Organisers:

United Nations UNCITRAL

香港和解中心 Hong Kong Mediation Centre

IDRRMI 國際爭議解決及風險管理協會 International Dispute Resolution & Risk Management Institute

Collaborating Organisation:

律政司 Department of Justice

INTERNATIONAL DISPUTE RESOLUTION CONFERENCE 2019

New Era of Global Collaboration

17 April 2019

Hong Kong Convention and Exhibition Centre

Organisers:

United Nations UNCITRAL

香港和解中心 Hong Kong Mediation Centre

IDRRMI 國際爭議解決及風險管理協會 International Dispute Resolution & Risk Management Institute

Collaborating Organisation:

律政司 Department of Justice

INTERNATIONAL COMMERCIAL MEDIATION 2019
CHALLENGES AND OPPORTUNITIES

Giovanni Matteucci

In Italy there is a proverb: "*A thin agreement is better than a fat sentence*".

After the Second World War international trade boomed, and the related disputes increased as well. International arbitration has been the most widely used mean of out-of-court dispute resolution, because of its flexibility, confidentiality, neutrality, the preference by lawyers and, above all, because of its international enforceability, thank to the 1958 New York Convention and to the more than 150 Countries that have undersigned it.

But a cheaper and faster commercial international ADR is going its way: it is mediation. Its average cost is less than 5% of the average cost of an arbitration and it usualy lasts no longer than two-three months. And in a short while it will have “teeth”: international enforceability, thanks to the Singapore Mediation Convention, to be signed in August 2019.

Nevertheless, mediation is not the *panacea* of the dispute resolutions. There are three main ways to solve the conflicts: litigation, arbitration and mediation. It is necessary to choose the most adequate one, according to the different situations.

If the parties live in countries, where there are enforcement difficulties, a local court decision could be the best choice. If it is necessary to interpret standard rules (with prevailing legal aspects), which will be included in future contracts, an arbitration award would be the second best. If "*time is money*" and a long term well-established trade relationship has to be continued, mediation could be the only way to go.

And different issues have to be considered, in order to get an efficient cross-border mediation:

1) mediation contract clauses,

2) proceedings (free lance professional / mediation institution ; mediation / co-mediation),

3) cultural differences;

4) training.

1' **Mediation clauses**: when drafting a contract, all parties are focused towards the success of the new project; but potential future disputes must be taken into account and not only the competent court should be specified but a clause should be included providing, before bringing the matter to the court, for mediation and, if mediation fails, arbitration (med-than-arb). At the international level the mediation or arbitration *"only clauses*" are well known, but "*multi step / hybrid clauses*" are more widspread.

The main problem behind the hybrid clauses is whether the mediator and the arbitrator should be two different professionals or, to save time, they can be the same person. According to my opinion, the first solution is the best, to allow mediation to have the maximum effectiveness thanks to one of its main features, confidentiality.

Mediation is becoming more evaluative; it may be because laywers are more and more involved in these proceedings.

It is interesting to be noted, in 2016 the College of Commercial Arbitrators, the International Mediation Institute and the Straus Institute for Dispute Resolution-Pepperdine Law School started a joint international task force on “mixed mode” dispute resolution, to study the interplay among mediation, evaluation and arbitration and in China an international commission was appointed in 2018 for the functioning of the International Trade Law Tribunals and the relationships among different ADRs. It is likely there will be changes in the theory of ADRs and a clearer view on which of them to choose for the resolution on international trade dispute as well.

How to induce international traders and investors to include mediation / arbitration clauses in as many contracts as possible?

Throuhg the banks.

In the Belt and Road Initiative, the great majority of investors will resort to fundig by the Asian Infrastructure Investment Bank (AIIB) and the Shangai-based New Development Bank.

These two institutions could insert multi-step clauses in their financing contracts and could ask, as a requirement to grant a loan, that similar clauses be included in all the contracts signed by the beneficiaries inside the BRI project. The use of mediation would spread greatly.

Moreover, as a considerable portion of the international controversies relate to maritime matters, mediation clauses should be inserted not only in standard contracts but also in the bills of lading.

And mediation will also be useful in international insolvency matters.

2' **Proceedings** : is it better to undergo a procedure managed by a freelance professional or by a mediation institution? If the conflicting parties are familiar with and particularly trust a specific mediator, they can turn to that professional. Otherwise, the choice of a mediation provider, with published regulations, tested proceedings and fees established in advance is recommended; this choice can increase confidence in mediation, especially if conflicting parties belong to different Countries and cultures. And what is better, a proceeding mananged by a single mediator or by comediators? We answer this question after a few words about the importance of cultural differences in international mediation.

