CHAPTER 13

IS OVER-REGULATION KILLING ARBITRATION AND WILL IT KILL MEDIATION?

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Three friends are drinking beer at a pub somewhere in England. They are discussing an incident that occurred some weeks previously. One of them had paid one of his drinking partners, a ship owner, to transport his goods to New York. The goods arrived late and partially damaged.

The third, a respected and slightly older friend, listened to them and, after a while, gave them his opinion and told them how they should resolve the dispute. The other two listened, accepted their older friend's opinion and ordered more beer. The dispute was over. The ad-hoc arbitration was over.

Picture the same dispute today.

It would still probably be decided by an arbitrator, but that is where the similarity ends.

To start with, the arbitrator would most likely be a lawyer. The parties would be represented by lawyers. The arbitration would not take place in a pub, but at an office or a specially built arbitration centre with hearing rooms and administrative support. The arbitration would be conducted according to rules from an organization.

The arbitration would last months, if not years.

What has changed?

Have we over-legalised arbitration? Have we over-regulated and over-institutionalised arbitration?

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For a dispute resolution process, of any kind, to be successful, regulation is necessary to provide order and certainty. But this regulation ought to respond to the needs of the process which, in turn, needs to address the needs of the parties utilising the process.

Once you overregulate, you lose sight of the process and consequently lose sight of the reason for creating the process in the first place.

Today, arbitration institutions exist in all jurisdictions. Many of the organisations throughout the world that administer arbitration were created in the last twenty years.

Arbitration courses were designed and arbitrators were trained by the thousand.

Arbitration has become a regulated multimillion-dollar industry.

The two friends seeking expert advice from their more experienced friend, and accepting his advice, would despair to think that today their arbitration would last months and cost hundreds of thousand of dollars, not including the process for enforcing the award.

Forget about drinking beer together.

Now let us picture a mediation process.

Two friends and business partners are sitting together with a third impartial and respected person, the mediator.

The mediator helps the parties to identify their own needs and to listen to each other. Some hours later, the parties, by themselves, find a resolution to their dispute - a resolution created and decided by themselves, not imposed by the mediator. They all shake hands, the dispute is resolved and the mediation is over.

How do we picture mediation in ten years time?

Will it follow the arbitration path? Will it, too, be over-legalised, over-regulated and over-institutionalised?

There has been a lot of discussion lately about the enforceability of mediated and conciliated agreements. Various organisations around the world are lobbying for a New York-style convention in order to enforce mediated or conciliated outcomes.

The argument is that, thanks to the New York Convention, arbitral awards are enforceable, and mediation would benefit similarly from such enforceability.

It is further argued that it is because enforceability provides certainty and finality that arbitration has become the most utilised Alternative Dispute Resolution (ADR) method for international commercial disputes.

Arbitration has certainly developed very successfully around the world, and especially in the Asia Pacific region. Hong Kong and Singapore are considered the hubs of international commercial arbitration.

Both of these jurisdictions have in place sophisticated arbitration centres that administer hundreds of arbitration processes each year.

In our region, for cultural and religious reasons, mediation has developed much more rapidly than did arbitration.

Over the last five to ten years, we have seen the creation of numerous mediation centres in the Asia Pacific region. Most importantly, legislation has been created, in Singapore, Hong Kong, Vietnam among others, to support and encourage the use of mediation.

So, why has mediation developed so rapidly?

Mediation is very well suited for commercial disputes.

Unlike other processes, the flexibility and non-confrontational style of mediation is ideally suited to resolving business disputes.

Business people do not want to spend time and money on lengthy processes. They want to resolve their disputes in a cost-efficient manner and get back to business.

Business is also attracted by the fact that the parties themselves have control over the mediated outcome. Business people do not like giving away the decision-making power, and mediation provides them with the opportunity to make their own decisions.

It is because of these advantages that mediation has become, in recent years, the method of choice to resolve commercial disputes, especially in cross-border disputes and international trade.

Corporations such as Nestlé in Switzerland, Bombardier in Germany, and Dupont in the USA have successfully implemented mediation processes to resolve not just external, but also internal, disputes.

The philosophy of mediation rests on the empowerment of the parties to find a resolution to their dispute. The parties are in control of the outcome.

The mediator acts as director of the dialogue, very often a heated dialogue, but the mediator does not impose a resolution. The fact that the parties themselves decide on how to resolve their dispute makes the agreement more likely to be complied with, as opposed to one imposed by a third party.

Consequently, when we talk about enforceability of a mediated outcome, it raises the question of why do we need enforceability?

When I speak in mediation conferences, I am frequently asked: "Is the mediated agreement enforceable?"

My answer is: "If the mediation has been conducted properly, enforceability is not an issue. If the parties have come up with the solution themselves, then why should they not want to comply with it?"

However, we are only humans and hidden agendas might have been present, as well as bad faith in one or all parties.

In these cases, how do you ensure compliance with the agreement?

In both Civil Law and Common Law jurisdictions, it is possible to make an application to register and enforce an out-of-court settlement. However, the time and money spent on this additional process might deter future users of mediation.

So, does it make sense to create a New York style convention to enforce mediated outcomes?

My answer is: possibly.

On the one hand, I feel strongly that mediation should be supported and encouraged around the world. The current practice of mediation not only resolves disputes, it preserves or restores relationships and creates peaceful communities. Furthermore, at this stage, it is not over-regulated, over-legalised or over-institutionalised. My concern is that the creation of a New York style convention might start the over-regulation of mediation.

On the other hand, international commercial disputes are complex and require legal frameworks to provide certainty and finality.

Legislation that provides for enforceability of mediated outcomes would certainly give peace of mind to users of commercial mediation, but would the advantage of enforceability balance the disadvantage of over-regulation in mediation?

More discussion is needed. Mediators, users of mediation, legal counsel and mediation organisations need to continue discussions in an environment of cooperation and honesty.

We all deserve to live in a peaceful society.