International Mediation First:

Let The Deal Makers Make Deals

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WELCOME

Have you ever wondered what's in it for the neutral? Why does an arbitrator arbitrate or a mediator mediate? In my case, the motivation came from people who were just bad at their jobs. Bad arbitrators. Bad mediators. People who took my clients' hard earned money and their valuable time and *wasted* them. And often, these clients had been ordered by a court to arbitrate or mediate against their wishes. They all did the best they could to vet the neutral. But face it, the information about neutrals is pretty limited in most cases. Unless you have used that individual neutral before, it is kind of a crap shoot.

The court that ordered the alternative dispute resolution technique gives no guarantees that you will get a good neutral. You can require all the training you want but sometimes the neutral is just bad at the job.

I have graduated through the basic training of mediation and arbitration to finally obtaining a certificate in International Commercial Arbitration from American University Washington College of Law. All this in an effort to be good at my job. I like solving problems. I like parties who are satisfied with the resolution of disputes, who don't crab about the neutral, and who tell their associates that ADR can be less expensive and less of a headache than litigation.

In thinking about creative dispute resolution, it occurred to me that there is a significant opportunity to use mediation techniques in international commercial disputes. Most international deals today have binding arbitration clauses. That's good. But "could it be better?" was my question. That was when I started thinking about applying my recommendation for Mediation First in domestic disputes to international disputes. Every jurisdiction uses mediation. It just seems that more often than not the very existence of the arbitration clause makes the demand for arbitration the first step. Please enjoy my thoughts about International Mediation First. And please, if you have criticisms or praise, pass them along to me for the next edition.

Business relies on deals.

Disputes happen. Well-intentioned business people make mistakes. They misunderstand. They over-promise and under-deliver. It happens. Get over it.

The steps you take next—after the dispute arises—define your business and the dispute. You can put all your energy into defending something you would never accept yourself. You can select an aggressive counselor who adopts a take no prisoners approach against the failing business associate.

Or you can realize this is just another obstacle on your way to ultimate business success. Disputes sap an entrepreneur's energy, time, and resources. Successful people don't let business disputes steal their energy or shake their focus.

Dispute resolution is never easy or cheap.

Typically, dispute resolution costs are sunk costs. Never to be recovered. Even if a contract, law, or treaty permits awarding attorney's fees and costs, the awards are replete with results where there were no such awards, minimal awards, or uncollectable awards. Sunk costs increase your cost of doing business and make it harder to compete.

The key to dealing successfully with dispute resolution is remembering that ultimately nearly all business disputes are decided by negotiated agreements ("settlements"), the same way the business arrangements started. You can make enemies and quadruple your expenses or you can negotiate and "make a *new* deal"—one that does not drag on for years—which is what you do best anyway.

The particularly ill-fitted mantel of litigation for international commercial disputes led to adoption of arbitration as the primary method for resolving these disputes.

Arbitrations are taking longer and costing more.

But, have you looked at arbitrators' decisions lately? The process has become nearly as convoluted and lengthy as litigation. And the expenses and time to decision have risen with the page length of awards. The arbitration literature is as awash with criticism of the arbitral process as it is of litigation.

And, there is a growing push for more arbitral awards to be published as a way of building up a body of "precedent" to guide future arbitrations. Sounds more and more like litigation. And less and less like a private method of dispute resolution that parties expect from the "confidential" arbitration clauses.

Nonetheless, arbitration is required for some disputes. Issues are fuzzy. Rules are opaque. Parties are intransigent. There will always be arbitration of international and domestic commercial disputes.

International Commercial Mediation IS an option.

But, there is an alternative: international commercial mediation. Mediation is private, economical, and swift. It retains the key elements of letting the business people decide their own fate in a confidential manner.

You all know what mediation is: a neutral third party who brings the parties together to help them resolve their dispute in a mutually satisfactory way leading to a mediated agreement for a successful way forward. In business, the parties frequently hope to continue doing business together. They just need to get past this dispute in a way that lets them work with each other.

