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INTERNATIONAL COMMERCIAL MEDIATION

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TABLE OF CONTENTS

ABSTRACT

This paper discusses the development of international commercial mediation as an alternative to international litigation and international arbitration. Dispute resolution in private international law can be complex, with many complicated rules that must be followed. International arbitration developed as an alternative to international litigation, and aimed to simplify many of the rules and procedures. Unfortunately, arbitration has now also become fairly institutionalised and no longer provides a true alternative. The growth of mediation in an international context aims to remedy this situation and provide a more simple and effective way for international business people to solve their disputes.

Mediation is one of the fastest growing dispute resolution mechanisms in the world. It has long been used in areas such as family law and employment law. Business people and lawyers are also now beginning to recognise its advantages in the resolution of business disputes. This paper outlines some of the main features of mediation and then discusses how it could be applied in an international commercial context. As it is a fairly new field, the related fields of commercial mediation and public international mediation are also discussed, in order to draw relevant parallels.

The paper concludes by stating that although international commercial mediation is a new field, in which not much progress has yet been made, the few examples of it have shown that it is a feasible dispute resolution option for the future. All the procedures are in place, it is only a matter of people taking the initiative and actually trying it.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 16 500 words.

I INTRODUCTION

Mediation is very much in vogue in certain circles at the moment. Some view it as a symptom of the caring, sharing 90s. Others use it because it works. In New Zealand, mediation has long been used in the employment and family law areas,[1] with a good deal of success. Following worldwide trends, the use of mediation is also being extended to other areas, such as landlord/tenant disputes, and between victims and offenders. Mediation has also been used to a limited extent in the resolution of commercial disputes, both between businesses and between businesses and individuals. Both the Chief Justice and the Minister of Justice have expressed support for Alternative Dispute Resolution processes, including mediation.[2] Its use can only increase as people realise the advantages of a quick, relatively inexpensive procedure over protracted, costly litigation.

In the international arena, negotiation and mediation have long been the preferred methods for solving disputes between states. There is a strong presumption in international law that disputes will be settled peacefully. Article 2(3) of the United Nations' Charter reads "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered." Article 33(1) reaffirms this by stating that:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

International law is by its very nature consensual and diplomatic, due to the theory of all states being equal and there being no overarching superior body.[3] With fewer and fewer states accepting the compulsory jurisdiction of the International Court of Justice,[4] the time

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1 For example, the Children, Young Persons and their Families Act 1989 provides for Family Group Conferences, a form of mediation, under both its Youth Justice and Care and Protection regimes.

2 T Frankham "Mediation in Resolving Financial Disputes" (1993) 72(4) Accountant's Journal 57, 57.

3 LC Reif "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes" (1990) 14 Fordham International Law Journal 578, 578.

4 More and more states are resorting to regional agencies such as GATT and the European Court of Justice to resolve their disputes. In fact, less than one-third of UN Member States currently accept the compulsory jurisdiction of the ICJ. Britain is the only permanent member of the Security Council to do so. FL Morrison "The Future of International Adjudication" (1990) 75 Minnesota Law Review 827, 830.

is ripe for ADR to become firmly established as the usual means of dispute resolution in international law.

Mediation has been used to resolve a wide variety of international conflicts. The mediators themselves have been equally varied, ranging from official bodies like the United Nations, to religious bodies like the Quakers and the Holy See, to individuals, such as Kissinger in the Middle East.

International mediation has traditionally been the bastion of states. However, due to the growth of mediation in domestic law, more and more varieties of mediation are creeping into the international arena. One such area is that of international commercial mediation. Mediation has been used domestically to solve commercial and business disputes for quite some time now, and it was only natural that it would eventually be adapted for international use.[5] This is partly due to the growing dissatisfaction with international litigation and even arbitration, which is currently the most popular way of solving international commercial disputes.[6]

Commercial mediation has also become popular due to the recognition that many big trading partners, such as China, Japan, and some Islamic countries have long used it as a preferred method of solving their business disputes.[7] This is especially important for New Zealand as it tries to establish itself on the Pacific Rim.[8] However, it is important to note that as they become more Westernised, these countries are beginning to adopt adjudicative methods, such as arbitration, to solve their disputes.[9]

This paper will consider the growth of commercial mediation in private international law. As it is a fairly new area, related forms of mediation will be discussed in order to draw

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[5] V Fischer-Zernin and A Junker "Arbitration and Mediation: Synthesis or Antithesis?" (1988) 5(1) Journal of International Arbitration 21, 28.

[6] Riekert reports that some arbitration users perceived little difference between arbitration and litigation. The costs of international arbitration can also be extremely high. J Riekert "Alternative Dispute Resolution in Australian Commercial Disputes" (1990) 1 Australian Dispute Resolution Journal 31, 32.

[7] For example, Article 97 of the Chinese Civil Code states that in all civil cases, conciliation must be attempted before proceedings are filed. C Lecuyer-Thieffry and P Thieffry "Negotiating Settlement of Dispute Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes" (1990) 45 Business Lawyer 577, 589. See also Fischer-Zernin, above n 5, 28.

[8] A Tompkins "Cross-border dispute resolution in international commercial transactions" [1993] NZLJ 256, 257.

[9] Reif, above n 3, 627-632. See also J Tyrril "Conciliation and Mediation of International Commercial Disputes- The Lawyer's Role" (1992) 9 International Construction Law Review 351, 353.

some parallels. Part II will outline some general mediation principles. Part III will consider public international mediation and highlight a few major points by way of case study. These will then be related back to the commercial sphere. Part IV will look at the domestic use of commercial mediation and discuss how the various models could be adapted for international use. Part V will consider some unique features of international commercial mediation, with Part VI drawing comparisons between international commercial mediation, international litigation and international arbitration. Part VII will attempt to formulate a model of international commercial mediation. Part VIII will conclude with a look at whether international commercial mediation is a feasible dispute resolution option for the future.

II PRINCIPLES OF MEDIATION

A The Development of Mediation

Mediation developed as as alternative to litigation to provide a quick, cost-effective way of resolving disputes. Not only was litigation foreign and prohibitively expensive for many people, but it also took control of the dispute away from the parties involved, often causing irreparable damage to their relationship. Mediation aimed to return the dispute to the parties, and to give them the responsibility for solving their own problems. By using mediation, the parties would hopefully be able to maintain some respect for each other and continue their previous relationship.

Due to overcrowding of the courts, litigation was also becoming extremely time-consuming, with large delays the norm. Especially in the United States, where criminal cases take precedence over civil cases, delays of up to two or three years before ones' case was heard were not uncommon.[10] This delay was one of the main reasons for the growing popularity of ADR techniques. Mediation is relatively speedy. As it is a private process, parties can appoint a mediator and start mediating as soon as the dispute occurs. If the parties already have a clause in their contract agreeing to submit to mediation in case of dispute, the process can be even faster.[11]

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[10] PJ Berman "Resolving Business Disputes Through Mediation and Arbitration" (1994) 64(11) CPA Journal 74, 74.

[11] If the parties do not have a mediation clause in their contract, they can agree to mediate after the dispute has arisen. In these situations, more time will obviously be needed to work out the logistics of the mediation, such as time and place. It may also be more difficult for the parties to agree to such things after the dispute has arisen.

B Definitions

Mediation involves the intervention of a third party in a dispute. Closely related to mediation is conciliation, which also involves third party intervention in a dispute. There is no doubt that both a mediator and a conciliator intervene to facilitate communications between the parties, but beyond this, their differences and similarities are not clear. Some claim that a mediator plays a more interventionist role than a conciliator. Others believe the opposite. The ambiguity can be illustrated by the following definition of conciliation:[12]

> The central objective of the conciliator is to facilitate an amicable settlement of the conflict by communicating with the parties, typically through structured conciliation proceedings, and by submitting written proposals for the resolution of the dispute. When conciliation is resorted to in name, however, the actual process that is utilized may be sometimes more akin to mediation than to conciliation as defined above.

Some commentators believe that domestically, mediation is a more formal process than conciliation, but in an international context, conciliation is more formal and structured than mediation.[13] In reality, the two often seem to be used interchangeably. In this paper, mediation will be used to refer to both mediation and conciliation. The two will only be distinguished when and if necessary.

There are a huge variety of definitions of mediation. For the purposes of this paper, mediation will be defined as follows:[14]

> A process by which disputing parties interested in achieving resolution to their differences agree voluntarily to engage the services of a skilled, independent third party to assist them in reaching a negotiated settlement themselves.

This assistance could range from merely facilitating communications between the parties, to gently "pushing" them towards resolution, to actively making suggestions as to possible solutions. What is required will be different in every case.

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12 Reif, above n 3, 584.

13 For example, Tyrril, above n 9, 371. See also TP Dress "International Commercial Mediation and Conciliation" (1988) 10 Loyola of Los Angeles International and Comparative Law Journal 569, 574, who believes that internationally, conciliation is like a hybrid of mediation and arbitration.

14 Frankham, above n 2, 57.

Another type of third party intervention which is in some ways similar to mediation is that of "good offices". Someone who offers their "good offices" to resolve a dispute usually only facilitates communications between the parties and encourages them to negotiate.[15] Beyond this, they have no role at all. "Good offices" tend to feature mainly in public international dispute settlement and will probably not be very relevant in the private sphere. However, it is important to keep in mind a clear distinction between "good offices" and mediation.

C Principles and Features

All types of mediation contain the following elements:[16]

- Use of an impartial, skilled neutral to help the parties reach agreement.

- The disputants maintain control over the dispute. They are able to structure and resolve the dispute in whatever way they wish.

- The procedure is voluntary, with any of the parties being able to withdraw at any time.

- The procedure is confidential.

- Flexibility is all-important.

The above points raise some interesting issues. The first one concerns the enforceability of any agreements reached during mediation. Unlike arbitral awards, most mediation agreements cannot be enforced by statute, although there are a few domestic laws which recognise conciliated agreements.[17] There is therefore a perception that due to its voluntary nature, agreements reached during mediation are not enforceable. Some argue that this inability to enforce will be the downfall of international commercial mediation. They believe that international business people are unlikely to accept a dispute resolution process which

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15 Reif, above n 3, 582.

16 Taken from BJ Thompson "Commercial Dispute Resolution: A Practical Overview" in DP Emond (ed) *Commercial Alternative Dispute Resolution* (Law Book Co. Ltd, Aurora, 1989) 91.

17 Reif, above n 3, 611. This is likely to increase, due to the growing popularity of mediation and conciliation.

does not guarantee the enforceability of any agreement reached, that they require certainty in their commercial practices and will therefore need an enforceable agreement. If this is true, mediation may only be able to take place in circumstances where the parties have complete trust and confidence in each other.[18] As such trust and confidence is unlikely to ever be present, international commercial mediation has no chance of success.

In fact, this argument is fallacious. Most agreements reached during mediation, in both the commercial and non-commercial spheres, are drawn up into a contract at the end of the mediation. This contract will then be enforceable in the usual way. Since parties to international contracts are usually free to choose the law which they want to apply to their contracts, they can specify in the contract which law they want to govern it. Therefore if one party defaults on the mediation agreement, the other party can take them to court. The only disadvantage of this is that it will take the parties back to the judicial system, which is what they had presumably sought to avoid in the first place by using mediation.[19] However, it is submitted that due to the requirement of certainty in international commercial transactions, mediation agreements would have to legally enforceable in order to be accepted by the international business community.

