MEDIATION TECHNIQUES

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Mediation Techniques

the global voice of the legal profession®

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the global voice of
the legal profession®

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Introduction

The Mediation Techniques Subcommittee of the International Bar Association was established to offer mediators from around the world the opportunity to share their practical expertise. It was felt that this would be particularly attractive to mediators from smaller jurisdictions where training may be offered by a limited number of providers and accordingly practice may be developing an undesirable uniformity of style. We have also started to invite high profile academics to the IBA Annual Conference to give a wider number of practitioners the opportunity of learning from them.

We decided to put together a book because although there are many books about mediation most of them concentrate on a single topic or have a bias towards the theoretical or philosophical. We felt that there was a need for a practical collection of tips from and for practising mediators of different styles facing different sorts of issues. We wanted it to be usable by mediators at an early stage in their career but to contain sufficient variety to still be interesting to more experienced mediators.

The format is a series of short essays by practitioners covering the topic from pre-mediation planning through to post mediation follow through, interspersed with pages of short hints and tips to which we hope users will add their own points as their practice develops. The final section of the book deals with the use of mediation in different fields and is intended to provoke debate as to how mediation could be advanced into new areas as well as providing information about topics with which many readers will be unfamiliar. You will find some duplication and much contradiction of advice throughout the book as what works for one person in one situation will be inappropriate for another. It is this flexibility that for many of us makes mediation such an attractive form of dispute resolution.

This book represents a collaboration between more than 50 members of the IBA Mediation Committee who have generously shared their experiences.

It should be understood that the views expressed here are the authors' own and may not represent those of their employers or of the IBA. We all hope that our readers will find it useful and that they will be inspired to come up with new and ever better ways of conducting mediations. We invite you to share your ideas with others and to consider joining our committee of which more details can be found at: **www.ibanet.org**.

Patricia Barclay
Co-Chair, IBA Mediation Techniques Subcommittee

Prior to Mediation

Practical Considerations When Thinking About Mediation

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Introduction

Mediation is becoming an increasingly attractive alternative for dispute resolution even outside traditional mediation venues like the United States and Europe. Specifically there is some good news coming from the Asia/Pacific front, with an increase in the number of cases submitted to mediation in China, Singapore, New Zealand, Australia and India.

Unfortunately, although arbitration is ever more a reality in Latin America, we have not seen the same development in the mediation field.

This much needed development, however, is possible and there are valuable initiatives, particularly regarding the establishment of a good set of mediation rules by various mediation and arbitration centres in Latin America, including Brazil, Argentina, Peru, Chile and Mexico.

The purpose of this article is to provide some guidelines for the drafting of mediation clauses, especially for commercial agreements. But let us start with the two basic questions that any lawyer should ask themselves when facing the challenge of drafting a particular agreement.

Why mediate and what to mediate?

Mediation is a process of alternative dispute resolution in which a neutral third party, the mediator, assists two or more parties in order to help them to settle a dispute.

An interesting definition of mediation was adopted in a bill of law which is pending approval by the Brazilian Congress: 'Mediation is the technical

activity exercised by an impartial third party chosen or accepted by the parties in order to consensually enable the prevention or resolution of conflicts'. In other words, any technique adopted by a specialised and skilled person to help two parties that have or might have in the future a dispute to prevent it from happening or to settle such dispute is considered mediation.

Mediation is appropriate for various types of disputes and agreements and is commonly used in matters related to family and succession law, construction matters, civil liability cases, commercial disputes of any kind and even disputes among shareholders.

It is especially appropriate in commercial disputes, which is the core type of dispute addressed in this article, particularly in complex and difficult cases,[1] because of the following reasons:

- protection afforded by confidentiality (reputations, good will, trade secrets, or a good name);
- possibility of avoiding the distraction of ongoing litigation or arbitration;
- possibility of avoiding the expenses of litigation;
- general need to expedite resolution of commercial disputes;
- impossibility of accurately predicting the outcome at trial;
- desire to maintain control over the dispute resolution process;
- general need for more than simply an award of damages or an injunction;
- possibility of compromise solutions rather than a win-lose outcome;
- desire to maintain control over the outcome; and
- complex cases often provide a greater potential for trade-offs and structuring of settlement packages.

When to begin mediation?

Although mediation can be applied successfully at any stage of a dispute, experience shows that it usually works better in its earlier stages, but after the parties have a complete knowledge about all the matters involved in the dispute.

It is a common saying in the mediation community that mediation creates a communication bridge between the parties, but this bridge is more likely to work if the mediation process begins before the parties have started pursuing aggressive measures against each other. In other words, while the parties still maintain a business perspective regarding the conflict.

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1 In this article complex and difficult cases are considered the ones with one or more of the following characteristics:
- multiple parties involved;
- multiple witnesses of fact;
- complicated and/or multiple issues of law, technical interpretation;
- uncertainties regarding forum and enforceability; and
- complex commercial background.

Drafting a mediation clause

As mentioned by Sally Fitzgerald[2] 'the dispute resolution clause is not the most glamorous aspect of a commercial transaction. It is a bit like a pre-nuptial agreement – nobody wants to be the first to raise the topic and "we probably won't need it anyway".'

In arbitration there is a well known term for such clauses that are drafted at the last minute of the negotiations, without the necessary care and thought, the famous 'midnight clauses'. As in arbitration, a careless mediation clause may cause some problems to the parties in putting together the mediation if a problem arises in the fulfillment or interpretation of any commercial agreement.

The main concerns regarding the drafting of a mediation clause are not so different from the ones applicable to drafting an arbitration clause.

This article addresses some of these concerns, without covering other issues that may be relevant for particular agreements and negotiations.

The issues covered in this article include the following:

- place of mediation;
- representatives of the parties in the mediation process;
- type of mediation (institutional or non-institutional – ad hoc);
- who selects the mediator;
- language of the mediation; and
- confidentiality of mediation discussions.

Place of mediation

The location where the mediation will take place is an important issue, particularly if you are facing an international dispute.

Knowing the particularities of mediation rules in certain countries is a key element in choosing a particular place for mediation.

The concept of neutrality of the place of mediation is not mandatory in international cases and there may be some benefits in locating the mediation where the agreement is performed or at the site where the specific project is or has taken place.

London is a common choice for mediation because of the UK's tradition in mediation and the availability of skilled mediators that have experience working there, but there are many other options that the parties should consider. It is important to note that the development of mediation as a whole requires the choice of other less traditional sites as places of mediation.

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2 *Drafting dispute Resolution Clauses that Work*, see: **www.bellgully.com/resources/resource.01414.asp**.

Representations of the parties in the mediation process

The most common cause of failed mediation is the absence of persons with real settlement authority during the mediation process. As a consequence, it is advisable for the parties to establish that they will be represented in the mediation sessions by people with authority to settle. In commercial agreements experience shows an increase in the rate of settlements when the mediation clause requires that the main officers of the legal entities be present at the mediation meetings.

Type of mediation (institutional or non-institutional – ad hoc)

If the parties do not specify the rules that shall govern their mediation, then the mediator appointed together with the parties will be required to develop or design the rules and procedures on an ad hoc basis.

Leaving these issues aside until after a dispute actually arises can be very risky for the success of the mediation process. There are many aspects of the mediation process that will require long discussions among the parties involved, like the exchange of documents, how the presentations will take place and the role of the mediator in the process.

For this reason, many parties prefer to incorporate existing mediation rules into their contract, for example when the parties decide to name a mediation centre or association (institutional mediation) and link their mediation process to the rules of said mediation centre or association. There are several good mediation centres with very comprehensive rules around the world and the parties may resort to such rules to simplify the drafting of a mediation clause.

Who selects the mediator?

If the parties are not confident about the skills or, specifically, the independence of the mediator selected for their case, it is certain that the process of mediation will end up in a great failure.

For this reason, the parties should select for themselves the mediator or resort to the rules of a mediation centre or association. A great number of mediation centres or associations have the same procedure for selection of the mediator: the parties may present a list based on a previous extensive list provided by the centre or association and the secretariat or the president of the centre or association selects one mediator that is common to the lists presented by the parties.

Language of the mediation

Communication is the basis for the process. Hence, if there is any potential difficulty for the parties involved to understand each other or the mediator, a settlement is unlikely.

It is also important for the mediator and the parties to understand some cultural aspects of the parties involved in order to be effective in the process.

As a consequence, the selection of the mediation language is also a key element to be decided in the drafting of the mediation clause. Of course, in international mediations involving parties from different countries, the parties will need to choose a language that is comfortable for both of them.

Confidentiality of mediation discussions

Mediation is in the majority of cases intended to be 'without prejudice' to any party's rights to continue or pursue legal proceedings. As a consequence, confidentiality is fundamental for the process.

In some jurisdictions – especially civil law countries like Brazil – negotiations are not always so clearly protected. Confidentiality should be assured by the parties in a written agreement.

Enforceability of any settlement

According to the majority of international rules, in order to be enforced a settlement must be reflected in a written agreement. In some jurisdictions, the form of the agreement may have a tremendous impact on its enforceability. As an example, there are some documents in Brazil that can be used in court as a way to permit a fast-track procedure for the recovery of credits. In case of settlement agreements, the inclusion of signatures from two witnesses or from the lawyers advising each party allows the plaintiff to use this type of fast-track procedure.

Conclusion

Given the details involved in a successful mediation initiative, parties and their advisors that are negotiating and drafting commercial agreements should take specialist advice in preparing the dispute resolution clause.

The dispute resolution clause should be carefully crafted with the same level of accuracy and dedication as any other clause of the agreement. Mediation clauses should be complete and extensive in order to ensure the commencement of the mediation process if the parties cannot negotiate among themselves a resolution for a certain dispute. On the other hand, a mediation clause should be as short as possible to avoid problems of interpretation and enforceability.

Issues for Mediation Clauses

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Writing about the drafting of mediation clauses implies first of all to establish what is meant by mediation, as in comparative law mediation and conciliation are hard to distinguish. Mediation can generally be defined as a process of dispute resolution in which an impartial third party – a mediator – intervenes in a dispute with the consent of the disputing parties and assists them in negotiating a consensual and informed agreement, meanwhile the decision-making authority rests with the parties themselves. Conciliation is a process where the impartial third party plays a more active role and has the power to make proposals to the parties.

Before drafting any mediation clause, one has to decide between institutional or ad hoc mediation. The former has the advantage to not reinvent the wheel and permits to insert a model clause in the contract; the latter, however, is the one most frequently used in commercial contracts, and this often presents many practical problems because it is insufficiently well thought out.

Most of the time, there is no 'pure' mediation clause, but multi-tiered clauses that certainly have their advantages. However, on one hand, they too present serious drafting difficulties, and, on the other hand, they do have particularities in regard to the arbitration clause, which is an issue that goes far beyond our subject.

Thus, a typical ad hoc mediation clause sets forth that:

> 'The parties agree that any claim or dispute relating to the agreement, or any other matters, disputes, or claims between the parties, shall be subject to non-binding mediation within 30 days of one party making a request to the other by letter. Any such mediation will be held in the city of New York'.

Such a clause may be considered as unenforceable because of lack of content,[1] because, among others, of the absence of a body of rules and an appointment process of the mediator tends to render such mediation impossible. In order to avoid these problems, the insertion of the following provisions may be recommended.

Applicable rules

In our view, the first issue to settle is what rules are to be applied to the mediation. In effect, most institutional bodies deal with all the essential points a mediation clause should foresee like the definition of mediation, the time frame, the appointment of the mediator and so on. In international contracts, we mostly opt for the 1980 UNCITRAL Conciliation Rules (rules for mediation are the same as for conciliation; in this particular case, we just establish in our clause that Article 7.4 dealing with proposals made by a conciliator is excluded). They provide a comprehensive set of procedural rules, covering all aspects of the conciliation process, providing a model clause, defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.

Definition of mediation

As we said before, in comparative law mediation is not always mediation, as what for one law is mediation, for another law is conciliation; even worse, sometimes they are treated as equivalent. The practical importance of the distinction resides in the notion of 'ultra petita'. In effect, if the clause provides that the neutral has no power to recommend solutions, and if in fact he does so and that recommendation is included in the final agreement, a party acting in bad faith could oppose an enforcement procedure arguing that the neutral acted 'ultra petita' – meaning beyond its mission – and that therefore the settlement agreement is null and void.

1 OLG Frankfurt am Main, OLGR, 2004.9; *Cable & Wireless Plc v IBM UK Ltd* [2002] EWHC 2059.

Scope

The mediation clause must set forth whether it covers any claim related to the contract, or only certain specific issues of the agreement.

Notice provision

The mediation clause should include a notice provision, in addition to the general notice provision ordinarily contained in the body of the contract.

Appointment procedure

The mediation provision should set out the procedure for selection of the mediator, and in case designate an appointing authority.

Seat of mediation

The establishment of the seat of mediation is first of all important in order to determine the applicable law. Mediation is not always a binding ADR mechanism and it may be that the mediation clause has no mandatory character at all in the country where one of the parties seeks the enforcement of the mediation agreement. Often, parties are confused and consider that the seat of the mediation is where they would like to physically hold their mediation sessions. Such a view is wrong. One has to distinguish between the *de jure* seat and *de facto* seat. The *de jure* seat is an abstract designation of a place to anchor the mediation in a national (or local) legal system, whereas the *de facto* seat is the place where the parties and the mediator meet as a matter of convenience. It is not recommendable to fix in the mediation agreement the *de facto* seat, as it is always possible that for various reasons, the parties and the mediator have to meet in different places over the course of the mediation process.

Time-limit and closing

It is not sufficient to foresee a time-limit for the mediation, if there is no provision on who decides when the mediation process has failed before the time-limit has been reached. For instance, the established time-limit is 45 days, but one party communicates after ten days to the other party its decision to consider the mediation as failed; is there really a failure, or is the party overly hasty? It is up to the parties to provide in the mediation clause if it is

the mediator or the parties who are to decide if their mediation process has been unsuccessful. It is also to establish if the decision to end the mediation should be communicated in writing or not.

Settlement authority

Any mediation clause has to require that only those who have settlement authority are to be involved. It is common to see that a lawyer is negotiating through the whole mediation process and that once an agreement is reached, the latter has to be deferred to the lawyer's client who for whatever grounds refuse to ratify it, the whole mediation having being thus worthless. Therefore, it is useful to require that at the beginning of the mediation session, parties present evidence of their authority to settle the dispute definitively.

Severability

A severability provision should be considered in case the dispute relates of the voidance of the contract, or in the event that parts of the agreement are found to be unenforceable.

Confidentiality and disclosure

Complete confidentiality of the mediation process should be provided, in addition to protection from disclosure by statute and settlement discussion privilege rules of evidence. Additionally, contractual sanctions should be agreed.

Costs

Finally, it is always useful to provide who pays what. It is common to establish that each party bears its own costs and that the mediation fees are borne equally by the parties.

