Using Appropriate Dispute Resolution (ADR)

WHEN TO USE NEGOTIATION, LITIGATION, ARBITRATION, CONCILIATION AND/OR MEDIATION FOR COMMERCIAL DISPUTES?

Jeremy LACK, Esq.
ADR Neutral & Attorney-at-Law
Tel: +41 79 247 1519
E-mail: jlack@lawtech.ch
Commercial disputes = a mix of stakeholders involved

- Investors
- Employees, Unions, etc.
- Clients
- Suppliers
- Lease/rental
- Misc. contracts
- Lenders
- Executive Management
- Board
- ENTERPRISE
- "Joint venture"
- Holding
- Affiliate / Sister
- Affiliate/Daughter
- Partner
- Partner
- Misc. contracts
- With third parties
- Internal to the company
International Commercial Disputes: The possible participants

Now, bring in an every-day international dimension

Who should be involved in resolving this dispute? What norms apply?
How to decide which type of ADR process to use?

“We have to start by defining the process as part of the problem”

David Plant
Arbitrator & Mediator
The Options

Least Evaluative
Least Structured
Least Formal

NEGOTIATION

MEDIATION

EARLY NEUTRAL APPRAISAL

CONCILIATION

EXPERT EVALUATION

ARBITRATION

LITIGATION

Consensual
Partners in control

Most Evaluative
Most Structured
Most Formal

Adversarial
Third party in control

Source: J. Kalowski, JOK Consulting
What type of negotiation process are the partners seeking?

Two monologues

A dialogue
Adjudicative Processes (Arbitration/Litigation) …

The 4 main differences between Arbitration & Litigation Tribunals:

**Litigation:**
1. Judges appointed by state
2. State laws of civil procedure apply
3. Binding judgment, with appellate review
4. Limited recognition & enforceability of judgments in other countries

**Arbitration:**
1. Arbitrators appointed by disputants
2. Institutional or ad-hoc rules apply
3. Binding award, with limited appeals possible
4. Greater recognition and enforceability in other countries (UNCITRAL New York Convention of 1958 (156 countries))

Based on a legal syllogism: facts + law/rules = outcome

Source: Joanna Kalowski
... Conciliation (an expert who guides the discussion) ...

Resolution by parties

Zone of Possible Agreement (ZOPA)

Precedents

Statutes

Conciliator

Legal doctrine

"Relevant" facts

Proposals

Positions

Party 1

Party 2

"OBJECTIVE" JUSTICE

Source: Joanna Kalowski
... Mediation

Resolution by parties

Source: Joanna Kalowski

- No ZOPA
- No proposals
- Interests, not Positions
- No facts are irrelevant (emotions, relationships ...)
- Law is a benchmark, not a driver for outcomes

“SUBJECTIVE” JUSTICE
Choice: 4 Different Types of ADR

A. Facilitative Non-Evaluative
B. Directive Non-Evaluative
C. Facilitative Evaluative
D. Directive Evaluative

Source: Based on L. Riskin “The New Old & New New Grids”
ADR: Process options under the Swiss CPC (2011)

Conciliation/Médiation/Arbitrage in the CPC

**Conciliation**

Partie 2, Titre 1 CPC

Arts. 197-212 (16 articles)

**Médiation**

Partie 2, Titre 2 CPC

Arts. 213-218 (6 articles)

**Arbitrage**

Partie 3, Titre 1-7 CPC

Arts. 333-399 (47 articles)

What is the difference?
What type of process do the disputants want?

<table>
<thead>
<tr>
<th>Facilitative (process)</th>
<th>Directive (process)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Evaluative (subject matter)</td>
<td>Evaluative (subject matter)</td>
</tr>
<tr>
<td>A. Facilitative, Non-Evaluative</td>
<td>D. Directive, Litigation/Arbitration/Conciliation</td>
</tr>
<tr>
<td>B. Directive, Non-Evaluative</td>
<td>C. Facilitative, Evaluative</td>
</tr>
<tr>
<td>Mediation</td>
<td>Conciliation</td>
</tr>
</tbody>
</table>

