From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation

Mordehai (Moti) Mironi*

1. Introduction

For many years transnational business disputes have been resolved almost exclusively through adjudication. These disputes have been litigated either in courts or brought to institutional/administered or ad hoc private/non-administered[1] arbitration of one sort or another. The forum is different, not the discourse. In both, the discourse is rights-based.[2] In recent years, we have witnessed a substantial increase in pre-dispute contractual arrangements and disputing behaviour where parties are willing to explore mediation before they invoke arbitration or court proceedings. As in other areas, such as labour, employment, securities and domestic commercial disputes, parties in transnational business disputes opt for mediation. They seek not only a speedy, informal, and less expensive procedure, but also an opportunity for interest-based discourse or a different platform; one which tends to avoid the deterioration of the business relationship associated with either power-based or rights-based discourse, i.e. adjudication.

The arbitration providers and administering organisations have responded to the growing interest in mediation and other non-adjudicatory dispute resolution processes. They have added various ADR techniques to the services available to disputants.[3] In practice, however, arbitration has not yet lost its dominance as a

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1 There are also hybrid practices when parties to a transnational business dispute use one of the administering organisations only for the appointment of the arbitration panel, and the whole proceedings are run as a non-administered arbitration.

2 The distinction among power-based, right-based and interest-based discourse was developed in William Uri, Jeanne M. Brett and Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflicts* (Jossey-Bass, San Francisco, 1988).

3 See ICC ADR Rules 2001 and LCIA Mediation Procedure 1999; E. Gaillard, "The New ADR Rules of the International Chamber of Commerce", *New York Law Journal,* October 10, 2001, p.3.

dispute processing technique, with mediation amounting to only a small fraction of the case intake a year.[4]

This article tells the story of a transnational business dispute referred by the court to outside mediation. The road to its final resolution began with a typical mediation process, later transformed into settlement efforts, and ended with final-offer arbitration. The journey took only two consecutive days and the parties came out highly satisfied with the process and the outcome. The case attests to the value and promise of mediation and other ADR processes for reaching amicable, speedy, inexpensive resolution of transnational business disputes. It demonstrates that mediation carries a potential for value creation and relationship transformation not only in domestic disputes, but also in international business disputes. Finally, it highlights the importance of having the flexibility and expertise in the full menu of ADR processes that enable the mediator to suggest moving from one process to another as the need arises.

The following section attempts to clarify and construct a common terminology, which is so problematic in writing about ADR. It is followed by a short description of the dispute and analysis of the process. The concluding section discusses important lessons for the mediation of transnational business disputes.

2. A note about terminology

The literature and the public debate regarding ADR have long suffered from terminological flaws. The problem seems to get worse as one moves to comparative analysis and attempts to give meaning to terms such as mediation, settlement, conciliation and facilitation.[5] For the purpose of this article, it is important to distinguish between court-ordered or out-of-court settlement and mediation activities. In addition, the process of final-offer arbitration in the context of med-arb, sometimes referred to as "medaloa" (mediation and last-offer arbitration),[6] will be explained.

Settlement and mediation Settlement and mediation are consensual dispute resolution processes in which a third party with no decision-making authority attempts to bring the disputing parties to end the dispute by agreement. In Israel, settlement is called "compromising". As a process, it can be performed either by a judge (the presiding or a settlement judge) or by others, inside or outside the courts. The list

4 One explanation for the low use might be that parties feel that in mediation there is less need for an administering organisation than in arbitration.

5 "Mediation" and "conciliation" have different meanings in various legal systems, A. Zack, "Conciliation of Labor Disputes-General Report, Thirteenth Meeting of European Labour Court Judges", 2005, p.5.

6 M. E. Telford, "Med-Arb: A Viable Dispute Resolution Alternative", Queens University, *Current Issues Series,* 2, 2000.

of out-of-court professionals who provide settlement services includes those who call themselves mediators, but who are actually engaged in settlement. Similarly, judges often glorify their settlement activities by calling them mediation. This discussion concentrates on the distinction between settlement and mediation conducted outside the courts. Both are entirely non-coercive and enable the person who conducts them to engage in private caucusing and sub-group meetings. Generally speaking, settlement is informal and off the record, partially or fully confidential,[7] three-side joint or separate communication,[8] based primarily on pleadings and other documents in the files. The person conducting the settlement is relying on his or her presumed professional status and subject matter expertise, trying to convince the attorneys and the disputants, in this order, to end the dispute by agreeing on an outcome which is located somewhere on, or close to, a virtual line connecting the parties' positions. The fact that the outcome is usually a compromise may explain the origin of the term "compromising".