Regardless of whether they result in contracts or not, one need only look at the statistics of mediation in order to determine its successs rate. Figures show that 80-90 per cent of all disputes submitted for mediation are successfully resolved.[20] In the majority of cases, any agreement reached is successfully completed by the parties. The general consensus seems to be that people are far more likely to uphold and complete an agreement which they themselves have formulated. Lisnek states:[21]

> The power of mediation lies in the creation of the solution by the parties themselves. This component makes mediation superior to both litigation and even arbitration. If the final agreement is one truly reached by a 'meeting of the minds', then its enforcement will not be a matter of concern.

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[18] J Stratton "Occupying the Middle Ground" (1990) 140 New Law Journal 719, 719.
[19] WF Fox *International Commercial Agreements* (Kluwer, Deventer, 1988) 158.
[20] S Kaufman "See You Out of Court" (1992) 80(6) Nation's Business 58, 58; Thompson, above n 16, 102.
[21] PM Lisnek "Mediation: Untangling Business Disputes through ADR" (1993) 8(5) Commercial Law Bulletin 12, 13.

Tompkins observes that because of their involvement, parties become very committed to the process of mediation, and will be likely to uphold any agreement reached.[22] It remains to be seen whether these trends will spill over into international commercial mediation.

Confidentiality is also an issue in mediation. This is usually maintained by a clause in the agreement to mediate. Confidentiality will extend to anything said or done by the parties or the mediator during the mediation. These confidentiality clauses aim to protect the parties in any subsequent proceedings and encourage the free flow of information during mediation.

Agreements to mediate also usually contain clauses concerning the immunity of the mediator and excluding him or her from liability. Such clauses will prevent the mediator from testifying or acting for any of the parties in any subsequent proceedings, judicial or arbitral. These clauses are also designed to encourage the free flow of information and ideas. To keep the mediation free and open, not only must the mediator be confident that the parties will not later file suit against him or her, but the parties must also be sure that anything revealed during the mediation will not be used against them in the future.

Immunity of third parties was discussed in the American case of *Howard* v *Drapkin*,[23] where the Californian Court of Appeal held that third party neutrals could be awarded quasi-judicial immunity in connection with the performance of judicially connected dispute resolution services, including mediation and conciliation.[24] Therefore, if a mediator is conducting court-based or court-referred mediation, he or she will be protected from suit by law.

Although many mediations do take place under the umbrella of the court system, it seems unlikely that many international commercial mediations will. It is true that most such mediations occur in the 'shadow of the law', and that the parties and the mediator will have a fair idea of what law would be applicable if the case were to be litigated. However, rarely in such an international context would the court be likely to order the parties to mediate against their will. This would be especially true in places like the United States, where the desire of judges to curry favour with politicians would make it unlikely for them to order

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22 Tompkins, above n 8, 257.

23 (1990) 271 Cal. Rptr 893.

24 Croskey JA stated that the main reason for extending immunity to mediators and conciliators was recognition of the fact that due to the problems of the court system, such as overcrowding, ADR was being recognised more and more as a competent alternative to litigation. It was therefore only fair and just that people involved in ADR should be awarded the same sort of immunity as judges. Above 23, 902.

large multi-national corporations, many of whom have much influence on the political scene, to mediate unless they themselves wanted to.

Howard v *Drapkin* [25]therefore could only be safely relied upon in cases where the choice of law was Californian and the mediation was judicially connected in some way. In all other cases, unless there is a specific law protecting the mediator's immunity,[26] parties should eliminate any risk by including an immunity clause in their agreement to mediate.

Another concern is whether agreements reached during mediation are fair. Some believe that an agreement can only be fair if it contains legal protections for each party in case the other defaults. Thus the argument runs that a mediation agreement cannot be fair since if one party faults, the other has no legal redress.[27] This argument is untenable. Firstly, there seems to be no logical reason why fairness should be defined as meaning the availability of legal protection. Secondly, this argument has fallen into the trap of assuming that mediation agreements are unenforceable. As has already been discussed, mediation agreements are usually drawn up into contracts. Therefore, they are legally enforceable.

The above discussion begs the question: If fairness is not connected with legal protection, then what is it? The definition of fairness is undoubtedly subjective and can vary depending on the circumstances. In mediation, it is submitted that an agreement will be fair if the parties have reached it voluntarily, with a thorough understanding of all the issues.[28] Mediation is about coming up with solutions which suit the parties. Even if on a so-called objective basis the agreement appears to favour one party, if the other parties are happy with it, it is difficult to see how it could be regarded as unfair. Indeed, the other parties may have gained some benefits which are not apparently obvious or have come away with more than they had expected to.

D Qualities of a Mediator

Usually, the most important quality of a mediator is neutrality or impartiality. However, this impartiality may be compromised in situations where the mediator possesses other

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[25] Above n 23.

[26] Some jurisdictions in Australia have mediator immunity clauses. See below n 74-78 amd accompanying text.

[27] MJ Fulton *Commercial Alternative Dispute Resolution* (Law Book Co. Ltd, Sydney, 1989) 99.

[28] Coulson also takes this view. R Coulson *Business Mediation- What you need to know* (American Arbitration Association, New York, 1991) 55.

qualities which are considered more important. For example, the mediator may have his or her own agenda[29] or possess resources which the parties desire.[30] In this way the mediator may be able to "sweeten the pie" for the parties.[31] These factors may be more important in any given situation than impartiality. However, impartiality will still be a very important factor in most mediations.

Other important qualities of a mediator include:

- The ability to analyse the parties' differences and identify the real issues at stake.

- The ability to put forward new ideas and options.

- Knowledge of the legal issues involved. Although there is debate about whether adversarially-trained lawyers make good mediators, some legal knowledge is essential since most mediation takes place in the shadow of arbitration or litigation.[32] An international commercial mediator should have some knowledge of conflict of laws rules so he or she can advise the parties as to which law would apply if the case went to litigation.

- Knowledge of the industry.[33]

- Knowledge of conflict situations.

- Personal skills, such as listening and the ability to win the trust and confidence of the parties.

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[29] For example, see the section on Algeria's intervention in the US/Iran hostage crisis. Below n 41-43 and accompanying text.

[30] J Bercovitch "International Mediation and Dispute Settlement: Evaluating the Conditions for Successful Mediation" (1991) 7 Negotiation Journal 17, 26. See also S Touvaal *The Peace Brokers* (Princeton University Press, Princeton, 1982) 326.

[31] For example, in the Camp David talks between Egypt and Israel, President Carter offered to build the Israelis a new airfield in the Negev if they evacuated the Sinai. Such inducements are more likely to be a feature of public international mediation rather than private.

[32] Tyrril, above n 9, 382.

[33] There is debate as to how much industry knowledge a mediator should have. Some believe that a mediator should be more concerned with process than substance, and so knowledge of the industry is not crucial. Others believe that a mediator with industry knowledge will be more likely to gain the trust and respect of the parties. For the former view, see Coulson, above n 28, 26 and Berman, above n 10, 76. For the latter see Thompson, above n 16, 115 and Tyrril, above n 9, 361.

None of these skills are static, and their importance will vary depending on the type of mediation. A mediator must be ready to adopt different skills as required over the course of a mediation.

E The Mediation Process

A mediation can commence by the parties either activating a mediation clause in a contract or agreeing to mediate after the dispute has arisen. Naturally, a detailed mediation clause will be most advantageous to the parties as many of the decisions pertaining to the mediation will have already been made.

The first step is for the parties to draw up an agreement to mediate.[34] This will usually be done after the mediator is chosen. The mediator can be anyone from a judge or lawyer, to someone with expertise in the particular field. Often organisations such as the Bar Association will have a list of suitable mediators.

The next step is for the parties to produce relevant documents, and exchange information and witnesses. As there is no formal discovery process in mediation, there must be some level of trust and honesty between the parties.[35] Each party will then prepare a memorandum identifying their legal positions and evidence.

During the actual mediation, the mediator should guide the process, leaving the substantive discussion to the parties. The mediator's first task is to create a structure for the mediation process that is acceptable to all the parties involved. The next step is fact-finding and isolation of the issues, after which the parties can start negotiating and creating possible solutions. Here, the mediator may need to engage in some "shuttle diplomacy"- talking to each party separately and confidentially. Finally, if agreement is reached, a contract may be drawn up, which will be reviewed to make sure it complies with the law.

Flexibility is the key throughout the process, and the whole mediation should be tailored to suit the underlying dispute.[36]

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[34] This contract will contain clauses dealing with confidentiality and immunity of the mediator as discussed above, as well as containing various provisions such as the mediator's fee.
[35] Tyrril, above n 9, 357.
[36] Berman, above n 10, 74.

III PUBLIC INTERNATIONAL MEDIATION

This section will consider three case studies in public international mediation in order to illustrate how mediation works in the international context. Salient points which could be relevant to a discussion of international commercial mediation will be highlighted.

A The Beagle Channel Dispute

1 Background[37]

The Beagle Channel dispute concerned sovereignty over three barren, windswept islands[38] at the mouth of the Beagle Channel at the extreme tip of South America. Chile and Argentina had been arguing over the sovereignty of the islands since time immemorial. A treaty of 1881 had failed to resolve the issue.

Subsequent treaties signed over the course of the twentieth century had also failed. Some of these treaties purported to settle the issue, others appointed a variety of arbitrators to arbitrate the dispute. For the most part, these treaties were signed but not ratified by either Chile or Argentina.

In the early 1970s, the two nations finally agreed to appoint Her Majesty, the Queen of England, as arbitrator. Chile had long been in favour of this appointment, but Argentina took some persuading due to the continuing tension with England over the Falkland Islands. A compromise was reached: it was agreed that the Queen would appoint a five-member panel from the International Court of Justice to carry out the arbitration.

The panel took approximately five years to come to a decision. This included numerous trips to the area. It awarded sovereignty over the islands to Chile, but allowed Argentina to retain certain of its maritime rights in the region. Argentina declared the award a nullity, and set out various grounds for its view. None of these grounds was valid for invalidating

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37 The following facts are taken from: H Astor and CM Chinkin *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) 290; DM Himmelreich "The Beagle Channel Affair: A Failure in Judicial Persuasion" (1979) 12 Vanderbilt Journal of Transnational Law 971; FV "The Beagle Channel Affair" (1977) 71 AJIL 733; T Princan "Mediation by a Transnational Organization: the Case of the Vatican" in J Bercovitch and JZ Rubin (eds) *Mediation in International Relations* (St Martin's Press Inc, New York, 1992) 153-156; *Chilean-Argentine Relations: The Beagle Channel Controversy- Some Background Papers.*

38 The Picton, Nueva, and Lennox islands were inhabited by approximately 20 Chilean citizens.

treaties under the Vienna Convention on the Law of Treaties. Subsequent negotiations also broke down, and both sides prepared for war.[39]

As troops faced each other over the border and warships sailed ever-nearer, the Pope stepped in and sent Cardinal Antonio Samore to the the area as peace envoy towards the end of December 1978. Samore's first priorities were to prevent any use of force, revert the military situation, and re-open negotiations between the parties. All this he managed to do in three weeks.

Actual mediation began in 1979 with a mediation team appointed by the Pope. For almost a year, the team met separately with each party, trying to elucidate their individual goals and interests. In December 1980, the Pope put forward his Propuesta- proposal. This granted sovereignty over the islands to Chile, certain maritime concessions to Argentina, and provided for a common zone for the joint exploration of mineral resources. Chile accepted the proposal. Argentina neither accepted nor rejected it. Matters then stood at a standstill for quite some time due to the war in the Falklands and the death of Samore in 1983.

The matter was finally settled by the signing of a final treaty in 1984, which was ratified in 1985. Under the terms of the treaty, Chile was awarded sovereignty over the islands, Argentina retained most of its maritime rights in the region, and the idea of a common zone was abandoned. Many other outstanding issues between Chile and Argentina were also resolved.

