, generating conditions to get communication between the parties and eventually reaching an agreement.

Based on the assumption that the parties are trying to conciliate, the conciliator may call one or more hearings to reach an agreement. The duration of the proceeding is approximately a maximum of two months. The conciliator must close the process no later than 20 business days from the date of the first hearing, but the parties may request an extension of the term for another 15 business days. A standard process of conciliation will have between two and three hearings.

Within this proceeding, there is no *discovery*. All of the information introduced in such hearings is confidential; parties may request to enter into a non-disclosure agreement executed in written form, but the process is confidential per se.

This proceeding may be closed by means of an agreement between the parties, which shall be in writing and submitted to the Ministry of Labour for approval. Once the Ministry of Labour confirms that the agreement meets all of the requirements of section 15 of Employment Contract Law (Ley de Contrato de Trabajo (LCT)), the ministry shall approve it. The approved agreement has the effect of *res judicata* and is judicially irreversible, unless that agreement, and thus its approval, is null.

As of some years ago, the conciliator and SECLO have conducted a more strict analysis of settlement agreements, precisely to avoid subsequent revisions in court. If the Ministry has objections in relation to specific terms, they are remitted to the conciliator for the purpose of amending said terms, if possible, with the parties, and sent back for its approval.

In case there is no agreement, the conciliator grants a certificate that evidences that the conciliation process was conducted and that no agreement was met. In this case, the certificate will include a description and breakdown of the claim. The worker is then entitled to file the claim in court. In case claimants have omitted claims in the filing of their cases with SECLO, they shall file new processes and extend their claims with the items omitted.

Likewise, another alternative is that parties to a labour dispute enter into agreements 'spontaneously', and ratify them at SECLO before an employee appointed for this purpose, who is not a conciliator. The agreement is then subject to an internal revision and, if applicable, is approved. In such cases, the agreement will have the same effect as an agreement reached before a conciliator then approved by SECLO.

It should be mentioned, however, that, in general, these spontaneous agreements are not as safe, for purposes of the approval, as those reached within a process conducted by a conciliator because, in the latter case, while the parties negotiate, the conciliator advances which terms and conditions would be objected to by SECLO.

This structure, with some differences depending on each province, as Argentina is a federal country and provinces are entitled by the Federal Constitution to enact their own procedural laws, is followed by all the jurisdictions of Argentina, and thus in all the cases the agreement so reached will be submitted for the approval of the administrative authority (Ministry of Labour).

The process described above is the one that takes place in the city of Buenos Aires. In the remaining provinces, the local procedures provide the conciliation before an administrative officer, and generally, in the other jurisdictions this is not mandatory for the parties before going to court. However, in all the cases, the agreement obtained must be subject to the approval of the administrative authority.

Conciliation is a mandatory step before appearing in court; if the conciliation was not successful or if the agreement so met is by any specific reason subject to review by the judicial court

An agreement after being approved by SECLO is conclusive among upon the parties. The effect is *res judicata* for any subsequent dispute. The possibility of having a judicial review of the settlement is, in some sense, exceptional and the rationale is that certain aspects of the agreement – in general, it refers to circumstances that are out of the agreement itself – have been affected. For example, in a case where the worker can prove that he or she was forced to enter into the agreement; if the terms and conditions of the settlement are in violation of the *labour public order,* that is, items of the due severance are materially reduced or omitted by means of a settlement; and the appointment of the legal counsel to the worker by the own employer (an old common practice in labour conciliations some years ago). In all the cases, the court decisions resulted in the invalidity of those administrative agreements, and the subsequent payment of the balance in the severances claimed by the workers.

There is also a conciliation step within the judicial proceeding after the parties have filed their claim and response, and evidence is proposed to the court

During the judicial proceeding, the judge may call the parties to a conciliation hearing. This conciliation step is conducted by the judge; no conciliator is appointed; and in case the parties settle the dispute in that hearing, the agreement entered into by the parties must also be approved by the court. Generally speaking, courts always call for a conciliation hearing before entering into the evidence stage; the reason is that evidence will bring costs and expenses to the parties, such as expert witnesses, more involvement of the legal counsels and the right to higher fees to be established by the judge when rendering the judgment on the case, etc.

In addition, since the approval is obtained from the court and not SECLO, the possibility that any of the parties file for a declaration of nullity of the agreement is very rare, or almost impossible. The judge, as part of the analysis prior to deciding on the approval, will have examined facts and determined if the terms and conditions of the agreement are in accordance with the labour public order.

In any event, any of the parties may request, at any time of the judicial proceeding, the appointment of a conciliation hearing.

As was mentioned above, the judge, *ex officio*, or any or both parties may file a petition to the judge, to appoint a conciliation hearing. Also the parties may file, spontaneously within the judicial proceeding, a settlement agreement and request the approval by the court. The formal requirement is that the worker ratifies his or her signature in court before it commences with the analysis of the agreement filed by the parties.

The judge may admit or deny the petition to appoint a conciliation hearing, considering among other circumstances, the number of hearings already held within the process. It is also customary that, if according to the evidence produced it is possible that the worker will be defeated, the court calls a conciliation hearing. The intention of this hearing is to move the parties to settle the case and avoid the worker experiencing a negative ruling.

It is important to mention that the appointment of the hearing may not suspend the terms of the proceeding, unless expressly indicated by the judge and said suspension is requested by both parties.

Thus, even when a party may pretend to abuse this right by requesting a conciliation hearing just to delay or avoid trial dates already fixed, this possibility is rarely incurred by the parties to a judicial case, as the judge would surely consider such an attitude when deciding on the admittance of the hearing, and even when deciding on the case.

Mass claim or a trade union dispute

In Argentina, the class action was admitted by a Federal Constitution after its amendment in 1994, but is still pending regulation. Trade union disputes have a particular process to mediation by means of a mandatory conciliation process that parties must exhaust before taking any measure of direct action. This process is provided by the national regime for the solution of collective conflicts (Law 14786); that the parties shall attend within 15 administrative days, extendable for another five administrative days, and where there is an active participation of the government. It is conducted by an officer of the Ministry of Labour and appoints him to mediate in

this dispute. In case the conciliation is not successful, arbitration can also be conducted, if so agreed by the parties. During the last few years, by means of formulas of conciliation provided in the collective bargaining agreements, more flexibility and prior steps of negotiation have been conducted before reaching the mandatory conciliation of the Ministry of Labour.

As formulas of conciliation, the clauses of 'social peace' should be mentioned, which provide commitments by the parties to maintain the labour relations in reasonable, stable conditions during the validity of the agreement.

From a conventional standpoint, the existence of social peace provisions (commitment to refrain from opening a conflict within a certain term) have the effect that strikes brought during the validity of a bargaining agreement and for causes treated therein are considered illegal, unless there is a significant change to the economic and social situation under which such an agreement is in place; a circumstance by which the provision *rebus sic stantibus* would be applicable.

Said clauses are included in the collective bargaining agreements and salary agreements, but they shall be approved by the Ministry of Labour to have effects *erga omnes*. Then court revision would take place in case those clauses are in violation of constitutional rights or another collective bargaining agreement that is more beneficial for the workers.

One example of this formula is the wage agreement of 2007 between a union for hierarchical and professional personnel for oil and gas activity in Patagonia in the southern region of Argentina, where the parties agreed on a social peace bonus of five per cent upon the wages calculated on a specific formula indicated therein granted on a non-remunerative basis as of 1 September 2007 for the maintenance of conditions for the social peace and normal performance of labour activity.

Law 14786 provides the mandatory conciliation. Failure of the parties to submit to this process results in the illegality of the behaviour assumed by the parties, and so there is responsibility in a double sense: (i) in the relation between the union, company and labour administrative authority for the omission by the conflicting party to inform the labour authority of the existence of a labour conflict; and (ii) in the collective relation between the union and the company for conducting direct action in violation to the provision that obliges the conflicting party to undergo a conciliation process. In this latter case, the violation will affect the individual relations if said direct action brings any modification to this individual relation. An example would be the illegality of a strike or a lockout. The illegality affects the right to abstain from rendering services, in the case of a strike, or the work stoppage, in the case of lockout, and such a violation will be subject to the scrutiny of the judge on an individual basis.

In other words, the law grants the right to use the conciliation service provided by the government and at the same time imposes the obligation to report the labour dispute and submit to the conciliation process.

If the parties are not able to reach an agreement, the Ministry of Labour will propose a settlement formula and is entitled to conduct an investigation, collect information from public or private offices or decide on any measure to obtain a better understanding of the conflict.

If the formula proposed, or even the suggestions brought in replacement of such a proposal, are not accepted, the conciliator will invite the parties to submit the dispute to arbitration. If such an invitation is also rejected, the conciliator will prepare and publish a report on the conflict, causes, a brief description of the negotiation conducted, the formula of conciliation proposed and the party that proposed (if not the conciliator), accepted and rejected the formula.

The purpose of this publication is precisely to make public the activity conducted by the administration, the dispute and the eventual effects of such a conflict.

If the parties accept the conciliation formula, they must sign an agreement with the name of the arbitrator, agenda of the negotiation, if the parties proposed evidence in the case and, if so, the terms for its production and the terms under which the arbiter shall decide. The arbitrator's decision shall be issued within the term of ten business days, which can be extended, and the appeal is only admissible in case of nullity.

During the process of conciliation, direct action is not conducted. The strike or voluntary and intentional reduction of labour activity, below the normal levels, determines the reduction or loss of salary if said attitude is maintained after the notice received from the applicable governmental authority.