Proposals:
1. Start at A?
2. Move around?
3. Combine?
Costs of EU Litigation for a € 200,000 Dispute

Range of costs: € 20,000 – € 70,000  
Range of time: <1 – 3 ½ years

## Comparison: Litigation, Arbitration & Mediation

<table>
<thead>
<tr>
<th>Value of the dispute</th>
<th>Court</th>
<th>Arbitration</th>
<th>Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>€ 200,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Time</td>
<td>Cost in Euro</td>
<td>Cost as % on disp.</td>
</tr>
<tr>
<td>Austria</td>
<td>540</td>
<td>€ 14.660</td>
<td>7,3%</td>
</tr>
<tr>
<td>Belgium</td>
<td>525</td>
<td>€ 16.000</td>
<td>8,0%</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>870</td>
<td>€ 17.885</td>
<td>8,9%</td>
</tr>
<tr>
<td>Cyprus</td>
<td>1445</td>
<td>€ 6.796</td>
<td>3,4%</td>
</tr>
<tr>
<td>Czech Rep</td>
<td>1280</td>
<td>€ 21.004</td>
<td>10,5%</td>
</tr>
<tr>
<td>Denmark</td>
<td>380</td>
<td>€ 46.600</td>
<td>23,3%</td>
</tr>
<tr>
<td>Estonia</td>
<td>291</td>
<td>€ 45.337</td>
<td>22,7%</td>
</tr>
<tr>
<td>Finland</td>
<td>800</td>
<td>€ 17.046</td>
<td>8,5%</td>
</tr>
<tr>
<td>France</td>
<td>330</td>
<td>€ 20.500</td>
<td>10,3%</td>
</tr>
<tr>
<td>Germany</td>
<td>246</td>
<td>€ 9.854</td>
<td>4,9%</td>
</tr>
<tr>
<td>Greece</td>
<td>970</td>
<td>€ 14.700</td>
<td>7,4%</td>
</tr>
<tr>
<td>Hungary</td>
<td>765</td>
<td>€ 11.312</td>
<td>5,7%</td>
</tr>
<tr>
<td>Ireland</td>
<td>515</td>
<td>€ 53.800</td>
<td>26,9%</td>
</tr>
<tr>
<td>Italy</td>
<td>2205</td>
<td>€ 19.527</td>
<td>9,8%</td>
</tr>
<tr>
<td>Latvia</td>
<td>420</td>
<td>€ 6.900</td>
<td>3,5%</td>
</tr>
<tr>
<td>Lithuania</td>
<td>460</td>
<td>€ 21.410</td>
<td>10,7%</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>321</td>
<td>€ 15.500</td>
<td>7,8%</td>
</tr>
<tr>
<td>Malta</td>
<td>1575</td>
<td>€ 8.100</td>
<td>4,1%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>700</td>
<td>€ 32.000</td>
<td>16,0%</td>
</tr>
<tr>
<td>Poland</td>
<td>540</td>
<td>€ 47.000</td>
<td>23,5%</td>
</tr>
<tr>
<td>Portugal</td>
<td>450</td>
<td>€ 11.428</td>
<td>5,7%</td>
</tr>
<tr>
<td>Romania</td>
<td>342</td>
<td>€ 19.414</td>
<td>9,7%</td>
</tr>
<tr>
<td>Slovakia</td>
<td>570</td>
<td>€ 51.993</td>
<td>26,0%</td>
</tr>
<tr>
<td>Slovenia</td>
<td>600</td>
<td>€ 8.087</td>
<td>4,0%</td>
</tr>
<tr>
<td>Spain</td>
<td>730</td>
<td>€ 30.000</td>
<td>15,0%</td>
</tr>
<tr>
<td>Sweden</td>
<td>610</td>
<td>€ 65.710</td>
<td>32,9%</td>
</tr>
<tr>
<td>UK</td>
<td>333</td>
<td>€ 51.536</td>
<td>25,8%</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>697</strong></td>
<td><strong>€ 25.337</strong></td>
<td><strong>13%</strong></td>
</tr>
</tbody>
</table>