The above mentioned points are, in our view, the most important issues to deal with when drafting a mediation clause. Of course, there is no reason not to establish other provisions. However, in our experience, a too detailed clause often results in confusion leading to secondary disputes on the interpretation of contradictory provisions. Last but not least, as we said at the beginning, there is no need to reinvent the wheel and the safest way to do things is to rely on a model clause provided by a mediation institution, or to use the UNCITRAL Conciliation Rules if the parties prefer an ad hoc mediation.

Drafting International Mediation Clauses

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It is often said that the quality of dispute resolution clauses suffers from the unwillingness of the parties to focus on the subject. Parties working – in most cases, amicably – to finalise a business or commercial agreement will understandably be hesitant to spend time imagining future grievances and the mechanisms that may be necessary to resolve them.

The specific topic of mediation, however, is less subject to this problem. If the parties are working through the complexities of a business deal, they should have relatively little difficulty envisioning themselves working through a future disagreement with similar shared purpose. Moreover, if counsel can take advantage of the parties' positive outlook to engage them in agreeing to a mediation clause, it may be easier to then deal with the more adversarial aspects of dispute resolution that may also be addressed in the contract.

Deliberate and precise drafting is, of course, required for mediation clauses even if mediation's consensual nature means the choice of terms carry your consequences than a clause committing the parties to a binding adjudicative process. Ambiguous drafting can lead to disagreements about the applicable procedures and time and money wasted on arguing about how a dispute should be resolved. Further, if the clause is too uncertain, the parties' intention to use mediation may be frustrated.

That said, drafting a mediation agreement suitable for an international transaction can be relatively straightforward, whether it is done in advance as part of the underlying contract or at the time the dispute arises. Model clauses for international mediation are now available from several institutions, and these can often be used with few, if any, adjustments.

Drafting a mediation clause from scratch is also not particularly complicated, although more care is needed to ensure that the clause does not result in gaps and uncertainties that model clauses will likely have addressed. This chapter seeks to identify various topics that are important to consider in drafting a mediation clause, whether based on a model clause or not, in the context of an international transaction.

Mediation as one part of the dispute resolution process

First, it is imperative to understand how the mediation clause, which does not assure resolution of the dispute, fits in the overall dispute resolution process. In most cases, the mediation clause will be drafted as part of a 'step clause' that provides for alternative means of dispute resolution prior to arbitration or litigation.

Mediation may be the first step, or it may be preceded by a negotiation step. Preceding mediation with negotiation provides an opportunity for efficient resolution of the dispute if the parties can quickly work through their problems on their own. It can also help ensure that the value of mediation is not diminished by moving forward with the process too quickly (ie, before the parties fully understand their positions). However, if the clause provides for an initial negotiation phase, short time limits are advisable to ensure that the overall process is not too protracted and that the mediation phase is not undermined by the parties hardening their positions or becoming more adversarial.

Concurrent mediation and arbitration is another option that has recently garnered attention.[1] Parties interested in such a process should closely review the available guidance for such proceedings to ensure that potential complications are mitigated.

In addition to deciding on the overall combination of dispute resolution steps, counsel should consider potential connections between the steps. For example, disclosure and confidentiality can be an issue if the parties are required to disclose information in the mediation process, which could then be used against them in arbitration or litigation. The steps can also be complimentary. For instance, if the parties intend to commit to mandatory mediation, the arbitration clause can provide that the arbitral tribunal may,

1 See, eg, CEDR Commission on Settlement in International Arbitration, *Consultation Document* (2009), available at: **www.cedr.com/about_us/arbitration_commission** (discussing the possibility of using mediation during an arbitration, and safeguards for such an approach); International Centre for Dispute Resolution, *Guide to Drafting International Dispute Resolution Clauses*, available at: **www.adr.org/si.asp?id=4945** (providing a model concurrent mediation-arbitration clause).

at its discretion, enforce the mediation clause if a party seeks to initiate arbitration without first attempting mediation.

Consistency in general is important. Language used in the mediation clause might, for example, be looked at to provide context for interpreting the arbitration clause. Using the same institution's model clauses and rules for mediation and arbitration should avoid problems with inconsistency. If different institutions are relied on for each step, or if both clauses are custom-drafted, then counsel should review the terms and underlying rules for compatibility.

Components of a mediation clause

Whether using a boilerplate clause or drafting anew, counsel should be cognisant of the various provisions that may be included in a mediation clause and their potential significance. One of the main tasks will often be balancing the convenience and reliability of referencing established mediation rules which address many aspects of the mediation agreement that might otherwise be included in the clause, with the need to establish a process which suits the specific needs of the parties. As with drafting any contractual terms, counsel must also consider any requirements that may be imposed by applicable law.

Scope

A mediation clause typically begins by specifying the types of disputes subject to mediation. There is unlikely to be a basis in advance for segmenting only particular types of disputes for mediation and most clauses will thus aim to provide that all disputes relating to the contract (or even to the parties' relationship more generally) will be subject to mediation.

Notice

It can be helpful to provide that a party believing that a dispute has arisen must first give written notice to the other party specifying the nature of the dispute and the party's intention to initiate the mediation. If mediation is preceded by negotiation in a step clause, the notice requirement would be included in the negotiation provision.

Mandatory or non-mandatory mediation

Whether or not to mandate mediation is, of course, a fundamental choice that should be specified unambiguously. A clause can explicitly provide that mediation will occur only if the parties wish to seek an amicable settlement at the time the dispute arises. Alternatively, it may specify that the parties must comply with the requirements of the mediation clause before seeking resolution of the dispute through other means (ie, arbitration or litigation). If mediation is intended to be mandatory, the clause should specify that the bar on proceeding to arbitration or litigation does not apply if a party believes that initiating such proceedings is necessary to preserve its rights.

Even if the parties agree to a mandatory mediation clause, such a clause may or may not be enforced by local courts or arbitral tribunals, based on the jurisdiction. For example, Swiss courts will not enforce a mandatory mediation clause, whereas French and English courts will enforce such clauses.[2] Accordingly, counsel may wish to specify an alternative remedy for a breach of the mediation clause in the clause itself. For example, the clause may provide for liquidated damages in case of a breach.

Level of effort

Clauses mandating mediation sometimes specify that the parties will make a 'good faith' effort to settle their dispute by mediation. In some jurisdictions, such language is problematic. For example, in Australia, the courts have found that a clause requiring mediation in 'good faith' is void for uncertainty.[3] While other jurisdictions enforce this type of provision, the risk of disputes over the meaning of such uncertain terms can be reduced by instead specifying the particular actions required of the parties (eg, the applicable mediation rules and the duration of the mediation).

Applicable mediation rules

The clause must identify the mediation process with sufficient certainty to be enforceable. The easiest way to do so is to incorporate an established set of rules by reference. Many reputable dispute resolution institutions

2 Corinna Klaus and Manuel Liatowitsch, 'Mediation', in *International Arbitration in Switzerland* 223, 233 (Gabrielle Kaufmann Kohler and Blaise Stucki eds, 2004).

3 See David Spencer & Michael Brogan, *Mediation Law and Practice*, 414-16 (2006) (discussing *Computershare Ltd v Perpetual Registrars Limited* (No 2) [2000] VSC 233).

provide international mediation rules,[4] including some for subject-specific disputes such as intellectual property disputes,[5] disputes between investors and host-states,[6] environmental disputes involving a state party,[7] and disputes between states.[8] Counsel should be careful to precisely identify the selected rules, including by noting the rules of a certain year or those 'then in force.' Counsel should also check that the rules cover all the necessary aspects of the mediation process, including those discussed individually below. If adjustments to the rules are sought, the clause can provide that the rules apply except as otherwise provided. If the parties do not wish to reference established rules, then the clause should set forth the basic process, including, in particular, how the mediator will be selected, the venue, the time limit, and the mediator's authority to determine the date, time, and conduct of meetings.

Selection of the mediator

The process by which the mediator will be selected should be determined in advance. Institutional rules typically provide that the institution will appoint the mediator unless the parties agree to their own choice. Even if the parties do not rely on institutional rules, the clause should provide for selection by an identified institution if the parties cannot reach agreement.

Institutional rules typically address the need for the mediator to be impartial. The parties may also wish to identify in advance any additional qualifications, such as language capabilities or experience in the subject matter of the underlying contract. The requirements should not be so exacting that they prevent identification of a suitable mediator.

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4 See, eg, ICDR International Mediation Rules, 1 June 2009, available at: **www.adr.org/sp.asp?id=33994#INTERNATIONAL%20MEDIATION%20RULES**; ICC ADR Rules, 1 July 2001, available at: **www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf**; UNCITRAL Conciliation Rules, 4 December 1980, available at: **www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf**; CEDR Model Mediation Procedure, April 2008, available at: **www.cedr.com/library/documents/MMP_10thEd.doc**; CPR Mediation Procedure, 1 April 1998, available at: **www.cpradr.org/ClausesRules/MediationProcedure/tabid/90/Default.aspx**; JAMS International Mediation Rules, 15 July 2009, available at: **www.jamsadr.com/international-mediation-rules**.

5 WIPO Mediation Rules, 1 October 2002, available at: **www.wipo.int/amc/en/mediation/rules/.**

6 ICSID Rules of Procedure for Conciliation Proceedings, January 2003, available at: **http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf**.

7 Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, available at: **www.pca-cpa.org/upload/files/ENV%20CONC.pdf**.

8 Permanent Court of Arbitration Optional Conciliation Rules, available at: **www.pca-cpa.org/upload/files/CONCENG.pdf**. These rules are also designed for use where only one party to the dispute is a state.

Place of mediation

Institutional rules often provide that, unless the parties agree otherwise, the mediation will be held at the regional office of the institution. With international transactions it can be helpful for the parties to identify a convenient location in advance, while still providing that an institution will select the location if the pre-determined site is unavailable.

Time limit

Whether included in the referenced rules or identified in the mediation clause, there should be a precise time limit on mandatory mediation, including a specified point at which the time limit commences, so that one party cannot transform the mediation into a dilatory device. Some model clauses contain time limits, though many institutional mediation rules themselves do not. Rather, institutional rules will often provide for the termination of mediation proceedings if a settlement is reached, if either party withdraws from the mediation, or if the mediator decides that the mediation is unlikely to resolve the dispute. In effect, it may be sufficient if the mediation can be terminated on the request of either party. However, one side terminating the mediation could be seen as an act of aggression, thereby pushing the two sides further apart, whereas if the parties fail to come to an agreement by a pre-determined time-limit, neither party is directly faulted with causing the mediation proceedings to come to an end.

Also of relevance is any applicable limitation period that may apply to bringing a particular dispute to domestic courts or to arbitration. Commencing mediation may not automatically suspend any such limitation period, and as such, the parties may wish to add additional language to the mediation clause waiving their rights to rely on any limitation defense for the duration of the mediation.[9]

Language

Particularly for international transactions, it is advisable for the mediation clause to specify the language or languages in which the mediation will be conducted.

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9 Such a waiver would have to be written carefully so as to prevent a party from commencing a mediation simply to avoid a later limitations defense down the road. The applicable law would also have to be consulted to determine whether any such waiver would be enforceable.

Disclosure and confidentiality

There is inevitably friction between the need for parties to disclose information in the mediation process and the parties' interest in protecting their positions in any subsequent arbitration or litigation. Institutional rules may address this issue. Local laws applicable to any ensuing court proceeding or arbitration may also address the issue. At the least, it should be clear that the parties must maintain the confidentiality of the mediation and not introduce or rely on as evidence in any later proceeding, any conduct or statements made by the parties or the mediator in the mediation process.

Apportionment of costs

Institutional rules normally provide that the costs of the mediation – including the fees and expenses of the mediator and the institution, but excluding each party's attorney, travel, witness, and expert costs – shall be borne equally by the parties. If such a rule is not incorporated by reference, it should be specified in the mediation clause.

Survivability of the mediation clause

For the sake of clarity, the parties may wish to specify in the mediation clause, or in the contract's overall survival clause, that the mediation provision survives the termination, expiration or alleged invalidity of the contract.

Conclusion

Attempting mediation in international transactions requires counsel to consider linkages with the other dispute resolution steps, the effect of the specific terms used in the mediation clause, and any requirements imposed by the applicable law. Spending the relatively small amount of time required to work through those issues will go a long way to ensuring that disputes will be resolved in accordance with the parties' expectations, and that time and money is not wasted disputing how to resolve a dispute.

Difficulties (not only) in Germany of Proposing Mediation: How and when to bring up mediation if it is not a contractual obligation

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In the last few years there have been many new publications about mediation. Most of the articles highlight different aspects of how to guide the participants through the mediation process. What is rarely discussed is how to bring the participants ***to*** the mediation process. In countries such as the United States or England where mediation people believe in mediation as an established way to resolve their issues, however, in Germany, for example, mediation is much less established. People only have a vague idea of what mediation means and how it works.

This short essay describes strategies to bring up mediation if it is not a contractual obligation. It starts with a short analysis of the basic problems concerning the acceptance of mediation. Then it offers some strategies to implement mediation in different situations.

The basic problem

The basic problem of mediation is the lack of acceptance in society. Usually neither the parties nor their lawyers think that an extrajudicial settlement is able to solve their problems as well as a decision rendered in state court proceedings by a 'real judge'. Their reasons however might be different.

The lawyer as a problem

Often, lawyers themselves are an obstacle on the way to mediation. One reason could be the underlying principles of education in civil law countries. It is usually based on adjudging claims and advocating for the client in front of the court. Therefore, a lot of lawyers keep this approach in mind in their professional life. In addition, many lawyers feel unfamiliar with new ways of settling disputes and are reluctant to lose the advantage of experience of their 'home zone' of court litigation. Alternative dispute resolutions are often rejected due to this attitude. A lawyer may also be reluctant to risk losing fruitful sources of revenue.

The client as a problem

The client himself could be another reason why the introduction of mediation seems to be difficult. Most of them know very little about the advantages of mediation. Their knowledge about alternative dispute resolutions is mostly fragmentary. Based on this, mediation is waved aside as 'nothing for real men'.[1] Proposing mediation to the other party is often interpreted as a sign of weakness.

Furthermore, clients often complain about the missing link to the action in court – the official seal is wanted. As a counter measure in some countries such as Belgium, France, and the federal courts of Germany a system called In-Court-Mediation has been developed.[2] However, this article will be restricted to how to bring up mediation if one party is threatening to bring a lawsuit but the litigation has not yet started.

Lack of knowledge – getting the lawyer ready for mediation

The lawyer's lack of knowledge is more difficult to overcome. Measures to solve this deficiency are of a more fundamental kind. Currently, lawyers

1 Breidenbach/Hennsler, *Mediation für Juristen*, p 96 et seq.

2 **http://cdl.niedersachsen.de/blob/images/C46288211_L20.pdf**; basically this approach is subdivided into two different types, an integration model and an outsourcing model. In the integration model each court has at least one judge who went through a special education as a mediator. If any action is brought to court and the competent judge(s) considers the case is suitable for a mediation process, mediation is officially proposed to the parties. If they agree, a mediation process starts. If at any time the mediation fails, the case is returned to the original judge(s). The lawsuit starts as usual. The external model is based on the same idea. Differing from the integration model, the mediator is an external mediator and not a judge from the same court.

should be encouraged to participate in educational programmes about mediation ideally through an intense study programme. The overall aim has to be to revolutionise the system of legal education: ADR has already taken its place in commercial reality. This has to be reflected in the practical legal training if it was not covered at the university stage.