During the settlement process, efforts are made to narrow the gap between the parties' positions by changing their perception on what could be acceptable to them. In addition, the person conducting the settlement makes his or her own proposals about possible compromise outcome, based on general evaluation of the case's merits, and the likely outcome in litigation. Settlement tends to be evaluative, rights-based and backward looking. In addition, lawyers play a pivotal role and the compromise outcome is generally confined to the remedies available in courts.

Mediation is distinctively different from settlement. In its orthodoxy, it tends to be non-evaluative, interest-based and forward-looking. It aspires to transform[9] the relationship between the disputants and to create, rather than divide, value[10] by

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7 The confidentiality of communication during in-court settlement is not nearly as legally secured as communication during settlement conducted by an outside mediator. In the latter, confidentiality is heavily regulated by law and by the mediation agreement signed by the parties before entering mediation.

8 Some writers make a distinction between in-court mediation and settlement. The former provides opportunity for a party to meet privately with the judge and to impart confidential information which may not be disclosed to any other party. The latter is conducted during pre-trial conference, in open court, and in presence throughout of both parties. See L. Street, "Mediation and the Judicial Institution" (1997) 71 Aust. L.J. 794 at p.796.

9 R. A. Baruch Bush and J. P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (revised edn, Jossey-Bass, San Francisco, *2005); R.* A. Baruch Bush, "Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation" (1989-1990) 3 *Journal of Contemporary Legal Issues* 1; J. P. Folger and R. A. Baruch Bush, "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of Transformative Approach to Practice" (1996) 13 *Mediation Quarterly* 263-278; A. E. Colsky, "Delivering Transformative Mediation to Every Zip Code" (2001) 52 *Labor Law Journal* 185; T. Nabatchi and L. Bingham, "Transformative Mediation in the USPS Redress Program Observations of ADR Specialists" (2001) 18 *Hofstra Law Journal* 399.

10 R. H. Mnookin, S. R. Peppet and A. S. Tulumello, *Beyond Winning-Negotiating to Create Value in Deals and Disputes* (Belknap Harvard, Cambridge, Mass, 2000), pp.11-43.

leading the parties to creative solutions that address their common and separate needs. In a dyadic dispute, mediation is an informal, strictly confidential, three or more way communication, carried on through joint meetings and private plenary or sub-group meetings. The participants are different. The disputants themselves play a major role and the mediator may be involved in direct communication between the disputants and their lawyers, as well as with a "second table" constituency.[11] As an interest-based discourse, the communication focuses on parties' interests, i.e. needs, aspirations and constraints, as well as on creative solutions that can address these interests. Legal arguments are taken into account primarily in order to assess the alternative to mediated agreement[12]; they are of secondary importance to the process leading to agreement. If successful, the relationship between the parties wilt undergo some transformation and new value may be created. In other words, the outcome will be located in a zone entirely divorced from the virtual fine connecting parties' positions in litigation and outside the confines of remedies available in courts.

Sometimes, writings about judges engaging in settlement activities differentiate between settlement and mediation by stating that the former is devoid of the possibility to engage in private caucusing and sub-group meetings. This is never the case when speaking about out-of-court settlement and mediation. The practice of private caucusing and sub-group meetings is available and frequently used in both; only the purpose is vastly different. Since settlement is a rights-based, narrowly focused and positional discourse, private and sub-group meetings are used for five main purposes: (i) to probe into parties' real positions and "red lines"; (ii) to continuously attempt to change these positions and levels of expectation, primarily through "reality check" or case evaluation of one sort or another; (iii) to avoid the reactive devaluation associated with low-trust competitive negotiation; (iv) to discuss proposals and options that parties might feel too risky to discuss in joint or plenary meetings; and (v) to enable the person conducting the settlement to engage in positional negotiation with the parties[13] and to facilitate the intra-negotiation within each disputing party.

Mediation, in contrast, is a broadly focused, interest-based and forward-looking discourse. Hence, private caucusing is used primarily as a means to attain two goals: (i) to broaden and deepen the discourse and the bonds between the mediator and the disputing party; and (ii) to enable the mediator to delve into the disputing party's emotions, feelings, needs, aspirations, resources, inhibitions and constraints, in general, and with regard to the dispute, not the case, in particu-

[11] Such as spouse and relatives, board members, general membership meeting, etc.