- These estimates are based on a hypothetical €200,000 claim for defective goods, with no appeal filed (using World Bank methodology).
- ADR Centres report a 70-80% settlement rate for commercial mediation, with another 50% settling in arbitration (Total ave. = 85-90%)
- Mediation = faster (<20% of time) & cheaper (savings >50%)

Source: The Cost of Non ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation, ADR Center Survey Report, June 2010, p.49
### Additional Statistics: Commercial Arbitration Costs

#### Cost Estimate - Civil-Law Arbitration

<table>
<thead>
<tr>
<th></th>
<th>Low</th>
<th>High</th>
<th>Mid-point</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Arbitrators (50%)</td>
<td>$100,000</td>
<td>$250,000</td>
<td>$175,000</td>
</tr>
<tr>
<td>Arbitration Institution</td>
<td>$12,000</td>
<td>$25,000</td>
<td>$18,500</td>
</tr>
<tr>
<td>Legal fees</td>
<td>$150,000</td>
<td>$500,000</td>
<td>$325,000</td>
</tr>
<tr>
<td>Trib expert (50%)</td>
<td>$10,000</td>
<td>$50,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>Party direct costs</td>
<td>$5,000</td>
<td>$10,000</td>
<td>$7,500</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>$277,000</td>
<td>$835,000</td>
<td>$556,500</td>
</tr>
</tbody>
</table>

#### Cost Estimate - Common-Law Arbitration

<table>
<thead>
<tr>
<th></th>
<th>Low</th>
<th>High</th>
<th>Mid-point</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 Arbitrators (50%)</td>
<td>$200,000</td>
<td>$500,000</td>
<td>$350,000</td>
</tr>
<tr>
<td>Arbitration Institution</td>
<td>$12,000</td>
<td>$25,000</td>
<td>$18,500</td>
</tr>
<tr>
<td>Legal fees</td>
<td>$400,000</td>
<td>$1,500,000</td>
<td>$950,000</td>
</tr>
<tr>
<td>Party expert</td>
<td>$30,000</td>
<td>$180,000</td>
<td>$95,000</td>
</tr>
<tr>
<td>Party direct costs</td>
<td>$10,000</td>
<td>$20,000</td>
<td>$15,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>$652,000</td>
<td>$2,225,000</td>
<td>$1,428,500</td>
</tr>
</tbody>
</table>

Estimates based on:
- US$ 6,000,000 claim
- US$ 4,000,000 counterclaim
- Construction case
- Total value of hypothetical dispute: US$10,000,000

Ave. Cost Civil Law = 5.6% of value
Ave. Cost Common Law = 14.3% of value
## More Statistics: Commercial Mediation (Costs & Time)

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average duration of a commercial mediation</td>
<td>4 x ½ day sessions</td>
</tr>
<tr>
<td>Percentage of cases reaching a settlement</td>
<td>79%</td>
</tr>
<tr>
<td>Willingness of the parties to repeat mediation</td>
<td>92%</td>
</tr>
<tr>
<td>Average value of the dispute</td>
<td>€ 5,000,000</td>
</tr>
<tr>
<td>Average procedural cost</td>
<td>€ 7,500 per party</td>
</tr>
<tr>
<td>Estimated legal costs (per party)</td>
<td>€25,000</td>
</tr>
<tr>
<td>Estimated total costs (all parties)</td>
<td>€65,000</td>
</tr>
<tr>
<td>Total cost as a % of value of dispute</td>
<td>1.3%</td>
</tr>
</tbody>
</table>

Source: Based on Manon Schonewille, ACB Foundation (Netherlands) data (2009) & World Bank data
### Comparison of Arbitration & Mediation (US$20M)

<table>
<thead>
<tr>
<th></th>
<th>Mediation</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Value of Dispute</strong></td>
<td>$20,000,000</td>
<td>$20,000,000</td>
</tr>
<tr>
<td><strong>Time to Outcome</strong></td>
<td>2-6 months</td>
<td>24-36 months</td>
</tr>
<tr>
<td><strong>Management Time (per party)</strong></td>
<td>100 hours</td>
<td>700 hours</td>
</tr>
<tr>
<td><strong>Fees of neutral(s)</strong></td>
<td>$15,000</td>
<td>$575,000</td>
</tr>
<tr>
<td><strong>Legal Costs (per party)</strong></td>
<td>$70,000</td>
<td>$600,000</td>
</tr>
<tr>
<td><strong>Institutional Costs</strong></td>
<td>$5,500</td>
<td>$38,500</td>
</tr>
<tr>
<td><strong>Average Costs</strong></td>
<td>$160,500</td>
<td>$1,813,500</td>
</tr>
<tr>
<td><strong>Result as a % of the value</strong></td>
<td>1%</td>
<td>9%</td>
</tr>
</tbody>
</table>

