Final Step: Issues in Enforcing the Mediation Settlement Agreement

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This article concerns mediation in the international arena and how its utilization and efficacy can be fostered. The growth of mediation over the past 15 years has been exponential, a tribute to the success of the process. Settlement rates in mediation are said to be on the order of 85-90 percent and are achieved long before the traditional “court house steps” at a significant saving of cost and time for the parties. User satisfaction is high, as parties retain control and tailor their own solution in a more confidential, less confrontational setting that preserves relationships and results in a win/win instead of a win/lose.

Multiple drivers are at work to further the already resounding success of mediation as a tool for dispute resolution. There are now literally thousands of court-sponsored mediation programs around the country in the United States, and the EU Mediation Directive issued in 2008 is likely to foster the development of many such programs in Europe and otherwise encourage the growth of mediation on the European continent. Business lawyers are increasingly inserting step clauses into contracts, which require an attempt at mediation before an arbitration or litigation can be commenced. State ethical obligations requiring that attorneys advise their clients about the availability of resolution through alternative dispute resolution (ADR) are on the rise in the United States, a requirement that may gain acceptance elsewhere. Corporations are increasingly trying ADR as is exemplified by the signature by 4,000 corporations of the Center for Public Resources (CPR) pledge, which commits signatories to trying ADR before filing suit in a dispute with another signatory. Deal mediation and other innovative uses of expert facilitation are emerging. The long traditions of harmony and

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conciliation in the Far East will inevitably influence the resolution of disputes in our global economy and advance the use of mediation.

Perhaps most importantly, as litigants complain about how costly and slow litigation is and arbitration seems to have become, they seek a cheaper and faster dispute resolution process. Mediation offers a solution and is growing exponentially. The increased interest in mediation is reflected in the mediation case loads of the dispute resolution institutions. For example, the Centre for Effective Dispute Resolution (CEDR) found that the number of mediation matters it handled increased sevenfold from 1997 to 2004, an increase to 700 cases from 100 cases.¹

LITIGATION OVER MEDIATION SETTLEMENT AGREEMENTS

It is said that settlements reached in mediation have a higher rate of compliance than court decisions. As the parties have themselves developed a resolution they feel is fair to them and that they are capable of performing, the likelihood of not fulfilling obligations of the settlement are reduced. For example, a structured settlement with payment terms within a party’s ability to pay is much more likely to be paid and useful to the other party than a court money judgment that leaves the prevailing party with the unhappy task of moving forward with collection actions, as the loser simply cannot make the payment.

However, as the number of mediations increases, there is an inevitable increase in the litigation that arises out of mediation. Professor Coben conducted a review of cases involving mediation in the United States in an article published in 2006.² He found over 1,200 cases in which substantive issues related to mediation were litigated and resulted in a reported decision. Many of those cases dealt with the enforcement of a mediated settlement agreement (MSA).

While an MSA is the outcome of a voluntary agreement between the parties, there are many reasons that might cause a party to retreat from an agreement reached. These reasons might include the following:

- There is a change of heart after the mediation is over;
- The company has a new boss or new ownership;