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“Developments in cross-border mediation:
The use of mediation as part of a ‘filter’ process in cross-
border disputes”

By Anthony Connerty ¹

1. Overview

This Paper will look at mediation in one particular respect: its use as a “filter” process in conjunction with arbitration.

Some see mediation and arbitration as being in conflict: either you use arbitration or you use mediation. In my opinion it is wrong to see the two systems as being opposed to each other.

Clearly each can operate separately: and one or the other may be more suitable to one

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He is a member of various international dispute resolution panels including the Singapore International Arbitration Centre (SIAC); the Hong Kong International Arbitration Centre (HKIAC); the China International Economic and Trade Arbitration Commission (CIETAC); the Cairo Regional Centre for International Commercial Arbitration (CRCICA); and the UN’s World Intellectual Property Organisation, Geneva (WIPO).

Anthony has acted as Advocate and Mediator in domestic and international mediations for more than 10 years - including major international commercial mediations in Singapore, China and England.

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particular type of dispute.

But the two systems may be usefully employed together so as to complement each other in a cross-border commercial contract under which the parties agree to a dispute resolution process that uses mediation first - and proceeds only to arbitration if the mediation stage fails to produce a settlement.

Over the ten years or so in which I have been involved in mediation both as Counsel and as Mediator, I have come more and more to the conclusion that mediation and arbitration can be viewed as part of a dispute resolution process in which the two can be used together: used in a process that I will refer to as a “filter” process.

So, for example, in an international commercial contract (and in this Paper I am dealing with cross-border commercial contracts) the dispute resolution clause will provide for the parties first to seek to resolve their disputes by mediation - and only if that fails do the parties then go on to arbitration. Of course, depending on the nature of the contract, the “filter” process may be more elaborate: for example, the parties are to seek to resolve any dispute by negotiation; but if that fails within a specified number of days the parties are to move to mediation; if that fails to resolve the dispute within so many days the parties are to move to arbitration.

Following a quote from Antonio Piazza by way of an Introduction to the topic of mediation, this Paper will consider:

- The nature of mediation;
- The development of mediation;
- The spread of interest in mediation;
- Mediation as part of a dispute resolution “filter” process: and some suggested model clauses;
- One particular scheme: the SMC-SIAC Med - Arb Service;
- The “Filter” Process: and Mediation, Arbitration and the New York Convention;
- An example of a Filter Process case.

And finally some conclusions.

2. Introduction

“God did not decree that the job of a litigator is to lay waste to the adversaries and win all for the client.

“Our system of civil litigation was crafted by men, incorporating a Hegelian dialectic of thesis – antithesis – synthesis; both sides beat themselves bloody, and a judge or jury decides what truths have emerged from the process.

“In the economic and cultural milieu in which this system was developed hundreds of years ago, it worked reasonably well. Times change. Today it can be described as

functional only by a definition of 'functional' that countenances clients routinely billed more in transactional costs for the litigation process than the amount of the settlement or judgement, and society taxed with the collateral costs and disruption of protracted and proliferating litigation.

"We might want to pause before we drag this time-hallowed system with us – or let it drag us with it – into the new millennium."

That quotation is taken from an article by Antonio C Piazza, then a partner in the San Francisco firm of Gregorio, Haldeman and Piazza.²

His telling and graphic description of what many see as the defects in the litigation system serves as a fitting introduction to this paper on mediation: probably the most widely - used and most widely - known form of what is variously termed Alternative Dispute Resolution or Amicable Dispute Resolution: ADR.

3. The Nature of Mediation

Mediation is a process under which a third party neutral seeks to resolve a dispute between parties in an amicable way. The neutral seeks to bring the parties to an agreement. The neutral - unlike a judge or an arbitrator - has no power to impose a decision on the parties. On the contrary, the job of the neutral is to listen to the parties - both in common sessions and in private "*caucus*" sessions³ - and to seek to bring them to a settlement of their dispute. The process is consensual and non - binding: although if the parties reach a settlement they may agree to put the terms of their agreement into a legally binding form.

