Article

Mediation Stories

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1 My First Mediation Case in New York

In 1994, a French client[1] I had been advising for about 20 years was entangled in a commercial dispute with a US customer, which was then pending before the US District Court for the Eastern District of Pennsylvania. My client was the leading French exporter of milk powder and one of the largest exporters of milk powder worldwide.

The dispute was about the conformity to specifications of the goods sold by its US subsidiary to this customer, but apart from quality issues, there were also side issues about some missing quantities, the liability of maritime and land carriers due to cargo handling and storage conditions, the cost of replacement goods, consequential damages and punitive damages. The United Nations Convention on Contracts for the International Sale of Goods would not apply to this case as the plaintiff and the defendant were established in the same country.

Being admitted as an attorney in New York, I knew too well the tremendous cost of litigating in the United States and the uncertainty of outcomes. A Pennsylvania litigation counsel was retained, who confirmed that the likely outcome of the case for our client was bleak. Besides, insurers were involved which made it even more complicated.

I persuaded the chairman of the board of my client, who had trust in my advice as a result of many solved or settled cases over the years in many foreign jurisdictions, that mediation was worth trying and I then proceeded to secure the cooperation of the US Counsel to the US subsidiary.

Then a potential mediator had to be selected, which unexpectedly was easy, because both litigants trusted an Irish businessman whom they had used as a business broker.

The interesting feature in this mediation was that the mediator was not technically independent, but this was not a problem as the fact that he brokered sales or purchases of milk powder for each side was known and accepted by both litigants.

Opposing counsel and I decided to use a particular set of mediation rules (the then current ICC Conciliation Rules) but without making any actual reference to the ICC secretariat to save costs, so this was in effect an ad hoc mediation.

A letter was drafted, which the US lawyers jointly signed and sent to the mediator, asking him to agree to mediate the dispute on the terms stated in that letter, and to confirm his agreement to do so by returning to all parties a copy of the letter signed by him.

The Irishman had no previous experience as a mediator, but the letter he received contained detailed procedural guidelines and since he had a fast learning curve, his lack of experience did not create any problem.

The proceedings in the US District Court in Pennsylvania were stayed, and the mediation meeting took place in December 1994 in New York.

It lasted for one and a half days and resulted in a written and signed settlement agreement which broke a serious deadlock and saved my client a lot of pain, aggravation and fees.

The mediator played rightly on the common interest of the parties to preserve their commercial relationship and convinced my client to see the cost of an out of court settlement as an investment towards future business with the plaintiff. He also pointed out to the plaintiff

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1. Clients' names are confidential.

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that my client was a reliable supplier which they had no good reason to blacklist.
My client was pleased with the outcome and continued instructing me for several more years until it was eventually taken over by a larger French agribusiness group.

2 My Second Mediation Case in New York

In 2005, a French company which I was advising as to its international contracts had developed innovative medical devices for haematology.
It had its registered office in Montpellier, and had entered first into a non-disclosure agreement and later into a research and development agreement with a large US corporation, with its registered office in Florida.
Both NDA and R&D agreements provided for disputes to be adjudicated by arbitration in Miami by a sole arbitrator under the commercial arbitration rules of the American Arbitration Association (AAA). There was no provision for a mediation attempt before resorting to arbitration, but interim relief could be sought in any court having jurisdiction.
I had not been consulted with respect to the wording of the arbitration clause but I knew the AAA commercial arbitration rules were not designed to resolve an international dispute, in contrast to the AAA international arbitration rules, and I felt a local sole arbitrator would be less impartial than a three-member arbitral panel, of which we could have selected one member.
In 2008, my client initiated court proceedings in the Commercial Court of Montpellier against its counterparty for interim relief, due to several violations of the R&D agreement. As a tit for tat, the US corporation terminated negotiations for a manufacturing agreement with my client, and initiated an action before the US District Court for the Southern District of Florida, in Miami, to have that court order the parties to go to arbitration in Miami.
By that time, my firm had signed up to a pledge of law firms in favour of mediation, and I could therefore, without appearing to be dubious about our chances of prevailing, invoke that pledge and suggest to the lawyers of the US corporation a mutual release from the two pending court actions, and the concurrent signing of an agreement providing for mediation in New York under the ICDR-AAA Mediation Rules, and, if the attempt was unsuccessful, arbitration in Miami before a three-member arbitral panel pursuant to the AAA international arbitration rules.
This med-arb suggestion was accepted, as it provided benefits for both sides and only minor concessions. To the US corporation, it guaranteed that ultimately the arbitration clause would be applied with the seat of the arbitration in its state. It only conceded the replacement of the AAA commercial arbitration rules by the AAA international arbitration rules, and the replacement of a sole arbitrator by a three-member arbitral panel. Accepting a prior mediation attempt administered by the same institution was not committing it to accepting any settlement, and this way, it was getting rid of annoying interim relief proceedings in a foreign jurisdiction. To my client, it was providing a mediation attempt outside the state of the opponent, better suited arbitration terms if the mediation attempt was unsuccessful, and getting rid of the cost of defending the court action in Miami.
The mutual releases were accordingly filed in October 2008 and the mediation proceeding concurrently commenced. The International Center for Dispute Resolution, which is the international arm of the AAA, sent the profiles of five potential mediators and among them, Edna Sussman was the first choice of both sides. She sent the parties a draft agreement to mediate, which provided *inter alia* that 'The mediator will be meeting privately in caucus with the parties separately …' and that 'The mediator may suggest ways to resolve the dispute …'.
The mediation session was held before her in November 2008 in New York. The hearing lasted one and a half day. The mediator left no stone unturned and in private caucus explained to my client the strengths and weaknesses of its contentions, paving the way to the acceptance of the resolution of the dispute she would suggest. The session ended with a settlement agreement being signed, which closed the dispute. My client got part of the damages it was claiming. This outcome spared my client the cost of a court litigation and of arbitration proceedings in the United States, which would have bled it for years.
As Ms Sussman is accredited as a mediator by the International Mediation Institute (IMI), she sent afterwards to the counsels of both parties the IMI feedback request form, which I completed and returned to her. To the question 'Which particular Mediator's skill made a decisive difference in the outcome?', I replied 'Empathy'. Indeed, she empathised with the parties and thus gained their trust.

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