

MEDIATION IN INTERNATIONAL BUSINESS

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I. THE WORLD OF INTERNATIONAL BUSINESS

The playing field for business has become the globe. National boundaries are no longer business boundaries. Spectacular technological advances, especially in computers and communications, and profound political changes, like the end of the Cold War and the creation of new international trade and investment regimes, have encouraged the globalization of business. Companies, large and small, in all countries are shifting from a national to a worldwide field of vision and of action.

The expansion of international business has been accompanied by vastly increased organizational and transactional complexity. No longer is international business merely a series of discrete foreign trade transactions, for example the sale of cloth by a textile broker in New Delhi to a clothing manufacturer in New York, or the export of groundnuts from a cooperative in the Sudan to a food processor in England. Today, international business transactions extend over long periods of time, often many years; create complex legal, financial, and technical relationships; and involve numerous participants from many different countries, including multinational corporations, global financial institutions, sovereign governments, state enterprises, and international organizations. Transnational business transactions include international manufacturing joint ventures, multi-party strategic alliances, huge infrastructure construction projects, high technology licensing agreements, international franchising arrangements, production-sharing petroleum agreements, and fifty-year mineral development projects, to mention just a few. Parties from countries throughout the world are negotiating and carrying out these complex transactions in an environment of diverse cultures, political instability, conflicting ideologies, differing bureaucratic and organizational traditions, inconsistent laws, and constantly changing monetary and economic variables. (Salacuse 1991). As a result, the potential for conflict in the world of global business is expanding along with the growth in the magnitude, diversity, and complexity of its transactions.

II. THE INTERNATIONAL DEAL: A CONTINUING NEGOTIATION

All international transactions are the product of a negotiation -- the result of deal making -- among the parties. Although lawyers like to think that negotiations end when the participants agree on all the details and sign the contract, this view hardly ever reflects reality. In truth, an international deal is a continuing negotiation between the parties to the transaction as they seek to adjust their relationship to the rapidly changing international environment of civil strife, political upheavals, military interventions, monetary fluctuations, and technological change in which they must work.

No negotiation, particularly in a long term transaction, can predict all eventualities that the parties may encounter, nor can any negotiation achieve perfect understanding between the parties, especially when they come from differing cultures. If they do encounter changes in circumstances, misunderstandings, or problems not contemplated by their contract, the parties need to resort to negotiation to handle their difficulties. In short, negotiation is a fundamental tool for managing their deal. And when the parties to a deal become embroiled in genuine conflict -- for example, the failure by one side to perform in accordance with other side's expectations -- negotiation may be the only realistic tool to resolve the controversy--particularly if the parties want to preserve their business relationship. Thus, negotiation, at least initially, is a means to mend a broken deal. (Salacuse 1988)

In the life of any international deal, one may therefore identify three distinct stages when conflict may arise and the parties rely on negotiation and conflict resolution to achieve their goals: deal making, deal managing, and deal mending. Within the context of each of these three kinds of negotiation, one should ask to what extent third parties, whether called mediators or something else, may assist the parties to make, manage, and mend productive international business relationships. This chapter seeks to explore that question.

III. DEAL-MAKING MEDIATION

The usual model of an international business negotiation is that of representatives of two companies from different countries sitting across a table in face-to-face discussions to shape the terms of a commercial contract. While many transactions take place in that manner, many others require the services of one or more third parties to facilitate the deal making process. These individuals are not usually referred to as "mediators." They instead carry a variety of other labels: consultant, adviser, agent, broker, investment banker, among others. These deal-making mediators usually have some sort of a contractual arrangement with one of the parties, and in rare cases both; however, they are not formally employees of either party in the strict sense. Although it could be argued that consultants and advisors should not be considered mediators since they are not independent of the parties, a close examination of their roles in the negotiation of an international business deal reveals that they exercise mediator's functions, as defined in this book, in that they assist the parties to change, affect or influence their behavior so as to manage conflicts or potential conflicts arising in the course of a negotiation. Even if a deal-making mediator has a contract with and is paid only by one side, his or her ability to play an effective mediating role is crucially dependent on the willingness of the other side to accept that person as a participant in the deal-making process. Indeed, in most cases, one of the principal assets of deal-making mediators is the fact that they are known and accepted by the other side in the deal.

