MEDIATION — the Way Forward

by Zoya H. BURBEZA

As the World develops into a Global Village, business has expanded beyond what could have been imagined 20 years ago. Now businessmen not only trade in their own towns and cities, but all over the world.

Experience has shown that misunderstandings and disputes regularly occur not only between businesses, but also between individuals and families: it is an aspect of human weakness. In ancient times, personal disputes used to be settled by a duel, or by the king deciding matters arbitrarily. As civilization advanced, disputes began to be settled in a more equitable way by courts of law. The courts heard the evidence of the parties and gave their decisions. Even so, judges often made mistakes and cases had to be re-decided by the Courts of Appeal.

Cases to be decided in court are argued by lawyers and determined by judges, who are also lawyers. Everyone knows the weaknesses of lawyers. As the famous judge Lord Denning said in an English Court of Appeal judgment, known as the Hadjitsakos (1975) 1 Lloyds Law Report, page 361, lawyers are too apt to go by the literal meaning of words. They analyse every sentence with meticulous care. They often argue amongst themselves. Cases go to the Court of Appeal where the judges outvote themselves at times. No one can say that one interpretation is more correct than another, particularly when it concerns the interpretation of commercial documents drawn up by commercial persons to be construed by commercial persons. This form of dispute resolution is often not very satisfactory, and so very often businessmen resort to arbitration.

The advantage of arbitration is that the parties appoint their own arbitrators, and so can appoint a person with appropriate commercial experience to decide their disputes. Arbitration began with the disputing parties requesting one of their peers to decide differences amongst them. For some years now it has been accepted as a more suitable and quicker means of resolving disputes. The whole object of arbitration is well stated in section 1 of the *English Arbitration Act 1996*: to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. That, of course, is a very laudable object, but as businesses have grown, modern arbitration, particularly, international arbitration, have become as drawn out and expensive a process as obtaining a decision in a court of law. What is more, the losing party very often goes on to challenge the arbitrator's decision in court.

In both arbitration and litigation, the losing party also loses face, and that often affects the relationship between the parties. Consequently, it became necessary to evolve a more suitable modern alternative dispute resolution process, which gave birth to mediation as we know it today.

"Mediation" as used in law is a form of alternative dispute resolution by the parties themselves. A third party, the mediator, assists the parties in negotiating their own settlement. In mediation the mediator, who is usually a professionally qualified mediator, brings about a structure, timetable and dynamics that ordinary negotiation lacks.

The mediation process is private and confidential. There are no obligations on the parties to reach an agreement. They are free to walk out at any time during the process of mediation. Interestingly however, a survey conducted by the CEDR (Centre for Effective Dispute Resolution) in the UK, which is the world's leading mediation organisation, shows that in 90% of cases mediation concludes in a settlement during the mediation process itself and in the other 10%, the settlement is concluded between the parties themselves within one year of the breakdown of mediation.

It is an essential requirement of mediation that the mediator is a person who can be trusted for his or her integrity by both parties. This is because in the course of mediation the mediator talks privately to each of the disputing parties. A mediator must also refrain from expressing any views to either of the parties on the merits of their position. A good mediator does not propose solutions to either party, but will skilfully, through intervention between the parties, try to get them to independently suggest the solution which was in the mediator's own mind. Therefore, although the mediator controls the process, he or she does not

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overtly influence the participants or the actual outcome.

The principle advantage of mediation is that, whilst a mediator may charge a fee comparable to that of an attorney, the mediation process generally takes much less time than running a case through the court process.

The most important element of mediation is that it brings about an acceptable win-win resolution for both sides, and because the result is obtained by the parties themselves agreeing a settlement, the parties' compliance rates to the settlement agreement is very high. This is not so in court litigation or arbitration, where more often than not judgements and awards have to be enforced through the court process. In mediation, the mere fact that the parties are prepared to sit with the opposite party to explore the possibility of resolution gives a strong indication to the opposite party that the first party is prepared to move its position. This rarely ever happens in litigation or arbitration, where each party tries to stick to its guns.

The advantage of mediation over litigation and arbitration is therefore plain for everyone to see. What can be achieved by mediation can never be achieved by litigation or arbitration. In mediation, the mediator can privately explore matters with the individual parties which would be personal or embarrassing. This often results in a party which is in the wrong moving its position. In mediation the mediator can freely use his or her personal experience and charm to impress on both parties the need to be open with each other and the advantages of being so. A judge or an arbitrator is not in a position to do this.

As businesses become more enlightened in their approach to resolving disputes in a more cost effective manner, which allows them to continue future businesses with those with whom they have disputes, mediation is bound to become a more attractive and acceptable method of resolving commercial disputes. The same could be said of disputes of other types, such as family disputes, where emotions usually run high. In those types of disputes, court litigation serves to fuel the dispute even further. In the future, therefore, dispute resolution will increasingly be achieved by mediation, and it would be in the interests of the legal profession to evolve by accepting mediation.

The legal world will do well to realise that it is not going to lose fees by encouraging mediation, as opposed to litigation or arbitration. A possible solution is for lawyers to agree with their client that they will get a reward fee if the mediation is successful. A client is happier to pay legal fees if he has participated in the results, and those results are acceptable to the client. The legal community has, therefore, nothing to fear from mediation.

Important ELEMENT of MEDIATION is that IT BRINGS about a WIN-WIN ACCEPTABLE RESOLUTION for BOTH SIDES

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