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Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective

Introduction and Abstract

The normal way for Western lawyers, and perhaps all modern lawyers, to settle a dispute is by litigation. In international business transactions, the role of litigation before courts has been largely replaced by litigation before international arbitral tribunals relying on such institutions and procedural rules as provided by the Paris-based International Chamber of Commerce, UNCITRAL, the Stockholm Chamber of Commerce, the London Court of International Arbitration or the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) plus a host of smaller, "emerging" arbitral institutions. The advantages of such arbitral litigation have been said to include greater neutrality (as compared to domestic courts), expertise, lesser cost, greater confidentiality, more expeditious settlement and helping parties to avoid confrontational and relationship-destroying litigation. A considerable arbitration service industry has emerged in the main arbitration centres. It is in the interest of this industry to maintain arbitral litigation as the preferred form of dealing with disputes between commercial companies and between companies and governments. This note suggests that arbitral litigation indicates a serious failure of management within the organisation and in the management of inter-company or company-state relationships. It is a very high-cost and high-risk activity which in many cases is inferior in terms of cost, risk, efficiency, management time or relationship nurturing and reputation to alternative systems of dispute settlement, mainly mediation and related methods (e.g. sole-expert adjudication). Modern management and financial analysis methods are rarely applied to litigation in practice. Litigation reflects a break-down of relationships within a company and with an external partner, often resulting from a break-down of a personal relationship. It also reflects a breakdown of the hold of management over the dispute – and very often indicates managerial failure. It is turned over to the corporate law departments. The dispute then and there triggers the normal

lawyers' reaction: Sue the bastards. In most scenarios, it would be much more efficient to analyse the dispute as a management problem and apply managerial decision-making to decide on the main options: give in, continue to negotiate, litigate or use low-profile mediation. But intra-corporate, intra-governmental and inter-personal dynamics – plus the emotional need for assertiveness in the face of conflict, tends to lead to the often sub-optimal strategy of litigation.

In-depth Comment:

Modern arbitral litigation is much closer to standard litigation, except that it is more confidential (with the exception of modern investment arbitration which tends to lead to extensive transparency) and more independent from government influence. It tends to encompass massive costs for the litigants. Assuming the – concededly extreme – UK approach, both sides will employ several lawyers (solicitors, barristers) to make its case. There will be as a rule a 3-person tribunal. Even in smaller cases (e.g. 5-10 M US \$) and assuming preparation time of 15 days for 10 lawyers and 25 days for the exchange of briefs and hearings and say 15 days for arbitral deliberation and decision-making, the total bill for direct costs can easily run up to 1 Million or more US\$. This does not take into account staff time – corporate lawyers for managing the contract between client and outside legal team, corporate management for giving evidence nor the time for enforcing an award once made. Total cost can thus amount to 1.5 M US\$ or more. Different from earlier claims of the expediency of arbitration, most arbitral procedures seem to drag as long as court procedures or even longer. Arbitrators tend not to be full-time judges available at all times. Their schedules require complex cross-border coordination. A large part of their time will be needed to make them into a functioning team.

Risk and uncertainty in arbitral litigation is probably even higher than in the setting of a national court. The arbitrators will tend to be less homogeneous than, say, judges in the English High Court. Different legal approaches will have to be coordinated in the tribunal's deliberation. There is much less a rule or tradition of precedent which, while not infallible, at least makes educated guesses about a tribunal's judgement after the taking of evidence possible.

Any litigation makes it much more difficult to continue a relationship thereafter. Typically, facts presented in arbitration will be very selective and aim at showing the other party's conduct in the

darkest light possible. Legal theories will equally be sought which paint the conduct of the other party as much condemnable as possible. As litigation evolves and each party is unable to recognise itself in the dark colours painted by other party's legal team, the logic of litigation intensifies mutual antagonism. The merits of "our" case increasingly dominate perception; detached critical analysis is absent and discouraged by corporate loyalties of an institutional and personal nature. The other side's argument are coloured negatively and easily discounted. Each party's team and internal thinking will coalesce into a "We against Them" mentality. Efforts to apply rational and detached analysis would usually indicate that there is problematic conduct on both sides and that the dispute has been exacerbated by a collapse of personal relationship and trust and the lack of early managerial focus on solving an emerging dispute will no longer be persuasive – they will be rather seen as treason to the evidently morally and legally just cause of each party.

Instead of running their business, executives will be required, by their and the other side's legal team, to devote increasing attention to the dispute, to its allegations and to refute the often extreme allegations of the other side. The fear of losing and thus losing face and credit in a competitive corporate environment full of detractors looking for their competitors' weaknesses will compel executives to get engaged in the dispute much more than the dispute warrants. The dynamics of litigation means that at the beginning it may not get that much attention and is more easily started. But as the confrontation develops heat, more and more attention is required. Initial estimates of cost and effort are therefore frequently likely to be substantially below what the logic of an escalating dispute in the end requires. International project managers are familiar with the risk of overshooting budgets. But this risk can as a rule be controlled. Litigation risk, however, can not. The overshooting of one's original time and cost budget is a necessary consequence of the antagonistic character of litigation where action by one party requires a commensurate response. This risk of overshooting the early litigation budget estimates is therefore hard, if at all, to control. Each side's investment in the litigation requires, in a circle of escalating confrontation, the respective other party to match such investment. Even after a judgement, rancour tends to persist. The proponents of litigation will often have made internally exaggerated and now disappointed claims over the relative merit of their position. They will not be content with the judgement and be encouraged to find sinister motives for judgements against them or not fully for them. Maintaining the relationship will therefore often be impossible. Organisations will take considerable time before they have enough trust in each other to re-start relationships in other areas. The little evidence we have indicates that it is very rare in

arbitral litigation that the original estimate – in particular provided by the counsel later commissioned to do the arbitration – is not exceeded, and often in multiples.

Why do then companies choose litigation and arbitration? Why do they not, as reasonable business people, analyse jointly the reasons for their dispute, the rules applicable, their interests implicated, and find a solution which allows them to maintain their relationship, their reputation and their interests to a maximum? I suggest that the choice of such an expensive, time- and effort-consuming response to a dispute as (arbitral) litigation is foremost a failure of management – both of the commercial managers usually at the root of the problem and of the corporate or governmental law department to whom an unsolvable dispute is usually forwarded – much like a general medical practitioner gets rid of an unsolvable case by sending the case onwards to a specialist.

