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Mining Mediation Rules for Representation Opportunities and Obstacles

Harold I. Abramson

MINING MEDIATION RULES FOR REPRESENTATION OPPORTUNITIES AND OBSTACLES*

*Harold I. Abramson***

Buried in mediation rules can be found a few surprises, some desirable and some not. The rules, usually few in number and quite compact, can contain unexpected opportunities and pitfalls when developing a mediation representation plan.[1] This article considers several distinctive issues[2] that can arise when applying mediation rules to international mediations.

I. SELECTING A NEUTRAL MEDIATOR

How do you select a mediator in a cross-border dispute whom both sides view as neutral? Parties must be confident in the mediator's neutrality so that they will trust disclosing information and trust the mediator's initiatives. Even though professional mediators know to maintain scrupulously their neutrality, parties may still be skeptical of any mediator from the country of another party.

Mediation rules occasionally include a default mediator selection process designed for parties from different countries.

The *mediator from a third country* approach is used in the UNCITRAL Model Law. It suggests that the person recommending a mediator "shall take into account

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* A version of this article was published in 1 J. INT'L DISP. RESOL. 40 (Germany, 2004). This article is based on a study of seventeen sets of mediation rules that were issued by the United Nations and dispute resolution organizations in Europe, the United States, Egypt, Hong Kong, and China. Next year, an expanded version of this article will be published that will analyze over fifty mediation rules from every region of the globe.

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[1] For a full examination of how to represent clients in mediations, including how to prepare a mediation representation plan, s*ee* HAROLD ABRAMSON, MEDIATION REPRESENTATION-ADVOCATING IN A PROBLEM-SOLVING PROCESS (2004).

[2] For a fuller discussion of a number of distinctive issues that can arise in international mediations, *see* Harold Abramson, *International Dispute Resolution, in* ALAN RAU ET AL., PROCESSES OF DISPUTE RESOLUTION 929-938 (3d ed. 2002) and Harold Abramson, *International Mediation Basics, in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION Ch.II.1 (Rufus Rhoades et al., eds. 2002).

the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."[3]

The *one from each country* approach is taken in a Chinese rule where each party appoints a mediator and the two mediators jointly conciliate the case.[4] If you elect the co-mediation solution, rules can provide different approaches to selecting the mediators. The Chinese and a German rule adopt the international arbitration model of party-appointed third parties; each party appoints a conciliator.[5] But the UNCITRAL Model Law, while preferring this approach in earlier drafts and characterizing it as the "prevailing view,"[6] in its *Draft Guide*, ultimately rejected this approach in favor of requiring parties to "endeavour to reach agreement on…conciliators" unless they agreed on a different procedure.[7]

A third approach, implicit in rules that are silent on selecting international mediators, is to select a *qualified mediator in the location of the mediation*. Realizing that the mediator has no decision-making power, a party may not be too concerned about the country of the mediator as long as the mediator has excellent credentials and experience.

Ultimately, you will have to come to terms with what selection process will give you confidence in the mediator. Fortunately, these concerns are not as weighty in mediations as in arbitrations. In mediations, you have the safeguard of simply walking away from the mediation if you lose trust in the mediator, while in arbitrations, you must demonstrate prejudice as a basis for disqualifying the neutral.

II. CHOOSING ROLES FOR THE MEDIATOR

There is no more important decision in mediation representation than choosing the roles of your mediator. You want to be sure that you select a mediator who will employ the mix of approaches and techniques that you think

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[3] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation, Art. 5(4) (2002) [hereinafter the Model Law], *available at* http://www.uncitral.org/english/texts/arbitration/ml-conc-e.pdf.

[4] China Council for the Promotion of International Trade (CCPIT) and China Chamber of International Commerce (CCOIC), CONCILIATION RULES, Arts. 9(3), 12, (2000), *available at* www.cmac.org.cn/BCC/a19.html (last visited on January 28, 2005).

[5] German Institution of Arbitration, DIS Mediation/Conciliation Rules, Sec. 7(2), (January 1, 2002), *available at* www.dis-arb.de (last visited on January 28, 2005).

[6] United Nations Commission on International Trade Law (UNCITRAL), *Draft Guide to Enactment and Use of the UNICTRAL Model Law on International Commercial Conciliation*, 35th Sess. at para. 46, U.N. Doc. A/CN .9/514 (May 27, 2002), [hereinafter the *Draft Guide*].

[7] The Model Law, *supra* note 3, Art. 5(2).

are warranted. Hidden in the flexible language of mediation rules can be found particular and sometimes unexpected mediator roles that can impact the way you represent your client.