Lack of knowledge – getting the client interested in mediation

If the lawyer considers the dispute suitable for mediation the first phase begins: the lawyer needs to inform his client about the advantages of mediation. As alternative dispute resolutions are rarely proposed, one should not conclude that the parties are unwilling to solve their conflicts by negotiation. Mediation is based on the participants own initiative. To avoid the impression of being pushed from the 'ordinary path' the lawyer now needs to offer the client an incentive to think of mediation as an alternative to litigation. Depending on the client, the case and the situation, the manner of proposing mediation can vary. If the conflict is between two individuals you may, ie, hand out an information sheet about the mediation process. While the client gets the chance to inform himself about mediation, the lawyer can analyse the chances of winning the litigation as the alternative.[3]

The bigger the financial dimension of the case the easier it gets to propose mediation because the financial risk of implementing mediation 'as a try before trial' becomes insignificant. Nevertheless, the lower costs are in any case a convincing argument for mediation in comparison to state court litigation and even arbitration. As several studies show, on average the costs of litigation are three times higher than the costs of a mediation process.[4]

In this situation the client has to be informed in a personal conversation, explaining the possibility of a fair and equitable solution through a mediation process. The outcome might be the reduction of the impression that mediation is a second-best-solution. After reviewing the chances in litigation, one might realise that it will not reach the expected gain or that a compromise could ensure a higher benefit for both participants. In addition it might be helpful to forge links with other lawyers or non-lawyers who are experienced mediators. The client can now contact them as 'objective third parties' for any further information.

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3 Von Schlieffen /Ponschab/Rüssel/Harms, *Mediation und Streitbeilegung, Verhandlungstechnik und Rhetorik*, p 67 et seq.

4 Haft/Von Schlieffen, *Handbuch der Mediation*, p 1171 ; Eucon e V.

Another problem – bringing the other side to mediation

Once the client is interested in mediation you need to enter into a second phase. As the party willing to bring up mediation does not want to show any weakness, mediation is often proposed as the last chance to avoid litigation. This approach makes it difficult to initiate mediation even where one party is in general willing. From such a perspective there is the risk that the other party sees the offer to mediate rather as a threat than a real offer.[5] The question here is how to get into contact with the other party and bring up the mediation process.

Party to party

In the first place one should consider a direct approach by one of the parties. If the parties are still able to have a rational discussion, one party might propose mediation as a possible way to settle the dispute. The proposing party can attach some further information about mediation or good feedback from other firms or business associates in the same situation. Mediation should not be advertised however as the 'better way' to resolve the dispute.[6]

Things are a lot more complicated in family disputes. The parties may not be able to communicate effectively due to the emotional situation. The more one party tries to threaten or to overpower the other party, the less likely there will be an agreement to mediate.[7] The proposing party should once again emphasise that mediation is absolutely voluntary. If at any time mediation fails, no matter if it is because the parties are unable to communicate with each other or because settlement cannot be reached, action can still be brought before a court.

Lawyer to party

Another approach could be that the consulting lawyer proposes mediation to the other party. This method has some disadvantages and should not be chosen. Mediation is based on the parties' own initiative and their voluntary decision to participate. If someone receives a proposal to mediate from the other party's lawyer, he will easily get the impression that the future participants of the mediation are already biased.[8] There may also be ethical issues with the lawyer contacting the other party.

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5 Haft/Von Schlieffen, *Handbuch der Mediation*, p 573.

6 Haft/Von Schlieffen, *Handbuch der Mediation*, p 573.

7 **http://familysfocusmediation.net/_wsn/page8.html**; in another context but the idea ist the same: Haft/Von Schlieffen, *Handbuch der Mediation*, p 1193.

8 Haft/Von Schlieffen, *Handbuch der Mediation*, p 6 et seq.

Lawyer to lawyer

Where both parties are represented by a lawyer it is appropriate for one lawyer to propose mediation to the other.

Mediator to other party

Another approach could be to contact a mediator first. This mediator can now decide if he wants to contact the other party himself. In this case, the impression of acting on behalf of one client may be reduced.[9] The mediator could also – to ensure his/her impartiality – encourage the party proposing mediation to contact the other.

If the parties are no longer able to talk to each other reasonably, the mediator can provide some written information about mediation in general. This information can introduce the idea of a mediation process and invite the other party to contact the mediator if he is agreeable.[10] This approach gives the opponent the chance to inform himself about that alternative kind of dispute resolution. The neutral and impartial role of the mediator is thereby guaranteed.

In addition, the mediator can offer co-mediation to the parties, which means that there is also a second mediator – preferably with a different educational background – who could also be of the opposite gender. Especially in separation and divorce mediation the help of a psychologist or a therapist supporting the mediator may be very useful.[11] This solution might be very attractive for parties that have children, because it offers a possibility for a better relationship in the future.[12]

Choosing the right moment

The later mediation is proposed the more difficult it gets to convince parties. This is based on two aspects.

Once litigation has started, the conflict has definitely escalated. Reaching a settlement by negotiation gets more and more difficult. The parties may not want to talk to each other anymore, accusing the other party of having brought up an action against them.[13]

9 Von Schlieffen /Ponschab/Rüssel/Harms, *Mediation und Streitbeilegung, Verhandlungstechnik und Rhetorik*, p 67 et seq.

10 Haft/Von Schlieffen, *Handbuch der Mediation*, p 6 et seq.

11 Breidenbach/Hennsler, *Mediation für Juristen*, p 128.

12 Schreiber, *Obligatorische Beratung und Mediation*, p 63; and is therefore advisable for any party interested in a future relationship for whatever reason.

13 *How your lawyer can help with mediation*, see: **www.nolo.com**.

Secondly, with litigation the parties harden in their opinions and positions and are no longer open to any compromises. In consequence, the negotiating leverage is reduced and the chance to bring up mediation is wasted.

Therefore the earlier parties propose mediation the more likely it is that both parties will agree to it.

Conclusion

Not every case is suitable for mediation. Bringing up mediation is a very complex part of the mediation process. If you choose the wrong way to propose mediation the participants may refuse to meet for a first appointment. A good proposal should respect the individual character of the case and offer a solution that demonstrates the participants' own initiative. The most important task is to provide information about mediation and its unbeatable advantages.

Tips and Hints

- Not all cases are suitable for mediation. As the outcome will be a contract it is not suitable where the parties require a declaration of rights such as the validity of any patent or where one of the parties is under some form of legal disability, eg, a minor or bankrupt.
- A great number of commercial and public organisations offer mediation processes and off the shelf templates for mediation clauses and these include:
  www.lcia.org
  www.jamsadr.com
  www.iccwbo.org
  www.wipo.int
  www.pca-cpa.org – for use where one party is a sovereign state
  www.adr.org
- Good arguments to use to initiate a discussion on mediation:
  - 'We value our commercial relationships and so wherever possible attempt to resolve our disputes quickly and amicably. For that reason we would like to propose mediation.'
  - 'We believe it is in everyone's interest that disputes are resolved quickly and at minimum expense: accordingly we would like to propose mediation.'
- By stating a preference for resolving cases by mediation as a part of your company's values there can be no risk of looking weak if you then propose mediation in a specific case.
- Where you have a strong case mediation is even more appealing as by demonstrating this to the other party at an early stage, rather than waiting on the 'appropriate' stage of legal proceedings to disclose particular information or arguments, the matter can be brought to a close without unnecessary waste of resources.

Quick and 'Dirty' Alternatives to Mediation

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At first sight, mediation has had more success in countries with legal systems that make litigation extremely onerous in terms of cost and time or where for other reasons recourse to the courts of law is fraught with risks, such as the unpredictability of the outcome. Another reason is that some countries push parties to mediation by mandatory court annexed schemes or other mechanisms built into their municipal rules of procedure. Moreover, mediation is thriving in certain areas where legal disputes are strongly influenced by personal conflicts such as disputes concerning family relationships or neighbourhood matters. Basically, mediation is at its best in multi-issue and multi-layer disputes which the parties themselves have problems disentangling due to their positional 'tunnel vision'.

When seeking solutions to their dispute, parties are often looking for a neutral and respected third party to solve the problem for them by making a proposal for settlement after having heard their views. Mediation does not aim at providing this kind of solution. Hence, such misconceived expectations would need to be corrected by the mediator at the outset of the procedure. However, there exist situations and issues which can be more quickly and appropriately resolved through determination by a third party.

This article describes some settings in which third party determination of specific issues may be envisaged as being the more appropriate solution and describes established ways of how this is done.

Settings where third party issue determination is used

Basically, neutral issue determination by a third party[1] is relevant in a context where the contractual relationship is negotiated and created at arm's length concerning a matter that by its very nature creates certain typical issues during performances that require an immediate solution in which a solution may not be obtained by recourse to courts of law or arbitration and should not be exposed to the risk of failed negotiations or mediation. In most cases the parties to such a setting are sophisticated and used to resolving such recurrent issues by direct negotiation. By agreeing on quick third party determination, they knowingly increase the pressure to agree, since they cannot normally delay determination by protracted negotiations unless the other party agrees.

Typical areas where neutral third party determination is agreed are engineering, construction, software-development, or outsourcing projects. Other areas are post-M&A disputes about price adjustment or price adjustments in long-term agreements. These areas normally have in common that the issues which are submitted to the neutral third party require expert knowledge. When agreeing on issue determination by a neutral third party the parties to an agreement assume that based on their common understanding the contractual framework and the applicable rules of law provide a sufficiently clear answer as to the consequences if the issue submitted to the neutral is determined. That this expectation may not always turn out to be justified does not detract from the practical usefulness of the concept as such.

Some examples for established neutral third party determination are:

Dispute boards

Dispute boards or dispute review boards (DRB) were conceived in the construction industry but can also be used for other complex agreements that are implemented over a long period of time and require cooperation among the contracting parties. A dispute board is normally established through the agreements underlying the project. The agreement sets forth how the DRB is constituted and defines its powers. This may be done by inserting a clause referring to institutional DRB-Rules such as inter alia the ICC Dispute Board Rules.[2]

In most instances the dispute board consists of three members who are appointed according to the agreed mechanism at the outset of contract

1 In this article the terms 'third party' or 'neutral third party' do not include arbitrators or state court judges.

2 See, eg: **www.iccwbo.org/court/dispute_boards/id4352/index.html**, **www.drb.org/index.htm**, **www.dbfederation.org/section1.asp**, and Wikipedia, search term 'Dispute Board'.

implementation, remain in office and are remunerated until the project is concluded. The dispute board members will periodically visit the project site and be on standby for resolving issues. Typically, they will have professional expertise in the concerned field, eg, an engineering background. However, also lawyers with practical experience in construction or engineering disputes are used since they have skills in dispute resolution methods.

Dispute boards are part of the project management in the wider sense of the word and are expected to proceed with a pragmatic 'hands on' approach. Depending on the contractual agreement on which their powers rest, dispute boards issue recommendations or decisions which the parties agree to be binding on them. In most instances the binding decisions may be reviewed by a court of law or, if this was also agreed, an arbitral tribunal, unless the parties have stipulated that a notice requesting such review be issued within a certain period of time and such notice was not given.

Since dispute boards are embedded in the project management, the flow of information back and forth between the parties is more informal. Because mutual trust is of the essence, the dispute board members will take care to maintain full transparency and fairness throughout their assignment. When discussing controversial issues with the parties certain techniques known from mediation, such as active listening and visualisation of information or interim results, assist in arriving at appropriate decisions.

Adjudication and other forms of third party issue determination

In some common law jurisdictions 'adjudication' refers to a statutory decision-making process provided for in statutes that mainly deal with the construction and housing industry.[3] These statutes determine the appointment, powers and the eventual enforcement of the decision of an adjudicator, ie, a neutral third party, for a defined category of disputes. Outside the scope of such acts the term may have any one of a broader array of meanings.[4] In the context of this article it will exclusively refer to binding decision-making by a neutral third

3 See, eg, UK Housing Grants, Construction and Regeneration Act 1996 (chapter 53, section 108) at: **www.opsi.gov.uk/acts/acts1996/ukpga_19960053_en_8#pt2-pb2-l1g108**; AU (Victoria) Building and Construction Industry Security of Payment Act 2002 (Division 2) at: **www.austlii.edu.au/au/legis/vic/consol_act/bacisopa2002606/**, AU (Queensland) Building and Construction Industry Payments Act 2004 (Division 2, sections. 21-32) at: **www.legislation.qld.gov.au/LEGISLTN/CURRENT/B/BuildngCIPA04.pdf**.

4 See, eg: Wikipedia, search term 'adjudication'.

party[5] that is neither a court of law nor an arbitral tribunal. In this particular sense of the term, adjudication is, for example, promoted by the FIDIC, the International Federation of Consulting Engineers, who is a leading provider for standard terms of contracts in the field of international construction and engineering.[6] Certain associations or companies also offer recourse to adjudication mechanisms, especially for dealing with claims for payment.

While binding decision making by dispute boards would technically also qualify as 'adjudication', the main difference is that an adjudicator will normally only be appointed upon request of one or all parties once the dispute has arisen. His/her mandate will end with the resolution of this dispute. As is the case for dispute boards, the neutral third party will be appointed and will have the powers to make a binding decision according to an agreement of the parties concerned. This agreement may either be included in their initial contract or made once the dispute has arisen. Institutions, such as the World Intellectual Property Organization (WIPO) offer Expert Determination Rules on which the parties may agree and refer to in their contract.[7] Another *sui generis* type of adjudication administered by WIPO is the self executing scheme for domain-name dispute resolution (UDRP).[8]

This type of binding determination by a third party is best suited if the parties disagree on a technical issue such as, for example: (i) the fitness of a product for the contractually agreed purpose or whether it meets specifications; (ii) whether a request by a customer is a change order or falls under the specifications; (iii) whether delayed performance is attributable to the contractor or external factors; (iv) whether invoices are due and/or properly calculated; (v) whether there is a defect giving rise to a warranty claim or not; (vi) how a price adjustment clause shall be implemented; and (vii) whether an intellectual property right is valid or infringed, etc.

This type of binding issue determination may be combined with traditional conciliation or mediation by agreeing that only if the parties do not reach agreement during the process, the third party may issue a binding decision.

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5 In non-common-law jurisdictions delegating decision making powers to third parties is often also legally recognised but the legal basis may vary. For example, in Germany the Civil Code (Bürgerliches Gesetzbuch, § 317) provides that parties may contractually agree that a third party determine contractual duties on their behalf and that this right shall be exercised with equitable discretion, unless agreed otherwise. The third party is called 'Schiedsgutachter' which should not but often is confounded with 'Schiedsrichter', ie, arbitrator.