Instances that could lead to SECLO not granting its approval to a settlement agreement

SECLO may not approve the conciliation agreement because of formalities not followed within the process, such as the case where by means of the agreement met there is not 'a fair re-establishment of the rights and interests of the parties' from section 15 of the LCT, with the latter being the main purpose of the protection provided by the labour public order. This principle implies the minimum rights of the worker that cannot be waived or affected by an agreement.

Any agreement by the parties is required to be approved, even by SECLO or by a judicial ruling, to be under the umbrella of *res judicata*.

Now, if the agreement is not approved, in the first instance it is important to consider if the denial is based on a formality omitted by the parties, that is, objections to the legal representation/power of attorney of one party, and so they will try to amend and file it again to obtain the approval.

If the denial was based on any other circumstance, the parties may enter into a new negotiation and, if agreed, will also file a new petition to obtain the approval. Otherwise, the claimant is entitled to go to court with no further requirements.

It is important to mention that under certain circumstances conciliation is excluded, such as in the case of protective preliminary measures, that is, attachment/size of assets; anticipated production of evidence prior to the filing of the claim; claims against employers under financial distress (composition of creditors process or bankruptcy); claims against the federal, provincial or municipal governments; and claims from workers with no legal age (where the public defendant must be involved in the process).

Waiver of labour law rights by workers

Technically speaking, the employer is not released from criminal prosecution in the case of non-compliance with the payment obligations with the government, such as the omission of employer contributions to the social security system, even when a settlement is reached under the auspices of SECLO. However, in practical terms, once an agreement is reached by the parties and approved by SECLO, there is a de facto release of the employer. In general, the local tax authorities do not prosecute employers for their omission to pay.

It should be mentioned that the agreements reached in SECLO never indicate the admittance of the facts or rights of the other party. The terms and conditions of the proposal and acceptance of the agreement are indicated to take place, 'only for purposes of reaching a settlement'.

The conciliator

The conciliator must be a lawyer with proven expertise on labour law, registered with the National Registry of Labour Conciliators (Registro Nacional de Conciliadores Laborales (RENACLO)) and appointed by the Ministry of Labour for each specific case. Only a person appointed by the Ministry of Labour can act as a conciliator. Otherwise, the settlement agreement is not valid. For such a purpose, and among other requirements, conciliators shall provide evidence of their seniority and experience. In addition, they shall attend and approve the training course of lectures by representatives of the Ministry of Labour.

Conclusion

Employment conciliation has been effective in resolving employment disputes. We can estimate that approximately 50 per cent of the cases are settled. I consider the success of this relatively new alternative for the dispute resolution is, in first instance, the fact that conciliation has been, from the very beginning, a mandatory step before going to court. The criticisms that, years ago, were raised for this reason have been silenced by the understanding that there was no other way to obtain the acceptance of this alternative, which at that time, was completely unknown.

While labour law conciliations faced uncertainties in the past once judicial review was admitted in several cases, now the advice from counsels, and even from conciliators, has been properly adjusted to avoid the possibility of such a judicial revision. In addition, the cost of the process is far from being substantial vis-à-vis the amounts generally involved in the process, which also has been a real incentive to move the parties to settle disputes.

Lawyers without borders: protecting children and women's rights in mediation of family law matters

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Report on the Family Law and Mediation Committee session, held in Boston

Monday 7 October 2013

Introduction

In 2010, a ward of the British court was removed by his natural parents from the United Kingdom, which ratified the Hague Convention on Protection of Children and Cooperation with Respect to Inter-Country Adoption (the 'Hague Convention'), and taken against his wishes to Nigeria, a non-Hague Convention country. It is important to note that one of the aims of the Hague Convention is to prevent the abduction, sale of or traffic in children, and invariably and undeniably protect the best interests of children.

The English case in the Family Court Division of the High Court of Justice

One of the leading matrimonial lawyers of our time, a committed and conscientious female lawyer in child abduction cases, was my instructing solicitor in England and briefed my law firm in Nigeria to see that the ward was returned to the child's country of choice of residence; that is, the UK. This is an arduous task, especially in situations where one of the parents is resident in the UK and the other in a foreign jurisdiction, and one of whom is not cooperating, as fully captured by Ramby de Mello,[1] where the foreign partner would usually refuse to return the child to the UK even in the face of court orders to the contrary. Returning the child was difficult, yet a task that had to be done, so we set to overcome the challenges, determined to attempt to succeed under exceedingly difficult conditions in Nigeria.

First, there was a successful application in August 2010 before Pamela Scriven QC, Deputy High Court Judge in chambers at the High Court of Justice of England and Wales, Family Division ('High Court') brought by the child's next friend, our instructing solicitor, wherein the court ordered inter alia that the child: 'shall remain a ward of this Honourable Court during his minority, namely until he reaches 18 years of age.' The orders also stated as that:

- the child's natural parents, one of whom, his mother, resident and remained resident in the UK and his father, a Nigerian, return or cause to return the child to the jurisdiction of England and Wales;
- the defendants be forbidden from taking any steps to cause or permit the child to undergo any ceremony or betrothal of marriage, whether civil or religious, in the UK or elsewhere outside the UK until such time as the order is varied or alternatively discharged;
- the defendants be forbidden to take any steps to force or to attempt to force or to cause or otherwise permit the child to enter into a marriage whether civil or religious in the UK until such time as this order is varied or alternatively discharged;
- the defendants be forbidden to use or threaten violence against the child until such a time as this order is varied or alternatively discharged;
- the second defendant, the child's mother, be prohibited from leaving the jurisdiction of England and Wales until such a time as this order is varied or alternatively discharged;
- upon the child's return to England and Wales the defendants shall be prohibited from removing the child from the jurisdiction of England and Wales without the specific permission of the court;

- a penal notice attached to the preceding paragraphs of the order stated above;
- permission granted to the plaintiff, the child's next friend, to serve facsimile, scanned or emailed copies of the proceedings personally upon the natural mother of the child; and
- permission granted to bring the notice of the proceedings to any and all administrative or judicial authorities in England and Wales and Nigeria as may assist in securing the return of the child to the jurisdiction of England and Wales.

In anticipation that this was not going to be too complicated a process, the child's next friend in the UK had tracked her ward to a school in Nigeria where the ward, aged 17 years old, struggled to escape from his abductors after pleas for his release proved abortive.

Getting abducted children back from non-Hague Convention countries

A problem in Britain identified by Ramby de Mello[2] is:

> '… that when British citizen children are forcibly taken or kept by one parent in a non-Hague Convention country against the wish of the other British citizen parent resident in the UK who wants the children to be brought up in the UK. The parent in the non-Hague Convention country will simply not return the children to the UK, despite the local family courts in the foreign country granting custody to the parent who is resident in the UK.'

Our instructing solicitor supported mediation as the way to resolve the problem and to de-emphasise litigation at the initial stages, when she introduced us to the school in November 2010 as the lawyer agent to take the ward in a way that was amicable; but that was not to be. Rather than allow us access to the ward, the school took us through several twists and turns and thereby compelled us, again following instructions, to file a lawsuit to register the two court orders of two judges of the High Court, Mr Justice Moylan and Mrs Justice Theis, before the Chief Judge of the Federal High Court of Nigeria ('Federal High Court'), who in consideration of an application we filed under section 4 of the Foreign Judgments (Reciprocal Enforcement) Act, Laws of the Federation of Nigeria 2004, the Child Rights Act 2003 et al, granted certain orders in the suit of the child by his next friend against the school on 3 December 2010 as follows:

- leave of court to the applicant for the registration of the orders of the Royal Courts of Justice, UK made by Mr Justice Moylan as of 11 November 2010 and Mrs Justice Theis as of 18 November 2010 in Case No FD10P01834;
- leave of court to serve the respondents collectively and or individually with the registered court orders by DHL courier service to be dispatched by the applicant's solicitors to the respondents' last known address;
- leave to the applicant to enforce the said registered orders of court forthwith and certainly by the 8 December 2010 when the committal proceedings against Miss 'L', the ward's natural mother, and others will be taken and determined by Mrs Justice Theis of the High Court; and
- the respondents ordered to attend court on the next adjourned date, in the company of Master 'E', a ward of the High Court, unlawfully being detained by the respondents, and to release him forthwith to the applicant's solicitor for the purpose of returning him to the UK.

The case was adjourned to 13 December 2010 for a report of compliance.

On 6 December 2010, the above court order of Justice Auta had been served on the school by DHL. The school was working with the ward's father in Nigeria to render nugatory the Federal High Court's order. A petition surfaced suddenly from the father's solicitor acting on behalf of his client to the school with instructions not to release the ward. They went before another judge in the High Court of Delta State, Sapele Judicial Division, and obtained ex parte orders on 10 December 2010 in a matter between the ward's natural parents, that is Mr 'J' as plaintiff and Miss 'L' as defendant, in these terms:

> '… In the light of the above, taking the best interest of the child as directed by section 3 of the Child Rights Law, 2009 of Delta State of Nigeria as a paramount consideration, I also take into consideration that no order of [the] High Court of England has been produced in this court. I hereby make the following orders: an order of interim injunction is hereby to issue restraining the first defendant by herself, agents, privies, servants and other labourers from repatriating the said Master Edirin Onojeta-Idogun to the jurisdiction of the High Court of England and Wales pending the hearing and determination of the motion on notice for interlocutory injunction…'

Faced with two conflicting court orders and the respondents in our case not being ready to bring the ward to Abuja for the purpose of his return to the UK as ordered, the ward, anxious to return to England, escaped from his abductors, but they lay in ambush for him at the International Airport, Abuja, assisted by Nigerian immigration officers, and thereby frustrated his movement to return. Once the ward was again with his father, he was removed from school to forestall the possibilities of further escape and kept at an undisclosed location in Delta State, thereby violating provisions of the Child's Rights Act 2003 (CRA), the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child 1990. The ward was 17 years old and the CRC defines a child as any human being below 18 years old. Note that some of the basic rights of a child include the right to: life; identity (name); dignity; freedom of association and peaceful assembly; freedom of movement; freedom of expression; privacy; right to survival and development; leisure, recreation and cultural activities; free, compulsory and universal primary education; health and health services; protection against harm and exploitation and freedom from every form of discrimination.

