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Mediation news

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ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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IN THIS ISSUE

From the Chair 4

From the Editor 4

Call for submissions for the special edition of the Mediation Committee Newsletter: ombuds services 5

Committee Officers 6

Meet the officer: Mauro Rubino-Sammartano, Chair of the IBA Mediation Committee 7

IBA Annual Conference, Tokyo, 19–24 October 2014: our committee's sessions 8

FEATURE ARTICLES

Does a communication problem affect mediation? 9

Game Theory and the Kyoto Protocol 10

India: make mediation mandatory in civil litigation 14

Brazil: Bill concerning mediation as an instrument to prevent and resolve conflict by agreement 17

Mediation in Portugal: one year after the new mediation law 18

Canada: Supreme Court of Canada rules on confidentiality of settlement communications 21

Does the cost of mediation really matter? 23

How many BATNAs are to be taken into account? 24

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From the Chair

From the Editor

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Call for submissions for the special edition of the Mediation Committee Newsletter: ombuds services

Some of you may remember a discussion in spring as to whether or not the Mediation Committee should form an Ombuds Subcommittee. A small working party was formed to discuss the matter further. We came to the view that the professions have a great deal in common, both in the required skills base and in the underlying philosophy of seeking resolution of disputes in as open and informal a manner as possible. There are also, of course, major differences. For example, ombuds procedures often lead to a formal decision, are often a required step in seeking redress and are most commonly found in the public sector. We also felt that there were crossovers with the interests of other committees, such as Public Law, Arbitration and Employment Law. To that end and to start the discussion rolling, we thought it would be interesting to have a special issue of the Mediation Committee Newsletter devoted to articles on the topic to which we would also ask members of these other committees to contribute. I am pleased to say that Mauro Rubino-Sammartano and John Siwiec have kindly agreed to our hijacking the newsletter in this way and this special edition is now planned for early next year. Depending on the level of interest and the types of topics that emerge, we may propose a session on ombuds topics for the annual meeting in 2015.

If you would like to contribute an article to this special issue on any ombuds topic or experience I would love to hear from you and can be contacted at patricia@bonaccord.eu.

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Meet the officer: Mauro Rubino-Sammartano, Chair of the IBA Mediation Committee

Why did you become a lawyer?

I became a lawyer because, first, I felt I needed to know which were my duties and my rights, and second, because I realised that it was my duty to help people to enforce their rights. If I were not a lawyer, I would have been happy to sit as a judge.

What advice would you give to someone new to being a lawyer?

I would advise someone who is new to being a lawyer, to inform himself or herself adequately about the many negative aspects of the legal profession, and as to whether he or she can bear the weight of injustice.

How has your role changed post-financial crisis?

The first financial crisis has, as in many occasions in the past, registered a sharp increase of litigation and a reduction in transactional assistance.

What area of your work do you enjoy the most?

I enjoy arbitration, mediation and litigation, acting in them as well as at the level of advising and in the area of research.

What are the current challenges facing your area of practice?

A great challenge to the legal profession as international lawyers is the opening of local offices by foreign firms, in breach of the old tradition according to which each lawyer was practicing in his or her own jurisdiction and referring disputes abroad to regular local agents.

What has been the biggest challenge of your career?

The biggest challenge in my career is to be met frequently by a formalistic and bureaucratic application of the law by many judges who go by the book and forget that their task is to do real justice. I fight this attitude, but often face a wall.

What are the ethical issues facing your area of practice?

The ethical issue in my area of practice is that the spirit of service has been replaced by greediness for financial success and to achieve prestige. I would comprehensively review the current legal system in my country, particularly with regard to how judges are appointed, transferred and 'promoted'.

What do you do in your free time?

In my free time, I read and write mainly on arbitration and mediation.

What were your parents' professions, and would you encourage your children to pursue a career in the law?

My father was an engineer and my grandfather a lawyer. It was never said to me whether they would like me to become a lawyer, but I knew they liked the idea. I have one son, who is a lawyer. Had he asked me whether I would have advised him to become a lawyer, I would have raised many caveats.

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Mediation Law Committee sessions

Monday 1430 – 1730

Mediation as an alternative method to resolve intellectual property disputes

Presented by the Mediation Committee and the Intellectual Property and Entertainment Law Committee

In many intellectual property cases, mediation is a highly effective mechanism to resolve disputes and to protect the parties from high litigation fees and significant damage, which can affect the image of a business in the marketplace. This session discusses the pros and cons of IP mediation with experienced mediators, users from the industry and their counsel. You will learn how to prepare for mediation, how it works and the possible results of a successful mediation. The session will also include information on the various existing rules and institutions in this field and show where state litigation or arbitration are the better way to resolve IP disputes.

Wednesday 0930 – 1230

Which type of advocacy is required for mediation from the perspective of in-house counsel, lawyer and business?

Presented by the Mediation Committee and the Corporate Counsel Forum

The requirement for a completely different mediation advocacy in mediation will be analysed, with a view of understanding the wishes of corporate counsel and other stakeholders. The discussion will form the basis of the Committee's long-term plan to introduce mediation advocacy. This issue will be analysed first by three working groups, respectively in-house counsel, outside counsel and businesses, and then all the participants will discuss jointly.

Thursday 0930 – 1230

Corporate disputes: why is mediation relevant and how does it work?

Presented by the Mediation Committee and the Closely Held and Growing Business Enterprises Committee

Corporate disputes resulting from commercial agreements and transactions are frequent and the costs and delays of litigation and arbitration are increasing. Yet, mediation is still hardly used. Should corporate and commercial lawyers care? Are mediators effective solution finders in corporate disputes?

This session will provide a comprehensive picture of the pros and cons of using mediation in corporate disputes so as to enable you to counsel your clients effectively:

- When does it make sense to mediate or to contractually provide for mediation? Which type of parties, which type of relationships, which industries, which contracts, which issues?
- Why would it work where negotiations have failed?
- How is it conducted?
- What is so special about a third-party mediator and how does he/she 'work his magic'?
- What's the role of a party's counsel in the mediation process?
- Consequences of a 'failed' mediation process: confidentiality and strategic concerns.
- What's the experience of mediation imposed by law? What's the trend?
- Should you accept a hybrid mediation/arbitration process?

Friday 0930 – 1230

What real estate attorneys can learn from mediators – and vice versa

Presented by the Mediation Committee and the Real Estate Committee

Mediators and real estate attorneys each possess and apply unique skills and unique tool-kits in their daily practice. This panel will demonstrate how they can learn from each other. Areas discussed will include negotiation skills, persuasive skills, technics to overcome deadlock situations, bridging cultural differences and avoiding and preventing disputes. The panel will be interactive and apply practical examples and case studies.

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Does a communication problem affect mediation?

