THE ROLES OF MEDIATION AND ARBITRATION IN RESOLVING FOREIGN COMMERCIAL DISPUTES

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1. Once again, I find myself with what is both a pleasure and an honour to have been invited to speak on a panel with such distinguished speakers. Once again, I thank you all for coming to listen to me.

2. I shall talk about the roles of mediation and arbitration in resolving foreign commercial disputes from the English perspective.

3. Why should a businessman use mediation or arbitration in the first place, instead of litigating in the English courts?

4. There are advantages to litigating in the UK.

    - The courts can act immediately in cases of urgency.
    - English judges are usually both competent and hardworking.
    - The courts have the power to enforce their orders, if necessary by committing a disobedient party to prison for contempt of court.
    - There are powers to enforce judgments.

5. But there are considerable disadvantages to litigating in the UK.

    - It is hugely expensive.
    - If you are claiming £200K (ie c165,000 yuan), you have to pay the court £10,000 (ie over 80,000 yuan) as a court fee.
    - You have very high initial legal expenses because you can only issue your claim once a considerable amount of preliminary work has been done.
    - It can take a very long time for your case to be tried. Even when it is tried, the judge might not be able to finish it, and might have to adjourn it for several months.
    - The judge might be very competent, but he might be difficult in dealing with the parties, or unskilled in the law relating to your case, or just lazy or not capable of dealing properly with your case.
    - If the case has taken longer than a day or so to try, the judge might not give his judgment for several months.
    - If you win, you won't get an order for all your costs except in very unusual circumstances: you will probably get an order for about 60% of your costs.

- Even if you do win, the losing party might appeal to the Court of Appeal. That can easily take more than a year to be heard, and will again involve you in more expense.
- If you win in the Court of Appeal, your opponent might try to appeal to the Supreme Court. Unless the Court of Appeal gives permission to appeal to the Supreme Court (which is unusual), it will take some months before the Supreme Court decides whether it will hear the case. If it does decide to give permission to appeal and to hear the case, it could be another year before the case is heard. But that is not the end of the matter, because the justices of the Supreme Court who hear the case (usually 5, sometimes 7 or even 9) generally take many months before giving their decision.
- So it can easily be 4 years between your dispute arising and your winning in the Supreme Court. You will still probably only have got awards of about 60% of your total costs, so you might find at the end of the day that you've had huge expense, huge strain and worry, you've been taken away from making your business grow, and the net amount you will get from your opponent is very small. An example is if

your claim is for £500,000 (ie a little over 400,000 yuan), and your total legal costs for the 3 stages of the hearings come to about £500,000 you will be likely to get an order for repayment of c£300,000 so even if you get everything back from the other side, your claim ends up only being worth £300,000 and not the £500,000 you originally sued for, because the litigation has cost you net £200,000.

- In any event, it's one thing getting a judgment, and another enforcing it. Many losing parties to litigation, or judgment debtors as they are called in England, are skilled at making it very difficult for the winner to enforce his judgment. That itself can take years, and cost a lot of money.
- There are also two potentially very important disadvantages to litigation, whatever the result. The first is that, because the courts are open to the public, members of the public can sit in court. So you suffer the embarrassment of their hearing the other side's lawyer call you a crook and a liar, or (even worse) hear the judge call you a crook and a liar. The second is that if your opponent has been a valued client, you will probably want to continue doing business with him.

But if your lawyer is calling him a thief, he's not likely to do any more business with you.

6. But there are alternatives to suing in the courts if you have a commercial dispute in England. The first is **mediation**.

7. The most common form of mediation is when two or more parties with an apparently intractable dispute agree to appoint an independent third party as mediator to try to reach a settlement between them. The overwhelming majority of cases are suitable for mediation, no matter how wide apart the parties appear to be. A skilled mediator can help most parties find an acceptable solution to their problem. Indeed, as those of you who heard me speak yesterday, the English courts are very keen to promote mediation so as to avoid litigation.

8. The fundamental point to bear in mind is that in mediation it is not a question of who is right and who is wrong. Nor is it a matter of simply splitting the difference (although this can transpire to be the solution). Each party has to ask himself: can I live with a negotiated settlement? If he cannot, then he should continue with his litigation. But before he does, he should consider the following:

- **Cost and speed.** Mediation is much cheaper than litigation. In one or two days, you settle the problem, as opposed to having to wait for several months or longer for a trial, while racking up enormous bills (only part of which you will get back if you win). You will be able to get on with growing your business rather than having the distraction of litigation.
- **Practicality**. What if you lose your case when you litigate? Apart from your own costs, you will almost certainly have to pay a high percentage of your opponent's costs. In addition, even if you win, your opponent might appeal, which will cause substantial further delay. Moreover, it is one thing getting a judgment, but (as I have pointed out) it can be quite another enforcing it, resulting in further cost and delay.
- **How important is your relationship with your opponent**?If you wish to continue that relationship, for example buying from or selling to each other, it will be much easier to do so if you mediate your dispute rather than have lawyers on either side calling the other party liars.
- **Confidentiality**. Litigation is open to the public and can be reported. Mediation is confidential. It may well be undesirable to have your commercial disputes viewed by the public, eg your competitors.

