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EDITOR'S NOTE

Has arbitration lost its glamour? Arbitration became popular among business people and lawyers because of the expense of litigation and the length of time it took a case to get resolved in court. Arbitration, once hailed for the cost savings, speed and privacy it provided companies facing complex litigation, has been frowned upon by lawyers and business people now saying that the alternative form of dispute resolution has become just as expensive and lengthy as a trial. Many find that the relaxed and unprofessional way of drafting the arbitration agreement allows things to get out of hand. We think that the system would be still effective and far more better than litigation, if we give more thought to what we require from the system of dispute resolution. Please give us your views to make arbitration more effective.

Looking forward .....

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Conflict Leadership (Part-1)

: MICHAEL LEATHES

In early 2009, a dozen General Counsel of international companies co-authored an article entitled "The Perfect Storm"[1]. The factors feeding the storm were cited as economic and financial turmoil, the drive by corporate law departments for greater control over outcomes, and new Information and Communication Technology capabilities. The authors predicted that energy generated by this triple convergence would radically change the attitudes towards disputes held by both the supply and demand sides of the legal services market. It spells opportunity for those acting on President Obama's The world is changing, and we must change with it, and loss for those that don't, or drag their heels.

Control

The control factor is one that individual General Counsel can really influence. Control is central to modern expectations of Good Corporate Governance, underscored by Section 404 of the Sarbanes-Oxley Act but extending far beyond financial reporting and risk assessment to embrace any significant risks that can have financial consequences. Litigation is inevitably such a risk for all parties. Exerting greater control over litigation has become a top priority for most organizations.

Controlling litigation

Litigation is not just a risk; it is one that cannot be controlled. A third party – a judge or arbitrator – is the one in control through their authority to impose a judgment or award. Advancing strong arguments is a proper attempt to exert *influence*, but is not an instrument of control. Exerting more effective control over litigation entails much more than delegating to competent litigators. It involves negotiating an acceptable settlement.

Do we have a conflict – or does the conflict have us?

In his book Confronting Conflict (1999), the Austrian political scientist, economist and mediator Friedrich Glasl described a ladder with nine rungs or levels that typified the life cycle of disputes. At the bottom end of the ladder comes the positions taken by the parties; Rung 2 is the polarization of those positions, and Rung 3 the deterioration of communication and the start of mutually recriminatory acts by the parties. Dr. Glasl identified Rung 3 as the limit of self-help in resolving the dispute. Then comes the Tipping Point when, as Glasl put it, *we no longer have a conflict, rather the conflict has us.* This is the stage at which litigation and arbitration replace self-help as the primary resolution method. Rung 4 sees the deployment of tactics, Rung 5 is loss of face and increasingly personal attacks, and Rung 6 represents the point at which threats become strategic. Harmful blows follow on Rung 7,

(Footnote)

[1] Article published in The Indian Arbitrator – Volume 1, Issue 4

supplemented on Rung 8 by the parties' goals no longer being confined to winning but also to destroying. On Rung 9, the parties enter a mutually-destructive abyss.

While every conflict is different from every other, Glasl's Escalation Ladder is helpful in focusing not merely on the need to *manage* disputes, but to *lead* the way to an early resolution and avoid an inevitable and uncontrollable escalation. Mature in-house counsel know that once they get past the self-help limit at Rung 3 on the ladder, they are locked into a spiral binding from which there is no easy way out. Whether the resolution requires negotiation, mediation or some other process, taking direct control over the potential outcome and the process to reach it requires strong doses of leadership, vision, determination, innovation and, often, courage.

Litigation is no place for romance; hope is no instrument of control

Hyperactive preventive counselling is essential. There is no such thing as a cast iron case but it is human nature to fall in love with the strength of our arguments and our sense of justice. Legal action is no place for romance. The best we can do is put forward the most persuasive argument in the hope that it prevails in the final judgment or award. Hope is no instrument of control. In about 50% of all cases that hope turns into despair.

Negotiation, on the other hand, is a very powerful instrument of control. It offers many more options for achieving an acceptable and certain outcome, usually much faster and cheaper than litigation or arbitration, and negotiators remain in control over what they are prepared to agree. The options are much more numerous because factors outside the scope of the dispute can be brought into play to help find a mutual settlement basis.