The great and well-described success of mediation in mediation-friendly jurisdictions is, unfortunately, balanced in many other jurisdictions by extremely modest access to mediation. In such countries, there are generally more mediators than mediations. This seems to be due, in some countries, to a lack of adequate information regarding the enormous advantages of mediation vis-à-vis litigation, whether in state court or arbitral proceedings.

In some countries, it seems that there is also basic confusion, even among professionals, between mediation and arbitration, which sometimes are believed to be the same, or more or less the same, which further impedes the use of mediation. Much has to be done to help people understand what mediation is and the major advantages a party can draw from it, in terms of results, time and costs. In other words, in such jurisdictions a culture of mediation is to be promoted to individuals, businesses, legal professionals, accountants, other professionals and even members of the judiciary.

I wonder, however, whether in not-yet-friendly countries an even bigger problem exists. For example, whether in such jurisdictions, when you propose to a layperson to refer a dispute to mediation, they understand what you mean.

A frequent belief of people is that, since they are the ones who benefit most from a settlement, no one can do it better than themselves. In this instance, clients are occasionally encouraged by their lawyers, who may believe that they are great mediators because they try to settle disputes on a daily basis and want to show their clients that they are cleverer than them. By behaving in this manner, lawyers can definitely kill the possibility of a settlement.

Many laypersons may just not understand why someone else would be able to achieve a settlement that they - the most interested party to it - have been unable to achieve. The added value that laypersons can obtain from mediation is not conveyed to them through the mere mention of the term 'mediation'.

To avoid misunderstandings, I am not suggesting lecturing a layperson on the notion and proceedings of mediation immediately after uttering the word. The problem seems to me to be one of communication. The short message, which aims to make the layperson understand what mediation means, should convey in two to three words the essence of the added value that a well-trained mediator may provide. If this view is shared, we must work on such a short message.

As always, it is much easier to identify a problem than to solve it, but if we are convinced that the problem exists, we may, and must, find the solution.

I suggest that we discuss it in our Committee's blog. To do so, you may place posts on the blog at **www.ibanet.org/Forum/Detail.aspx?ForumUid=1d27433a-d3e7-4bb0-b7eb-8cd81c84ad0b**.

Game Theory and the Kyoto Protocol

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Introduction

Game Theory is a multidisciplinary field of study that involves, among other subjects, mathematics, economics, psychology, sociology and conflict resolution. This field of study also has a huge impact on important decisions and policy making. The ideas and assumptions embedded in Game Theory have contributed to shaping various decisions and outcomes in recent history.

This article analyses some practical implications and applications of Game Theory, focusing on the case study of the implementation of the Kyoto Protocol in the European Union.

Game Theory developed its concepts and reached its position of importance in modern thinking due, to a large degree, to several ideological, theoretical, historical and material factors. Among them, the most important were the ideological, philosophical and theoretical foundations of ideas and concepts created during the Enlightenment period, capitalism and industrialisation, physics as the model of 'ideal' science, the use of statistics and mathematics as a requirement in social sciences, and the Cold War combined with the availability of powerful computing.

Game Theory development

In the middle of the 1940s, the stage was set for Game Theory to develop. Although there were several seminal and exploratory works before the Second World War, the post-war period provided all the necessary conditions for the rapid development of Game Theory and its practical applications.

Mathematical Game Theory started its rise to notoriety with the works of John von Neumann and Oskar Morgenstern and the publication of 'The Theory of Games and Economic Behavior', built on mathematical analogies to ordinary games of strategy, such as chess and poker (Rigney, 2001).

In essence, Game Theory is a representation, in the form of games, of any form of interaction that involves strategic play. The central idea is that each player, in choosing its moves, takes into account the future moves - or at least what it anticipates them to be - of the other players, continuously readjusting its behaviour in response to the behaviour of others. This behaviour is called strategic interaction (Rigney, 2001).

As in any other field of knowledge, Game Theory incorporates a series of assumptions and beliefs traceable to the ideas, ideologies and historical conditions of the social environment in which it was developed.

Perceived reality

Game Theory incorporates the perception of reality consolidated during the Enlightenment, where the emphasis was on the rational application of the scientific method to social sciences, combining science and reason.

Reality is fixed and objective

Time is linear and the universe can be observed, described, explained, predicted and controlled by human beings. Language is a truth bearer, which translates the individuals' thoughts. In short, Game Theory does not create or shape reality (Gergen, 2001).

The impact of these ideas on Game Theory formulations is dramatic:

- Since reality is perceived as fixed and objective, Game Theory proposes that it can be universally applied in all cases and social settings (Rigney, 2001).
- Since time is linear, a conflict or game must have clearly defined beginning and endpoints (Mitchell, 2002).
- Consequently, a conflict or game is a problem that must be solved within the shortest possible period of time (Lederach, 2003). In this problem solving orientation, a conflict is resolved by achieving a settlement, which could be: win-win (total payoff expands and all players enjoy prosperity); or zero-sum (gains for one party necessarily come at the expense of the other party) (Rigney, 2001).
- Finally, since language is a truth bearer and does not create or impact reality, a conflict or game is self-contained and, therefore,

all conflict resolution is content-centred (Lederach, 2003).

Reality is measurable

The belief that physics is the benchmark by which all other fields of knowledge must be compared, emphasises the use of mathematics and statistics as the most important tools for scientific validation. It is, therefore, no surprise that Game Theory has attracted so much interest.

Game Theory offers sophisticated mathematical models that produce, or at least claim to produce, precise predictions. Game Theory promises to explain universally human interactions by discovering and applying universal social laws through the use of statistics and mathematics. It proposes a methodology that would have the capacity to generate predictions in a logically, rigorous and internally consistent way (Vericat, 2001).

Human nature and individualism

In Game Theory, human nature is viewed through the lens of the ideas created during the Enlightenment period, which, among other consequences, places the individual, not society, at the centre of human behaviour.

Building upon Thomas Hobbes's views of human nature, Game Theory incorporates the assumption that human beings are individualistic, rational, selfish, amoral and self-serving.

Rationality equals satisfaction of individual needs

Game Theory shares assumptions and concepts with neoclassical economic theory. 'Players' are considered rational when they act in order to maximise the satisfaction of their individual needs (utility curve). John Nash, a recipient of the Nobel Prize in economics, based the assumptions for his Game Theory models upon the following neoclassical economic ideas (Kagan, 2009):

- players can calculate their payoffs or utility curves accurately;
- players have equivalent bargaining skills and power;
- players have complete and perfect knowledge of the other player's preferences; and
- there is no collusion during the game.

Motivations and actions of a rational human being

Given the assumptions regarding human nature embedded in Game Theory, it is only logical that it assumes that players will (Rigney, 2001):

- calculate accurately their payoffs and decide rationally based upon the results of this calculation;
- attempt to maximise their payoffs through a strategy of deception without concern for the well-being of others; and
- make their decisions based upon individualistic and rational choices.