Deal-Making Mediation in Hollywood

The acquisition in 1991 by Matsushita Electric Industrial Company of Japan, one of the world's largest electronics manufacturers, of MCA, one of the United States' biggest entertainment companies, for over \$6 billion illustrates the use of mediators in the deal-making process. (See Bruci, 1991) Matsushita had determined that its future growth was dependent upon obtaining a source of films, television programs, and music,-- what it termed "software",-- to complement its consumer electronic "hardware " products. Matsushita knew that it could find such a source of software within the U.S. entertainment industry, but it also recognized that it was virtually ignorant of that industry and its practices. "For Matsushita executives, embarking on their Hollywood expedition may have felt almost interplanetary. They were setting out for a place that was ... foreign to their temperament, culture, and business experience..."(Bruci, 1991, pp.39-40). They therefore engaged

Michael Ovitz, the founder and head of Creative Artists Agency, one of the most powerful talent agencies in Hollywood, to guide them on their journey.

After forming a team to assist in the task, Ovitz, a man who was fascinated Asian cultures and who had been a consultant to Sony when it had purchased Columbia Pictures, first extensively briefed the Japanese over several months, sometimes in secret meetings in Hawaii, on the nature of the U.S. entertainment industry, and he then proceeded to propose three possible candidates for acquisition, one of which was MCA. Ultimately, Matsushita chose MCA, but it was Ovitz, not Matsushita executives, who initiated conversations with the MCA leadership, men whom Ovitz knew well. Indeed, Ovitz assumed the task of actually conducting the negotiations for Matsushita. At one point in the discussions, he moved constantly between the Japanese team of executives in one suite of offices in New York City and the MCA team in another building, a process which one observer described as "shuttle diplomacy," a clear reference to the mediating efforts of Henry Kissinger in the disengagement talks between the Israelis and the Arabs following the 1973 October War. Although Matsushita may have considered Ovitz to be their agent in the talks, Ovitz seems to have considered himself to be both a representative of Matsushita and a mediator between the two sides.

Because of the vast cultural and temperamental differences between the Japanese and American companies, Ovitz's strategy was to limit the actual interactions of the two parties to a bare minimum. During the first six weeks of negotiations, the Japanese and Americans met only once in a face-to-face meeting. All other interactions took place through Ovitz. He felt that to bring the parties together too soon would create obstacles that would inevitably derail the deal. He was not only concerned by the vast differences in culture between the two companies but also by the greatly differing personalities in their top managements. The Japanese executives, reserved and somewhat self-effacing, placed a high value on the appearance if not the reality of modesty, while MCA's president was an extremely assertive and volatile personality. Like any mediator, Ovitz's own interests may also have influenced his choice of strategy. His status in the entertainment industry would only be heightened by making a giant new entrant into Hollywood dependent on him and by the public image that he had been the key to arranging one of the biggest deals in the industry's history. It should also be noted that Ovitz's primary interest was in making the deal happen, and only secondarily in creating a foundation that would result in a profitable long term acquisition for Matsushita.

Although Ovitz launched the deal-making process and moved it a significant distance, he was not able to bring it to completion alone. Eventually the talks stalled over the issue of price, and meetings between the two sides ceased. At this point, a second deal-making mediator entered the scene to make a crucial contribution. At the start of the negotiation, Matsushita and Sony together had engaged Robert Strauss, a politically powerful Washington lawyer who had been at various times U.S. Ambassador to the Soviet Union and U.S. Trade Representative, as "counsellor to the transaction." Strauss, a member of the MCA board of directors and a close friend of its chairman, was also friendly with the Matsushita leadership and did legal and lobbying work in Washington for the Japanese company. In effect, his strong personal and business relationships with the two sides led them to appoint him to represent them both. Although his letter of appointment merely stated that Strauss was to "co-ordinate certain government relations matters," and even excluded his participation in the negotiations themselves, it appears that both MCA and Matsushita felt that he might be useful in other, unspecified ways.