The overall process known as ADR is generally taken to cover all forms of dispute resolution other than litigation and arbitration. The reason for this is clear: both litigation and arbitration operate regardless of the will of the parties and result in a binding and enforceable outcome. The Defendant / Respondent against whom litigation / arbitration proceedings are launched has no choice as to whether to participate in the process and may be faced with a judgment / award that can be enforced in the national courts. In litigation the process is imposed by the State. In arbitration the result follows from the parties' agreement to arbitrate, coupled with the State's support of the arbitral system.

But ADR in its various forms – the most familiar probably being mediation / conciliation – is a consensual process: the parties do not have to take part in it. And if they do, they do not have to abide by the outcome. Generally speaking, national courts will not enforce

² CPR Institute for Dispute Resolution, *Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR*, CPR Institute for Dispute Resolution, New York, 2001.

³ The writer's view, after more than 10 years acting as Mediator (and as Counsel in mediations) in England, Singapore and China, is that the *caucus* sessions are arguably the most useful part of the mediation process: the part of the mediation process that is most likely to assist the Mediator in bringing the parties to an agreed settlement of their dispute.

ADR agreements and the ADR process – unlike arbitration – is not subject to any statutory code (in England at any rate). So for example, in many States legislation will provide for arbitration awards to be enforced by the national courts - but there may be no equivalent way of enforcing a settlement reached in mediation.⁴

Most importantly in the cross-border context, the New York Convention applies only to arbitration awards and not to settlements reached in mediations.

However, I refer later in this Paper to attempts being made to convert mediation settlements into arbitration awards that may be enforceable as New York Convention arbitral awards.

4. The Development of Mediation

There is nothing new in the concept of ADR: mediation and conciliation have been used in the East for centuries. What is new is the kind of techniques that were developed in the United States: the U.S. led the way in developing new methods of dispute resolution other than by way of litigation and arbitration.

My view on the topic was set out in an article entitled ‘The Role of ADR in the Resolution of International Disputes’, published in 1996 in *Arbitration International*, the Journal of the London Court of International Arbitration (LCIA):

“Alternative Dispute Resolution (ADR) has developed alongside litigation and arbitration as a means of resolving commercial disputes in accordance with procedures aimed at avoiding the inherent costs and delays of the adversarial process. Those costs and delays have been felt most acutely in the United States, where pre trial obligations are the most burdensome. The United States has accordingly led the way in developing innovative ways of keeping parties away from the courts and arbitration.... But the methods used are not always new. The philosophy of the East has always been in favour of a non-contentious approach to dispute resolution... The pressures resulting from litigation and arbitration are far from unique to the United States and recent years have seen the English courts take active steps to promote the use of ADR alongside the formal court system.”

My conclusions in that article were that ADR:

“ in its various forms is emerging as a genuine complement to arbitration and litigation, both through increasing support in domestic courts for its active consideration and, more significantly, through increasing initial recourse to non-binding dispute resolution techniques in major international contracts. Whilst recourse to ADR in contracts is likely to lead to a multi-stage process which may, in

⁴ Although, as mentioned earlier, if the ADR process leads the parties to a settlement of their differences it is then open to them (not to say very sensible) to put the terms of their agreement into a legally binding form.

*certain circumstances, lead to increased delay, the hope is that the vast majority of disputes will be filtered out at the ADR stage of the process, thereby saving the costs, time and antagonism which usually accompany formal litigation or arbitration.”*⁵

5. The Spread of Interest in Mediation

That article was published over 10 years ago. Since it was published there has been an increasing interest in ADR globally, with some of the world’s leading dispute resolution bodies like the ICC, the LCIA, the AAA, and the CCPIT⁶ introducing a range of dispute resolution processes in addition to arbitration.⁷

In other cases separate arbitration and mediation institutions have been set up. One example is Sweden: the Stockholm Chamber of Commerce’s Arbitration Institute dates from 1917 and the SCC’s Mediation Institute was set up in 1999. Another example is Singapore: the Singapore International Arbitration Centre (SIAC) was created in 1991 and the Singapore Mediation Centre (SMC) in 1997.

In addition to the interest shown by the major international commercial arbitral bodies, the fact that UNCITRAL has promulgated a Model Law on International Commercial Conciliation (and had some years earlier adopted a set of Conciliation Rules) demonstrates the world – wide recognition of the importance of mediation / conciliation (I do not consider that there is any real difference between the two terms).

