Mediation as an Option for International Commercial Disputes

Uluslararası Ticari Uyuşmazlıklar İçin Bir Seçenek Olarak Arabuluculuk

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Abstract:

Over the last decade the approach taken by commercial parties towards dispute resolution has changed. While traditional forms of dispute resolution (i.e. litigation and arbitration) remain popular, commercial parties are increasingly looking to alternative forms of dispute resolution to find methods which better suit their commercial needs and deliver efficient and effective results. Mediation often provides the answer. Mediation allows the parties to keep control of a dispute and to aim at a commercial solution rather than legal remedies. It can turn a dispute from a business threat into a business opportunity. Therefore, mediation is a first option – arbitration and litigation are alternatives. In this paper, in addition to explaining the characteristics of mediation and how the process works, the advantages and disadvantages of mediation is explained, and suggestions how to promote mediation in commercial disputes are discussed.

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This paper was presented at the American Society of Comparative Law Younger Comparatives Global Conference held on 18-19 March 2016 at Tulane Universty Law School in New Orleans, Luisiana.

Key Words: Mediation, Commercial Disputes, Alternative Forms of Dispute Resolution, Charachteristics of Mediaion, Enforcement of Settlement Agreements.

Özet

Ticari sözleşmelerin taraflarının uyuşmazlık çözümü konusundaki yaklaşımlarının özellikle son yıllarda değiştiği görülmektedir. Ticari uyuşmazlıkların çözümü konusunda mahkeme yargılaması ve milletlerarası tahkim tercih edilmekle beraber, taraflar ticari menfaatlerine daha iyi hizmet edecek etkili çözüm yolları arayışlarına girmişlerdir. Ticari uyuşmazlıkların çözümü konusunda arabuluculuk çok avantajlı bir uyuşmazlık çözüm yolu olarak karşımıza çıkmaktadır. Arabuluculuk, taraflara hukuki bir çözümden ziyade ticari bir çözüm olanağı getirmekte ve ticari bir riski ticari bir fırsata dönüştürebilme imkânı sağlamaktadır. Arabuluculukta kararı veren tarafların bizzat kendileri olmaktadır. Taraflar karşı karşıya değil bir araya gelmektedir, çünkü arabuluculukta amaç tarafların kazan-kazan çözümler üretmesi için bir ortam sağlamaktır. Bu nedenlerle, arabuluculuk ilk aşamada başvurulması gereken bir uyuşmazlık çözüm yolu olarak göz önünde bulundurulmalıdır. Bu çalışmada, arabuluculuğun özellikleri ve sürecin işleyişi hakkında bilgi verildikten sonra arabuluculuğun avantajları ve dezavantajlarına değinilecek, son bölümde ise ticari uyuşmazlıklarda arabuluculuğun nasıl daha etkin hale getirilebileceği konusundaki önerilere yer verilecektir.

Anahtar Kelimeler: Arabuluculuk, Ticari Uyuşmazlıklar, Alternatif Uyuşmazlık Çözüm Yolları, Arabuluculuğun Özellikleri, Sulh Sözleşmelerinin Icra Edilebilirliği.

I. Introduction

Over the last decade the approach taken by commercial parties towards dispute resolution has changed. While traditional forms of dispute resolution (i.e. litigation and arbitration) remain popular, commercial parties are increasingly looking to alternative forms of dispute resolu-

tion ("ADR") to find methods which better suit their commercial needs and deliver efficient and effective results. Mediation often provides the answer.

Mediation is an ADR mechanism in which a third party assists conflicting parties in order to reach an amicable settlement of their disputes arising out of or relating to a contractual or other legal relationship. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine rather than accepting something imposed by a third party[1]. The mediator does not have the authority to impose upon the parties a solution to the dispute.

In this paper, in addition to explaining the characteristics of mediation and how the process works, the advantages and disadvantages of mediation is explained, and suggestions how to promote mediation in commercial disputes are discussed.

A. Characteristics of Mediation

Mediation is a voluntary process whereby a neutral third party facilitates negotiations between the parties to a dispute to help them find a consensual outcome. The mediator is actively involved but generally has no power to adjudicate or say who is right and who is wrong[2]. Importantly, in mediation the parties retain ultimate control over the decision of whether to settle and on what terms[3].