6 See, eg: FIDIC at: **www1.fidic.org**/; a FIDIC 'Red Book'.

7 WIPO Expert Determination Rules at: **www.wipo.int/amc/en/expert-determination/rules/index.html**, the ICC Rules for Expertise (Article 12.3) require that the parties explicitly agree that the expert's findings be binding on them (**www.iccwbo.org/court/expertise/id4379/index.html**).

8 WIPO UDRP at: **www.wipo.int/amc/en/domains/index.html**.

In appropriate cases parties may agree that the third party will not have discretionary powers and shall select one of the final offers submitted by either party which then will be binding.

The comments in the last paragraph of the section dealing with the way dispute boards work equally apply to this kind of neutral third party determination.

Early neutral evaluation

Parties who prefer to remain in control may opt for early neutral evaluation of the issue in dispute. Basically, the process corresponds to neutral third party determination, but the decision is not binding and serves as basis for further negotiation. Embedding early neutral evaluation in mediation proceedings may therefore oblige the mediator to communicate his or her personal views before the resolution of the dispute. In order not to compromise his or her role, a mediator may therefore refuse to engage in such a 'neutral evaluation'. In such a situation the appointment of another individual in a neutral position who will act as evaluator should be considered.

The legal 'nature' of third party issue determination

The legal nature of the above mentioned determinations depends on the applicable rules of law, which eventually may also establish certain mandatory formal requirements. Basically, the parties can choose the applicable law in their agreement. If no such choice is made or insofar as mandatory law is relevant, conflict of law rules will be applied to determine the law.

However, even binding decisions of dispute boards, adjudicators, or other neutral third parties will normally not be directly enforceable as would be the case for an arbitral award or the judgement of a state court. Instead they require an action for non-compliance that will either be submitted to an arbitral tribunal, if this was agreed, or to a competent state court. Accordingly, many legal systems qualify the decision as a determination of contractual rights and duties which itself has a contractual nature.

Practical considerations

While agreeing on a dispute board in the context of a major project contract or on a specific neutral issue determination once a dispute has arisen or during mediation is relatively straightforward, including expert determination in complex dispute resolution clauses in the initial agreement

is not always simple. Most parties will try to make a distinction between issues that should be determined by the neutral third party/adjudicator on the one hand and other legal issues which are to be submitted to arbitration or a court of law. Accomplishing this is not simple, because when the contract is drafted it is not possible to foresee the nature of the dispute in detail. This may create problems especially in the context of expert determination within post-M&A.

Considering this potential difficulty, one solution could be to stipulate for the possibility of a full review of the third party determination and the power of finally determining the issue by an arbitral tribunal or court of law. Additionally, set deadlines for making the third party determination could also be stipulated, albeit, if appropriate, with the proviso that the third party may under exceptional circumstances extend such periods after having heard the parties.

A crucial feature of such clauses should be that under any circumstance none of the conditions or deadlines can stand in the way or unduly delay a final resolution of the dispute. At the same time such dispute resolution clauses should contain only absolutely necessary conditions and time periods and be as simple and straight forward as possible. The parties who thus need to navigate between Scylla and Charybdis may wish to consider seeking advice from a DR specialist or DR service provider in this regard.

A stipulation limiting or foreclosing later review of the issue determination by the third party will normally require that the parties exactly know the issues and the risks that may be associated with determination of the issues by a neutral third party. Consequently, they should only in exceptional cases exclude or limit later review by a court of law or an arbitral tribunal in contractual clauses that are made long before a dispute may arise.

There is no legal requirement for parties to a third party determination or adjudication process to be represented by lawyers. As is also commendable for mediation, the parties should take and remain in control of presenting their case to the neutral third party. However, this does not mean that they need not seek legal advice or support during the whole process.

What to Look for in a Mediator

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What skills are required for mediating different kinds of disputes?

Mediators are often chosen for the wrong skills sets

Often the parties look for an expert in the substance of the disputed matter and ignore the ability of the mediator as a process designer and process administrator who knows how to overcome impasse. Erroneously, parties, and more likely their attorneys, believe that a good mediator is someone who will favourably evaluate their claims and that will cause the parties to move from the intractable positions that preceded the mediation to one favouring their client. These 'issue familiarities' may be important in developing initial trust among the parties with the mediator. However, in commercial disputes, formal evaluations are often not helpful if they demonstrate that the mediator has lost impartiality. Good mediators know how to educate the parties as to strengths, weakness and probabilities of outcomes without stepping over the line of being overly evaluative.

If the issues are extremely complex, sometimes a mediator may suggest a co-mediator with more substantive knowledge of the issues in disputes. However, most good mediators believe that co-mediators are not necessary and can complicate the process. Good arbitrators are 'quick studies' and can learn what they need to know from the parties and their experts.

The importance of the mediator's psychological skills

As a result of confidential communications with the attorneys and even sometimes with the parties, a good mediator will understand the

psychological and risk-aversion profiles of the decision makers. As part of the pre-mediation investigation, the mediator will determine special factors needing to be addressed that may have and will continue to generate anger and therefore a reluctance to accept a settlement which otherwise appears in a party's best interests. The mediator knows how the proper framing of an issue can lead to success, and such framing should incorporate the presence of such factors. For example, should public sessions be avoided that result in confrontation? To the contrary, is confrontation and catharsis needed? Are there issues between the stakeholders of a party that need to be resolved privately? As the mediation continues, the good mediator will quickly understand when 'people need to be separated from the problem.'

The mediator should understand the relationship of lawyers and experts to the stakeholders

A good mediator will investigate and determine the role of expert opinion and legal analysis causing the parties to resist changing settlement positions. For example, if an issue in the underlying case involves widely divergent, expert opinion about the cause of a condition, a good mediator knows how reducing those differences into risk factors often causes the experts to reduce their differences. Likewise, the parties' position may in large part be determined by legal opinions from their lawyers, eg, 'My lawyers (to whom I paid a lot of money) tell me we can't lose this case.' A good mediator can work with those lawyers to reduce legal evaluations into risk factors that can be quantified.

Is the case ripe for settlement?

For a case to be ready to be settled by mediation, the parties and their lawyers must believe that enough information is known to enable an evaluation of the positions of the parties. The later the mediation occurs in a process leading to trial or arbitration, the more information is available. However, these 'late' mediations are often more difficult to settle because of the financial and emotional investment the parties have in their positions. Therefore, a good mediator knows how to settle cases early. That requires skills in assisting the parties in a fast and cost-effective way to engage in information exchanges, including expert evaluations.

Are there insurance issues?

If insurance coverage is an issue, a good mediator will probe for and identify those issues before the start of any formal mediation sessions. Are the insurance concerns so critical that coverage issues should be reduced, if not resolved, either before or during a separate (with or without the same mediator) mediation?

However, what usually makes a difference in reaching a settlement are the process skills of the mediator, including their ability to understand the psychological profile of the decision makers towards risk and fairness.

Where and how to find good mediators

Recommendations

The best way to choose a mediator is to rely on a recommendation. Those recommendations should be based on track records concerning effectiveness. Most major agencies that recommend mediators do not recruit or retain panel members who are not effective. However, be aware that the quality control factor, especially among local agencies, can vary widely and should influence which agencies should be consulted. Often persons from those good agencies can discuss potential candidates with the parties. It is appropriate to ask recommended candidates for their references. In major matters, parties may want to jointly interview mediators.

Ask colleagues

A very common way to find good mediators is to ask colleagues. These enquiries are often made within companies and law firms or within affinity groups. The request often comes: 'Can you recommend a good mediator?' A good answer requires having some knowledge of the nature of the dispute. Another common question is: 'Do you know any of the following who have been recommended as mediators?' If I do not know enough about the candidates, the best answer is 'ask for their references.'

Bibliographic information

The biography of the candidate may have some useful information since many mediators discuss their philosophy of mediation. Their background with arbitration may be interesting but not very useful for selecting

them as mediators. Some listing organisations, of which there are many, some proprietary and some non-profit, often do not distinguish between experience as an arbitrator or mediator. The non-profit American Arbitration Association/International Center for Dispute Resolution has information on their recommended mediators publicly available at: **www.aaa.mediation.com**. JAMS (**www.jamsadr.com**) lists their mediators as persons combining both arbitration and mediation experience into one biography. Other than AAA/IICDR and JAMS, the organisations that identify quality mediators for international disputes are just beginning to evolve.

Many mediators list their biographical information at: **www.mediate.com**. The biography may indicate the candidate has active participation in organisations devoted to the continual development of mediation skills such as the International Academy of Mediators (**www.iamed.org**), the American College of Civil Trial Mediators (**www.acctm.org**), local, national and international bar association groups. However, it is more useful to have active participation in those organisations, rather than just membership. Recently, the International Mediation Institute (**www.imimediation.org**) has begun certifying mediators and someday this may be useful as a criterion for selecting mediators.

Pros and Cons of Co-mediation

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The term co-mediation (sometimes also called 'team-mediation') is used for different forms of mediation conducted by two mediators: there might be a 'training' relationship (the co-mediator acts only under the responsibility of an experienced mediator) or a partnership between two experienced mediators who share joint responsibility.

Co-mediation has proved effective in complex situations (technically, emotionally or legally, cases with major commercial interests, cases with many parties, intercultural cases or one-day-mediations) and in international cases. There are various ways of composing the team of mediators, eg, (i) interdisciplinary or non-interdisciplinary, (ii) mediators of the same or different gender or age, (iii) mediators of the same or different cultural background.

The main advantage of co-mediation is obvious: two people will hear and see more than one person. An interdisciplinary team is most effective in emotionally complex cases, especially if a mediator trained in psychology is involved. The use of a gender-mixed or age-mixed team provides the neutrality that the parties want to see in gender-based conflicts or in conflict situations of different generations. If parties with different cultural backgrounds are involved, a multicultural team may achieve more support from the parties.

On the other side, co-mediation has an impact on the duration of mediation. The total turn-around time of these mediations is longer on average. In addition, engaging two mediators will double the costs. Therefore it is worthwhile to reflect carefully, when and for which cases a co-mediation should be considered.

Pros of co-mediation

- Double awareness of mediators.
- Balance of gender, age and intercultural situations.
- Better handling of emotionally burdened cases.
- Higher success rate.
- Training for less experienced mediators.
- Higher effectiveness of complex situations and international cases.
- Better response to the conflict and the parties.

Cons of co-mediation

- Higher costs of mediation.
- Longer duration of the mediation proceeding and the mediation sessions.
- More efforts on the mediators' side with respect to preparation, interaction and finalisation of the mediation.
- Need for stable, open-minded and cooperative mediators for best practice during the mediation proceeding.

Selecting a Venue and Related Logistics – it's all about Risk

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My heart sinks a little as I step forward towards a familiar, very functional and supremely well organised mediation venue somewhere in Central London. As I sign in, I am greeted as an old friend: nothing is too much trouble for the facilities staff. However, once in the lift, I am already reminding myself to tell the parties that if they need a decent coffee they can find one just around the corner and if sandwiches are not their thing for lunch then there are a number of other choices for interesting and healthy food close by. Above all, I recall the location of the nearest green space with trees and seating and shade or shelter and remember to get everyone's mobile phone number so I can get them back into the room when they are needed. I have my attendance list to hand, prepared with spaces for the numbers.

In the run up to a mediation I encourage the lawyers to select a venue which has a number of features that I believe genuinely increase the *risk* of a successful outcome. It is a hard job. Everyone understands why the elements I propose are desirable and yet invariably the final decision is based on cost and convenience and it is one less risk in what is, after all, a risky business. They usually agree on the offices of one or other of the legal representatives. In practice this is not an ideal environment for getting parties to 'shift perspective'. Neither is it helpful when the host firm 'commandeers' the largest room with the most light and the best chairs!

I remember a time when venues had to be neutral and it was easier for the mediator to achieve their preferences without having to explain why. In the days when mediation was less understood, lawyers were more open to being guided by the mediator: we were the experts. More recently, lawyers

feel more confident in 'controlling' the mediation and even have their own trading system for gaining perceived advantages. 'You can chose the venue, we choose the mediator' may not be said out loud but I have often been told that this is an example of easy concessions designed to gain advantage for the tougher negotiation later on. The offices proposed may be well appointed but frequently they are not suited to mediation. Too many have acres of glass leading on to corridors to maximise precious light, light which will inevitably be excluded to maintain privacy, or they have no light at all. More significantly, they are a similar environment to what most of the participants are used to and therefore support unconscious repetition of the learned behaviours of corporate and business meetings. The environment hasn't changed so why should they act differently?

The presence of certain environmental elements improve problem solving, energy management, decision making, risk taking and reaching agreement. Research on this is well hidden and spread across a diversity of specialist areas such as environmental psychology, architecture and design, mental health studies, gang culture, Alzheimer's disease and more besides. This is not the familiar reading material of either mediators or lawyers. [1]

I will share with you my personal check list and explain why these elements make a significant and positive difference to the whole experience of mediation for the parties, their representatives and the mediator and why they increase the risk of settlement.

Natural light

This is the one non-negotiable element for me. I cannot ask anyone to spend the whole day in a room with no natural light. Mediation is stressful enough without creating additional barriers to engagement and endurance. To create the feeling of being 'entombed' is neither logical nor helpful to the process. People want to get away and if you turn the [sun]light off, people go to sleep. The effect is exacerbated by the now common use of low energy, low wattage bulbs which are environmentally friendly but not 'alert human' friendly.

Access to natural surroundings

Outside space is especially helpful for those who feel strongly about being 'hemmed in'. In practice the availability of natural surroundings makes a huge difference. I accept that it is a challenge especially in cities, but it is one worth the effort to overcome and they can be overcome with a bit of creative

1 See: **www.amandabucklow.co.uk**; *Environment and Mediation - literary review.*

thinking. London, for example, is blessed with many parks, courtyards and squares. I have found that if I want to keep people engaged in the process and build stamina for the difficult parts then the best approach is to give them freedom to leave: literally. Offering opportunities for and encouraging people to walk, sit, think, eat and drink whenever they feel the need generally ensures that they are paying attention to 'when' they are needed, and when they are needed, they pay attention. The benefits of time spent in a garden or park are significant and many of my mediations have 'turned' during a walk and talk session. Walking side by side is less confrontational than face to face over a table; the mediator can broach sensitive issues more easily. That is a dynamic which is sometimes difficult to achieve with ease and grace in a private room.

Physical exercise is known to release endorphins which increase feelings of well being and that enhances decision making. Walking changes breathing patterns which rebalances the 'coherence'[2] of the heart and keeps the pathways open to the neocortex which is where decision making takes place. Nature offers intrinsic interest and a sense of fascination which helps switch the brain into an enquiring or curious state and curiosity has a key role to play in successful mediation especially in reducing the risk of assumptions leading to bunkering.

Furthermore, studies show that there is a faster recovery from stress in response to nature related stimuli than to built settings.[3] Comprehensive reviews have been carried out by Hartig, Mang and Evans, Kaplan and Kaplan which show that reducing stress is a major factor in creating the environment for people to change their minds, see the other person's view and make better decisions.