Social interactions between selfish human beings

Game Theory's perceived reality and assumptions regarding human nature assume players will continuously choose their moves according to the expectation that other parties will move exclusively with the aim of maximising their individual payoffs without any regard to the needs of others. In this scenario, how can it be possible for human beings to cooperate?

According to philosopher Thomas Hobbes, life in society is only possible because each individual recognises that, in order to prevent war against all other individuals, it must submit to a sovereign state and surrender individual rights. The state then protects each individual from other individuals, creating a 'social contract'.

Game Theory creates its own version of the social contract. According to Game Theory, cooperation will result if the payoffs for cooperating are larger than those of not cooperating (Rigney, 2001). One of the ways cooperation can be achieved in Game Theory is by applying the tit-for-tat strategy, where a player provides signals and incentives to the other player in order to induce cooperation:

- the player cooperates in the first round and imitates the other player's behaviour in the next rounds; and
- a player always cooperates when the other player cooperates and/or punishes the other player when there is no cooperation.

Nash equilibrium

Adapting the neoclassical economic concept of market equilibrium, John Nash created the Nash equilibrium, a critical concept in Game Theory. According to his theory, players

of a given game will play until the point at which, through trial and error, none of the players would like to change their respective strategies. In other words, the player's strategy in equilibrium is the best response to another player's strategy in equilibrium (Moorthy, 1985).

The ideological justification for this proposition can be also found in Darwin's theory of natural evolution. The justification for the Nash Equilibrium is that natural selection will favour changes in strategy until a solution that maximises the payoffs for each player is reached.

Individuals using the equilibrium strategy will make adaptive, or rational, choices to maximise their payoffs by selecting the best course of action from a set of possible strategies. When equilibrium is reached, a player cannot gain anything by using an alternative strategy (Enquist, Arak, Ghirlanda and Wachtmeister, 2002).

Game Theory with regard to the Kyoto Protocol

Game Theory has been applied in fields as diverse as psychology, business management, military strategy, international policy and the economy. In order to illustrate the use of Game Theory in practical situations, we examine global warming.

Global warming is a threat to the survival of mankind. In order to survive, the nations of the world need to renegotiate their relationships among themselves so that carbon emissions may be reduced peacefully.

The Kyoto Protocol (the 'Protocol'), adopted on 11 December 1997 and entered into force on 16 February 2005, is a protocol to the United Nations Framework Convention on Climate Change (UNFCC) aimed at combating global warming. Under the Protocol, countries have committed to reduce greenhouse gases (GHG) by 5.2 per cent from their 1990 levels.

Adopting a Game Theory-style approach, the Protocol allows for several flexible mechanisms, such as emissions trading, clean development mechanisms (CDMs) and joint implementation. The concept behind such mechanisms is that GHG can be traded through financial exchanges.

By putting a price on GHG emission allowances (GHGEA) and creating a market for it, the UNFCC aims to use market forces as a conflict resolution mechanism between countries and individual companies.

The Protocol created scarce merchandise, GHGEA, and initially allocated it among countries, allowing them the ability to further allocate GHGEA to individual companies following the principle of grandfathering: allocations would be made according to each company's past emissions. These individual companies would then be allowed to trade GHGEA.

Assuming that the players, in this case individual companies, are rational beings and that the market works perfectly, the Kyoto Protocol provides incentives to individual companies to create cleaner technologies in order to minimise their emissions and, simultaneously act towards the maximisation of their economic well-being by trading excess allowances that they may not be using.

In a perfect market, Game Theory principles should lead to the creation of the common good through the independent maximisation of individual needs. If, however, the market is not perfect, Game Theory principles would result in individual companies seeking to maximise their satisfaction at the expense of the common well-being.

For the EU, the emission target is a 20 per cent reduction of GHG emissions by 2020. In order to meet these goals, the EU Emissions Trading Scheme (EU ETS) was introduced with the following rules (Jaehn and Letmathe, 2009):

- There are three periods of emission trading: 2005–2007, 2008–2012 and following.
- At the beginning of each period, each country has to present a national allocation plan, which defines how many emission allowances each major emitter has the right to emit in each respective period.
- Companies may sell the allowances that they are not using to other companies that lack allowances.

In establishing this scheme, the belief was that each player would seek to maximise its economic well-being by investing in technology and trading emission allowances. By doing so, via trial and error, players would find the Nash equilibrium, or, in other words, a point at which no player would be interested in changing the relationship between supply, demand and prices of GHGEA. Such equilibrium would result in a dynamic that would ultimately reduce GHG emissions.

However, when the scheme was first applied, from 2005–2007, the EU ETS generously allocated GHGEA to enterprises in emission-intensive industries according to

the grandfathering principle. Despite these generous allocations, in the first 17 months trading, GHGEA prices in the market were much greater than had been forecasted originally. This period was followed by sharp fall in the prices of emission allowances, as illustrated by Figure 1 (Jaehn and Letmathe, 2009).

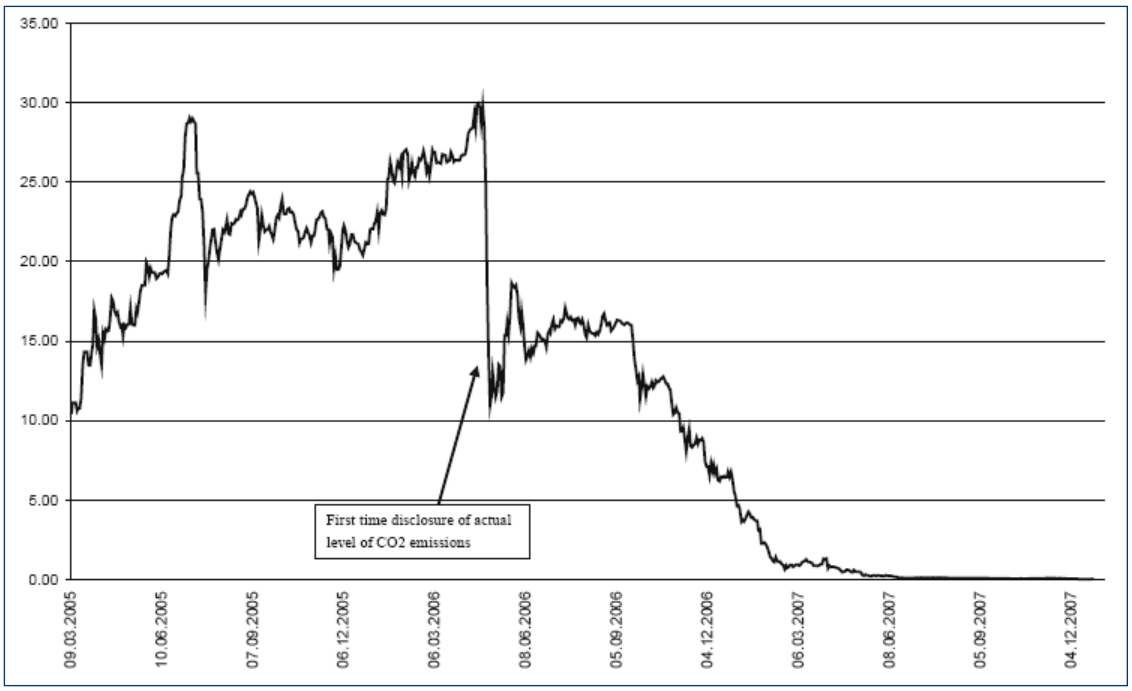

Figure 1: Price History for CO2 Allowances (data taken from www.eex.com) (Jaehn and Letmathe, 2009)