Furthermore, section 3 of the CRA stipulates that Chapter IV of the Constitution of the Federal Republic of Nigeria on fundamental rights shall apply in safeguarding the rights of children. We again approached the Federal High Court in the jurisdiction where the ward was prevented from travelling for breach of his fundamental right of movement and the dignity of his person. We relied heavily on sections 33, 34(1), 35, 36, 37, 39, 40 and 41 of the Constitution of the Federal Republic of Nigeria 1999, as amended, the CRA and the CRC.

As though providentially, in the course of the court proceedings, mediation was initiated by the father and arrangements concluded for the safe return of the ward to England where he lived happily thereafter.

Judicial collaboration is a *sine qua non* in managing trans-border enforcement of court orders, especially where the legal or procedural matrix connects to a non-Hague Convention country, such as Nigeria, where the making of judicial pronouncements in the matter aided the process of the return of abductees to their country of choice of residence. Therefore, the active involvement of a foreign judge, that it, the Federal High Court, was a necessary tool in facilitating the child's return. We invited the court in pursuance of section 251(1)i of the Constitution of the Federal Republic of Nigeria 1999, which confers exclusive jurisdiction on the Federal High Court in matters of immigration and emigration.

We also sought reliance on sections 11, 15, 19(1), 95(1), 104(2), 107(b) and (c) and 108 of the Sheriffs and Civil Process Act Laws of the Federation of Nigeria 2004 and the Foreign Judgments (Reciprocal Enforcement) Act LFN 2004 in navigating the terrain to enable, register and execute the court orders and judgments for England and Wales.

Children's perspectives and preferences in decision-making processes are non-negotiable. Hence judges must meet with them or read from them before they hand in decisions affecting children in family disputes and resolution.

Article 12 of the CRC creates an obligation for governments to ensure that children are provided with an opportunity to express their views about decisions that affect their wellbeing. Yet, certain tensions remain between those that believe children need protection and those that believe children have rights and need to be able to exercise their rights, particularly during family disputes that involve their wellbeing. Most children want to be asked their opinions about the plans being made for them.

In summary, children want a voice, and the CRA have given them a strong voice and we owe every child a duty to ensure that they are heard.[3]

Dissolution of marriage and division of matrimonial property: protecting women's rights

In a celebrated case in point, *Prest v Prest*,[4] a High Court judge in England in 2011 had ordered Michael Prest to pay his former wife Yasmin Prest £17.5m out of his total wealth, estimated at £37.5m. Mr Prest's money was tied up in offshore companies and some of those companies owned properties in London, one of which was the former matrimonial home, a house in Little Venice, West London worth £4m. Justice Moylan ordered the companies to transfer those properties to Mrs Prest in part payment of her £17.5m. The decision was appealed. Although the issue split the Court of Appeal, the Supreme Court did uphold the divorce settlement in June 2013.

Within a period of three years, a case had begun at the High Court and was decided in

the Supreme Court; other jurisdictions, for example, Nigeria, ought to emulate these remarkable judicial quick strides.

The English court did rely on section 24(1)(a) of the Matrimonial Causes Act 1973, that in granting a divorce the English courts may order a party to the marriage to transfer to the other party: 'property to which the first-mentioned party is entitled, either in possession or in reversion'.

The crux of the case is that Mr Prest did not own these properties; his companies owned them. The companies were owned by him, so he had sole control over them and was entitled to them, said Justice Moylan; that was the word used in the statute. Describing Justice Moylan's reasoning as 'heretical', the Court of Appeal, per Justice Rimer held that: 'a one-man company does not metamorphose into the one man simply because the person with a wish to abstract its assets is his wife.' Justice Patter agreed with him and held that Justice Moylan was wrong because shareholders have no interest in, or entitlements to, company assets. Justice Thorpe, a senior member of the three-member panel and a family court judge, defended Justice Moylan's decision, in tandem with previous decisions of the family court; with Justice Moylan upholding the fundamental rights of women and children in family law matters.

When the Supreme Court ruled in June 2013, the most senior member of the seven-person panel, Lord Sumption delivered the lead judgment and found a theory that the companies' properties in London were held on trust for Mrs Prest, even though they were owned by companies that were controlled by Mr Prest, those companies must now transfer the properties to her.

What was Mrs Prest referring to when at the close of verdict she said: 'None of this would have been necessary if Michael had been sensible and played fair'? Playing fair and being sensible could imply mediation of family disputes, negotiations and settlement of property with the petitioner rather than being unyielding and recalcitrant. Had one of the parties initiated mediation and the other accepted it, the matter may not have reached the stage of judicial determination.

The benefits of mediation are that it:

- is less costly, less rancorous and not subject to media attention, unlike litigation;
- is flexible in arriving at a satisfactory arrangement, mutually acceptable to the parties;
- retains mutual trust based on discovery of new common grounds during mediation;
- sustains friendship; parties agree to disagree as friends and not litigating adversaries;
- avoids long drawn out parental conflict, which has a long-term, negative impact on children of all ages;
- is time efficient; mediation saves communication, whereas litigation and arbitration do not; and
- is confidential; the parties control it, not court or attorneys as in litigation.

By way of quick emphasis, sections 11, 12, 13 and 14 of the Matrimonial Causes Act, CAP M7 Laws of the Federation of Nigeria, 2004 intended to inject mediation when it made copious references to one of its twin-pillars, conciliation, as stated here:

'11 (1) It shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may –

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;

(c) nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.

(2) If, not less than fourteen days after an adjournment under subsection (1) of this section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the judge shall resume the hearing, or the proceedings may be dealt with by another judge, as the case may require, as soon as practicable.

12 Where a judge has acted as conciliator under Section 11(l) (b) of this Act but the attempt to effect a reconciliation has failed, the judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings; and, in the absence of such a request, the proceedings shall be dealt with by another judge.

13 Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part of this Act shall not be admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorised by any enactment, federal or state, or by consent of parties, to hear, receive and examine evidence.

14 A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorised in Nigeria to take affidavits, an oath or affirmation of secrecy in accordance with the form in the Second Schedule to this act.'

Section 72 subsections 1, 2 and 3 of the Matrimonial Causes Act CAP M7, Laws of the Federation of Nigeria (LFN) 2004 state that:

'The court may, in proceedings under this Act, by court in order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application for the benefit of all or any of the parties to, and the children of, the marriage of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements on the parties to the marriage, or either of them.

The power of the court to make orders of the kind referred to in this section shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.'

Although section 72(1) of Matrimonial Causes Act LFN, is similar to section 24 of the Matrimonial Causes Act 1973 in Nigeria, the above provision exists on paper only as no Nigerian in Nigeria has yet enforced the law. However, as long as women remain in marriages, Nigerians should consider prenuptial or postnuptial agreements, especially as our law refers to these provisions. Hence, I will commend to the International Federation of Women Lawyers in Nigeria ('FIDA-Nigeria'), the Nigerian Bar Association (NBA) Women Forum and other gender groups to start the sensitisation campaigns towards keeping the future of our women and children financially secure in the unlikely event of death, divorce or judicial separation.

In a recent case, I testified before a United States court via Skype and was cross-examined rigorously by a strong female American attorney. The petitioner, a Nigerian lady resident in the US, sought for the dissolution of her marriage to a Nigerian soccer star. I gave expert opinion on when a marriage is valid under our Matrimonial Causes Act. In the end the petitioner got what no Nigerian judge would have awarded her: some real estate of note owned by the respondent abroad. She began with a lawsuit and ended by mediation initiated by the respondent and his counsel after my written and oral testimony was made under oath and, when tested under cross-examination, remained unshaken. No other expert opinion was called thereafter and the family dispute was, with respect to proprietary rights of parties and the rights of the child of the marriage, resolved.

Notes

1 Ramby de Mello, 'Getting abducted children back from non-Hague Convention countries' (2013) IBA Family Law Newsletter Issue Number.
2 *Ibid.*
3 Robert E Emery, 'Children's voices: listening – and deciding – is an adult responsibility' (2003) 45 Arizona Law Review pp 621–627.
4 2013 UKSC 34

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Settlement through mediation of insured claims in Africa: benefits and possible challenges

Thursday 10 October 2013

Introduction

Due to ever increasing domestic and foreign investment in Africa, there is more pressure for a modernised, fair and organised dispute settlement mechanism within the continent. There is no doubt that Africa is reputed to be buoyantly blessed with enormous mineral and human resources and as such, is seen as a large viable market for foreign investment. Naturally, in such an environment there is bound to be competition from organisations and individuals, both local and foreign, in their bid to tap into this glut of wealth and opportunities. As a result, people are bound to take risks in order to have an edge over their competitors, and in the complex field of risk management, insurance has become the universally recognised and accepted means of rescuing, managing and cushioning such risks taken by investors and individuals. With this in mind, no nation or continent can survive without the active support of a disciplined and viable insurance industry.