2 *Analysis*

Samore managed in three weeks what had not been possible in almost a hundred years because he had the complete co-operation, trust and confidence of the parties. He had been the papal ambassador to Columbia and was regarded as a Vatican expert on South American affairs. As such, he was highly respected by these two Catholic countries. He also had the backing of the influential Catholic Church, with the Pope himself playing an active part in the mediation.

Samore played a highly interventionist role in the mediation. He made many proposals himself, and strongly encouraged the parties to come to an agreement. He focused on the

[39] One reason for the renewed hostilities was the newly-discovered mineral deposits in the area.

parties' interests, not their positions.[40] For example, he realised that Argentina's main concern was access to the Beagle Channel waterway itself, not sovereignty over the islands. Argentina was afraid that access would be cut off if Chile gained sovereignty over the islands. To solve this problem, Samore proposed that the Channel become a de-militarised zone. He also understood the symbolic importance of saving face for each side, and sought to resolve the dispute with a minimum loss of face for each party.

Samore and the Vatican displayed many important attributes of a good mediator. Many of these would also be relevant to private international mediation. The Pope played a pro-active role and intervened in the conflict on his own initiative, stepping in before the conflict escalated to uncontrollable proportions. Samore himself was personally respected in the region as well as being a representative of the Catholic Church. He was therefore wholeheartedly accepted by the parties and was viewed as being impartial. As a skilled diplomat, Samore was also able to pinpoint the parties' exact concerns, which turned out to be much easier to resolve than their initial polarised views. Finally, his own proposals and encouragement showed the parties how necessary it was to settle. The Vatican's pro-active approach and Samore's quick, clear thinking almost certainly diverted a potentially destructive war.

B Algeria's Intervention in the US/Iran Hostage Crisis 1979-1981

1 Background[41]

In 1979, Iranian student extremists stormed the US Embassy in Tehran and took the people therein hostage. Various negotiations between the parties for the release of the hostages failed. Towards the end of 1980, with the death of the Shah (who had been in exile), the commencement of the Iran/Iraq war and the US Presidential elections, both sides again started pushing for release.

Into the fray stepped Algeria, and offered its services as mediator. This was not a selfless act of intervention. States usually only intervene in conflict between other states when their

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[40] One of the main advantages of mediation is the ability to look beyond the parties' surface positions to see where their true interests lie. When one looks beyond the legal positions, any number of solutions become possible. Stratton, above n 18, 719.

[41] The following facts are taken from: Astor and Chinkin, above n 37, 288-290; and Bercovitch and Rubin (eds), above n 37.

own sovereignty is threatened or they have something to gain.[42] In this case, Algeria was hoping to increase its international standing and prestige, especially among other Islamic states. It also wanted to improve relations with the USA.

The US and Iran accepted Algeria as mediator because they realised that in their current impasse, direct negotiations would be impossible. Separately, Iran trusted Algeria as a fellow Islamic state, and Algeria had also made friendly overtures to the United States.

The Algerians adopted a highly interventionist role in the conflict. They had a very skilled mediation team which immediately went about establishing communications between the parties, who refused to meet face to face. This involved extensive use of "shuttle diplomacy", where the team shuffled between Algiers, Washington DC and Tehran, transmitting proposals and counter-proposals, and refusing to transmit ultimatums. They also acted as cultural interpreters, explaining the legal and political system of each country to the other. They reality-tested proposed solutions, and came up with some suggestions themselves. They also kept an eye on the welfare of the hostages, arranging for medical examinations and the like. Finally, they acted as a depository for payments the Iranians were demanding in exchange for releasing the hostages. Algeria was also the first port of call for the hostages after release.

2 *Analysis*

Algeria played quite a different role to that of the Vatican in the previous example. Although the Algerians too offered their services without being asked, their mediation style was quite different from the Vaticans'. Algeria was accepted by the parties who realised that third party intervention was necessary for the resolution of the conflict. Since Algeria was not a strong, widely respected mediating nation, it fought hard to prove its suitability for the task. It went out of its way to convince the parties that it had the necessary skills and expertise to facilitate a successful resolution of the dispute. In this situation, ability to resolve the dispute was more important than impartiality. Indeed, Algeria's impartiality does not even seem to have been an issue.

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42 S Touvaal and IW Zartman (eds) *International Mediation in Theory and Practice* (Westview Press, Boulder, 1985) 8-9.

Algeria's goal of increasing its international standing is quite a common feature for nations involved in public international mediation but is unlikely to be so common in a private setting. In private international mediation, a mediator's sole concern will usually be to resolve the dispute between the parties. Concerns of public international law, such as increasing ones international standing and maintaining peace and security, are unlikely to be of concern in a dispute between two or more commercial parties. A mediator of international commercial conflict is unlikely to have his or her own agenda except to the extent of trying to raise his or her own profile as a good mediator.

Another interesting feature of this case was Algeria acting as cultural interpreter. Cultural differences between the parties are a unique feature of international mediation and in some cases they can be the only factor that sets an international mediation apart from a domestic one. One of the most important tasks of a mediator is to try and bridge any cultural gaps between the parties, and make sure they fully understand each other. Assumptions of the understandings and positions of parties from different cultures should not be lightly made. The mediator must be prepared to look into the backgrounds and cultures of the parties in order to try and understand where they are coming from. Unfortunately, lack of preparation in this area is not uncommon. One commentator states: "What is surprising is...that we routinely underestimate the risks of engaging in transnational business interactions with minimal information about the nations, cultures and individuals with which we deal."[43] Such a statement would be especially relevant in a commercial setting, where the parties may have an on-going business relationship.

C Kissinger in the Middle East in the 1970s

1 Background

In the early 1970s, US Secretary of State Henry Kissinger undertook extensive mediation in the Middle East between Israel and the Arab states. Kissinger freely admitted his own agenda- he wanted to achieve peace in the Middle East in order to preserve US interests in the area,[44] but his main aim was to enhance his own personal prestige. To a certain extent, he succeeded in both.

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[43] Dress, above n 13, 571.

[44] This was the cold war era, and Kissinger was keen to make sure that Russian influence in the Middle East was thwarted as much as possible. See R Fisher "Playing the Wrong Game?" in JZ Rubin (ed) *Dynamics of Third Party Intervention: Kissinger in the Middle East* (Praeger, New York, 1981) 97 and Astor and Chinkin, above n 37, 290.

Kissinger mediated several agreements between Israel and the Arab states. His impartiality was not an important factor, even though he was Jewish and was initially seen as sympathetic to Israel.[45] What was important was the huge amount of power the US wielded in the region, and Kissinger's ability to "sweeten the pie" for the parties. By the end of the mediations, Kissinger had also managed to win over many of the Arab leaders, both on a personal and professional basis. This he did by relating to them as individuals, not just as representatives of nations.[46] He made it his business to get to know each one of them personally.

Kissinger used many techniques of industrial mediation to achieve his goals.[47] These included using shuttle diplomacy in persuading each side to make concessions, and allowing the parties to save face by making their concessions to him rather than to each other. He developed alternatives that took all the parties' interests into account and maintained momentum by making the parties believe that agreement could be reached, that it was just around the corner. Finally, he allowed the parties to take their anger out on him instead of on each other.

2 Analysis

The main reason why Kissinger succeeded was because he had the backing of the United States government. Despite his personal skills, this was probably the single biggest factor in ensuring his success. It is debateable whether he would have succeeded had he been from a smaller, less-influential nation. Although he was mediating in an individual capacity, all the parties were acutely aware of his United States backing and were therefore keen not to offend him.

Kissinger's main trump card was that the US possessed resources which the parties desired. He used these to "sweeten the pie" for the parties and encourage them to make concessions. Bercovitch states:[48]

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[45] Fisher, above n 44, 141.
[46] Fisher, above n 44, 98.
[47] For a full list of techniques, see Fisher, above n 44, 137-138.
[48] Above n 30, 26.

> The mediator's task is primarily one of reframing and persuasion. These are best achieved...not when a mediator is unbiased or impartial, but when he or she possesses resources that either or both parties value. Effective mediation in international relations is related more to resources than to impartiality.

This possession of resources is a common feature of public international mediation, but is unlikely to play an important role in private international mediation. Private law is more concerned with settling disputes between parties, not extending the influence of the mediator. The mediator in private law will usually be an individual who will be unlikely to have material resources at his or her disposal. Since the non-resolution of an international commercial dispute is unlikely to threaten international peace and security or result in some other type of international incident, it is unlikely that mediators will be willing to put their own resources on the line. This could also affect their impartiality. The only resources a private international mediator will usually bring to the mediation are his or her own skills.

Kissinger's other important skill was his ability to get to know the players as individuals. Even though the conflict took place in the public arena, Kissinger rightly estimated that decisions would be made on an individual basis. He realised how much power each of the people involved had- that while President Sadat could make most of the decisions on behalf of Egypt, Golda Meir needed the support of the Israeli Knesset. He used this knowledge to his advantage, pushing the former for decisions, but allowing the latter sufficient time to consult her Ministers. By getting to know the parties in this way, Kissinger proved that even the most complicated international disputes can be mediated, as in the end, they all come down to individuals, their beliefs, and their relationships with one another.[49]

D Summary

The preceding case studies have attempted to present some features of public international mediation which could also be relevant in a commercial setting. Many skills of a public international mediator could be used by a private international mediator, with a little adjustment. Other roles and features are probably unique to a public setting, and will have little application in the private sphere. Hopefully these differences have also been made clear.

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[49] Dress, above n 13, 578.

IV COMMERCIAL MEDIATION

This section will look at the use of mediation in solving domestic commercial disputes. The term domestic is taken to mean a situation where all the features of the dispute are located more or less in the same jurisdiction. Such features include the nationality of the parties, place where the relationship is formed, place of performance etc. The reasons behind the rise in popularity of commercial mediation will be examined and the most common uses for mediation will be outlined.

A Mediation as an Extension of Business Negotiations

Mediation can be seen as a natural extension of the negotiations business people carry out every day.[50] Business people tend to have finely-honed negotiation skills which they use in negotiating better contractual terms, supply deals and so on. In case of dispute, is there any reason why these skills should not be put into use? Naturally, due to the tension-raising nature of a dispute, there may be situations where the parties reach an impasse or cannot negotiate directly themselves. In these cases, calling on an impartial third party to facilitate communications may be just the impetus the parties need to resolve the dispute.[51]

Many commercial parties look on mediation as a "soft" option. It is commonly perceived that it is a sign of weakness to suggest it.[52] This seems strange in light of the fact that out of all dispute resolution procedures, mediation is probably the one most closely related to business peoples' existing skills.This attitude is slowly changing as business people begin to realise the advantages of mediation.

B The Costs of Litigation and Arbitration

Many businesses cannot afford the costs of litigation or even arbitration, not only in terms of financial expenses but also in terms of time and manpower. Often, it is only the large corporations that can afford litigation,[53] with smaller companies prefering to work out their differences informally and with as little disruption to their businesses as possible. This can

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[50] ED Green "Corporate Alternative Dispute Resolution" (1986) 1 Ohio State Journal on Dispute Resolution 203, 274; Bercovitch and Rubin, above n 37, 5.
[51] Tyrril, above n 9, 368.
[52] Tyrril, above n 9, 355.
[53] Thompson, above n 16, 95.

be illustrated by the following example.[54] A dispute arose between a small San Francisco-based office chair manufacturing company and one of its executives, who was planning on leaving and setting up his own business using company knowledge. A court case would have involved over ten separate claims and US $35 000 in legal fees for each side. Kirk Wallace, a lawyer for the company, suggested mediation. This was accepted and the dispute was resolved within a few days. Wallace stated: "Mediation is great if both parties are interested...It's much more flexible than litigation. Business people prefer to work out their differences informally and spend money on building their businesses, not on legal fees."[55]

Mediation also has certain advantages over arbitration. Arbitration originally developed as an informal alternative to litigation. Unfortunately, it has now taken on several of litigations' undesirable features. These include the rising costs of arbitration and the parties feeling that they have again lost control over the dispute. Riekert reports that in some situations, participants perceived little difference between litigation and arbitration.[56]

C What Types of Disputes are Suitable for Mediation?