Leading is much more than Managing

A few years ago, litigation or arbitration were things we were expected to *manage*. Usually, this was a corporate euphemism for delegating real influence to outside counsel. We pretended to be in control by virtue of our status as the client, but in reality we mainly monitored the situation, commenting here and there, paying the bills and riding out the risk, while escalating claims and counter-claims, allegations, tactics, smoke screens, costs and risks took command. Control was impossible. We were obsessed with doing things right – a mark of a manager – not doing the right things (a mark of a leader).

Today is so Yesterday

This is not Good (or acceptable) Corporate Governance in the 21st Century. Intel's motto *Today is so Yesterday* reinforces the significance of change. Tomorrow, if we don't imaginatively lead our way to avoid disputes, or drive for an early resolution of those that escape our avoidance efforts, we will rightly be judged passive and ineffective, consuming value rather than adding value. And possibly in violation of new performance norms being imposed on corporations by law.

The pendulum has swung from managing risk to the leadership activity of avoiding it in the first place, and then when it is unavoidable to resolving it and prioritizing the achievement of an acceptable outcome as soon as possible.

Let's admit, however, that arbitration or litigation is sometimes *necessary*. There are situations, like test cases, where a precedent is important, or where interim relief is needed, where an alternative way forward truly is impossible or even undesirable. Those cases need measured, honest, objective and regular assessment.

Breaking the Spiral Binding

When parties are past Rung 3 on Dr. Glasl's escalation ladder, past the Tipping Point, they are probably incapable of initiating productive dialogue. Each will most likely feel that any attempt to propose a way forward will be misinterpreted as self-doubt or loss of face. Private desires to settle therefore lay dormant and unexpressed. This is the stage at which mediation comes into its own as a risk control process. But how to get to a mediator? If I propose mediation, will the opponent think I need to settle, that I feel weak? Might it prompt an *"Ah-Ha!"* reaction and have just the opposite effect?

So it is that mediation often does not get proposed or gets rejected because the other side misinterprets the signals and draws strength a perceived weakening opponent.

There are many ways to overcome this conundrum. Not letting a conflict get past Rung 3 is an important conflict avoidance and preventive law strategy. For the cases that are already up there on the ladder, or crawl up anyway despite all efforts, deliberate action is needed to break the spiral. Some options are set out below.

Re-wiring

Most change begins with leadership and inspiration from the top. The generation of a genuine conflict avoidance mindset and culture is a first step. Lawyers do avoid conflict by instinct. Disputes are familiar ground and we have been trained to relish them. We are experts at tactics, litigation, defensiveness, advocacy, positional bargaining. *"It's what I'm paid to do."* When an attorney moves from a law firm to a corporate law department, most need re-wiring. Their attitudes need to change, as do their perceptions of the goals. What drives up stock prices has more to do with gaining early certainty than eventually winning all cases. Average law firm profitability is driven by the opposite.

To change a corporate mindset, entails changing the expectations placed upon people within the organization as well as those outside it and providing the skills and tools needed to implement it. This change must be visible and felt subcutaneously throughout the organization and beyond. It needs to be based on strength and confidence, pragmatism and governance principles. The leadership will want to be seen to practice it in person and explain actions taken, because any lack of conviction or passion is soon felt by those that hang on the leadership's every word and deed.

Change-ability begins at Home

Changing mindset can be achieved internally as a starting point. Internal conflict, something that all employees watch with unbridled intensity, is a great arena for proving, and testing, new ways to do things. Sometimes, though, it is so subtle that the relevance of a conflict avoidance strategy must be explained if it is to be appreciated and understood. Avoiding and resolving internal conflicts is a relatively safe place to begin.

Conflict Avoidance Systems are mainly a new phenomenon. In Designing Conflict Management Systems (Jossey-Bass 1996), Costantino and Merchant explained that most companies fail to take a systematic approach to their conflicts, somehow content to manage them in a piecemeal, ad hoc fashion as isolated events. They rarely examine their disputes in the aggregate to reveal patterns and explore efficiencies. This book explained the need to view conflict management systemically, with a wider perspective.