When the talks stalled on the question of price, Strauss' close relationship to the two sides allowed him to act as a trusted conduit of communication who facilitated a meeting between the top MCA and Matsushita executives that ultimately resulted in an agreement on what Matsushita would have

to pay to acquire the American company. In arranging that meeting over some fifteen hours, he apparently gained an understanding of the pricing parameters acceptable to each side and then communicated them to the other party. The Japanese, at that point, apparently had greater trust in Strauss, particularly because of his former role as high U.S. government official, concerning the delicate issue of price than they did in Ovitz, who they sensed had a dominant interest in simply getting the deal done, regardless of the price the Japanese would have to pay for it. (Bruci, 1991, p. 66) In the end, as a result of that meeting, the two sides reached an agreement by which Matsushita acquired MCA.

The Matsushita-MCA case shows clearly how two mediators facilitated the deal making process, a deal that the parties probably would not have achieved by themselves. The factors that allowed Ovitz and Strauss to play successful roles were their knowledge of the two parties and their industries, their personal relationships with the leadership of the two sides, their respective reputations, the trust that they engendered, and their skills and experience as negotiators. On the other hand, although Matsushita did succeed in purchasing MCA, the acquisition proved to be troubling and ultimately a disastrous financial loss for the Japanese company. One may ask whether Ovitz' strategy of keeping the two sides apart during negotiations so that they did not come to know one another contributed to this unfortunate result. It prevented the two sides from truly understanding the vast gulf which separated them and therefore from realizing the enormity -- and perhaps impossibility -- of the task of merging two such different organizations into a single coordinated and profitable enterprise.

Other Deal-Making Mediators

An opposite mediating approach from that employed by Ovitz is the use of consultants to begin building a relationship between the parties before they have signed a contract and indeed before they have actually begun negotiations. When some companies contemplate long-term relationships, such as a strategic alliance, which will require a high degree of cooperation, they may hire a consultant to develop and guide a program of relationship building, which might include joint workshops, get-acquainted sessions, and retreats, all of which take place before the parties actually sit down to negotiate the terms of their contract. The consultant will facilitate and perhaps chair these meetings, conduct discussions of the negotiating process, make the parties recognize potential pitfalls, and discuss with them ways to avoid possible problems. Once negotiations start, the consultant may continue to observe the process and be ready to intervene when the deal-making process encounters difficulties. (Buhring-Uhle, 1996, p. 318-319)

Not all mediators in an international business negotiation have the reputation and prestige of a Robert Strauss or a Michael Ovitz or receive specific authorization to engage in relationship building. Sometimes persons involved in the negotiation because of their technical expertise or specialized knowledge may assume a mediating function and thus help the parties reach agreement. For example, while language interpreters ordinarily have a limited role, they may facilitate understanding by explaining cultural practices that seem to complicate discussions or by finding linguistic formulas that lead to agreement, formulas that the parties would not be able to arrive at on their own. Similarly local lawyers or accountants engaged by a foreign party to advise on law or accounting practices in connection with international negotiation may assume a mediating role in the deal making process by serving as a conduit between the parties, by suggesting approaches that meet the other side's cultural practices, by explaining why one party is behaving in a particular way, and by proposing solutions that are likely to gain agreement from the other side.