Mediation has been used to solve a wide variety of disputes. However, it is probably not advisable to attempt it in situations where the parties' views are too polarised to make concessions or where they want their legal rights conclusively determined.[57] There is some debate about whether mediation is more suitable for two-party or multi-party disputes. Some believe that mediation works well when there are multiple parties involved because each party is given the opportunity to reconcile with every other.[58] It is also easier to persuade multiple parties to submit to mediation rather than arbitration as mediation is a relatively low-risk process.[59] On the other hand, where there are more than two parties involved, the mediator may find it difficult to remain impartial.[60] It is the view of the author that the former view is preferable, given that multi-party mediations have been successfully employed in many areas such as family law.

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54 Taken from Kaufman, above n 20.
55 Kaufman, above n 20, 58.
56 Above n 6.
57 Reif, above n 3, 586.
58 Tyrril, above n 9, 355.
59 Thompson, above n 16, 101.
60 EA Morse "Mediation in Debtor/Creditor Relationships" (1987) 20 Journal of Law Reform 587, 593.

Parties will often seek and accept third party intervention when they are unwilling or unable to reach agreement themselves and feel that a third party may be able to help them.[61] Mediation is also used in situations where the parties need to maintain good working relationships, such as partnerships and joint-venture agreements.[62]

Frankham believes that mediation can be used to solve property price disputes and in determining quantum of damages.[63] Kaufman lists the following areas as being suitable for mediation:[64]

> Mediators are commonly used to solve construction cases, personal-injury cases, partnership disagreements, commercial-contract disputes, employment conflicts, real-estate disputes, and landlord/tenant fights. Mediation is also often used to resolve product-liability cases and to settle disputes between stockbrokers and their clients.

In Australia, mediation is being used in the construction and civil engineering industry, and is on the rise in partnerships and the computer and information technology fields.[65]

Judges are also beginning to refer cases to mediation, instead of, or in addition to, judicial proceedings.This occurred recently in two large commercial cases in Australia.[66] *AWA Limited* v *Daniels & Others* was a landmark case concerning auditor's negligence and director's duty of care. In the Commercial Division of the Supreme Court of New South Wales, Rogers CJ referred the parties to mediation, apparently under authority found in sections 23[67] and 76A[68] of the Supreme Court Act (NSW) and the inherent jurisdiction of the Court.[69] However, as his power to order mediation was accepted by the parties, there

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61 RB Bilder "International Third Party Dispute Settlement" (1987) 17 Denver Journal of International Law and Policy 471, 477.

62 Tyrril, above n 9, 355.

63 Frankham, above n 2, 57. He believes, however, that liability for damages is a legal issue which must be decided by the courts.

64 Above n 20, 60.

65 Riekert, above n 6, 36.

66 For a fuller discussion of the following two cases, see H Park "Corporate Disputes and Orders to Mediate" (1993) 3 Australian Journal of Corporate Law 122.

67 Section 23 of the Supreme Court Act (NSW) states: "The Court shall have any jursidiction which may be necessary for the administration of justice in New South Wales."

68 Section 76A was inserted by the Supreme Court (Commercial Division) Amendment 1985. It states: "The Court may, from time to time, give such directions as the Court thinks fit (whether or not inconsistent with the rules) for the speedy determination of the real questions between the parties to proceedings in the Commercial Division."

69 *AWA Limited* v *Daniels & Others* No. 50271 of 1991, Unreported, Supreme Court of New South Wales, Rogers CJ, 24 February 1992.

was no discussion as to whether these sources of authority were actually valid. Unfortunately, the mediation was unsuccessful. The case went to court and was later appealed.[70]

The case of *Spedley Securities* v *Yuill & Others* was another complex case, except here it was one of the parties that suggested mediation.[71] Rolfe CJ recognised that contrary to *AWA Limited*,[72] the courts probably had no explicit power to mandate mediation, but had been doing it for years on an informal basis anyway. He adjourned proceedings to allow mediation to take place. Sir Laurence Street was the mediator, and despite the number of parties and the complexity of issues involved, the mediation was successful.[73]

Most federal and state courts in Australia can and do refer cases to mediation.[74] For example, the Courts (Mediation and Arbitration) Act 1991 (Cth) amended the Federal Court of Australia Act 1976 (Cth) by allowing the Federal Court to refer proceedings before it to mediation with the consent of the parties.[75] Privacy and confidentiality are protected[76] and the mediator is accorded judge-like immunity.[77] As an example of what of what happens in state courts, the Queensland Supreme Court requires mediation of certain commercial causes.[78]

Australia has also recognised the ability of arbitrators to initiate mediation. Section 27 of the Commercial Arbitration Acts, which have been almost identically adopted in all the States and Territories, reads:

> Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall have the power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to

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[70] *AWA Limited* v *Daniels & Others* (1991) 7 ACSR 463, Supreme Court of New South Wales; *Daniels* v *Anderson, Hooke* v *Daniels, Daniels* v *AWA* (1995) 13 ACLC 614, Court of Appeal.

[71] Mediation was suggested by counsel for the Chairman of Spedley Securities Limited, who wanted to get his client out of the proceedings as fast as possible before he became personally liable. M Slattery *The Spedley Mediation.*

[72] Above n 69.

[73] Although it took over two months before the main agreement was concluded. Mediation took place both during adjournments and when the hearing was taking place.

[74] For a discussion of the various provisions, see Astor and Chinkin, above n 37, 161.

[75] Section 53A of the Federal Court of Australia Act 1976 (Cth).

[76] Section 53B of the Federal Court of Australia Act 1976 (Cth).

[77] Section 53C of the Federal Court of Australia Act 1976 (Cth).

[78] Queensland Supreme Court, Commercial Causes Jurisdiction 'A' List Practice Direction No. 4, 1987, Para. 6.

> achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

Section 27 also raises the possibility of med/arb, authorising the arbitrator to act as a mediator and then become an arbitrator if the mediation is unsuccessful.[79]

In an international context, if Australia is the lex fori, these rules could be applied to facilitate mediation. However, it is still unclear whether the courts can order parties to mediate against their own will.[80] If the case is heard in another forum, the rules could only be used if Australian law was the substantive law to be applied and the mediation provisions were deemed to be part of the substance, not procedure. Referring parties to mediation seems to be more a procedural matter than a substantive one.

In New Zealand, the courts have no power to order the parties to mediation. They can, however, recommend it. In *McCormick* v *Hughes*,[81] a case concerning the dissolution of a partnership of convention and conference managers, Barker J strongly recommended that the parties attempt mediation. The plaintiff lived in Brisbane but the partnership operated in New Zealand. The claim was against the defendant for certain breaches of fiduciary duty that occurred in New Zealand. Barker J recommended mediation because it was inexpensive and speedy and as the parties were in the same industry, there was a chance that they might have to work together again in the future.

In deciding whether or not a particular case is suitable for mediation, the following factors should be taken into account:[82]

- The parties' needs, expectations, and underlying interests. If a clear decision on the parties' legal interests is required, adjudication may be more suitable than mediation.

- The cause of the dispute; and why it has not yet been resolved.

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[79] For a discussion of med/arb, see below n 94-96 and accompanying text.
[80] This would of course militate against the voluntariness principle, which is so important to the success of mediation.
[81] Unreported, High Court, Auckland Registry, CP 672/93, 28 July 1994. Noted at [1994] BCL 1262.
[82] Taken from Thompson, above n 16, 97-102.

• The level at which the dispute has arisen, for example, at management level or at a lower level.

• Who has authority to resolve the dispute. It is important to ensure that people who actually have authority to resolve the dispute are present at the mediation, in order to avoid delay. If the dispute has arisen at a lower level, people higher up in the company should attend as they may be able to view the dispute more objectively. They will also not have to worry about being blamed for the dispute while they try to resolve it.[83]

• Resources available to resolve the dispute. Can the parties afford the costs of litigation or arbitration? Can they afford to have their people tied up for a long time?

• The need for confidentiality and privacy versus the desire for publicity. The privacy of mediation appeals to business people trying to resolve sensitive economic disputes. On the other hand, the parties in some disputes may want to publicise their position to some advantage.

• The nature of the dispute. Mediation is good for dealing with cases that involve both legal and non-legal issues.[84] If there are only legal issues involved, adjudication may be preferable.[85] On the other hand, if resolution of the dispute requires technical expertise in a certain area, independent expert appraisal may be the best way to deal with it.

• Nature of the business relationship. Mediation is good for maintaining on-going business relationships. If the dispute arises in a one-off transaction, the parties may prefer an imposed decision, since they will not have to face the consequences in the future.

• Timing. This encompasses two issues- how quickly the dispute needs to be resolved, and the optimum time to intervene in conflict. It is important to intervene before the conflict escalates too much, but also at a point when there is enough tension between the parties to warrant it.

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[83] H Yanming "Mediation in the Settlement of Business Disputes" (1991) 8(4) Journal of International Arbitration 23, 31.
[84] Bilder, above n 61, 473.
[85] VH Umbricht *Multilateral Mediation Practical Experiences and Lessons* (Martinus Nijhoff, Dordrecht, 1989) 22.

• Remedies required. In a court case, breach of contract is most likely to result in damages. In mediation, solutions are only limited by the creativity of the parties.

• Number of parties involved.[86]

• Motivation to settle. In some situations, one party may want to delay settlement in order to attract publicity or accrue interest on damages. This would not be possible in a mediation.

• Importance of the right to appeal.

• Enforcement.

• Costs.

D Mediation in Civil Law Systems

Mediation is rarely used in civil law systems, as both mediation and conciliation are inherent in the role of the courts and of arbitrators. Most arbitrators in civil law systems will make an effort to conciliate the parties before rendering a binding decision,[87] and a judge may do so as well. For example, the German attitude may be summarised thus:[88]

> Today judicial encouragement of compromise so pervades the entire German system that imperative instructions are not needed to remind the judge of his duty. He is by legal education required, and in practice accustomed, not only to run[ning] the proceedings, but is by definition also a conciliator at all stages in the legal process and at every court level.

The same cannot be said for the common law system, where there are clear differences between the roles of judges, arbitrators and mediators. Except in the case of med/arb, the roles rarely ever combine. This is probably a good thing given that quite different skills are needed for each role. For example, judges must have legal training while arbitrators are often simply experts in the field in which the dispute has arisen.

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86 See above n 58-60 and accompanying text.
87 This would be a process similar to med/arb. See below n 94-96 and accompanying text.
88 Fischer-Zernin, above n 5, 30.

E Summary

Mediation use is without a doubt on the increase in commerce and industry. For business people, mediation has the advantage of being private. It also allows them to structure and control their dispute in any way they wish.[89] With the rising costs and delays involved in litigation, it is no wonder that people are seeking alternative ways of resolving their disputes. For example, the Ford Motor Company in the USA has established a mediation panel consisting of three consumer and two company representatives who hear service complaints from customers. Decisions are binding on the company, but not on customers, who may proceed with litigation if they so wish.[90] Many large corporations, law firms and accountancy firms in the USA have also signed policy statements stating that they will refer disputes to mediation before filing a lawsuit.[91] The concern now is with the smaller companies, many of whom are not yet aware of the advantages of commercial mediation. They are probably also the companies who would benefit the most from using ADR.[92]

Mediation offers a great many advantages for the business person. Of course, it is not a panacea for all types of ills. In any given situation, the facts must be weighed up carefully to see whether mediation or another form of dispute resolution is appropriate. What is important is that the parties be informed and be aware of all the alternatives open to them.