The year that book was published coincided with General Electric beginning such a systematic, company-wide approach to conflicts tied to their Six Sigma quality initiative revolving around DMAIC – Define, Measure, Analyze, Improve, Control. Litigation was seen as adversely impacting quality in five ways – speed, cost, management time, business relationships and outcome certainty and was considered a Defect. GE evolved a system that required the early involvement of counsel, early case assessment (including business, technical and legal aspects), defining the company's goals and understanding the other side's likely interests, agreeing with the other side the best dispute resolution methodology, identifying who owned the dispute and measurement of costs, savings and cycle times. The system, which has evolved and improved over time, enhanced the business reputation of in-house counsel as problem-solvers rather than process-chasers, significantly reduced major litigation, generated substantial savings in legal fees and increased productivity (as a result of reduced cycle times and higher quality results).

Georgia-Pacific, a leading international pulp and paper products company based in Atlanta and now part of Koch Industries place special emphasis on systematic Early Case Evaluation. Their legal team secured top management buy-in to a conflict resolution program that involved training, the inculcation of a resolution mindset through, for example, multi-step dispute resolution clauses in contracts, the development of real in-house expertise in the dispute resolution field, being willing to litigate when necessary and measuring the results. In the 12 years from 1995 to 2006, Georgia-Pacific have estimated their savings from the program at $44.8m.

AkzoNobel, the world's largest paints and coatings company have a similar program. Starting with a Board policy encouraging early resolution and a clear reporting structure and process, AkzoNobel appoint case teams Through training, they ensure in-house specialists know the wide variety of conflict resolution tools and practices, and they systematically analyse risk in each case using business-led case teams. The Company uses multi-step dispute resolution clauses and evaluates and measures results. Early Dispute Resolution has been used on many different cases including IP infringement, M&A, insurance claims and an alleged monopoly abuse action.

Understanding these and other examples is important to gain inspiration, but every company needs a system tailored to their special needs. Tina Monberg's Handbook of Human Conflict Technology sets out the components of many different systems. Each needs to be tailored to individual organizational needs. Most begin with an analysis of how things are done (or not done) at present, an inventory of current skill sets, and a benchmarking against organizations with successful systems already in place. Are conflict avoidance targets already set? How stretching and realistic are they? Are legal managers adequately equipped, educated and motivated to implement those targets? Is there a policy for insisting on multi-step dispute resolution clauses – including a mediation step - in contracts? How competent are mangers to negotiate unaccompanied? Are cases regularly assessed for early settlement potential? If so, are the right criteria applied by those with the right skills? How clear are the expectations? Is data captured to measure efficacy and progress, and track risk reduction benefits and cost savings? A rounded conflict management system can work wonders. Many systems appoint senior executives as champions, leading and teaching by example.

(to be continued...)

(Author: Michael Leathes is the Director of International Mediation Institute, The Hague, Nethrlands. This Article is based on a presentation made to 24 General Counsel and Legal Directors of international companies meeting in Frankfurt, Germany on September 3rd 2009)

Article

Finding an international mediator

: MICHAEL MCILWRATH

It can be difficult for parties to identify suitable candidates to mediate an international commercial dispute. This article proposes some avenues available to parties that can help get the initial part of the mediation process – agreement on a mediator – underway.

Identifying suitable candidates to mediate an international commercial dispute.

Once parties have agreed on location and potential dates, they will proceed to what is currently the most challenging part of international mediation: identifying candidates and selecting a mediator. Obviously, they will want someone who possesses the qualities and skills they perceive would be helpful in achieving resolution of their dispute. The international character of a dispute will only magnify the difficulties parties already face in locating someone each side will trust and respect. Unfortunately for parties, the identification of suitable candidates and agreement on the appointment of mediators (and arbitrators, for that matter) remains firmly embedded in pre-20th century technology: imperfect information transmitted via word of mouth, and what can be gleaned from a curriculum vitae or an initial discussion with the candidate. Although there are some hopeful indications that this will change as private international dispute resolution grows, it is through these admittedly unreliable channels that parties must generally weigh their considerations about a mediator's suitability for their dispute.