In international mediations, you should carefully clarify the roles of the mediator because unusual variations of mediation can occasionally be encountered. In one atypical arrangement, the mediator might investigate the facts and law and issue a written report containing her recommendations.[8] In another uncommon arrangement, each party may designate a mediator and then the mediators meet with each other to hammer out a resolution that is presented to the parties for their confirmation.[9] You should guard against surprises by specifically discussing the roles of the mediator that each side contemplates. This inquiry is essential in order to avoid cross-cultural misunderstandings.

This vital discussion of mediator roles is not left to chance by the Oslo Chamber of Commerce Rules: "The Mediator, in cooperation with the parties, shall see to it that an Agreement is made"[10] that covers this subject. This prophylactic measure is a particularly appealing one because it can ensure that the parties face essential design questions and formulate a suitable process before the first mediation session. The more typical approach, however, gives parties the option of negotiating the roles. And, if they do nothing, the default process in the rules would control. The default rules usually give the mediator broad authority to do what is "appropriate" along with some other particular powers such as caucusing (meeting privately with one side).

One mediator power that can potentially overshadow the entire mediation process is the power to recommend settlements. This mediator power, which can occasionally be found in rules, has the potential to singularly pigeonhole and shape your entire mediation representation strategy.[11] Realizing that the mediator may formulate settlement proposals, you may be induced to approach the

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[8] *See* Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L. J. 578, 585-87 (1991/92) and Tobi Dress, *International Commercial Mediation and Conciliation*, 10 LOY. L.A. INT'L & COMP.L.J. 569, 574 (1988).

[9] *See* WILLIAM FOX, JR., INTERNATIONAL COMMERCIAL AGREEMENTS 193 (1992) and Reif, *supra* note 8 at 632-33.

[10] Oslo Chamber of Commerce, RULES OF THE ARBITRATION AND DISPUTE RESOLUTION INSTITUTE OF THE OSLO CHAMBER OF COMMERCE, Art. 34, (2003), *available at* www.Chamber.no/tekster.cfm?artid=53.

[11] For a more a more in-depth analysis of the impact that mediator evaluation can have on advocacy, *see* Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation,* 10 HARV. NEG. L. R. (2005)(forthcoming) (The article considers how to implement a "constricted problem-solving" approach to advocacy when the mediator may engage in evaluation).

mediation more like a judicial process than a negotiation. Instead of viewing the mediator as a facilitator, you may view the mediator as a decision maker. Instead of formulating a negotiation strategy based on meeting parties' interests, you may be impelled to formulate a strategy designed to persuade the mediator to recommend favorable settlement proposals.

The new UNCITRAL Model Law, for instance, gives the mediator the power to "make proposals for settlement," "at any stage of the conciliation proceedings."[12] This provision is especially surprising because the Model Law also makes clear that the mediator cannot act as an arbitrator without approval of the parties,[13] stating reasons, in the *Draft Guide*, that apply equally to barring mediators from making proposals.

The UNCITRAL's *Draft Guide to Enactment* recognized the dilemma for the advocate when a mediator might subsequently act as an arbitrator by pointing out that "[a] party may be reluctant to strive actively for a settlement...if it has to take into account the possibility that if the conciliation is not successful, the conciliator might be appointed as an arbitrator…"[14] The same underlying point applies when the conciliator might formulate proposals. Permit me to indulge in editing the *Guide*: "A party may be reluctant to *participate candidly* ~~strive actively for a settlement~~...if it has to take into account the possibility that if the conciliation is not successful, the conciliator might *formulate a settlement proposal based on what was learned during the conciliation* ~~be appointed as an arbitrator~~…" (edits in italics)

The risk of the recommendation power overshadowing the mediation can be reduced by the type of carefully crafted approach adopted in the CEDR Mediation Rules. The Rules give the mediator *conditional* recommendation authority:

> If the Parties are unable to reach a settlement in the negotiations at the Mediation, and only if all the Parties so request and the Mediator agrees, the Mediator will produce for the Parties a non-binding recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Mediator suggests are appropriate settlement terms in all of the circumstances.[15]

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[12] Model Law, *supra* note 3, Art. 6(4). Similar authority is given the mediator by the AAA International Mediation Rules. *See* American Arbitration Association, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, Rule M-10, (July 1, 2003), *available at* www.adr.org.

[13] The Model Law, *supra* note 3, Art. 12.

[14] *Draft Guide*, *supra* note 6 at para. 70.

[15] Centre for Effective Dispute Resolution (CEDR) MODEL MEDIATION PROCEDURE AND AGREEMENT, para. 12 (2002), *available at* www.cedr.co.uk/library/documents/MMPA.8thedition.pdf.

