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Global Mediation Group: Insight briefing March 2013

International mediation, global trends

Mediation has been a hot topic in the world of dispute resolution for at least 20 years. The potential advantages of mediation to litigants are clear: a well-timed mediation can result in significant savings of time and cost, enabling the parties to focus on their core businesses as opposed to conflicts, and give them the control over the outcomes of their conflicts that they would not otherwise have had.

Although mediation is now well-established in some jurisdictions, where parties to litigation frequently resort to mediation with a view to resolving their disputes at any stage in the proceedings, it is still in a state of development in other jurisdictions, where the concept is not yet properly understood and accepted or the legal framework has not yet been put in place fully.

Clifford Chance's international perspective means that we are particularly well-placed to guide our clients through differing mediation cultures in various jurisdictions around the world, ensuring that the extensive experience of our lawyers in jurisdictions where mediation is more established can be used for the benefit of clients involved in mediation in places where this process is still somewhat new.

With a view to encouraging a better understanding of the differences between jurisdictions in respect of mediation, we have compiled an International Mediation Guide.

It is clear from this that, while there is a wide divergence, there have been recent developments in favour of mediation in a number of jurisdictions:

- In some jurisdictions, such as England, the United States and Australia, mediation is well-established and there is a sophisticated mediation culture and a well-developed mediation infrastructure.
- A number of European jurisdictions have recently brought in legislation to implement Directive 2008/52/EC (commonly referred to as the "EU Mediation Directive").
- An example is Germany, where a law introduced in July 2012 requires every statement of claim submitted to a state court to specify whether or not the parties are open to mediation or other forms of alternative dispute resolution and empowers judges to propose referring the dispute to a private mediator or a so-called "conciliation judge".

- Although the concept of mediation resonates with the principles underlying Chinese society, in mainland China modern commercial mediation has only taken off in recent years. However, progress has been rapid, partly through the efforts of the China International Economic and Trade Arbitration Commission. At the same time, mediation is well-established as a means of dispute resolution in Hong Kong.
- In the United Arab Emirates (UAE) mediation was not a popular form of dispute resolution until recently; however, the UAE has now made impressive progress in introducing mediation. This is particularly the case in Dubai, both through the compulsory mediation carried out by the Centre for Amicable Settlement of Disputes in Dubai and through the encouragement given to parties by the Dubai International Financial Centre Court to consider the use of mediation and conciliation.
- There remain jurisdictions where mediation is still uncommon in commercial disputes, including Brazil, Morocco, Romania, Russia, Turkey and Ukraine. Nevertheless, some of these jurisdictions have taken steps to introduce a legislative framework with a view to boosting the popularity of mediation.
- Lastly, one jurisdiction has suffered a recent setback in its efforts to improve the mediation framework, namely Italy, where legislation on compulsory mediation was struck down in 2012 as unconstitutional.

> Through our Global Mediation Group, our lawyers are not only at the forefront of local initiatives in the jurisdictions where mediation is less well-established – they can also bring to those jurisdictions lessons learned from their colleagues in jurisdictions where mediation is more well-established.

ENGLAND

Mediation is relatively commonplace in commercial dispute resolution in England and there is both:

- legal encouragement for mediation, including the possibility of court orders to pay costs where a party has unreasonably refused an invitation by another party to engage in mediation; and
- a well-established infrastructure relating to mediation, with a number of sophisticated and experienced mediators and suitable venues for mediation.

Attitudes to mediation have changed in recent years. In the past, mediation was sometimes considered to have "failed" if a settlement was not reached. These days, commercial parties

frequently approach mediation with an open mind as to whether the case will settle or not. Obviously, if the case settles, the mediation is successful.

However, if a settlement is not reached, the mediation may still be successful if it has resulted in a narrowing of issues in the case, if it has led the parties to understand each other's case better or if it helps to pave the way for settlement at a later stage in the proceedings. Moreover, even if none of these objectives is achieved, commercial parties are now more likely to view mediation as a step worth taking because of the possibility that a settlement might be reached, notwithstanding that there are no guarantees that it will happen.