V INTERNATIONAL COMMERCIAL MEDIATION

This paper has so far considered various features of mediation in different settings which could be of relevance to a study of international commercial mediation. This section will address some unique features of international commercial mediation.

A Mediation as Part of a Layered Dispute Resolution Process

Mediation usually works best as a first optional step in a layered dispute resolution process. As mediation is voluntary, any of the parties are free to withdraw at any time. They could also fail to reach agreement. In such cases, backup dispute resolution procedures must be

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89 Kaufman, above n 20, 59.
90 Green, above n 50, 264.
91 Lisnek, above n 21, 12; Frankham, above n 2, 57.
92 Coulson, above n 28, 23.

available. Even where a mediation does break down however, it will often have been useful in clarifying the major issues and positions of the parties:[93]

> For the same reasons that mediation is an excellent mode of conflict resolution in the public sector, parties involved in international trade are beginning to recognize the benefits of its use in their disputes. Especially in large, complex disputes, mediation is used increasingly as a first step toward reaching a settlement. Even where resolution of the entire controversy cannot be achieved through mediation, parties often succeed in reaching agreement on a number of adjunct factual and legal issues, thus simplifying and expediting the remaining issues for resolution through arbitration or litigation.

Mediation can be combined with any number of other dispute resolution processes including litigation, arbitration, independent expert appraisal and med/arb. Med/arb is a process in which an impartial third party will first act as mediator to try and help the parties resolve their dispute themselves. If they are unable to do so, the third party will then act as arbitrator and impose a binding decision on the parties.[94] The main objection to med/arb is whether or not a single person can possess the necessary qualities to be both an effective mediator and arbitrator, as the two roles are very different.[95] Another problem lies with the disclosure of information. Mediation is concerned with creating an environment which encourages parties to disclose information which they would normally not reveal in an adversarial setting. It is thought that if a party knows that arbitration may ensue with the same third party if mediation breaks down, it might be more hesitant in disclosing information. Parties may also lose confidence in the third party if the dispute is not successfully resolved through mediation.[96] It is submitted that the integrity of mediation would be better protected by keeping it completely separate from arbitration.

Critics of mediation state that if it is used as a first step after a dispute arises and it is unsuccessful, the extra costs that would result in having to employ another dispute resolution process would outweigh the benefits of trying mediation in the first place. This opinion is erroneous, as disputes submitted to mediation appear to be resolved 80-90 per cent of the time.[97] Interestingly, the high success rate of mediation seems to be directly

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[93] MF Hoellering "Alternative Dispute Resolution and International Trade" (1986) 14 Review of Law and Social Change 785, 791.
[94] Green, above n 50, 266.
[95] Thompson, above n 16, 48.
[96] Fischer-Zernin, above n 5, 36.
[97] Above n 20.

related to satisfaction rates with the third party.[98] Therefore in the vast majority of cases, extra costs will not need to be incurred in using another dispute resolution process after mediation breaks down.

B Cultural Factors

The sorts of problems which can arise when people from different cultures do business can be illustrated by the following example.[99] A large trade union in Southern California was trying to conclude a labour agreement with a Japanese-owned produce processing plant. The representatives of the Japanese company were fairly traditional and conservative, with a limited knowledge of English. Traditionally, Japanese culture views the buyer in any given transaction (in this case the company), as having more bargaining power than the seller (the union). It also places a duty on the buyer to establish a relationship of trust and confidence with the seller, so the two can maintain a good working relationship after the sale.

Following this theory, the Japanese company made an offer to the union. The union promptly made a counter-offer. Much to the union's frustration, the company would not budge from its initial offer. It was expecting the union to accept it, so it could start establishing a good relationship with the union. The union, on the other hand, was expecting a bargaining process of offers and counter-offers. In the end, the parties managed to resolve their differences on all but one of the issues, resulting in the union taking its members out on strike.

The big stumbling block in this case was the different perceptions the Americans and Japanese had of the buyer/seller relationship. In Japan, it is the buyer who has the power to make offers. In the USA, the buyer and seller are much more equal, with both having the power to make, accept, or reject offers. If the parties had been warned at the outset of this state of affairs, they might have been more willing to make concessions, or at the very least they would have understood where the other was coming from. It is these sorts of cultural differences that differentiate a mediation with international elements from a domestic one. Without the services of a well-informed, well-trained mediator, such differences could be exceedingly difficult to overcome.

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98 Riekert, above n 6, 38.

99 Taken from J J-M Sunoo "Some Guidelines for Mediators of Intercultural Disputes" (1990) 6 Negotiation Journal 383, 384-387.

For effective cross-cultural communication, the mediator must enquire into the culture and social expectations of the parties. Sunoo lists the following as guidelines for mediators of inter-cultural disputes:[100]

• To expect different expectations and not rely on the usual "rules of the game". This is well illustrated by the previous example where the Japanese expectations of the buyer/seller relationship were markedly different from American ones. In these cases, the mediator must make sure of the meaning behind the parties words and actions.

• To not assume that the parties understand what is being said. Have each party summarise and repeat what the other has just said in order to ensure that they understand each other.

• To listen carefully.

• To be patient and willing to learn. Especially in situations where there are language barriers, a cross-cultural mediation may take longer and encounter more difficulties than other types of mediation.

• To adopt a win/win attitude rather than an adversarial one. Win/win is a feature of all types of mediation. Mediation was first introduced as an alternative to the adversarial system, which was thought to be alienating too many people from the judicial process. In a cross-cultural mediation, any cultural differences are likely to be further antagonised by pitting the parties against each other. If cultural differences are the root of the parties problems, it may even be that trying to understand the others' background will clear up some of the problems.

• To use innovative techniques where needed. Since one of the advantages of mediation is that the parties are able to come up with a range of creative solutions, many of which would not be available in a legal setting, it seems sensible to employ whatever techniques are necessary in order to come up with the best possible solutions.

Many of these factors are applicable not only to cross-cultural mediation, but to mediation generally. It therefore seems that mediation techniques are well-suited to resolving cross-

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[100] Sunoo, above n 99, 387-388.

cultural disputes, providing a depth of understanding of the other party that the judicial system does not allow.

C International Organisations

Many international organisations provide services which help facilitate international mediation between commercial parties. Most of these organisations provide a set of rules which the parties can choose to adopt. Some suggest model mediation clauses that can be included in contracts. Some can even appoint a mediator upon request of the parties and even provide a venue for the mediation. Some of the major organisations and their roles and features will now be discussed.

1 United Nations' Commission on International Trade Law (UNCITRAL)

UNCITRAL was formed in 1966. Its purpose was to facilitate "the progressive harmonization and unification of the law of international trade".[101]

The United Nations' General Assembly adopted the UNCITRAL Conciliation Rules in 1980. In a declaration issued upon adopting the Rules, the General Assembly recommended that they be used when disputes arose in the context of international commercial relations and the parties wished to resolve those disputes amicably.[102] The recommended model clause contained in the Rules states:

> Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

The Rules themselves are brief and fairly ambiguous, allowing for the greatest amount of flexibility. Article 1(1) states that they are to apply to any legal or contractual relations. Article 1(2) states that the parties may vary or exclude any of the Rules at any time. The model conciliation clause can also be varied.

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[101] II Dore "Peaceful Settlement of International Trade Disputes: Analysis of the Scope of Application of the UNCITRAL Conciliation Rules" (1982) 21 Columbia Journal of Transnational Law 339, 339.
[102] UNCITRAL (United Nations, New York, 1986) 31.

Conciliation commences with one of the parties sending a written conciliation invitation to the other.[103] Conciliation can only take place if the other party accepts. Silence will usually be construed as rejection. There can be one, two or three conciliators appointed. Under Article 4, the parties can request an "appropriate institution" to recommend or appoint conciliators. Presumably, an "appropriate institution" could include any organisation which provides mediation services, be it domestic or international.

The conciliator will begin by asking each party to submit a brief written statement of the nature of the dispute and the points at issue to both the conciliator and all the other parties- Article 5. Article 6 states that the parties may represent themselves or be represented by anyone of their choice. This would presumably include legal counsel. Article 11 contains a requirement of good faith between the parties and the conciliator.

Under Article 12, the parties may submit suggestions for the resolution of the dispute to the conciliator. Any agreement reached during conciliation may be drawn up into a settlement agreement. Any such agreement will be binding on the parties under Article 13. Article 14 deals with the confidentiality of the proceedings and Article 15 with the termination of the conciliation- either by agreement, or by the conciliator or either of the parties declaring their intention to withdraw.

Under Article 16, no party must initiate judicial or arbitral proceedings while conciliation is taking place. Article 19 prohibits the conciliator from representing either party or acting as a witness in subsequent judicial proceedings. Article 20 prevents the parties from disclosing any information revealed during the conciliation in subsequent judicial proceedings.

The UNCITRAL Conciliation Rules provide a thorough, though brief coverage of conciliation. Parties wishing to have the option of conciliation for solving future disputes could well do worse than include a model clause like the one above in their contracts. Although they are brief, the Rules contain all the basic features of commercial mediation such as confidentiality and the immunity of the mediator. The only possible concern is also the strong point of the Rules: their flexibility. Although the huge amount of flexibility contained in the Rules is consistent with the voluntary nature of mediation, it may become a concern if weaker parties are shown to be coerced into accepting variations of the Rules

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[103] There is no indication in the Rules as to whether they apply to multi-party disputes. Presumably, as the Rules can be varied, they could be amended to apply to situations where there were multiple parties involved.

which are detrimental to them. This would normally occur at the contract negotiation stage, before any dispute has arisen. The weaker party will therefore not even have the protection or support of the third party in deciding whether any of the Rules should be varied or excluded.

The other problem with the Rules is the lack of any body to support them. Although it promulgated the Rules, UNCITRAL does not seem to have envisaged any major role for itself in the actual conciliations.[104] In fact, the only reference to outside bodies at all is contained in Article 4, which deals with the appointment of conciliators. Article 4 states that parties may apply to "appropriate institutions" for the appointment or recommendation of conciliators. Apart from this, the parties are left pretty much to their own devices under the Rules. The few procedural rules contained in the Rules deal with the actions of the conciliator. In one sense, this enforced independence will re-enforce the principle of mediation that the parties should have as much control over their dispute as possible. On the other hand, one wonders whether parties could need a little more help in establishing and running their conciliation than is provided for in the Rules. This is especially so given that conciliation and mediation will be a new experience for most who attempt it. The intention of the Rules was probably that such help should come from the mediator. This would certainly allow for the greatest amount of flexibility.

2 *International Chamber of Commerce (ICC)*

The ICC Rules of Optional Conciliation are similar to the UNCITRAL Rules but are even more brief. They contain no suggested model clause, but the parties could presumably formulate their own to include in a contract.

The Preamble to the Rules states that "Settlement is a desirable solution for business disputes of an international character". Article 1 states that international business disputes may be submitted to conciliation by a sole conciliator appointed by the ICC. The party seeking conciliation must make an application to the Secretariat of the Court of the ICC stating the reason for the request- Article 2. Under Article 3, conciliation will only proceed if all the parties have agreed to it.

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[104] This is in stark contrast to the International Chamber of Commerce, which will be discussed in the next section.

Article 5 contains the duties of the conciliator. These are to conduct the conciliation by "the principles of impartiality, equity and justice". The conciliator may also fix the place for conciliation and the parties may be assisted by counsel. Article 6 states that the proceedings must be confidential.