Game Theory can explain this price fluctuation, as both the sharp price rise and its sudden decrease can be explained by the rational actions of the players (individual companies) that were participating in the trade. First, the EU ETS was set up with the assumption that the GHG emissions market was a perfect market, which clearly is not the case (Jaehn and Letmathe, 2009).

Market power

As noted above, the distribution of emission allowances based on the grandfathering criteria concentrated the GHG emission rights in the hands of a few players, mostly energy producers.

Energy producers tend to be natural monopolies or oligopolies with significant market power in their respective markets. This market power translates into the companies' ability to easily pass the increased cost of GHGEA to end consumers.

Therefore, in the first period, the rise in price of GHGEA was in the best interest of the companies that received the largest allowances. These companies increased energy prices to consumers in order to maximise their profits without any concern about the well-being of others, in this case, the reduction of GHG, just as Game Theory would predict. Those consumer prices, however, remained high when the prices for GHGEA fell (Jaehn and Letmathe, 2009).

Asymmetric information

Since accurate measures of emissions were not easily and publicly available, large GHG companies with market power in the GHGEA market could hide their emission levels without wasting allowances (Jaehn and Letmathe, 2009).

In doing so, they adopted strategic behaviour as they held and/or banked most of their GHGEA in order to keep GHGEA prices high so that the price increases remained in place for their consumers.

Once consumer prices were increased, the companies sold their excess GHGEA. With the increased supply of GHGEA in the market, the prices of GHGEA fell sharply in a very short period of time (Jaehn and Letmathe, 2009).

In short, the combination of market power and asymmetric information created

the opportunity for companies to accrue additional profits by both manipulating GHGEA prices, and the price of their products and services to the consumer (Jaehn and Letmathe, 2009).

Game Theory dictated that the companies sought to maximise their individual value without any regard to the broader issue of the GHG emission reduction and global warming. Exhibiting rational, individualist, selfish, amoral and self-serving tendencies, the players acted without taking into account the consequences of their actions.

Accordingly, Game Theory does not seem to resolve disputes that involve ethical dilemmas or the need to preserve collective interests. In such cases, a more collaborative, cooperative approach grounded by strong shared values might be the best solution.

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India: make mediation mandatory in civil litigation

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Much has been written in the recent past about the rapid progress made in the field of mediation in India.[1] Author after author has addressed the history of mediation in India, writing how, in the past, *panchayats*[2] in villages throughout the country served as mediators between parties to help to resolve their disputes. After India became independent and was declared a republic, mediation was introduced in various legal statutes, such as the Industrial Disputes Act, 1947; Hindu Marriage Act, 1955; Special Marriage Act, 1954; Family Courts Act, 1984 and the Legal Services Authorities Act, 1987. It is important to mention that, under Article 39 (A) of the Constitution of India, it is obligatory on the part of the Indian state to enable the operation of the legal system to secure and promote justice on the basis of equal opportunity. Courts in India were kept busy with enormous pendency and the situation reached a flash point.

After the advent of globalisation, in the 1990s, it became necessary in India to amend laws pertaining to arbitration. The Arbitration and Conciliation Act, 1996 (the 'Act') was enacted to eliminate the cumbersome and technical arbitration regime existing at that time. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration was the basis for the Act, but mediation was not one of the methods of alternative dispute resolution (ADR) governed in the Act, except

for a passing reference made in section 30, which neither defined nor made any attempt to specify or clarify the nature and extent of mediation in India. The Act also did not make any attempt to define or distinguish the different modes of ADR, except arbitration. Mediation, as understood in India, remains an undefined creature of judicial interpretation. It is also interesting to note that, although the Act specifically mentions conciliation as a mode of ADR, it states that the concept of international commercial arbitration and international commercial conciliation are to be understood as one and the same until it comes to be defined differently.

By the Code of Civil Procedure (Amendment) Act, 1999, section 89 was introduced in the Code of Civil Procedure, 1908 (the 'CPC'). For the first time in the history of Indian civil jurisprudence, the settlement of disputes by mediation and other methods of ADR, excluding arbitration, were recognised. In this context, it is important to quote section 89 of the CPC:

'89. Settlement of disputes outside the Court.
(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-
  (a) arbitration;
  (b) conciliation;
  (c) judicial settlement including settlement through Lok Adalat; or
  (d) mediation.

(2) Where a dispute had been referred-
  (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
  (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
  (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
  (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.'

As a result, under the section 89 CPC regime, court ordered mediation became a reality in India.

As is commonplace in India with most new laws, the provisions of section 89 in the CPC were challenged before the courts. In *Salem Advocate Bar Association v Union of India*,[3] after much deliberation on the issue, the Supreme Court of India upheld the validity of section 89 of the CPC.

Later, in the case of *Salem Advocate Bar Association, Tamil Nadu v Union of India*,[4] the Supreme Court of India also constituted a high-level committee tasked with framing rules and regulations for referring disputes, new and pending before courts, for resolution through the ADR process under the new section 89 ADR regime. The report of the committee, which was constituted under the earlier *Salem Bar Association* case of 2003, was considered by the Supreme Court of India. The Supreme Court of India finally came to the conclusion that it was mandatory for courts to consider referral under section 89 of the CPC for each case to promote the expeditious resolution of disputes between parties and in turn, enable courts to reduce their ever increasing backlog.