Natural surroundings help people to develop what Kobasa and Maddi call 'hardiness'[4] sometimes referred to as resilience (sustained competence exhibited by individuals who experience challenging conditions). This is a useful strength both in parties and their advisers and identified as essential in effective mediators.[5] Hardiness is a combination of an internal locus of control (confidence in controlling factors in one's life through one's own actions or externally through powerful or influential others), appreciation

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2 McCraty R, Childre D, *The appreciative heart: The psychophysiology of positive emotions and optimal functioning,* Boulder Creek, CA: HeartMath Research Center, Institute of HeartMath, Publication No 02-026, 2002. See: **www.heartmath.org**.

3 For example, after 45 minutes of taxing mental work, a walk in a natural area led to better recovery than a walk in an urban area or reading magazines and listening to music (Hartig).

4 Salvatore Maddi, Suzanne Kobasa, *The Hardy Executive: Health under Stress,* 1984, Irwin Professional Publishing, ISBN 978-0870943812.

5 Bucklow A, *The Skills, Attributes, Strengths and Behaviours of Effective Mediators*, 2006.

of challenge as opportunity and a commitment to self all of which moderate the effects of stress. Deane Shapiro[6] extends the concept and proposes that a healthy sense of external control, that one's decisions can have an effect, leads to trust and willingness. These are all desirable pre-conditions to finding an agreement.

Nourishment and nurturing

There are two other areas which I find are very beneficial. They are about food and hosting. The mediator is variously director, chair, observer, host and guardian and the care of the parties is an important part of rapport building. It is also a way of demonstrating even handedness and is useful if the mediator senses that there is some undercurrent of 'the others are getting too much of your time'. Conversations over food are an age old way of encouraging rapprochement. If I can, I will arrange the lunch to be in a communal area where people can select their own food. This reduces the risk of lunch arriving just in the middle of a crucial conversation and it gets them out of their private rooms. There is a risk they might have an accidental meeting which could start a useful shift. If there is any chance that this approach might restart communication then I actively create the opportunity. The gesture of offering a bowl or plate of food to another is symbolic and often good manners can overcome inhibitions or reluctance that have been a feature of the previous few hours. I think it is a question of modeling behaviours that are helpful and it is a question of judgment on the part of the mediator whether this will work. In all but the most vexed atmospheres, I find it does.

Choosing a venue which addresses physiological and psychological needs and encouraging people to look after themselves increases their sense of being appreciated. Providing them with the means to do so, including the time, is an important part of momentum. Momentum is not about just keeping going at a pace, momentum is a rhythm which includes slow time. If is difficult for parties to change their minds in front of you, it might be easier for them to say that they have been for a walk and they have been thinking… or that they have had a conversation with so-and-so and 'what about this as a way forward?'

6 Deane H Shapiro, Jr, 'A Control Based Approach to Psychotherapy, Health and Healing' in *Wiley Series on Personality Processes*, 1998, John Wiley & Sons, ISBN 978-0471552789.

Ideal facility	Alternative 1	Alternative 2
Natural light	None	None
Easy access to garden (ground floor) and preferably with water	Access to park. Green space, courtyard with fountain. The sound of water is a bonus.	Rooms with views. Windows that open. Plants/flowers in rooms. Paintings and photographs of nature and particularly mountains. If none of these are available take a couple of books with beautiful images about a subject which encourages curiosity and interest.
Easy access to outside without major security issues. This is important when the mediation extends past normal business hours and when the pressure is frequently at its highest.	General area/reception area which is private to the group but not the private room of any one party. Extra benefit if a communal drinks area is available to encourage 'accidental meetings'.	
Rooms bigger than needed to allow each person to have reasonable private space.	General area/reception area which is private to the group but not the private room of any one party. Extra benefit if a communal drinks area is available to encourage 'accidental meetings'.	
Provide lunch and decent snacks. Low carbohydrate. Protein and salad, fresh fruit. Central food area (to encourage accidental meetings). Large bowls rather than individual servings.	Offer alternatives in the location which include mainly salad/fresh food. Ask assistant to take orders and arrange.	Sandwiches as a last resort! Emergency chocolate supplies.
Jugs of water filled with sliced lemon, lime, orange and cucumber. An attractive alternative for people who usually drink coffee or soft drinks. Water hydrates the brain better and keeps people alert.	Bottles of mineral water with slices of lemon which can also be used for tea.	

Tips and Hints

- Information Technology (IT) offers a plethora of tools that can make life easier for mediators and parties. Examples are communication technologies such as video or telephone conferences, e-mail, chat-rooms, or other platforms for exchanging information in writing. These tools are particularly useful for organising and preparing meetings. However, they are the lesser alternative to person to person meetings during the substantive mediation process, since the technical functionality of all these limits the available communication channels and the options for personal interaction. Certain types of communication channels, such as body language, are not available. If a person hangs up or logs out, you cannot run after her as would be possible in a personal meeting.
  IT in the form of computer hardware and programs can also play an important role during personal meetings, especially for visualisation purposes. For example there are very effective mind-mapping tools and decision tree generating programs that allow for modifications with much more ease than is the case with drawings on flip-charts and other physical means. Another example is mathematical calculations that are easily performed and varied when a spreadsheet calculation program is used. However, using such programs requires that all participants can easily see the information. This is impossible when gathering around a laptop computer. What is preferable is at least one LCD projector and a colour printer.
  However, potential increases of quality by using such information technology can be easily offset by the disruptive effects caused by operational problems. Therefore, it is crucial that the mediator or her aides are sufficiently familiar with the soft- and hardware so that their use integrates seamlessly into the process without requiring interruptions for manipulating the program or keying in required information. Unless this is guaranteed, using IT risks adversely affecting the process and distracting the attention of the participants. Thus, any IT solution should only be used if the mediator is sufficiently certain

that it will improve the process by providing better quality than would be achievable by more traditional means.

- Co-mediators usually work together. While one is speaking the other is watching the reaction of other participants. They then get together outside the mediation to strategise on the way forward however sometimes it can be useful for the mediators to work with separate groups for part of the time. For example, where both sides are represented by experts and the experts disagree it may be useful for one mediator to work with the experts to understand what areas of agreement exist and the basis for any differences of opinion. This can then be fed back into the main mediation.
- Where co-mediators have been selected to match the backgrounds of different parties they must be extremely careful to avoid any suggestion that they are representing either of the parties.
- Sharing food may be used as a means to break impasse or to create a better atmosphere. When spirits are lagging late in the day producing a cake (preferably chocolate – that contains chemicals that make people feel more positive) that requires cutting up by one person and sharing around by others (combined with the resultant sugar rush) may help move things along.
- Alcohol should always be avoided!
- Consider carefully who should attend a mediation. Traditionally a single powerful decision maker has been recommended but in most corporations it can be helpful to send a team of two or three. One executive alone may be nervous about agreeing to a compromise especially if his own position within the company is not secure. If you have a team they will encourage each other to see the broader picture, to agree a settlement and on their return to the company a team decision is much less open to criticism.
- Having the CFO at a mediation is usually very helpful. He is more likely to be pragmatic than someone who has been emotionally involved in the project, he will generally have a very clear understanding of both the detail of the situation and the company's overall interests and may be able to understand the risk profile of any proposed settlement more clearly than a single line manager.
- A mediator with some prior exposure to the particular sector will more quickly gain the confidence of parties unfamiliar with the mediation process and this may speed up the whole mediation.
- Key to achieving a successful outcome in a mediation is the concept of 'wholesomeness'. This is the sum of each and every element in bringing about a complete settlement of a dispute. As against other forms of

alternative dispute resolution, mediation pursues the complete settlement of the dispute as every element of the dispute, no matter how small, has the potential of developing into an array of issues leading to fresh disputes. Anything ignored now for the sake of a quick settlement will simply reignite the problem later and the mediator will lose credibility. The advantage of the safe confidential haven of mediation is that the parties can be helped to bring all the underlying issues to the table. There are no procedural rules to exclude points on grounds of relevance. The ongoing Cold War can be avoided.

In order to achieve this level of openness and self awareness the mediator must ensure an atmosphere of integrity and respect, fairness and balance; in short, 'wholesomeness'.

Exchange of Materials in Mediation

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There are a number of approaches to this subject among mediators and disputants, ranging from no structured exchange of materials, to direct mediator action in collecting and analysing all relevant background information. Recent research in the area of construction disputes leaves little doubt that exchange of materials, and the quality of that exchange, is a fundamental driver of early settlement.[1]

While the subject seems simple enough at first glance, after all you either exchange materials or you do not, it is surprisingly subtle and complex in practice. Whereas in arbitration the parties surrender their dispute to the arbitrator and the arbitrator is granted a significant degree of unilateral power over the documentary production process, the opposite is true in mediation. In mediation, the parties retain control of their dispute and everything that happens in the mediation happens consensually, including the exchange of materials. Another distinguishing characteristic of mediation is the 'do no harm' principle. Applying this principle to the exchange of materials reveals a tension inherent in the mediation process: the deep and fearless disclosure required by mediators to conduct 'interest based' mediation is precisely the kind of disclosure that could prejudice a party in litigation or arbitration in the event that the case proceeds.

This inherent tension can be reduced by applying a principle of 'purpose and proportionality' to disclosure in mediation. Disclosure in mediation

1 Nicholas Gould et al, King's College London, *The Use of Mediation in Construction Disputes; Summary of Report of Final Results*, 7 May 2009, reports at page 10 that of the construction disputes surveyed that settled, over 70 per cent settled at the stage of pleading or disclosure.

should serve the purposes of the mediation itself, not the proceedings within the shadow of which it is conducted. The level and quality of disclosure should therefore be proportionate to the size, nature and type of the dispute, and be sensitive to the possibility of abuse of the mediation process by an unprincipled or misguided party.

In most cases the materials exchanged prior to a mediation event will include a brief prepared by legal counsel providing an overview of the case, a description of the factual and legal issues involved, and some degree of argument as opposed to mere neutral exposition. The brief will also usually annex copies of whatever documents or extracts from the documents and proceedings are supportive of the points made in the brief.

The purpose of exchanging materials in mediation

At least five purposes are served by the exchange of materials prior to and at a mediation:

Affirming the credibility of the process

Judicial and arbitral credibility ultimately comes from the power to enforce regularly obtained judgments and awards. The credibility of mediation, however must be established and re-established every day of the mediation by conducting a demonstrably fair and principled process. This begins with the process for exchanging materials. The exchange of materials also minimises any adversarial element of 'surprise' and 'ambush' in the mediation process, which otherwise detracts from the parties' trust and confidence in the process. Party interaction with the mediator over disclosure provides the experienced mediator with their first opportunity: (i) to begin asking the parties and their counsel open-ended questions about the case, to get them thinking about interests instead of positions; (ii) to begin understanding the role and influence of legal counsel on the course of the dispute; and (iii) to begin the process of limited reciprocal concession that can lead to settlement.

Affirming the credibility of the mediator

Mediators are usually chosen on the basis of perceived subject matter and mediation experience. The parties therefore come to the mediation event favourably predisposed toward their mediator. The mediator's job is not to disappoint. The mediator can reaffirm credibility by delivering a balanced and concise summary of the facts and core issues at the opening of the

mediation event, often instead of individual opening statements by counsel or the parties. This kind of a performance is only possible if there has been a high-quality exchange of documents prior to the mediation event itself. The better the exchange of materials, the easier it is for the mediator to acquire competence over them and maintain credibility.

Enabling meaningful BATNAs and WATNAs

At some point during the mediation, the mediator will likely ask the parties to consider their best and worst alternatives to a negotiated agreement (BATNA and WATNA, respectively). This modelling exercise tests whether the parties' have been 'listening' to their opponent(s) and to the mediator. If they have been listening, they will produce realistic BATNAs and WATNAs and this should inform all of their subsequent negotiations. The more comprehensive the materials exchanged prior to the mediation event, the more reliable the parties' BATNAs and WATNAs.

Levelling the information playing field

One of Canada's most renowned and experienced mediators has pointed out that information asymmetry is at the root of many commercial disputes and that once this asymmetry is corrected, these cases tend to settle.[2] The exchange of materials in advance of mediation assists the mediator in levelling the playing field as 'process and analytical consultant to all parties'.[3] Where there are gaps in the parties' understanding of their dispute, the exchange of materials prior to the mediation will reveal this fact to the mediator, allowing the mediator to help the parties fill these gaps in plenary or caucus sessions as may be necessary. The type of mediation being conducted is also a relevant consideration here. If the mediation is 'facilitative', the parties' 'interests' dominate over their 'positions'. Facilitative mediation may require less in the way of collateral facts and document exchange prior to the mediation event because it has less to do with positions and more to do with interests. In a truly 'facilitative' mediation the parties will decide what they need to communicate to the other side about their underlying interests. If the mediation is 'evaluative' on the other hand, or is a conciliation or court-

2 The Honourable George W Adams, QC, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian Ltd, 2003) at page 165: 'The asymmetry of information in a lawsuit tends to make all parties more optimistic than they should be. Each party has much information about itself but much less data about the other side.'

3 *Ibid*, at page 167, citing H Raiffa, *The Art and Science of Negotiation*, (Cambridge, MA: Harvard University Press, 1982) at p 226.

annexed mediation that requires a report back of some kind, the mediator will be called on to evaluate the relative merits of the parties' cases so will want to have greater input into the nature and quality of the materials exchanged prior to the mediation event.

Establishing a settlement vocabulary

Substantial or complex disputes will have acquired their own vocabulary by the time of the mediation event. This vocabulary might be technical, industrial, emotional, political, legal, or any combination of these or other special characteristics. It helps the cause of facilitation and settlement if the mediator can speak about the parties' dispute using the same language as they do. This language will be found in documents contemporary with the formation of the dispute, which documents will (or should) form part of the exchange of materials prior to the mediation event itself.

Assuming that the mediator and the parties have concluded that there is a purpose to be served by exchanging materials in advance of the mediation, how is this exchange accomplished? Five points are made in this context:

How does the 'exchange' actually take place?

Simultaneous exchange of documents (ie, all briefs and supporting documents delivered to the opposite parties and the mediator at the same time, on the same day) is a less adversarial procedure than sequential exchange. Simultaneous exchange provides the mediator with a more accurate insight into individual parties' perceptions of their own and the other parties' cases. A common variant of this approach is to use the mediator as a clearing house for the exchange of materials. Each side sends their materials to the mediator who distributes them appropriately only when all materials are received. That way a tardy party gains no advantage from being tardy (remember the 'do no harm' rule). Simultaneous exchange is well suited to facilitative mediations if they are conducted relatively early in the dispute. Sequential exchange on the other hand (ie, claimant's brief, responding briefs, then one or more reply briefs) is a more adversarial approach better suited to evaluative mediations, conciliations or mediations conducted very late in the adversarial process, such as on the eve of or during a trial or arbitration.

What documents get exchanged?

The short answer is: whatever the parties choose. The longer answer to this question depends very much on the stage of the dispute at which the mediation event is conducted. The earlier the mediation is conducted, the greater the parties' strategic interest will be in the timing and quality of documentary disclosure. The later the mediation is conducted, the more mature the formal record will be and the less strategic the parties will be in trying to control the timing and quality of disclosure for the purpose of the mediation. Beliefs about the other side's positions on the issues are constructed more on the basis of induction earlier in the dispute and more on the basis of deduction later in the dispute, when a reliable record has been created.

