

Finding an International Mediator

Identifying Suitable Candidates to Mediate an International Commercial Dispute

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

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

process. They are not "mediators" as the term is generally used to refer to a specific profession.

The Opposing Party: Sharing information about potential candidates.

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

Word of Mouth

As with the appointment of arbitrators, what parties really hope to identify in candidates are the soft qualities and skills that are not readily apparent from a curriculum vitae or public listing of the mediator's name and general qualifications. There is no greater selling point than a peer who attributes a past settlement to a particular mediator's skills. But while word-of-mouth recommendations may be useful means of identifying and appointing mediators in the context of disputes between domestic parties, it not usually a very good one in the international context where the issues and parties are likely to vary even more substantially from one dispute to another. While a previous party's satisfaction with a certain mediator is a help-

ful endorsement, it should be considered no more than a starting point in the process of identification of suitable candidates. Thus, while we encourage parties to ask their contacts to recommend candidates, we warn that they may find these recommendations of limited value in practice.

Institutions

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

Mediation Institutions

Many mediation institutions maintain a closed pool or list of mediators, and often exist as a form of cooperative or partnership for the benefit of the mediators included in this pool. For example, this is the approach followed by the Centre for Effective Dispute Resolution (CEDR) in London, JAMS in the US, and the ACB in the Netherlands, three well-known mediation institutions. In our experience, mediation institutions,

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

Arbitration Institutions That Provide Mediation Services

All of the major international arbitration institutions today – the ICDR, ICC, LCIA, WIPO and SIAC – now offer mediation

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

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

There are disadvantages of requesting names from an arbitration institution, however. The first is that unlike mediation specialists who refer parties to their listed mediators, arbitration institutions will charge the parties a fee to conduct their search on the market, i.e., they will not provide a list until the parties have appointed the institution and engaged them in the process. The second is that an arbitration institution will

obviously have much less experience in mediation than an institution dedicated to that purpose. The ICC's national committees, for example, have a substantial reputation and experience in appointing arbitrators, but the total average ICC caseload of mediations conducted is fewer than 20 per year. Still, the “go-to-market” approach adopted by an international arbitration institution, even if not perfect, is in many ways best suited to identifying a mediator for an international dispute rather than relying on the restricted pool of largely domestic mediators maintained by a mediation institution. ■

*This is Part 1 of an abridgment of an article produced collaboratively online as a “knol.” The article may be found in its entirety at <http://knol.google.com/k/finding-an-international-mediator#>. Part 2 will appear in the next issue of *The Peacemaker*.*

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Save the Date!

The International Committee of the Dispute Resolution Section of the North Carolina Bar Association cordially invites you to the following:

**“International Arbitration from Local to Global Perspective”
February 18 at noon, Duke Law School (Durham, NC)**

For reservations and more information, please contact
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