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"CAN MEDIATION BECOME INTERNATIONAL?"

LORD HACKING

INTRODUCTION

This is a pertinent question to ask in the newsletter of the IBA Mediation Committee. The focus of the IBA is the practice of law in the international field and the focus of the Mediation Committee is mediation in this context. Yet while mediation is being increasingly practiced within individual states, thus far its application across the borders of states (where the parties are located in different states) is very limited.

STATISTICS ON USE OF MEDIATION AND ARBITRATION

The evidence lies in the statistics. For example, they show, of the major international dispute resolution institutions, that mediation plays, at present, a very small role in international dispute resolution. For example the ICC Court of Arbitration statistics, for the year 2005, record 521 new arbitration cases but only 6 new mediation/conciliation cases under their ADR Rules. In 2006 a similar picture is obtained – 593 new arbitration cases but only 12 new mediation/conciliation cases.[1] The statistics from the LCIA paint the same picture: in 2005, 74 new arbitration cases against two 2 mediation cases and, in 2006, 89 new arbitration cases against 4 new mediation cases.[2] The statistics of the ICDR in New York paint a slightly different picture but still arbitration cases predominate over mediation cases. Their figures are: 2005: 544 new arbitrations against 36 mediations and 2006: 543 against 43 mediations.[3] It should, however, be noted that a lot of the ICDR cases come from within North America where domestically mediation is well established.[4]

Further evidence can be obtained from the leading mediation provider in the UK, the Centre for Effective Dispute Resolution ("CEDR"). It conducted in 2005, 661 major commercial mediations – with sums in dispute of over £1 Million – and, in 2006, 649 major commercial mediations. However out of all of these mediations only about 10 per cent can be categorised (where one or more of the parties is based outside the United Kingdom) as 'international mediations'.[5]

While authors have argued, I believe rightly, that mediation or other forms of ADR should be more used in a variety of international dispute resolution processes the

[1] *See ICI Bulletins Vol 17 No 1 and Vol 18 No 1*
[2] *See LCIA News Vol 12 Issue 1*
[3] *Statistics given to author by ICDR Secretariat*
[4] *See, for example, at Federal level, the Uniform Mediation Act of 16 August 2001 and, at State level, the California and Connecticut Mediation Statutes*
[5] *These statistics were provided to the author by the Secretariat of CEDR*

evidence continues to be that this is not happening – at least to any significant extent. For example in a recent article, an author argued for the increased use of ADR in interstate investment disputes but despite the introduction of the ICSID Conciliation Rules, he could only find to date five ICSID conciliation cases and in two of them the same two parties were involved.[6]

THE ASCENDENCY OF INTERNATIONAL ARBITRATION

It is not difficult to identify why arbitration, in the international scene, is so ascendant. It has been around for a very long time! As identified by Professor Derek Roebuck, arbitration, as a means of settling disputes, was well established under Roman Law by the first century BC. Under Roman Law the parties to a dispute entered into an agreement, called a *compromissum,* to submit to arbitration and abide by the award. Among the writings of Roman authors – Cato, Cicero, Livy, Ovid and Seneca – of the first century BC and the first century AD – there are found to be extensive references to arbitration.[7] For a hundred years and more the great trade associations, covering worldwide trade, in shipping, coffee, cocoa, sugar, grain, cotton and many other commodities have all incorporated the arbitration process. We look, for example, in London to the Cocoa Association or the Coffee Trade Association or the Grain and Feed Trade Association – the last being an extensive user of arbitration. This has been further buttressed, in London, by the establishment of international exchanges such as the Baltic Exchange (for shipping) and the Exchanges for International Petroleum, for Metal, and more recently, for the International Financial Futures and Options – all again users of arbitration. Thus trading associations and exchanges, throughout the world, have long used arbitration as the process for the settling of disputes between members of the same trade.

It should be noted that Professor Derek Roebuck, in another interesting work,[8] just published, traced mediation back to before AD500 and particularly followed its history in England from the 12th century to the 20th Century but as Professor Roebuck concedes mediation, unlike arbitration, never has had a separate formal existence. Of course mankind has sensibly sought (although not always!) from our first existence on earth means to settle disputes… bargaining and arguing…with others (like mediators) intervening to help out. This, however, did not result in giving these activities any formal structure as was accorded in England to arbitration by the Courts[9] and by Statute[10].