9. The disadvantage of mediation, of course, is that you will not be getting what you believe is due to you, nor will you be having your day in court to explain to the judge why your opponent is a rogue and has taken unfair advantage of you. But most sensible people will realise that the advantages of mediation far outweigh any disadvantage.

10. If you do come to a settlement in mediation in England, the lawyers draft an agreement which both parties sign. If one of those parties subsequently regrets signing the agreement and wants to go back on it, the other party can enforce it in the courts. I appreciate that this is different from the position in China, where a mediation agreement is only legally enforceable if the mediation itself has been through the court.

11. In summary, my advice to virtually any litigant would be to try mediation. People are often surprised at how successful the process can be. In any event, if the mediation does not result in a settlement, you can always arbitrate or litigate. It is common for so-called “step clauses” to be inserted into commercial contracts, providing for various stages of negotiation (including mediation) before getting to the stage of arbitration or litigation.

12. The second alternative to litigation if you have a commercial dispute is **arbitration**.

13. Arbitration has the following advantages:

- Like mediation, it is confidential.

- **You** choose who decides the dispute: the arbitrator. If it is just one arbitrator, you decide on who it will be by agreement with your opponent. If you disagree, then a neutral third party (eg the institution under whose rules the arbitration is to be conducted) will decide who is to arbitrate. Earlier this year, the parties to an arbitration between chartered accountants could not agree on who the sole arbitrator was to be, and the President of the Institute appointed me as arbitrator. I had had no previous connection with either party.

- In big cases, there will be a panel of three arbitrators. Each party appoints one, and those arbitrators appoint the third who will act as chairman of the panel. If they cannot agree,

then once again the relevant arbitration institution will appoint the chairman.

- Arbitration is based on the agreement of the parties, usually when they make their contract, but it can be at any time. So they can agree that normal rules of evidence do not apply, or that there should be no disclosure of documents (which can be a hugely expensive and long process) or that no live witnesses should be called and the arbitration decided simply on the documents, or that there will be a full hearing with witnesses called and cross-examined.

- The English courts can only intervene in very limited circumstances:

    - To decide whether or not an arbitration agreement exists. If there is no binding arbitration agreement, then one party cannot force the other to submit to arbitration.
    - To help in implementing the arbitration agreement if it does exist, eg by appointing, removing or replacing an arbitrator in limited circumstances.

- To issue an injunction (except in limited circumstances[1]) preventing litigation proceedings being brought in breach of an agreement to arbitrate. This quite often happens: there is an arbitration agreement, the parties fall out, one wants to arbitrate, but the other thinks it will do better if it brings litigation in its own country.
- To enforce or set aside any award.
- To hear appeals from arbitral awards but only in very limited circumstances: there must be an important legal point, and not just an attempt to get the Judge to decide the facts differently from the arbitrators. One way in which parties to an arbitration can try to reduce the chances of the losing party appealing to the court is by not asking the arbitrator(s) to give reasons for the award, but simply to make the award.

- Arbitral awards can be enforced in any country in the world which is a party to the New York Convention of 1958. More than 150 countries, ranging from Afghanistan to Zimbabwe,

[1] Between EU or Lugano states

have become parties to that Convention. China became a party to it nearly 30 years ago[2] subject to two reservations: first, reciprocity (ie the state by which the judgment was given must itself be a contracting state to the Convention); secondly that the award is given in relation to differences arising out of legal relationships (whether contractual or not) considered to be commercial under Chinese law.

- There are defences to the enforcement of arbitral awards under the New York Convention, but they are limited.

14. There are, however, disadvantages to arbitration. They include the following:

    - Although it is supposed to be cheaper than litigation, that is not always the case. A little while ago, I was counsel in an arbitration which had a 5 day substantive hearing, and the total costs of both sides exceeded £5m ie over 4m yuan.
    - If you have a panel of 3 arbitrators, there can be cultural differences and misunderstandings between them which can make for difficulties in agreeing an award.

[2] January 1987

- Most importantly, the arbitrator or arbitrators might be so busy, that they take up to a year or longer before making their award. This is most unsatisfactory for the parties, because they want to know where they stand. If there is a substantial sum in dispute, that can make a considerable difference to the parties' business plans, eg re investment or expansion. The way round this, of course, is to include in the terms of appointment of the arbitrator or arbitrators that they will provide their award within so many weeks of the conclusion of the arbitral hearing.

15. In England, we do not have the process known as **med-arb** which you do have in China. That enables a dispute to move between mediation and arbitration as the adjudicator (as I shall call him) thinks appropriate. This has the advantage of flexibility but the disadvantage that, if you are involved in a mediation and know that what you say to the mediator is confidential, you are likely to disclose to him things that you wouldn't want an arbitrator to know because it weakens your case or your bargaining position. So if you are in med-arb, you will not want to tell the adjudicator during the mediation part of the process what you might have told him if it had simply been a mediation. A way round this

problem is to allow one party to object to the adjudicator being the arbitrator if he has been the mediator.

16. There are some cases where litigation or arbitration is necessary, eg where you are arguing over a point of law such as the interpretation of a law. But in the overwhelming majority of cases, I would advise anybody with a commercial dispute to try mediation as a first step. As I said, if it fails you can always go on to arbitration or litigation if mediation fails.

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