The Explosive Growth of International Mediation

Robert B. Davidson

Executive Director of JAMS Arbitration Practice
New York, New York USA

While the concept of amicable settlement using a third party is literally thousands of years old, mediation, as an institutionalized way of settling commercial disputes, was rarely used ten to 15 years ago.¹ The typical domestic State court version of commercial mediation consisted of the lawyers standing in front of the judge’s bench when he would ask each of you what you wanted and then tell you to split the baby down the middle. If you said “no,” he (it was always “he” in those days) glared at you and told you to pick a jury. This led to settlements in which the parties themselves rarely participated and bred disrespect for a system that cared little for the merits of a dispute.

The U.S. federal appellate system in the Second Circuit had a program where a magistrate would caucus with the parties and try to resolve a pending appeal. That system, which was later expanded into several other jurisdictions, met with some success and began to educate the New York bar as to the added value in the settlement process of an independent third party who actually knew something about the merits. The use of magistrates as settlement masters, especially in the U.S. federal courts, then came into use adding to the positive view of a negotiated settlement using a third party who had actually read the papers and thought about the case.

However, the possible use of mediation as a means to resolve complex commercial disputes did not come into most litigators’ arsenals until relatively recently. Mediation as a means to resolve international commercial disputes is in its very early stages.² The American Arbitration Association (AAA) began a program years ago in which a case manager would call the lawyers for the parties in new arbitrations and then suggest mediation. Some took advantage of the suggestion, but not very many. The success rate for those who opted for mediation was by all reports uneven at best.

¹ Mediation in the labor relations field was, of course, well known.
In 1979, three California judges started a company called Judicial Arbitration and Mediation Services (JAMS). Its model was the use of retired judges to assist parties to resolve their differences. It worked with a fair degree of success and began to grow quickly with the entry into the company of several highly skilled retired judges whose success rates made the mediation of commercial disputes, at least in California, much more acceptable and well regarded.

In 1992, JAMS sought expansion beyond California and merged with an ADR company on the East Coast named Endispute. The two formed what was then—and is now—the largest of the private providers of these services. Meanwhile, other groups began to enter the field largely dealing with specialized matters, such as the resolution of community-based disputes, employment, or family law matters. SPIDR and the Academy of Family Mediators (AFM) were two of these.

By the year 2000, the AAA was doing perhaps 150 or so commercial mediations. Mediator training was uneven and consisted of mostly war stories and some role play. The more successful mediators, through trial and error, developed their own techniques for resolving these cases.

Internationally, the International Chamber of Commerce (ICC), which began as an institution in 1919, had rules for the longest time that were called the “Rules for Conciliation and Arbitration.” While at Baker & McKenzie as a young associate in the 1970s, I participated in one of the first international “conciliations.” It consisted of the selection of three prominent European professors and the parties’ preparation and exchange of briefs. The lawyers then assembled in Paris at the ICC’s headquarters where—after an extraordinary expenditure of time and money—these three professors announced with great solemnity that they had carefully considered the positions of the parties and suggested that they settle the dispute at one-half of the damages claimed. The case did not settle and ultimately went the route in arbitration.

The notion of “conciliation” which implied a totally evaluative exercise by prominent academicians or retired counsel did not prosper and, indeed,

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3 The company is now known simply as “JAMS.” Its Web site is at http://www.jamsadr.com.
4 SPIDR was an acronym for the Society for Professionals in Dispute Resolution.
5 SPIDR and AFM merged in January 2001 with the Conflict Resolution Education Network (CREnet) to form ACR, which is an acronym for the Association for Conflict Resolution. ACR’s Web site is at http://www.acrnet.org.
6 The AAA’s Commercial Mediation Procedures can be found at http://www.adr.org/sp.asp?id=22440.