The conciliation shall come to an end either by the parties signing a binding agreement, the conciliator reporting that the conciliation has not been successful, or by either party withdrawing- Article 7. Under Article 8, the conciliator must inform the Secretariat of the Court of the ICC of the results of the conciliation. Article 10 prohibits the conciliator from acting for either party or being called as a witness in any subsequent judicial proceedings. Article 11 prevents either of the parties from disclosing any information revealed during the conciliation in any subsequent judicial proceedings.

The ICC Rules are fairly similar to the UNCITRAL Rules but with two major differences. The first one is that once the Rules are adopted, they are binding on the parties. They must also be adopted as a whole and cannot be excluded or varied. This provides more certainty and greatly eliminates the possibility of coercion of the weaker party. However, the Rules are so brief anyway that many gaps would have to be filled in by the parties. Fortunately, this is likely to take place in the presence of the conciliator, who can try and equalise any power imbalances between them.

The second difference concerns the role of the ICC. In the UNCITRAL Rules, UNCITRAL itself plays little or no role in the actual conciliation. The position of the ICC is somewhat different. Once parties have chosen to adopt the ICC Rules, the ICC takes on a fairly controlling, interventionist role. Not only does it appoint the conciliator, but it gives him or her the right to effectively take control of the conciliation. The ICC also oversees the whole mediation, requiring reports of conciliation agreements and breakdowns.

The advantage of having a strong body like the ICC backing its own Rules is that help and guidance will be available to parties unsure about what they are doing. By taking control over the process of conciliation away from the parties, the Rules allow them to concentrate on the substantive issues. On the other hand, control over the process has long been an important feature of mediation and conciliation and the ICC rules should not take this away altogether.

Unfortunately, statistics show that the ICC Rules are woefully under-utilised. In the period 1985-1990, the ICC received 2 380 requests for arbitration and only 35 for mediation and conciliation. Only three of these were actually conciliated in the end, with the rest going to arbitration.[105] These figures may be an indication that people are not using the Rules because of a perceived uncertainty and vagueness in them. This could be fixed by making the Rules more detailed, but giving the parties the option of contracting out of certain provisions, similar to the UNCITRAL Rules. However, the main reason why the Rules are probably not used very much is simply that most people have not heard of them. This is no doubt due in part to the entrenched nature of international arbitration.

It is submitted that the best mediation procedure for international commercial parties would be a mixture of the UNCITRAL and ICC rules. Overall, the UNCITRAL Rules are preferable. They are more detailed, thereby providing certainty, but also allow for flexibility by the ability to vary or exclude any of them. The major advantage of the ICC Rules is the backing of the ICC. The ICC could be of great help to parties unsure about conciliation procedures, without taking too much control away from them. The ideal solution would be for the parties to use the UNCITRAL Rules, but appoint an international body to oversee the whole process and assist them where necessary. Of course, experienced parties may not need such guidance but could operate quite successfully under the UNCITRAL Rules or some variation of them.

3 International Centre for the Settlement of Investment Disputes (ICSID)

Article 1 of the Convention on the Settlement of Disputes Between States and Nationals of Other States[106] established ICSID under the auspices of the World Bank. Its purpose was to provide facilities for the arbitration and conciliation of investment disputes between Contracting States and Nationals of other Contracting States. The Articles of the Convention contain procedures for both conciliation and arbitration.

Conciliation procedures are dealt with in Articles 28-35 of the Convention. Under Article 28, any party wishing to institute conciliation proceedings must send a request to the Secretary-General of ICSID, who will pass the request on to the other party. Article 29 establishes the Conciliation Commission. Conciliators shall be appointed by agreement of

105 Tyrril, above n 9, 353.
106 (1966) 575 UNTS 159.

the parties. The conciliators will usually be appointed from a panel of conciliators established under Article 3 of the Convention but may be appointed from elsewhere in certain circumstances.

Article 32 states that the Conciliation Commission is to be the judge of its own competence. Article 33 allows the parties to vary any of the Conciliation Rules and states that any matter which arises that is not covered by the Rules is to be decided by the Commission.

Article 34 contains the duties of the Commission. The main one is to "clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms". To this end, the Commission may make recommendations to the parties for the resolution of the dispute. The conciliation will end with the parties reaching agreement, withdrawing, or the Commission terminating proceedings.

The ICSID Conciliation Rules are brief and to the point. They are less interventionist than the ICC Rules, leaving the parties to appoint their own conciliators, but still oversee the whole process and require reports as to its failure or success.

The main advantage of using the ICSID Conciliation Rules is that they de-politicise international law. As the Convention applies to investment disputes between Contracting States and Nationals of other Contracting States, it allows individuals to directly bring claims against States. It is one of the few areas where an individual can operate on the same level as a State. This vastly simplifies matters for the individual, who can bring an action of their own accord rather than having to go through their own State. It also recognises that States are playing an increasing role in international trade and commerce.

Using ICSID is relatively quick, inexpensive and confidential. However, it is also under-utilised. Reif reports that by 1990, only two conciliations had been refered to ICSID. Only one was actually settled at a conciliation meeting, with the other being settled beforehand.[107] The reasons for this are not clear. It may be that States are reluctant to participate in mediation because they do not want to be dealt with on the same level as individuals. In participating, States will have to waive many of their sovereign rights, such as sovereign immunity. It may also be that the Convention itself is not widely known or adhered to. Reif believes that this is because most parties fail to include conciliation clauses

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107 Reif, above n 3 606.

in their contracts because they believe that conciliation is a waste of time and money since it is non-binding.[108] These concerns have already been addressed elsewhere in this paper.

4 Other Organisations

There are many other organisations which are concerned with international commercial mediation. The Centre for Dispute Resolution in England and IDR Europe Limited not only mediate, but also run training courses for mediators all around Europe. CDR Associates in Boulder, Colorado is possibly the world leader in international cross-border and cross-cultural mediation.[109] In Australasia we have the Australian Commercial Disputes Centre and LEADR- Lawyers Engaged in Alternative Dispute Resolution, which has recently opened a New Zealand chapter. Although both these organisations are concentrating on domestic mediations for the moment, they could also deal with international ones if and when they arose.

Dispute resolution under GATT also provides for mediation and conciliation. The Uruguay Round Provisional Decision expanded the use of good offices, conciliation and mediation for disputing parties and provided detailed rules for their use. The first step when a dispute arises between GATT Member States is consultation, followed by good offices and conciliation.[110] There is also a panel-Council to which disputes can be referred which has conciliation-like features.

Dispute resolution under the North American Free Trade Agreement (NAFTA) also raises the possibility of international commercial mediation. NAFTA creates a free-trade zone between Canada, the USA and Mexico.[111] Its aim is to progressively eliminate tariffs and non-tariff barriers between these three nations. Due to the problems associated with international trade, especially with nations like Mexico where businesses are subject to heavy State control,[112] NAFTA recognised the importance of putting effective dispute resolution procedures into place. Article 2022 of NAFTA states:

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108 Reif, above n 3, 607.
109 Tompkins, above n 8, 259.
110 Reif, above n 3, 590.
111 NAFTA obtained Congressional approval on 20 November 1993. JI Miller "Prospects for Satisfactory Dispute Resolution of Private Commercial Dsiputes Under the North American Free Trade Agreement" (1993) 21 Pepperdine Law Review 1313, 1314.
112 Which could raise sovereign immunity problems.

> 1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
> 2. To this end, each Party shall provide appropriate procedures to ensure the observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.

Although it appears from the above that arbitration will be the principle means of resolving disputes under NAFTA, the option of using other forms of ADR such as mediation and conciliation is also available. Unlike arbitration, where the consent of the parties to arbitrate in the event of a dispute is usually indicated by the existence of a contractual arbitration clause, parties must consent to mediation or conciliation, even if a contractual clause exists.

Mediation and conciliation are useful in situations where the parties feel that they would rather settle for some sort of compromise rather than risk losing everything in an all-or-nothing court case or arbitration. This is especially true in situations where the parties have a great deal at stake, such as important international business deals.[113] Internationally, parties may need to negotiate and compromise in such areas as the establishment of joint-venture agreements. Litigation or arbitration in the event of a dispute could ruin the parties' relationship even before the agreement was concluded.

Unfortunately, it seems that mediation and conciliation under NAFTA will face the same problems as they do in other international contexts: people will look upon them as being unenforceable, and will therefore shy away from them.

VI INTERNATIONAL COMMERCIAL MEDIATION COMPARED WITH INTERNATIONAL ARBITRATION AND LITIGATION

This section will draw comparisons between international commercial mediation and international arbitration and litigation. It will outline the main features of these latter two processes and discuss the advantages and disadvantages of each as compared with international commercial mediation. It must be kept in mind that all the processes are quite different, so at times comparisons may be made in a general way.

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[113] Miller, above n 111, 1359.

A International Arbitration

International arbitration is far and away the most popular way of solving international commercial disputes. It originally developed as an alternative to litigation and has many advantages over it such as privacy and confidentiality, speed, cost, and party autonomy.

Despite its differences, international arbitration also shares many features with international litigation. For example, arbitration is usually run along similar lines to a court case. However, it is completely governed by private agreement between the parties, not law.

International arbitration also shares many features with international commercial mediation. In fact, there are only two major differences between mediation and arbitration. The first one concerns the role of the third-party. In an international arbitration, the role of the arbitrator is similar to that of a judge in judicial proceedings. His or her task is to determine the law and apply it to the facts, issuing a binding decision which will be legally enforceable. The main advantage that the parties have in an arbitration is that they can choose their arbitrator. He or she will usually be someone with a good knowledge of the law in that area or an expert in the field. This makes arbitration popular in technical or specialist areas. Arbitration is also private and relatively inexpensive as compared with litigation.

In a mediation, the mediator's task is not to consider the law and render a binding decision, but to help the parties come to a decision themselves. The mediator's role is to facilitate negotiations, not to judge. If the mediation breaks down, the mediator will not be able to make a decision for the parties unless med/arb is being used.

The second difference concerns the enforceability of agreements reached. Arbitral awards are usually enforceable by the domestic laws of states.[114] At international law, there is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Many people do not realise that mediation agreements are in fact enforceable by contract.

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[114] For example, New Zealand has the Arbitration Act of 1908.

Both mediation and arbitration are governed by a private agreement between the parties. If the parties have agreed to arbitrate, they will normally be bound by this agreement. However, if parties have agreed to mediate, they will normally be free to withdraw whenever they wish to.

Arbitration is often referred to as being 'quasi-juducial' and as such, it is fairly institutionalised as compared with mediation. There are many rules and guidelines as to its use, such as the UNCITRAL Model Law, which has already been adopted by many states. This institutionalisation provides an element of certainty in international arbitration which is lacking in international mediation. Since arbitration is so widely used, it is not surprising that many of its features have become fairly concrete. This would no doubt also occur with international mediation if it increases in popularity.

Despite their similarities, the fundamental difference between arbitration and mediation must be kept in mind. In mediation, flexibility of both substance and procedure is the key. The parties can tailor the dispute to suit their underlying needs. Arbitration, on the other hand, is generally only procedurally flexible e.g. the parties choosing their arbitrator and the venue for the arbitration. Substance-wise, arbitration is run in a similar way to litigation. Arbitration does not usually explore the relational issues between the parties, which are often at the heart of any dispute.

Arbitration and mediation will normally appeal to very different types of parties. Arbitration is useful in situations where the parties desire speed, efficiency and privacy, but do not want to get too involved in the dispute themselves. They can send their lawyers along to the arbitration instead of going themselves if they so desire. Mediation is only useful where the parties are willing to put a great deal of time and effort into working out a solution themselves. Some international business people may feel that they do not have the time or resources to attend a mediation , while others may have so much at stake that they want to participate in order to obtain the most favourable result possible. Whether arbitration or mediation is used in a particular case will depend on the individual circumstances and the attitudes and expectations of the parties.