In the last ten years, insurance in Africa has grown to become an industry that has gradually made an impact in the investment and risk management sector of the continent. According to the African Insurance Organisation (AIO), the umbrella body for insurance organisations across the continent, the insurance market in Africa raked in premium income worth about US$66.3bn at the end of the 2011 financial year. This figure, according to the AIO, translates to 1.66 per cent of total insurance premiums made by insurance operators across the world. Some might argue that this is relatively small when compared to other continents; however, given the effect of the global meltdown, the underdeveloped nature of the industry in most parts of the continent and the fact that the industry has been growing at a moderate pace relative to other sectors of the economy, there is no doubt that from the figure above, the insurance industry in Africa has the inherent potential of becoming a major player in shaping the economy of the continent in the near future.

The African economy is set to go from strength to strength, with the continent outpacing the global average gross domestic product (GDP). The major challenge to this growth is when there is a dispute and how it can it be resolved in such a way that it does not affect the flow of business and investment in the insurance industry and other sectors of the economy. Africa is generally known for its adjudication system for resolving disputes; however, businessmen and foreign investors generally tend to be wary about Africa's national judicial systems, which are often beset by corruption, undue delay, costly procedures and lack of efficient enforcement of the law. From this point of view, it can be argued that mediation as a form of alternative dispute resolution (ADR) serves as a viable option in the settlement of commercial disputes and presents the best possible way of resolving insurance disputes between two or more parties, with concrete effects.

Mediation is seen as an intervention between disputing parties for the purpose of maintaining and fostering a healthy relationship between them. Mediation is gradually becoming the most preferred ADR in the settlement of commercial and civil disputes across the globe due to its salient features. For example, in China, mediation has become the most frequently used ADR.

According to the Supreme People's Court of China, China's highest court, around 67.1 per cent of the cases brought to its courts were settled through mediation in 2011. Australia has even gone further by applying mediation to its civil appeals. In France, any settlement agreement reached through mediation may be rendered enforceable by a court order and will therefore have the same legal force as a judgment of court. Some major international commercial contracts require parties to attempt mediation before they become entitled to commence any other form of dispute resolution process. Some jurisdictions, such as the United Kingdom, have made it mandatory that an agreement that obliges parties to attempt mediation before invoking other forms of ADR would be upheld and enforced by the court if one of the parties breaches this agreement. The case of *Cable and Wireless Plc v IBM United Kingdom Ltd*[1] is a clear example of this.

For a successful mediation, the parties involved need to be committed to the process. Mediation adds structure to simple negotiations between the insurance company and the insured/policyholder. The primary purpose of a mediator, the person in charge of the mediation proceedings, is to create an environment that results in the settlement of the dispute between the parties. It should be noted that the parties in dispute are the authors of their own fate; you cannot force an insurance company to go to mediation, neither can you compel a policyholder to settle through mediation.

It is pertinent to note at this point that mediation as a form of ADR is not a new way of resolving commercial disputes in Africa. What is new is the extensive promotion and proliferation of the ADR models, wider use of court-connected ADR and the increasing use of ADR as a tool to realise goals broader than the settlement of specific disputes. The increasing importance of mediation in the settlement of insurance disputes in the African context is a reflection of the global growth in ADR and the preferred methods of resolving disputes in business transactions generally. Mediation, called Ubuntu within the southern parts of Africa, as a form of dispute resolution that was historically an integral part of the customs and tradition of the African society. It was seen as the traditional means of solving disputes arising from a breach in a relationship between two or more parties. Through mediation, parties could arise from a dispute resolution process and maintain their relationship. In Africa, some communities still prefer to settle their disputes through mediation and other models of ADR rather than going to court. A good example is Kenya, where more than 60 per cent of its population prefer to settle their disputes through traditional ADR rather than the court. Since the turn of the century, there has been a surge in the participation in ADR by less developed countries. It is therefore important for legal practitioners in developing countries to be aware of the issues and problems involved in the various models of ADR.

Salient features of mediation

Before proceeding to the benefits and challenges facing mediation in the insurance industry, it is important to note what makes mediation different from other models of ADR. The salient features of mediation are discussed below.

Mediation is a non-binding procedure controlled by the parties

A party to mediation cannot be forced to accept an outcome that it does not like. Unlike an arbitrator or a judge, the mediator is not a decision-maker. The mediator's role is rather to assist the parties in reaching a settlement of the dispute. Indeed, even when the parties have agreed to submit a dispute to mediation, they are free to abandon the process at any time after the first meeting if they find that its continuation does not meet their interests. However, parties usually participate actively in mediation once they begin. If they decide to proceed with the mediation, the parties decide on how it should be conducted with the mediator.

Mediation is a confidential procedure

In mediation, the parties cannot be compelled to disclose information that they prefer to keep confidential. If, in order to promote resolution of the dispute, a party chooses to disclose confidential information or make admissions, that information cannot be provided to the other party or anyone outside the context of the mediation. Mediation's confidentiality allows the parties to negotiate more freely and productively, without fear of publicity.

Mediation is an interest-based procedure

In court litigation or arbitration, the outcome of a case is determined by the facts of the dispute and the applicable law. In mediation, the parties can also be guided by their business interests. As such, the parties are free to choose an outcome that is orientated as much to the future of their business relationship as to their past conduct. When the parties refer to their interests and engage in dialogue, mediation often results in a settlement that creates more value than would have existed if the underlying dispute had not occurred.

Mediation creates greater party autonomy

In mediation, there is an opportunity for relationships damaged or destroyed by the dispute to be repaired or restored, as it allows parties to speak for themselves and not through third parties, as in court litigation and arbitration. This distinct feature has been regarded by jurists as the greatest advantage of mediation, as it makes possible the continuation of the business relationship because the dispute is settled with consideration for the needs of both parties.

Benefits of settling insured claims through mediation

Due to it peculiar features, using mediation as a dispute resolution mechanism to settle insured claims offers the minimum risk for the parties and generates significant benefits. Indeed, one could say that even when a settlement is not achieved, mediation never fails, as it causes the parties to define the facts and issues in dispute and thus prepares the ground for subsequent arbitration or court proceedings. There are many advantages of mediation over other ADR models or court litigation and some of these are discussed below.

A faster way of settling insurance disputes

Settlement of disputes through mediation in Africa typically takes days or weeks (or in very complex cases possibly months), provided parties are committed to it, unlike arbitration and litigation. For a simple insurance dispute, it is advisable for parties to use mediation, as it allows a more reasonable timetable for resolving disputes between parties.

Less expensive

Mediation is cheaper than arbitration and vastly less expensive than any typical court litigation. As an insurer or policyholder employing a mediator to settle an insured claim costs significantly less than employing a lawyer to commence an action in court, and combined with the much quicker turnaround, you will be paying less money over a shorter period of time. In addition, mediation can protect parties from some of the extra problems associated with court litigation and arbitration, such as punitive awards, cost of instituting the action, etc. It is not unusual to see multiple parties in mediation with the expectation that several individual claims may be settled in a single mediation, thereby saving costs. For example, insurance claims of a group of people involved in the same accident, like a plane crash, can be settled in one mediation process.

Fewer formalities

The informality of mediation allows the parties to be more engaged than they would be in a court-driven process with an abundance of rules and procedures designed to regulate the process and guide the conduct of third parties' advocates. Accordingly, as the mediator deals directly with the parties, the mediator can focus the attention of the parties on their needs and interests rather than on their stated positions.

Confidential

Most court-driven processes in Africa are public, whereas in mediation, the process is strictly confidential. This means that there are no records or transcripts and any evidence introduced during mediation cannot be used in any subsequent proceedings.

Preserves relationships

One of the most overlooked benefits of mediation is that it can help preserve relationships between the insurer and the policyholder, which might have been destroyed or damaged if parties had resorted to litigation. This is due to the fact that mediation is a collaborative process rather than an adversarial process. Mediation also helps parties to communicate on a personal level by acknowledging hurtful core feelings, while promoting and facilitating dialogue that allows both parties to air their grievances and disappointments.

Greater flexibility and control

Mediation generally allows the parties to be in control of proceedings, unlike litigation and arbitration. This means that the parties have much greater control in negotiations and settlement outcomes, unlike litigation and arbitration.

Better results and greater compliance

For all the reasons above, parties generally report a better outcome as a result of mediation than they do from a lawsuit. Also, because there is no winner or loser, no admission of fault or guilt and the settlement is mutually agreed upon, parties tend to comply with the settlement agreement.

Easier preparation

The preparation for mediation is far simpler than is required for arbitration or litigation. In fact, in mediation, attorneys are not necessary, but may participate at the request of one of the parties in dispute. Furthermore, procedures such as discoveries and interrogatories are limited in mediation, which usually means that parties' attorneys, if involved, will rarely pursue the burdensome fishing expeditions that can occur in ordinary litigation and even arbitration.

Venue of choice

Mediation generally can be held anywhere, unlike litigation and arbitration where parties are restricted to the choice of venue.