The main reason for inabilities of individuals, teams, corporate departments and even the organisations themselves to settle often minor disputes is the very logic of a dispute. A dispute leads as it evolves to a hardening of positions within individuals' minds and within their organisation – negotiation theory calls this the "lock-in" of bargaining positions¹. The trust that was available or established when negotiating a deal is fast eroded as a dispute evolves without settlement and in particular as it moves into confrontational litigation mode. Outside counsel have little interest, background or position to move towards settlement. They are like mercenaries paid to fight, and not to make peace. They are paid as a rule for billable hours; the natural incentive is then to maximise billable hours, but not to cut short the evolution of a process that promises to continue the billing process. If the two external legal teams and the arbitrators would sit together and say: This dispute is really not necessary; it can be easily settled. Let us push both parties like tantrum-throwing children towards seeing the light of reason – they would effectively cut off their economic life-line. Internally, the original trouble-makers will fight hard not to be seen as such, but to paint the other party in the blackest light and invoke the loyalty and solidarity of the organisation. Proponents of a settlement risk being seen as traitors to the corporate community. Even the corporate adversaries of the original trouble-makers may see litigation as a convenient way to drive the trouble-makers into a loss of face detrimental to their career. Stopping the train towards litigation by saying: Wait! Shall we not try to settle this? Is therefore most difficult from a certain stage, probably from the stage when the external team with its own drive towards litigation has been assembled and contracted.

¹ Roger Fisher, *Getting to Yes*, 1992

Long-standing disputes have often been caused by executives who later leave either their position or the company. The intricacies of the dispute are then lost in the mists of time. Nobody remains in the company who understands easily what was at stake and what could be done about it. The litigation machine by then has taken off and can not be stopped easily. Litigation then develops its self-propelled dynamic, vested interests, institutional inertia and it is very hard to suspend or stop. The corporate lawyers to whom the case has been handed down apply their normal skills – making the legal argument, preparing for litigation. The logic of legal confrontation which turns into an organisational and emotional confrontation then moves forward on its own. There is not a corporate function of professional dispute management – rather than a law department function of “litigation” to which the dispute then gets moved.

In this situation it is normal that companies have been looking for “alternatives” to conventional litigation. Most of these alternatives try to avoid (at least in the beginning) litigation and focus on trying to overcome the psychological, emotional and organisational obstacles to the parties negotiating a successful solution to their problem. Recent court reforms (e.g. in the UK) have highlighted the instrument of “mediation” (sometimes grouped with related techniques together as “ADR”) as a stage preceding the initiation of litigation. Mediation (or “conciliation”) is nothing revolutionary new. It was included in key legal instruments setting up the Hague-based Permanent Court of Arbitration² and has often been used in international disputes (e.g. the Pope mediating by bringing Chile and Argentina to a settlement of their age-old Beagle Channel dispute or the two facilitators mediating in 2002 the Guatemala-Belize boundary dispute)³.

Mediation is probably pervasive in all cultures, though some cultures, ancient and modern, have a more institutionalised, culturally recognised and recommended method of choosing a respected elder to mediate family, commercial and political disputes⁴. Mediation is also a standard, not as such described, management technique. There is no senior executive around who does not engage frequently in mediating between warring

² R. Meese, *delimitations maritimes: reglement jurisdictionnel et conciliation internationale*, *Annuaire du Droit de La Mer*, 1998, 161-187

³ For a longer discussion: T. Waelde, *Methods for Settling Boundary Disputes: Escaping from the Fetters of Zero-Sum Outcomes*, in: 4 *J World Investment*, 51, 2003

⁴ *Excellent: Christopher Moore, The Mediation Process, Wiley 1996. The most helpful guide to practice in my view – provided analysis and guidelines are intelligently adapted in quite different, non-US, situations.*

subordinates or colleagues. Practising lawyers, e.g. in insurance or tort claims, or defense lawyers with respect to "plea bargaining" are frequently engaged in negotiating a settlement to avoid litigation. Judges – though less so in the English judicial system – often engage in techniques to persuade (sometimes with strong-arm techniques) parties to settle. Judicial economy (or, as my lawyer father would say, "the natural laziness" of judges) is a strong incentive for such practices. A judge that is not paid extra for writing complex judgements and has, or feels, overloaded with his/her caseload, will evidently benefit from early settlement of a case. I remember from my days as a judicial clerk at the Landgericht Frankfurt that some judges – in particularly those valuing leisure time – were particularly expert and effective in pressuring parties into a settlement. The distinctive feature of "mediation" as compared to settlement by bargaining between the parties and their lawyers or settlement imposed by judges under the shadow of their decision-power is that a neutral, non-adjudicating person chosen by both parties seeks to move them to a settlement, either by shuttling between them and persuading (with his insight knowledge) them to move towards a mutually acceptable bargaining position or by developing and presenting a settlement proposal him/herself.

But formal mediation for commercial disputes (or disputes between governments and companies) is much less established than it should be, given the evident problems of the litigation approach and the last decade of increasing theoretical popularity and spread of "ADR" methods. The reasons are not fully clear, but I venture some explanations. First, professional lawyers are in control of disputes, both in government and in the commercial world. They are trained from day 1 at university at making a "legal" argument about the relative merits of one party over the other one. The legal profession is geared towards litigation. This controls the mindset of most practitioners and academics. Non-litigative ways of settlement tend to downgrade the great value the legal community attaches to the legal argument, i.e. using facts selected for their suitability under processed legal principles to argue for the justice of one case as compared to the opposing case. Pure economics also play a role. The legal professional owns dispute much as the investment banking community owns large-scale corporate transactions. There is much less money to be made out of settling a dispute rather than playing it out to the fullest extent. Providing full justice – in lawyers' speak – means making sure no legal stone is left unturned and no argument not contradicted in detail. Payment by time, now the normal way of computing legal fees' income, heavily discourages any action that might cut a legal proceeding short. It also explains the enormously repetitive character of arguments hurled again and

again at the respective other side in major arbitral litigations with lawyer numbers the size of a football team (US and non-US) in major cases – just look at the large NAFTA arbitrations against, for example, the US government on www.naftaclaims.org. The impression is sometimes that the lawyers do not only get paid by the hour, but also by the page. The same incentive applies for arbitrators; these are additional under real or contrived constraints not to show partisanship by suggesting settlements favouring one or the other party. The situation seems to have different up to the 19th century when arbitration was considered to be not only legal, but also “political”. But modern arbitration is mostly, in particularly in the Anglo-Saxon legal culture, “arbitral litigation” in the full sense. Legal constraints (“ne ultra petita”, unflexible ways of adjudicating on “impartiality” of arbitrators who take a pro-active role and excessive rules developed by the courts in enforcement cases) must have contributed to this change for the worse, but also the ownership of the arbitral process by the litigation departments of large law firms.

Second, there is no well-established set-up for mediation. The legal profession lives on over 2000 years of education, culture and institutions. Mediation does not have such a long, deep, prominent and respected tradition. There are privately organised mediation organisations, but they are far from the deep respect for and staying power of litigation in the legal world.

What are then the main objectives distinguishing mediation from litigation?