IV. DEAL-MANAGING MEDIATION

Once the deal has been signed, consultants, lawyers, and advisers may continue their association with one or both parties and informally assist as mediators in managing conflict that may arise in the execution of the transaction. In some cases, the parties to a complex or long-term transaction, seeking to minimize the risk of conflict, may include specific provisions in their contract stipulating a process to manage conflict and prevent it from causing a total break down of the deal. For example, the contract may provide that in the event of a conflict cannot be settled at the operational level, senior management of the two sides will engage in negotiations to resolve it. Generally, top management, not directly embroiled in the conflict and with a broad view of the transaction and its relationship to the company's overall strategy, may be in a better position to resolve a dispute than persons at the operating level, who have come to feel that they have a personal stake in "winning" the dispute. Once top management of the two sides have reached an understanding, they may have to serve as mediators with their subordinates to get them to change behavior and attitudes with respect to interactions at the operational level. (Buhring-Uhle, 1996, p.317)

Deal-Managing Mediation in the Construction Industry

The international construction industry has developed an important form of deal-managing mediation that employs a designated third person, such as a consulting engineer, to resolve disputes that may arise in the course of a major construction project, such as a dam or a power plant. International construction projects typically include many parties, involve highly technical complexities, and take a long time to complete. The possibilities for conflict among the participants are virtually endless, yet it is essential for all concerned that disputes among the parties not impede the progress of the project. The construction contract will therefore usually designate a consulting engineer, review board, permanent referee, or dispute advisor, with varying powers, to handle disputes as they arise in a way that will allow the construction work to continue. Sometimes, as in the case of a consulting engineer, the third person will have the power to make a decision, which may later be challenged in arbitration or the courts; sometimes as in the case of dispute advisor the third person plays the role of a mediator, by engaging in fact finding or facilitating communication among the disputants.

One particular type of mediator worthy of note is the Dispute Review Board, which was used in the construction of both the Channel Tunnel between England and France and the new Hong Kong Airport and is now required by the World Bank in any Bank-financed construction project having a cost of more than \$50 million. (Bunni, 1997, p.14) Under this procedure, a Board, consisting of three members, is created at the start of the project. One member of the board is appointed by the project owner and a second by the lead contractor. The third member is then selected either by the other two members or by mutual agreement between the owner and the contractor. The Board functions according to rules set down in the construction contract. Generally, it is empowered to examine all disputes and to make recommendations to the parties concerning settlement. If the parties to a dispute do not object to a recommendation, it becomes binding. If, however, they are dissatisfied, they may proceed to arbitration, litigation or other form of mandatory dispute settlement. (Bunni, 1997)

Deal-managing mediators in the international construction industry approach their task with advantages that mediators in other domains usually lack. First, the parties designate them at the time they sign their contract and before any specific conflict arises. Thus, the mediators have a clearly defined role, and their acceptance by the parties is assured. They approach their task with a high degree of legitimacy. Second, they are intimately familiar with the transaction from its very

start and are in continuing contact with the parties through meetings and visits to the construction site. Third, they have recognized technical expertise which is applicable to most disputes that may arise in the course of the project.

The use of such dispute review boards or dispute advisors in construction contracts has proved to be a cost-effective means of settling disputes while permitting a continuation of construction project in an expeditious manner. This mechanism would seem to have application in other areas of international business. For example, in a complex multi-party strategic alliance, the participants might designate a person or organization to serve as a permanent mediator to assist the parties to manage conflicts that may arise in the course of their business relationship. Thus far, however, this device does not appear to have reached much beyond the construction industry.

IV. DEAL-MENDING MEDIATION

The parties to an international business relationship may encounter a wide variety of conflicts that seem irreconcilable. A host government may expropriate a foreign investor's factory. A poor developing country may stop paying its loan to a foreign bank. Partners in an international joint venture may disagree violently over the use of accumulated profits and therefore plunge their enterprise into a state of paralysis. Here then would seem ideal situations in which mediation by a third party could help in settling conflict. In fact, mediation is relatively uncommon once severe international business conflicts break out. To understand why, one must first understand the basic structure of international business dispute settlement.

