

## "Amicable Resolution" of International Disputes

Businesses that are significantly engaged in international activities will find it useful to provide for a "seamless web" of consistent dispute resolution procedures in their international contracts and deal documentation. In that regard, parties to an international commercial dispute are not limited to choosing between international court litigation or final and binding arbitration.

Mediation is increasingly becoming a preferred way to resolve, as a required first step, international disputes. Unlike arbitration, where one to three arbitrators issue a binding arbitral award, mediation usually involves one third-party mediator who facilitates a structured negotiation process that is completely voluntary and results in a non-binding solution created by the parties. The mediator acts only as a facilitator of the dispute resolution process, not as a judge. In addition to resolving disputes more quickly, efficiently, and creatively, effective mediation can preserve the business relationships that can end when final and binding arbitration or court litigation commences.

A question unique to international commercial mediation is the nationality and substantive legal background of the mediator — cross cultural business and legal sensitivity is critical. The civil law and common law approaches to legal analysis may differ. If the parties have agreed on a nationality for the chair of any subsequent final and binding arbitration, that may be the best nationality for the mediator. If the parties have not, then performing the kind of analysis that drives the selection of a "neutral" chair, different from the nationalities of the parties, may be appropriate.

Another question to consider carefully is the type of mediator you want. Do you want a straight-shooter who will call the merits as he or she sees it, and provide an independent and unbiased assessment that may persuade one party more than another to settle? Or do you want a mediator who views his or her job to brokering a settlement no matter what? Also, it is important to establish clear timelines which can only be extended by agreement of *both* parties and for party-principals to have settlement authority, at least within certain parameters.

Many of the multinational commercial dispute resolution centers have established mediation rules for use by parties to disputed international business arrangements, and often have updated them to make them more user-friendly in modern commerce. They can be used on a stand-alone basis once a dispute arises that otherwise would go to arbitration or court litigation, or included as, *e.g.*, a condition precedent to final and binding arbitration in an international dispute resolution clause.

### The ICC's Approach to Amicable Dispute Resolution

In this commentary, we review the International Chamber of Commerce's (ICC) approach to Amicable Dispute Resolution (ADR) with a specific focus on the increasing use of international commercial mediation.

Mediation under the ICC is completely voluntary, meaning that it only occurs if the parties agree to mediate either in a pre-existing dispute resolution clause or specifically for a particular dispute that has arisen. The parties control the process and can create more creative solutions than would normally be available to them in litigation or arbitration — where judges or arbitrators who may be unfamiliar with the inner-workings of the business relationship render binding decisions. Here, the parties actively decide on their own solution. This is because parties have the opportunity to talk about concerns they might ordinarily not discuss if not legally relevant in an arbitration or litigation. If a dispute reaches settlement, the mediator will draft the agreement for the parties who can then choose to keep it as a non-binding agreement or have their lawyers turn it into a binding contract.

### CONTACTS

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The neutral evaluation mechanism allows the parties to seek a neutral third-party's non-binding opinion on a variety of matters, including: issues of fact or law, technical issues, and contractual interpretation or modification issues. Another available ADR technique is the mini-trial. Mini-trials begin by creating a panel consisting of a neutral third-party as a facilitator and an executive from each of the disputing parties. The executives have authority to bind the company, but should not have previously been involved in the dispute. Each party presents its position to the panel and then the panel either seeks a solution acceptable to all parties or expresses an opinion on the positions of each side.

### **Evolution of the ICC's Amicable Dispute Resolution**

In 2001, the ICC replaced its 1998 Rules of Optional Conciliation with the ICC Amicable Dispute Resolution Rules as a result of a worldwide interest in promoting mediation for resolving international business disputes. An ICC task force comprised of practitioners and jurists throughout the world reviewed and updated the ICC ADR Rules. While amicable dispute resolution techniques such as mediation have become relatively popular in the United States, they are still gaining acceptance in other parts of the world, including Europe.

The ICC refers to its approach as "amicable dispute resolution" rather than "alternative dispute resolution" because of the amicable nature of its process and because the phrase alternative dispute resolution in the past often referred to final and binding arbitration, in contrast to court litigation. (One could observe that the ICC's use of the ADR acronym for its various non-binding options may not lessen confusion.) The ICC excludes arbitration from ADR and only includes proceedings that cannot be enforced at law. The main characteristics of ICC ADR rules are intended to provide for proceedings that are flexible, party-controlled, rapid, confidential, and inexpensive.

Typically, parties can use ICC ADR before resorting to arbitration or they can use it in conjunction with arbitration. The enforceability of an ADR decision is also within the control of the parties. Parties may decide to agree in writing that they will follow a decision of the neutral third-party, even though the decision itself is unenforceable. Their agreement would then be binding on them in accordance with the law applicable to that agreement.

### **Tailoring Dispute Resolution Clauses to Meet International Business Needs**

The question becomes which method is best to resolve a particular international business dispute. The ICC provides a variety of suggestions, including dispute resolution clauses that call for: (1) optional ADR; (2) an obligation to consider ADR; (3) an obligation to submit to ADR with an automatic expiration mechanism; or (4) an obligation to submit to ADR, followed by an ICC arbitration as required. Dispute resolution clauses governing how the parties will handle disputes are typically drafted into the underlying contract or in a later agreement. If the parties have not addressed dispute resolution before the dispute arises, there is always the option of submitting a Request for ADR to the ICC. This is typically submitted by one party and accepted by the other party.

Many international business contracts provide multi-tiered dispute resolution clauses that provide for different forms of dispute resolution depending on whether or not the parties reach an agreement. For example, when a dispute arises, parties to an international business contract may decide that they would first be interested in pursuing mediation and then arbitration. In such a situation, the parties should have a multi-tiered dispute resolution clause in their original contract. Under this example, a sample multi-tiered dispute resolution clause, would look something like this:

#### **1. Mediation**

The parties shall endeavor to resolve any controversy or claim arising out of or in connection with this agreement or the breach, termination or validity thereof, by mediation under the [ICC Rules] in effect on the date of this Agreement. Unless otherwise agreed, the parties will select a mediator from the list of [ICC] neutral third-parties.

All negotiations and proceedings pursuant to paragraph 1 are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality protections provided by applicable law.

If the dispute has not been resolved by mediation as provided herein within [60] days of

the initiation of such procedure, either party may initiate arbitration in accordance with provision 2.

## 2. Arbitration

All disputes arising out of or in connection with the present Agreement shall be finally settled under the Rules of Arbitration of the ICC by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be \_\_\_\_\_ and the language of the arbitration shall be in \_\_\_\_\_.

In addition to setting up the order in which dispute resolution mechanisms will be used, the dispute resolution clauses may also seek to address many other details, including but not limited to: whether the parties would like to conduct in-person negotiations before using mediation; how a neutral will be selected; which executives from each side will attend the ADR proceeding; the number of neutrals for the ADR and arbitration proceedings; the country where the proceedings will be held; whether the parties must, in good faith, try ADR (i.e., mediation in the above example) before moving to the next tier of their dispute resolution clause; whether any sanctions will be imposed for breaching obligations in the dispute resolution clause; and how any other costs will be dealt with.

If you would like to discuss your international business dispute resolution methods as they relate to your specific business needs, please contact Allen Green at [agreen@mckenna.com](mailto:agreen@mckenna.com).

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