**“OR” v. “AND”: Can the 2 processes be combined to benefit from both systems?**

### US AAA Data on Reasons for using ADR

#### Reasons for Using Mediation and Arbitration

(Base: Use Mediation or Arbitration)

The primary reasons for using mediation or arbitration include saving money and saving time.

<table>
<thead>
<tr>
<th>Reason</th>
<th>Mediation</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Saves money</td>
<td>91%</td>
<td>71%</td>
</tr>
<tr>
<td>Saves time</td>
<td>84%</td>
<td>73%</td>
</tr>
<tr>
<td>Provides a more satisfactory process</td>
<td>83%</td>
<td>66%</td>
</tr>
<tr>
<td>Allows parties to resolve disputes themselves</td>
<td>81%</td>
<td>60%</td>
</tr>
<tr>
<td>Has limited discovery</td>
<td>68%</td>
<td>66%</td>
</tr>
<tr>
<td>Is court mandated</td>
<td>63%</td>
<td>45%</td>
</tr>
<tr>
<td>Uses expertise of mediators/arbitrators</td>
<td>61%</td>
<td>49%</td>
</tr>
<tr>
<td>Gives more satisfactory settlements</td>
<td>61%</td>
<td>41%</td>
</tr>
<tr>
<td>Preserves good relationships between disputing parties</td>
<td>56%</td>
<td>38%</td>
</tr>
<tr>
<td>Is required by contract</td>
<td>54%</td>
<td>87%</td>
</tr>
<tr>
<td>Is desired by senior management</td>
<td>48%</td>
<td>37%</td>
</tr>
<tr>
<td>Preserves confidentiality</td>
<td>47%</td>
<td>54%</td>
</tr>
<tr>
<td>Is a managerial or technically complex dispute</td>
<td>36%</td>
<td>37%</td>
</tr>
<tr>
<td>Avoids establishing legal precedents</td>
<td>36%</td>
<td>32%</td>
</tr>
<tr>
<td>Provides more durable resolution compared to litigation</td>
<td>31%</td>
<td>25%</td>
</tr>
<tr>
<td>Is an international dispute</td>
<td>16%</td>
<td>25%</td>
</tr>
<tr>
<td>Became standard practice in industry</td>
<td>14%</td>
<td>21%</td>
</tr>
</tbody>
</table>


Addressing the effectiveness of ADR procedures, a substantial majority of respondents said that they believed that both mediation and arbitration reduced the time needed to resolve disputes (see Figure 10) and lowered the costs of the dispute resolution process itself (i.e., it reduced all costs involved exclusive of judgment or award costs) (see Figure 11).
The Possible Impact of Process on Conflict Escalation

1. Disagreement
   - The Problem

2. Debate + polemic
   - The people

3. Actions, not words

4. Images and coalitions

5. Deliberate loss of face

6. Management of threat

7. Limited destructive blows

8. Fragmentation of the enemy

9. Together into the abyss

Target zone for conflict resolution?

Entering the images/coalition zone means the Neutral can now be used competitively. (“We have to convince the Neutral …”)

NB: Mediation can be effective for de-escalating the conflict at any stage

Inspired by: Tina Monberg
Source: F. Glasl’s “Confronting Conflict”
### Questions for Setting Up a Mediation