- First and foremost, the objective of mediation is to make parties come to an agreement rather than have a legal determination by a litigation authority. The method is the use of an independent mediator – rather than the employment of at least two partisan legal teams and one, usually, three-person tribunal.
- The second objective is to maintain, or end efficiently (“velvet divorce”) a commercial relationship rather than succumb to the relationship-destroying logic of escalating confrontation which is the almost inevitable implication of litigation. This has both a commercial aspect (maintaining the relationship is usually much more efficient than having to re-invest into building up an alternative relationship) and a reputational aspect – companies (and individual executives) which manage their disputes well will inspire more trust and have it easier to build commercially productive relationships.
- The third objective, which can be the principal one and which is most accessible to proper financial analysis, is to cut down,

dramatically, the direct and indirect cost of arbitration/ litigation, the time required to solve the dispute and, often neglected in an semi-blind assessment of litigation, to minimise both the time required for corporate staff (which can be costed) and the emotional focus of senior executives on the dispute. This is harder to quantify, but it is evident that competent executives should better spend their time and emotional attention on business matters than on an avoidable dispute. Disputes, though, do have the tendency to trigger and require an intensive emotional focus of corporate staff involved, i.e. their "distraction power" is large and usually grows beyond early estimates as the litigation winds its way through statements, counter-statements, evidence-taking and hearings.

To the extent studies have been undertaken⁵, mediation is superior in most cases to litigation in terms of cost. This is confirmed in my own practice. In average, mediation should cost about 15-25% of total litigation cost – without account being taken of indirect and hard-to-quantify costs (e.g. executive time and concentration). The proper analysis of the mediation versus litigation option will look at the cost of mediation and the likelihood of the result (which can be expressed by value of result times probability) and compare this to cost of litigation and the probability of the various ranges of outcomes. Typically, a mediated result will be along the median of various results (i.e. middle of a bell-curve), while litigated outcomes will include extreme results (e.g. total loss or full gain). A proper analysis will therefore usually indicate that for a relatively risk-averse company, the risks of litigation outweigh the potential benefits of large-scale gain. The time factor will mostly advocate a mediation effort – except if there is an interest to drag out litigation so as to delay payment (or exhaust an opponent with less litigation resources).

These considerations only apply a zero-sum approach, i.e. they see the outcomes of the dispute resolution process as strictly divided between the disputing parties, without the possibility of actually increasing the total, sharable "utility". In fact, and my own experience confirms this, mediation is best suited for identifying win-win situations, i.e. not just distributing an available utility (e.g. monetary amount) between the parties but looking to design a mediated and then negotiated solution which increases this "utility" by identifying the relative and different valuation of the two parties for specific negotiating elements. "Splitting the difference" and compromise are therefore the hallmarks of not so competent mediators or extremely intractable parties and situations.

⁵ E.g. Carroll/Mackie, International Mediation (Kluwer 2000)

To move from decision theory to practice: Disputing parties almost invariably have different preferences and value the same item differently. A creative mediation will identify such different preferences and design a package where each party gets what it values most and concedes what itself values less than the other party. This requires both a "listening" approach to find out in the maze of corporate and legal talk what the parties (and their main players) want most and really – often not what is said in legal briefs. And then it requires a creative approach to construct a package that gives to each party what they want most and what the other party can in fact give. Such "listening" – very much into the inside of an organisation, and such creativity is typically absent in litigation. One of the key advantages of competent mediation over all litigative approaches is the focus not only on the relationship between both parties, but the relationships within each party (departmental, personal) and even personal and departmental relationships crossing the organisational boundary between both parties. The judge/arbitrator looks at what each party, in a very formal and consistent way, presents to him/her. Any competent mediator will have a much deeper and wider perspective: He/she will look into the internal organisational process and politics of both organisations and identify the "blockages" and the potential for re-creating a "deal".

The litigation logic leads to very selective provision of information, and certainly not of secret insights, internal divisions and hidden agendas. It also does not lead to creativity in designing a give-and-get package, but rather massive argument over both defending one's position and rejecting the other side's position. This much wider and deeper perspective required by mediation also means that there are many more elements available for fashioning a solution. The judge/arbitrator in essence decides between competing claims and with a very limited choice of remedies that can be granted. The mediator can help to design a package that can contain anything that is within the effective power of both parties, and often also within the power of significant outside players if these can be drawn to provide contributions which make a better deal possible.

The significant cost advantage of mediation is not a fiction propagated by mediation services looking for increased market share against litigation. It is easy to understand if one looks closely at the economics of litigation. In mediation, both parties employ primarily one person (perhaps sometimes an assistant or in

complex cases a team⁶). They pay this one person to learn about the case, its facts, its uncertainties, its legal implications and arguments and the insight information (e.g. internal tensions, problems in one country, mishaps, turf-battles, change of staff, mismanaged relationships). Since the mediation process and the mediator (and his team) operates with the trust of both parties (otherwise mediation is rarely useful), both parties share information with him/her easily. In the alternative scenario of litigation, the situation is very different. First, each party has to pay its legal team. Using perhaps London rates and including at least a solicitor and a barrister, a work-day for the team could easily go to 6000 \$ each – i.e. 12000 \$. Often, junior lawyers and paralegal staff will be deployed as well, quite apart from party-appointed experts. In addition, they have to pay the arbitral tribunal – say another 10000 US\$ per day⁷. All these, say, 5-7 smart lawyers are essentially paid to learn about the case. But their learning is not as easy as for the mediator as they will get from the respective other side only selected and distorted information. In addition, a large part of the litigation contingent's time will be spent in rebutting the selective and distorted information from the other side and the other side's legal argument. While there are often "efficiencies" as legal argument over the course of a long litigation becomes repetitive, the usual way is for each legal argument requiring more and more research as one's research is refuted by the other side and requires an even higher degree of countervailing legal research and argument. The dynamics of litigation therefore explain easily the escalation of cost which probably in most cases exceeds original estimates by far. Litigation is, in essence, like the Cold War's arms' races: Each new weapon in the armoury triggers a countervailing response and so on.

There have been to my knowledge no serious studies of the financial cost and risk of arbitral litigation. I have encouraged, at CEPMLP, doctoral-level research on this topic. My estimates of a cost of 3-5 Million US\$ for larger investment arbitration cases before the ICSID have been criticised by insiders as far below the real cost.

Similar considerations apply to the comparison of the alternative time budgets. A mediator is in essence a project manager focusing on the dispute, intelligence gleaned in confidential discussions with

⁶ *I have done mediation for large-scale and complex cross-cultural cases under the shadow of moving and invariably uncertain regulatory regimes. Here, the mediator may need support from technical, financial, economic and regulatory experts. This raises the issue of project management – not too dissimilar of the conduct of a large corporate M&A negotiations.*