Mental obstacles to mediation.

Now come the doubters. “We did not agree to mediate in our contracts.” “We do not have a way to force the other side to mediate.” “Why would they agree to mediate now?”

Good questions but the wrong side of the coin. Why wouldn’t the other side be willing to mediate if you are? Nobody will force them to spend more time or money on mediating than they agree to spend. Nobody will force them into any particular result. They can get a better understanding of your position and your facts in case they do have to go to arbitration or court later. They even have a fair shot at persuading you of their position. And, they will have a trained neutral who can evaluate the strengths and weaknesses of their position.

These are powerful reasons to propose mediation, and to agree to mediation, even when there is no requirement for mediation in the formal business arrangement.

Mediation First agreements

The obvious answer to these obstacles to post-dispute mediation is to adopt a requirement in business arrangements that the parties will always mediate before seeking to arbitrate or litigate. The mediation first requirement is simple and easy to enforce. A short paragraph stating the parties agree to participate in good faith mediation (certified by the mediator at mediation conclusion) before instituting litigation or arbitration is sufficient. The rationale of reducing costs and increasing privacy will support a mutual agreement for mediation first. A further clause declaring that the parties fully expect a court or arbitral organization or panel to defer all action until the good faith mediation is certified complete by the mediator can be enforced. Naturally, efforts to preserve the status quo during mediation may need judicial or arbitral assistance but that is achievable as well.

These innocuous agreements can also be waived by the parties after the dispute has arisen if there is simply no chance that the mediation will be successful. This occurs frequently with court-mandated mediation requirements in the United States.

The commitment to mediation first can be used in nearly every type of written arrangement: commercial contracts; partnership agreements; joint ventures; settlement agreements (mediated or not), and corporate operating agreements. They even have been used in Wills and Trusts. Anywhere a party may want to stave off publicity and reduce costs from dispute resolution is the right place for a mediation first agreement.

What kind of mediator?

Choosing a mediator is no less difficult than Choosing an arbitrator. These choices typically suffer from a lack of information. The mediators and arbitrators are bound by the confidentiality Agreements governing their prior experiences. The previous parties seldom are available for interviews about the quality or characteristics of the neutrals. So you fall back on publicly available information about education, training, and experience. Not a perfect world for picking a neutral but it is what it is.

For many years parties held to the belief that retired judges made good mediators. Some do. Some do not. The good ones are able to bring their knowledge of litigation to the mediation to help a party understand the downside of an argument if it were to go before a court. That can be very helpful.

Often though, retired judge mediators are so accustomed to *deciding* disputes they cannot help themselves. They have difficulty remaining a neutral facilitator and the case does not get resolved in mediation. One side senses an upper hand and the mediation breaks down.

Knowledge of international commercial arbitration for international mediators.

For the most part, one mediation looks like any other in the United States. The parties articulate the legal issues and theories on which they rely for the benefit of the mediator, who is frequently an attorney. International commercial arbitration is so different from United States common law though that trying to educate a mediator for an individual case is foolhardy. The nuances of the applicable treaties, situs rules, remedy rules, and enforceability rules play an important role in how the parties feel about their cases and how willing they are to resolve them in mediation. The mediator needs to be familiar with those issues and rules to facilitate the mediation.

High quality training recommended.

There are few high quality training courses in International Commercial Arbitration. American University's Washington College of Law had one of the earliest and still the best programs for training international commercial arbitrators. It is an intense course with skilled professors providing one on one education in both the unique issues of international business law but the varied international laws. www.wcl.american.edu/arbitration/

The full college semester Certificate Program prepares arbitrators to understand and apply all of the sophisticated concepts of international commercial arbitration from day one.

Conclusion

These are just some of the reasons Rhonda Smiley both recommends **MEDIATION FIRST** for international commercial disputes and is ready to help you mediate to a successful, private, cost-effective resolution.

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