<table>
<thead>
<tr>
<th>Topics</th>
<th>Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who would you like to have participate from your organization (and why)?</td>
<td>Interest-based or positional players: Business execs, trusted advisors, representative negotiators?</td>
</tr>
<tr>
<td>Who would you like to have participate from your partner’s organisation (and why)?</td>
<td>Possible future allies or nemeses: Future-oriented or past-focused players (interests v. positions)?</td>
</tr>
<tr>
<td>Language of proceedings?</td>
<td>Language of key participants and/or of neutral? If interpretation: simultaneous or consecutive?</td>
</tr>
<tr>
<td>Venue?</td>
<td>“Off site” setting or office setting for efficiency?</td>
</tr>
<tr>
<td>Food?</td>
<td>Joint sit-down meals v. sandwiches?</td>
</tr>
<tr>
<td>Social Events?</td>
<td>Introductory dinner/drinks/events/puzzles etc.</td>
</tr>
<tr>
<td>Prior submissions?</td>
<td>Position vs. Interest statements/OLE forms</td>
</tr>
<tr>
<td>Possible Set Agenda?</td>
<td>Creates certainty: e.g., Values, interests, brainstorming, options etc.</td>
</tr>
<tr>
<td>Opening presentations?</td>
<td>Opening a conversation vs. positional statements</td>
</tr>
<tr>
<td>Time &amp; time management issues?</td>
<td>Rest, relations-oriented; decision fatigue</td>
</tr>
</tbody>
</table>
Process Design & Combining Processes

**Sequential**
- Med-Arb
- Arb-Med
- Windows
- Arb-Med-Con-Med-Arb
- Consent awards

**Parallel**
- Med//Arb
- Carve-outs
- Shadow mediation
- Partnering

**Integrated**
- MEDALOA
- Dispute Boards
- Combined Neutrals
- ??? (3 question marks)

**Factors**
- Parties
- Certainty of outcome
- Costs
- Time & deadlines
- Applicable law(s)
- Languages
- Skill sets
- Venue & distances
- Institutional rules
- Nationalities/cultures
- Counsel
- Neutrals (roles & no.)
- Availabilities
- Advisors & Experts
- Confidentiality
- Discovery
- Implementation
- Enforcement
Can the same neutral switch hats? Two reactions:

It can sometimes be done, with proper precautions in place.
Some Users’ Perspectives

**PROS**

- Neutral sees the whole picture
- More flexible
- Less time
- Less money
- Better outcomes?
- Greater freedom to innovate
- Greater control over process by users

**CONS**

- Confusion of roles
- Can I trust the neutrals not to use certain information in case of arbitration?
- Can this slip off -track?
- Less certainty of enforceability?
- Do we all know what we’re doing?

“The truth begins in pairs” (Michael Lukas Moeller)

Is combining 2 neutrals possibly a better solution?
E.g., SCAI: Flexible international ADR Rules

Swiss Rules of International Arbitration
In 2004, several Swiss Chambers of Commerce jointly adopted the Swiss Rules of International Arbitration, which replaced their individual arbitration rules. In 2012, the Swiss Rules were slightly revised for the first time so as to increase their efficiency and cost effectiveness.

Arbitration is generally more expeditious than proceedings before State courts. Arbitrators are independent practitioners specialized in the field of dispute resolution. Contrary to State court judgments, arbitral awards remain confidential. Pursuant to certain international conventions, they are enforceable in almost all countries.

Swiss Rules of Commercial Mediation
In addition to arbitration, the Swiss Chambers' Arbitration Institution has adopted rules for commercial mediation. These rules are particularly suitable if the parties are willing to make a joint effort to find an amicable solution to their dispute, and if they require the assistance of a neutral to do so.

If successful, mediation proceedings are much faster and considerably less costly than litigious procedures. The Mediation Rules suggest ways of combining arbitration and mediation. The Swiss Rules of International Arbitration themselves allow the arbitral tribunal, with the agreement of the parties, to take steps to facilitate the settlement of the dispute.

www.swissarbitration.org
Customized ADR Clauses (including Med-Arb, Arb-Med-Arb, etc.)

Customize Your Arbitration Clause

The customized arbitration clause allows the parties, where appropriate, to reduce the time and cost of an arbitration. This is especially useful for commodity traders, for instance, whose demands are always very immediate.

