PROMOTION OF CROSS-BORDER COMMERCIAL MEDIATION

Nedyalka Alexandrova[1],

e-mail: alexandrova.n@ue-varna.bg 1

Abstract

The report argues the benefit of using mediation as an alternative dispute resolution form in international business, but also as an underlying conflict resolution tool. The main international initiatives aiming rising in mediation attractiveness and promoting its application are summarized. As a main obstacle is shown the lack of an effective possibility of enforcement the mediation agreements.

Key words: mediation, international business, cross-border disputes, alternative dispute resolution.

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Introduction

Today the business is international, multinational and even global and that is an everyday fact that does not need proving. The amount of interactions between different legal systems, traditions and cultures is increasing – another well-known fact. Alongside with increased possibilities for positive outcomes, there is a great number of possible obstacles that follow the acceleration in international trade. The diversity makes development possible and brings us, the humans, a great range of possible reactions to the challenges we face, but it is also a prerequisite of frictions and tensions that may lead to conflicts. Therefore, doing international business without developing ways of dealing with conflicts has very low ceiling in terms of sustainability.

In international business the more common form of dispute resolution is arbitration due to its advantages comparing to litigation as lower cost, independency from national legal systems, confidentiality and speed. But recently mediation becomes more and more popular because it has most of the advantages of arbitration and, in addition, may not only be used as a dispute resolution mean but – and this is its great power – as a conflict resolution tool. Despite the fact that mediation has undeniable advantages, there are some obstacles to its more widespread applica-

[1] Chief assistant professor, PhD. International Economic Relations Department, University of Economics - Varna.

tion. Overcoming these obstacles can play an essential role in promoting its wider use in cross-border commercial disputes.

This report will, in the following, attempt to illustrate the mediation as a procedure that has a potential to play an essential role in resolving cross-border commercial conflicts and to analyse the role of international initiatives of promoting it in order to increase its attractiveness. The focus will be on enforcement of mediation agreement settlement as a main prerequisite of it promotion in cross-border commercial dispute resolution by using a comparative legal method.

Mediation and the need of promoting it

Mediation as a conflict resolution tool in international business

Doing business in complex environment inevitably leads to interaction between companies, social groups and individuals with opposing interests. Disagreements are not exception in cross-border trade but rather everyday reality. Historically alternative dispute resolution (ADR) mechanisms are being main practice in international business due to their undisputable pluses in comparison with litigation. Traditionally arbitration is being a leader in terms of popularity among all ADR forms. However, there is another ADR form that deserves attention and has already gained popularity – mediation.

Mediation is a voluntary method of resolving issues between two or more parties where a mediator – neutral third party – facilitates the process and guides them to finding solution they all agree to. The mediator does not provide or propose solution, but manages the procedure instead. He or she usually is trained and certified for the purpose and in most countries there are special registers for licensed mediators. Because the parties, encouraged by the mediator, find a solution themselves, reach an agreement and, if necessary, sign a settlement, in vast majority of cases they comply the settlement voluntary and there is no enforcement needed.

One of the leading principles of mediation is that it should be voluntary at every stage. It should be initiated voluntary by the parties, they should participate voluntary and fulfilment of the settlement should be voluntary as well. It is to some extend contra intuitively to count on such a method that does not provide enforcement, but researches provide evidences that in vast majority of cases it is successful and meets the expectations of reaching dispute resolution and even something more – resolving the conflict.

The core philosophy of mediation is that the dispute itself is not the core of the problem. It is an indicator for prior existing conflict and seeking dispute resolution without resolving the conflict that lays down provides short-term results and may lead to future problems. The conflict is a process, not just a manifestation, and starts with understanding of one of the parties that its interests oppose to those of another party of a relationship or interaction (Thomas, 1992). According to John

Burton (Burton, 1990), a conflict is long-term disagreement concerning deeply rooted issues perceived as "non-negotiable". Dispute, in contrast, is a short-term disagreement and the disputants can reach some sort of resolution. The mediation is oriented to revealing the core conflict not focusing only on its manifestation as a dispute and directing the parties to seeking a mutually acceptable solution on that basis. If it succeeds in that effort and conflicting parties reach an agreement on that, they can easily find dispute resolution or even sometimes the dispute losses its significance for them.