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[6] *See article of Harris Bor "ADR Possibilities in Investment-State Disputes" The International Journal of Arbitration, Mediation and Dispute Management: Vol 71 No 1 pages 90 and 95: February 2007*

[7] *See Professor Derek Roebuck: "Roman Arbitration":* amazon.co.uk.

[8] *See "The Myth of Modern Mediation": The International Journal of Arbitration, Mediation and Dispute Management Vol 73 No 1 p.105; February 2007*

[9] *The Chancellor in English Court of Star Chamber: "This dispute is brought by an alien merchant….and he ought not to be held to await trial by twelve men and other solemnities of the law of the land but ought to be able to sue here from hour to hour and day to day for the speed of merchants": YB 13 Edward IV, p 96*

[10] *Viz: the English Arbitration Acts of 1698, 1889, 1950, 1979 and 1996*

THE UNITED NATIONS AND THE INTERNATIONAL CHAMBER OF COMMERCE

Other factors have played a very important part in the establishment of international arbitration – a benefit not yet accorded to international mediation. For over 80 years the United Nations and the International Chamber of Commerce in Paris has been fostering the use of arbitration as the means for resolving disputes in the international forum. The International Chamber of Commerce in Paris founded its Court of Arbitration in the 1920s at which time the predecessor of the United Nations, the League of Nations in Geneva, established a Protocol on 'The Validity Of Arbitration Agreements' (24th September 1923) and a Convention on 'The Enforcement Of Arbitral Awards' (26th September 1927).[11]

In passing it is amusing to note that the early intervention of the League of Nations into international dispute resolution was not without controversy. When the British Government proposed to enter into the League of Nations Protocol on 'The Validity of Arbitration Agreements' both the English Lord Chancellor, Lord Cave, and the Attorney General, Douglas Hogg KC (later himself Lord Chancellor) threatened resignation rather than to have the League of Nations create laws to which English Courts would be bound!

THE IMPACT OF THE ARBITRATION INSTRUMENTS OF THE UNITED NATIONS

For those who believe mediation should be in the arena of international dispute resolution, there should be recognition of the immense support given to arbitration by the United Nations. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Arbitration in New York on June 1958 (known as the 'New York Convention'), the Arbitration Rules of the United Nations Commission on International Trade Law adopted by the UN General Assembly on 15th December 1976 (the 'UNCITRAL Arbitration Rules') and the Model Law on International Commercial Arbitration adopted by United Nations Commission on International Trade Law in Vienna on 21st June 1985 (the 'UNCITRAL Model Law') have each been standard bearers in the development of international arbitration.

THE 1958 NEW YORK CONVENTION

There has been no more important instrument in international dispute resolution than the New York Convention of 1958. No less than 142 countries have now ratified and entered into force the New York Convention.[12] It was the original intention that, following its adoption in New York in June 1958, that all countries who wanted to enter into the Convention should do so by 31st December of the same year.

[11] *See Author's Article: "Arbitration Law Reform: the Impact of the UNCITRAL Model Law on the English Arbitration Act 1996": The Journal of the Chartered Institute of Arbitrators Vol 63 No 4: Nov 1997*
[12] *See: UNCITRAL Website: www.uncitral.org/NYConvention*

Fortunately that was not adhered to and countries such as Afghanistan (in February 2005) and the Marshall Islands (in March 2007) are still being permitted – indeed encouraged – to become a signatory to the Convention. So it is that almost every country in the world, who indulges in trade, has become a signatory to the New York Convention: from the Russian Federation to Bolivia from Lithuania to Thailand.[13]

In assessing, in the international context, the ascendancy of arbitration over mediation, the sheer power of the New York Convention has to be recognised. Thus, as long as each party has entered into a written agreement "…to submit to arbitration all or any differences which have arisen or which may arise between them…" (Article II.1) "….the court of a Contracting State *shall*… *refer* the parties to arbitration…" [emphasis added] (Article II.3).

It cannot be said that there has been perfect compliance world wide to the New York Convention – judges in India, Bangladesh and Indonesia, to mention a few countries, where things have gone wrong, have not always properly followed the New York Convention but overall it has underpinned, worldwide, international arbitration.

THE UNCITRAL ARBITRATION RULES AND MODEL LAW

The UNCITRAL Arbitration Rules and Model Law further consolidated arbitration as the premier means of resolving international disputes. For example in the last twenty years there is not a single country in mainland Europe which has not introduced new arbitration laws based upon, or largely influenced by, the UNCITRAL Model Law.[14] It has had a similar impact in many other countries around the world from Korea to Brazil, from India to Malaysia.