⁷ *Excellent information from WIPO (www.wipo.org) provides an indicative idea of the current market ranges for the services of arbitrators.*

both parties, objective assessment of legal and factual arguments. If he has time to focus on the dispute and the parties collaborate, he/she can proceed swiftly. Litigation is like a mobilisation on both sides of heavy forces which meet at specified intervals (exchange of legal briefs) and then retreat to ponder, do more legal research and develop a new reply to the opposing side. The tribunal itself, with three people, will take much more time to coordinate its action than a sole mediator. It will have to give each side the opportunity to respond in detail to one side's legal brief, allow time for more research and mustering of one's facts and arguments and allow coordination of the external legal teams within each other and with their clients. The Carroll/Mackie book already quoted includes examples of the average time required for mediating certain types of disputes. My own experience is that a dispute that would have required at least a year (and I may be naïve) in litigation could be resolved in six weeks, requiring only a few days of the mediator's time. Larger and more complex disputes require more time and resources, but I suggest they as a rule will constitute about 15-25% of full-fledged arbitration. Here, questions of complexity and party expectations play a role. If the issue is more complex and if personal meetings with the parties are required (rather than email contact and telephone interviews), time can also accumulate in mediation. But it is unlikely ever to reach even a quarter of the time for arbitration – provided the mediator focuses, pushes the issue ahead vigorously and the parties collaborate with the mediator effectively. Incentives evidently play a significant role: Litigation works almost exclusively in Anglo-Saxon countries by payment for time. The natural implication is that everybody wishes to maximise payable time: the arbitrators and the external lawyers. The external lawyers will also be under pressure from their firm not only to maximise their own billable time, but to involve as many underemployed associates as possible⁸. The same incentive works, one should recognise, also in the case of involvement of other professional firms (engineering, accounting or consultancy firms). A mediator working as a sole practitioner will not have an incentive to maximise "total law firm billing" by involving other, underemployed, staff, but will have an interest to maximise his/her own billable time. But there may be less need to cover overhead. If the mediator is not a full-time mediator, there will be an incentive not to drag on a dispute too long. The normal – mildly effective – disciplines of professional ethics and reputation play a role for both lawyers, arbitrators and mediators. To counteract the incentive to play for time, incentive payments focusing on a successful result ("success

⁸ Note the discussion about Clifford Chance's 2400 hours per year target for younger lawyers in the *Financial Times*, 27-31. October (daily). I presume that Clifford Chance is no exception but rather represents the normal pressures in any major law firm.

fee"⁹ or "lump sum") should be considered and will be discussed in the conclusion. For a competent mediator, a rapid conclusion accompanied by a risk participation incentive fee will often be more attractive to the alternative of trying to maximise income by maximising time spent on a case; this incentive works clearly less in the case of a relatively underemployed and less competent mediator. He/she will want to get as much out of a particular case as possible.

Procedure of Mediation

Mediation starts when both parties to agree on the use of a mediator. Such an agreement needs to be formal and needs to be accompanied by a serious commitment of both organisations (or at least the main players with an ability to make a decision in their organisation). Mediation makes no sense except as a pre-litigation formality to play for time (which sometimes helps to let tensions subside) if there is not a serious will on both sides to engage in mediation and trust the mediator. But again, there will also be detractors (open and camouflaged) within each organisation and the mediation process has a momentum of its own which is often not appreciated by the detractors at the onset – they will come back to try to kill the deal once done.

The appointment of the mediator should be based on an agreement proposed by the mediator to both parties and accepted by them formally – by signature of a proposed agreement or in less complex matters by an emailed consent to a proposed agreement. Such an agreement should provide for:

- Terms of reference: What the mediator is expect to do – a description of his proposed actions. Is the mediator expected to prepare a non-binding recommendation? Or is he appointed as "expert adjudicator" (which might follow an unsuccessful effort to bring the parties to either negotiate a settlement or accept the non-binding recommendation (i.e. a two-phase mediation followed by determination). Or is the mediator in essence a project manager of a number of intensely managed mediation meetings accompanied by a role as adviser to both parties – i.e. "shuttle diplomacy"?
- Applicable standards and depth of required research for the mediation: Role of legal analysis? Proposals to be made "ex aequo et bono" – i.e. without need to

⁹ As the term "success fee" has problematic connotations in the legal community, I now prefer the term "risk-participation incentive" which may be more attuned to managerial thinking.

exclusively rely on legal analysis. Or rather closer to arbitration (as expert adjudicator) with reliance exclusively, or partly, on legal analysis. Required depth of legal analysis (which can be described by an estimate of time used – similar to a “summary judgement procedure”. Reliance on trade practices?

- Procedure: Submission of initial briefs on both facts and law by both parties; authorisation to conduct separate discussions with each party without disclosure of the result of such discussions to the other party (an essential difference to the “due process” principle in litigation); obligation of each party to make time and staff available to receive and work with the mediator; to attend meetings; to work under an agenda and the chairing by the mediator; right of each party to formally call off mediation at any time or with a specified notice period; reference to existing mediation procedures (e.g. by the ICC – available at www.icc.org; UNCITRAL or the Hague-based PCA; with very modern mediation rules recently prepared by WIPO); time limits for important milestones: submission of briefing notes to mediator; review by the mediator; consultation by mediator with parties; mediation meeting; deadline for mediator’s submission of proposed settlement or (for expert adjudicator’s) final determination; end of mediation period and option for extension. Required reasoning (and level of reasoning) for a recommendation or binding expert determination.
- Remuneration by both parties: No mediation should commence before an advance payment has been received which is likely to cover the minimum costs of mediation – payment is a sign of taking the process seriously. A remuneration schedule should include fees (per day; risk participation incentive or success fee) and cost rules (travel, accommodation, cost of support staff) and payment modalities (including accounting).
- Legal character of mediation result: Binding (per contract between the parties; or per incorporation into an arbitral award or other forms of legal enforceability) character of mediator’s proposed or negotiated settlement (or non-binding character as recommendation).
- Exclusion of Liability for mediator
- Confidentiality clause
- Assurance of neutrality and impartiality of mediator, including disclosure of any facts which might raise doubts

- Prohibition on both parties to use facts on the other party obtained during mediation in a subsequent litigation; on any involvement of the mediator in subsequent litigation (as arbitrator; counsel; expert witness).¹⁰

Carroll/Mackie (cited above) include standard language and options for the various forms of mediation, including more complex “mini-trials”.

We have encountered the use of tendering procedures for the selection of the mediator (and his support team). This may be a way for both parties to agree on the mediation agreement and the mediator’s appointment and has the natural advantages of greater transparency and competition. But it is also somewhat inconsistent with the considerable “personal” nature of both the mediator’s services and the role of the mediator. My suggestion is for the parties to at least agree (and pay) for a joint discussion with one – or several – mediators. In a formal tender, the mediator’s expertise – which is the key element – may gain less attention than slick presentations by the large accounting, investment and consulting firms typically selected. These will in most cases put expensive youngsters on the case, with little of the intensely personal commitment by a senior negotiator-mediator which a successful mediation requires. In our experience, such established large companies are also horrified of the idea of a success fee or risk participation. They have trouble handling such “speculative” income in their budgeting process, are used to prepare documents and charge for them and lack in the end the confidence to accept some participation in the risk of failure of the negotiation. Parties would do well to require an ex-ante acceptance of a degree of risk participation (“success fee”) and zoom in on the individual personality of a fully committed mediator – rather on a large group of people with outstanding paper qualifications usually submitted. The greater the support team and the more the Mediator is integrated into a large-company consultancy project, the more he/she will have to spend a large amount of his/her energies in mediating within this team and with the contractor organisation.