Are there any limits on the exchange of materials?

Any limits on exchange of materials in advance of mediation should be discussed and agreed well in advance of the mediation event. The agreement on disclosure should form part of the parties' executed mediation agreement. The mediator will usually facilitate this agreement by conducting a brief organisational meeting or conference call well in advance of the mediation event. This meeting or conference call will also function as a rehearsal for the process of reciprocal concessions that will take place at the mediation event itself. It gives the mediator an opportunity to begin the mediation process. In terms of imposing limits, it must always be remembered that the mediator has no inherent power whatsoever. The only 'power' that a mediator has is professional credibility and respect and, perhaps, the power to withdraw services. Even a party that agreed in writing to file material but failed or refused to do so, or that, for example, continued to deluge the mediator and other parties with further and better materials after an agreed deadline for submission, would still be entitled to attend and participate in the mediation unless the mediation agreement gave the mediator the express right to withdraw services for that reason. Another limit on the exchange of materials is the desire to avoid the domination of the mediation by a more powerful, sophisticated or better financed party. The risk is that a dominant party could so outspend and overawe a subordinate party with the quality of mediation materials that it would lessen the chances for settlement. A common example occurs when a sophisticated claims consultant or expert witness produces at the mediation event, for the first time, a professionally produced PowerPoint presentation including previously undisclosed data and analysis. No lawyer likes to be shown up in front of their client and

no mediator would want this to happen at the mediation event. It is good practice therefore to have the parties declare in advance their intention to use demonstration or presentation software and to provide all parties with a hard copy in 'slide' format well in advance of the mediation event.

'Information sessions' in complex mediations

One common solution to the problem of document exchange in complex commercial or construction industry mediations is to have the parties meet separately with the mediator well in advance of the mediation session for a day or more to learn the case directly from that party and its counsel. This leaves the mediation event free of any need for factual development or narrative. The key in conducting a successful information session with one or more parties is transparency. If the mediator is to adopt and apply the 'do no harm' principle, these information sessions must be agreed by all parties and the scheduling and conduct of such sessions must be communicated to all parties. Anything the mediator is given to take away from a particular information session should be simultaneously provided to the other participants in the mediation. The mediator should consider using some of the initial plenary session to review with all participants the information received at the information sessions, to 'level the playing field' in advance of breaking to caucus.

Internet and other research by the mediator

Although it is not strictly an 'exchange' of materials, some mediators will conduct an internet search of available web-based or news industry materials relevant to the parties, their counsel, the project or the dispute itself. Some mediators will also do their own gratuitous legal research to better understand legal issues raised by the parties in their mediation briefs. If a mediator takes it upon themselves to do such extra-curricular factual or legal research, extreme care has to be taken as to how this information is used or disclosed at the mediation event, lest it be used by one party against another if the mediation does not result in a settlement.

A summary of selected institutional rules and provisions regarding the exchange of documents in mediations closes this paper.

Appendix 'A'

Institutional rules regarding exchange of materials, a comparison chart

Institution	Section	Mandatory	Permissive	Exchange	Iterative	Description
ADR Institute of Canada	15		✓	--	--	-Based on agreement -Standard for production: documents necessary for effective mediation -Mediator cannot compel disclosure
British Columbia Mediator Roster Society	12	✓		✓		-Parties to exchange documents -As directed by mediator, in consultation with parties
British Columbia Arbitration and Mediation Institute	--	--	--	--	--	-No provisions for exchange of documents
International Chamber of Commerce	5.3	--	--	--	--	-Neutral shall conduct the procedure in such manner it sees fit, guided by the principles of fairness and impartiality and by the wishes of the parties
American Arbitration Association (Construction ADR Rules)	M-7(c)	--	--	✓		-Parties are encouraged to exchange all pertinent documents
World Intellectual Property Organisation – Arbitration and Mediation Center	9, 12		✓		✓	-Parties shall submit materials which they deem necessary for the purposes of mediation -Mediator may suggest further disclosure
Commercial Arbitration and Mediation Centre for the Americas	10.2 10.3	✓			✓	-Parties are 'expected to produce all information' required 'to understand the issues' -Mediator may require that information be supplemented
Institute of Arbitrators and Mediators of Australia	7.2(b) 6.2(b)		✓	✓		-Parties expected to agree on dates and particulars of exchange of briefs and documents -Parties expected to comply with any procedural orders made by mediator

Preparing to Act as Counsel at Mediation

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It is not unusual to find parties being assisted by their advisers in mediations. Some mediators insist, or at least voice their preference, that the mediation proceed without lawyers since it is commonly perceived that the stumbling blocks to a successfully negotiated settlement of a dispute is the lawyers insistence on 'winning'. The perception is that this tends to lead lawyers to advise the client that they should hold out for a better position and that since the likelihood of success in trial is high they should not 'give up'. This is a misconception on both sides: mediator and counsel. How can it be changed? The answer lies in each player understanding their respective roles and how their conduct needs to be directed to a negotiated settlement. Of course, although a good mediator can deftly deal with a recalcitrant counsel, it is not easy for any mediator to override the advice being given by the adviser to the party. Sometimes the influence of a counsel over the client can be significant even if the client has agreed to mediation on the advice of that counsel. This influence can be harnessed by a good mediator towards the common goal. But, a good counsel can use this influence more fruitfully to benefit the mediation.

Counsel's role

There are three important ways in which counsel can be of great assistance in a mediation, all of which focus on the speedy, efficient and effective resolution of the dispute:

- in preparing themselves for the mediation;
- in preparing any material required by the mediator or agreed by the parties,

such as a position paper; and
- in preparing the client for what is to come: it is of the utmost importance that the client understands the full benefit of what mediation can achieve.

Preparation

Lawyers from an adversarial system and background usually encounter the greatest difficulties in making the switch to and handling, in an effective manner, the essentially non-confrontational situation of a mediation. However, preparation and planning can pave the way for a successful mediation for all players. Counsel in a prospective mediation should, before all else, acquire the requisite training from a recognised institution in the art and practice of mediation: what mediation is, how it operates and what is intended to be achieved by the process. Too often, too many counsel treat mediation as another form of formal 'hearing', just another forum that provides an opportunity for them to perform in a process they think they can control and conduct in order 'to win'. It is often abundantly clear as to which counsel do not or have not understood the purpose behind mediation. It simply is a waste of time to 'go in blind' in the hope of winging it on the day. There is no shortage of reputable bodies who undertake excellent training courses.

Preparatory material

Having obtained the relevant training, counsel should assess the issues that separate the parties, the facts that each party challenges and an assessment of the best and worst scenarios for the client. This involves weighing up, as objectively as possible, all of the pros and cons of the case theory. Since mediations usually take place once the issues have crystallised and case theories established, it is relatively easy to assess the probabilities of success on a commercial basis.

This assessment is a necessary prerequisite to advising the client not only in respect of what to expect but also how to negotiate. Clients accept mediation and participate willingly because they want to see the dispute resolved without the great expense of running a case in court or even in arbitration.

The goal for counsel must remain achieving, within the means available, the client's desires and not 'winning the case' or becoming entrenched with or hung up about an esoteric principle or concept of law. Usually, that matters very little to a client: The client's most oft asked question is: 'What does it mean in practical terms for him/the company/them and how quickly and cheaply can the matter be resolved?'

Having worked out the pros and cons of each of the issues in the case, it is important to make a plan of the different negotiable positions that each party might take. Thinking merely about 'the bottom line' or the highest figure at which the client can/should settle are not sufficient. These are basic steps in the analysis. The analysis must involve different scenarios leading to settlement taking into account the various difficulties in each case, including ones own.

These negotiable positions will allow flexibility when it comes to working out a negotiated settlement in the mediation. Although, the mediator's role is to facilitate a negotiated settlement, the parties have total control over the procedure, the process and the settlement itself. Regularly, the best settlement comes directly from the parties (after hours of cajoling from the mediator!).

Positional stances should be avoided and concessions made where necessary (on a without prejudice basis) to enable the core issues to be exposed; issues which will have significant impact on the means of resolution. The position paper should take a pragmatic approach to the issues and facts of the case and aim to assist in finding negotiable positions. A position paper that merely regurgitates the case without regard to the possible weaknesses in the client's case and the possible strengths in the other party's case is next to useless to the mediator and the other party. Sadly, this only shows up the counsel who believes his or her own propaganda without a real regard to the needs of the client.

Preparing the client

The previous two steps are funnelling into this most important step. Just as it is necessary to prepare a client for what he or she can expect in a hearing in court or arbitration it is equally important that a client is made comfortable with what is likely to occur, who the attendees will be (usually a mediator will ask for this in advance and so counsel should already know this), how to behave and who will do the speaking and at which times. Counsel should make it their usual practice to explain to the client all the benefits of a mediation or ADR generally. Hopefully that has been done at the first meeting and not merely shortly before the mediation itself. Many clients have only a vague understanding of the different ADR processes and confuse arbitration with mediation; mediation with expert determination and so on. Hence, it is important to explain:

- the differences in the ADR processes;
- that in a mediation the matter is in the hands of the client;
- the purpose of general sessions and private sessions;

- the nature of confidentiality between the mediator and the respective parties;
- the importance of assessing the nature of the compromise that may ultimately be acceptable to the client;
- that the process allows for the exploration of personal motivations as well as commercial necessity;
- that the parties can meet alone or with the mediator; and
- that any number of permutations of gathering is allowable depending on what might work at the time in moving the process along.

It is also important to ascertain whether the client needs to 'vent spleen'. This is a very important cathartic process and is akin to having had ones day in court. It is wrong to assume that only emotional situations or cases require this. Very sophisticated commercial players need it as much as the divorcing couple. Work out with the client if this is something the client wishes to take advantage of, work out when it should best occur, at the beginning, the middle or in the dying stages. Work out whether the client is keen to retain a commercial relationship with their opposite number. This is usually a very significant factor for each of the parties but tends to get glossed over by the lawyers in their quest to win.

It is also important to explain to the client that flexibility is the key to negotiation. In explaining this notion of flexibility to a client, I like to quote Atticus Finch from *To Kill a Mockingbird* when he said,

'You never really know a man until you crawl inside his skin and walk around in it; see things from his point of view.'

This walking around in another man's skin allows a greater appreciation of what it is the other party is saying and why. Without it there can be no 'compromise' as such. You give up something because you understand your weakness and their strengths and accept those in order to move on. Walking around in another man's skin enables different means of negotiation and negotiated positions.

This preparation contributes immeasurably and will provide the foundations for the mediation to move along smoothly to a successfully negotiated settlement of all matters in dispute.

Preparing the Parties for Mediation

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www.lawlibrary.ie

The mediation process may arise out of a number of different circumstances; it may be court ordered, it may be a contractual obligation, or it may be as a result of one or more of the parties to the dispute suggesting this process as a means of dispute resolution. If all of the parties are familiar with the mediation process then the mediator's task is easier. If, which is far more common, some or all of the parties – including members of their legal teams – are not familiar with the process, then it is essential that the mediator introduces the process as a serious method of alternative dispute resolution, educates the parties as to what to expect and what not to expect from the process, explains to the parties how the process works, and ensures that the parties know how to prepare for the process. This must be done prior to the mediation itself, and the complexity of the dispute will dictate how far in advance this preparation will need to commence.

Introducing the concept of mediation to the parties as a serious method of dispute resolution

When the mediator first makes contact with the parties in dispute he begins to set the tone for the rest of the process. This initial contact can have a significant impact on the possible success (or failure) of the mediation. From this first opportunity for contact, the participants will make judgments about the process in which they are about to engage, and about the capability of the mediator to assist them with their dispute. It is therefore essential that the mediator creates an atmosphere of professionalism, comfort, and safety in

which the parties can feel confident to deal with their dispute and confident that the mediator has been trained in the skills necessary to assist them find a solution. When serious issues are at stake – and everyone perceives their dispute as serious, having emotional, probably financial, and always quality of life implications – the parties want to trust that the process is a serious process and not just a 'happy-clappy' get-together which might result in a group-hug and someone breaking out their guitar.

Whether the process is court ordered or otherwise, it is important that the parties recognise that mediation is a structured process, internationally recognised, provided for extensively in legislation, and accepted widely as frequently a more successful method of dispute resolution – compared to say litigation or arbitration – due to its expediency, efficiency, relationship-saving qualities, and creative resolution development. Educating the parties individually on these aspects can be done through an initial meeting, or the provision of a concise well-researched document, or both. It may be useful to point to the European Directive adopted in May 2008,[1] the European Code of Conduct for Mediators or other code of ethics to which the mediator had subscribed, and rules of court in the parties' jurisdiction(s) all providing for the mediation process. It may also be useful to refer to some case-law where highly complex and expensive disputes have been resolved through mediation – eg, the *Microsoft* cases[2] and the *Visa/Mastercard* cases.[3] Whether the mediator chooses to refer to mediations in which he has participated is a matter of personal choice. But in doing so the mediator must not raise suspicions in the parties' minds as to the confidentiality of the processes and whether or not the mediator is actually capable of dealing with the issues peculiar to the parties' dispute.

Educating the parties as to what to expect and what not to expect from the process

Particularly for those who are unfamiliar with the mediation process the mediator, in preparing the parties' attitude towards the mediation, must emphasise the differences between mediation and other forms of dispute resolution – in particular litigation with which the parties are likely to be more familiar. In this regard the mediator must define his role as a neutral and impartial facilitator, the role of the lawyers as non-adversarial assistants and advisors, the role of experts (if any) to creatively assist in brain-storming

1 Directive 2008/52/EC of the European Parliament and Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

2 *United States v Microsoft Corp,* 231 F. Supp. 2d. 144 (DDC 2002).

3 *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d. 503 (EDNY 2003).

and not mire the process in technicalities, and the role of the key stakeholders and decision-makers in whom the ultimate responsibility will lie in resolving the dispute.

The mediator may emphasise the non-adversarial future focus nature of mediation, as distinct from the concentration on past behaviours entitlements and wrongdoings one would tend to experience through litigation. The mediator will educate the parties to the fact that they are the ones in control of the creation of a resolution to their dispute, and that the success of the process rests, to a substantial extent, on their shoulders. Having clarified the position on confidentiality – and this can vary depending on jurisdiction – the mediator will encourage as much openness as possible, as the more salient information that is available to all concerned the easier it will be to create a workable and sustainable resolution that will meet, to an optimal extent, the parties' interests. The emphasis is on persuading the other disputants, and not on destructive or abrasive criticism. The mediator will inform the parties that he will not be providing an adjudication on their particular case but will merely help them to reality test the proposals they themselves are formulating and, by considering alternatives to resolution, help to bring the parties closer to a resolution.