The ascendancy of arbitration over mediation is also fostered by the plethora of international arbitration conferences which, according the 'International Arbitration Planner' issued by the London Law Firm of Lovells, are now amounting to about a dozen international arbitration conferences per month – 144 such conferences per annum! This is not to state that mediation is being neglected – indeed some of these arbitration conferences 'cover' mediation – but it is to state that international mediation is having to grow under the great oak tree of international arbitration!

THE DIVERSE FORMS OF MEDIATION AND OTHER MEANS OF ALTERNATIVE DISPUTE RESOLUTION

Another difficulty faces the international adoption of mediation and other forms of dispute resolution. In its inchoate state the forms of mediation can greatly differ: there is, for example, facilitative mediation in contrast to evaluative mediation and then there are a variety of ways in which mediations can be conducted: mediations with 'caucuses' and mediations without and so forth. Added to this, it has multiple

[13] *ibid*

[14] *See Author's Article: "Arbitration Law in Europe": The Journal of the Chartered Institute of Arbitrators Vol 65 No 3: August 1999.*

cousins: adjudication, negotiation, brokered talks, conciliation, neutral evaluation, expert determination, neutral fact finding etc.

This is not to state that mediation – and its cousins – are not growing. One can cite the increasing success and growth of mediation in countries of high commercial activity – the leader being, of course, the United States of America and its growth and success of mediation is not limited to the commercially powerful countries of the world. I read recently a paper by Steven Hendrix, about the growth and success of mediation in the Central American State of Guatemala.[15] In the cultures of Central America midwives interestingly have had a key role in sorting out family disputes and other local conflicts. In urban areas Mayors and Assistant Mayors have played key roles as 'mediators' or problem solvers in community disputes. From their introduction in 1998 under a USAID programme, there were created in Guatemala seven community–mediation centres. In these centres the mediators have the record of resolving 73 per cent of all cases that enter their doors whether the disputes be of a civil, commercial, family or criminal nature. Moreover of the cases settled over 70 per cent of the settlements were fully complied with - in no less than one month! Beyond the roles of Mayors and Assistant Mayors, Justices of the Peace, priests, policemen and even relatives of the disputants have played an active and successful part in the conduct of mediations in Guatemala.

As the speakers in the conference in Vilnius entitled "Mediation in Europe: Present Challenges and Future Developments" in May 2007 were able to explain, mediation in one form or another is being developed in almost every country in the European Union. However, in the main, it is being used, albeit very successfully, in disputes concerning the family and children. Only two countries in the European Union were able to point to mediation statutes which had universal use in civil disputes. These countries are Hungary with its 'Act on Mediation' which came into force in March 2003[16] and Austria with its 'Federal Act on Mediation in Civil Law Matters' which came into force on 1st May 2004.[17] Good though these statutes may be covering the registration of mediators, the training of mediators, confidentiality and other important matters, the use of mediation in the European Union is still at an infant stage. Indeed Dr Webber from Austria confessed that the number of registered mediators (approximately 4,000) was far more than the number of mediation cases currently being conducted in Austria!

THE ROLE OF THE COURTS

Mediation does have an ally: the Courts. For many years Judges in German Courts have actively involved themselves in the settlement of cases. In England the new

[15] S*ee "Empirical Data on Conflict Resolution and Strategies to Advance Access to Justice in Rural Areas"; Sistemas Judiciales 108: Dec 2003*

[16] *See paper of Dr Szabolcs Németh, Counsellor, Ministry of Justice, Republic of Hungary, to be published by Vilnius University School of Law.*

[17] *See paper of Dr Martin Webber, Judge, Federal Ministry of Justice, Federal Republic of Austria, to be published by Vilnius University School of Law.*

Civil Procedure Rules concentrate on the active management by the Court of cases and that active management includes "encouraging the parties to use an Alternative Dispute Resolution Procedure if the court considers that appropriate and facilitating the use of such procedure" (English Civil Procedure Rule 1.4 (2)(e)). It is not the policy in English Civil Procedure to compel parties to enter into mediation but the English Courts are prepared to visit on the parties sanctions where parties should have, in the view of the court, entered into mediation but unreasonably refused to do so. Thus, in England, a party who does not enter into mediation, when it should have done, is exposed to adverse costs orders against it.[18]

