Hybrid Processes Combining Mediation and Arbitration to Apply the Best Process to the Dispute

American Bar Association Section of Dispute Resolution Annual Conference
Washington, DC
April 5, 2018

Thomas Stipanowich, Pepperdine University School of Law
Edna Sussman, Sussman ADR LLC

Reporter: Markus P. Beham, University of Passau

Program description: Hybrid, or mixed mode, dispute resolution draws on the characteristics of mediation and arbitration. Fellows of the College of Commercial Arbitrators with experience in using hybrid methods will discuss these newer and evolving processes, in both domestic and international disputes.

The panel was sponsored by the College of Commercial Arbitrators featured Professor Thomas Stipanowich of the Straus Institute for Dispute Resolution, Pepperdine University School of Law, Malibu, California, and Edna Sussman, alternative dispute resolution practitioner in New York.

Thomas Stipanowich on "The Influence of Culture and Legal Tradition on the Interplay Between Mediation, Evaluation and Arbitration"

Starting out from a common set of goals and values for (alternative) dispute resolution, ranging from party autonomy to the promotion of a negotiated outcome, Thomas Stipanowich raised the question of how culture and legal tradition affect choices regarding mediation, arbitration, and other forms of dispute resolution. Contrasting the US, German-speaking countries (where arbitrators are even known to "telegraph" where they are heading, as he said) and China (where judges supposedly ask parties whether they want to seek arbitration), it became clear how culture plays a role in defining these different procedures.

Drawing upon the results of the Global Pound Conferences (2016-2017), the common denominator of what constitutes effective dispute resolution seems to be a combination of adjudicative and non-adjudicative processes, what might be called "liti-gotiation", as a combination of adjudication (litigation and arbitration) and negotiation measures (mediation, evaluation, but also arbitration to some extent). However, Stipanowich also pointed out that arbitration in the US, in fact, more and more reflects litigation.

Stipanowich further explored the possibility of "changing hats" between mediation and arbitration. Here, again, he contrasted the US and China, finding that the latter favored moving from arbitration to mediation, as opposed to the US. Stipanowich sees much of the reason for this in the cultural underpinnings, finding China more concerned with societal and relational harmony than the US, where individualism takes the lead role.

Edna Sussman on “Arbitrators Setting the Stage for Settlement”

Edna Sussman followed-up on the question of appropriateness of arbitrators suggesting settlement, tracing shifting values throughout different rules and guidelines, both international and domestic (including ICC Rules, Swiss Rules, German DIS Rules, the Hong Kong Arbitration Ordinance, CIETAC Rules, as well as UNCITRAL, IBA, and ABA instruments).

She particularly urged more flexibility and sensitivity in the outset of dispute resolution proceedings to get a better feel for the arbitrators’ and parties’ expectations. In particular, she emphasized the movement from “decision maker” to “dispute manager” and the potential role as a facilitator for dispute resolution between the parties.

Sussman pointed to a greater interest of parties for mediation and conciliation wherever arbitration proves inflexible. At the same time, she brought basic factors of human nature into the equation, giving the example that the settlement rate in court is higher than in arbitration, simply because people do not see each other.

Q&A

Questions from the audience revolved around the desirability of universal aspirations in dispute settlement approaches and the value of comparisons between different regional traditions when it comes to alternative dispute resolution.

While not necessarily finding uniformity in international dispute resolution a desirable goal, Thomas Stipanowich called for the community to take a step back and observe these different local approaches to promote an international conversation for a better understanding of the individual building blocks – the “subatomic particles” – of dispute settlement. On the basis of this toolbox, Edna Sussman suggested to simply see what happens at the beginning of an arbitration and tailor the procedure to the parties’ specific needs.

Adding to the aspect of comparability, the question was raised as to the added value of looking at processes such as mediation in different legal backgrounds, be it China or the US. Thomas Stipanowich argued for the intrinsic value of an international conversation in creating a greater understanding for the processes themselves.

Take-away

Drawing upon a variety of empirical data and recent initiatives, the overall emphasis of the panel was on the need to find a least common denominator among different legal traditions so as to frame the discussion of hybrid processes properly in the first place. Only on this basis would it then be possible to suggest to parties the most ideal means for the resolution of their dispute.