Reasons why insurance players in Africa do not resort to mediation

As with all dispute resolution models there is simply no accurate and perfect system; some models are only suitable for certain disputes. Some of the perceived challenges that may arise to restrict the settlement of insurance disputes through mediation and the reasons behind its non-recourse in Africa are discussed below.

Lack of a definitive result

There is no guarantee that the insurer or policyholder would agree to a peaceful settlement of the insurance claim. The parties can attend the mediation process and still come away without a settlement agreement. If the relationships between the disputing parties are already complex going into the mediation and remain so during the mediation, the lack of perceived reasonableness can serve to separate the parties further.

Mediation can be used as a delaying tactic

Despite the advantages of mediation (it is not expensive and less formal) some parties can attend mediation only for the purpose of delaying the party that is seeking an immediate settlement of the dispute. This delaying tactic is used by insurance companies that do not intend to pay policyholders the insurance claim or might want to pay less than the agreed compensation. The longer they delay the payment, the easier it is to convince and cajole the policyholders to accept whatever they are offering as compensation.

Mediation is not suitable for complex and sophisticated insurance disputes

Where the subject matter of the dispute between the parties is quite complex and sophisticated, mediation is not advisable, as an inexperienced mediator will only worsen the dispute between the parties rather than reaching an amicable settlement.

Lack of requisite authority

A mediation proceeding that does not include the person with the authority to be bound by the settlement agreement will not achieve any purpose; it would just be a waste of time and money. A simple solution is to ensure at the beginning of the mediation that every person whose authority is necessary for there to be a settlement agreement should be present or the person's written consent must have been obtained for that purpose.

Neutrality of the mediator

This might be regarded as an advantage, but it is also a disadvantage in the sense that the mediator cannot advise either party personally. The parties must still rely on their attorneys to be fully informed of their options and whether it would be in their interest to sign the settlement agreement in those circumstances.

Enforceability of the settlement agreement

This is one of the major challenges facing the development of international mediation and, in fact, constitutes the main reason why most insurance players do not have faith in this ADR model. As mediation is voluntary and consensual, that is, disputing parties must willingly agree to mediate, an insurer cannot be forced to accept and sign a settlement agreement that it is not in its favour. How do you enforce the settlement agreement or make it binding on a party who refuses to sign it? Most legal writers have advocated that the only way to get the settlement agreement enforced and binding is by going to court, but does this not defeat the whole purpose of having mediation as an alternative to litigation in the settlement of disputes?

Lack of coercive authority and power

Considering the fact that a mediator, unlike a judge, has no power or authority to compel disputing parties to settle or abide by the settlement agreement, most insurance players in Africa do not believe in its purpose to settle their disputes conclusively; they prefer to go to court, where parties can be compelled to obey the orders of the court. In addition, in mediation, parties are not compelled to disclose information. The party seeking disclosure must rely on the other party's good faith. Where the party fails to disclose, the mediator has no power to compel the party to do so. Furthermore, parties cannot be forced to settle. Where an insurance dispute involves restraining one of the parties from doing an act, mediation would not be the correct vehicle to get such an injunction or restraining order, as a mediator cannot issue an order for this purpose.

Lack of good faith between parties

Mediation is based on trust and sincerity of parties to the mediation process. Disclosure of sensitive information and truthfulness in communication between parties depends on good faith. It is natural for parties to keep certain information to themselves especially if that information would be unfavourable to their cause if disclosed.

Parties are free to withdraw at any stage

As mediation is voluntary, either party can withdraw at any time during the process without any consequences. If one of the parties feels that the mediation proceedings are going in a direction not favourable to the party's position, it can withdraw voluntarily from the proceedings without being sanctioned.

Ignorance and scepticism about mediation

In Africa today, many policyholders are not aware that their insurance disputes can be settled through mediation and those who have the knowledge about it or are willing to try it do not have faith in it, as they see mediation as a strategy used by insurance companies to delay payments and/or even prevent policyholders from receiving any insurance claims.

Enforceability of the mediation settlement agreement

Before concluding this paper, it is pertinent to note that despite the many advantages of mediation as a dispute resolution mechanism, the enforceability of the settlement agreement still remains the major challenge to its applicability in Africa. This is in sharp contrast to arbitration, which has a globally recognised regime: The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which ensures the enforceability of both arbitration agreements and arbitral awards. A possible solution to this challenge, as some writers have argued, is to adopt the UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and modify it for mediation in a manner that will ensure the enforceability of any mediation settlement agreement in any part of the world.

Another method of ensuring enforcement of a settlement agreement is having a court-annexed mediation. For instance, where a lawsuit is settled by mediation under the directives of the court, the mediation settlement agreement is usually entered as the judgment of the court. Thus, it is argued that even without the court-annexed mediation, where there are no court directives or proceedings involved, a clause can be inserted in the insurance contract stipulating that in the event of a dispute, whatever settlement agreement is reached should be filed and made the judgment of a court. A similar approach is used by France, wherein any settlement agreement reached through mediation may be rendered enforceable by a

court order and will therefore have the same legal force as a judgment of a court.

Another possible solution to this challenge of the enforceability of a mediation settlement agreement is to convert the agreement into an arbitral award and thereby take advantage of enforcement under the New York Convention stated above. Practically, what this means is that parties on reaching an agreement after mediation can appoint the mediator as an arbitrator (or appoint someone else), who thereafter adopts the parties' agreement as the award. Some countries like Korea, with the Korean Commercial Arbitration Board, Sweden with the Stockholm Chamber of Commerce and some states in the United States provide for the entry of an arbitral award to record an agreement reached in mediation.

Conclusion

Notwithstanding the many challenges facing mediation, countries in Africa are beginning to note that it is a very dependable ADR model and that in many instances, its advantages in settling insurance claims and other commercial and civil disputes far outweighs its demerits. Several countries have set up mediation centres where disputing parties can request mediators, as well as conduct mediation proceedings. Such centres also support the training of mediators. For example, in Nigeria, the Citizens' Mediation Centre (CMC) provides a non-adversarial forum for the mediation and settlement of disputes between parties who voluntarily agree to mediation. The increased interest in mediation is reflected in the mediation case loads of the dispute resolution institutions across the continent.

Despite its challenges, there is no doubt that mediation is increasingly becoming the preferred ADR for the settlement of civil disputes, including insured claims. While there is no doubt that there is still much to be done to create an enabling environment for the enforceability of a mediation settlement agreement without resorting to court as we have for arbitration agreements and arbitral awards, the laws applied by various countries that are actively using mediation as a form of ADR can serve as a useful guide on how to achieve this goal of removing the major challenge to settlement through mediation of insured claims in Africa.

Notes

1 [2002] EWHC 2059.

Interview with John Brand on settlement through mediation of employment disputes

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Tuesday 8 October 2013

John Brand from South Africa qualified as a lawyer in 1975 and commenced his legal career by defending eight students who were charged with crimes ranging from riotous assembly to sabotage as a result of their involvement in a student uprising in Soweto. After several years of hard-hitting litigation acting primarily for trade unions and political activists, his practice changed dramatically so that by the end of the 1980s, instead of going into conflict as a gladiator for one side, he was being asked to come in as an independent third party; initially as an arbitrator, but more and more as a mediator.

This career change occurred for a man who, in whose own words, once had no concept of sophisticated negotiation and was, in fact, even hostile to mediation.

Co-Chair (CC): Are there special mediation procedures for employment litigation in your jurisdiction?

John Brand (JB): Yes there are. The Labour Relations Act requires all rights disputes concerning matters like unfair dismissal, unfair labour practice and breaches of collective and individual contracts of employment to be referred to conciliation, which is synonymous with mediation, prior to litigants being entitled to adjudicate before the Commission for Conciliation Mediation (CCMA) and Arbitration or in the Labour Court. The Act also requires that, before workers or employers can participate in a protected strike or lockout, the dispute must have been referred to conciliation.

The conciliation process under the Labour Relations Act is conducted by the CCMA or sectoral bargaining councils, where such exist. The parties may also voluntarily refer disputes to private mediation. The jurisdictional divide between disputes that must be referred to the CCMA as opposed to bargaining councils is fairly complex.

CC: Is mediation in the employment sphere a new concept in your jurisdiction?

JB: No. The law was enacted in 1995. Prior to 1995, there was a strong tradition of private mediation primarily performed under the auspices of an NGO called The Independent Mediation Service of South Africa (IMSSA). What the legislature did in 1995 was to endeavour to replicate the service of IMSSA under the auspices of the CCMA. There was also a form of statutory conciliation under the auspices of the Department of Labour going back to the original 1924 Industrial Conciliation Act. This conciliation was relatively ineffective, particularly in the later years because of the lack of independence of the Department of Labour. This was one of the primary reasons for the establishment of IMSSA and for the tripartite nature of the CCMA.

CC: That's interesting; the lack of independence of the conciliator? Can you elaborate? In what way were they lacking in independence? What was their motivation? How is the CCMA structured so as to avoid the same potential problem? Can you tell us a little about the mediation process, for example, can parties be represented, extent to which documents are tendered, duration?

JB: Rule 25 of the CCMA Rules provides that in a conciliation hearing, parties to a dispute may represent themselves or be represented only by a director or employee of the employer party or by any member, office bearer or official of the party's registered trade union or registered employer's organisation. Legal practitioners have no right of appearance in the CCMA at conciliation hearings. Generally, bargaining councils have similar rules, whereas in private mediation the parties may agree to legal representation, and often do.