Further, various countries have adopted mediation as a dispute process to act in conjunction with and to support the national courts. England is one such country.⁸

⁵ [1996] 12 *Arbitration International*, 47-55.

⁶ The China Council for the Promotion of International Trade operates the well-known CIETAC Arbitration Rules (China International Economic and Trade Arbitration Commission) and a separate set of Conciliation Rules.

⁷ One example of the interest in ADR on a global basis is the ICC’s International Commercial Mediation Competition staged in Paris by ICC Dispute Resolution Services. Forty universities from around the world took part in the 4th Competition held in Paris in February 2009.

⁸ I was appointed some years ago by Her Majesty’s Court Service in England to create a Mediation Scheme for the Mayor’s and City of London Court. That Court is sited in the City of London close to the historic Guildhall, and is said to be able to trace its origins back to Anglo - Saxon times. The Scheme is administered by the City Disputes Panel (the CDP was set up to deal with financial matters in the City of London by, amongst others, the Bank of England and the Corporation of London). Cases considered by the Judges in the Mayor’s Court to be suitable for mediation are sent to the CDP as the Scheme’s administrator. Mediators are provided by the LCIA, the Chartered Institute of Arbitrators, CEDR and In Place of Strife. The CDP allocates cases to those mediation providers on a rota basis: it seemed to me when devising the Scheme that this would ensure that the Scheme would operate in an even-handed way – and be seen to operate even-handedly. Accommodation for the scheme is provided by the International Dispute Resolution Centre in nearby Fleet Street in the City of London. The scheme has been operating for a number of years with a high success rate.

6. Mediation as part of a dispute resolution “filter” process

A concept that may be of considerable practical significance – particularly in the field of cross-border disputes - is the use of mediation as part of a “filter” process: try mediation first and only if it fails do you move on to arbitration.

The great benefit of mediation as part of such a filter process is that it can take mediation into the cross-border field of dispute resolution, giving the parties to even the most complex and high – value disputes the chance to settle their dispute amicably without being pitched headlong into the expense of a lengthy and costly arbitral process.

The type of contractual provision that can achieve this result will be along the lines that, in the event of a dispute, the parties will seek to reach an agreement through mediation under the auspices of a named mediation institution, but that, if the mediation fails (a time limit being specified), the dispute will proceed to arbitration under the rules of a named institution.

Examples of the type of provision in use can be seen from the model clauses suggested by various international dispute resolution bodies:

LCIA

“In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause.

If the dispute is not settled by mediation within [.....] days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The language to be used in the mediation and in the arbitration shall be [.....].

The governing law of the contract shall be the substantive law of [.....].

In any arbitration commenced pursuant to this clause,

(i) the number of arbitrators shall be [one/three]; and

(ii) the seat, or legal place, of arbitration shall be [City and/or Country].”

A clause suggested by the ICC provides:

“In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in

writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”

World Intellectual Property Organisation

A WIPO model clause provides:

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO [Expedited] Arbitration Rules. [The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators].] The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].”*

* The WIPO Expedited Arbitration Rules provide that the arbitral tribunal shall consist of a sole arbitrator.⁹

In the above cases the mediation/arbitration filter system operates within the same institution. As mentioned earlier, in Singapore the system operates through separate arbitration and mediation institutions: the SIAC and the SMC.

7. The SMC-SIAC Med - Arb Service¹⁰

The Singapore Mediation Centre and the Singapore International Arbitration Centre have designed a med-arb service “*that allows disputants to resolve disputes by drawing on both the SMC’s mediation services and the SIAC’s arbitration services (if the parties are unable to reach a settlement at the SMC).*”

The two Centres say that their med-arb service “*provides a seamless transition from mediation at the SMC to arbitration at the SIAC. Parties who wish to avail themselves of the med-arb service may incorporate the SMC-SIAC med-arb clause in their contracts. A*

⁹ <http://www.wipo.int/amc/en/clauses/index.html#2>

¹⁰ http://www.mediation.com.sg/Med-Arb_Service.htm

party may start the med-arb process by delivering a Notice of Arbitration together with a Request for Mediation to the SMC and the other party or parties. The Notice of Arbitration shall contain the particulars prescribed for a Notice of Arbitration under the applicable arbitration rules of the SIAC (“SIAC Rules”). Both the Notice of Arbitration and the Request for Mediation may be incorporated in the same document. Arbitration at the SIAC is deemed to commence on the date the Notice of Arbitration is delivered to the SMC. However, all subsequent steps in the arbitration will be stayed pending mediation at the SMC.”