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1 For definition of mediation please see Wells Jr, Southern Illinois University Law Journal (2003), p. 652.; John G Bruhn & Howard M Rebach, Handbook of Clinical Sociology, (Springer Science & Business Media. 2012). Moffitt&Schneider, Dispute Resolution: Examples & Explanations. 2011., p.83, see also Reismann, International Commercial Arbitration: Cases, Materials, and Notes On The Resolution of International Business Disputes, 1997., p.74.

2 Ivan Bernier & Nathalie Latulippe, Conciliation as a Dispute Resolution Method in the Cultural Sector, The International Convention on The Protection and Promotion of The Diversity of Cultural Expressions, p.4.

3 Thomas D. Cavenagh & Lucille M. Ponte, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 93.

Since the participation of the parties and the mediator is voluntary, the parties and/or the mediator have the freedom to leave the process at any time. The mediator may decide to stop the process for ethical or other reasons, and the parties may decide that they are not satisfied with the process. The agreement, which is reached between the parties, is voluntary; the parties own it and are responsible for implementing it. Unlike arbitrators and judges, mediators do not bear binding decision authority[4].

B. Advantages of Mediation

Mediation has a special advantage when the parties have ongoing relations that must continue after the dispute is managed, since the agreement is by consent and none of the parties should have reason to feel they are the losers[5]. Mediation provides an opportunity for conflicting parties to maintain their current relationship by resolving dispute by a win-win solution and accordingly establish strong long-term business relationship. Mediation is increasingly adopted during long term contracts, particularly in international infrastructure and construction contracts, where nominated mediators are brought in at short notice to help the parties move round problems which would otherwise delay or destabilize the project. As this indicates, mediation can be particularly useful where the parties wish to continue a business relationship which could be damaged by aggressive court or arbitral proceedings. Consequently, mediation may be appropriate when there is potential for preserving an ongoing relationship.

Apart from the advantage mentioned above, the flexibility can be count as another advantage of mediation. Parties of a dispute are entitled to determine process of the mediation in accordance with interest and needs of each party. This may involve the choice over location of the me-

[4] Cavenagh & Ponte, p. 93; Bruhn & Rebach, p.199; Meadow, International Encyclopedia of the Social and Behavioral Sciences, Elsevier Ltd (2015)., p.3; Runesson & Guy, Mediating Corporate Governance Conflicts and Disputes, 2007., p.25.

[5] Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, No.7, p.30

diation, the time frame, the people who are to be involved, the selection of acceptable objective criteria, and many other choices related to the process[6].

Mediation is less costly when compared adjudicative ADR methods. Mediation can normally be completed in multiple conferences between conflicting parties. Furthermore, mediation is not a formal evidentiary process requiring extensive use of expert witnesses or demonstrative proof. As a result, the costs associated with the use of expert witnesses, trial counsel and case preparation are substantially reduced or even eliminated[7].

Another charming feature of mediation is the speed of the proceedings of which parties can resolve their dispute faster than adjudicative methods. There are various reasons of this circumstance; first, mediators are present to manage negotiation, not to represent a party or render a legal decision, they need not prepare extensively to conduct the conference[8]. Second, the vast majority of countries face a spectacular problem of overcrowded court dockets which cause considerable delay in trials.

One advantage of mediation in the international commercial context is that the parties have an opportunity to develop a creative outcome. Mediation process offers wide range of settlement options which is limited only by the imagination of the parties and the mediator. Although certain forms of injunctive relief are possible through litigation, most judges and juries think of the resolution of a civil case in dollar terms. Conversely, mediation allows parties to consider a far wider range of remedies. Long-term structured payment schedules and annuities allow parties to treat economic outcomes more creatively[9]. Since agreement is made by consent, parties are generally free to create value with their settlement for example, by developing new business relationships that were not originally contemplated[10].

[6] Shamir, p.30.

[7] Cavenagh & Ponte, p. 94.

[8] Cavenagh & Ponte, p. 94.

[9] Cavenagh & Ponte, p. 94.