It is unusual for the parties to submit documentation to the conciliator or mediator ahead of the conciliation or mediation. All that the mediator has before him or her is the submission form, which very briefly describes the nature of the dispute. In rights disputes, it is unusual for any further documentation to be submitted. In interest disputes, like wage disputes, the parties will often submit the minutes of the preceding negotiation. It is exceptional for more documentation to be filed.

As a general rule, parties do not present evidence at conciliation. At most, they submit relevant background information and the process focuses on finding a negotiated settlement rather than on adjudicating upon factual or legal disputes. Some conciliators, particularly those in the CCMA, tend to apply a more evaluative as opposed to facilitative approach in order to encourage parties to a settlement in a short space of time. In private mediation, the mediators tend to apply a far more facilitative, interest and problem solving-based approach.

In rights disputes before the CCMA and bargaining councils, the conciliation seldom lasts more than two or three hours and, if agreement is not reached in that time, the parties are permitted to proceed to arbitration or the Labour Court. In private mediation, the conciliation will normally not exceed one day, but in exceptional circumstances may be postponed for another day. In interest disputes, the mediations normally take longer, but seldom last more than a day or two. In very exceptional circumstances, they may last longer. I have been mediating a dispute in the municipal sector, which involves all the terms and conditions of employment of all municipal workers in all municipalities in South Africa.

That mediation has lasted 21 days over a period of nearly a year.

The Labour Relations Act requires that the conciliation be completed within 30 days from the date on which the referral to conciliation was made. The conciliator may issue a certificate of deadlock within that period if he or she believes that there is no prospect of settlement. The parties may also agree to extend the 30-day period.

CC: How protected are parties rights? Are the discussions completely without prejudice? Is there a risk that something said during mediation could be used against one party or other?

JB: The Labour Relations Act does protect the confidentiality and, without prejudice, advantages the conciliation process by preventing conciliators from disclosing or being required to disclose any information, knowledge or documents acquired on a confidential or without prejudice basis except on the order of a court. In private mediation, confidentiality is regulated by the agreement to mediate.

CC: Does the mediation process differ if it is a mass claim or a trade union dispute?

JB: Mass claims are possible in South Africa. Usually they are facilitated by a trade union and they are processed in a similar fashion to individual disputes.

CC: Does the existence of a mediation procedure make a big difference to the possibility of an amicable settlement?

JB: Yes it does. There are a high proportion of settlements in conciliation of both employment rights and interest disputes in South Africa. I can make the relevant stats available if necessary.

CC: Is compulsory mediation the way to go?

CC: Are there other factors present that may get in the way of an effective mediation?

JB: Yes. Mandatory mediation of all employment disputes in South Africa has resulted in an enormous number of mediations and the Commission for Conciliation Mediation and Arbitration (CCMA) resources are very stretched resulting in very truncated and often superficial mediations. The body also cannot afford to employ some of the best and most experienced private mediators. Lack of negotiation skills on the part of the parties, as well as very high levels of adversarialism often make mediation difficult. It is an option for parties to employ mediators outside the CCMA or bargaining councils. Generally, the conciliation service of the CCMA and bargaining councils is free of charge, whereas private mediation involves a payment to the mediator and small administration fee.

The greatest limitation on the efficacy of mediation is limited resource. The way in which both statutory and private mediation can be improved is by improving the skills of the mediators. In South Africa, there is very limited resource available for this training, particularly in statutory conciliation. Scarce resource also means that mediators are required, in the statutory system, to do between three and four mediations a day in order to manage the case load. The only way to make these mediations less superficial and more interest and problem solving-based is to increase the number of mediators to reduce the case pressure on them.

There is a risk that parties may see mediation as simply a necessary step on the way to adjudication. However, in South Africa, where the vast majority of claimants are impecunious workers, they desperately want to resolve their cases quickly and cheaply, so generally they do not see mediation as a mere step on the way to adjudication. On the contrary, they often make compromises that would not be necessary if they were better resourced. There is a tendency on the part of some employers to simply go through the motions in conciliation in the hope that they can exhaust employees. However, if one looks at the settlement statistics referred to earlier, this is not a major problem. Employers too are often keen to get rid of disputes quickly and cheaply.

There have also been allegations of CCMA commissioners applying undue pressure on one or more of the parties to settle. This is a consequence of the high volume of cases that they have to handle and the fact that their performance is measured on their settlement rate. It is a problem that has to be continually monitored.

CC: How effective is mediation in resolving disputes? Can parties realistically hope for a win-win result?

JB: I do think it is realistic and I can cite examples of such success.

CC: Is the element of costs an incentive for mediation?

JB: In cases before the CCMA and bargaining

councils, although it is possible for the arbitrator to award costs against an employee, this is seldom done and may be a disincentive to settlement in certain cases. In the Labour Court, costs are more often awarded against the loser and this is certainly a factor in favour of settlement.

CC: Do lawyers help or hinder the mediation process? How involved are lawyers in the mediation process?

JB: The answer here is yes and no. It depends very much on the lawyer. There are lawyers who understand the mediation process and are a great help to the mediator in assisting the parties to reach settlement. On the other hand there are lawyers who are very adversarial, legalistic and who put their own interest in prolonging the dispute above that of their clients. Just as there are cooperative parties and uncooperative parties, I think mediators must be able to deal with 'all comers'.

It is acceptable for mediators to speak to lawyers without their clients being present and vice versa, but this would generally only be done with the consent of all of the parties and their representatives. Because legal representatives are not permitted in CCMA and most bargaining council conciliation, the issue doesn't arise as often as it does in civil mediation.

CC: Do parties use the mediation process as a fishing expedition? Do you think there is a reluctance by parties or lawyers to engage in full and frank discussions before a mediator for fear of disclosing all the cards in their hand? By way of example, in most jurisdictions, it is necessary to disclose documents in advance. Lawyers will, however, not disclose their strategy or certain arguments they may wish to make. Has it been your experience that there are parties or lawyers who therefore 'hold back' in one way or other with the aim of saving the main salvo for trial?

JB: In my own experience as a mediator, I strongly discourage lawyers and the parties from making extensive disclosure of evidence and even argument. I find that if that happens, the mediation takes on an adjudicative form. I impress upon the parties that, as a mediator, I am not going to be determining who is right or wrong, but instead trying to facilitate a sensible commercial settlement. I only encourage disclosure of evidence or legal argument if I believe that it may help a party to change its view about the prospects of success in litigation. If the obstacle is a different assessment of the law, I often encourage a separate meeting between the lawyers. If the obstacle is a different assessment of the facts, there are occasions when a party is reluctant to disclose evidence for fear that the other side will prepare a defence to those facts in adjudication, but I find that situation to be rare. Generally, I like to do a risk analysis with the parties in side meetings in the hope that I can cause doubt in their minds, which will facilitate a commercial settlement.

CC: At the end of a successful mediation, how is the settlement recorded? Is the settlement then enforceable like any other order of court? Can parties refuse to record all the terms and just state that an amicable settlement has been reached? Are there instances where a party has sought to resile from a settlement after mediation?

JB: In the event of a successful mediation, the agreement is generally recorded in writing and is enforceable in the courts like any other civil contract. The parties could refuse to record all the terms and state that an amicable settlement has been reached, but his seldom happens because of the potential problems around enforcement.

There are instances where parties have failed to comply with mediation agreements, but generally, this is far less common than the failure by parties to comply with arbitration awards and court judgments.

The likelihood that States adopt mediation for investment disputes

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Notes from a discussion between Professor Lou Wells and Karen Mills

Co-Chair of the Investor State Mediation Rules Sub-Committee of the IBA Mediation Committee

We begin with a discussion as to the likelihood that states and investors would adopt mediation, under the IBA rules, as the first step to resolve their disputes. We consider under what circumstances a state is most likely to opt for mediation:

1 What do you see as the likelihood of states and investors adopting mediation, if possible, under the IBA rules, at least as the first step towards resolving their disputes? Under what circumstances would this be most likely and under what circumstances least likely, and why?

Most likely:

- where the arbitration outcome is reasonably predictable;
- with an authoritarian government where the decision-maker is clearer;
- where the investor has other interests in the country that it would like to protect from the results of acrimonious arbitration;
- where the investor is 'small' and finds it difficult to fund arbitration, and
- where the investor is vertically integrated and is more interested in assuring supplies than in receiving cash compensation.

Least likely:

- when the investor is out for revenge or to teach countries lessons, for example, about the sanctity of contracts;
- when the politics do not allow for a mediated solution; when the dispute has become very public;
- in the middle of financial crises, when officials will not devote attention to the dispute;
- when governments cannot assign authority to an official to settle, which is common! The 'president' cannot be a direct party to mediation, but the decision may lie with him or her, and
- when lawyers for one side or the other insist on arbitration, either because they do not see mediation as working, or because they like the fees which arise from arbitration.

2 What advantages do you see to using mediation, aside from an immense reduction in costs?

- I have been deeply involved in investor-state arbitrations. I see them as costly, slow and as creating irreversible animosity between the parties. The outcomes of arbitrations are confined to 'damages', when there may well be other solutions to disputes that could be reached. I'd love to find ways to settle differences more rapidly, in a friendlier manner, at less cost and with more flexibility on outcomes – mediation may be a possibility.
- I have seen some efforts to use mediation work, or come close to working. Proposals could be considered that could not come out of arbitration, for example, giving the investor another project, modifying legislation in mutually acceptable ways, changing regulations.