The Supreme Court of India thereafter came to consider the procedures to be followed by civil courts under the section 89 regime in *Afcon Infrastructure Ltd and another v Cherian Varkey Construction Co (P) Ltd and others*.[5] The interpretation and procedure formulated by the Supreme Court of India in *Afcon Infrastructure Ltd* led to various problems. In order to remove these deficiencies and difficulties, the Law Commission of India, in December 2011, prepared amendments to make the application of section 89 more straightforward and result-orientated. The proposed amendments specifically considered whether reference to ADR processes, as mandated under the section 89 regime, was

mandatory or at the discretion of the courts. The Law Commission of India, after referring to the views expressed by the Supreme Court of India in *Afcon Infrastructure Ltd* and *Salem Bar Association*, proposed that neither section 89 nor Rule 1-A of Order X of the CPC are intended to supersede or modify the provisions of the Act or the Legal Services Authorities Act, 1987. It was further clarified that, two of the ADR processes, arbitration and conciliation, would continue to be governed by the provisions of the Act and the other ADR processes, such as mediation, that are not governed by any enactment, would follow in terms of the express provision of section 89 and such procedures as may be prescribed therein. In keeping with this approach, the Law Commission of India proposed various amendments to section 89, which have yet to be implemented. The recommendations of the Law Commission of India can be viewed at Law Commission of India, Report No 238, dated December 2011.[6]

Since the introduction and promotion of the section 89 regime in the CPC and the existing ADR mechanism found under the Act, much progress has been made by various mediation centres set up in the District Courts, High Courts and by the Supreme Court of India. The mediation centres have done well and shown remarkable progress, but one of the factors that remains to be resolved is that, even under section 89, the process of mediation has not been adopted at the initial stages of filing a case. It is necessary that, at the first instance of launching a dispute, parties should attempt to mediate their dispute, if it is a case that is deemed fit by the Indian courts and even more so in a case where mediation is the most feasible and possible alternative to adversarial court litigation. One often finds that parties on the losing end, after years of litigation, seek to get their dispute finally settled through mediation, which has come to depict an unfair practice.

As a result, mediation has fast become a tool used by the party most likely to lose in litigation to buy time and delay the process of justice rather than a means of ending a pending *lis* in a manner favourable to all, as mediation was initially intended.

It has, therefore, become essential that the existing section 89 of CPC regime undergoes a drastic change to provide for mandatory mediation at the time of a dispute's inception rather than providing a cure for an ailing litigation in its last stages of disposal.

A sea change will also have to be brought about in the attitude of the judiciary so that at the very outset, that is, the inception of the litigation, the court can make such a reference after applying its mind to whether the case is fit for being sent to mediation. This would enable achieving both the ends of justice and reduce the ever rising backlog of litigations in India. Mediation should be regarded by litigants and the judiciary as a cure rather than a tool exercised to delay and ultimately defeat the ends of justice.

Mediation has proven that it is an important tool that can alleviate overburdened courts and promote an effective result-orientated judiciary. As the expression goes: 'Better to light a candle than to curse the darkness' Mediation is that candle and it can help to overcome the darkness that has engulfed the Indian legal system.

Notes

1 Newsletter of the International Bar Association Legal Practice Division, Volume 8, Number 1, September 2012 available at www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/Default.aspx.

2 The Constitution (Seventy-Third Amendment) Act, 1992 defines 'panchayat' under Art . 243 (d) as: '(d) 'Panchayat' means an institution (by whatever name called) of self-government constituted under article 243B, for the rural areas'. Article 243B further provides that: '243B. Constitution of Panchayats.- (1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part. (2) Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs.'

3 (2003) 1 SCC 49.

4 (2005) 6 SCC 344.

5 (2010) 8 SCC 24.

6 Law Commission of India, Report No 238, dated December 2011 available at http://lawcommissionofindia.nic.in/reports/report238.pdf.

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Brazil: Bill concerning mediation as an instrument to prevent and resolve conflict by agreement

There have never been any regulations in Brazil governing mediation: a process through which disputing parties seek the help of an impartial third party to resolve a conflict. Resolutions are typically reached through communication between the disputing parties, as the essence of mediation is dependent upon the will of the parties.

Despite the lack of regulation, mediation is becoming used widely in Brazil. Its use has grown in relation to various proceedings, including litigation, arbitration and administrative tribunals, in an effort to avoid lawsuits.

In light of this situation, the National Justice Council of the Brazilian Judicial System recently has taken various measures to provide dispute resolution alternatives and establish regulations for mediation. Legislators believe these regulations support efforts to seek higher quality justice and a more peaceful society because mediation can greatly shorten the amount of time a conflict lasts.

In light of this, the Commission for the Constitution, Justice and Citizenship recently approved Bill 517/2007 (the 'Bill') from the Brazilian Senate: a new and updated bill promoting mediation as an instrument for the consensual prevention and resolution of conflict. It is currently awaiting approval by the Brazilian House of Representatives.

The main purpose of the Bill is to establish court-supervised and out-of-court mediation for the resolution of all types of conflict, except those dealing with the determination of parentage, adoption, parental authority, invalidity of a marriage, disability, court-supervised reorganisation or bankruptcy. This is intended to decrease the pressure on the courts and is based on a cultural transformation: from litigation to dialogue.

Under the Bill, mediation is a technical activity performed by an impartial third party who does not have the power to issue a decision, but serves to help and encourage the parties to develop a consensual solution to their conflict (Article 4). Among the guiding principles for mediation are the mediator's impartiality, equal treatment of the parties and their decision-making power, informality, efforts to find consensus, and confidentiality, in addition to dealing in good faith and voluntary participation (Article 3): a party cannot be obligated to mediate.

The Bill allows parties to submit their dispute to mediation even if the parties have filed a lawsuit or commenced arbitration. To do so, the parties must request that the judge or arbitrator suspends the proceeding for the parties to attempt to reach a consensual resolution to the conflict within three months (Article 8(5)). However, this does not impede the granting of preliminary injunctions in related litigation or arbitration.

Parties may also be represented by attorneys in mediation. If only one party is represented, the other parties can request the appointment of a public defender.

Court-supervised mediation differs from out-of-court mediation in several aspects. Court-supervised mediation can be converted into a conciliation hearing, which will be conducted by a judge, if the mediator believes it is necessary and the parties do not oppose it (Article 13). Out-of-court mediation, on the other hand, results from a mediation agreement contained in a written document that is signed by the parties.

In either case, the mediator can meet with the parties, either jointly or separately, hear third parties and request information that he or she believes necessary to clarify the facts and understand the parties. Mediation ends when a settlement agreement is signed or when continued efforts to find consensus are no longer justified, as decided by the mediator or the parties.

Whether or not a settlement is achieved, Article 23 of the Bill establishes the requirements necessary to prepare the terms of reference for mediation. These include the mediator's qualifications. In order to be a mediator and conduct settlements, a person usually takes courses in order to learn best practice when approaching disputing parties and informing them of their rights. This means that a mediator will have obtained a bachelor's degree at least two years earlier in a higher education course recognised by the Brazilian Ministry of Education and have been trained in a school or entity that is recognised by the National Council of Justice or the National School of Mediation and Conciliation of the Ministry of Justice.

The Bill intends to facilitate conflict resolution. According to the Bill's sponsoring senator: 'through mediation, claims can be resolved in a friendlier environment. This is an instrument that can encourage other ways of resolving matters, reduce the number of lawsuits and fight the distortion of the state's judicial role.'

The senator also emphasised that mediation is not limited to dispute resolution: 'The practice seeks to resolve deeper emotional issues that are not always exposed in the traditional way of dealing with a problem, whether in the public or private sector.'

