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15. Mandatory Mediation and Its Variations

by *Nancy A. Welsh**

The use of arbitration to resolve international investment disputes clearly represents an improvement over “gunboat diplomacy” and its implicit threat of violent confrontation. Nonetheless, investors, States and other stakeholders have begun to express dissatisfaction with some elements of arbitration in the international investment treaty context. First, arbitration proceedings can be quite lengthy, and their transaction costs seem to be increasing. Second, parties’ compliance is not guaranteed. Some States suggest they may refuse to abide by arbitral awards. Third, the process focuses parties on their legal rights when non-legal issues may be equally important and useful to achieve resolution. Fourth, arbitration can sometimes marginalize parties’ unique socio-cultural characteristics and inhibit parties from identifying and building upon their mutual interests. Last, losing parties (and even some of those who have won) are unlikely to perceive arbitration as providing them with a meaningful opportunity to exercise self-determination in the resolution of their disputes.

As a result of these concerns, some stakeholders—investors, States and interested international bodies—have begun to express interest in the consensual process of mediation. The term, “mediation,” however, is used quite loosely at this point, and there is no single definition or model of the process. Rather, there are several variations, and each is likely to serve certain objectives better than others. Each is also likely to be more appropriate at certain points in the life of a dispute. This essay will describe these variations and their suitability in different contexts. It will also examine the advantages and disadvantages of making participation—or at least consideration of the mediation process—mandatory. IIAs could, for example, require the use of mediation whenever a dispute arises between parties. Such agreements could even condition parties’ submission to arbitration upon documented proof of a previous attempt to reach agreement through mediation. There are significant concerns about mandatory mediation, however. This essay will examine those concerns and describe important and potentially useful variations that permit parties to tailor the scope of what will come within a mandatory mediation requirement.

This essay’s intent is simultaneously modest and ambitious: (1) to provide stakeholders with important information regarding the key variations of mediation that are available in the United States; (2) to provide stakeholders with important information regarding their options in defining the scope of a mandatory requirement; (3) to enable stakeholders to avoid a premature focus upon only the most obvious and controversial of those variations; and (4) to provide stakeholders with some examples of creative adaptation that may inspire further creativity and thoughtful adaptation to the international investment context.

Variations of mediation

What exactly is the process called “mediation?” Based on the definitions contained in various influential documents such as the Uniform Mediation Act and Model Standards of Conduct for Mediators, we can say with some certainty that mediation in the United States will possess the following characteristics: the presence of a third party (called the mediator); communication and negotiation between the parties; and *voluntary* decision-making or agreement

by the parties. Mediators' ability to meet separately with the parties—i.e., “caucusing” or engaging in *ex parte* communications or “shuttle diplomacy”—also tends to distinguish mediation from judicial or arbitral settlement conferences.

Beyond this, however, mediation in the United States takes many different forms. There are several models that share a focus on drawing out the disputing parties, understanding their values and underlying interests, helping them to communicate fully, respectfully and productively with each other, and fostering their ability to develop their own, customized solutions (Riskin and Welsh, 2008; Welsh, 2001a). These models are called “facilitative”, “elicitive”, “understanding-focused”, “therapeutic”, or “transformative”. On the other hand, mediation can be implemented in a manner that is “evaluative”, “directive”, and focused on “bargaining”. This second set of models presents a rather different picture, in which the mediator plays the central role, hopefully beginning by listening to the disputing parties but quickly shifting the focus to the provision of advice to the parties and their lawyers, to help them to be realistic regarding their options (usually in civil litigation or administrative adjudication) and to guide them toward a resolution generally consistent with those options.

The available research generally suggests that the most effective mediations (and mediators) are likely to combine elements of all of these models: thoroughly preparing themselves and facilitating the preparation of the disputants and their lawyers; probing for important interests; listening carefully and effectively; asking parties to explore or justify their assumptions and predictions regarding legal outcomes; challenging unrealistic assumptions; and assisting disputants and lawyers to develop responsive, realistic solutions (Riskin and Welsh, 2008; Welsh, 2004a; American Bar Association, 2008).

A wealth of research and theory affirms the importance of providing a mediation process that the parties will perceive as fair (Welsh, 2007; Welsh, 2001b; Lind and Tyler, 1982) – also described as one that offers the parties “an experience of justice” (Welsh, 2001b: 791-792). To achieve this experience, the parties need: the opportunity to be fully heard; to know that what they have said has been considered (ideally, by both the mediator and the other party); and to feel treated in an even-handed and respectful manner (again, ideally, by both the mediator and the other party). All of these procedural characteristics are consistent with the idea of drawing out the parties and affirming their centrality to the dispute and its resolution. Importantly, they are *not inconsistent* with a process that also involves the mediator ultimately playing a central role in educating and guiding the parties toward resolution.