The two Singapore Centres say that a unique feature of their med-arb service is that it gives the parties the option “*of recording a settlement reached during mediation in the form of an arbitral award on agreed terms. A mediator appointed by the SMC for the mediation may concurrently be appointed by the parties as an arbitrator for the sole purpose of recording any settlement reached as a result of the mediation in the form of an arbitral award on agreed terms. Such an award is potentially enforceable extra-territorially in the countries and territories that have acceded to the New York Convention, subject always to the law prevailing in the relevant jurisdiction where the award is sought to be enforced.*

If the mediation fails to produce a settlement acceptable to the parties within 4 weeks of the date of the first mediation session, or such other period as the parties may agree to, the mediation will terminate and the arbitration will resume. The SMC will transfer the matter to the SIAC for resolution by arbitration in accordance with the applicable SIAC Rules.”

The New York Convention point is of great importance and I refer to it again later in this Paper.

The SMC-SIAC Med-Arb Clause provides:

“Parties who wish to resolve their disputes by med-arb may incorporate the following dispute resolution clause in their contracts:

Dispute Resolution by Med-Arb

“All disputes, controversies or differences arising out of or in connection with this agreement shall be submitted to the Singapore Mediation Centre and the Singapore International Arbitration Centre for resolution by med-arb in accordance with the SMC-SIAC Med-Arb Procedure for the time being in force, which procedure is deemed to be incorporated by reference into this clause.”

7. The “Filter” Process: and Mediation, Arbitration and the New York Convention

Returning to the SMC-SIAC Med -Arb comment on the New York Convention: there are two separate but related situations where the question may arise as to whether an award in a cross-border dispute is “*potentially enforceable extra-territorially in the countries and territories that have acceded to the New York Convention...*”

The first is where the parties to an arbitration reach an agreement during the course of the

arbitration and wish an award to be made in the terms of their agreement.

The second is where, during the course of a mediation, the parties to a cross-border dispute reach a settlement and wish the terms of their agreement to form the basis of an arbitration award: presumably with an eye to that award being enforceable extra-territorially as a New York Convention award.

Of interest in relation to both points is a third question: whether a mediator can switch to acting as arbitrator; and whether an arbitrator can switch to act as mediator - and then switch back again to act as arbitrator should the mediation fail.

(1) Agreement reached during the course of an arbitration

The English Arbitration Act of 1996 provides in section 51 that, if during the course of arbitral proceedings the parties settle the dispute, the parties may request the arbitrator to record the settlement in the form of an “agreed award” provided that the arbitral tribunal does not object. The agreed award shall state that it is an award of the tribunal “*and shall have the same status and effect as any other award on the merits of the case.*”

The provisions of section 51 of the English Act are similar to the provisions of Art. 30 of the UNCITRAL Model Law. Art 30 of the UNCITRAL Arbitration Rules contains similar provisions.

(2) Agreement reached during the course of a mediation

Article 12 of the Rules of the Mediation Institute of the Stockholm Chamber of Commerce provides that, upon reaching a settlement agreement, the parties may “*subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award.*”

In the case of a cross-border dispute that would seem to be aimed at converting a settlement in a mediation into an arbitral award that may be enforceable as a New York Convention award. Or, as the SMC-SIAC scheme puts it: “*such an award is potentially enforceable extra-territorially in the countries and territories that have acceded to the New York Convention...*”¹¹

The idea of a mediator in a cross-border dispute changing roles and assuming the role of an arbitrator - in order to issue an award in the terms of a settlement agreement reached during the mediation - has obvious attractions.