B International Litigation

While international commercial mediation may be similar to international arbitration, it shares fewer features with international litigation. This section will discuss a few features

of international litigation and compare them to international commercial mediation. The UNCITRAL Conciliation Rules and the ICC Rules of Optional Conciliation will be used as points of reference.

1 Initiating proceedings- Service out of jurisdiction

In New Zealand, service out of jurisdiction is dealt with under High Court Rules 219-227. Service out of jurisdiction should be approached carefully, as it disturbs the comity of nations by making a foreign defendant appear before our courts: Diplock LJ in *Mackendar* v *Feldia AG*[115] and *Amin Rasheed Shipping Co* v *Kuwait Insurance Co.*[116]

Service out of jurisdiction of a statement of claim, counterclaim, notice of proceeding or third party notice is permitted without leave in the cases specified under r 219. These include where there has been any breach of any contract in New Zealand, where relief is sought against a person ordinarily domiciled in New Zealand, or where the act or omission in respect of which damages is sought occurred in New Zealand. In other cases, leave to serve proceedings out of New Zealand must be obtained from the High Court under r 220. In deciding whether to grant leave, the Court must consider various factors such as the value of the property in dispute, whether the court in the place of residence of the person being served has jurisdiction to hear the case, and the comparative cost and convenience.

Under r 213, service of foreign process in New Zealand must be in the form of a Letter of Request transmitted through the Secretary of Justice to the Registrar of the Court nearest to the place where the person being served resides.

Service out of jurisdiction can be a complicated process. It must me made in the proper form and through the appropriate official channels. Service without leave can only be made in the situations provided for in r 219. Although this list is fairly wide, it is not inconceivable that disputes could arise that would not fall within it. In these cases, leave to serve must be obtained from the High Court, necessitating a hearing which would result in more cost amd delay.

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115 [1996] 3 All ER 847, 850.
116 [1984] AC 50.

Initiating mediation is a much more straightforward process. Under Article 2 of the UNCITRAL Rules, the party seeking mediation need only send a written invitation to the other party inviting them to conciliate under the Rules. If the other party accepts, conciliation can begin. Conciliation under the ICC Rules begins with the requesting party making an application for conciliation to the Secretariat of the Court of the ICC, stating the purpose of their request: Article 2. Under Article 3, the Secretariat of the Court shall inform the other party of the request. This party has 15 days to accept or decline the invitation. Silence will be construed as rejection.

The methods of initiating proceedings under litigation and mediation are very different. Each is designed to serve its own unique purpose. On a purely objective basis, service in mediation is undoubtedly faster, cheaper and simpler. However, if ones dispute falls within the list specified in r 219, service out of jurisdiction can also be fairly easy. Litigation and mediation are very different processes and are designed to deal with different types of situations. Although ease of service will probably be a factor in deciding which one to use, it is unlikely to be of very great importance. In those cases where mediation commences after proceedings have been filed, it will not be possible to avoid service out of jurisdiction anyway, as this will already have taken place.

2 *Forum non conveniens*

The doctrine of forum non conveniens allows a court to dismiss an action if it lacks jurisdiction to hear it. It has developed into a protective measure for defendants, protecting them against plaintiffs who file suits in jurisdictions that are greatly disadvantageous to, or place enormous burdens upon them.[117]

In New Zealand, the test for forum non conveniens is whether "the interests of justice are best served by litigating in New Zealand or elsewhere".[118] The issue will arise either where there is an application for leave to serve proceedings outside New Zealand under r 220 or where the person being served contests jurisdiction under r 131.[119] In applying the doctrine, courts will consider a wide variety of factors, many of which were enunciated in

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[117] For example, a plaintiff may issue proceedings in a jurisdiction which could award treble damages against the defendant in case of success

[118] *McGechan on Procedure* (Brooker & Friend, Wellington, loose-leaf service) 3-248b.

[119] For example, see *Kuwait Asia Bank* v *National Mutual Life Nominees Ltd* [1990] 3 WLR 297.

Spiliada Maritme Corp v *Cansulex Limited.*[120] These include whether another court would provide more effective relief, or whether the defendant would be greatly disadvantaged by having to appear before New Zealand courts. The burden of proof will usually be on the defendant in requesting a stay of proceedings.

Unfortunately, in the USA at any rate, forum non conveniens is increasingly being used as a political tool.[121] Courts are dismissing cases on the grounds of forum non conveniens simply because they are too busy and do not want to take on more work and thus appear inefficient. Conversely, not-so-busy courts may accept cases even if on the application of a forum non conveniens analysis another jurisdiction may appear more appropriate. Forum non conveniens should not be exploited in this way. The danger lies in the parties' interests being subsumed by some greater political agenda.

In mediation, the issue of forum non conveniens does not arise. Since there are no jurisdictional issues involved, parties can choose where they want their mediation to take place. In an international mediation, a third, neutral country will usually be chosen. Other possibilities include the place where the contract between the parties was concluded, or the principal place of performance. Since a venue will rarely be chosen without the consent of all the parties, they are unlikely to protest. Mediation also has the advantage of focusing totally on the parties' interests. Since forum non conveniens will rarely arise, the parties interests have no chance of being hijacked by political considerations. The privacy of mediation also keeps it out of the public eye, and consequently, the political arena.

3 Choice of law

To a certain extent, it is impossible to avoid choice of law rules in an international mediation as the parties will need to choose a law to govern their contract. Choice of law in the law of contract is usually based on the choice of the parties. The courts will generally uphold whatever law the parties choose.

Apart from this, choice of law questions can also arise when the parties wish to know what law would be applicable to them in case the mediation fails. To determine this law, the process of characterisation must be employed. Characterisation involves determining the

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120 [1987] AC 460; [1986] 3 All ER 843.

121 R Turner *Forum Non Conveniens in the USA* LLB(Hons) Seminar Paper, International Litigation, Victoria University of Wellington, 24 July 1995.

subject-matter of the dispute and the relevant connecting factor. For example, according to choice of law rules, if the subject-matter of the dispute is some immovable property, the connecting factor is where the property is situated. The applicable law to the dispute will therefore be the law of the place where the property is situated.

Although the parties in international commercial mediations will be aware of the law, the actual mediation can completely by-pass legal issues altogether if the parties so choose. Mediation is not primarily concerned with applying the law, but with solving the parties' problems however possible. In an international mediation, these problems will often be based on relational and cultural factors. A strict application of the law may only serve to drive the parties further apart. Legal issues often only arise in a mediation when one of the parties wish to use them as a bargaining tool. Of course, there is nothing to prevent parties from raising legal issues at a mediation if they so desire.

4 The difference between substance and procedure

In international litigation, procedural issues are conducted according to the lex fori. The substantive law to be applied is determined by choice of law rules and characterisation. This can be fairly complicated depending on the types of issues in dispute. For example, if a foreign law is determined to be the substantive one, issues of proof of foreign law arise. In New Zealand, foreign law will usually be proved by having an 'expert' in the foreign law, such as a practitioner or academic, testify. This can increase the cost and time for the trial.

In some cases there can be confusion as to the difference between substance and procedure.[122] It can be unclear whether a certain issue is one of substance or of procedure, and therefore by which law it should be governed. Even if a foreign law is determined to be the applicable substantive law to the dispute, care must be taken to ensure that only the substantive parts of that law are applied, and not the procedural.

In mediation, the difference between substance and procedure is clear. The mediator's role is theoretically purely procedural. He or she should only control and guide the dispute. If all the parties have adequately prepared for the mediation, they should be capable of

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[122] R McLeod *Private International Law and the distinction between Substance and Procedure* LLM Seminar Paper, International Litigation, Victoria University of Wellington, 22 May 1995.

discussing the substantive issues themselves. The mediator should avoid taking part in the discussion of substantive issues wherever possible. Not only would such involvement compromise their impartiality, but they would also lose their ability to view the dispute objectively. The easiest way to avoid this situation would be by appointing a mediator who did not have enough knowledge of the substantive issues of the dispute to be able to become involved. This would also avoid the likelihood of bias.

5 Evidence collection

New Zealand has several different regimes for international evidence collection. Different regimes apply depending on whether or not the proceedings are civil or criminal and the jurisdictions involved.[123] Working out which regime is applicable in any given situation can be a bit of a minefield at times, especially due to the fact that certain exisitng regimes are in fact inoperable.[124]

No matter which regime is used, evidence collection abroad must be effected by the appointment of special examiners, letters of request or by mutual assistance through administrative organs. Each of these must proceed through the appropriate channels e.g. letters of request must be sent through diplomatic channels to the judicial authorities of the foreign country.

Section 46 of the Evidence Amendment Act (No 2) 1980 deals with the collection of evidence overseas generally. It enables the High Court or a Judge to order that a letter of request be issued overseas for the collection of evidence. This evidence appears to be limited to the examination of witnesses; it does not cover the production of documents.[125]

Apart from section 46, separate regimes apply to countries with which New Zealand has bilateral evidence collection conventions. These conventions mainly only apply to civil and commercial matters and are fairly old, so care must be taken before using them in ensuring that they are still applicable. There are also different regimes dealing with civil proceedings

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123 For an outline of the various regimes available, see R Best *Matters of Evidence in Transnational Litigation* LLM Seminar Paper, International Litigation, Victoria University of Wellington, 31 July 1995.

124 Best, above n 123, 6.

125 Though Best believes that by its inherent jurisdiction, the Court could order the production of documents. Above n 123, 7.

between New Zealand and Australia,[126] and competition law proceedings between New Zealand and Australia.[127]

There are no formal rules of evidence collection in international mediation. Therefore, there must be some trust and co-operation between the parties in order for them to disclose evidence. Usually, since parties who consent to mediation are somewhat committed to the process and are keen on arriving at a satisfactory resolution, they will reveal information which they might be hesitant in disclosing in a litigation. The requirement of confidentiality and the trust of the mediator are also important in encouraging this free flow of information. Ultimately though, it is up to the parties to reveal whatever information they choose to, although under both Article 10 of the UNCITRAL Rules and Article 5 of the ICC Rules the conciliator can request information from the parties. The mediator must also not disclose anything revealed to him or her in confidence.

Unfortunately, mediation is sometimes used not as a genuine method of problem-solving, but as a way of amassing information to be used in later litigation or arbitration. Almost all agreements to mediate contain confidentiality clauses, but these can only go so far. For example, if a piece of information is hinted at in a mediation but is not actually discussed, will it be protected by the confidentiality clause? Where to draw the line is unclear, but it is submitted that in order to prevent the mediation process from being abused, confidentiality should be maintained at all times. Otherwise mediation runs the risk becoming a way of getting around evidence collection laws; a mere discovery tool.

6 Enforcement of foreign judgments

In New Zealand, foreign judgments can be enforced at common law or under the Reciprocal Enforcement of Judgments Act 1934.[128] In practice, common law procedures are more likely to be used, as the Act only applies to the few countries specified in Regulations under the Act.

Under the Act, a foreign judgment can be registered in New Zealand and thereby enforced if:

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126 Evidence Amendment Act 1994.
127 Sections 56D-56S of the Judicature Act 1908.
128 R Anderson *Enforcement of Foreign Judgments in New Zealand* LLM Seminar, International Litigation, Victoria University of Wellington, 10 April 1995.

- It is final and conclusive.

- It is not in respect of a tax, fine or penalty.

- It was given after that country was specified under the Regulations as being a country to which the Act applied.

- It is capable of being enforced in the country in which it was given.