THE EUROPEAN COMMISSION

The European Commission is another driver for the increased use of mediation for the settlement of disputes. I refer to the EU Green Paper on Mediation of April 2002, the European Code of Conduct for Mediators of July 2004 and the EU draft Directive on Mediation.[19] Here importantly the Code is looking to the competence and knowledge of mediators in the process of mediation including proper training and continuing education and practice in mediation skills. It is also looking to mediation accreditation schemes (paragraph 1.1 European Code of Conduct for Mediators). Agreement has not yet been reached on the EU draft Directive on Mediation but its proposals include the power of a court "to require the parties to attend an information session on the use of mediation" (Article 3.1) and the suspension or interruption of the running of limitation periods during the mediation process (Article 7). This all adds up to improving the efficacy, and hence the use of mediation in the European theatre.

Unfortunately the proposed EU Mediation Directive has run into several difficulties with the European Parliament and Council of Ministers who want to limit its scope to 'cross-border cases'. Sadly the United Kingdom government is one of the countries which is opposed to this proposed Directive applying to all mediations whether or not they are 'cross-border' mediations.[20] In the view of the Commission this limitation, particularly as being proposed to it by the European Parliament, damages enormously the efficacy of the proposed Directive and its aim to support and advance the use of mediation throughout the European Union. Until this difficulty over the scope of the mediation Directive, and one or two other matters, are resolved the Directive cannot be brought into being.

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[18] *See analysis of the role of the English Courts in mediation in Paper of Kate Williams of Shadbolt & Co: "The Growing Role of Mediation :the English Perspective" at Spring Meeting 2007 of ABA International Law Section:* www.abanet.org/intlaw/spring07/agenda.html

[19] *See papers issued by European Commission and for draft Mediation Directive: 2004/0251 COD COM(2004) 718 final*

[20] *This goes to the whole chestnut of 'subsidiarity' under which Member States seek to keep the European Community out of its domestic laws. The fear, therefore, of the UK is that a concession here on subsidiarity could be used as a precedent for the European Commission imposing other law into the domestic law of the United Kingdom.*

ADVANTAGES OF MEDIATION

There are other reasons for believing that mediation should be playing a greater role in dispute resolution in Europe and elsewhere round the world First and foremost it is a process which does not focus on the legal rights of the parties and fault. On the contrary it is a process in which each party is being encouraged to focus upon its best interests. It is also a process in which results can be obtained which are not possible in arbitration or litigation. In the best result mediation can actually put right the wrongs out of which the dispute between the parties arose: for example by re-defining the responsibilities disputed between the parties. Even such things as an apology can help the healing process in mediation.

Other factors, running in favour of mediation are its greater speed, its greater simplicity, its greater cost saving and the stricter control of confidentiality than is possible to obtain in an arbitration where confidentiality (at least the enforcement of it) has been largely abandoned. Thus, in times, when some arbitrations are taking an absurd amount of time – years rather than months – at ever greater complexity and cost, there is a powerful case for much greater use of mediation in international dispute resolution.

NOT NECESSARILY THE PERFECT SOLUTION

This is not to state, while mediation does have clear advantages over arbitration, that it is always the right means of dispute resolution – nor does it necessarily bring about the perfect solution. Sometimes it is very important, in disputes between parties, to obtain a binding ruling upon the contractual responsibilities of parties. While agreement can be reached between parties, as part of the mediation settlement, on the respective contractual responsibilities between them, it is not the same as an arbitrator or judge giving definitive rulings on these issues. Mediation is also not a process in which the weak can necessarily be protected from the strong. A party, powerful in the market place, can still use its weight in a mediation to bring out a settlement which runs more to its benefit than to the weaker party. Although mediators should do their best to steer parties in the mediation process away from ‘horse trading’ they cannot prevent it and in disputes, particularly relating to insurance companies, horse trading can take place and can wear down another party to a settlement to which it might not otherwise have agreed. Then there are parties in mediation who are not truly looking for settlement of the dispute but who are entering into ‘fishing expeditions’ into the weaknesses and strengths of the other party or generally sizing up the opponent. In such circumstances mediation can delay, and add costs to, the dispute resolution process. Of course when one party is stronger than another there is no process in which, as such, the weaker party can be made stronger but when a dispute is decided, in the arbitration or litigation process, on its true merits, the respective strength of the parties in the market place is not, per se, the deciding factor.

CAN MEDIATION BE BETTER, AND MORE EXTENSIVELY, USED IN THE INTERNATIONAL DISPUTE RESOLUTION PROCESS?