Analogous to the arbitration, mediation is relatively cheap and fast procedure, it is independent from the national legal systems and strictly confidential. I addition two material advantages of mediation over arbitration might be outlined. Firstly, in mediation there is no third party owing the power to decide and determine the outcome in the face of the mediator. The mediator conducts the procedure but does not rule or state the solution, even does not propose it. The whole control over resolution is kept in the field of the conflicting parties and they do not experience loss of their sovereignty. Secondly, as in the judicial process, the result in arbitration is a "clean" victory or a "clean" defeat, and the parties are obliged to comply with it and implement the decision, regardless of whether they agree. In other words, the result of the arbitration is a win-lose type. Thus, the arbitral award, analogous to the court's decision, in predominantly amount of cases ends both the dispute and the entire relationship. But, and that is an essential distinction from the mediation, does not end the conflict but terminates its manifestation instead. The conflict continues its existence and has the potential to manifest itself in another future dispute situation that has a different appearance but the same root. To some extend the win-lose situation can grow in a future lose-lose situation. Unlike arbitration, a successfully conducted mediation results in a resolution where all parties feel satisfied, i.e. of the win-win type. Often, in these cases, the agreement reached by the parties is implemented by them even without being formalized in writing, because they all perceive the agreement reached as a manifestation of win-situation and have no stimulus to oppose its implementation. Moreover, with properly conducted mediation, even if the parties have not reached a final solution to the conflict (or to the dispute), they retain the possibility to interact in the future, i.e. the relationship is not destroyed. This ability of mediation to facilitate perseverance of relationship between parties is particularly valuable in international business, which in its modern forms increasingly applies strategies related to long-term partnerships and complex mutual obligations.

Regardless of its many advantages, mediation cannot be considered as a universal dispute and/or conflict resolution tool and when considering its appliance, a number of disadvantages should be taken into account. Among them are some related to the reputational risk of an out-of-court settlement of a dispute that has become public, as well as situations where the relationship between the parties has deteriorated to such an extent that no further contact between them is possi-

ble, even conducted by a mediator. Alongside with these situations, mediation has one significant disadvantage over arbitration in terms of the enforceability of the agreements reached in international business.

As Radulescu stated "Mediation in international commercial disputes must be considered as a process with three stages of work with accurate objectives, such as: the mediation agreement, the actual mediation, and the mediation implementation." (Radulescu, 2012) Therefore, successful promotion of mediation in cross-border commercial disputes should overcome obstacles in all the three stages – mediation agreement, the actual mediation process and implementation, including, if necessary, some form of enforcement.

Promotion and enforcement of mediation in international business

The mediation is a voluntary procedure on every stage, for that reason it could only be initiated provided all parties are willing to participate. The will for participating in mediation may be expressed in written form, but it is also possible for the parties to manifest that they desire to participate in the process by their actions. This can be done ad hoc by agreeing to attend the first mediation meeting. There is an option for them to agree in advance to resolve possible future conflicts through mediation. For that purpose, they can use mediation clauses in the contracts they conclude with each other and there are model mediation clauses developed by UNCITRAL also. It is important to emphasize that these clauses cannot force the parties to participate in a mediation procedure if they do not wish to, because this would contradict one of the core principles of mediation - voluntariness. Voluntary participation is an unavoidable prerequisite for achieving a satisfactory outcome of the mediation process and it could not be violated for any reason. It is also important to emphasize that even when a mediation procedure has started, each of the parties can at any moment refuse to participate in it. In mediation, free will is an absolutely irrevocable principle. For the reasons already stated, as well as because in the lack of results from mediation attempts, the parties always have the possibility of resorting to resolving the dispute through another method - court or arbitration, the mediation clauses in the contracts have a rather character of an expression of the good will of the parties for understanding and cooperation. However, in some jurisdictions where commercial contracts include a mediation clause, the court will hear the case only provided at least initial mediation meeting has been held.