¹⁰ *This prohibition is often advocated, but has its limitations: There is no way in an extensive mediation process that parties will not find out a lot about the other parties’ case, background, legal merits. To keep such intelligence out of subsequent litigation is almost impossible – at most one can keep the mediator, his/her staff and formal communications out of the arbitration. On the other hand, one of the advantages of mediation is that it provides a much more realistic intelligence basis for each party on the factual and legal merits, risks and limitations of its and the other party’s case.*

Mediator Competence

There is no professional qualification for mediators' equal to the century-old qualification forms for lawyers. Private institutions (e.g. the London-based Centre for Effective Dispute Resolution) offer training courses and certification. Such certification and inclusion on approved panels should be useful. But more important is the general experience of the mediator in international business, in particular in the type of industry (such as oil, gas, energy, mining, infrastructure). Mature industry experience cuts down on learning time, helps to avoid mistakes in understanding the issues and allows better "listening" and "creative" competence. This is in the end essential for high-quality mediation. The other quality is energy and a proven ability to manage projects, i.e. move two sometimes unwilling or not overly interested organisations to do what is necessary to meet the milestones of the mediation process. Complex mediation is a time-consuming and emotionally very exhausting process requiring much more stamina than judicial and arbitral work. The mediator has to understand often very complex issues (as requires judicial work), but, different from an arbitrator, he/she has to pro-actively burrow deep into the organisations, the personalities, the politics, the sensitivities of all parties – including often involved (but not cooperating) third parties. At all times the mediator has to be on top of the process, bending sometimes more to one side and then to the other, showing sympathy, but keeping a sense of detachment, building trust, but not partisanship, sharing some information and advising confidentially each party, but without becoming the advocate or adviser of only of the parties. He/she must continuously worry over both sending out information to the parties, but not the wrong information or the information that would imperil the mediation process (e.g. information and advice that may be professionally correct – as a legal adviser would, but which might tend to "inflare" the dispute, provide fuel for the mediation's and deal's detractors). He must share some of the insight he received – to make the other party get more realistic and accepting of the inevitable compromise, but not so much as to weaken one party too much. There is hence considerable tension – and stress – in balancing sharing and restricting information, sympathy and detachment, pushing and relenting, discretion and frankness.

"Listening" with intelligence, insight and understanding is a key qualification. The same applies to a persistently positive and constructive attitude. This is a key quality of any successful mediator. Without such attitude (and many professionals are very little aware that they in fact exude a negative, de-constructive

outlook with a tendency to depreciate rather than to understand personal and organisational weaknesses), a mediator is bound to fail. Such very personalised competence is not necessarily indicated by the training and certification now available from private ADR-institutions. It is something that can be inferred from successful negotiating and dispute resolution experience. Most mediators will have some track record in a particular industry. Arrogance, condescension, pomposity, control freakery, bullying or cultural insensitivity are warning signs that should lead to rapid disqualification. A positive rather than a negative outlook to life and relationships is a necessary condition for success.

One can debate if a proper legal qualification and experience is necessary. In arbitral litigation, it seems that a high level of procedural expertise is now required to steer arbitration through the various legal risks. A proper legal qualification and extensive experience can help to assess the legal implications, the validity of the legal argument and the probability of litigation outcomes. But experience exclusively in litigation should rather disqualify – the outlook here is on argument and in-depth legal reasoning. Such an outlook acquired by decades of practice will almost automatically make it very difficult, if not impossible, for a mediator to pay attention and understand the commercial, personal and organisational reasons for the dispute and to fashion creatively a package that meets rather the commercial interests and is viable within the organisation than a legal judgement. If parties want an inexpensive legal judgement they can appoint an “expert adjudicator” – a sort of “litigation-lite” alternative to “heavy” litigation. A recent quote from the Economist (“Don’t sue – Economist October 26, 2002, p. 34) suggests that “without re-training, barristers are usually rotten mediators and judges even worse”. They are “trained to give their clients answers rather than bring them to agreement”. Feed-back I have received on failed mediation involves “professors who lecture and tell the parties that they are wrong” and bloody-minded lawyers who disrupt the mediation process by an ill-considered insistence on their clients’ legal rights.

The type of dispute has a bearing on who might be the most suitable arbitrator. In many cases, a professional lawyer with extensive commercial, management and negotiation experience and much less with litigation experience or a manager or academic with commercial and negotiating experience might be most suitable. One has to be careful, though, of the businessman who develops a mediation opportunity into an amateur litigation pontificating about law and viewing himself as a judge, the retired judge who can not escape his life-long habit of adjudicating or the “corporate man”

(there are few women of this type around as yet) who is used to manage within a strictly hierarchical organisation rather than listen, think creatively and suggest. A consulting background – i.e. where one has to work to a client's priorities rather than one's own, understand the insight workings of client organisations and sell a service others want – may be therefore more useful than a purely managerial history. An acquired or natural habit of legal argument, judging or commanding is probably least helpful. Theoretically, the ideal mediator would be a lawyer (to understand legal argument and litigation implications), a commercial manager (to understand the economics of the issue), an organisation specialist (to understand the inside organisational dynamics of the dispute), a professional negotiator (to know how to bring two sides to a deal), a psychologist (to understand the huge amount of self-love, vanity, competitiveness, love, hatred, jealousy, greed, insecurity that is usually involved in an inter-company dispute), a political scientist (to understand the workings of government bureaucracy and its difficulty of making and maintaining deals with multinational companies), a psychoanalyst (to listen carefully for little noises that indicate suppressed needs and desires)¹¹, an accountant (to put a value to the various positions being discussed), an engineer (to understand the technical complexity and failure risks in technical project management and a diplomat (to be able to gently persuade two parties to give up their normal self-righteousness) . Since these god-like qualities are not found in one person (and rare even in teams which would have their own internal mediation needs), one needs to go for a realistic combination of those. That is usually extensive and intelligently lived experience in international business with a proven track record in managing complex negotiations effectively. Our experience also suggests that age is an important even if not always explicit factor in the selection of mediators: Parties do as a rule prefer a mediator with sufficient and visible experience under his belt – it is not a business for more or less brilliant and keen younger lawyers or MBAs. Grey or white hair is a clear asset. On the other hand, mediation requires much more energy than arbitration where "grey" hair seems also often very desirable. Which means there is both an implicit age floor and ceiling. A word should be added on cross-cultural and transnational mediation. If a dispute takes place within one culture, it is normal to appoint as arbitrator someone with standing in this community. But if a dispute is cross-cultural and transnational, it is essential to look for a mediator with an extensive, decade-long cross-cultural and international commercial experience, in complex disputes probably within the relevant industry. A professional without extensive cross-

¹¹ Note the work by psychoanalyst Prof Dieter Flader, FU Berlin, on the cultural and psychological impediments to commercial communication between Western countries and East European transition countries.

cultural background – evidenced by familiarity with foreign languages, comparative legal practice, years of residence and conduct of business in other countries (as compared to tourism, school French and short stints in a law firm branch abroad) – should be disqualified early on. Most transnational disputes have, in my experience, a very strong element of blockages in cross-cultural communication. In-depth and long-term exposure to cross-cultural environments is perhaps the only way – but no guarantee – to acquire the necessary sensitivities. It is a cosmopolitan approach one needs; senior negotiating responsibility in multinational companies, international organisations or truly multinational professional firms is probably essential.