Can mediation be better, and more extensively, used in the international dispute resolution process? In order to seek an answer to this question regard should be had to the differences in the arbitration and mediation processes. In nearly all large arbitrations, the parties go for a three person Tribunal in which they exercise the right, on each side, to choose an arbitrator of their choice. Thereafter, a Chairman is chosen who should have total neutrality from the parties – not being chosen by one party or another and from a different country or jurisdiction from those of the parties. Thereafter in the arbitration process none of the arbitrators are being trusted with confidential information known to one party but not to another. Yes, parties in arbitration are trusting in the integrity of the Arbitral Tribunal to properly and fairly receive and decide the issues before them. They are not, however, being entrusting it with secrets!

In mediations the usual choice is a sole mediator although mediations can conducted with two or even three mediators. Whatever the quantity of mediators there is a vast amount of trust placed with the mediator when he or she is working in separate sessions with the parties and their counsel. The fundamental problem, therefore, in moving over mediation from the domestic forum to the international forum is that the parties, particularly when selecting a sole mediator, are having to find somebody, being wholly independent, who does not come from the same country and does not share the culture of either of the parties.

This is in marked difference to a domestic mediation where the mediator will be from the same country as the parties and share the same culture. There is now in international arbitration a core of international arbitrators who are all well known and who are trusted by the arbitral community. As such they have the trust of the parties albeit coming from different jurisdictions and different cultures. Moreover these arbitrators regularly meet at arbitration conferences and special symposia such as those of the LCIA. Is it possible to build up a similar fraternity for international mediators? Efforts are being made. For example, in this context the decision of the IBA to set up a separate Mediation Committee, alongside its Arbitration Committee, is a good step in this direction.

The European Commission in its Code for Mediators and in its draft Directive for Mediation has the potential to develop mediation across all countries of the European Union. Theoretically there is no reason why mediation should not enjoy internationally the same success as it is enjoying domestically in such countries as the USA and the UK. The need, however, it to educate the international commercial community – and other communities – in the benefits of mediation and to engender greater trust in it and those who seek to act as international mediators.

WHAT CAN AND SHOULD THE ARBITRAL COMMUNITY DO TO ASSIST?

It is here that I believe the international arbitral community could and should assist more in the international dispute resolution process. Judges – apart from visiting on the parties mandatory mediation which is a different subject - in Germany, England and the USA engage pro-actively to assist parties to find a means of settling their disputes. In contrast arbitrators stand back from any such involvement. It is claimed that to become involved could make the award unenforceable under Article V 1 (b) of New York Convention on basis that the parties were somehow prevented from 'presenting' their case. This cannot, in my view, stand up. Arbitrators who encourage or assist parties towards mediation or generally towards settlement are not, in any way, preventing a party presenting its case.

The use of the Med Arb process, where the parties agree to the Arbitrator suspending the arbitration while he seeks, acting as Mediator, to assist the parties to settle their dispute by mediation, is taking the Arbitrator significantly further into the settlement process and is a process which could bring about, in international disputes, the increased use of mediation. It is a process, which I have used, with the agreement of the parties, in domestic arbitrations and is a process with which I am comfortable. Thus I believe a measured use of Med Arb, in the international context, is another means by which mediation can be further developed. I would add that it is always possible, during the course of an arbitration, to hold a mediation as a separate exercise using different person or persons than the arbitrator or arbitrators conducting the arbitration. Moreover it is perfectly proper for the mediation to take place without the arbitral tribunal having any knowledge of it. As I have I have learned later, in more than one arbitration in which I have been arbitrator, this is what has happened.

I know a Canadian International Arbitrator, who conducts an arbitration, writes an Award, seals it and then invites the parties to enter a mediation with him. If the mediation is successful, the Award is never issued. If the mediation is unsuccessful the seal on the Award is broken and the Award issued.[21] I am not sure whether there is not doubling up of effort and whether I would commend this course of action but it does illustrate how mediation can be brought into the arbitration process.

Logically mediation should progressively spread its wings into international dispute resolution. In the course of time parties and their counsel should have increasing confidence in mediation and become comfortable with a mediator who comes from a different jurisdiction and possesses different culture values. Ultimately it is all a question of building up knowledge of the mediation process and learning and valuing the advantages of it – the wider solutions it provides, its greater speed, its greater simplicity and its saving in costs.

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[21] S*ee Transnational Dispute Management Vol 4 Issue 1: Feb 2007*