[12] Fisher and Uri coined the concept of BATNA (best alternative to negotiated agreement). See Roger Fisher and William Uri, *Getting to Yes: Negotiating without Giving In* (Houghton Mifflin, Boston, 1981), pp.101-111.

[13] J. C. Freund, *The Neutral Negotiator-Why and How Mediation Can Resolve Dollar Disputes* (Prentice Hall Law & Business, New York, 1994).

lar. The vast information gathered during the private caucusing and sub-group meetings provider the mediator with a better bird's eye view of the dispute, not the case, and the disputants in their entirety. It is the raw material which will be used later by the mediator and the parties to build forward-looking creative and value-creating solutions. Not less important are the trust and bonds that are built during the private caucusing and sub-group meetings between a party's delegation members and the mediator. These bonds are used by the mediator to empower[14] the parties, to avoid the reactive demonising associated with litigation and to inspire them to engage in recognition, forward-looking, creative problem solving and relationship transformation.

Med-arb and final offer arbitration The term med-arb[15] is used to describe situations in which parties in mediation or settlement jointly appoint the mediator as an arbitrator, authorising him or her to render a final and binding decision in lieu of agreement or decision by the court. It may be used pre-dispute, but is commonly used ad hoc, i.e. when parties fail to reach agreement during settlement or mediation. Med-arb requires the parties to have a high level of faith in the integrity of the person conducting the settlement or mediation. It raises a host of practical and ethical questions.[16] To address some of them, parties have been experimenting with reversing the order. The third party arbitrates, but does not issue the award unless the settlement or mediation fails to bring the parties to agreement. This is called arb-med or post-arbitration mediation.[17]

Final-offer arbitration has been referred to by different names: pendulum arbitration, either-or arbitration, straight or forced choice arbitration, flip-flop arbitration, one-or-the-other arbitration and baseball arbitration.[18] There are many versions, but the common thread is that the arbitrator is authorised to adopt only one of the parties' final positions. The underlying idea is that a decision-making model of this sort forces the parties to adopt more reasonable positions, increasing the probability of reaching pre-arbitration agreement or leaving the arbitrator to decide within a much narrower gap between parties' expectations.

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14 The concept of empowerment and recognition are the corner stones of transformative mediation: see above fn.8 and R. A. Baruch Bush, "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation" (1989) 41 *Florida Law Review* 253.

15 B. Bartel, "Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis and Potential" (1991) 27 *Willamette Law Review* 661-692.

16 Telford, above fn.6, pp.2-6; D. Elliot "Med/Arb: Fraught with Danger or Ripe with Opportunity?" (1995) 34 *Alberta Law Review* 163-179.

17 Telford, above fn.6, p.15; Bartel, above fn.15, p.668.

18 R. Lewis, "Final Offer Arbitration: The Anglo-American Dimension" (1993) *Industrial Law Journal* 310-313; Philip Bassett, *Strike Free New Industrial Relations in Britain* (Macmillan, London, 1986), pp.109-116; J. L. Fizel, "Play Bali: Baseball Arbitration after 20 Years" (1994) 49 *Dispute Resolution Journal* 42-47; P. A. Miller, "An Analysis of Final Offers Chosen in Baseball Arbitration" (2000) 1 *Journal of Spons Economics* 39-55.

"Medaloa" (mediation and last-offer arbitration) refers to a special brand of med-arb in which, if settlement or mediation efforts are not successful, the parties move to final-offer arbitration.[19]