Worldwide there are attempts to promote this form of dispute resolution by introducing mandatory mediation. Italy took a leading role in this process, where an attempt was made to regulate mandatory mediation by law. The Constitutional Court of the country overruled this and currently it is a procedural prerequisite to hold at least one mediation meeting for certain types of cases to be considered by the court. Despite the controversial approach taken in Italy, the result has been an increase in the popularity of mediation in society (Metteucci & Stoppa, 2023).

In addition, in a significant number of cases after the initial meeting, the parties continue the mediation process and often manage to reach an agreement and avoid litigation. However, the promotion of mediation by making it mandatory could not have any positive effect on the society and business, because it would invalidate its greatest advantage - the potential to facilitate reaching the conflict resolution by the disputants themselves not violating their free will.

One of the most well-known benefits of mediation is that it brings satisfaction into parties' experience and this increases the likelihood of upholding the terms of a settlement. In international business more often than not the interaction and relationship between parties are long-lasting and companies usually are willing to prolong them. Even when there is a lengthy contract it cannot cover every possible contingency, especially when it emerges from a changed or unexpected situation. Of course one can count on enforcement but the costs of it are usually high. It is always better to achieve rapport and build the deal on it.

Despite of existing rapport and the settlement achieved it is possible that one of the parties change their mind or finds itself in a changed situation where fulfilling the agreement is not reasonable, desirable or even possible. It can happen event in private relationships but in corporate world it is even more likely because changes of management and therefore in corporate goals and strategies may occur. The longer time horizon of the settlement agreement is, the more possible is attitude change like this. Weisbach finds correlation between CEO turnover and changes in firm's operations including discontinued ones (Weisbach, 1995). Barron, Chulkov and Waddell replicate this result and add that the relationship exists only in cases of contender succession, but does not when the successor can be recognized as a follower (Barron, et al., 2011). Nevertheless, management changes may lead to reversals of prior decisions which means that there is a possibility of changes in readiness of fulfilling prior agreements. Other circumstances may also lead to change in a party's attitude resulting in fulfilment refusal. Therefore, counting only on voluntary fulfilment of previously reached agreement or settlement is not always a good option. After all the settlement, being a result of a mediation or not, is a form of a contract and the possibility of one party's refusal of acting according its clauses is always persistent. This is a serious drawback of an otherwise very beneficial procedure such as mediation.

In an attempt to utilize mediations many benefits in international conflict resolution and in an effort of overcoming this drawback, two international initiatives in the field have been launched. The EU has enacted Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters and The United Nations General Assembly adopted The United Nations Convention on International Settlement Agreements Resulting from Mediation. The two initiatives are aiming to address the problem of not an enforceable mediation award in terms of cross-border disputes by providing clear legal classification of the final agreement resulted in mediation.

The EU Directive follows the Conclusions on alternative methods of settling disputes under civil and commercial law adopted by the European Council according to it the establishment of basic principles regarding alternative dispute resolution facilitates and improves "access to justice" for all (Mohamed, 2020).

The scope of the directive covers not only commercial but also civil matters. In art. 6 it states that a route through which mediation agreements, with the consent of both parties, can be made enforceable is to be provided by the Member States. In other words, the Directive states that a mediation agreement is not enforceable itself, but it can be made such through a "stamp of approval" by public authority. Which particular public authority has the power to authorize the agreements depends on domestic legislation, these are usually courts. As a result, the mediation agreements are enforceable across borders within the EU by judgements mutual recognition mechanism.