[10] Brette Steele, Enforcing International Commercial Mediation Agreements as Arbitral

Mediation allows the parties to present their arguments in an informal manner, not bound by the procedures of the legal system. The parties may discuss their positions, and thus, generally feel that their concerns and positions are heard and dealt with fairly, regardless of the outcome. Once the parties believe that their positions have been accurately heard and discussed, tensions often diminish and a new receptivity develops, thus opening the parties' minds to a creative and consensual solution[11].

As mentioned above, parties are, at any time, free to opt out mediation proceedings without any valid or justified reason. Besides mediation process shall not preclude parties' main right to apply more formal dispute resolution mechanism such as arbitration or litigation. Parties are therefore free to strive for a settlement without jeopardizing their chances for or in a trial if mediation is unsuccessful[12].

One of the greatest advantages of mediation is that the parties discuss the issues confidentially[13]. Litigation is usually open to public while all written and/or oral correspondences through the course of mediation are private. The confidentiality of mediation may encourage parties to speak more openly and allow the true reasons for the disputes to emerge more quickly[14]. It is not only the mediation itself that is confidential: the sessions between the mediator and each party before, during and after the mediation will also usually be protected under confidentiality.

With all these advantages, mediation often results in settlement, thereby reducing the large volume of arbitration and litigation. Mediation may also change an adversarial relationship into a cooperative one, potentially improving the relationship between the parties. Even if mediation does not lead to a resolution, the parties are no worse off because they may still take advantage of arbitration or litigation. Moreover, they have had the opportunity to narrow the disputed issues and structure the

Awards under the New York Convention, 54 UCLA Law Review 1385 (2007), p. 1399.

11 Shamir, p.30.

12 Cavenagh & Ponte, p. 94; Runesson&Guy, p. 26.

13 Radford Mary F., Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters, 1 Pepperdine Dispute Resolution Law Journal 2012, p.242.

14 Radford, p.242.

framework for future negotiations. Consequently, parties who wish to maintain a harmonious business relationship and to preserve their contractual and commercial ties often prefer mediation.

C. Disadvantages of Mediation

Like other ADR methods, mediation also has its disadvantages. Most sensitive disadvantages of mediation are:

The formalized procedural and evidentiary rules of due process designed to protect parties and associated with the trial or arbitration of lawsuit are lacking in mediation[15].

Parties of a dispute cannot apply to appeal process in the event that the privately negotiated agreement is later determined by one of the parties to be flawed in some way. All mediation process and agreement is strictly confidential and accordingly it is never performed on the record or recorded by a clerk. Owing to that, unlike arbitration and litigation, mediation agreements are virtually impossible to appeal[16]. Consequently, parties of the mediation process are usually bound by the agreement reached mutually and in accordance with the interests and needs of conflicting parties. It is possible to argue that an agreement was tainted by fraud, duress or some other legal defence to a contract, but this is much different from formally appealing a court's judgement or setting aside an arbitrator's decision[17].

Lack of standardized rules and process sometimes makes mediation inconsistent, haphazard, unpredictable and unreliable.

If the mediation does not result in a settlement then the parties may encounter additional costs stemming from the need of following any other dispute resolution mechanism in order to procure a binding and valid decision as to the dispute at stake.

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[15] Cavenagh & Ponte, p. 95.

[16] Cavenagh & Ponte, p. 95.

[17] Cavenagh & Ponte, p. 95.

In case of settlement one may ask whether that settlement agreement can be enforced in another jurisdiction. Unlike arbitration, there is no similar network of treaties relating to the enforcement of foreign judgments. International commercial arbitration is therefore distinguishable from both international litigation and international mediation with respect to enforceability issues[18].

II. Overview of the Mediation Process

One of the main characteristics (and advantages) of mediation is flexibility: the identity of the mediator and the procedure and format are agreed by the parties in accordance with their commercial needs. As such, there is no universal procedure but typically, commercial mediations go through at least four main phases: Preparation, Opening session, Private meetings (often called "caucus sessions") and Conclusion.

Mediation usually commences upon a request of one party to solicit the participation of other parties to the dispute. Upon receiving the request of mediation, the prospective mediator shall declare that there is no conflict of interest exists between him or herself and parties of the dispute. Application of the conflict of interest restriction is quite sensitive issue and therefore there are lots of open doors for abuse. Mediator should not have an interest in the substance or outcome of the dispute and also any relationship with the parties of the dispute at stake. Through the course of negotiation process, mediator should serve as a facilitator not as a supporter of any party. Owing to that mediator shall remain impartial and keep his or her distance between the parties of the dispute. If no conflict of interest exists, the mediator will contact all relevant parties in order to explain the mediation process and secure participation of the parties.