The Bill is without a doubt an advance for dispute resolution in Brazil, providing an alternative to the growing culture of litigation.

Mediation in Portugal: one year after the new mediation law

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Introduction

Portugal, for some years now, has been witnessing a revolution in its dispute resolution paradigm. In fact, economic factors, including the 'troika' (the International Monetary Fund, European Central Bank and European Union) joint financing package worth €78bn with conditions attached, have had a major influence on the legislator, courts and practitioners, who are now talking about economic justice[1] or a new face of justice.[2] In this context, the Portuguese legal system is seeking to create and regulate new mechanisms that allow greater efficiency in the way that disputes are resolved.

Economic factors, together with the well-known backlog of Portuguese courts, have led to a growing movement away from the courts, or the privatisation of justice, with a corresponding increase in the use of alternative dispute resolution (ADR) mechanisms. Although the focus has been primarily on arbitration, with a new Arbitration Act and recent soft law developments, mediation has also taken advantage of the inefficiencies of the state-run justice system and gained several supporters.

The EU has also facilitated this phenomenon, with the 'Green Paper on alternative dispute resolution in civil and commercial law'[3] and, in the specific case of mediation, with Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.[4]

In fairness, it should be noted that mediation is not new in the Portuguese legal system, having been specifically regulated in Portugal since at least 1997, when the Ministry of Justice signed a protocol with the Bar Association creating the Family Mediation Department. More importantly, mediation received a considerable boost with the creation of Justices of the Peace in 2001, by Law 78/2001 of 13 July, whereby mediation was established as a default procedural step that has to be rejected expressly by one of the parties in order for the parties to bypass mediation in relation to claims brought in civil court. Other legal reforms established further grounds for the development of mediation, including the Employment Mediation System created in 2006, Family Mediation System in 2007, Criminal Mediation System in 2008 and implementation of Directive 2008/52/E

in the Portuguese Procedural Code in 2009. These reforms culminated into last year's consolidation of the various pieces of legislation on mediation into a single law: Law 29/2013 of 19 April.

Definition and legal framework

In the Portuguese legal system, mediation is understood as 'an alternative dispute resolution mechanism, held by public or private entities, by which two or more parties to a dispute seek voluntarily to reach a settlement with the assistance of a mediator' (Article 2a of Law 29/2013). This mechanism is flexible, informal, private, confidential, tends to be fast, with low costs and seeks to allow the parties to reach a solution.

Concerning mediation involving public entities, the Ministry of Justice[5] oversees the Justice of the Peace mediation services (Law 78/2001 of 13 July), criminal mediation (Law 21/2007 of 12 July), family mediation (Order 18778/2007 of 22 August) and employment mediation (Protocol of 25 May 2006).

In criminal mediation, departing from certain assumptions, the mediator promotes approximation between the defendant and victim, and supports the attempt to achieve an agreement that allows reparation of damages and the restoration of social order. This process thereby promotes restorative justice principles within the predominant framework of retributive justice in the Portuguese criminal justice system.

Family mediation is also well established, seeking to resolve family disputes, notably: (i) regulation, alteration and breach of parental responsibility; (ii) divorce and legal separation; (iii) conversion of legal separation into divorce; (iv) reconciliation of separated spouses; (v) attribution and changing of provisional or definitive maintenance; (vi) deprivation of the right to use the surname of the other spouse; and (vii) authorisation of the use of the former spouse's surname or the family home. Finally, employment mediation aims to solve disputes regarding employment issues, provided these do not concern unalienable rights.

Civil and commercial mediation is regulated by Chapter III (Articles 10 to 22). Disputes involving economic interests are subject to mediation within this framework (Article 11.1). Disputes may also be subject to mediation when, even though they do not involve economic interests, the parties are entitled to conclude a settlement regarding their rights at issue in the dispute (Article 11.2). Chapter III establishes pre-judicial mediation (Articles 13 to 15) and the whole process for civil and commercial mediation (Article 16 to 22).

Law 29/2013 also governs the status of mediators (Chapter IV), which is an extremely important improvement, enabling additional accreditation to mediators. Another important matter is governed by Chapter II (Articles 3 to 9) regarding the principles applicable to all mediations:[6]

- Mediation Principle: establishes that all principles under Chapter II are applicable to all mediations held in Portugal;
- Voluntary Principle: four dimensions, including the freedom to choose mediation, the freedom to terminate the mediation, the freedom to reach an agreement and the freedom to choose the mediator;[7]
- Confidentiality Principle: has two implications. On the one hand, the mediator has the duty of secrecy and, on the other hand, referring to the negotiations that took place during the mediation in a court or before an arbitral tribunal is forbidden;[8]
- Impartiality and Equality Principle: the parties have equal standing in the mediation proceedings and the mediator is neutral to the parties;
- Independence Principle: has two dimensions. The mediation is free, meaning that the mediator is not bound to any entity, and the mediator is free of any self-interest or interest of a third person that could create any influence on the mediation;[9]
- Competence and Responsibility Principle: mediators must exercise specific skills in carrying out their duties, and if they violate these duties, they may be subject to civil liability; and
- Enforceability Principle: any agreement reached by mediation, in accordance with the conditions under Article 9, is enforceable without the need for judicial confirmation.

Finally, Article 18, which is extremely important for Portuguese practitioners, establishes that parties may be accompanied by lawyers, trainee lawyers or paralegals. This encourages the general understanding that the role of the lawyer in mediation has specific characteristics that are different from those performed in a court or before an arbitral tribunal.[10] The corollary of mediation is that the central role is occupied by the party and not its lawyer.[11]

Innovations and statistics

The new mediation law creates a single regulation for all civil and commercial mediation. It is thus a major boost to the growing use of mediation and an evolution that meets the needs of the market by bringing dynamism to the Portuguese economy.

The new law addresses the questions raised in the 'Green Paper on alternative dispute resolution in civil and commercial law',[12] by establishing rules on limitation periods (Article 13.2), minimum quality standards (by establishing procedural principles, Articles 6 and 7), confidentiality (Article 5), validity of settlements (Article 20), enforceability of mediated agreements (Article 9), status of mediators (Article 23 to 27) and, finally, the liability of mediators (Article 8).

A recent survey[13] revealed that large companies are most likely to resort to ADR to resolve their disputes. Of the number of ADR cases between large companies in the last three years (51.9 per cent of all dispute resolutions), mediation was used in 20.8 per cent. For medium-sized companies, ADR was used in only 7.7 per cent of disputes and mediation in only 1.5 per cent. For small companies, from an ADR total of 2.3 per cent, only 0.9 per cent used mediation. Large companies are keen to admit that the underlying reasons for resorting to mediation are its reduced costs, speed and the possibility of maintaining a good relationship with the other party.