CEDR's *Guidance Notes* state that "[t]he intention of paragraph 12 is that the Mediator will cease to play an entirely facilitative role only if the negotiations in the Mediation are deadlocked. Giving a settlement recommendation may be perceived by a Party as undermining the Mediator's neutrality and for this reason the Mediator may not agree to this course of action."[16]

Another mediation rule that is quite common bars a mediator from switching to the role of arbitrator unless both parties specifically authorize the mediator to switch roles. The temptation to ask the mediator to switch roles to resolve conclusively the dispute can be considerable when the parties have reached an impasse after spending a day or more together mediating the dispute. This temptation can be especially powerful when fueled by the cultural practices of one side. For instance, consider the Conciliation Rules of the China Council for the Promotion of International Trade ("CCPIT") and the China Chamber of International Commerce ("CCOIC"). The specific wording of Rule 21 starkly reveals the attitude of the Rules: "If conciliation fails, the conciliator(s) may be appointed by one of the parties as arbitrator(s) in the subsequent arbitration proceedings, *unless such appointment is opposed by the other party* (emphasis added)."[17] The Introduction to the China International Economic and Trade Arbitration Commission ("CIETAC") Website, in commenting favorably on combining arbitration and conciliation, points out,

> Many years of practice has [sic] indicated that the combination of arbitration with conciliation can make good use of the advantages of both arbitration and conciliation, so as to settle disputes more efficiently and turn hostility into friendship. It may also save parties expenses and help to maintain the friendly relations and cooperation between them. This practice in Chinese arbitration has received worldwide attention and approval.[18]

The convenient benefits and compromising risks posed by the same neutral serving two roles are widely known.[19] If you elect this scheme, you should consider adopting a number of protocols for minimizing its risks, protocols that

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[16] CEDR *Guidance Notes for Model Mediation Procedure and Agreement*, The Mediation 9-12 (October 2002). *Also see* CPR MEDIATION PROCEDURE FOR BUSINESS DISPUTES IN EUROPE, Rule 6 (1996)(limits the recommendation power to after the parties fail to reach a settlement and after parties consent to receive a mediator's final settlement proposal).

[17] See CCPIT and CCOIC RULES, *supra* note 4.

[18] *Introduction*, Section XV. Combination of Arbitration and Conciliation, *available at* www.cietac.org.

[19] *See* Harold Abramson, *Protocols for International Arbitrators who Dare to Settle Cases*, 10 AM. REV. INT'L ARB 1, 3-4 (1999).

are designed to preserve the integrity and effectiveness of each dispute resolution process.[20]

III. ENSURING CONFIDENTIALITY OF THE MEDIATION PROCESS

Confidentiality, one of the great benefits of mediation, can be less secure internationally than you might be accustomed to at home due to the less developed and untested laws in some countries. Even though virtually every set of mediation rules provides confidentiality, the scope of protection can vary from set to set, although you should be aware of an incipient effort to promote uniformity in mediation rules.[21] You ought to assess carefully whether the rules that you are considering provide sufficient protection and will be enforced in relevant jurisdictions.

IV. ENFORCING SETTLEMENT AGREEMENTS

In cross-border disputes, you need to give extra attention to how any resulting settlement agreement will be enforced. In domestic disputes, you can rely on your local court system for enforcement. However, pursuing cross-border enforcement in the local court of a foreign country can take more time and expense and sometimes can be less reliable.

An intelligent and efficacious solution is offered by the Stockholm Chamber of Commerce Rules. Parties can agree to appoint the mediator as an arbitrator and "request him to confirm the settlement agreement in an arbitral award."[22] The resulting "consent" award can then be enforced in numerous other jurisdictions under the relatively reliable procedures of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[23]

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[20] *See id.* at 7-15 (The twelve suggested protocols, designed for when an arbitrator mediates, need some modifications for when the mediator arbitrates).

[21] The Model Law on International Commercial Conciliation, adopted by UNCITRAL and recommended by the United Nations General Assembly in 2002, is designed to promote uniformity in mediation law among nations. The Uniform Mediation Act, approved by the National Conference of Commissioners on Uniform State Laws in August 2001 and amended in August 2003 to coordinate with the UNCITRAL Model Law, is being considered for adoption by a number of states in the United States.

[22] RULES OF THE MEDIATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, Art. 12, (April 1, 1999), *available at* www.sccinstitute.com.

[23] 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, T.I.A.S. No. 6997 (1959).

V. CONCLUSION

I was surprised to discover surprises in these mundane and essential mediation rules. They can open up opportunities and present obstacles when one is representing clients in international mediations. Do not leave home without studying them.