Mediation and (arbitral) Litigation¹²

The usual approach is to do mediation before (arbitral) litigation¹³. A good dispute mechanism in the underlying contract should provide for a duty of both parties to engage in mediation (if at least one party requests it) for at least a specified period of time (say 6 months) before either party can go to court/tribunal. Mediation can, however, also be initiated during litigation; in that case either the litigation is suspended or both procedures run parallel. There are several stages in litigation where mediation should be considered: After receiving the request for arbitration, after the first briefs have been exchanged and after the taking of evidence.

Sometimes, however, mediation is unlikely to work except for delaying litigation:

- If one of the parties is definitely not willing to collaborate, e. g. using litigation to delay payment for financial difficulties or obstruction or for bringing to bear its own superior litigation resources on a weaker party – even if “more in the right”. But one must bear in mind that in larger cases involving organisations, there are as a rule internal forces in favour and against the mediation. It is therefore difficult to state that a party is “not willing” to collaborate – signature of and payment on a mediation agreement are the best indicator’s of the organisation’s overall willingness to collaborate. Internal

¹² Note the excellent article by Michael Schneider, M. Schneider, *Combining Arbitration with Conciliation*, in this issue of OGEL (2-2003)

¹³ *Arbitration used to be seen as much more flexible and compromising – deserving even the epithet of “political” arbitration. Modern arbitration, I suggest, has largely become a privatised form of litigation. Many restraints (ne ultra petita; an unproductive view of impartiality; and judicial rulings associated with enforcement) have produced a culture that justifies to speak of “arbitral litigation”.*

politics will play a role how well collaboration works and how difficult it will be to “sell” the mediated agreement in the end, but every well-led mediation effort will develop a momentum of its own. This is not often well appreciated by internal and often camouflaged detractors of the mediation process. Opposition to mediation – and its results – comes usually from the litigation-philes; these tend to be the insecure “control freaks” with weak negotiating competencies.

- If one party does not take the other party’s legal rights and willingness to go to arbitration seriously: Here, to be taken serious, mediation can only be practically envisaged once the first shots – the request for arbitration and the appointment of the first arbitrator – have been fired;
- If what the parties seek is less settlement of a particular dispute but some clarification by an authoritative court of a point of law.
- If the dispute at issue is closer to a tort than a commercial contract claim, but even here mediation may help to settle on compensatory package in a more innovative way than a litigation of a claim focusing exclusively on damages. In ancient legal history, tort claims were mediated before they were subject to formal tort litigation.
- There will also be significant problems for mediation if there is a conspicuous lack of balance in terms of bargaining power and competence between the parties. The mediator is appointed by both (i.e. not just the weaker or stronger party) – but would he not have an ethical and professional duty to assist the weaker party in compensating for glaring weaknesses – e.g. a weak and inexperienced developing country agency dealing with a highly competent and experienced international energy company.
- Finally, it is often argued that certain issues of public policy typically litigated in investment arbitration are not suitable for mediation as this is likely – though not absolutely necessary – to reduce the public profile, public access and transparency. I am not certain. First, a mediator (e.g. the Nicaragua-Belize boundary mediators in 2002) can actually involved third-parties with or without a legal participation right much more flexibly than a litigation procedure can. There is no reason why mediation can not – if so desired by the parties – incorporate consultations with, for example, significant NGOs. But for the parties under the glare of

public criticism and attention, mediation can be an effective way to look for a low-profile, consultancy-like joint assessment of their dispute and the ways of solving them. Such low-profile joint assessment, consultation and discussion is usually impossible once the heavy machinery of modern investment arbitration has swung into motion.

But even in these cases, mediation may have some benefit. First, its costs are relatively insignificant compared to proper litigation. Second, much of the work done for mediation will be used in formal (arbitral) litigation. Third, the passing of time may bring passions to subside, bring about a change of the major players in each organisation; methods such as a "test trial" may help to make more informed decisions on both settlement and litigation. This approach – first mediation, then, possibly, litigation – will not work if the issue really requires an authoritative legal clarification or if time is of the essence (though a mediation agreement can be accompanied by measures or an agreement to secure essential items, e.g. evidence or security for subsequent payments). Agreements reached by mediation can be converted into enforceable arbitral awards (e.g. by appointing the mediator as sole arbitrator) or into legal instruments which allow rapid execution with most exceptions waived as available in many legal systems.

Mediation can include mini-trials or test trials where both parties present their claims and arguments before a panel consisting of the mediator (acting here mainly as project manager) and senior executives from both sides without prior involvement. This can help senior executives to get an independent assessment of the dispute, not influenced by the inevitably warped view of the key individual disputants within the organisation and the in-house and external lawyers. The mediator can use the results of the mini-trial to try to find a solution – by recommendation or by being a "midwife" for a negotiated settlement – with the senior executives after they have been exposed to the arguments from the other side and freed from dependence on their own people. Such "test trial" can also help to assign better probabilities for both costs, risks and benefits of formal litigation.

Mediation and Investment (investor-state) Arbitration

While mediation/ADR is currently much promoted in national jurisdictions to relieve the workloads of courts, there seems to be very little if any formal use in investor-state arbitration. These have mushroomed over the last five years, in particular with the ICSID

and under the North-American Free Trade Agreement (Ch. XI of the NAFTA). The formal use of arbitration – with increasingly greater publicity and disclosure due to the public-interest involved, the implication of discipline on national regulatory sovereignty and criticism by the NGO-community in particular in Canada – seems to move closer to the limits of political acceptability. The efforts and resources required are massive – large teams of lawyers, both government and private, operate on behalf of the state defendants; proceedings go on for years (e.g. the Methanex v. US NAFTA proceeding which has lasted for at least three years). Defeats for government involve considerable domestic political problems, criticism of the arbitration mechanism per se, loss of face and reputation and continued litigation to enforce arbitral awards (e.g. in the Metalclad v. Mexico case). The now accepted third-party intervention of NGOs as “amicus curiae” (in the UPS and Methanex cases) makes the dispute ever more confrontational, antagonistic and hardens the fronts on both sides. The more transparency, other-party intervention and disclosure is now occurring, the less is investment arbitration suitable for the peaceful settlement function. It would therefore seem that the much lower-profile mediation should have a particularly suitable field for application. But investor-state arbitration is now much less worked on with diplomatic methods which are closer to mediation than to litigation. In the past, investor’s complaints were taken on by their home governments; both countries’ diplomatic services then tried to settle the dispute, and since they were at least somewhat removed from the origin of the dispute, they did provide an element of rational analysis and detachment to bear. With investor-state arbitration now exclusively under the control of private investors, such diplomatic negotiations closer to mediation seem to be almost absent.