The idea has particular attraction in relation to the “filter” process under which there is a contractual agreement for the parties to try mediation first and resort to arbitration only if the mediation fails: if the mediation succeeds there would seem to be every reason to

¹¹ The difference between the Stockholm system and the Singapore system is that the former operates within the same mediation institute and the latter operates between two separate institutes: one mediation and one arbitration.

support a desire on the part of the parties to put the terms of their settlement into an arbitral award that may be enforceable as a New York Convention award.

(3) Arbitrator / Mediator / Arbitrator

So far we have considered the situation where terms of settlement reached during arbitration and mediation proceedings are rendered in the form of an arbitral award - an award that may be enforceable in the national courts of another State that has ratified the New York Convention.

Of interest also is the broader and related question of an arbitrator switching to act as a mediator - with the prospect of having to revert to an arbitral role if the mediation fails.

The difficult issue here is the problem that, as mediator, confidential information may have been given to him in *caucus* sessions. Can the arbitrator, in delivering his award, put out of his mind information given to him as mediator - which information would presumably never have been confided to him as arbitrator? ¹²

In China the idea of this change in role is accepted. The CIETAC Arbitration Rules permit an arbitral tribunal to switch roles and act as conciliators: “*where both parties have the desire for conciliation...the arbitral tribunal may conciliate the case during the course of the arbitration proceedings...where the conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an award.*” [Article 40]

This combination of conciliation and arbitration is a distinguishing feature of CIETAC arbitration. ¹³

Article 12 of the UNCITRAL Model Law on International Commercial Conciliation permits a conciliator to go on to act as an arbitrator - provided the parties agree. That Article states that, unless otherwise agreed by the parties, the conciliator “*shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship.*” ¹⁴

¹² I recently acted as co-counsel together with in-house corporate counsel in an international arbitration in a commodities dispute. At a stage which we had pre-determined we suggested to the other party that mediation be attempted. The parties agreed to appoint a leading London mediator. The sole arbitrator was requested to stay the arbitration proceedings - which were being conducted under the Rules of a London commodities association. The mediation was successful and the parties signed an agreement embodying the terms of settlement. Had the mediation failed the arbitration would have been resumed: and the arbitrator would not have been aware of what had been said in the course of the *caucus* sessions in the mediation.

¹³ Some years ago I was Counsel for a group of Chinese and Hong Kong companies in dispute with a group of Italian companies. The contract provided for ICC arbitration. One of the hearings took place in Beijing. The sole arbitrator - a retired English Court of Appeal judge - switched with the consent of the parties to act as mediator. Articles on the case have been published in various journals including the CI Arb' s Journal - “A Foreign Arbitration Held in China”: *Arbitration* (1999) volume 65, No. 3.

¹⁴ The UNCITRAL Conciliation Rules, which pre-date the UNCITRAL Model Conciliation Law by some

The arbitrator / mediator / arbitrator *role - changing* problem may perhaps be a cultural issue: what is regarded as acceptable practice in China may not be so easily accepted in, say, England.

However, the notion of a Judge reading a document *de bene esse* in order to decide whether the contents of the document are admissible in evidence is accepted practice in England. Should the Judge decide that the document is not admissible he then “puts the document out of his mind” - and he cannot take the document into account in reaching his judgment.

If a Judge can do that, why cannot an experienced international arbitrator?

8. An example of a Filter Process case

I will give an example of a mediation involving a contractual provision for a three -stage filter process. This was a case in which I was appointed as sole mediator. The mediation took place in Singapore.

The case involved a Scandinavian operator of an oil drilling rig (the “Employer”) that had contracted with an Asian company (the “Contractor”) to carry out works on the kind of rig commonly known as a “jack-up rig”.

A jack-up rig is a self-contained combination of a drilling rig and a floating barge. The rig is fitted with long support legs that can be raised and lowered independently of each other. The barge/drill is towed into location with its legs up and with the barge section floating on the water. On arrival at the drilling location, the legs are jacked down onto the seabed. The legs are pre-loaded so that they can be securely driven into the seafloor. Once driven into the bed of the sea, the effect of continuing to jack down the legs is to slowly raise the entire barge and drilling structure out of the water and up to a pre-determined height above the sea. Once the jack - up procedure is completed, wave, tidal and current movement act only on the relatively small area of the legs, and not on the far greater area of the barge and drill.

