International Mediation, Arbitration, and Innovation

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Some corporate counsel and states have expressed dissatisfaction with international arbitration as an alternative dispute resolution tool. In response, international mediators have raised the possibility of international mediation as another mode of dispute resolution. Arbitration and mediation both have their appropriate uses in context, and, universally, both meet all consumer demands for better dispute resolution products at lower prices and in a faster time frame.

It is certainly true that there is dissatisfaction with the cost and slow pace of international arbitration. It is, however, untrue that international arbitration was intended or designed to achieve higher speeds and lower costs as compared to litigation, and in particular, to U.S. litigation. Corporations typically favor domestic arbitrations because of the potential benefits of limited disclosures rather than limited discovery, speedy resolution, lower costs, and perceptions that arbitration asymmetrically favors corporations over consumers or employees. These real and perceived benefits do not obtain in international arbitration, except for, perhaps, limits on the scope of disclosures.

International arbitration was designed to correct other shortcomings of domestic litigation of international disputes. Decisions of many domestic courts are not designed to meet the practical needs of international commerce. Choice of forum and choice of law provisions often prevent a neutral court in a jurisdiction unconnected to the parties or dispute from hearing the dispute. Instead, domestic courts of either party may exert jurisdiction, giving the foreign party little comfort about the actual or perceived neutrality of the court, about equal burdens in the transportation of witnesses and documents, or about equal knowledge of local judicial practices and personalities that can tilt litigation in one party’s favor. Although courts may seal evidence, the presumption is against sealing unless a party makes a motion.

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to do so and meets the thresholds imposed under local laws for secrecy. Even if a domestic judicial process is fair and the decision is right, enforcement of the decision may not be guaranteed in a foreign jurisdiction where the losing party’s assets are located.

The anatomy of international arbitration is different and better adapted to the particular environment of international commercial disputes. Arbitrators can be selected from nationals who are not from the states of the disputing parties. The seat of arbitration and choice of law can be a neutral forum. The New York Convention enables the prevailing party to enforce the award in the jurisdiction of any state that is a party to the convention, increasing the likelihood of actually recovering after time and expense has been spent arbitrating and winning a dispute. Many institutional rules provide for the confidentiality of the award, and the parties are free to agree that their disclosures are confidential. This feature can be vitally important when trade secrets are involved, as they often are in international commercial disputes. It is for these reasons, and not speed and costs, that international arbitrations are often favored over domestic court proceedings to resolve international commercial disputes.

Be that as it may, economic pressures, especially after the recent global recession, have increased consumer demands for lower cost and quicker alternatives to address international commercial disputes. As ever, the free market, including the market for professional legal services, is a driver of innovation to achieve higher efficiencies of cost and time. One innovation is international mediation. Mediation is a social process where a third party with the consent of the disputing parties attempts to de-escalate the dispute to the point where the parties voluntarily and mutually accept an outcome. International mediation simply applies this process to cross-border disputes.

When the process of economic exchange between two corporations with an ongoing relationship has broken down and the parties wish to repair it, international mediation may be an appropriate instrument to weld the break. Parties that desire to overcome a dispute and continue cooperating with each other often prefer a swift and pragmatic resolution through international mediation, rather than seeking resolution through international arbitration, which may entail the application of strict legal rules after a process of fact finding.

Consider the following international mediation. There was a U.S. exclusive distributor of spirits, whose products were produced by an Italian

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2 The author offers thanks to the international mediator who recounted this dispute but requested to remain anonymous.