3. The dispute

The case was referred to mediation by the court with the consent of the parties.[20] The plaintiff X was a well-established Israeli company, importing, selling, installing and servicing hearing instruments. The defendant Y was a multinational American company, one of the largest producers of hearing instruments in the world, which as part of its M&A strategy bought an Austrian producer of hearing aids, with whom the plaintiff had had a long and fruitful business relationship. X claimed that, after being the exclusive distributor for over 30 years, Y had cut it off without notice and in bad faith, appointing one of its competitors as an exclusive distributor. Furthermore, simultaneously with the decision to terminate the distribution relations, Y refused to fulfill orders which X had sent before the termination date, and even to supply parts for instruments previously sold by X. X alleged that Y's decision had caused it a major loss in revenue and severely damaged its reputation. It asked for compensation based on expected sales over one-and-a-half years, compensation for loss of reputation, a mandatory injunction ordering Y to continue to supply spare parts for five years, and discovery as to the sales of all Y's products in Israel during the one-and-a-half years following the severance. Y claimed that there was no agreement appointing X exclusive distributor for Y or for the Austrian company that was merged with Y; and in any case that X's performance was poor; that it became useless as a distributor, clinging to the old model of business relationship with the Austrian company, which centred on analogue devices; that it failed to adapt to the fact that its business partner had changed and with it also the business policies and practices. For instance, X refused to adjust to the new marketing policies and sale targets as to quantity and types of product, especially as to marketing the new generation of programmable digital instruments developed by Y. Even though X had known that failure to make a clear, unequivocal and timely commitment to promote the sale of the new line of products would cause Y to look for a new distributor, X failed to respond promptly and acted in bad faith by asking for more information and trying to stall for time, which was simply not available given the fierce competition in the market. Y contended that it was disappointed to discover that all along X had been selling much larger quantities of hearing aids produced by Y's main competitor, the ratio being nine to one. In addition

19 Bartel, above fn.15, p.668.

20 In 1992, the Parliament introduced non-mandatory mediation for all civil claims. According to the Courts Law 1984, s.79C, a judge may propose that the parties try to settle their dispute by mediation. There is no penalty for refusing to go to mediation. There is, however, one badly construed incentive: if the dispute is resolved in mediation, the plaintiff recovers the court-filing fee.

to its substantive defence, Y claimed the Israeli court had no jurisdiction and alternatively filed a counterclaim for money allegedly owed by X. This was a run-of-the-mill contract case, except that it was a transnational dispute and the parties agreed to try mediation instead of litigation or arbitration.

4. The process

Building the infrastructure The first stage in the process was a preliminary or pre-mediation planning meeting with the lawyers representing the parties. During the meeting I explained the essence of the mediation process and we examined whether mediation would be adequate for this particular case. We also discussed two issues which play a pivotal part in the architecture of any mediation and are critical when mediation is conducted in transnational settings. The first referred to who would participate in the mediation; the second to the format of the meetings. We quickly agreed to the following: (i) lawyers would be present throughout the mediation; (ii) in addition, X would be represented by the two partners, who jointly own the firm, and Y by its regional manager whose office was in Austria; (iii) the mediation would be conducted in English; and (iv) we would plan for two consecutive days of marathon meetings. Within days we signed a mediation agreement, scheduled the meeting days for the next month, and the lawyers approved my assistant mediator.[21] Following the meeting we made a conference call and agreed that, in order to save colts, the two law firms would alternately host the meetings.

Mediation On the first morning the parties told their story at length. We summarised and reflected. The underlying subtext of their narratives was a mutual disappointment from the developments that had led to the litigation. It was clear that X had not appreciated Y's time pressure. It had mistakenly perceived Y's sales targets as "take it or leave it" figures rather than as initial demands. Y's management mistakenly interpreted X's caution and reluctance to over-commit itself, to what it perceived as an unreasonable yet uncompromising sales target, as unwillingness to adapt to Y's new policy of aggressive marketing and giving priority to promoting the new fine of product.

In the afternoon we moved to a private caucus. Being in mediation, no time was spent discussing questions such as whether or not the parties had a binding agreement or whether the agreement had been breached and by whom. We only allowed the lawyers to state their positions very briefly on the legal issues in order to remove it from the table. Instead, we asked each party why it had behaved the way it did, what had happened to their business as a result of the events that had led to the lawsuit, and what were its immediate and strategic

[21] Most mediation in Israel is conducted as co-mediation: V. Lam, "Learning to Dance Together" (2001) 1 *In Consent* 14-23.

needs. We gained two important insights. First, the primary reason why the good relationship, which had existed for years between X and the Austrian company, went sour was that, as a result of two rounds of acquisitions and mergers, the Austrian company had become part of Y. New management had come into power and frequent policy changes were introduced. The Austrian company and Y's regional European office had imposed high demands and strict timetables on X because they themselves were under severe pressure to comply quickly with the new management's policies and sale objectives. X on the other hand could not be expected to act differently than it had. It moved slowly and hesitantly because of the high level of uncertainty associated with what it perceived as too frequent and stormy changes in Y's ownership, management and policies. Secondly, the interests of both sides would be best served by renewing their business relationship. Since the claim had been filed, Y had been through a third merger and acquired a new fine of products. In addition, several of its products had difficulties in penetrating the Israeli market. In short, Y could not find a satisfactory replacement for X. X still needed Y's products, especially the old generation analogue instruments, and would be happy to enlarge its business opportunities by selling all or part of the new lines.