Explaining to the parties how the process works

The mediator will normally provide the parties with a mediation agreement during the preparatory period which should, inter alia, detail to the parties how the process works. This will include details of the ground rules or etiquette for the process, eg, conduct at plenary sessions, rules pertaining to the caucus sessions, rules on confidentiality, rules on note-taking, what is required of the parties if someone wishes to leave the process, rules on brain-storming, and the creation of a settlement agreement. The agreement would also normally give precise details to the parties of the fee arrangement for the mediator. The provision of the mediation agreement well in advance of the mediation, with the request that the parties would read it and revert if there are any queries in relation thereto, and the signing of the mediation agreement prior to the commencement of the mediation ensures that the parties are aware of what the process is about, ensures that the parties know what is expected of them, and confirms that the parties are committing to a particular type of process with certain rules that will assist them in resolving their dispute.

Ensuring that the parties know how to prepare for the process

Having awoken the mindset of the parties to the constructive process of mediating in good faith to find an optimal solution for all involved, it is then necessary to ensure that the parties are equipped for the process so that momentum and opportunities are not lost. The following factors should be taken into account when assisting the parties in their preparation:

- Setting of dates – Obviously a date needs to be fixed such that all of the key participants can be present.
- Committing to time – It will be essential that the parties agree to allow a set period of time on the fixed date(s) to allow for the process to take place uninterrupted.
- Authority to settle – It is absolutely vital that those who attend have authority to settle and this should be confirmed well in advance of the mediation.
- Who should attend – The mediator should be provided with a list of those who will attend, with a description of each person's role. Everyone who would be required in order to reach an agreement would preferably be in attendance, but no more than is minimally necessary. It may not be necessary for experts to attend and expert reports will frequently suffice. Who needs to attend will be dictated by the nature of the dispute.
- Summarising the issues in dispute – To expedite the process and focus the parties' minds, particularly in complex disputes, the parties may be requested to provide a very short document summarising the issues in dispute and, perhaps, listing the most salient issues first.
- Selecting only the salient documents – If parties wish to produce documentation for the purposes of the mediation they may be requested to select only those documents which will assist in explaining their difficulties and which will help in the resolution process. Again, the mediator may wish to differentiate how documentation is used in mediation compared to litigation. The documentation should not be used to prove wrong-doing and liability, but to assist in developing an understanding of a situation so that a resolution can be reached. The mediator, together with the parties, should have reached an understanding on the confidentiality of documentation and rules in relation to the exchange of information.
- Focusing on interests – Again in preparing their mindset the parties may be asked to consider what they wish to achieve from the process and in what possible ways their interests may be met.
- Beginning to contemplate the zone of acceptability – Although it will not be possible to formulate solutions until hearing the views of all the other parties, the parties might be encouraged to contemplate, in reaching an

accommodation to bring the dispute to finality, what they are willing to bring to the table and what might be acceptable to them.

- Becoming aware of the alternatives to finding a resolution – Again the ability to assess the likelihood of obtaining a desirable resolution in an alternative forum to the mediation will be minimal without hearing all the other parties. However, in order to encourage commitment to the process, in preparing for the mediation the parties might be asked to start contemplating, and to continue to bear in mind what might happen if they fail to reach a resolution at mediation.

Finally, given that the quality of a person's life can be hugely affected through the emotions and time expended on a dispute, it can be comforting to the parties to remind them, in this preparatory phase, that by going through this process and controlling the solution to their dispute, they can get back a quality of life that was missing while this dispute troubled them.

BATNA and WATNA

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BATNA is an acronym that stands for 'best alternative to a negotiated agreement'. It has been defined as being 'the alternative action that will be taken should your proposed agreement with another party result in an unsatisfactory agreement or when an agreement fails to materialise. If the potential results of your current negotiation only offer a value that is less than your BATNA, there is no point in proceeding with the negotiation, and one should use their best available alternative option instead. Prior to the start of negotiations, each party should have ascertained their own individual BATNA.'[1] WATNA is the converse, standing for 'Worst alternative to a negotiated agreement.' It has been defined as representing 'one of several paths that you can follow if a resolution cannot be reached. Like its BATNA counterpart, understanding your WATNA is one alternative you can use to compare against your other options along alternative paths in order to make more informed decisions at the bargaining table.'[2]

As the above definitions reflect, in any negotiation it is important to be aware of one's BATNA and WATNA. This confers a degree of leverage in negotiating power. BATNA has for this reason also been described as being a 'Plan B' or a 'backup'. But it is important not to confuse the notion of a 'backup' with that of a 'fallback'. Parties inevitably tend to overestimate their BATNA and underestimate that of their counter-party. A skilled mediator can 'reality check' the parties assessment of their BATNAs and thus help with achieving an informed and high quality negotiation strategy.

1 **www.negotiations.com/definition/batna/.**
2 **www.pon.harvard.edu/glossary/watna/.**

Identifying your BATNA

Fisher and Ury[3] provide a three point basis for identifying your BATNA:

- develop a list of actions you might conceivably take if no agreement is reached;
- improve some of the more promising ideas and convert them into practical options; and
- select, tentatively, the one option that seems best.

The above process will often engage significant brain-storming. In his work *The Power of a Positive No*, William Ury gives the example of a company which desires to penetrate a particular market but which is not competitive on price because of the high price to it of a significant component under a ten year fixed costs plus profits contract with a European supplier. After an initially gloomy assessment of the situation, during brain-storming, someone recalls that another factory making the same component used to exist locally, but has now shut down. Inquiries are made, and a BATNA developed of buying the disused factory and recommencing manufacture of the component at an acceptable price. The confidence of the team in subsequent negotiations with their European counterpart generated by the BATNA resulted in a successful outcome, acceptable to both parties.

BATNAs are dynamic

Once you have identified your BATNA, it is important to think of it as having two stages in a negotiation. You start off with your 'walking-in' BATNA; the things you can influence or control before the negotiation begins. However, once negotiation starts, the BATNA is a dynamic element, changing as you derive information about the interests of other parties and their constituencies and as you compare the resources each party (including you) has available to bring about and fulfil an agreement.

One can think of BATNA in negotiation like playing a game of cards. Your walking-in BATNA may be the first cards you are dealt. In many card games, your hand may change during the play as new cards are dealt to you (and others). So your BATNA changes as new cards come into your hand. If those new cards are only known to you, you develop a greater understanding of your own apparent strength. If the new cards are dealt to all the players in a way that allows each player to see at least some of the cards in each player's hand, you learn more about the comparative strength of your BATNA. In negotiation, rather than looking at cards, we are assessing information about

3 Fisher, Ury and Paton, *Getting to Yes*, 2nd Ed.

our own resources, those of other negotiating parties, and the influences on each negotiator from their constituencies.

By looking at BATNA as an ongoing, changing measure of negotiating strength, as a mechanism for deciding whether and/or when to quit, we develop a disciplined, informed approach to our negotiations.

The purpose of BATNA/WATNA analysis

The purpose of conducting such an analysis is to assist with an informed approach to resolution of the dispute, whether to accept a proposal or not. The analysis assists the parties in deciding if a particular resolution is in their best interests or not. It also helps mediators to ground parties in reality and prevent impasse by focusing them on actual possibilities rather than unformulated dreams.

The most common alternative path in mediation is litigation. The following table[4] demonstrates a BATNA/WATNA analysis of following the Litigation Path in a simple real estate dispute.

Plaintiff's BATNA (probability estimate 60 per cent)	**Mid-Case Scenario (probability estimate 20 per cent)**	**WATNA (probability estimate 20 per cent)**
Plaintiff proves seller was aware of and failed to reveal these problems with the property, and must reimburse for damages. $45,000 termite damage $20,000 faulty foundation $10,000 illegal boundary fence $10,000 emotional distress $80,000 Initial Result - Costs - $30,000 Attorneys' Fees (Receive) $55,000 Final Outcome *Other Non-monetary Costs:* 2 years in litigation Stress Time off for litigation-related activities	Plaintiff proves awareness of some problems but not others. Court less inclined to grant emotional distress. $40,000 termite damage $5,000 emotional distress $45,000 Initial Result v- Costs - $30,000 Attorneys' Fees (Receive) $15,000 Final Outcome *Other Non-monetary Costs:* 2 years in litigation Stress Time off for litigation-related activities	Plaintiff fails to prove any seller liability. $0 Initial Result - Costs - $30,000 Attorneys' Fees (Pay Atty) (-$30,000) Final Outcome *Other Non-monetary Costs:* 2 years in litigation Stress Time off for litigation-related activities No sense of vindication

4 Taken from **www.mediate.com/articles/notini1.cfm**.

Defendant's BATNA (probability estimate 50 per cent)	**Mid-Case Scenario (probability estimate 30 per cent)**	**WATNA (probability estimate 20 per cent)**
Plaintiff fails to prove any seller liability. $0 Initial Result - Costs - $20,000 Attorneys' Fees (Pay Atty) (-$20, 000) Final Outcome *Other Non-monetary Costs:* 2 years in litigation Stress Time off for litigation-related activities	Plaintiff proves awareness of some problems but not others. Court less inclined to grant emotional distress. - $10,000 illegal boundary fence - $5,000 emotional distress - $15,000 Initial Result - Costs - $20,000 Attorneys' Fees (Pay Atty and Other Party) (- $35,000) Final Outcome *Other Non-monetary Costs:* 2 years in litigation Stress Time off for litigation-related activities	Plaintiff proves seller was aware of and failed to reveal these problems with the property, and must reimburse for damages. But defendant has different estimates for some damages. - $30,000 termite damage - $15,000 faulty foundation - $10,000 illegal boundary fence $5,000 emotional distress $60,000 Initial Result - Costs - $20,000 Attorneys' Fees (Pay Atty and Other Party) (-$80,000) Final Outcome *Other Non-monetary Costs:* 2 years in litigation Stress Time off for litigation-related

It is crucially important to include costs as part of the analysis. Parties tend to underestimate this aspect in particular, in relation for example to the time value of money. It is also important to give a percentage value to the chance of the outcome – a five per cent chance of a US$100,000 recovery is in fact an expected outcome of US$5,000.

When to introduce the analysis

The appropriate moment for the mediator to remind the parties to conduct this analysis is a matter of judgment, but will usually be after the story-telling and exploration of interests stages of the mediation. Typically, the mediator will develop the analysis with each side in private caucus, and will seek permission to share the analysis with the other side so as to 'reality check' that side's analysis. This should be done in a tone and style that is educational and not threatening or likely to give rise to defensive reactions. In many cases the BATNA/WATNA analysis will also then form the basis for the development of settlement proposals.

Conclusions

Effective development of BATNAs and assessment and analysis of BATNA/WATNA is a potent tool in a mediation, enabling parties to know whether to accept a proposal or not and providing significant leverage over the type of resolution that may be arrived at.

Tips and Hints

- Encouraging the parties to do an initial BATNA and WATNA before coming to the mediation will start the process of thinking realistically about their risks and options.
- Some mediators counsel against doing too much reading around the subject or asking for too much preparatory material from the parties as this may lead to preconceptions that block the mediator's ability to listen openly to the parties and may also start the mediator in thinking about his own solutions to the problem.
- In addition to the materials to be exchanged between the parties, some mediators are open to receiving briefing material in confidence from the parties that may explain their reasons for wanting or not wanting a particular outcome and which is not shared with the other party.
- The mediator does not provide the parties with legal advice. If the mediator is aware of any legal barriers to the settlement the parties propose he should of course indicate this but if the mediator is not a specialist in this area of law he may be unaware of the problem. This is one very good reason for ensuring that parties in cases where there are likely to be significant legal issues are legally represented throughout the proceedings. This does not stop at the mediator proposing that parts of the discussions are held without the presence of lawyers so long as they are involved before a final agreement is made.
- Some mediators like to demonstrate their understanding of the case, gain the respect of the parties and save time in the recounting of the factual elements of the case by opening the meeting with a resume of the facts rather than relying on the parties to do so. However there is a risk that the dispute will then become framed within the mediator's terms rather than those of the parties. If the real problem is an underlying issue and not the stated problem, which may simply have been the flashpoint, any full resolution of the issues may be hampered, missed or delayed.

- In advance of the mediation ask the parties to consider for themselves what they could do to make the mediation go more smoothly in order to reach a satisfactory solution.
- Be clear that prevarication or posturing will not help reach a resolution and will diminish the standing of the perpetrator with other participants.
- Consider how the interests of the different participants within the organisation are to be recognised and communicated.

The Mediation

Mastering the Opening Address

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An effective mediator will establish right from the beginning an atmosphere of trust in the mediation process; trust in the mediator's role, trust in the procedural elements of the mediation and trust in the parties' mindset that mutual interests exist between the parties for conflict resolution.

Introduction

Mastering the opening address will not only enable you to set down the ground rules for the mediation but also allow you to create a confidential and facilitative environment in which parties can perceive common goals for achieving settlement of the dispute. An effective mediator will have already assessed in the first 15 to 20 minutes, whilst delivering their opening address, the best route for managing the parties' expectations throughout the mediation process.

Consider for a moment that you are watching a job interview, in this scenario the first impression (both verbal and non-verbal) given by the prospective employee will typically guide the employer's instinct about how this individual might perform in the job. In this first meeting the employer has already begun a subconscious and intuitive filtering process to determine, for the most part, whether he/she prefers the demonstrated characteristics of the prospective employee against his/her own set of social and learned norms.

Think of the opening address as your important first impression, the job interview example is helpful in this regard as it serves to highlight the 'observer's point of view'. What specific conclusions did the employer draw from his/her observations of the prospective employee during the job interview? In our example, the employer utilised his/her own beliefs

and values in the decision-making process when attempting to determine whether or not to hire the prospective employee. Consequently, those beliefs and values played a central role in how the personal characteristics of the prospective employee were interpreted. This 'observer's point of view' must always be considered when conducting your opening address, no matter how outstanding you perform on the day there will be a deep-seated and perceptive streamlining process simultaneously occurring in the parties' mind-set – which in turn, influences judgment and decision-making on their part. This 'observer's point of view' is not necessarily a conscious process, rather a basic impulse by the parties to gather information about their immediate surroundings and to gain insight into what is unfolding before them (eg, observing an aggressive party grimacing or listening to the mediator clearing his throat incessantly).

Your role as mediator will be highly-scrutinised in the mediation room with any personal characteristics that you reveal (eg, uncertainty or nervousness) potentially vulnerable to being used strategically by the parties so as to complement their own mediation strategies. Your first impression must signal that you are a competent and neutral mediator in control of the mediation and of the parties. Your success as a mediator will be greatly advanced through developing your ability to communicate (both verbally and non-verbally) a sense of trustworthiness to the parties. Do establish credibility and control at outset as well as for the remainder of the mediation process.

Four simple steps to establishing trust in the mediator's opening address

Know the parties

Considering the 'observer's point of view' for each of the parties prior to an up-coming mediation provides an initial glimpse into a party's willingness to settle the dispute. Parties attend mediation either voluntarily or because they have been compelled to do so. Those parties faced with a compulsory procedure to attend mediation are perhaps motivated by a different set of beliefs and values then those of a voluntary attendee. The background facts of a dispute will help indicate if a party is feeling disengaged or is reluctant to participate, you may have your work cut out for you but being forewarned helps you strategise how to best combat any initial resistance.