Although many commercial mediations follow a similar format, involving exchange of position papers in advance of the mediation and a combination of plenary sessions at which all parties present their cases before the mediator and "break out" or "caucus" sessions during which the mediator meets separately with the parties with a view to exploring their appetite for settlement, the mediation format is flexible and capable of being developed and tailored to suit the different needs of individual cases.

Examples of our recent experience include the following:

- The use of two or more mediators in cases involving multiple parties with different interests to be reconciled. The mediators can conduct individual break out sessions and sessions with sub-groups of parties separately or jointly. If they do so separately, they can then meet to discuss how to bring the various strands of the dispute together.
- Mediation with a time guillotine. This means that the parties are willing to explore the possibility of settlement in a mediation but keep the possibility of walking away from the mediation and proceeding with their dispute if settlement is not reached by a certain time.
- Mediation without a mediator. This involves applying the techniques used in mediation to structure settlement discussions and may appeal to those who are not keen on the involvement of the third party in the process. For example, such a structured settlement discussion would involve giving each side an opportunity to present its views on the case and the likelihood of settlement in a plenary session: it would involve frank and open discussions about ways in which the case might be settled. It would be attended by lawyers and those representatives of the client who have full authority to settle the case.

Mediation can be attempted at any stage in relation to a dispute, including before proceedings are commenced and after trial has started. It is common for mediation to be attempted once the parties have pleaded their cases fully but before they have embarked on the costly documentary disclosure and evidence phases of proceedings; however, the circumstances of a particular case may make it more sensible to have a mediation earlier or later in the process and the timing of a mediation is a key tactical consideration.

For example:

- The parties may be better able to assess their chances of success at trial after documentary disclosure or exchange of written witness evidence: this may point to mediation only being attempted after these phases have been completed; and

- Where simply pleading the case in written statements of case is likely to be a costly exercise (for example, requiring the input of experts), it may make sense for mediation to precede the exchange of pleadings.

AUSTRALIA

Mediation is an important and well-utilised form of alternative dispute resolution in Australia.

Federal legislation was introduced in 2011 requiring applicants in proceedings in the Federal Court of Australia to file a "genuine steps statement" setting out the steps that have been taken to try to resolve the issues in dispute between the parties to the proceedings (or the reasons no such steps have been taken) prior to proceedings being commenced. The respondents must also file a statement responding to the genuine steps statement. The legislation also imposes duties on lawyers to advise clients of the need to file such a statement and to assist a client in complying with the requirement. An attempt to mediate the dispute prior to commencing proceedings will likely be a highly relevant factor in any such statement.

Due to its interactive style, mediation can be used effectively in complex disputes where multiple parties are involved. As is the case in England, mediation has the secondary advantage that parties may benefit from learning about each other's needs and interests so that, even if no settlement is reached at mediation, it may help to narrow the issues in dispute or open the door for a possible settlement at a later stage. Where privacy and confidentiality are important, mediation also enables parties to preserve these rights without public disclosure. For these reasons and for the avoidance of costs and delays associated with Court litigation, commercial parties often view mediation as a step worth taking because of the possibility that a settlement might be reached, notwithstanding that there are no guarantees that it will happen.

As regards the framework, the parties may agree to conduct their mediation in accordance with rules produced by a relevant institution (such as rules of the relevant State Law Society or the Institute of Arbitrators and Mediators) but the adoption of such rules is not compulsory. As is the case in England, the mediation format is also flexible and capable of being tailored to suit the particular needs of individual cases.

Most commercial mediations in Australia follow the same format as that seen in England, with the exchange of position papers prior to the mediation and the same combination of plenary and "break out" sessions. At some stage before the commencement of the mediation, it is common for the parties to enter into a mediation agreement. The agreement usually briefly outlines the particulars of the dispute to be mediated, the role of the mediator, the requirement of confidentiality, payment and allocation of costs of the mediation and the parties' commitment to co-operate for the purpose of the process. The parties involved in a mediation are under a duty to act in good faith.