The procedure for registration is contained in High Court Rules 726-750.

Even if it is enforceable in New Zealand, the judgment may still be set aside if it was obtained by fraud, is contrary to public policy, or if the court which rendered the judgment did not have jurisdiction to do so.

Under common law, the judgment of a foreign country can be enforced in New Zealand if:[129]

- The foreign court had jurisdiction to give the judgment under New Zealand's conflict of law rules.

- The judgemnt is final and conclusive.

- The judgment is for a debt or a definite amount of money, unless it is for the payment of taxes, charges, fines or penalties.

Even if it fulfils the above criteria, the judgment may still be set aside if it was obtained by fraud, is contrary to public policy, or violates the principles of natural justice.[130]

As has been discussed, the usual way of enforcing mediation agreements is by drawing them up into contracts, which can then be legally enforced. There seems little to choose between judgments and mediation agreements in the way of enforcement. Enforcing a

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129 See *SHC* v *O'Brien* (1990) 3 PRNZ 1.
130 *Adams* v *Cape Industries plc* [1990] 2 WLR 657.

contract is not usually a complicated procedure, and a foreign judgment can also be enforced by ordinary proceedings, or by summary judgment. If summary judgment procedure is used, enforcement is quite likely to be a straightforward matter. Therefore as far as enforcement of decisions is concerned, both international commercial mediation and litigation provide possibilities which are both certain and effective.

7 Summary

This section has attempted to provide an outline of the various features of international litigation and shown how they would be treated in a mediation context. The level of complexity of an international litigation depends very much on the nature of the issues in dispute. For example, service out of jurisdiction under r 219 is relatively simple, while it can become complex if leave is required under r 220. Mediation, on the other hand, will almost always provide a simpler alternative to litigation. However, the ambiguity of mediation can sometimes lead to uncertainty. It is also susceptible to being usurped for various other purposes than the one for which it was originally intended.

In conclusion, it can only be said that international litigation and mediation provide different alternatives for different situations. Which one is more appropriate in any given situation will depend very much on what the parties hope to achieve, their need for certainty etc. There is a place for both processes within the dispute resolution field. Care must be taken to ensure that they are both used in good faith and for a genuine purpose.

VII A PROPOSED MODEL FOR INTERNATIONAL COMMERCIAL MEDIATION

Is international commercial mediation a feasible dispute resolution option for the future? If so, how would it work?

The major barrier standing in the way of international commercial mediation is the entrenched nature of international arbitration. Arbitration has long been the preferred method of solving disputes in private international law and is likely to remain so for quite some time. However, it is becoming more and more adversarial, and is thus no longer

fulfilling its role as a true alternative to litigation. International arbitration can also be very costly, something that smaller corporations may well not be able to afford.[131]

Another problem is enforcement, which has already been discussed. Essentially, there are two options. Either people must come to realise that mediation agreements can be enforced by contract, or the law will need to be changed so that it recognises conciliation and mediation agreements. Business people will also need to change their attitudes and realise the merits of mediation. Changing the law may be difficult, but changing people's attitudes will be infinitely more so. Tyrril states:[132]

> However, in the foreseeable future, the factors involved in international disputes, including cultural differences, the entrenched nature of international commercial arbitration and, particularly, the issue of enforceability, will likely result in arbitration remaining the international commercial dispute resolution method of choice for some time to come.

With respect, it is submitted that contrary to the above quotation, mediation is an ideal dispute resolution mechanism when there are cultural factors involved. Even where a neutral forum for litigation or arbitration is chosen, it is more than likely that cultural differences between the parties will not be explored. Instead, argument and discussion will be limited to the legal and technical issues involved. This is a grave mistake, as most international business disputes will involve a combination of legal and non-legal issues. Among the non-legal issues, cultural misunderstandings are likely to feature. Mediation is flexible enough to take account of both legal and non-legal issues,[133] thereby investigating cultural differences and hopefully clearing up some misunderstandings between the parties. In turn, this flexibility leads to more satisfactory and effective dispute resolution which can encourage the growth of international trade.[134]

Another important factor in mediation is the skill of the mediator. The mediator must be seen to be impartial, although this will have a greater importance in some cases than in others. The mediator must also thoroughly research the background of the case. Although some say that mediators should not have much knowledge of the substantive issues but should instead concentrate on process, it is submitted that the mediator will be able to

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131 Tyrril, above n 9, 355.
132 Above n 9, 383.
133 Bilder, above n 61, 473.
134 Hoellering, above n 93, 785.

operate more effectively with a sound knowledge of the issues at stake, as in reality, mediation is usually conducted in the shadow of arbitration or litigation. Mediators should have enough knowledge of the content of the dispute to be able to inform the parties of possible outcomes if the case ends up in court or arbitration. They should also have some knowledge of the technical matters involved and the general practice of the industry. These factors do not require that the mediator be a lawyer or an industry expert in any way. He or she must simply be prepared to put some time and effort into getting to know the case. Where there are cultural differences involved, the mediator must take even more time to thoroughly research the background of the case, in an effort to understand where the parties are coming from.

A mediator must also be able to control the mediation. Amongst all the people involved, the mediator is likely to be the only person with any previous experience of mediation. For most parties it will be a completely new and unusual process. They will look to the mediator for guidance. He or she must be able to predict how much guidance and help the parties need by observing them, listening carefully, and knowing about their background. If the parties appear to be in control, the mediator can effectively fade into the background, leaving the parties to negotiate for themselves and come up with their own solutions, intervening only if and when necessary. If the parties are hesitant, the mediator can adopt a more interventionist role by guiding the discussion, setting boundaries, and suggesting solutions. It is this flexibility which allows the creation of a range of solutions which would not be available in litigation or even possibly arbitration.

Mediation will not be suitable in every situation. It will usually be up to the parties' legal counsel to scrutinise each case to see whether it would be suitable for mediation. More and more clients are demanding that they be told of all the possible ways of resolving their disputes, and be advised as to the best option. Due to its high success rate, lawyers are also beginning to be more happy about recommending mediation. This allows them to serve their clients more effectively.

Cases where animosity between the parties is high or all the blame is on one side are usually not suitable for mediation, as this animosity may be further raised by a face-to-face encounter. If mediation is used in these situations at all, shuttle diplomacy should probably be used, at least until hostilities have been reduced. Mediation is concerned with equalling power disparities between the parties, therefore if one party is completely to blame, it will

be difficult to persuade the other party to take any responsibility for the dispute or make any concessions. Indeed, this party may feel re-victimised if it is asked to do so.

Even though mediation may not be suitable where blame is in issue, it can still be used in determining quantum of damages and any other sort of compensation or punishment. The possibilities are endless. For example, in victim/offender mediations, offenders sometimes agreed to do some work either for a charity or for the victim. In international commercial cases, resolutions are more likely to be the traditional ones of damages and specific performance. Mediation could however determine the amount of damages and the time and method of payment(s).

Mediation may also not be appropriate in situations where the parties seek a conclusive determination of their legal rights. Mediation is not first and foremost about rights, it is about coming up with a solution that is acceptable to the parties. Legal rights may not enter into the discussion at all. One exception is the construction industry, which has had mediation codes for a long time. Most mediation in the construction industry is rights-based, with the mediator giving the parties an assessment of their legal rights and possible outcomes if the case were to go to litigation or arbitration.[135] In all other situations, mediation is about looking at all the issues involved. If the only issue at stake is the existence of a legal right, adjudication will be a clearer way of determining that right.

Since international commercial mediation is such a new field, there must be adequate guidance and back-up in order for it to further develop. This is where the international organisations have a big role to play.[136] The rules promulgated by organisations such as UNCITRAL and the ICC provide clear guidelines for those engaging in mediation or conciliation for the first time. The backing of bodies like the ICC and ICSID provide a good pool of expertise in the way of mediators and advice. It is strongly recommended that any parties wishing to engage in international mediation or conciliation for the first time consult one of these bodies for assistance. They can not only provide rules, but expertise to help fill in any gaps.

In summary, the following steps are recommended for any international commercial mediation:

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135 Tyrril, above n 9, 373.

136 Tyrril believes that the international organisations are essential to the continuance of international commercial mediation. Above n 9, 362.

• Determine whether or not the case is suitable for mediation. This will normally be the job of the parties' legal counsel, but the parties themselves are also free to suggest mediation. Any determination will require a consideration of the factors discussed previously.[137]

• Choosing a mediator. This is probably best done by contacting one of the international organisations, or an organisation such as the Bar Association. Both the ICC and ICSID maintain panels of mediators and conciliators across all fields of industry which they can either appoint or recommend. The mediator must have sufficient technical and legal knowledge of the issues involved, and must also be prepared to explore the cultural and other differences between the parties. The mediator will also assist in drawing up the agreement to mediate.

• Choosing the time and place for mediation. There must be sufficient time allowed for the parties to exchange information and the mediator to investigate the facts and background to the case. Often, some pre-mediation mediation is required, while the parties decide what information should be disclosed. The venue for mediation can be chosen either by the parties or the mediator. It will often be a third, neutral country, but could also be the place where the contract was made, performed, or where the equipment is located etc.

• The actual mediation. Here, the mediator may have to adopt a very interventionist role or may not have very much to do at all. He or she must gauge how the mediation is progressing and determine when intervention is necessary. He or she must also determine when shuttle diplomacy could be of use. Above all, the mediator must remember his or her primary task of "facilitating negotiations". The one big advantage of mediating commercial disputes is that the parties are likely to have had some prior negotiating experience.

• Agreement, enforcement and follow-up. As has already been noted, the only way a mediation can be enforced is by drawing it up into a contract. A few jurisdictions have begun to recognise conciliation agreements, but these are few and usually only apply to agreements that are part of an arbitration, such as in the civil law system. Experience has shown that enforcement is usually not a major problem. Where it is, follow-up procedures should be available to monitor each parties' implementation of and adherence to, the agreement. Unfortunately, follow-up procedures in mediation are usually poor, with

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[137] See above n 82-86 and accompanying text.

mediators and mediation services having little time and resources to monitor the after-effects of a mediation agreement. None of the international organisations provide for follow-up in their rules. Perhaps they recognise that they would not be able to effectively administer any such monitoring. It is submitted, however, that monitoring procedures should be considered by the parties in any mediation agreement they come to. Ideally, they could enlist the assistance of an international body to do this. This may become possible if international commercial mediation gains popularity.

VIII CONCLUSION

International commercial mediation is a new and emerging field. It faces stiff competition from both litigation and arbitration. As it is so new, it is still searching for its own identity and place among the myriad of dispute resolution procedures available today. Any close study of it involves construing and analysing a host of features from related types of dispute resolution such as public international mediation and commercial mediation.

International commercial mediation has not yet been put to the test. It has been used in a few cases with some measure of success. This leads one to believe that it may be a feasible option for dispute resolution in the future. It appears to have worked particularly well in situations where there were cultural differences to be taken into account. It also seems a logical extension of the negotiations business people carry out every day. Most commercial disputes are eventually settled anyway, so why not settle them quickly and effectively with mediation? Naturally, not all cases will be suitable for mediation, but many will be. After all, as Kissinger well concluded, all disputes come down to individuals, and their relationships with each other.

This paper has attempted to discuss the feasibility of international commercial mediation. There has been very little research done in the area, so I have tried to evaluate what there was, compare it to existing forms of mediation and relate it back to first principles. As there is little 'precedent' in the area, my predictions have been based on available facts and trends surveyed in other fields of mediation. I have also made some recommendations for change which I believe will be necessary in order for international commercial mediation to operate effectively in the future.

International commercial mediation has barely got off the ground. It may not even fly. However, the possibilities are endless. The attempt is all.

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