According to the Boletim de Informação Estatística, Number 26, May 2014, from the Directorate-General of Justice Policy, the use of mediation in relation to proceedings before the Justice of the Peace courts has increased from 32.2 per cent to 40 per cent between 2006 and 2013.[14]

Conclusions

It seems premature to analyse the evolution of mediation in Portugal since the implementation of the new Mediation Law. However, it is not too soon to conclude that this law will have a significant effect on the development and use of this type of ADR. Taking into consideration justice and economic related concerns, this new law is expected to bring dynamism to the Portuguese economy though the prompt resolution of civil and commercial disputes.

Slow justice is the denial of justice itself. Mediation, and other ADR methods recently favored by national legislation, will certainly assist the justice system in diminishing what is both internationally and domestically seen as a social and economic disadvantage, thus providing an important contribution to the necessary overturn of Portugal's current difficult situation.

Notes

1 http://ffms.pt/estudo/24/a-justica-economica-em-portugal.
2 Paula Costa e Silva, 'a Nova Face da Justiça, Os meios Extrajudiciais de Resolução Alternativa de ControvérsiasI' (Coimbra Editora, 2009).
3 European Commission, Green Paper on alternative dispute resolution in civil and commercial law (2002) available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0196&from=EN.
4 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=PT.
5 www.dgpj.mj.pt/sections/gral/mediacao-publica.
6 See Nuno Líbano Monteiro and Francisco da Cunha Matos, 'Princípios gerais aplicáveis à mediação em Portugal' (PLMJ Newsletter, April 2013) available at www.plmj.com/xms/files/newsletters/2013/Abril/Principios_gerais_aplicaveis_a_mediacao_realizada_em_Portugal.pdf.
7 See Dulce Lopes and Afonso Patrão, 'Lei da Mediação Comentada' (Almedina, 2014) p 28 et seq.
8 Ibid, pp 38–39.
9 Ibid, p 50.
10 With the same opinion, Mariana França Gouveia, 'Curso de Resolução Alternativa de Litígios' (Almedina, 2014) 3.ª Edição, p 52–53.
11 bid, p 53.
12 See Green Paper p 28 et seq.
13 Justiça Económica em Portugal – Inquérito, p 43 et seq available at http://ffms.pt/upload/docs/justica-economica-inquerito_yRfhm8K82UiU2R3YS5PATw.pdf.
14 www.dgpj.mj.pt/sections/siej_pt/destaques4485/estatisticas-sobre1705.

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Canada: Supreme Court of Canada rules on confidentiality of settlement communications

In a recent decision, the Supreme Court of Canada (the 'Court') ruled that the terms of a confidentiality clause in a mediation agreement must be clear in order to override the common law exception to settlement privilege.

At common law, settlement privilege is a rule of evidence that protects parties' communications in efforts to settle a dispute. However, the rule provides for an exception, where disclosing the communications that led to a settlement is necessary in order to prove the existence or scope of the settlement.

Facts

In *Union Carbide Canada Inc v Bombardier Inc*,[1] the Court addressed the question of whether a confidentiality clause in a standard form mediation contract displaces the common law settlement privilege, including the exception, thereby preventing parties from proving the existence or scope of a settlement.

The parties were involved in a long-standing, multimillion dollar civil suit concerning defective gas tanks used on personal watercraft. Bombardier Inc ('Bombardier') claimed that the tanks supplied by Dow Chemical Canada Inc and Union Carbide Canada Inc, now known as Dow Chemical Canada ULC ('Dow'), were unfit for their intended purpose, and commenced an action in Montreal before the Quebec Superior Court: the court of first instance.

During the course of their civil suit, the parties agreed to private mediation and signed a standard mediation agreement provided by the mediator. The mediation agreement contained the following confidentiality clause:

> '2. Anything which transpires in the Mediation will be confidential. In this regard, and without limitation:
> (a) Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding;
> (b) No statement made or document produced in the Mediation will become subject to discovery, compellable as evidence or admissible into evidence in any proceeding, as a result of having been made or produced in the Mediation; however, nothing will prohibit a party from using, in judicial or other proceedings, a document which has been divulged in the course of the Mediation and which it would otherwise be entitled to produce;…'

Following their mediation, Bombardier accepted a settlement offer made by Dow. Two days later, a disagreement arose regarding the scope of the settlement: whether, as contended by Dow, it was for a global settlement amount, or, as Bombardier alleged, only for the Montreal litigation.

When Bombardier brought a motion to enforce the settlement agreement, Dow sought to strike out allegations contained in Bombardier's motion materials that referred to the mediation process in breach of the confidentiality clause.

Decision

The Court held that the mediation agreement did not preclude the parties from producing evidence of communications made in the course of the mediation process in order to prove the terms of a settlement, but only insofar as it is necessary to prove the terms of the settlement.[2]

The Court set out its analysis by addressing two questions. First, whether a confidentiality clause in a private mediation agreement can override common law settlement privilege and its exception that parties can produce evidence of confidential communications made in the mediation process to prove the existence or scope of a settlement, both the common law privilege and exception form

part of Quebec civil law. Second, if the answer to the first question is affirmative, whether the confidentiality clause at issue displaces the exception.[3]

In addressing the first question, the Court noted that mediation is a 'creature of contract', which means that parties can tailor their confidentiality requirements to exceed the scope of the common law settlement privilege and, in the case of breach, rely on contractual remedies.[4] The Court, however, stated that 'the mere fact of signing a mediation contract that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it… unless that is the contract's intended effect.'[5]

The Court found international support in its approach to confidentiality with jurisdictions in 14 countries, both in common and civil law systems, that have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation. Article 9 of the Model Law states:

> 'Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law *or for the purposes of implementation or enforcement of a settlement agreement.* [emphasis in the Court's reasons].'[6]

This article recognises both the need for confidentiality in settlement communications, and the ability of parties to enter into their own agreements in this regard ('unless otherwise agreed').

The Court determined that:

> '*Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear.* It cannot be presumed that parties who have contracted for greater confidentiality in order to foster frank communications and thereby promote a settlement also intended to displace an exception to settlement privilege that serves that same purpose of promoting a settlement. *Parties are free to do this, but they must do so clearly* [emphasis author's own].'[7]

Turning to the second question, whether the confidentiality clause at issue displaces settlement privilege and its exception, the Court applied the rules of contractual interpretation under the Civil Code of Quebec, as the relevant jurisdiction. Where parties disagree on the scope of a contract clause, Quebec courts will determine what the parties originally intended at the time of the formation of the contract.[8]

The Court held that:

> 'The nature of the contract must be considered together with the circumstances in which it was formed. Neither of the parties drafted the mediation contract or the confidentiality clause. It was a standard form contract provided by the mediator, who sent it to both parties to sign on the eve of the mediation. Neither party amended the standard mediation agreement or added any provisions relating to confidentiality when they signed it. *There is no evidence that the parties thought they were deviating from the settlement privilege that usually applies to mediation when they signed the agreement… Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement.* Such a result would be illogical [emphasis author's own].'[9]

The Court concluded that the parties did not renounce the common law exception to settlement privilege by way of the confidentiality clause in the mediation agreement and instructed the judge presiding over the enforcement proceeding to consider the impugned paragraphs individually to determine whether each of them is necessary to prove the terms of the settlement.

