LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Mediation As An International Arbitration Tool

Law360, New York (June 8, 2015, 10:27 AM ET) --

Hugh Hackney

Can mediation work as an alternative dispute resolution tool in international arbitration disputes? Imagine a case with five parties from four countries, with documents written in six languages and the law controlling the case is from two countries and is written in three languages. Obviously, these logistics create issues unto themselves before you get to the facts and the law of the case. The fact situation was real, and it created an arbitration that was intellectually challenging and legally complex.

Sometimes the parties and their attorneys are reluctant to engage in mediation because they do not understand mediation practice. This reluctance can be based on several prejudices and misconceptions; however, many cultures use some form of mediation based upon tradition and experience. Tribal cultures are more open to mediation than some that have more legalized systems of law. They possess more awareness of the process and practical skills used in mediation to obtain the desired resolution of a conflict. Developed civil law systems may be less receptive to the process, but it is used with great success in Africa, the Middle East and Asia where varying forms of mediation have been practiced for centuries.

Sometimes parties are reluctant to spend the money necessary for a multiday mediation and to pay the fees for their attorneys and a mediator to prepare for and attend the session. Yet the cost of a mediated settlement pales in comparison with the cost of a full-blown international arbitration. Many attorneys, especially those with limited experience with the process, are reluctant to relinquish control of their client and the process to a third party for various reasons. The potential resolution of a case with large fees involved may not appeal to some clients, but sophisticated global corporations see the process as a way to save money, to arrive at business solutions to disputes, and to continue to do business with the opposing party.

The logistics of an international mediation, like an arbitration, may be both time-consuming and expensive. The parties must agree upon the location, the language(s), the use of interpreters, when necessary, the agreed-upon version of the documents and the session dates which are dependent upon the schedules of incredibly busy international business leaders and political figures. However, these logistical issues are easily solved when the parties and their respective attorneys desire resolution of the dispute.

When all the issues surrounding the preparation to mediate have been resolved, the parties must then agree on what their goals are for the process. Do they wish to limit the issues to be resolved? Will they

assure the presence of the key players at the negotiating table with authority to settle and a clear understanding of the process?

It is recommended that the parties and their attorneys meet with the mediator in person, if possible, to discuss the case, their goals and any important facts necessary for the mediator to understand all of the underlying issues as well as those being openly discussed. It is essential for the parties to understand the confidential nature of the process, to be candid and to trust the mediator and the process. Hopefully, trust was a key element to the selection of the mediator along with the competence of the individual. Also, the parties need to allow adequate time for the process to evolve. The international aspect of the dispute makes it necessary to anticipate that more time needs to be allotted for resolution to occur. At least three days are generally necessary for a complex international matter to be resolved.

Timing is an important but often overlooked aspect of the process. The fact that the agreement in dispute may call for mediation or conciliation before the parties are allowed to arbitrate does not necessarily dictate a rush to sit down. It is possible to proceed along parallel tracks toward resolution if the parties agree. Many times, mediation will resolve several of the underlying or collateral issues and thus narrow the scope of the arbitration. Once it appears mediation has failed, the real question is: "When is never really never?" Often, one or more of the parties will want to reconvene after they have tested the resolve of their opponent(s). When that event occurs, it may be much easier for the mediator to reopen the door to a resumed mediation than for either party to raise the proposal.

Enforcement is always a topic for discussion in a mediated settlement agreement. The question of where to enforce an award or a mediated settlement agreement, should a party renege on its agreement, is always present. The presence of binding treaties and how to enforce the agreement require consideration. The use of business leverage and political leverage also deserve analysis as part of the process. Political leverage can be a very tricky proposition to use and to define. Local and national politics can create last minute changes in bargaining positions along national cultures and unexpected events, including natural catastrophes. Political risk can change dramatically in our present, unstable world. However, when flexibility and patience are shown by all parties, their attorneys and the mediator, last minute developments need not derail the settlement of a case

Finally, the best friend of a good mediation and ultimate resolution is total confidentiality, which is often missing in international mediations either because of the rules governing the process or because of the skills of the selected mediator. It is impossible to overstate the importance and necessity of the confidentiality of the process. Success rates rise dramatically where it is part of the process. While many impediments to the mediation of international arbitration disputes may exist, it is still the best way to resolve differences economically and efficiently. After two weeks of hearings and four days of mediation, the case discussed above settled with a business resolution that worked for the parties.

—By Hugh Hackney, JAMS

Hugh Hackney is a neutral with JAMS in Dallas.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2015, Portfolio Media, Inc.