The appointment of the mediator can be critical to the success of the mediation. If there is a mediation clause in the contract this will often

[18] Strong, Washington University Journal law & Policy (2014)., p.28, see also Peter Rutledge, Convergence and Divergence in International Dispute Resolution, J. Disp. Resol. (2012)., see also Runesson & Guy,. p.41.

provide the method for appointment. Most mediators of commercial disputes are lawyers but legal training is not a necessary qualification and other professionals, such as engineers or architects, often act as mediator. They can be appointed via mediation services providers (who often have panels of accredited mediators) or parties can elect to agree on a mediator[19]. At this point the Turkish legislator departed from the flexibility regarding the qualifications necessary for acting as a mediator. Turkish law requires mediators to be registered as such with the relevant central registry. Only Turkish citizens, who are graduates of law faculty with at least five years' experience, have full capacity and have no criminal convictions may be registered (Turkish Mediation Act Art. 20). The standard mediation training and written and oral examinations conducted by the Ministry of Justice are compulsory.

For disputes arising out of international business transactions the parties may want to choose a mediator with international experience and cultural sensitivity. By selecting an experienced international mediator who both respects and understands cultural differences, the parties may minimize their concerns and frustrations of not being understood or being misunderstood throughout the mediation process.

After receiving consent of relevant parties to proceed with mediation, the mediator will send an agreement to mediate which is a formal document and demonstrates the expectations of the parties and mediator[20]. The agreement is normally in a contractual form and contains, among other things, guarantees regarding the confidentiality of the process, the finality of any agreement reached, and the authority to settle[21]. The parties usually sign such agreement in the first mediation meeting. The mediator will confirm that all parties participating agree to do so with full authority to settle the case.

Normally the mediation process initiates with a brief, to the point and informal mediator's opening statement. Opening statement includes

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[19] Cavenagh & Ponte, p. 107.

[20] Bruhn & Rebach, p.207.

[21] Cavenagh & Ponte, p. 99.

details as to the mediation process and roles of both parties and the mediator. Following the mediator's opening statement, the party opening statements will be delivered to the mediator. Party opening statements involves a summary of the facts, issues and desired outcome.

Party opening statement affords an opportunity to the mediator to examine parties' position in order to proceed in a productive manner. Subsequently, the mediation process will continue with facilitated negotiation. Through facilitated negotiation period, the mediator will attempt to facilitate incremental compromise from both parties toward settlement. This is accomplished most significantly by helping the parties to expand the sources by identifying assets not previously described by the parties, by redefining or reconfiguring certain assets, or by looking for noneconomic assets that may be of some value to the parties[22].

The mediator is entitled to conduct private meetings with each party together with the mediation meetings. These private meetings is termed as *caucus* and allow parties to address issues which are not appropriate to discuss or disclose in open sessions, such as strengths and weaknesses of particular aspects of the case. Caucus meetings are strictly confidential and thus parties of a dispute at stake are feeling significantly freer to disclose confidential information as to their case and claims.

Parties are entitled to walk away from mediation whenever they deem such process as insufficient. Nonetheless, if parties find common way to settle the dispute at stake, the mediator will assist parties with regard to the closure. At this stage, the mediator has two roles to play in the closure scene. First, the mediator will assist parties to reach a point of final, formal acceptance of the settlement. Furthermore, the mediator is under obligation to remind the parties of the finality of any agreement reached via mediation process. Second, the mediator will also assist the parties while drafting the agreement because most successful mediation meetings result with an agreement that is final, permanent and immediate. This type of resolution is desirable because it is usually viewed as a "win-win" solution.

[22] Cavenagh & Ponte, p. 99.