International Commercial Arbitration

Nearly all international business contracts today provide that any disputes that may arise in the future between the parties are to be resolved by international commercial arbitration. The parties choose this option for a variety of reasons: to avoid the vagaries of national courts, to secure a neutral and expert forum for their disputes, to conduct dispute resolution in private, and to have legal assurance that arbitral awards will be enforceable. International arbitration is of two types: ad hoc, which is basically administered by the parties according to an agreed upon set of rules, or institutional, which is administered by an established institution such as the International Chamber of Commerce, the London Court of Arbitration, the American Arbitration Association, the Stockholm Chamber of Commerce, or the International Centre for Settlement of Investment Disputes, an affiliate of the World Bank.

The parties by agreement are free to shape the arbitral process as they wish. Normally, most opt for a three-person arbitral panel consisting of an arbitrator appointed by each of the disputants, and the third, the panel's chairman, selected by the two arbitrators. By virtue of the Convention on the Recognition and Enforcement of Arbitral Awards, now signed by over a hundred countries, both arbitration agreements and arbitral awards are enforceable throughout the world. (See Streng and Salacuse 1986, Chapters 30 and 31)

At the outset, it should be emphasized that arbitration is not mediation. International commercial arbitration is a legalistic, adversarial process whose purpose is to decide on the respective rights and obligations of the parties to the dispute, not to help them change their attitudes and behavior to resolve their conflict. Essentially it is private litigation. The failure of arbitrators to decide a dispute according to the applicable law is ground for invalidating such award by the courts.

Thus in the background of virtually all international business disputes is the prospect of binding arbitration if the parties, alone or with the help of a third person, are unable to resolve the conflict themselves. This factor influences the ways in which the parties deal with their dispute and it also

affects the strategy of any mediator who may be invited to help the disputants settle their conflict. In this regard, international business disputes are unlike virtually all international political disputes between states where no such adjudicative process is waiting in the wings to impose a binding decision. As result, when parties to an international business transaction find themselves embroiled in a dispute which they judge to be irreconcilable, they will invariably commence arbitration to settle the matter.

Arbitrating a dispute is not, however, a painless, inexpensive, quick solution. Like litigation in the courts, it is costly, may take years to conclude, and invariably results in a final rupture of the parties' business relationship. Even when an arbitral tribunal makes an award in favor of one of the parties, the losing side may then proceed to challenge it in the courts, thus delaying or even preventing a final resolution of the dispute. For example, one arbitration between Egypt and foreign investors took five years in its first phase and resulted in legal and administrative costs of nearly \$1.5 million dollars. (International Chamber of Commerce Court of Arbitration, 1983) But thereafter, the arbitral award was appealed in the courts and the case was rearbitrated in another forum. The parties finally settled the matter through negotiation fourteen years after the dispute began.

The prospect of such a costly, lengthy and potentially destructive process does encourage the two sides to negotiate a settlement of their dispute. For example, approximately two-third of all arbitration cases filed with the International Chamber of Commerce Court of Arbitration are settled by negotiation before an arbitral award is made. (Schwartz 1995, p.99). Third persons, whether called mediators or otherwise, could in theory help parties embroiled an international business dispute settle their conflicts without the intervention of an arbitrator's decision.

Initially, one may ask whether the arbitrators themselves can and should seek to facilitate a negotiated settlement of the dispute. On this question, practice seems to vary considerably among countries. Generally, Americans and some Europeans consider it improper for an arbitrator to facilitate a settlement of the dispute. In their view, an arbitrator should do no more that to suggest the possibility of settlement but should not actively engage in mediating efforts. In other cultures, for example China and Germany, arbitrators often take a more active role by proposing at the parties' request possible formula for settlement, by participating in settlement negotiations, and even meeting separately with the parties with their consent. In Asian cultures, which have a particular aversion to confrontation, arbitrators are even more energetic than their European and American counterparts in seeking to facilitate agreement among the disputants rather than merely imposing a decision.(Buhring-Uhle, 1996, p.127-217)

Generally speaking, an arbitrator's efforts, however minimal to facilitate settlement, tend to have the effect of persuading the parties that if they allow the dispute to be arbitrated they will not achieve all that they hope. Such efforts by arbitrators have a predictive effect. When arbitrators strongly encourage settlement, they are actually saying to the claimant company that it probably will not receive all that it claims, and they are also telling the respondent that if the case goes to an award it will have to pay something. The strategy of arbitrators who seek to play a mediating role is to give the parties a realistic evaluation of what they will receive or be required to pay in any final arbitration award.

