第四环节：个案分析 － 选择解决争议方法的实践
Session Four: Dispute Resolution in Practice – A Case Study
讲题： 选择诉讼、调解及仲裁的策略
Topic: Strategy in Choosing Litigation, Mediation and Arbitration
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Strategy in choosing Mediation, Litigation and Arbitration *by Neil Kaplan*

1. When drafting a commercial agreement, it is better practice first to agree on the law that is going to be applicable to the substance of the dispute. If the parties do not agree what law is to apply, then the court or the tribunal will have to decide which law is applicable, applying relevant principles of private international law. It is therefore cheaper and more convenient to agree this at the time of contract conclusion rather than leaving the issue open.

2. It is, of course, not necessary for the parties to a commercial agreement to agree to a dispute resolution clause. If they forget to deal with it, or they cannot agree on it, then when a dispute arises the claiming party will have to make a claim in a court which would accept jurisdiction of the dispute. In some cases, one party may go to one court, and the counter-party may go to another court in a separate jurisdiction and the problem of competing jurisdictions can arise.

3. To avoid all this, it is best practice to agree on a dispute resolution clause. If the parties want litigation then they should attempt to agree a court which will have exclusive jurisdiction to deal with the dispute. However, if they prefer an alternative to state court litigation, then they should consider a mediation/arbitration clause.

4. There are cases when it is not appropriate to have an arbitration clause, for instance, in some jurisdictions there may be a limit on the topics or subject-matter that can be amenable to an arbitration. In other cases, it is necessary to have litigation so that the decision of the court can bind or affect parties other than those signing the agreement. This is particularly so in patent and trademark cases.

5. If the decision is to opt for arbitration, a number of matters need to be considered. Firstly, it is essential to agree in which language the arbitration will be conducted. This is not an issue in state court litigation, because the language of that state applies, but in an international arbitration, language should always be agreed, because if not, it can lead to enormous difficulties, expense and time wasting.

6. Mediation might be an option for commercial parties that have engaged in a long lasting and friendly commercial relationship. Dispute resolution through mediation has the potential of settling disputes in an amicable manner and finding a solution that is acceptable to everybody, thereby making it more likely that the business relationship is maintained. Unlike litigation or arbitration, mediation does not end with a *"winner"* and a *"loser"*. While a mediated *result* is not in itself enforceable, it is in many cases shaped as a contractual settlement and thus binding on the parties.

7. Today, it is common to see tiered or escalated dispute resolution clauses. The idea here is that the party should first attempt a negotiated settlement or mediation. Failing that they agree on some interim binding arrangement, and failing that, having an arbitral award that finally decides the substantive issues between the parties.

8. There are many clauses that seek to achieve a staged process but which in fact fail to do so. In most jurisdictions, if it is intended to make mediation a pre-condition to arbitration, then the clause has to be drafted in such a way as to achieve that. Clauses such as *"in the event of a dispute the same shall be settled by friendly negotiations failing which the dispute shall be referred to arbitration"* fail to achieve this by being too uncertain.
   What does *"friendly negotiation"* mean?
   When does it start?
   When does it end?
   If the parties intend mediation as a pre-condition then they should use language such as *"in the event of a dispute the matter shall be referred to amicable negotiations* [or mediation] *(*[set out the mechanics]*) and until such process is completed, or after 49 days have elapsed since it commenced, neither party shall be entitled to commence an arbitration"*.
   Wording like this is clear and the courts can give effect to it.

9. For some contracts, such as the ones for Hong Kong's Airport, there was provision for an interim stage between mediation and arbitration. That stage is called "adjudication" and is particularly appropriate in complex construction cases. If the negotiation/mediation is unsuccessful, the parties submit their respective cases to an adjudicator who has to arrive at a result within very strict and short time limits. Such clauses provide that such decisions are binding, in other words, they have to be obeyed, but they are not final in the sense that an aggrieved party can have the matter reconsidered in a full-scale arbitration. Such clauses frequently require sums ordered by the adjudicator to be paid even though it may be subject to later review in an arbitration that opens up the issues. So the rule is: pay first, argue later.

10. The advantages of arbitration are well-known but can be summarised as follows:

    a. Arbitration is private and in some jurisdictions confidential. Many business men prefer disputes to be dealt with behind closed doors.

    b. Due to the success of the New York Convention, arbitral awards are generally easier to enforce in a cross-border scenario than judgements of a state court.

    c. Arbitration allows the parties to have some involvement in the choosing of the tribunal - something not permitted in state court litigation. This allows for a cultural and legal balance.

    d. Additionally, arbitrators can be more flexible and use procedures designed to aid expedition and minimise cost.