Parties may design their own rules to govern the mediation (also called "ad hoc" rules) or choose from several institutional rules. For international conventions and organizations, three primary institutions provide mediation rules: The United Nations Commission on International Trade Law (UNCITRAL), the International Centre for the Settlement of International Disputes (ICSID), and the International Chamber of Commerce (ICC). One of the most popular choices for international commercial disputes are the ICC Rules of Conciliation and Arbitration (ICC Rules). Unlike the UNCITRAL Rules, the ICC Rules are somewhat inflexible because they prohibit the parties from altering or deleting any rule once the process is implemented. In addition, the ICC Rules are less detailed than the UNCITRAL Rules; however, they do not restrict the mediator beyond the minimum necessary to ensure a fair process. The ICC is widely recognized as a reputable institution to support the mediation process, whereas UNCITRAL has no governing or administrative body to assist in the mediation process.

III. Promotion of Mediation

In the light of aforesaid explanations, currently, mediation is deemed as an important dispute resolution mechanism for the vast majority of disputants due to its non-adversarial, flexible and efficient nature. However, businesses do not use mediation more frequently to resolve private trans-border commercial disputes. The number of mediations in private trans-border disputes is low compared to the number of arbitrations. The deserved popularity of international commercial arbitration no doubt owes much to its flexibility, confidentiality, ability to nominate law and fact-finding procedures, and the near universal availability of foreign enforcement through the New York Convention[23]. With 156 signatories, including all major trading nations, the Convention plays a vital role in the predictability of international business. International commercial arbitration has undoubtedly benefited from the extensive system of international treaties designed to promote international commercial

[23] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

arbitration. International commercial mediation, on the other hand, has primarily existed as a form of "soft law"[24].

There are several ways that can be discussed how mediation can be promoted among business people. One way is to introduce a mandatory mediation requirement by law so that the parties have to mediate before litigating a case. Another suggestion is to establish this obligation by the agreement of the parties rather than by law. Lastly, the enforceability of the outcome of a mediation process shall be considered in order to promote the use of mediation in international business transactions.

A. An Obligation on Litigants to Mediate

There are still considerable discussions as to whether mediation should be mandatory applied to all or some disputes prior to applying most desirable ADR method. In most jurisdictions, the choice to engage in mediation remains entirely that of the parties – on the whole, courts do not have the power to force parties to enter into settlement negotiations. Some argue that the success of mediation relies on the willingness of parties to compromise their positions, so it would run contrary to the spirit of the process for unwilling disputants to be forced to enter into such discussions. Others disagree, and some studies indicate the settlement rate of enforced mediation is comparable to that of purely voluntary mediation[25].

It may be suggested that obligatory mediation may be beneficial for some disputes with respect to family and simple commercial disputes because usage of such method shall decrease docket numbers in courts and also provide considerable efficiency (with respect to time and cost) to disputants. However, it is vital to bear in mind that unsuccessful mediation process may cause delay in process and waste of economic resources.

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[24] Stelle, p. 1394.

[25] Tamara Relis, Perceptions in Litigation and Mediation (Cambridge: Cambridge University Press, 2009), p. 65-89.

B. Providing for Mediation in the Dispute Resolution Clause

Mediation can be used successfully together with arbitration or litigation - where parties agree to seek to resolve a dispute by mediation first and only proceed to arbitration or litigation if the mediation fails to produce a settlement. In other words, parties establish an obligation to mediate before commencing arbitration or court proceedings. These obligations are referred to as escalation clauses or multi-tier clauses[26].

When drafting a contract it is possible to build mediation into the contractual dispute resolution process. This not only ensures that mediation is automatically considered once a dispute arises but means that parties do not lose face by suggesting mediation; it is simply the operation of the contract. The parties entering into an agreement that includes an obligation to mediate may have a strong interest in being able to resolve their disputes without having to resort to arbitration or litigation. It is clear that the time, expenses and reputational burdens associated with arbitration far exceed the costs of mediation. Consequently, the parties should be mindful about the inclusion of mediation clause in the agreement. However, one should also keep in mind that the timing as the beginning of the dispute may be too early for the parties to realistically agree a compromise.