In the case of a dispute between two domestic parties, the ease with which they are able to locate a suitable mediator will vary based on the country in which the dispute arises. In the United States, for example, there are literally dozens if not hundreds of institutions at the national and local levels that can provide parties with names of qualified candidates. By contrast, in countries where mediation has not developed into a robust profession, there may be few or no institutions to provide such as service. For better or for worse, international mediation is more akin to the latter situation, with few institutions even claiming to specialize in the resolution of international commercial disputes. And where such claims are made, parties may want to eye them with suspicion. Just as there are lawyers in some countries who claim to be "mediators" after having attended a conference or heard a lecture on the subject, there are international arbitrators who also hold themselves out at as "mediators" despite never having been trained in nor had much experience with the process. They are not "mediators" as the term is generally used to refer to a specific profession.

Question: If an international arbitrator claims on their cv that they are a "mediator", can I assume they have at least been trained in mediation and have experience with the process?

Answer: No. Unfortunately, just calling oneself a mediator is absolutely no indication of a person's qualification or skills to conduct a mediation. There is no official qualification or degree by which a person can claim to be an "international mediator". In fact, in most countries there is no authority or professional body that restricts or regulates claims of being a "mediator".

A complaint leveled against the mediation profession in some jurisdictions is that it is not a "profession" at all, or at least as the term is generally used to refer to a certain degree of training, certification, and standards. "Throw a stone, hit a mediator", is how one prominent US mediator has described the unregulated system in the US (true of most other countries) by which one can become a mediator, at least in theory, merely by announcing one's intentions. There are, however, ways of identifying whether a proposed candidate possesses at least the most basic skills of a mediator.

The opposing party: sharing information about potential candidates. The selection of a mediator is too often confused by inexperienced counsel and parties with the process of selecting an arbitrator, perhaps because there are superficial similarities in appointing a neutral third party in the context of a dispute in which trust will be lacking. In contrast with the adversarial process of appointing someone who will adjudicate a dispute and hopefully be favorable to one side's positions, however, the selection of a mediator should be a collaborative and even congenial one. Indeed, it is in a party's strategic interest to find someone that the *other* side will like and trust (since settlement is the goal). There are also tactical advantages to deferring to the other side. A savvy party will treat the selection process not as an adversarial one but as genuine collaboration, and use that collaboration to build trust that will be useful in the mediation. It should come as no surprise, therefore, that a meaningful number of cases are successfully resolved by the parties as a result of this dialogue, and before a mediation even takes place.

Word of mouth. As with the appointment of arbitrators, what parties really hope to identify in candidates are the soft qualities and skills that are not readily apparent from a curriculum vitae or public listing of the mediator's name and general qualifications. There is no greater selling point than a peer who attributes a past settlement to a particular mediator's skills. But while word-of-mouth recommendations may be useful means of identifying and appointing mediators in the context of disputes between domestic parties, it not usually a very good one in the international context where the issues and parties are likely to vary even more substantially from one dispute to another. While a previous party's satisfaction with a certain mediator is a helpful endorsement, it should be considered no more than a starting point in the process of identification of suitable candidates. Thus, while we encourage parties to ask their contacts to recommend candidates, we warn that they may find these recommendations of limited value in practice.

Institutions. Although an institution may have the experience to appoint someone well-qualified for the dispute (which is not a given, however, in an international case), the parties failure to reach agreement on a mediator is not a good way for them to start the mediation process. That said, parties should feel perfectly comfortable asking institutions to provide a list of potential mediators to consider. There is no downside to this, and institutions will attempt to identify candidates that meet the selection criteria provided by the parties. Additionally, obtaining a list of names from institutions can reduce the risk of "reactive devaluation" that a party may encounter from the other side when proposing candidates. Ironically, this psychological term is part of the toolkit used by mediators to overcome negative or mistrustful feelings that one side will associate with the other's proposals. When drawing up a list, institutions will have one of two sources for the candidates: a closed pool of mediators maintained by the institution, as is the case with many mediation institutions, and "going to market" to find suitable candidates, an approach usually adopted by arbitration institutions that also offer mediation services.