The Standard Clause, which is the foundation for each customized clause, provides for arbitration under the Swiss Rules of International Arbitration with the option to initiate mediation under the Swiss Rules of Commercial Mediation at any time before or during the arbitral proceedings. You can select the standard clause alone. You can also customize the Standard Clause by adding any, or all, of the four options. Scroll over each option to learn more. When you have made your selections, click Show Arbitration Clause.

- Choice of language(s)
- Choice of location
- Choice of speed
- Cost control
- Ability to mix modes as appropriate (e.g., MEDALOA)
- Access to leading practitioners in international arbitration and mediation (civil law & common law)

For more customized choices from other providers, see website.

https://www.swissarbitration.org/Arbitration/Arbitration-clauses
Two Definitions of Mediation

“The process by which the participants, with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs.”

Folberg & Taylor, *Commercial Mediation, 1984*

“Mediation is a method of dispute resolution whereby the parties attempt to reach an amicable settlement of their dispute or avoid future conflicts with the assistance of a neutral third party, the mediator. The mediator facilitates the exchange of information and perspectives between the parties and encourages them to explore solutions that meet their needs and interests. Unless specifically requested by the parties, the mediator does not give his or her own views (as would an expert), and abstains from making proposals (as would a conciliator).”

*Swiss Rules of Mediation of SCAI (the Swiss Chambers of Commerce Association for Arbitration and Mediation) (2019)*
The Mediation Process (7 phases)

1. **Preparation Phase**
   - Process design: selecting the rules and the type(s)/role(s) of the mediator(s)
   - Ensuring a common understanding as to procedural matters (“contracting”, attendance, etc.)
   - Coordination between the negotiation partners (written submissions, opening presentations, timing, etc.)

2. **Opening Phase**: Mediator’s statement & Opening Presentations

3. **Exploration Phase**: Identifying topics for discussion
   - Identification of needs, interests, points of agreement/disagreement, BATNAs/WATNAs/PATNAs
   - Exchanges of information: joint sessions and separate meetings/caucuses
   - Dealing with impasses and possible reality testing (re-evaluation of interests v. positions)

4. **Option Generation Phase**: Generating options and possible new solutions
   - Brainstorming (without evaluation)
   - Analysis (with evaluation)

5. **Negotiation Phase**: (Interest-Based v. Positional)
   - Selection

6. **Closing Phase**
   - Drafting and reviewing a Heads of Agreement or Settlement Agreement
   - What to do in case of partial agreement only?

7. **Compliance Phase**: Exequatur/homologation and implementation/enforceability
Using the TRI-O/S Neuro-Model

VALUES

3rd Rational

Pre-Set Rigid

2nd Emotional

Usual zones for dispute resolution?

1st Social

New Dynamic
Towards -mode/safe
In-Group =

BASELINE = ENERGY LEVELS & STATES OF MIND

NEEDS

Optimal zone for dispute resolution?

CONSCIOUS

UNCONSCIOUS

Stimulus

Time

0ms 100ms 200ms 300ms 400ms 500ms 1 min.

h Plasticity

VALUES

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Implications: 7 Phases = 7 critical junctures

1. Preparation phase
2. Opening phase
3. Exploration phase
4. Option generation phase
5. Negotiation phase
6. Closing phase
7. Compliance phase (enforcement, homologation, etc.)
# Cross-cultural situations

<table>
<thead>
<tr>
<th>UNIQUE</th>
<th>INDIVIDUAL CULTURAL HUMAN</th>
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<td>preferences</td>
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<td>adjustment</td>
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<td>family patterns</td>
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<td>attitudes to money</td>
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<td>respect patterns</td>
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<td>work patterns</td>
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<td>SAME</td>
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<td>purpose in life</td>
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<td>covering</td>
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<td>belonging</td>
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<td>self respect</td>
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<tr>
<td>self fulfilment</td>
<td>(Maslow)</td>
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</table>

We tend to instinctively start off at this level.