The contours of the interest-based and value-creating solution were clear and on the table. What was needed was to restructure the relationship. This restructuring would entail renegotiating a three party deal between Y, X and the firm with whom Y had been working. The diversification of Y's products and the relatively high investment needed to sell and service each product, cried out for re-dividing the market for Y's products between two or more importers along product lines. The parties agreed this was the optimal solution, creating real value. Nevertheless, to our disappointment, it was not feasible. Y's representative, its regional manager, had neither the authority nor the time to discuss a future relationship. He had been sent to the mediation with a clear-cut mandate: to reach a quick out-of-court monetary settlement. He and his lawyer made several telephone calls to headquarters, but failed to change the mandate and the demise of the mediated win-win solution. It was late in the day and the right time to adjourn. The parties agreed to devote the next and final day to settlement, to try to reach a compromise agreement over the money.

Settlement As the second day began, we, as mediators, felt that something was different from what mediators and those who conduct settlements usually experience. The atmosphere, the discourse and the music of the negotiation were entirely different. The lawyers were assuming a much more active role in advocating their clients' positions and the parties' representatives were concentrating on attributing responsibility for past events and calculating losses. Nonetheless, everyone seemed to be soothed. The preceding day of mediation had transformed the discourse. There had been mutual recognition; parties understood that legitimate albeit different business considerations had brought about the

dispute; they had been engaged in interest-based, forward-looking negotiation, falling short only of renewing their business relationships. All these had impact on the mode of negotiation. During the morning we had joint meetings and separate caucuses. Both parties felt an urge to come to agreement and made some concessions on the money. At noon the gap was still wide. A few more rounds of separate caucuses had not produced any progress. Both parties felt that they had made huge concessions and refused to move further. Since time was running out, I suggested that the amount of money to be paid to X should be determined through an elaborated model of final-offer arbitration.

Final-offer arbitration The underlying idea of final-offer arbitration is to cope with the chilling effect and judgmental overconfidence that often block the parties' way to agreement.

Its main purpose is to cultivate the negotiation process by deterring them from arbitration and forcing them to adopt more reasonable positions. This is why final offer arbitration is so effective where there is a large and enduring gap between the parties' positions. In this case we felt that they had put a high value on reaching their own agreement, with the assistance of the mediators. A decision by a third party was perceived as a second best and last resort. Consequently, I designed for them a special model of final-offer arbitration.

In a regular final offer, the arbitrator listens to parties' arguments and then selects one of the parties' offers made in confidence. I suggested that at the end of oral arguments the two offers would be opened on the table. Then the parties would have three hours to negotiate. The idea was that the two offers would serve as a new anchor for the negotiation and that they would compromise to avoid the uncertainty of an arbitration. If they failed to reach an agreement, the arbitrator would select one of the offers. Both parties instantly embraced the idea. They insisted that my assistant and I serve as arbitrators. That decision transformed the process into a med-arb final-offer (medaloa), except that, according to our improved model, the parties would have an additional opportunity to negotiate on the basis of their final offers. A detailed agreement was drafted and signed. It laid out the arbitration model as well as other issues that had been agreed upon throughout the mediation, such as the continued supply of spare parts and the offsetting of X's debts. Special provisions were added to the agreement to protect the mediators and their award against a party's attempt to quash our decision for Jack of neutrality. The provisions stipulated that the parties had selected the mediators as arbitrators knowing that we had acted previously as mediators, had conducted private caucuses and had received confidential information. The parties agreed that we would use all this confidential information for our decision, waiving any right they might have to attack the award for that reason. The parties also signed a motion asking the court to give the agreement the authority of a consent judgment and to refund court fees which the parties had paid when the

claim and counterclaims were filed. With the signed agreement and motion in hand, the only thing left was to fill in, at the end of the final offer arbitration, the sum of money the defendant would pay.