3 You have read the IBA rules. Do you see any issues with them, or points that you think might be improved, removed or added?

- How formal should mediation be? What I've seen work, or come close to working, was quite informal.
- The rules require the mediator be a disinterested party. I've seen cases where an interested third-party mediator trusted by both parties can be rather successful (Insurer (MIGA)). But I can see it could cause problems in an investor-state case, where a supervising authority of the state would not be satisfied with the settlement.
- I note experts may be called by the mediator. Does this not render it more similar to a third-party decision?
- Should third-parties, for example, NGOs, local communities, have any access to projects?
- Would it be possible to hold the mediation without using lawyers, or at least without

external counsel? It could be the equivalent of a 'business-to-business' format?
- How to deal with confidentiality? If offers cannot be revealed and mediation fails, how to deal with claims in subsequent arbitration that the government did not make a good faith offer of compensation? (Maybe the current ConocoPhillips case?)
- What skills should a mediator have? Should they have more industry knowledge than is required for arbitrators, where 'experts' will provide that knowledge?

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Settlement of insurance claims through mediation

This article's objective is to provide an overview of why mediation may be the best alternative to settle disputes related to insurance claims by considering the essential issues related to these claims, presenting the advantages offered by mediation and discussing a Brazilian leading case of Dispute System Design (DSD) involving insurance.

The insurance and reinsurance sector has been affected by an increase in the diversity and number of disputes involving insurance claims. There are several reasons for this phenomenon. Among the most important are the tighter regulations put in place after the economic crisis, consumers becoming increasingly aware of their rights, the impact of globalisation that increased trade (and therefore the need for insurance) and the integration of larger insurance consumers following the economic development of the emerging markets.

In short, disputes involving insolvency, contested coverage and reinsurance recoveries have been increasing in their frequency, complexity and scale.

Whether the subject matter relates to finance, energy, construction, product liability or even our life insurance, disputes are often complex, affecting large groups of policyholders, underwriters, brokers, claims managers and reinsurers.

In addition to their complexity, the disputes usually involve repeated players, such as the same insurance and reinsurance companies, large corporations and insured clients. When these insurance disputes arise, the parties' best interests become to resolve them in an effective, efficient, fast and inexpensive way. It is clear that the current court systems are not equipped to handle these cases via litigation.

It seems, therefore, that implementing alternative ways to address these disputes is key to the insurance industry. In this scenario, mediation seems to be the most obvious choice, as it can deliver a basket of benefits not offered by other dispute resolution methods. Some of these benefits are discussed below.

Minimising time and costs

The first and most evident benefit of mediation is that it can save parties considerable amounts of time and money compared to other alternatives to dispute resolution that will involve lawyers, expert advice, judiciary costs, etc.

Flexibility

Another very important advantage when we are talking about disputes with this level of complexity is flexibility. Mediation allows participants to take different approaches to creative problem solving and to resolve disputes to their interests on any bases they see fit.

Party control of the process

While courts and arbitration tribunals are expected to resolve disputes on the basis of the evidence, the law and, in some cases, industry practice, they are not generally able to resolve disputes taking into consideration commercial concerns of the parties, such as the preservation of their continuing business relationships, which is important when you deal with repeated players.

Mediators, on the other hand, are not constrained by the facts or the law applicable to a given dispute. The best mediators are experts in facilitative thinking and in helping people to develop a process of dispute resolution tailored to the case at hand.

Party control of the outcome

In addition, in mediation, parties take control of the outcome of their dispute rather than relying on a third party's binding determination of right or wrong for them. Parties are the final decision-makers, which makes them more likely to comply with the reached settlement.

Preserving and maintaining relationships

Mediation can create an opportunity to preserve relations when a continuing relationship is desirable or inevitable for the parties. This means that after the dispute is settled through mediation, the business relationship is more likely to continue and the parties can still conduct their business by leaving the dispute, and the bad feelings associated to it, behind.

Image

Last, but not least, the use of mediation may help insurance companies to build and maintain a good public image by showing their concerns and efforts in achieving fair and sustainable solutions for the disputes at hand. Mediation may help insurance companies to be perceived as trustworthy, reliable organisations, which are extremely important and positive qualities for any company in any business.

In addition to the advantages of the mediation proceeding itself, the mediator's role as a neutral third party is also very important in dealing with insurance claims. There are at least three important aspects of how mediators can help to resolve insurance disputes,[1] which are discussed below.

Flow of information

The flow of information is a key factor in the successful resolution of a conflict. Mediators work to help the parties uncover important, and sometimes neglected, information.[2]

However, at the same time, mediators who work with insurance claims must be careful about this respect and blend openness with the realisation that the parties and lawyers consider information to be a valuable commodity and the release of it to be a strategic decision.[3]

Therefore mediators can assist by promoting a discussion about the nature of the information, the pros and cons of holding or releasing it and the likely consequences of either decision.[4]

Case analysis

Most of us cannot think of everything that could possibly go wrong with a case or every interpretation of the facts or law. Therefore, some case analysis discussion will be appropriate and helpful, even when the parties have been prepared carefully.[5]

Mediators help lawyers and their clients by posing important and probing questions to come to grips with the realities of the case. Mediators can translate the thoughts of one side to the other in such a way that each side can listen to and consider the analysis of the other.[6]

Mediators are agents of reality.

Facilitating negotiations

When parties try to settle disputes that involve monetary compensation, they often have a difficult time starting the process ('who goes first?'), they have a difficult time keeping it going when they find that their ranges vary widely and they grow resentful as they make concession after concession in an effort to settle their case to no avail.[7]

When parties react strongly to the other side's proposal, the mediator can understand the basis of the reaction and reflect that basis back to the participant in such a way that the participant knows that the mediator understands him or her.[8]

Litigants are more likely to get back to the business of proposal making if they have the experience of being understood by the mediator.[9]

Parties who react strongly to a proposal from the other side lose sight of the fact that they have many tools at their disposal to further the objective of settlement. Mediators can help the reacting party identify a number of ways of dealing with the situation other than by leaving or making no proposal at all.[10]

One good example of how mediation may be used to settle complex and challenging insurance claims was the Brazilian DSD, which provided an efficient and just system to compensate the victims of a terrible plane accident that occurred in Brazil in 2007, TAM flight 3054, in which 199 people lost their lives.

This DSD was created for the unique needs of this specific case in order to protect the interests of the families of those who lost their lives and to avoid the enormous costs of the Brazilian judicial system.

This claims resolution facility opened in 2008 and featured an assistance division to help the beneficiaries in filing their claims. In practice, neutral representatives were present at every meeting that the family members had with the companies.

The DSD also featured an advisory arbitration committee, in which the public authorities would issue nonbinding opinions to help the parties resolve their disputes. This was aimed at protecting the beneficiaries from eventual opportunistic offers.

One year after they opened the facility, 200 people, beneficiaries of around 55 victims, were compensated. The neutrals also assisted the beneficiaries involved in litigation processes, leading 90 per cent of them to settle.

At the end of the process, on account of the methodology used, both the airline and the insurance companies did not only save on legal fees, but were also able to focus on better compensating families, obtaining more satisfactory results than they would have under the old model. In short, the claims were resolved more quickly and more efficiently at much lower costs.

At the same time, consumer satisfaction was clearly maximised. The members of the victims' families reported that the system's transparency and impartiality helped them to get through their ordeals with greater tranquillity.

In a situation that involved complex business and economic problems, compounded by the tragic and emotional consequences of irreparable loss of life, this DSD demonstrated clearly how mediation was an important component in fixing complex problems by changing the way the dispute was approached from a litigating mood to a collaborative model.

In conclusion, mediation may contribute to adding value to the insurance industry by resolving the inevitable disputes more quickly and at lower costs, both economical and emotional.

When applied to insurance claims, mediation may solve seemingly untreatable problems with a creative approach, participation of all parties involved in the dispute in the search of a reasonable and mutually agreeable solution and the recognition that one size does not fit all.

Mediation may just be the tool to assure the insurance companies that their customers feel that they are being listened to and treated fairly when a dispute arises. From the insurance industry standpoint, mediation is not only a way to resolve disputes; it is an investment with almost guaranteed returns.

Notes

1 Dwight Golann, *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates* (ABA Publishing 2009) pp 294-301.
2 *Ibid.*
3 *Ibid.*
4 *Ibid.*
5 *Ibid.*
6 *Ibid.*
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *Ibid.*

Eduardo Silva Romero

Advantages and complementarities of investment mediation vis-à-vis investment arbitration

Due to its advantages and complementarities, investment mediation can be considered an alternative or aid to investment arbitration.

Advantages of investment mediation vis-à-vis investment arbitration

Investment mediation can be a valuable alternative to investment arbitration in the settlement of investor-state disputes. Indeed, investment arbitration involves difficult issues, including political issues, that can be avoided in the context of investment mediation.

In particular, investment mediation offers advantages to investors and states vis-à-vis

investment arbitration with regard to: (i) procedural issues; (ii) the outcome of the proceedings; and (iii) the enforcement of arbitral awards against states.

Advantages related to procedural issues

Investment mediation is less expensive and time-consuming. As a general rule, only one mediator is required and mediation does not rely on producing full evidence, does not involve pleadings and is less open to dilatory litigation strategies.

Investment mediation provides privacy and confidentiality; Article 10 of the IBA Rules provides for as much confidentially as the parties wish. Investment mediation also provides informality and flexibility.