We can (re-)build bridges at this level.
Mediation followed by international arbitration

“Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers' Arbitration Institution in force on the date when the request for mediation was submitted in accordance with these Rules. The seat of the mediation shall be ... [name of city in Switzerland]. The mediation proceedings shall be conducted in... [specify desired language]. If such dispute, controversy or claim has not been fully resolved by mediation within sixty (60) days from the date when the mediator(s) has (have) been confirmed or appointed, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution in force on the date when the Notice of Arbitration was submitted in accordance with those Rules. The number of arbitrators shall be ... "one" or "three"]; The seat of the arbitration shall be in ... [name of city in Switzerland]; The arbitral proceedings shall be conducted in ...[specify desired language]. [The arbitration shall be conducted in accordance with the provisions for Expedited Procedure.]”

(https://www.swissarbitration.org/Mediation/Mediation-clauses)
The impact of clauses: “Clause & Effect” Principle

The same Conflict Management System (“CMS”) was proposed in 2 cases:

**PROPOSAL OF PETER LUNDHUS**

**Musketeer bonus + Steering group**
1. Negotiation
2. Dispute Resolution Board
3. Mediation
4. Arbitration

LUNDHUS PROPOSAL **REFUSED**

**LUNDHUS PROPOSAL ACCEPTED**

- Opened 9 months early
- Within budget
- No company lost any money
- No negative press of politics
- Positive relationships
- Less accidents and no deaths

The impact of clauses: Affects social behavior and outcomes.
Search Tools for finding a mediator

Some more sites:

1. www.imimediation.org
2. www.csmc.ch
4. www.mediation.sav-fsa.ch
6. www.arbitration-ch.org
7. www.cpradr.org
8. www.jamsinternational.com
9. www.adr.org
11. www.whoswholegal.com
Attention-focus: This dispute = a crisis or an opportunity?

Crisis

Danger + Opportunity

Source: Michael Leathes
A commercial perspective of dispute resolution

WHY NOT INCLUDE MEDIATION?

“Turn your dispute from a business threat into a business opportunity”

Cees J.A. van Lede, Chairman of the Board of Management
Akzo Nobel NV

Source: http://www.mediation-bedrijfsleven.nl/english.shtml#quote4
When to include mediation?

THE EARLIER THE BETTER?

“Early Dispute Resolution – the earlier ADR processes are implemented in the conflict cycle, the less risk there is of the dispute escalating out of control.”

Hans Peter Frick, Group General Counsel, Nestlé SA
The Base + 3 Pillars of Mediation

Confidentiality

Procedural Fairness

Substantive Fairness

Participant Autonomy
1. Partner Autonomy:
   1. Self Determination
   2. Informed Consent
2. Confidentiality
   1. Facilitates trust within the group
   2. Legally and morally binding
3. Procedural Fairness:
   1. Power Balanced
   2. Neutrality
   3. Impartiality v. Multi-partiality
   4. Understanding biases
   5. Understanding emotions
4. Substantive Fairness:
   1. Vulnerability?
   2. Target BATNAs
   3. Outcome is no worse than PATNAs

Mediator’s Concerns

Mediator’s Status:
- In or Out of Group(s)
- Follower?
- Leader?
- Norms Generator?
- Norms Educator?
- Norms Advisor?
- Simple conduit of information?
- To elicit interests?

Source: Ellen Waldman
Thank you!

Jeremy LACK, MA (Oxon)

- Barrister (UK), Attorney-at-Law (US), Avocat (CH)
- Door Tenant, QUADRANT CHAMBERS (GB)
- Of Counsel to HELVETICA AVOCATS (CH)
- General Counsel & Ombudsperson to SMEs and NGOs
- Accredited mediator: IMI, AAA, CEDR, CMAP, CPR, CSMC, ICC, ICDR, INTA, JAMS, SIMC, WIPO, etc.
- Member, Section of Foreign Lawyers, Geneva Bar (OdAGE)
- Member of the State Council Commission on Mediation, GE
- Vice-President, Independent Standards Commission of the International Mediation Institute (IMI)
- President, Swiss Chamber of Commercial Mediation (Romandie)
- Advisor on Mediation to the Geneva Chamber of Commerce
- Coordinator of the Global Pound Conference Series 2016-17
- Part-time faculty UNIGE & EPFL

Jeremy LACK, Esq.
ADR Neutral & Attorney-at-Law
Tel: +41 79 247 1519
E-mail: jlack@lawtech.ch