Mediation in International Business Disputes

Traditionally, companies engaged in an international business dispute have not actively sought the help of mediators. They have first tried to resolve the matter themselves through negotiation, but when they judged that to have failed, they have immediately proceeded to arbitration. Various factors explain their failure to try mediation: their lack of knowledge about mediation and the

availability of mediation services, the fact that companies tend to give control of their disputes to lawyers whose professional inclination is to litigate, and the belief that mediation is merely a stalling tactic that only delays the inevitability of an arbitration proceeding.

With increasing recognition of the disadvantages of arbitration, some companies are beginning to turn to more explicit forms of mediation to resolve business disputes. Increasingly, when a dispute can be quantified, for example the extent of damage to an asset by a partner's action or the amount of a royalty fee owed to a licensor, the parties will engage an independent third party such as an international accounting or consulting firm to examine the matter and give an opinion. The opinion is not binding on the parties but it has the effect of allowing them to make a more realistic prediction of what may happen in an arbitration proceeding.

Conciliation

One type of deal-mending mediation used occasionally in international business is conciliation. Many arbitration institutions, such as the International Chamber of Commerce and the International Centre for Settlement of Investment Disputes, offer a service known as conciliation, which is normally governed by a set of rules. (e.g. ICC Rules of Optional Conciliation, 1995) In addition, the United Nations Commission on International Trade Law has prepared a set of conciliation rules which parties may use without reference to an institution.

Generally, in institutional conciliation, a party to a dispute may address a request for conciliation to the institution. If the institution concerned secures the agreement of the other disputant, it will appoint a conciliator. While the conciliator has broad discretion to conduct the process, in practice he or she will invite both sides to state their views of the dispute and will then make a report proposing an appropriate settlement. The parties may reject the report and proceed to arbitration, or they may accept it. In many cases, they will use it as a basis for a negotiated settlement. Conciliation is thus a kind of non-binding arbitration. Its function is predictive. It tends to be rights-based in its approach, affording the parties a third person's evaluation of their respective rights and obligations. Conciliators do not usually adopt a problem-solving or relationship building approach to resolving the dispute between the parties. The process is confidential and completely voluntary. Either party may withdraw from conciliation at any time.

Deal-Mending Mediation in Trinidad

Since conciliation is confidential, public information on the process itself is scant. One of the few published accounts concerns the first conciliation conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). (Nurick & Schnably 1986) ICSID, an affiliate of the World Bank created by treaty in 1964, provides arbitration and conciliation services to facilitate the settlement of investment disputes between host countries and foreign investors. One such dispute, between Tesoro Petroleum Corporation and the government of Trinidad and Tobago, arose out of a joint venture which the two sides established in 1968, each with a 50% interest, to develop and manage oil fields in Trinidad. By their joint venture contract and subsequent agreements, the two partners developed a complex arrangement on the extent to which profits would be paid as dividends or reinvested to develop additional oil properties. Their joint venture agreement also provided that in the event of a dispute the parties would first attempt conciliation under ICSID auspices, but if the dispute was not settled within six months from the date of the conciliation report, either party could then commence ICSID arbitration.

By 1983, following the rise of oil prices and continued turbulence in world petroleum industry, Tesoro and the Government of Trinidad and Tobago were embroiled in a conflict over whether and to what extent to use accumulated profits for payment of dividends to themselves or for

reinvestment to develop new oil properties. Finally, Tesoro decided to sell its shares and pursuant to their agreement offered them first to the Trinidad and Tobago government. The two parties then began to negotiate a possible sale, but appeared to make little progress. In August 1983, Tesoro filed a request for conciliation with the ICSID Secretary-General, claiming that it was entitled to 50% of the profits as dividends and that the government had breached the joint venture agreement on dividend payments.