The principal role of a mediator is to facilitate voluntary resolution of the dispute by the parties. Although a mediator may become involved in the resolution of procedural matters, the mediator

usually refrains from giving advice on legal issues or the legalities of the mediated outcome. The views expressed by an experienced and well-regarded mediator as to the strength of a party's legal position, or lack thereof, may assist in the successful resolution of a matter at a mediation.

The role of legal advisers in mediations is also critical. We prepare clients for the mediation and assist them throughout the mediation. In legally complex disputes that are mediated before senior legal practitioners, who are commonly retired judges, it is often desirable for the parties to have strong legal representation at the mediation. Legal advice concerning the various settlement outcomes will also be critical to the success of the outcome. Lawyers are also commonly charged with the drafting of a final settlement agreement and must ensure that the settlement terms are sufficiently certain and clear to create a binding agreement and avoid further disputes.

There is no set stage in a dispute for when a mediation can be attempted. Pre-litigation mediation may arise out of a contractual obligation to mediate a dispute between the parties to the agreement. Where there is a contractual obligation to mediate, the mediation clause must be sufficiently detailed to allow meaningful enforcement and it must clearly set out the procedure for the parties to follow prior to the mediation and state the process by which the mediation shall be conducted.

The courts have also endorsed mediation as an integral part of the adjudicative system. If litigation is already on foot, Australia's Federal and State courts have the power to refer a dispute (or part of a dispute) to mediation with or without the consent of the parties. The exercise of that power and the timing of the mediation will vary from case to case and depend on the circumstances of each case. Having said this, it is more common for the courts to direct parties to take part in a mediation once each party has completed its evidence and discovery, as the issues between the parties will be clear by then.

THE UNITED STATES OF AMERICA

In the United States, mediation can be used either before or after litigation has begun, although it is more typical for mediation to be used as a tool for resolving pending litigation.

Often, one side or the other will see a benefit to engaging in at least some measure of discovery before engaging in serious settlement discussions, and such discovery can assist the parties in focusing on the issues or seeing more clearly the strengths and weaknesses of their respective cases. However, mediation is also commonly used after the pleading stage and the resolution of any motion to dismiss the complaint. At that early stage in the case, the parties might agree to exchange certain core documents to assist the mediation process, with a goal of settling the litigation before the parties incur the often substantial expense and burden of full-blown discovery in the litigation.

Mediation can take any format, which is usually agreed up-front at an initial teleconference between the parties and the mediator.

The most common format is for the parties to exchange and submit to the mediator a written statement of their case some time in advance of the mediation session (sometimes this is followed by another round of pre-session submissions). The mediation session is then usually attended by client representatives and their attorneys, and typically begins with an oral presentation from each side.

Thereafter, as in England and Australia, the mediator usually meets privately with each side, often going back and forth between the parties during the day (although it is not uncommon for a mediator to bring the parties together at certain points to discuss particular issues). If a resolution is reached, the parties typically execute a term sheet that day, with the express understanding that they will negotiate the specifics of a full written settlement agreement after the mediation session.

How we can help

We accompany our clients through every step of their mediation needs. Exemplary ways in which we do this include:

- arranging client workshops on mediations so clients are aware of how mediation can work and what can be done to assist in producing a positive outcome;
- accompanying clients at mediations and representing them throughout the process;
- having dress rehearsals of mediations with the other side's case presented by an independent team and a separate mediator being involved, so that the tactics of the mediation can be explored in a controlled environment before the mediation takes place (or is proposed/agreed to); and
- advising clients on when is the most appropriate time for mediation to take place.

If you would like to explore these options further and would like us to explain to you our capabilities in relation to mediation and how we can add value to your organisation through our global mediation expertise, please speak to your regular contact or one of the individuals listed at the end of this briefing.

Please also see the International Mediation Guide published at the same time as, and to complement, this insight briefing. We have a number of accredited mediators across our Global Mediation Group, whose skill and experience can be deployed to assist clients in mediation.

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