Promoting Student Authors

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

Mediation institutions. Many mediation institutions maintain a closed pool or list of mediators, and often exist as a form of cooperative or partnership for the benefit of the mediators included in this pool. For example, this is the approach followed by the Centre for Effective Dispute Resolution (CEDR) in London, JAMS in the US, and the ACB in the Netherlands, three well-known mediation institutions. In our experience, mediation institutions, because of their desire to promote the practices of the mediators associated with them, are generally happy to assist parties by providing lists of suitable candidates, often at no charge. The advantages of this approach, particularly for domestic disputes, is that the institution regulates both the quality of its pool and will likely have the benefit of experiences and party feedback that it can use to help parties find the person most suitable for their dispute. The drawback, of course, is that the pool is likely to be limited for the most part to mediators whose only experience is domestic litigation. In the best of cases, however, the institution's pool may include a handful of highly experienced commercial mediators whose experiences are also international, and parties can benefit from having them on their list. There are also certain institutions that are training or developing neutrals having specific subject-matter expertise for disputes where there is a belief that appointing a specialized neutral may be preferable (e.g., GAFTA for commodities and shipping disputes, and WIPO for intellectual property related disputes). These lists are not necessarily open. (For example, although WIPO publishes its list of domain name panelists on the Internet, this is not the same list it has for mediators and arbitrators, which is not publicly available).

Arbitration institutions that provide mediation services. All of the major international arbitration institutions today - the ICDR, ICC, LCIA, WIPO and SIAC - now offer mediation services in addition to arbitration. This is also true of some leading regional institutions, such as the Chamber of Arbitration of Milan, the Swiss Chambers of Commerce, and the Chamber of Mediation and Arbitration of Paris (CMAP). Rather than maintaining their own pools of mediators, arbitration institutions take a "go to market" approach of attempting to find the most suitable candidate for the parties. The ICDR, for example, will request input from the parties and then refer the matter to regional offices for candidates who may fit the relevant description. The ICC adopts a similar approach, relying on its network of "national committees" to identify suitable mediators. (While the ICC does not in their ADR Rules state that they will provide parties with a list of candidates, they will oblige a party request for one after an ADR proceeding has been initiated.)

Arbitration institutions may also be adept at supporting the parties' administrative and logistical needs, such as negotiating fees with the mediator, arranging for suitable meeting facilities for the mediation, and managing all aspects of invoicing and payment.

There are disadvantages of requesting names from an arbitration institution, however. The first is that unlike mediation specialists who refer parties to their listed mediators, arbitration institutions will charge the parties a fee to conduct their search on the market, i.e., they will not provide a list until the parties have appointed the institution and engaged them in the process. The second is that an arbitration institution will obviously have much less experience in mediation than an institution dedicated to that purpose. The ICC's national committees, for example, have a substantial reputation and experience in appointing arbitrators, but the total average ICC caseload of mediations conducted is fewer than 20 per year. Still, the "go-to-market" approach adopted by an international arbitration institution, even if not perfect, is in many ways best suited to identifying a mediator for an international dispute than relying on the restricted pool of largely domestic mediators maintained by mediation institution.

Emerging information sources. If cross-border dispute resolution is to keep pace with the growth of international business, it would be reasonable to expect that growth to be accompanied not only by increased use of arbitration and mediation, but also the specialization of the providers of these professional services and information about them. Two emerging trends are mediator directories and "blogs".

Mediator directories. There are multiple directories that exist in different locations that provide basic biographical data about mediators. As these are mainly marketing devices for mediators, we see little utility in them for parties to a cross-border commercial dispute. As mediation grows internationally, however, an interesting development has been the announcement of publicly-accessible databases that will provide feedback from parties with their impressions of the mediator and his or her capabilities, in addition to basic biographical information. These databases are accessible at no charge. As of publication, two such databases have been announced. One is the "Mediator Directory" hosted by The Mediator Magazine in the UK,

www.themediatordirectory.co.uk. Although initially intended for the UK market, mediators may still use this directory to list qualifications that may be attractive to litigants in an international dispute. Internationally, the International Mediation Institute (IMI), www.IMImediation.org, a non-profit organization in the Netherlands dedicated to promoting international mediation standards, has announced that it will provide a publicly-accessible database of all mediators who meet IMI standards. The database will initially list only those mediators considered at the top of the profession in different countries, and over time add mediators who meet IMI's certification standards.