The ICSID rules, recognizing the importance of a conciliator in whom the parties have confidence, gives the parties wide scope in the conciliator's appointment. The rules allow them to choose anyone, provided he or she is "of high moral character and recognized competence in the fields of law, commerce, industry, or finance, who may be relied upon to exercise independent judgment." Tesoro and the Trinidad and Tobago government agreed to a single conciliator (instead of a commission of three or more conciliators as the Rules allow) and through direct negotiations chose Lord Wilberforce, a distinguished retired English judge, in December 1983 to serve as their conciliator.

Lord Wilberforce held a first meeting of the parties in March 1984 in London, where they agreed upon basic procedural matters, including a schedule for the filing of memorials and other documents by the parties in support of their positions. The parties proceeded to file their memorials and then met once again with Lord Wilberforce in July 1984 in Washington, D.C.. In this meeting, at the conciliator's suggestion, they agreed that no oral hearing or argument by the parties would be necessary, that the parties could submit to Lord Wilberforce their views in confidence on what might constitute an acceptable settlement, and that thereafter Lord Wilberforce would give them his recommendation.

In February 1985, Lord Wilberforce delivered a lengthy written report to the parties, in which he stated that his task as a conciliator had three dimensions: 1. to examine the contentions raised by the parties; 2. to clarify the issues in dispute; and 3. to evaluate the respective merits of the parties' positions and the likelihood of their prevailing in arbitration. Thus, he saw his task as giving the parties a prediction of their fate in arbitration, with the hope that such prediction would assist them in negotiating a settlement. He concluded his report with a suggested settlement, which included a percentage of the amount sought by Tesoro, based on his estimate of the parties' chances of success in arbitration on the issues in dispute.

Following receipt of the report, Tesoro and the Trinidad and Tobago government began negotiations, and by October 1985 they had reached a settlement by which the joint venture company would pay dividends to the two partners in cash and petroleum products totaling \$143 million. The conciliation thus helped the parties reach an amicable settlement of their dispute with minimum cost, delay, and acrimony. The whole conciliation process from start to finish took less than two years to complete, and administrative costs and conciliator fees amounted to less than \$11,000. Equally important, conciliation preserved the business relationship between the parties. After the conciliation, the Trinidad and Tobago Government purchased a small portion of Tesoro's shares so as to gain a majority interest, but Tesoro continued as a partner in the venture. Had the matter proceeded to arbitration, without conciliation, the case would have lasted several years, cost many hundreds of thousands of dollars and perhaps more, and would have resulted in a complete rupture of business relationships between Tesoro and the Government.

Thus far few disputants in international business avail themselves of conciliation. For example, out of a total of ten cases on the docket of ICSID in 1996, only one was for conciliation (ICSID, 1996). Similarly, from 1988 to 1993, a period in which over 2000 arbitration cases were filed at the

International Chamber of Commerce, the ICC received only 54 requests for conciliation. Of that number, the other party in the dispute agreed to conciliation in only 16 cases; however, the ICC appointed only 10 conciliators, since the parties settled the dispute or withdrew the request in six cases. Of the ten conciliations, nine had been completed by 1994, five resulting in complete settlement. (Schwartz, 1995, pp. 98, 107-117).

VII. CONCLUSION

The use of mediators in international business is fragmented and uneven. If one defines a mediator broadly as a third person who helps the parties negotiate an agreement, then their use in deal-making is fairly extensive. Their use in deal-managing seems to be growing, particularly in the international construction industry, but in deal-mending, where the parties to a transaction are embroiled in a genuine conflict, the use of mediators is relatively rare. In all three types of negotiations, mediators participate only because the parties have specifically sought them out and invited them into the process. It is extremely rare for persons to volunteer their services as mediators in an international business transactions. In all cases, mediators in international business are private individuals, rather than organizations, institutions, or governmental officials. Institutions such as the International Chamber of Commerce or the International Centre for Settlement of Investment Disputes only facilitate the search for an appropriate mediator or conciliator. They do not themselves participate in mediation. Once on the job, the mediator works independently of these organizations, is not their representative, and does not operate under their direction.