The goals of those using—or requiring the use of—the mediation process will guide the decision about the most appropriate mediation model. If the aim of mediation in the investment context is to enhance the parties' ability to communicate and negotiate directly with each other—which may be particularly important when there will be an ongoing relationship, a need to collaborate in the implementation of any agreement, or volatile emotions or political situations that must somehow be acknowledged to permit people to move toward an embrace of good (though not their preferred) solutions—it appears important for the process to foster parties' ability to engage in “mutual consideration” (Welsh, 2004a). In other words, the parties need sufficient opportunity to speak and be heard, but they also need the opportunity to *listen* to each other, to reflect upon what was said and to *demonstrate* that they have listened to each other.

Certain courts and agencies have affirmatively selected this model and have implemented monitoring and evaluation systems to ensure its use.

For a variety of reasons, however, the achievement of mutual consideration can be a significant challenge, and parties are not always motivated to act in a manner that will be most beneficial to their relationship. Meanwhile, continued conflict may not be acceptable. Resolution may not just be desirable, but necessary. In response to these sorts of needs, many court-connected and agency-connected mediators begin with facilitative interventions and then play an increasingly central and even directive role to encourage the parties to settle. Of course, these mediators should never become coercive or engage in “muscle mediation”. Such an approach is wholly inconsistent with respecting the parties’ ability to engage in voluntary decision-making and resolution. Research also suggests that if mediators make specific recommendations for settlement, non-settling parties are likely to express dissatisfaction with the process. The line between directive and coercive mediation, however, can be difficult to draw. In response, a few courts provide that settlements developed in mediation will be binding only after a cooling-off period has elapsed (Welsh, 2001a).

Variations regarding the scope of mandatory requirements

Many courts in the United States have also adopted *mandatory* mediation programmes. In general, such adoptions occurred after courts realized that purely voluntary programmes were receiving little usage. Federal agencies have also adopted variations of mandatory mediation. In a different context, commercial contracts may now include tiered dispute resolution clauses that mandate the use of mediation prior to arbitration or litigation. But what precisely is mandatory in these contexts?

Mandating mediation can mean very different things in different courts (McAdoo and Welsh, 2004). Some courts order *all* cases into mediation. Others use a substantive screen for their mandatory programmes, identifying *only particular types* of lawsuits—usually those that seem most likely to include important non-legal issues—to go to mediation. In contrast, other courts may require all civil lawsuits to go to mediation, but then will *exempt* particular types of cases. All of these represent “categorical” referrals to mediation. Other courts provide their judges or court administrators with the discretion to order mediation on an *ad hoc* basis. These are described as “discretionary” referrals (Sander *et al.*, 1996).

Courts in the United States also have experimented with the scope of the mandatory obligation. In some courts, parties are required only to *consider* the use of mediation and submit a document to the court that responds to the court’s questions regarding the appropriateness of the process. Other courts require parties to attend a case conference at which mediation will be discussed. Sometimes, these conferences transform into initial mediation sessions. Other courts explicitly require the parties to attend *an initial* orientation or mediation session. After the parties have completed this obligation and thus have had the opportunity to develop their perceptions of the mediation process and the particular mediator’s capacities, they may determine whether they wish to continue with the process. Last, of course, many courts in the United States require the parties to participate in an entire mediation process. In general, though, courts do not specify how long the mediation must last or how many sessions the parties must attend. The mediation, therefore, will last only as long as the parties wish to continue. Some courts impose an obligation

upon the parties to participate in good faith in mediation, but most courts have interpreted this to require only attendance and submission of required pre-mediation documents. (In some other countries that do not mandate the parties' participation in mediation, courts may nonetheless refuse to shift litigation-related costs if they judge that a party was unreasonable in its refusal to mediate.)

Even when courts have adopted a straightforward mandatory mediation programme, the parties often play a role in determining whether or not the mediation will take place. As previously noted, some courts require only that the parties consider the use of mediation and submit a document. An individual judge or court administrator may then review the submission to determine whether this particular case should be ordered into mediation. The judge or court administrator is likely to defer to the parties if all of them agree that mediation is not likely to be useful. On the other hand, the court is much less likely to defer to one party's reluctance if another party expresses interest in mediation. Even if a court has ordered the parties' participation in mediation, the court also may permit the parties to "opt out". Some courts grant such opt-outs on a very liberal basis. Others require the party requesting the opt-out to make certain showings to demonstrate why the mediation would be duplicative of earlier efforts, unlikely to be productive or might even cause harm.