Building on the effectiveness of the process, commercial contracts now often include an obligation on parties to attempt to solve any disputes by mediation before launching arbitration proceedings (so called medarb clauses). For example, parties can draft their dispute resolution clause as following: *In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such*

[26] Uria Menendez, Multi-Step Dispute Resolution Clauses, Liber amicorum. Bernardo Cremades David Arias (Editor), Miguel Ángel Fernández-Ballesteros (Editor). Las Rozas (Madrid): La Ley, 2010 y en Mondaq , p. 1.

dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

If the contractual provision to mediate simply expresses an intention or desire to reach a voluntary settlement before instituting arbitration or litigation proceedings, then it is unenforceable as an agreement to agree. However, provided the clause is sufficiently clear as to what the parties have to do, for example, by naming a specific ADR procedure, it will be held to be sufficiently certain and thus enforceable. If enforceable, the courts may order any proceedings to be stayed pending mediation. If the dispute is to be arbitrated it may well be that an arbitrator will not have jurisdiction to determine the dispute until the mediation process has been gone through. Where there is a breach of a mediation clause, as well as a stay of proceedings, parties may be entitled to specific performance and/or damages.

C. Enforcement of Settlement Agreements

Parties considering mediation for international disputes consider their enforcement options as well. Businesses may be more likely to choose international commercial mediation over international commercial arbitration and litigation if mediation agreements and settlement agreements were as easily enforceable as arbitration agreements and arbitral awards[27]. A settlement agreement entered into during mediation governs the contractual relationship between the parties and is therefore enforced as a contract. In some jurisdictions like Turkey, a settlement agreement approved by the court will be deemed a court judgement and may be enforced accordingly (Turkish Mediation Act Art. 18).

Many people believe that the key benefit of international commercial arbitration relates to the easy enforceability of arbitral awards[28]. Over the last fifty years, the international legal community has established a highly effective system of treaties and other mechanisms that promote

[27] Steele, p. 1387.

[28] Gary Born, International Commercial Arbitration 2009, p.76-78.

the recognition and enforcement of foreign arbitral awards. As a result, arbitral awards are far easier to enforce internationally than court judgments, since there is no similar network of treaties relating to the enforcement of foreign judgments.

International commercial arbitration is therefore distinguishable from both international litigation and international mediation with respect to enforceability issues. Furthermore, the experience of international commercial arbitration suggests that mediation may be more attractive to parties if international mediation and settlement agreements are as easily enforceable as international arbitration agreements and awards.

Therefore, it may be necessary to adopt an international enforcement regime similar to that which applies in international arbitration to support the use of mediation in cross-border commercial disputes. In order to promote mediation, efforts by the United Nations Commission on International Trade Law are currently taking place to find a solution. In July 2015, UNCITRAL approved giving Working Group II a mandate to work on the topic of enforcement of settlement agreements resulting from international commercial conciliation. Working Group II has a mandate to prepare a convention on the enforceability of international commercial settlement agreements resulting from mediation. This is the core of the aforementioned Proposal and is supported by the international community including the International Mediation Institute. The idea of the Proposal is based on the successful role played by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention") in the development, promotion and use of international arbitration worldwide. Questions logically arise as to what elements should be included in an international convention on international commercial mediation. Experience in the arbitral realm suggests that simplicity is key[29]. Therefore, drafters of any proposed treaty on international commercial mediation should likely limit themselves to two basic elements that are also reflected in the key conventions on international commercial arbitration: enforcement of

[29] Born, p.95-96.

the agreement to engage in a particular type of dispute resolution process and enforcement of the end product of the dispute resolution process[30].

IV. Conclusion

When striking deals and drafting contracts, little importance is typically given to the dispute resolution method which form part of the boilerplate clauses at the end of the contract. It is important, however, that this clause receives as much attention as the substantive provisions of the contract. Failure by parties to agree or to include a suitable dispute resolution clause may lead to lengthy and potentially expensive disputes over the dispute resolution procedures to be applied to a given contract. Regardless of their choice of rules, the parties should always specifically indicate their preference for dispute resolution in their contracts before any dispute arises. Otherwise, it may be more difficult for the parties to reach an agreement after a dispute has arisen.

In the area of international dispute resolution, voluntary forms of settlement are often more appropriate than adjudicative approaches in order to maintain lasting international relationships. Unlike adjudicative methods, mediation allows the parties to have complete control over the process and direct contact between the parties. It also affords the parties an opportunity for optimal creativity in their solutions. Mediation allows the parties to keep control of a dispute and to aim at a commercial solution rather than legal remedies. It can turn a dispute from a business threat into a business opportunity. Therefore, mediation is a first option – arbitration and litigation are alternatives.

[30] Born, p.95-96.