Like any mediation, effective international business mediation requires three things: disputant motivation, mediator opportunity, and mediator resources, including skills. No mediation can take place unless the parties to the business conflict want or at least acquiesce in the presence of a mediator. Variations in the degree of disputant motivation in deal-making, deal-managing, and deal-mending may explain the difference in the frequency of use of mediators in these three types of negotiation. Motivated to achieve a deal because of expectations of profit, parties have a strong incentive to use third persons to achieve their deal-making goals and may view the alternatives as the loss of the deal with no compensation. Similarly, agreement to use mediators in deal-managing may be a condition for achieving agreement or for securing financing from institutions such as the World Bank; consequently, disputant motivation may also be high in these cases. However, in the case of a broken deal, at least one of the parties will lack motivation so long as it believes that it can obtain compensation or secure enforcement of its version of the deal in the courts or in international commercial arbitration. In short, that party does not see the failure to mend a deal through mediation as an absolute loss. So long as it considers litigation or arbitration as an acceptable alternative to a mediated agreement, it will have little motivation to accept the presence of a mediator. Unfortunately, most of the time, one of the parties to a business dispute does in fact believe that it will gain more in litigation or arbitration than it could through the services of a mediator.

Mediators have an opportunity to mediate international business disputes only if both parties invite them into the process. Parties to international business transactions can enhance mediator opportunity by agreeing at the time they make their contract to use third persons, such as Dispute Review Boards, to help them with future disputes; however, outside of the international construction industry, such provisions are relatively rare. To a certain extent, the low degree of disputant motivation to use mediators in international business disputes is also caused by the general lack of knowledge by businesses and their lawyers of the potential value of mediation and

their belief that mediation will be used by one of the parties merely to stall and delay the inevitability of a law suit or arbitration case.

To be effective, mediators in international business, like mediators in other domains, must possess certain resources, including skills. The essence of their resources resides in their ability to influence the parties to arrive at an agreement. Mediators in international business transactions derive their power to influence the parties from various factors. Unlike some mediators in the political arena, business negotiators generally have no coercive power. The basis of their power first and foremost resides in their expertise. The power of Ovitz, Wilberforce, and consulting engineers in major construction projects to influence the parties clearly resided in their knowledge about the respective industries and issues they were dealing with. In the kind of rights-based mediation engaged in by Wilberforce, where the source of his influence was to give the parties a clear prediction of how they might fare in arbitration, expertise in the law and the functioning of the arbitral process was an important source of mediator power.

Mediators may also have power because of their relationships with the disputants. This referent power is particularly present in deal-making mediation in international business. Thus, the relationships of Ovitz and Strauss with both sides in the MCA-Matsushita negotiation gave weight to their advice and recommendations to both sides. And finally, international business negotiators may also rely on legitimacy in influencing the parties to a dispute. Wilberforce had legitimacy because the parties specifically selected him to make a recommendation, a Dispute Review Board for a major construction project has legitimacy because the parties created it at the time they signed the construction contract to resolve future disputes, and Strauss had great legitimacy because MCA and Matsushita had designated him in a formal document as "counselor to the transaction."

Mediation and the Future of Global Business

The magnitude, complexity, and duration of international business transactions create a substantial and continuing risk of conflict. International commercial arbitration, the primary dispute settlement mechanism designed for international business, has proven itself to be expensive, destructive, time consuming, and in some cases lacking in finality. Mediation of varying types offers international business executives a possible attractive alternative, an alternative that they should explore at the time they negotiate their transactions. They might include in their contracts from the outset mechanisms such as dispute advisors to help in the problem of deal management, and they might also commit themselves to try mediation or conciliation before they take the usually irrevocable step of submitting their disputes to arbitration.

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