The arbitration stage began with a short meeting, during which the parties had one hour each for oral submissions and an additional half hour for a response. Immediately afterwards the parties submitted their final offers in sealed envelopes. We let the parties see the offers. As expected, they were not far apart. We adjourned in order to allow the parties time for negotiations. After only one hour they asked us to decide. We did. Both were very satisfied with the outcome and the process. Y's regional manager left for Vienna on time.

5. Analysis

Many insights and lessons for transnational commercial mediation can be drawn. Some are common with transnational commercial and cross-cultural negotiation. The four aspects discussed briefly below highlight the particular mediation dimension.

The challenge of language and cultural differences The ability to cope with language barriers and cultural differences is much more crucial in transnational commercial mediation than in arbitration. The concept of cultural differences refers to differences in the culture of doing business, the legal culture[22] and the culture of disputing and dispute resolution. In arbitration, the disputants may partially overcome language barriers and cultural differences by hiring the services of an appropriate attorney. Other than giving testimony, the disputants do not take an active part in the process. Furthermore, someone else-the arbitrators-makes the decision for them on the basis of what they understood from the attorneys' presentations. In transnational commercial mediation, managers and officers, not lawyers, are the real players and they have the responsibility to make decisions by consensus. In order to do this, they need to feel comfortable with the language of the mediation and overcome or bridge, with the assistance of the mediator, the cultural differences.

As this case demonstrated, mediators in transnational settings may structure and conduct the mediation process in a way that assists the disputants to relieve or overcome the difficulties associated with language barriers and cultural differences. Co-mediation serves many functions. The mediator may engage a co-mediator proficient in the language of the disputant who experiences problems with the language used in the mediation. Another effective means to cope with language and cultural differences is to reflect upon the parties' statements with far more length, depth and detail than usual in domestic mediation. This may

22 Mnookin, Peppet and Tulumello, above fn.10, p.167.

reduce the risk that both the mediator and the other parties may not understand what the speaker meant; a risk which is always there but is much larger in transnational mediation.

Time constraints Transnational mediations are always conducted under severe time constraints. Naturally, they call for marathon sessions to be held on consecutive days. Quite often this is a big advantage. The parties and their lawyers are away from their homes and desks and free from other obligations. They can devote all their attention to joint efforts to reach agreement. In addition, the transformation process is not interrupted by intervals in between sessions. However, time constraints and the ensuing pattern of marathon meetings on consecutive days may have a downside. In this case it did not allow the time needed to work out an interest-based, forward-looking and value-creating solution-a solution which was on the table and could optimally serve the immediate and strategic business needs of X and Y and of a third party, the firm which replaced X as Y's distributor in Israel. Since we did not have an extra day or a time interval in which to develop and examine the feasibility of the win-win, interest-based and systemic solution, we had to compromise on an "inferior" monetary settlement.

The participants Almost all negotiations are conducted by representatives or agents, be they lawyers, union leaders, government officials, professional negotiators or managers. Negotiation literature deals with the principal/agent impact on negotiation and the difference between negotiation by representatives and direct negotiations. Although mediation literature hardly touches on this issue, the make-up and authority of the representatives to the mediation and the relationship between them and their constituency is a crucial element, which often separates failure from success. The magnitude of the representation problem tends to increase as we move from settlement to mediation and from domestic to transnational business mediation. Not only the time allotted to the mediation but the identity of the participants, i.e. who will represent the disputing parties, in addition to lawyers, is decided in advance. At that stage, no one actually knows in which direction the mediation will go. Quite often, especially in settlement, this does not create a problem. In this case it did. We had a golden opportunity to reach an integrative win-win solution. The interests of both parties would have been better served by restructuring their relationships, rather than by reaching a compromise on the compensation for the alleged breach. Nonetheless, Y's relevant or essential decision makers were neither physically present nor accessible to give a fair chance to the mediated win-win solution. To the disappointment of all who worked together on the architecture of the mediated solution and deeply believed in its superior qualities, it did not see the light of the day.

Mediation and dispute resolution This case demonstrates that, due to the urgency and time constraints associated usually with transnational business mediation, there is a pressing need or at least an advantage to engage a mediator with special

qualities: one who is well versed in dispute processing design, has versatile skills and experience in the rich menu of ADR processes, and possesses the prudence, flexibility and sensitivity to select and facilitate the process of moving from one dispute resolution process to another, as the need arises and changes.