The rig in question was designed to operate in Arctic conditions. Thermal insulation was therefore vital. Being of an older construction, much of the insulation contained asbestos. In order to comply with current regulations, material containing asbestos had to be removed and disposed of, and the rig re-insulated with material of an approved type.

The Contractor was a specialist in asbestos work in relation to rigs. It was agreed that the Contractor would carry out the works for the Employer in a shipyard in Singapore.

The contract contained a three-stage dispute resolution process of the kind that I have described as a filter process. Attempts to resolve any dispute were to be made by:

twenty years, do not permit a conciliator to act as arbitrator: Article 19

- (1) Negotiation between senior executives of the parties who have authority to settle;
- (2) An Alternative Dispute Resolution procedure if negotiation does not resolve the dispute within 30 days;
- (3) Arbitration if the ADR process fails within 60 days.

Default provisions allowed the parties to seek the assistance of the President of the Chartered Institute of Arbitrators in relation to the choice of an ADR process, and in relation to the appointment of an arbitrator and the choice of arbitration rules. The seat of any arbitration was England and Wales, and the governing law was the Law of Singapore.

If the attempt at mediation failed, and the dispute moved into the arbitration stage, the issues in the dispute would involve legal argument on the interpretation of the contract; factual evidence from witnesses on matters relating to extensions of time and delay; and expert evidence in relation to insulation requirements. In addition, the parties would be faced with the prospect of an arbitration in London governed by the English Arbitration Act but with the Tribunal hearing expert evidence and legal argument on Singapore law.¹⁵

The parties were unable to settle their dispute by negotiation. An application to commence the mediation process was made by the Contractor to IDRS Ltd, a division of the Chartered Institute of Arbitrators in London. IDRS sent both parties a list of names from which to choose a Mediator. I was subsequently appointed as Mediator by the President of the Institute.

The parties wished the mediation to take place in Singapore. Preparations were made between me and the parties' Singapore-based lawyers to establish the venue for the mediation and the estimated time needed for the mediation and for the preparation of Statements of Case and supporting documents. The place chosen for the mediation by the solicitors was a Mediation Suite in the Singapore Supreme Court. The arrangements were made through the Singapore Mediation Centre.

The Mediation Suite comprised one large meeting room and two breakout rooms, all overlooking the Singapore Parliament Building. The Suite was housed off the first floor of the new Norman Foster - designed Supreme Court building. This meant that those wanting a break from the sessions could sit outside the Suite and relax in the vast hallways of the building – with views towards the Singapore River and Boat Quay.

¹⁵ English procedural law requires a “foreign” law to be proved as if it were a fact. Therefore evidence needs to be called to show what the foreign law provides in relation to the relevant issues in the case. The process is not as daunting as it might at first appear. I was appointed as a sole arbitrator in an *ad hoc* arbitration. The “seat” of the arbitration was London. The contract between U.S. and Turkish parties provided that Turkish law was the governing law of the contract. Both parties (who had instructed English solicitors who in turn instructed English counsel) called expert evidence on Turkish law. My award therefore included my interpretation of Turkish law as based on the expert evidence called by the parties - and on the submissions of counsel.

The solicitors and I estimated that three days should be reserved for the mediation.

On the first day a preliminary meeting took place at the offices of the Employer's Singapore solicitors. Amongst other things we considered the broad approach that we would take to the mediation sessions.

The second day saw the start of the sessions in the Supreme Court building. We started with a joint session, with each side putting forward its views of the case by reference to the detailed Statements of Case prepared by the parties' law firms. What followed over the next two days was a series of *caucus* sessions interspersed with more joint sessions. I made it clear to the parties and their lawyers that whatever was said to me by one party in the confidential *caucus* sessions would only be relayed to the other party provided I had been given express permission to pass on the information.

Party representatives had travelled to Singapore from Scandinavia and India, and contact was maintained by telephone throughout the mediation with London and other cities.

Much groundwork was covered in the sessions on the second day. By the third day the pace of the mediation was accelerating. The number of *caucus* sessions increased, and by the afternoon of day three the broad picture of a possible settlement was emerging.

The overall process towards this stage had been helped by a number of factors.

First, the parties themselves – whatever their differences may have been during the course of the works on the rig – were keen to see the dispute settled at the Singapore mediation.