As a last point, and particularly in situations characterized by power imbalance, some agencies and corporations have provided that if the less powerful party to a dispute requests mediation, the other party must participate. In other words, the mediation process is voluntary for the less-powerful party, but mandatory for the more-powerful party. The United States Postal Service (USPS), for example, offers a mediation programme to resolve workplace disputes. If an employee requests mediation to address a dispute with her supervisor, the USPS requires the supervisor to participate. Similarly, some school districts in the United States provide that if a parent requests mediation to resolve a special education dispute, the school officials must participate.

Some commentators have urged that courts and other institutions should never make mediation mandatory because this represents a violation of the parties' self-determination and may have the effect of coercing settlements and reducing actual or perceived access to the courts. Other commentators are less categorical, expressing support for a time-limited mandatory mediation programme in order to force lawyers and other repeat players to learn how to participate in the process (Sander *et al.*, 1996; Welsh, 2004b). Research has demonstrated that lawyers who have experienced mediation are likely to recommend its use on a voluntary basis. After this period of "coerced education", courts may then convert to voluntary programmes or provide for easy opt-outs.

Potential application to investment treaty disputes

In this brief essay, it is possible only to begin to consider the model of mediation that could be most appropriate for international investment treaty disputes, as well as the most appropriate mechanisms for a mandatory structure. Much depends upon whether the dispute arising under an IIA is more likely to resemble a private commercial dispute or a public policy dispute. In the former type of dispute, the issues and parties are more likely to be relatively well-defined, with a relatively straightforward allocation of decision-making and implementation

authority. In the latter type of dispute, however, it can be quite challenging to define the issues and the parties whose participation is required for decision-making and compliance.

Particularly for those IIA disputes with dynamics that are similar to those of public policy disputes, it is likely to be especially important to use a model of mediation that will enhance the parties' ability to communicate with each other (and important constituents) and represent an "experience of justice" for all. If the investor and State come to a mutually-understood solution that truly represents an exercise of their informed and inclusive self-determination, they are more likely to support and implement that solution. At the same time, the challenges of this situation suggest the value of having an experienced and legally and politically-savvy mediator who can, at the appropriate points, assist the parties in being realistic regarding their options and their consequences. In other words, the most appropriate model of mediation for IIA disputes is likely to be a hybrid. Given the research that exists, however, an IIA might particularly preclude a mediator from providing the parties with her own recommended resolution, unless such a recommendation is requested in writing by all parties.

Meanwhile, in this context, preparation of the parties for the consensual process of mediation—as distinct from the adjudicative process of arbitration—is absolutely essential. Such preparation is more likely if the IIA requires it. This may be accomplished by requiring the parties and their attorneys to make pre-mediation submissions to the mediator as a prerequisite to mandatory mediation. These submissions could require responses regarding the party's definition of the issues in dispute, perceived obstacles to reaching resolution, procedural adaptations that would be likely to improve the likelihood of reaching resolution, the responding party's underlying needs and concerns, identification of other parties whose participation would be needed to ensure implementation of any agreement (or avoid the likelihood that someone will serve as a spoiler), the presence of externally-imposed deadlines, etc. Mediators regularly gather this sort of information when they serve a convening function in public policy disputes. Even some court-connected programmes seek responses to similar questions in order to customize their mediation sessions in complex matters (Riskin and Welsh, 2008). Requiring the parties to engage in this sort of analysis will make it more likely that the parties are prepared, the mediation process is structured appropriately, and the mediation ultimately will enable the parties to make progress toward resolution. Meanwhile, in some instances, the obstacles identified by one or more of the parties in the pre-mediation submissions may persuade the mediator that requiring mediation would be fruitless. Perhaps the mediator could be permitted to find that the parties had fulfilled the mandatory mediation requirement simply by making their pre-mediation submissions. In other words, the IIA could establish the basis for a principled opt-out.

Conclusion

Mediation can take many forms. The only constants are the presence of a mediator; communication and negotiation between the parties; and voluntary decision-making or agreement by the parties. Similarly, the mechanisms to implement mandatory mediation can take many forms. Some mandatory mediation programmes or clauses are broader and more automatic than others. Though such variations can be confusing, their existence also offers tremendous opportunities to the stakeholders in the investment treaty context to specify the mediation process and programme structure that is most likely to offer a responsive, useful and clearly alternative

complement to the arbitration process. This essay has proposed one, very preliminary approach to the institutionalization of mandatory mediation. Hopefully, this suggestion will encourage others.

Notes

* Ms. Nancy A. Welsh is a Professor of Law, Penn State University, Dickinson School of Law. The views expressed in this article are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat.

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