CHAPTER 12

The Current Status and Future of International Mediation

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Introduction

It has always been my belief that the cost and time required of international arbitration would cause parties to bring these cases to mediation at an early stage, which is why I still believe it is a growth area. However, old habits are hard to break. It will require general and corporate counsel to put meaningful ADR clauses in their transactional contracts that creates a requirement for mediation before an arbitration can be pursued, for any of this to get real traction.

Mediation is still a U.S.—appreciated art. Some don’t appreciate that even when you don’t settle, there are other benefits to an early effort at mediation:

- Once you’re in the same room, cases tend to shrink (less discovery, fewer claims, etc.)
- There is a better chance for the dispute to be resolved later, even if you don’t settle in the first mediation.

This is an overview of international mediation today, as it is found in several geographic areas around the globe, and as embraced by some of the leading provider organizations. In summary, international mediation is alive and well, and there are a lot of developments in the area for practitioners, academics, mediators, advocates and others interested in mediation. This article reviews the current status and recent developments on an institutional, organizational and geographic basis.

Institutions and Organizations

Two of the leading provider organizations in the international arbitration world, the International Chamber of Commerce (ICC) and the International Dispute Resolution Centre of the American Arbitration Association (ICDR)
have made changes and improvements in their rules and approach to international mediation.

The ICC
On 4 December 2013, the Paris-based ICC published its new Mediation Rules, which went into effect on 1 January 2014, one year after the effective date of the ICC’s new Arbitration Rules. The Mediation Rules replaced the ICC’s existing Amicable Dispute Resolution Rules, which had been in force since 1 July 2001.

The change in name (from ADR Rules to Mediation Rules) reflects the predominance of mediation in international ADR at the ICC. Approximately 90 per cent of the ADR procedures held under the ICC’s ADR Rules to date have, in fact, been mediations, with conciliations and neutral evaluations making up only 10 per cent of the total. It is still possible, however, for parties to agree to conduct other forms of ADR, e.g., conciliation or neutral evaluation, under the Mediation Rules if they wish.

The Mediation Rules include many well conceived provisions. These should help to enhance the ICC’s appeal not only to users of international arbitration, but also to those who seek to resolve their disputes by alternative, less costly and faster methods.

The Rules provide for the ICC International Centre for ADR to play an active role in guiding the parties towards a mutually acceptable form of mediation, e.g., deciding on the place and language of mediation. This is meant to avoid the need for the mediator to take such decisions and thereby potentially alienate one of the parties. Where there is no pre-existing agreement to mediate, and one of the parties makes a mediation proposal, the Centre will play an important role in encouraging the other party to accept the idea of mediation.

The selection of mediator, unless agreed upon by the parties, will be made by the Centre. The Centre does not have an official roster of mediators, but it has developed an open network from which it selects mediators depending on the subject matter of the dispute, the place of mediation, the language of the mediation and the nationalities of the parties. Mediators have to sign a declaration of availability, impartiality and independence, as in an ICC arbitration.

Although the Rules deliberately refrain from specifying how the mediation should take place, a separate document—entitled Mediation Guidance Notes—provides recommendations on how to conduct mediations. The Notes give useful guidance on a number of topics such as the use of joint and private sessions, preparation for mediation sessions, the need for someone with authority to attend the meetings, use of case summaries, and the relationship between mediation and arbitration proceedings.

The fee structure has been modified. There is a non-refundable filing fee of US$2,000. In addition, the Centre will request one or more deposits to cover