Notes

1 (2014) SCC 35 (Supreme Court of Canada).
2 *Ibid* para 66.
3 *Ibid* para 27.
4 *Ibid* para 39.
5 *Ibid* para 52.
6 *Ibid* para 52.
7 *Ibid* para 54.
8 *Ibid* paras 57 to 61.
9 *Ibid* paras 64 to 65.

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Does the cost of mediation really matter?

What are the positive features of mediation? The most likely answers are that mediation gives the parties the possibility to control the result, mediation is quicker than court litigation and, last but not least, mediation is cheaper than court litigation.

If we accept these answers, a conclusion that should be drawn is that the lower the cost of mediation, the more cases that will be handled by mediation.

Unfortunately this conclusion does not always follow. To prove this point, this article focuses on mediation in civil cases in Poland.

Mediation became a means by which parties could resolve civil cases in Poland almost ten years ago, at the end of 2005. Prior to 2005, mediation was not regulated by the courts. Since that time, regulations that have come into force appear to be effective. They provide for the voluntary participation of parties with the right to withdraw at any time without having to provide a reason. Parties have the right to choose their mediator and if they cannot reach a consensus, parties have the right not to accept the mediator appointed by the court. All proceedings are confidential and parties cannot be prejudiced by any arguments or offers made during the mediation in the related litigation or subsequent proceedings.

A dispute can be referred to mediation before filing a suit ('private mediation' or 'non-court mediation') or, if the case is already in court, it can be referred by the judge to mediation (so-called 'court mediation'). Despite the name 'court mediation', it is run by a neutral mediator outside the court, but on the order of the court. If parties reach a settlement, the court will enforce it as a judgment of the court. If parties are unable to settle their dispute through mediation, the case returns to court.

The cost of 'private mediation' is not limited, but 'court mediation' in Poland is extremely inexpensive. In cases related to material interests, the cost of mediation is 1 per cent of the value of the claim, with a maximum of PLN 1000 (about €250). That amount includes all mediation costs and is usually covered evenly by both parties.

In such circumstances, if the low cost of mediation was the most important factor, all or almost every case would be referred to mediation. The reality, however, is completely different. The number of 'court mediations' is negligible.

This demonstrates that the low cost of mediation may be a factor that encourages its use, but not the main factor. What are the factors that prevent mediation from being a commonly used form of dispute resolution?

In Poland, there are three main factors that influence the number of mediated cases.

The first is the fact that mediation is not a well-known form of dispute resolution. Mediation needs greater promotion. Every judge and advocate knows the official regulations related to mediation and its theoretical advantages, but most do not see the real positive aspects. Parties often do not even know what mediation is, and even if they have some theoretical knowledge, they do not understand the benefits of mediation versus court litigation.

A second factor can likely be attributed to a common attitude in Poland, which is probably not unique to Poland. When parties are in dispute, they are in an 'adversarial mode'; they do not want to talk to each other and their only focus is on winning. Parties are generally willing to pay court fees and high advocates' fees to have the vindication of winning. They do not want to settle; all they want to do is show that they are right.

The third factor in Poland relates to the fact that anyone who has full legal capacity can serve as a mediator. This means that cases are sometimes run by mediators who do not have the proper training, knowledge or experience.

So, does the cost of mediation really matter? It should matter, however, it is not the most important factor. In Poland, mediation is well regulated and extremely cheap, but it is also not used. To make mediation a legitimate means of alternative dispute resolution (ADR), it is important to promote it, to show its positive aspects and to make people want to talk to each other to settle their conflicts outside of the courtroom. If parties were more familiar with the benefits of mediation, the low cost associated with it would not be the main factor for parties to turn to mediation; at least it would not be the most important factor.

How many BATNAs are to be taken into account?

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The Best Alternative to a Negotiated Agreement (BATNA) is a topic that might be opened and closed in one sentence, that is, it is a fundamental ingredient of negotiations, which we largely owe to the Harvard Negotiation Project.[1] The same applies, of course, to the Worst Alternative to a Negotiated Agreement (WATNA), which is, in a way, its reverse.

One could then easily confine oneself to say that no well-advised negotiator would deal solely based on his or her feelings, impressions and emotions, and therefore without having identified the BATNA and WATNA. It is also known that in order to identify one's BATNA (and the same may be applied essentially to WATNA),[2] a negotiator must proceed in a well-organised manner.

First, the negotiator must list all of the available alternatives. Then he or she must consider the results that are foreseeable by following each of the alternatives. The next step is to establish the value of each alternative. Once this exercise is complete, the negotiator will be able to identify the worst deal he or she is willing to accept.[3] That would be seen as the conclusion of this exercise.

As frequently happens in life, things are not as simple as one would expect. First, BATNA (as well as WATNA) may vary during the mediation proceedings and the negotiator should review them throughout the process. Some further analysis is needed, which, rather than complicating the matter, makes it more interesting.

Which BATNA (and WATNA) has to be identified?

Let us start with ourselves. It is stimulating to assess *our best* alternative agreement. However, in order to prepare more for the negotiation, one must try to assess the BATNA (and WATNA) for the other side. This will frequently aid in understanding its position, the way it will negotiate and its strengths and/or weaknesses.

A reader might feel entitled to conclude that, this time, this is the real end of this exercise. That might be the case in many situations, but not all.

A party may be negotiating through a manager, professional, consultant and so on. The actual negotiator may have a view of the matter, which is not exactly the same as the party for which he or she is negotiating. The negotiator's personal reputation, prospects, career and so on may be influential and result in a different approach to the results of the negotiation, which may reflect also on his or her personal BATNA. That may push the negotiator to take an approach, which is not entirely in line with that of the party for which he or she is acting. The negotiator may then wish to settle, or not to settle, for personal reasons. Even if this does not push the negotiator not to act in the interest of that party, it may influence him or her.

Some further analysis to gather information that may help to establish whether the negotiator's interests and BATNA are exactly the same as the party for which he or she acts, may then provide a higher level of information regarding how to proceed throughout the negotiation.

It is then suggested that in a negotiation, one should identify at least two BATNA, and in some cases, even four, to account for the parties and the negotiators.

Notes

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1 See Roger Fisher, William L Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin 1991).

2 But to simplify things, this article will concentrate on BATNA.

3 Deepak Malhotra, 'Accept or Reject? Sometimes the Hardest Part of Negotiation is Knowing When to Walk Away' (Negotiation Newsletter, August 2004).