Within EU members there is a diversity in the enforceability of mediation settlement agreements regulation, procedural rules are different as well, and this results in difficulties regarding mediation settlements enforcement. One of the biggest ambiguities regarding enforceability of mediation settlement agreements is consent of the parties. The problem arises from the diversity of approaches among EU member states and it is possible that mediation agreement is enforceable in some states but not in others which does not serve as a promotion of the mediation for cross-border commercial conflicts. For instance, Sweden's Act on mediation provides that the consent of the parties for enforcement should be given at the time of application for it (Mohamed, 2020). Somehow EU Mediation directive approach remeins of vicious circle – the enforcement is needed when lacks readiness of one of the parties to fulfil its settlement obligations, but it can be reached only after its consent. Therefore, the diversity in enforceability of mediated agreements regulation is likely to continue within the EU (Alexander, 2013).

The Singapore Convention on Mediation (SCM) was adopted by the UN General Assembly on 20 December 2018 and a signing ceremony was held in Singapore on 7 August 2019. Till the end of September 2023 the convention has 56 signatories and 11 states have ratified it. For the moment no EU Member state nor EU as a whole have signed the SCM. The scope of the Convention differs from the scope of EU Mediation Directive. It applies to international mediation agreements in written form on commercial conflicts, but does not apply to agreement on labour law, family law and regarding consumer relationships.

The Singapore Convention approach to dealing with enforceability problem differs from that in EU Mediation Directive. It provides two possibilities: on one hand the parties can apply for enforcement by the competent authority of their state, and, on other hand, if a dispute arises relating to a matter already resolved by the settlement agreement, the mediation settlement can be can be used as a defence. For that purpose, SCM states that international mediation agreements should be in written form and there must be proof that they are a result of procedure conducted

by mediator. The competent authority may refuse to enforce the mediation settlement on several grounds: lack of capacity of a party; settlement agreement is not binding, null and void, inoperative or incapable of being performed under the law to which it is subjected, or has been subsequently modified; doubts in mediator's capacity or independence; agreement contradicts the public policy of the state. The attractiveness of cross-border commercial mediation under SCM will depend on the interpretation of grounds for refusal by authorities in different states. If they apply broad interpretation and often refuse enforcement, commercial cross-border mediation will lose its attractiveness as an alternative dispute resolution form. Alternatively, SCM will serve the aim of promoting it provided authorities apply more liberal approach. Since the Convention is relatively new and has come into force for very few countries it is difficult to be predicted whether it will succeed to play an essential role in promoting cross-border commercial mediation.

Conclusion

The complexity of international business in the modern world implies both opportunities for great development and prerequisites for the emergence of conflicts of a commercial nature. Along with the more familiar and traditionally applied methods of resolving disputes such as litigation and arbitration, mediation has gained popularity in recent years. It has the potential not only to serve as a dispute resolution form, but to help overcoming the conflicts that predetermine them. Along with the great advantages of the mediation, the lack of a working possibility for its enforcement is a significant obstacle in front of it. This significantly reduces its attractiveness, because of the business need in predictability.

This report summarizes the main international initiatives aimed at promoting mediation in cross-border commercial disputes. The main conclusions can be summarized as follows:

1. The models of mediation clauses developed by UNICITRAL practically solve the issue of pre-arrangement of mediation as a means of settling disputes at the conclusion of the contracts. Mediation itself is possible at any time even without the presence of such clauses.

2. The EU Mediation Directive has too wide scope, including family, consumer and other disputes. Its main focus is ensuring equal access to justice, but it does not provide the possibility of enforcing mediation to an extent sufficient for international business.

3. The Singapore Convention has greater potential for the applicability of mediation in international business, but is currently signed and ratified by very few countries. Since there is still a lack of practice in its implementation, it is not clear whether this potential will be realized.

Future research on the topic will focus on business perceptions of the role of mediation, as well as investigating the practice of its enforcement when one is established.

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