It is therefore suggested that the negotiators and draftspersons of modern investment treaties should even more than in private commercial contracts include a mandatory mediation mechanism, including the cooling-off period one finds in some treaties (e.g. for tax disputes in the Energy Charter Treaty). It is usually much more difficult to suggest mediation once a dispute has arisen. In this scenario, a suggestion of mediation requires considerable in-house negotiation without that it is certain the other party will accept it. A suggestion of mediation will be opposed by those professional interests specialised in litigation (e.g. litigation-hungry in-house governmental lawyers or the fee-based external counsel). A mediation proposal may also be seen as a weakness in a climate that is often characterised by the “machismo” typical for the litigation community. But mediation would solve a number of severe risks of investment arbitration, namely:

- *The Sovereignty Problem: Getting publicly embarrassed: Almost zero in mediation*
- *Third-party intervention: Close to zero in mediation, except if third parties need to be involved to get a satisfactory overall settlement. The mediation process can be set up to seek integration of all relevant parties – not only those with “standing”.*
- *Enforcement is much less of a problem with mediation*
- *Cost disadvantages for governments are much less, with mediation in average at 15% of full-blown arbitration*
- *Loss of face for both parties is virtually nil.*

The current arbitral institutions – built on arbitration as a main mode of operation and supported by a fee-based professional community – don't have the same incentives as national justice authorities (concerned over court overload) to push or even compel mediation as a stage preceding full-blown litigation.

Mediation Techniques

There are many books replete with advice on mediation techniques. Very different from all litigation procedures which rely on a heavily structured, predictable and ritualised procedure screening out a large part of reality as irrelevant to its purpose, there is no comparable canon of mediation techniques. This is why the conduct of mediation has to be developed on the basis of best practice, but also in interaction with the specific situation and the parties. I will therefore just give some ideas (without delving too deep into the proprietary know-how) which I have found effective:

- I believe in a pro-active and strongly managerial approach – a preference that is not shared by everybody. This means I prefer an approach that is structured in particular in the beginning of a mediation and at times has similarities with arbitration, i.e. submission by both parties of their position, their view of the facts and their arguments. But I then prefer to widen the examination with a questionnaire approach which asks much more deeply about the interests, the experiences of the organisations with each other, previous efforts at reaching an agreement, the results and the reasons for – relative – failure. These questionnaires will as a rule not reveal the whole truth, but I will scrutinise responses very carefully to identify the blockages for the normal course of events – parties negotiating and agreeing without outside intervention. The reply to questionnaires helps to provide the

contours of a picture. Parties will as a rule present a consistent narrative of a unified organisation dealing with a very trouble opponent. Legal, commercial, regulatory issues may start appearing out of the surface, though not very clearly as yet. I will then also examine with the detail required the usually massive contractual documentation. A fuzzy first-draft picture of the dispute is then likely to emerge. In simple cases, I would follow this up with additional questions – per email, phone conversation – to get at the informal and subterranean issues. I will try with particular attention to identify, in a close reading of correspondence and negotiating files, where the blockages (personal, substantive, political) lie, but also what solutions the parties have already come up with. Mediation in my view is largely about “midwifery”, i.e. not phantasmising about theoretically persuasive solutions, but to use the parties’ previous efforts, insights, studies and expertise to see what might work if the main blockages of negotiation were relaxed. In my experience, the individuals involved mostly know already what the deal should and could be, but they have been kept by institutional and political constraints from developing this deal. My first rough ideas of a deal may emerge already then, but it is essential not to be chained too early in the game to a fixed idea of what the dispute, the parties and the desirable solution are.

- In a second stage, for a more complex dispute, I will begin “shuttling”. Shuttling is really about developing personal relations, trust, set up effective communication channels. I would prepare this by extensive intelligence gathering – networks, contacts, press or the use of the poor man’s intelligence services in the form of www.google.com. Direct shuttling will lead usually to a gradually more realistic picture. Internal divisions in the organisations are first hinted at, barely perceptible, then then emerge more clearly. The people behind the organisation’s façade take on proper colour and appear in the flesh. Their ambitions, jealousies, interests and attitudes can be discerned more clearly. I will also try to identify the role of “significant” third party actors – what they can bring to the table, what makes them “tick”, what their relations are with the primary actors and to what extent their contribution is essential for the sought-after “deal” – the promised land of the mediation process.
- The third stage for me is intensive reflection – something many will have no understanding for. Reflection helps to develop a mental picture – for me a pictorial representation is necessary – of the very complex contractual, political, financial, technical, institutional and personal web of relationships. In this stage, I will start to play with solutions,

communicate with the various participants of the process, try out solutions, try to correct misperceptions, engage in debate. I will also produce several very formal documents: First, I will produce a "Joint History" which describes my view of what happened, how the parties perceive the history, each other and themselves. This is usually quite a surprise to both parties where a very different and naturally very biased picture of their joint history has developed and coalesced within the organisation. I also will write separate "case assessments" where I assess, from my hopefully relative neutral perspective, the legal merits, but also the practical issues – litigation, enforcement, political implications – of each party's case, looking from the position of their own interest. Again, that is usually very surprising to both parties where a highly partisan (and usually very unrealistic) picture of the righteousness of their case and the riskless strategy of pursuing it through litigation has usually developed. The purpose of both methods is to "shake" the self-righteousness in both organisations, to make them at least try (some can, some cannot) to put themselves into the shoes of the other party and thereby "soften them up" for considering agreement.

- I then tend to engage in another round of shuttling (which can be done physically, or by email or by phone) where I discuss my case assessments and try to get the parties to start thinking about a realistic solution. I find that a solution should not come from me. Parties (and in particular the detractors) will be very suspicious with something they have not developed themselves. So the process here is essentially to plant the seed of a possible solution into peoples' minds and then nurture growth – until they see the solution as "theirs". I also consider that as in large multilateral conferences, it may be useful to have ready a "Joint negotiating text " in MoU style – but to ensure this helps as a framework, but not as a rigid constraint.
- The climax of any mediation is the "mediation meeting". Here, chaired by the mediator, sometimes supported by the mediator's experts, they meet face-to-face. A lot of effort has to go into logistics, preparation of rules, suggestions as to the right people (a strategic issue), their terms of reference and powers, agenda, role descriptions (though much of this will and has to fall away as the parties suddenly start to collaborate). There is an important place for ritual – of eating, drinking, meeting formally and informally, even speeches; there is an important part of ritualistic adhortation about good will, avoidance of positional lock-in, collaboration – and a reminder that each participant's professional pride and face is

involved. The mediator then has his/her most intensive phase – chairing – and giving up control, shuttling between the parties, setting up of working groups, neutralising opposition. While I think it is good practice to start with a structure – in writing, it is also necessary to then play by ear: If the negotiators work with each other constructively, this is much more important than sticking to a pre-established game plan. The group can break up into deal-maker caucuses, technical caucuses and the mediator and his/her team will be there to listen, suggest, recommend and draft. If the mediation is successful, the mediator's power fades. Mediator power is low at the beginning; as the mediator develops privileged insights and communication channels with non-communicating parties, he/she gains power, and often very large one. The moment the parties collaborate, the mediator power vanishes. In the most successful case, the parties no longer need the mediator, if they are simplistic they will regret payment for the process and wonder what he was for in the first place. The mediator becomes either superfluous or reverts to the more low-profile role of a fatherly counsellor to both parties.