Second, their lawyers co-operated in a very professional but friendly way: protecting their client's interests on the one hand but on the other assisting their clients towards a possible solution that would benefit both sides.

The third factor was that on day three I had suggested that the key players for the parties should have direct discussions with each other. These direct discussions could take place whilst my discussions with the lawyers continued. Having suggested the basis on which the direct discussions could proceed, I took no part in the key - player discussions themselves. The key players reported back to their lawyers, and I made suggestions from time to time as matters developed.

Fourth, the place chosen for the mediation contributed towards a settlement being achieved. The quiet calm of the Supreme Court building - the ability to stroll around the hallways, and the opportunity to sit and relax in the spacious building - all seemed to create an atmosphere which helped the discussions between the parties.

These four factors assisted positively in favour of a settlement being reached whilst the parties were in Singapore. There was a fifth matter which was relevant, although this time it was a negative factor: the prospect of a lengthy and costly arbitration in London if the mediation process failed to lead to an agreement.

By late afternoon on day three a combination of the *caucus* sessions and the direct discussions taking place between the key players seemed to be taking the mediation closer to an agreement. Early evening saw a fairly clear settlement picture emerging, but fine-tuning of terms of the agreement took us into late evening.

And by late evening terms of settlement had been reached. I drafted an agreement. Final changes were made to my draft, and the final agreement was typed. By about 10 pm on the third day of the mediation sessions in Singapore all relevant parties to this international mediation had signed the agreed terms of settlement.¹⁶

8. Conclusions

International arbitration and international mediation are clearly two different animals. Each can operate independently, providing separate dispute resolution systems: one may be more appropriate than the other, depending on the circumstances of any particular case.

But the two systems should not be viewed as being in opposition to each other. Rather they should be seen as potentially able to complement each other.

It seems to me that this is so because what mediation in an international context is able to offer - through the major international commercial dispute resolution institutions and organisations like UNCITRAL - is the possibility of resolving international commercial disputes before they reach the stage of a full-scale international commercial arbitration battle.

One particular example of this is the use of mediation as a filter process: only if the mediation stage fails does the dispute then proceed to arbitration. Commercial contracts can be drafted so as to provide a two or more stage resolution process that commences with mediation.¹⁷ If that succeeds all is well. If it fails the parties proceed to some more formal dispute resolution process such as arbitration.¹⁸

I have given examples earlier in this paper of model “filter” clauses providing for mediation followed by arbitration where that proves necessary: examples from the LCIA, ICC, WIPO – and the SMC-SIAC med-arb process.

Related to these filter clauses is the issue of provisions and schemes aimed at converting settlement agreements reached in a mediation process into an arbitral award which – in the case of cross-border disputes – may have the very great benefit

¹⁶ An article on the Singapore mediation was published in *Asian Journal on Mediation*, Volume 4 of 2008.

¹⁷ More complex systems may operate in areas like international construction, where the filter process may include negotiation, dispute review boards, mediation and finally arbitration.

¹⁸ The parties may well find at the arbitration stage that some of the issues in the original dispute were resolved during the mediation process.

of being enforceable extra-territorially as a New York Convention arbitral award.

In the same context – where mediators switch to act as arbitrators in order to make an arbitral award out of a mediation settlement - I have looked at schemes under which arbitrators switch to act as mediators. Are the objections to this purely cultural? Will what is accepted in China become acceptable in, say, England?

I suggested earlier that one of the great benefits of mediation as part of a filter process is that it can take mediation into the arena of international commercial dispute resolution, giving the parties to complex international transactions the opportunity to settle their dispute amicably and at an early stage: hopefully being able – if mediation works – to avoid the cost of arbitration. Arbitration is, after all, a more formal and complex process: particularly in the case of international commercial arbitration.

With the assistance of an experienced mediator, and the support of a respected mediation institute, the parties may reach an acceptable agreement and at the same time avoid the costs of arbitration.

Mediation deserves to succeed, and deserves to take its place in the international commercial field as one of the major dispute resolution processes. Inclusion in a cross-border contract of a filter dispute resolution process under which mediation is tried first – before resort to arbitration – will hopefully encourage the use of cross-border mediation.

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