Blogs. The number of "blogs" by and about mediators is an interesting source of information that appears to be growing. To give some examples:

Mediator Blah Blah, www.mediatorblahblah.blogspot.com,
Mediation Channel, www.mediationchannel.com, and
Settle It Now!, www.negotiationlawblog.com.

There is even a directory of global mediation blogs,ADR Blogs of the World, www.adrblogs.com.

These blogs can provide information about the mediators who write and maintain them, and if nothing else underscore their passion for the process. Taking by way of example one of the blogs listed above, a party checking it as of this writing would learn that in a period of just two months, the blog's author had attended a week-long international mediation training conducted in another country, was corresponding with mediators in different jurisdictions, and held strong opinions about what techniques were most effective in persuading parties to settle their disputes or for overcoming roadblocks to settlement. The ability to refer the opposing party to a suggested candidate's "blog" for information may also be useful if a party wishes to recommend that mediator to the other side. And even if these professional blogs appear to be intended more for mediation peers than for parties, they can also be a means of identifying global trends, negotiation tips, and other useful information.

Nationality: The issue of nationality is often important in an arbitration context. This can also be the case in mediation, but for different reasons and in different ways. Some institutions recommend that the mediator should not have the same nationality as one of the parties. This approach, whoever can be too limiting and should be reconsidered on a case-by-case basis. In some cases nationality will be meaningless (e.g., the mediator may have been raised as a "third culture kid") and in others, it can hide a cultural bias (e.g., assuming a person to be of an Asian culture, based on their passport, whereas they may have been raised and completely educated in an American or European culture). Arguably, the issue of nationality is less important where the neutral has no authority and cannot impose an outcome, but it may paradoxically be an advantage in certain cases to have a mediator who is of the same nationality or culture as the other party. This may help to ensure a better appreciation or any cultural issues that may be acting as an impediment to settlement, where the cultural differences are great. It can also be helpful to have a mediator who is a bi-national (or is familiar with both parties' cultures). Offering the other party to choose any mediator of its preference and of their nationality, or to suggest a list of three neutrals having the same nationality as the other party can be a way of conveying confidence and trust in the process and the other party, although it is obviously important to know that such a neutral is properly trained and would not be biased as a result.

A Checklist of possible issues to consider: There is a very broad range of mediation styles and mediators. Choosing "the right" mediator can be very important in a cross-cultural/international context. For example in some countries the terms "mediation" and "conciliation" are used interchangeably and may mean the same thing, whereas in others they can mean very different things. In Switzerland, for example, the word "mediation" is used to describe a process in which a neutral is expected to be elicitative and non-evaluative, who refrains from making any proposals, and where the outcome should be based on subjective interests, whereas "conciliation" is used to describe a more directive and evaluative process, in which the neutral is expected to express a non-binding opinion based on objective or legal norms and to suggest a zone of possible agreement. Both involve a process in which a neutral assists the parties in reaching a settlement, but the styles and processes can be very different experiences for the parties and their lawyers. Even if this distinction is clear, does it make a difference? What do the parties really want, and what difference does it make whether they choose an evaluative norms-based process, or an elicitative subjective interests-based process?

Often it may make no difference, as the parties are simply interested in achieving a faster and cheaper outcome. In other cases, however, the difference may be extremely important. The process of probing more deeply into subjective interests and perceptions may result in generating a broader range of options and different outcomes, which may be better aligned with the parties' future interests (for example, in understanding one-another better and strengthening a future business relationship). These differences are becoming more apparent in certain international commercial mediations, where different emphases can be seen to emerge in some common law jurisdictions (e.g., greater use of caucuses) as opposed to other continental jurisdictions (e.g., greater use of joint sessions or co-mediation). It is impossible to generalize and stereotype, but there can be a danger in underestimating these differences when seeking to set up a mediation process. It is thus possible for a French and a US company to both agree on "mediation" using an institution, but with very different expectations as to what the process and the substantive skills of the mediator should be about, which may only be discovered too late. If one party wants an "objective", facts and law-oriented conciliation based on specific subject-matter expertise applied to past facts, and the other wants a future-looking "subjective" business interests-based process, spending substantive time on interpersonal and relationship-based issues, the parties may never agree on the neutral to be appointed and the issue of appointment may become contentious in and of itself. This can leave the institution in the difficult situation of having to appoint the neutral itself, who may be a disappointment or frustration to one of the parties (possibly even both) if this issue has not been identified and properly discussed. An excellent discussion on the topic of mediator's styles and the kind of mediations that can be sought can be found in Lenny Riskin's article "The New Old Grid". Professor Harold Abramson has also written a lot of excellent material on this topic, as has Kenneth Cloke (the author or *Mediating Dangerously* and *Crossroads of Conflict*).

