Mediation – Does it work in the Middle East?

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May 2014

The Rules govern the parties' agreement to ICC Mediation or any request made by the parties following a dispute to use the ICC Mediation process. The Rules are simple and straightforward and the cost is comparatively low. These Rules are not as extensive as the arbitration rules because the Rules are not binding and are subject to the parties continuing with mediation.

The Rules emphasise the strict confidentiality of the process and outcome including everything disclosed or submitted therein. They also provide for the independence of the mediator and the restrictions on them acting in any future capacity once the mediation is completed. The mediation process, however, is left for the mediator to agree in consultation with the parties and no specific details are outlined in the Rules. Finally, the Rules provide for the mediation cost and the fee of the mediators. Other arbitration centres around the world, like the LCIA, have mediation rules similar to the ICC's.

Part of the discussion at the conference focused on whether in-house counsels prefer to settle disputes through mediation, litigation or arbitration as well as the effectiveness of mediation. It was agreed that mediation is the preferred option for clients for a number of reasons which will be discussed in this paper. It is important to note that mediation is not appropriate for all cases and some are better suited to litigation or arbitration. Certain cases are litigated for strategic reasons and others because one of the parties is completely unreasonable and unrealistic and has no interest in reaching a compromise settlement. In such cases there is no room for mediation as the mediation can only proceed if the two parties agree to it.

Mediation is often the preferred dispute resolution mechanism in complex commercial transactions where the parties have differences but their common focus is on running a successful business. Destroying the other party is not the intention and both parties seek to reach a balanced commercial settlement so they can finalise the dispute and move forward. The mediation process provides an opportunity for the parties to clarify and better understand the issues of the dispute and the other party's position which may not have been presented in a sensible way prior to mediation commencing. Appointing a mediator who is trained, experienced and not affiliated to either party with a fresh eye on the dispute is beneficial to both parties.

For mediation to be most effective and the process to be worthwhile, the following considerations must be taken into account by the parties.

It is important to choose an experienced mediator who is skillful in mediating between the parties or has the full trust of the parties who are willing to be engaged with them in the mediation process because of their status or relationship with the parties.

The mediator must be independent and it is extremely useful if they do not have any background in relation to the dispute. Having a fresh eye on the documents, the facts and the issues between the parties and listening to them first hand is extremely important. The mediator will be able to express their opinion and reflect on what they hear for the first time whilst trying to balance the differences between the

parties.

There is no requirement for the mediator to be a particular nationality or to be the same nationality as the parties or to be a specific gender. Appointing a mediator is the parties' choice and if the parties are unable to agree on a mediator, the Rules provide for the ICC to propose a mediator in consultation with the parties as their involvement in the process is extremely important. The aim is reaching common ground through the mediation process rather than imposing a decision on the parties.

It is beneficial if the mediator is familiar with the relevant industry, particularly if the dispute requires technical expertise. However, if these skills are not available the mediator can still achieve progress through briefings and clarifying the parties positions and narrowing the dispute to one or two specific points or in some cases to a quantum.

It is extremely important for the mediator to have access to the senior management of both the parties to discuss the issues with them, understand their point of dispute and share their thoughts and the thoughts of the parties with either side to make progress on the issues in dispute. Reaching out to the senior management and obtaining their input will help to progress the mediation faster and is likely to reach a favorable result. However, the mediator is often not in control of this and the in-house counsel may not provide them with such access.

Not all mediation achieves results and even with a skillful mediator, they may not be able to reach an amicable settlement and the parties may continue with their dispute to proceed to arbitration or litigation. This is why most of the Rules provide for the mediation to be confidential and not to be shared or disclosed by either party or the mediator. Critics to mediation argue that it is another level of litigation and sometimes a waste of time and money when no binding decision is reached and the parties subsequently litigate. When mediation fails this is a valid point, however I believe the benefits of a successful cost effective mediation, outweigh this concern. Parties to a successful mediation are more likely to keep their relationship friendly and possibly continue their business relationship in the future. It is also true that even if the parties do not reach an agreement and are bound by confidentiality, they tend to learn a great deal about the facts of each party's respective case and are more reasonable and rational in litigation or arbitration in the future. Investing in reaching a settlement must be one of the responsibilities of the senior management and in-house counsel of any organisation and mediation is one such investment that needs to be made or at least explored, particularly when the cost to the parties is relatively minimal. While the cost and the mediation process vary at different mediation centres, they have a common aim with very similar rules and most of the process being determined by the mediator and parties.

There is nothing different in the Middle East from the rest of the world when it comes to litigation, arbitration or mediation. Mediation existed in the Middle East hundreds of years ago and continues to be the preferred method for settling disputes. While most of the disputes are settled out of court, they are not usually settled through a recognised mediation process or mediation centre. Most of the disputes throughout history and in the modern days are settled by the parties seeking the assistance of an independent, trusted, honorable person in the community who will help in mediating between them to reach an amicable settlement. This usually occurs through a number of meetings and discussions and a technical person may be used by the mediator to assist them with technical issues to help the parties reach an amicable settlement. Mediation has historically been the mechanism of settling disputes between tribes and neighboring countries and again the status and the honor of the mediator and the respect of both parties have helped the process in reaching amiable compromise settlements. One feature of mediation in the Middle East which distinguishes it from other mediations is that the respect of both parties to the mediator makes it difficult for the parties to withdraw from mediation or terminate mediation and therefore, whenever mediation commences there is a likelihood that both parties will see the process through and consequently reach an amicable settlement.