3' **Culture sensitive mediation** : according to Sun Tzu's "*Art of war*": "*In the practical art of war, the best thing of all is to take the enemy's country whole and intact; to shatter and destroy it is not so good. So, too, it is better to recapture an army entire than to destroy it, to capture a regiment, a detachment or a company entire than to destroy them. / Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting./ …. the worst policy of all is to besiege walled cities*".

On the contrary, according to two Italian scholars, Cosi and Romualdi, "*the western model of war, as it has been formed in B.C. Greek time, seems all focused on the direct confrontation of battles ... on the phalanx, in which two bodies of heavily armed oplites deployed in compact ranks advancing each other without the possibility of diversion or escape. The battlefield, often chosen by common accord, must be open and free of pitfalls*.

”…*There is probably more than a simple analogy between the way in which the phalanxes clashed on the battlefield and the way the 'logoi', confronting within the 'polis', structure the archetypal shapes of Western thought. The ‘war agon’ finds an equivalent in the way in which the speech in the tragedy (and comedy), in the assembly, in the court is articulated: that it is theatrical, political or judicial, it is always a debate where the ranks of opposing topics are addressed directly and 'closely' in order to reach a decision*”.

In western tradition, the clash of interests is usually brought to court; in Chinese, however, the accommodation is mainly used.

Scholars underline the differences between individualistic and collectivistic cultures.

In individualistic societies (in the present times, mainly western countries, based on the values of democracy) "*all human beings are born free and equal in dignity and rights*" (Universal Declaration of Human Rights, art. 1, 1948); therefore the single person is very important and freedom, self expression, personal achievements, protection of the individual in front of the authority are guaranteed values. Competition is stimulated and the conflicts that follow are handled according to the same rules for everyone.

Collectivistic societies, on the contrary, underline the importance of the community (family, clan, caste), the social organization is rigid, the interests of the community prevail over those of the individual, controversies should be avoided because they would undermine the armony of the community and (if they occur) they are not handled with written rules and formal documents but respecting the principles of tradition and group authority; so the individual can also step back, provided the group's respectability and harmony are preserved. Social norms are structured to prevent internal conflicts and conflict management is indirect, principally through non-verbal and little contradictory communication.

While Westerner operators aim at the precision of the agreements, to their written editorial, the Easterners give greater value to the words, to the mutual trust; so often they are vague and, if the counterpart insists on pointing out, they may feel they are not believed. As a result, they may not reach the agreement.

In addition, a response such as "*I will think*" to a Westerner may mean that negotiations can be resumed, for an Easterner instead, who belongs to a culture that avoids confrontation, may be equal to a flat no.

When you deal with other people, there are two basic principles to be respected:

- be yourself ("*Do not belong to anyone else, if you can belong to yourself*")
- reciprocity ("*Do not do to others what you would not like them do to you"*).

Furthermore it is also necessary to take account of the "culture" of the people you are dealing with. Culture as the set of customs, traditions, values, religiuos principles, lifestyle, "roots" they have received (very often unknowingly) from the society, the community or the group they belong to. All very important matters in mediation, where communication and empathy are basic elements.

And co-mediation could be the best way to handle the proceeding with parties with different cultures: "*Co-mediation offers the parties two communication channels that interact adding value to the cultural knowledge and mediation skills of the single mediator. The participation of a mediator of their own culture makes the parties feel comfortable and at ease, leads them to opening up and trusting the proceedings*" (Marsaglia).

But, to be effective, the co-mediators need similar training, deep common knowledge of the proceeding and shared experience.

4' **Training** : geopolitical situation is rather confused, there are strong disagreements on international trade relations, worrying climate changes will have strong consequences on the international trades lines (i.e., new maritime trade routes in the Arctic region), the Belt and Road Initiative will reshuffle not only transport corridors but also the global division of labour, artificial intelligence will deeply affect the way of producing in different geographical areas.

The use of technology will increase: the European consumer online dispute resolution platform is already working (but, up to now, it is very underused); the Department of Justice of the Hong Kong Special Administrative Region is working on an online dispute resolution platform eBRAM.hk for cross-border disputes; international commercial mediation will have to deal with blockchain and smart contracts.

New problems but, the other side of the coin, opportunities, if we shall be able to manage the situation. And that means, first and foremost, studying and training.

The more complicated are the problems, the simpler and more flexible the methods for managing them must be. And the mediation is perfectly suited to this target. But it must be understood, learned, used. The popularity of mediation is growing, but too many professionals have shifted from arbitration to mediation, which has become more adversarial, less interest-based and more right-based. A trend to be avoided. An *ad hoc* training course carried out by universities, trade and financial organizations and ADR providers, located in different countries, would be particularly useful.

"*Life is really simple, but we insist on making it complicated*"

Many thanks for your attention.

giovannimatteucci@alice.it