For these reasons, the following may be a useful checklist of issues to consider when setting up a mediation process or selecting a mediator:

1. The Mediator's credentials:

a. "mental model" (family history, education, and professional training)
b. cross-cultural experience (e.g., trainings, travel or education)
c. professional experience (source profession and business experience)
d. national trainings & continuing professional development interests
e. subject matter expertise/areas of specialization
f. checking their understanding of what it means to be "neutral, impartial and independent" or "multipartial" (and ensuring that they are indeed!)
g. checking their understanding of what "confidentiality" means to them and how they intend to handle this issue.

2. The Mediator's preferred procedural approaches:

a. facilitative/elicitative, evaluative, transformative, narrative etc?
b. their attitude towards emotions and how to deal with them
c. their use of caucuses (when and why)
d. their (un)willingness to coach the parties
e. who directs the process: the mediator, the parties, the lawyers, all of the above (the mediator as "director" v. "orchestrator")?
f. how they like to involve clients
g. how they like to involve attorneys (e.g., restrictively v. actively)
h. what preparation work they request pre-mediation (e.g., fully or partial briefing v. no prior knowledge v. a brief summary of the party's needs and interests — but not their positions)
i. use of time constraints
j. willingness/ability to co-mediate and work with other neutrals / co-mediation (why, when and how?)
k. attitudes to hybrid processes (e.g., Med-Arb. MEDALOA, Arb-Med, Shadow arbitrator etc)
l. familiarity with brainstorming and trust-generating techniques (De Bono lateral thinking/ stimulation techniques, confidence-building exercises, non-violent communication, NLP, systemic theory etc).

m. broad v. narrow
n. (un)willingness to conduct joint witness conferences, as opposed to sequential fact gathering sessions
o. (un)willingness to carry messages

3. The Mediator's cultural preferences:

a. formality v. informality of proceedings
b. dress code
c. propensity to be "left brain" v. "right brain" oriented, neither or both
d. preferences as to venue
e. emphasis on a "social" program or event
f. attitude to power and distance to power
g. individualism v. collectivism (seeking consensus v. a majority decision)
h. (dis)comfort with emotions and the importance (or lack of importance) in demonstrating empathy
i. preference to avoid uncertainty v. comfort with uncertainty (e.g., on procedural or substantive issues)
j. creativity and willingness to "experiment" with the parties
k. long-term v. short term orientation
l. attitude towards "face" and "saving face" issues
m. willingness to be confrontational, direct or to do "reality testing" with the parties and their counsel
n. emphasis on seeking "a settlement" v. a "win-win" outcome.

These are only some considerations, many of which may be irrelevant in certain cases, and there are no doubt others that should be mentioned. They are certainly worth bearing in mind before embarking down the road with a mediation and selecting a sole mediator.

(Author: Michael McIlwrath is the Director and 2009 Chairman of the International Mediation Institute, The Hague, Netherlands. He is also Senior Counsel at GE Oil & Gas, Italy. Article (with J. Lack, D. Levin, and G.N. Giudice) originally published on http://knol.google.com/k/finding-an-international-mediator#)

Think ... Are you a MOST or a SOME?

Most read books. Some write them.
Most attend conferences. Some create them.
Most fake intimacy. Some live intimately.
Most love great design. Some design.
Most listen to great music. Some write great music.
Most point out problems. Some solve them.
Most admire beautiful art. Some create it.
Most receive generously. Some give generously.
Most imagine what should've been. Some imagine what can be.
Most criticize. Some create.

Are you a "MOST" or a "SOME"?

