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LEX ARBITRI



Last month Colin Roberts looked at alternative dispute resolution (ADR) mechanisms of Negotiation and Expert Determination. This time he looks at an ADR mechanism that is recognised and accepted by the international community – mediation. Mediation can be conducted on an ad hoc basis or through a recognised accredited mediator, accredited by, and administered through, respected international institutions. Namely, the Chartered Institute of Arbitrators (CIArb), the Centre for Effective Dispute Resolution (CEDR), the International Chamber of Commerce (ICC), the mediation and conciliation sector of the International Centre for Settlement of Investment Disputes (ICSID), an autonomous body with close links to the World Bank, and others. The author is so accredited.

The power of mediation

Mediation is assisted negotiation. It is where a neutral third party facilitates the parties to a dispute to identify common ground in order to obtain settlement. Mediation is not adjudication. The mediator does not decide the issue. It is the parties' dispute and it is the parties who settle their dispute.

A mediation will start with a joint session of all parties led by the mediator where each party will briefly outline its case. The mediator will then conduct separate discussions with each party, gaining more understanding of the effects of their case but also, most importantly, of the underlying issues driving each party – these are often of a personal nature not directly related to the commercial facts in dispute.

The mediator then generally shuttles between the two parties persuading each, separately, to open up and discuss their real fears, concerns and issues – critically, such discussions between the mediator and each party are entirely confidential and not revealed to the other party. In this way, not only does the mediator gain a deeper understanding of the dispute, far wider than that had by either party (i.e. because of the nature and content of the confidential discussions with each party) but also the parties have the opportunity, in confidence, to expound and explore their case with a neutral present.

Having established the broad facts of the case, including the underlying – often hidden, often personal – issues, the mediator can then explore various options for settlement of part or the entire dispute – again, in confidence with each respective party.

A skilled mediator will have been highly trained in people skills in order to assist and guide the parties in moving towards a resolution of all the issues, whether open (i.e. the commercial matters under dispute) or closed (i.e. underlying issues affecting personalities).

As any mediated settlement agreement only has the status of an ordinary private contract, there are potential difficulties of enforcing such an agreement worldwide. The author suggests that should a mediated settlement agreement be entered into, it would be advised that thereafter an arbitral tribunal be convened to recognise the mediated settlement agreement in the form of an arbitral award. This would then allow enforcement of the mediated settlement agreement by way of an award on a worldwide basis and pursuant to the Washington Convention and the New York Convention.

Some 80% of disputes referred to International Commercial Mediation are successful and result in a mutually agreeable mediated settlement agreement.

There are many other ADR mechanisms in place such as Adjudication, Mock trials and others. However, for the purposes of this column, we will now concentrate on international commercial and investment arbitration, the international treaties that protect the parties and the procedures, highlighting the pitfalls, that should be followed when investing in a foreign state.

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