- There are follow-up phases: The deal has to be finalised, and once the enthusiasm of a successful "retreat meeting" disappears, the cold realities in each organisation come to the fore again, detractors (in particularly those that would rather wish the mediation to fail) will attack the deal (and the deal-maker) as having "sold out". Repeat sessions, perhaps at higher level, may be necessary. Finally, the deal has to be sold to the relevant constituencies (boards, chiefs, finance officers, ministries, relevant third-parties). The mediator can help in providing an independent assessment indicating why the deal is good for both parties, why each party did not get all they set out to get and what the benefits of this deal over the litigative uncertainties are.

Conclusion

Mediation and related ADR forms are no panacea. There are situations where these methods are not appropriate and where mediation will not result in settlement. But while the upside chance is very high – much less costs, much less time, less risk, the downside risk is very limited (more time added to an already very lengthy litigation period; a quite limited (if at all) add-on to the total dispute management cost. I suspect that it is mainly the self-love and self-righteousness of the antagonists of inter-company or investor-state disputes and the natural incentives, proclivities and traditional culture of the legal profession which favours so strongly the "warrior" over the "peace-maker" approach – plus, the loss of a

litigation war may be not good for a client, but is rarely bad for the external lawyers. The Economist (October 26, 2002) suggests that successful mediation may require that the parties' lawyers, "with their vested interest in lengthy cases" are first removed. Mediation should therefore be used much more actively. It is almost imperative if the "legal" approach would be controlled by a professional "commercial", "managerial" and "financial analysis" of dispute-related decision-making. It should be the first idea in a legal department's mind when a dispute is brought to it from the company's commercial departments. It should also be much higher and more visible in the minds of negotiators/draftspersons of international commercial contracts, investor-state contracts and international investment protection treaties.

I would give more thought than is given now to "success fees", perhaps better termed "risk participation incentives". Most handbooks on mediation seem to suggest a very thrifty approach to remunerating mediators (e.g. Carroll/Mackie). But as so often, there is inevitably a relation between price and quality. But if the fee is lower than the ones used for the huge machinery of large-scale dispute (arbitral) litigation, then one cannot expect a much better service. A successful mediator should be worth her value in gold – and definitively much more than the chairman of an arbitral tribunal. A tribunal chairman combines roles of project management with a judicial function. But he/she is limited to a legal assessment, based on initiatives by the parties' legal teams. A successful mediator has to be a project manager for actions involving not only legal teams, but people and functions deep in both parties internal system. He/she also has to be a much better listener – not only to legal argument (as the arbitrators), but also to explicit and hidden messages from both parties' corporate system. Finally, she/he has to be creative – not in fashioning a legal concept, but in trying to exceed simplistic zero-sum division of claims by creating a package that gives to each party what it values most. A success fee (while as any remuneration element not without its own problems) would tend to focus the mediator on getting a result, rather than on maximising billable time. If the success fee's weight in the overall remuneration package were weighty, he/she might wish in fact to focus only on success – i.e. a settlement that is mutually beneficial, rather than on spending time. A success fee could complement the conventional lawyer's approach to hours billed, or it could partly or largely replace it. A mediator should therefore rather be seen as an investment banker brokering a large deal and getting his percentage commission than a lawyer producing transaction-related

text for which a time-based system may be more appropriate¹⁴. A success fee, for example, could be a lump-sum negotiated in advance or a percentage of the value of the dispute to both parties. Formal and professional mediation is currently rather in its early stages. One needs to think through much more carefully (and apply proper modern financial and incentive analysis) to the methods of remuneration. A high-success fee, for example, should tend to concentrate efforts on relatively easily solvable high-value cases; a difficult and uncertain dispute would rather attract time-based fees. There is also the fact that a success-fee motivated mediator will push parties to an agreement where a justice-based approach (readily supported by the litigation lawyers) might call rather for full, extensive, in-depth litigation testing all arguments. But then, pushing the parties to an agreement may in almost all cases be in the interest of the parties, while the "justice-based" approach of deep litigation may in the end do justice to nobody but the litigation community. The cost-raising implication of "doing full justice" may be particularly relevant in international arbitration, even more so than in national litigation. Arbitrators are, and have to be, very concerned over not giving reasons for a subsequent attack on the award. One of the major reasons for setting aside arbitral awards is an omission by the arbitrators to due full justice, i.e. comply with such principles as "due process", fairness and "natural justice". Awards have been set aside for insufficient opportunity for both parties to respond to the other party's, or the arbitral tribunal's statements of fact and law. As a result, the economic incentive for arbitrators (and counsel) plus the good reason provided by the requirements of extensive "due process" result in ever lengthening procedures, both with respect to reciprocal and escalating legal argument and taking of (and responding to) evidence. In case of doubt, incentives plus the concern over a subsequent attack on arbitral procedure and award will make tribunals always favour a more in-depth, detailed and extensive investigation of any issue brought forward – while there could be a risk if the proceeding get cut short, there is no risk (except much higher cost) if the proceedings are allowed to continue.

The success fee implication therefore requires considerably more thought and investigation. For example, one could – as investment bankers do – base the success fee on the value of the settlement. But that would make the mediator interested in a high-number settlement (as contingency-fee based lawyers have) which should not be the case. In addition, it would tend to disregard (or lead to valuation difficulties) with respect to "intangible" value created by a

¹⁴ *I don't want to ignore, though, that the mediator is in a different position from an investment banker. The investment banker works for one side, the mediator works for both which means conflict of interest issues have to be reflected on.*

creatively efficient mediation. A success fee could be based on the valuation both parties place on their respective, initial interest. That would reflect the overall value of the dispute, and not produce an interest for a high (or low) settlement. The success fee could also be a lump-sum originally negotiated with the parties and it would therefore reflect the mediator's view of both the complexity, likely difficulties and prospects for settlement of the dispute. Finally, one can envisage a success fee graduated according to the time it takes to settle (i.e. with an early success producing higher fees than a settlement reached after a lot of time); this would encourage the mediator to work very hard for an early settlement.

As mediation practice unfolds (which it clearly does – cases brought in English commercial courts have declined from 1996-2001 from 2500 per year to about 1100 per year), its own problems and implications will become clearer. In particular, rules on professional ethics and integrity and more standardised rules of engagement will have to emerge. It is also necessary to distinguish the claims of the various training and certification facilities from a proven track record of successful mediation. It is also easy to overstate the "cheapness" from some cases (The Economist suggests the couple of thousands of pounds rather than millions for litigation). This is an unrealistic overstatement of the efficiency of mediation. A complex dispute will require a large effort, also involving interdisciplinary expertise, in just understanding the facts, quite apart from the explicit and hidden reasons for the parties' inability to solve that dispute. The more actors (within the disputant companies or without the disputant companies) are involved, the more difficult will it be to bring them to all to a settlement – quite similar to any multi-party international business negotiation with a host of secondary actors (banks, lenders, purchasers, politicians, regulators, NGOs) exercising influence on the primary negotiating parties.