Let's stop being afraid of those blank canvases that stare us down and scare the hell out of us.....and let's create.

~Pastor Scott Hodge~

AMA Conference at Malaysia

The 2nd AMA Conference will be held at Kuala Lumpur during 24-25 February 2011. The topic of the conference is "Rediscovering Mediation in the 21st century". The Malaysian Mediation Centre, Bar Council will be hosting the Conference. The Registration fee for AMA Members / Mediators on MMC panel / Members of the Bar / Pupils is RM900. The normal rate is RM1,200 (1st Nov 2010 onwards) and the Early bird Rate is RM1,000 (before 31st Oct 2010). For Registration form or for more details log on to www.malaysianbar.org.my

Indian High Court orders stay of foreign arbitration

A division bench of the Bombay High Court in MSM Satellite (Singapore) Pte Ltd. v. World Sport Group (Mauritius) Limited granted injunction restraining the respondent – Mauritius company from proceeding with the arbitral proceedings initiated by the respondent before the International Chamber of Commerce on 28th June, 2010 after the plaintiff filed Suit against World Sport Group (India), the respondent – Mauritius company and BCCI. Even so, having regard to the fact that injunction is an equitable remedy and that the legislative scheme of minimal judicial intervention is in order to ensure that the party not agreeable to go for arbitration does not succeed in avoiding or delaying discharge of its liability by taking recourse to judicial proceedings for restraining arbitral proceedings, the Court imposed a condition that the appellant – plaintiff, MSM Satellite shall deposit a sum of Rs 300 crores before the court. This is probably the only reported instance of an international commercial arbitration involving two foreign parties being stayed by Indian Courts.

Enforcement of awards under New York Convention in Portugal

The Supreme Court of Portugal recently held that an arbitral award under the New York Convention can be enforced automatically in Portugal without having been reviewed or confirmed. (*Colectânea de Jurisprudência STJ*, 2009, 214, volume I, pages 147 to 149). The Supreme Court reversed the previous decisions and the conclusion was based on Articles 48, 49 and 1094 of the Civil Procedure Code, read in conjunction with Article III of the convention. The court held that according to Portuguese law, a domestic arbitral award is enforceable in the same way as a court decision, without the need for review or confirmation. The court noted that a foreign arbitral award is enforceable in Portugal only if it has been previously reviewed and confirmed by a court. However, this general rule applies only if no relevant convention, treaty or law states otherwise. In this case the convention – specifically Article III – was applicable. The Supreme Court's decision, which appears to be highly favourable to arbitration, is unprecedented. Until now, Portuguese case law has followed the principle that in order for a foreign arbitration award under the convention to be enforced, it must have been reviewed and confirmed.

Once the game is over,
the King and the pawn go back in the same box.
~Italian Proverb~

Research shows rise in UK arbitration and mediation

The use of arbitration and mediation in the UK has risen dramatically in the wake of the financial crisis, according to research published by a new independent body of senior City figures. The report, 'Dispute Resolution in London and the UK 2010' was published by TheCityUK's legal services and dispute resolution group. Figures contained within the report show that the total number of disputes resolved through arbitration and mediation in the UK reached 34,541 in 2009, a 78% increase on the 2007 figure of 19,384.

Ayodhya issue – Parties seek mediation of former President Abdul Kalam

Nirmohi Akhara, a main plaintiff in Ayodhya title suits, which is an important legal and political issue in India, wants mediation of former President A. P. J. Abdul Kalam, Islamic seminary Darul Uloom Deoband and Jamiat Ulema Hind along with Hindu religious leaders like Baba Ramdev and Shri Shri Ravi Shankar and Murari Bapu. Pujari Ram Das, special emissary of the ailing chief of Nirmohi Akara Mahant Bhaskar Das, said "we have lighted a candle of peace from Ayodhya and now it is also the responsibility of those people who command respect in their communities and general society of India to protect it and to spread it". "When great brains unite, the formula that will be worked out will also be great and will play a crucial role in establishing peace and Hindu-Muslim brotherhood in India", said Pujari Ram Das. The reconciliatory approach followed the Allahabad High Court's September 30th order, dividing the disputed Ayodhya plot into three parts – two going to separate Hindu parties and one to Muslims.

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