Advantages related to the outcome of the proceedings

Investment mediation results in the total resolution of the dispute. In contrast to investment arbitration, investment mediation permits closely related but non-investment issues concerning labour, human rights, the environment, etc, to be dealt with by the mediator, while arbitral tribunals often avoid dealing with non-investment issues.

The uncertainty of an adjudicated result maintains the interests of the parties to a dispute in negotiating an acceptable alternative outcome, with the assistance of a mediator.

By the preservation of the business relationship, the parties to the mediation can reach a win-win solution, moving beyond the narrow legal dispute to a bargain that benefits both sides, in contrast to the win-lose rupture that often marks arbitration between foreign investors and states. This means that if the foreign investor would like to keep operating in the territory of the host state, investment mediation could be more appropriate than investment arbitration as a method of dispute resolution.

Preserving business relationships is also an important issue when the foreign investor has more than one investment in the territory of the host state. In this case, if a dispute arises with regard to one of the investor's investments, launching investment arbitration proceedings against the state risks poisoning the relationship between the investor and the state and affecting the investor's other investments in that state which, in principle, were not the subject of any dispute. By contrast, if the dispute with regard to one of the investor's investments in the host state is submitted to investment mediation, the relationship between the investor and the state is preserved as both parties attempt to find a mutually consensual solution to their dispute. This means that the other investments of that investor in the territory of the state are less likely to be affected.

Munir Maniruzzaman[1] notes that the particular context of investor-state disputes that involve: (i) public interest issues; and (ii) the accountability of state's representatives to the public/tax payers requires the choice of an appropriate style of mediation. According to the author, such a style would be the 'evaluation-driven-facilitative mediation', described as follows:

> 'it may sound plausible that the mediator starts with the evaluation of the parties' respective [legal] positions and then assists them to reach a solution to their disputes in their own terms. Thus, the mediator's style could be described as evaluation-driven-facilitative mediation or evaluative-facilitative mediation (EFM). The parties need to provide in their contract the appropriate dispute mechanism in detail. However, the mediator needs to be cautious that throughout the process impartiality and confidentiality are maintained according to the parties' wishes.'[2]

An example of evaluative mediation is given by the first International Centre for Settlement of Investment Disputes (ICSID) conciliation case, *Tesoro Petroleum Corporation v the Government of Trinidad and Tobago.*[3]

Advantages related to the difficulties in the enforcement of arbitral awards against states

If the state refuses to enforce an arbitral award voluntary, the investor shall seek the recognition of the award (if non-ICSID arbitration) and its judicial enforcement around the world, where the state has assets. One major difficulty for the enforcement is the immunity from enforcement of the state, for example, Argentina.

The judicial enforcement of arbitral awards is time consuming and expensive. Moreover, it can be entirely frustrated where the investor is unable to find state assets free from immunity hurdles. By contrast, if the investor and the state settle their dispute through investment mediation, such a settlement will most probably be enforced voluntarily for the reasons discussed below.

First, the settlement obtained through investment mediation is, by definition, a win-win agreement. As such, both parties will have an interest in enforcing it.

Secondly, such a settlement does not necessarily involve financial compensation. For instance, the host state might agree to extend the duration of the investment by a reasonable number of years.

Thirdly, if the settlement involves financial compensation, the investor can request that the state party stipulate that the corresponding amount be carved out of the state budget in order to satisfy its obligation to pay under the settlement or that it grants security on that payment.

Complementarities of investment mediation vis-à-vis investment arbitration

Investment mediation can also complement and develop alongside investment arbitration. There are three ideas, as discussed below.

Administrative processes prior to the declaration of termination of an administrative contract: occasion for mediation

There should be an appropriate period to attempt investment mediation.

Cooling-off period in BITs: occasion for mediation

The traditional formulation of the investor-state dispute settlement provision found in many bilateral investment treaties (BITs) provides that, in the event of a dispute related to the investment, the parties to the dispute shall initially seek to resolve it amicably through consultations and negotiations. If the dispute has not been settled amicably within a certain lapse of time from the date on which the dispute arose or was notified to the state, in general three or six months (the 'cooling-off period'), then the dispute can be submitted to international arbitration.

The pre-arbitration requirement of negotiations during a cooling-off period is therefore a good opportunity for investors and states to resort to mediation. When mediation intervenes in the context of the cooling off period required by BITs, the parties would not perceive mediation, if it fails, as a waste of time.

In general, BITs provide for prior negotiation, but do not specify how such negotiation should be conducted. Even if no specific language is contained in the BITs, they clearly do not prevent the investor and the state from resorting to mediation in order to assist them in their negotiations. However, including specific language in BITs and encouraging or authorising the use of mediation prior to having recourse to arbitration can be useful to: (i) provide knowledge to the parties of the existence of mediation; and (ii) encourage them to have recourse to it.

For instance, the report of the International Chamber of Commerce (ICC) Commission on Arbitration Task Force on Arbitration Involving States or State Entities recommends the reference to the amicable dispute resolution (ADR) in the arbitration agreements in investment arbitration in the following terms:

> 'Contracting states may also wish to offer the possibility of using other ICC dispute resolution services. If a state wishes ICC ADR to be used, the parties should identify the dispute and provide that it shall be submitted "to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."'

Consent awards

When successful, investment mediation results in a settlement agreement. The investor and the state reaching a settlement agreement through investment mediation held in parallel to investment arbitration could request that the arbitral tribunal record the parties' settlement agreement in a 'consent award'. A consent award can be either rendered within the context of the ICSID Convention or in the form of another type of institutional or ad hoc award protected by the New York Convention. The purpose of resorting to a consent award is to give to the settlement obtained through mediation the same legal force as a final judgment.

Conclusion: the issue of responsibility/ liability, administrative and/or criminal of public servants

In sum, because of its advantages and complementarities vis-à-vis investment arbitration, investment mediation has great potential to emerge as an appropriate method to resolve disputes between investors and states. This is especially true when the foreign investor and the host state desire to preserve their underlying business relationship.

However, one of the most important challenges for investment mediation today relates to the issue of administrative and/ or criminal liability of public servants. As investment disputes often relate to complex issues involving the public interest, it can be difficult for state officials to take the personal responsibility for a decision to agree to a settlement with the investor. Therefore, it is not simple for the state party to an investment mediation to identify: 'a representative which is authorised to settle the difference or disputes on its behalf or describe the process necessary for a settlement to be authorised', as required in Article 9(3)(a) of the IBA Rules.

The establishment by the state of a permanent and independent body in charge of negotiating and possibly settling disputes with investors, or at least recommending a settlement if there is a special process necessary for the settlement to be authorised, could contribute to diminishing the risk of individual administrative and/or criminal liability of public servants.

Notes

1 Munir Maniruzzaman, 'A Rethink of Investor-State Dispute Settlement', (Kluwer Arbitration Blog, 30 May 2013), available at http://kluwerarbitrationblog.com/blog/2013/05.
2 *Ibid.*
3 (ICSID Case No. CONC/83/1)

Enforcement of mediated settlements

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There are two aspects to enforcement settlements made outside India: (i) settlements where parties are before court; and (ii) private settlements between parties. The first aspect can be seen in two situations: settlement decrees of a reciprocating territory and settlement decrees of a non-reciprocating territory.

Settlement decrees of reciprocating territories can be enforced directly, but they have to stand the test of Section 13 of the Indian Code of Civil Procedure. For a foreign decree to be conclusive it should not be obtained by fraud, opposed to the principles of natural justice, in breach of any law and it should be on merits.

If the opposite party makes a claim that the settlement decree is not on merits then it is precluded from making that plea. The judgments of the Indian courts have held that if parties have signed the agreement by consent, then they cannot take a plea that it was not on merits. In fact, it is interesting to note that these judgments date back to 1929 in British India. Of course, this proposition has been supported by many subsequent judgments of the Indian court, one as recent as 2006.

Settlement decrees of non-reciprocating territories cannot be enforced directly because they only have evidentiary value, and for such settlements a suit has to be filed and the decree can be given only as evidence. However, if the settlement decree has a clear admission of liability then a decree may be taken by the Indian courts under order 12, rule 6 of the Indian Code of Civil Procedure for decree on admission. This enables a party to obtain speedy judgment. Reliance may be placed on *HSBC Bank v Silverline Technologies,*[1] and on *Uttam Singh Duggal v United Bank of India.*[2]

The second aspect is regarding private settlement between parties. Consent terms retain all elements of a contract. Such settlement agreements may be enforced as a contract by filing a suit for specific performance or breach of contract and usual contractual defenses are available, such as the settlement was obtained by fraud, undue influence, coercion and misrepresentation.

In conclusion, taking a broader view, parties go for mediation to avoid lengthy litigation. However, if one of the parties does not fulfill its obligations under the settlement agreement, the other party is compelled to file for enforcement and parties have to wait for years before a final judgment can be given in a matter. Nevertheless, on balance, it is still better to use mediation to arrive at a settlement, which may shorten the process before the court.

Notes

1 A Mumbai High Court judgment of 2006.
2 (2000) 7 SCC 120.

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- Start in January or July each year
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Business, finance and the legal services market	January 2014
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International commercial legal practice	January 2014
International public companies practice	January 2014
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International mergers and acquisitions practice	January 2014
International antitrust practice	January 2014
International business organisations	January 2014
International arbitration practice	January 2014
International joint ventures	January 2014

For further information, and to register please email: **llm@lawcol.co.uk**

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