Know your role

In order to gain the parties' trust you will first have to ascertain what the parties are expecting from you. Discovering new and useful techniques for the opening address might be a matter of re-evaluating your reference peers, 'mediator to mediator' brainstorming provides a viewpoint in the same way that a 'mediator to community' conversation offer a third-party perspective. You might find it refreshing to ask your neighbour or friend to contribute a different outlook.

For example, create a hypothetical situation which results in a mediation process for your neighbour or friend, something which the individual can easily relate to or which might be of particular interest. This subjective approach will ensure you receive a somewhat candid response. Next, ask your neighbour or friend to visualise this hypothetical mediation and tell them that it is about to begin, help by describing visual cues and set the scene (ie, describe the room lay-out or the behaviour of the other party attending). Those visual cues are a set of variables, introduce subject-matter that you wish to learn more about and then conduct a quick-fire question round allowing for a one to two minute response time.

As an example, let's introduce a mediator who arrived late, was unprepared for today's mediation and who has a physiological tendency to flick his eyes to the right when he is nervous. Your dialogue with the neighbour or friend might result as follows:

Question: The mediator is running 20 minutes late, how do you feel about that?

Answer: Well, obviously the mediator doesn't think there is much point to show up on time, anyway there is no way we can settle such a hostile dispute in only one day.

Question: The mediator has finally arrived and after a general introduction begins shuffling through other documents in his briefcase before reading the mediation procedure off a checklist. He doesn't make eye contact with you the entire time, but rather looks in the direction of the other party. How does that make you feel?

Answer: He obviously just wants to get his job over and done with, he did spend longer introducing the other party, maybe they are in cahoots.

Know the procedural elements

KEEP IT SIMPLE

The most persuasive message is the message best understood. Articulate clearly and take the parties step-by-step through the process, define their expectations, describe your role as mediator and signal what is yet to come. Be aware that parties might tune out if the content is addressed in a mechanical fashion or if it is overloaded with detail. Use vocal tools, such as pauses and a clear speaking voice to generate rapport in a calm and reassuring manner.

ESTABLISH THE GROUND RULES

Setting ground rules for your mediation is critical to maintaining the integrity of the mediation process. Ensure that you have established that each party is present and voluntarily participating in the mediation in a confidential setting – without prejudice. Confidentiality is not only a highly-valuable bargaining tool in the settlement stage of the mediation process but also in the opening address. Parties are more likely to disclosure or concede information as long as they see no repercussions of such disclosure occurring post-mediation.

AUTHORITY TO SETTLE

Mediations can easily stall or lose traction if repeated checking is required to determine which individual or representative for each of the parties (eg, spouse, partner, employee, director, board member, etc) has the requisite authority to settle. Make note of the respective individual or representative with authority to settle in the opening address thereby avoiding the potential to derail the mediation at a later stage.

Know your non-verbal cues

SPATIAL DISTANCE

Be aware of your spatial distance at the mediation table in respect of where you are seated and where the parties themselves choose to sit. Consider not only the physical distance but also the psychological distance that can be created, for example by either sitting too closely to one particular party or by leaning in whilst speaking to one of the parties but leaning back as you address the other.

Distracting body language or habitual ticks

Avoid making any distracting body language or habitual ticks during the opening address. It may be useful to video-tape yourself giving a mock-presentation and then count the number of times you touch your face, flick your hair, etc. Managing your non-verbal cues will enable you to achieve visual clarity in the opening address. Be aware of displaying any body language which might serve to distance you from the parties as it could be perceived as superiority, reluctance or even distrust. Don't erode your ability to effectively settle a dispute because of distracting body language or habitual ticks which could easily be identified and managed.

Conclusion

The examples that have been provided in this article are merely suggestions intended to illustrate the kind of issues that a mediator must contend with as he/she mitigates the parties' conscious and sub-conscious behaviours. An effective mediator knows the importance of delivering a well thought-out and strategically-sound opening address. Mastering your opening address is achieved through gaining the trust of the parties equipping you to explore commonalities while guiding them towards possible settlement options.

Alternative Ways of Opening: Mediating Through Positive Emotions

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It is usually taught that, at the beginning of mediation, parties should be invited to express their feelings and emotions and that, emotions having been vented, the conversation will go on in a more reasonable way. Clearly the emotions to be vented are negative ones: 'You are bad! You have done me wrong!'

Though this method obviously works, I am not certain that it is the best.

I have always thought there was something paradoxical in inviting parties to start arguing with each other when you are there to help them agree. There is a significant risk that this strong expression of emotions may ruin the relationship between the parties (if it can actually put be worsened). Once people have expressed their mutual hard feelings, mediators, who have initiated this confrontation, may find it difficult to try and reconcile them and may prefer separating them and carrying proposals from one room to the other. Actually, mediators using this technique seem to need to make an extensive use of caucuses at later stages of the mediation.

As Professor Robert Mnookin likes to point out, the extensive use of caucuses may challenge the confidence of the parties in the mediator. Parties may fear that they are being manipulated. They will remain in a defensive attitude and the mediation may turn into bargaining on positions rather than an open-minded and sincere discussion of interests, options and solutions. An agreement on the substance may be reached. It is unlikely that the relationship will be restored. It is also unlikely that the parties will feel comfortable for very long with the agreement and it may be challenged if it has not been implemented at once.

Actually, this method is based on the assumption that emotions are an impediment to finding a solution. Solutions cannot result from emotion but only from reason. One should then get rid of emotion to start a serious and efficient search for a solution.

It has now been proven that this assumption is wrong and that solutions just as conflict are generated by emotions: you agree because you like it! Books such as *Emotional Intelligence* by Daniel Goleman and *Beyond Reason* by Roger Fisher and Daniel Shapiro proved this ancient opinion wrong.

I am of the opinion that confrontation is not an obstacle to agreeing. On the contrary, if the mediation process can be organised in such a way that positive emotions can be created from the beginning, the chances of success will increase and the agreement may include the restoration of mutual respect if not of a business relationship.

Though I created this technique significantly before *Beyond Reason* was published, it can very well be described through the concepts that Roger Fisher and Daniel Shapiro unveiled in their book.

By satisfying the five core concerns of the parties (appreciation, affiliation, autonomy, status and role) at the very beginning of the mediation, you can reduce negative emotions and enhance positive feelings.

Appreciation and status will be dealt with even before the opening by asking the parties to introduce themselves 'in depth'. People taking part in the mediation may not know each other. They may not really know each other when, in large companies, the conflict is handled by another department than the one where it originated or when the person in charge has changed. Parties may not know the lawyers. They usually do not know the mediator. An introduction is then always needed. If instead of simply noting the names and titles, the mediator tries to understand a little more about who is seated around him, he will have demonstrated his interest in the people and their ability to play a role in the mediation, thereby acknowledging their status and allowing them to feel that their input will be appreciated. Questions could flow as follows: How long have you been holding this position? Have you faced this kind of situation before? What is your background? At what stage did you get involved in this matter? The same kind of questions can be asked to the lawyers: did you or your firm draft the contract? Have you been representing your client for long? Have you been in this firm for long?

Through these types of questions, information will be exchanged that was often previously unknown to the other parties. It generates a strong and positive feeling of mutual recognition. It may sometimes create affiliation when people discover that they share some common background or experience or that several of them are not quite familiar with the case that they have recently been instructed to handle.

In addition to this, affiliation can be created at two other moments in the process. Before the mediation starts, it may be good to have an informal moment together, sharing a cup of coffee and some biscuits, discussing the weather and the last or next weekend and other trivialities. This allows participants to interact in another environment than the conflict.

At the beginning of the first plenary session, instead of asking the parties or their lawyers to make opening statements, my suggestion is to ask the parties (not the lawyer) to describe the history of their relationship to the mediator together. One party will tell how they met and the other will immediately be asked to confirm or give their version. The whole story will be described through this process allowing all parties to take a role in informing the mediator.

This process creates very strong positive feelings for a variety of reasons:

- Parties must have felt positive towards each other at the beginning of their relationship, otherwise they would not have worked together. They are reminded of this happy period at the beginning.
- They collaborate instead of fighting. Their collaboration is due to the mediation process, for the information of the mediator. Therefore, parties immediately understand that the process can change their relationship in a positive way.
- Because the mediator will be very active in this phase by asking all sorts of questions, parties will feel that the mediator is in control; he is active and acting positively. Trust in the process and in the mediator will be created as a result of this process.

During this phase the mediator will not only be interested in facts (what happened?) but also in the reasons behind the facts (why did you do/think/say that? How did you feel about this fact?). By answering these questions, the parties will reveal their interests, their emotions and their expectations in a manner that will not imply any aggressiveness toward the other party. Just like in non violent communications, they will express what they observed, what they felt and what they need.

When the story reaches the point when the relationship deteriorated, everyone understands why. Because expectations have been explained, deceptions become understandable.

In other words, the fight has turned into a problem solving exercise. People have been separated from the problem in the most convivial way and are ready to work together at finding solutions.

As described above, this method would seem only to apply when people have had a relationship before (marriage, contract, etc).

In fact it also applies when people did not really have a relationship but have lived alongside one another. This is the case in IP breach disputes.

It is interesting to have each party explain what their business was in the past, how it developed, how they created/used this IP right, how they discovered that the other one was using it too, what consequences were observed on the market, etc. Again this will separate the people from the problem and let their interests be revealed in a very natural way.

Against my own expectations, this also worked in a construction dispute that was referred to me after many years of litigation. After having asked the parties to explain the construction works and the problems that had appeared, I asked them to tell me the story of this long lasting litigation. This exercise made them realise the vanity of the dispute in comparison with what was really at stake and what could be done to best satisfy every one including the insurers. This 12 year old dispute was resolved in four hours.

The main benefits of this method are:

- parties regaining mutual respect if not esteem;
- very little aggression if any;
- easy unveiling of interests;
- generating positive emotions;
- creating collaborative dynamics from the beginning;
- separating the people from the problem; and
- making the conditions of a solution very clear.

I would welcome any comments before or after you have experimented with the use of this method.

Opening Statements

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After the mediator's opening, it is usual for the mediator to invite each party to make an opening statement. There has been some debate as to the value of or the need for such statements.

The power of a clear and well-crafted opening statement should not be underestimated. The opening phase of the mediation is often the first time in a long while (if at all) that the parties have had the opportunity to address one another face to face.

The tone and the content of the parties' opening statements set the scene for the remainder of the mediation. The mediator should therefore ensure that each of the parties is aware that they will be asked to make an opening statement well in advance of the mediation so that they have adequate time to prepare.

Sometimes one or both of the parties will express a reluctance to give an opening statement in a joint session. However, the opening statement is an invaluable opportunity for each of the parties to tell their story uninterrupted, to hear the other side's perspective and to obtain new information. It also allows the parties to formulate and understand their own case better as well as giving them an early opportunity to identify topics, interests, aims and objectives. For all of those reasons, and many others, it is usually a mistake for a party to forgo the opportunity to give their own or to listen to the other side's opening statement.

The authors recall a mediation involving complex tax issues following the multi-million dollar acquisition of a company in Europe by a US corporation. The dispute had been running for a number of years. Scepticism was expressed by opposing counsel for the need for opening statements as the case was 'well understood' by the parties. Nonetheless, the parties agreed

to provide short openings statements. Opposing counsel went first and set out its position in the form of a not untypical 20 minute statement that said nothing that could not be read from the papers. We responded with a succinct five minute statement that sought to crystallise the essence of the dispute and set out a way forward to reach a resolution. The response from the opposing side's CEO, who was present at the mediation and who was not a details man, was to thank us for making it clear to him for the first time what the case was really about. The dispute settled a few hours later.

Depending on the reason for a party's reluctance to give an opening statement, a mediator faced with a party that does not wish to give an opening statement in joint session, may well try to encourage that party to re-think its decision in view of the perceived benefits noted above. It will sometimes help if the mediator emphasises the confidential and without prejudice nature of the mediation process at this stage. A reluctant party can also be reminded that they are free to leave the joint session at any point if they feel that they must do so. If a party continues to refuse to meet in joint session to give its opening statement, that party should be invited to give an opening statement to the mediator in private session (at least initially). Having done so, that party may then feel more comfortable delivering an opening statement in a joint session, if that is appropriate in the circumstances.

One of the first procedural matters for the mediator to decide is who will deliver their opening statement first. If proceedings have already begun, it is commonplace for the mediator to invite the claimant to begin. If there is no natural claimant, however, the choice will be more difficult. In making a decision, the mediator ought to be conscious that the beginning of the mediation is a particularly sensitive time; the parties and their advisors are likely to be carefully focussing on the actions of the mediator during this phase and may be looking for any significance in the decisions that the mediator makes. With this in mind, the mediator may like to preface any decision they make about the order of the opening statements with a comment that there is no particular rationale for the choice that has been made and that each of the parties will be given an opportunity to speak.

An alternative approach is for the mediator to ask the parties to decide who will go first. This can be done in advance of the mediation. Often the parties will choose an order without much difficulty and this can be a helpful first step as it signals the parties' willingness and ability to cooperate with each other from the outset, providing a platform for consensus building on more substantive matters as the mediation progresses. However, if the parties cannot agree on who will speak first, the mediator will then need to mediate this aspect of the dispute in the same manner as he or she would deal with any other issue, taking care to endeavour to resolve the matter as

quickly as possible in order to prevent the parties becoming disillusioned with the mediation process early on.

When preparing their opening statements, the parties will usually give consideration to who will deliver their opening statement – the lawyer, the client, or both? Some mediators express a preference that the parties (and not their lawyers or other advisors) speak during the opening phase. This is usually on the basis that mediation is a party driven process and that the expression of emotion by parties in the opening phase often facilitates the resolution of the dispute. It helps parties buy-in to the process and gives them that all important 'day in court' feeling in the relative safety of the without prejudice environment of mediation overseen by the mediator. If the lawyers deliver the opening statement, on the other hand, this can stifle and filter out the emotional aspects of the dispute and thus remove one of the key benefits of the opening statement. There is, however, sometimes good reason for a lawyer or other advisor to deliver the opening statement, particularly if a party feels unable to speak so early in the mediation process. The authors recall representing oversees clients in UK based mediation where the mediator and opposing side were English. Our client was extremely sensitive at the risk of being 'home-towned' and so they were very keen to have their English counsel make the opening statement. A combined approach often works well with the lawyer addressing the legal issues and their client speaking to the factual issues and commercial objectives.

Whilst there is no universally accepted formula for an effective opening statement, any party (or advisor) preparing an opening statement for mediation would be well advised to consider some or all of the following:

- *Humanise* – introduce yourself and your team;
- *Language* – speak carefully, with respect and use neutral language avoiding personal attacks;
- *Legalese* – in so far as is possible, avoid legalese or other technical language;
- *Persuasive* – try to be persuasive but avoid emphasising highly controversial or confrontational issues – point scoring or initiating debate at this stage is likely to be counter-productive;
- *Interests* – focus on interests and not positions and try to acknowledge the needs and interests of the other party/parties;
- *Open* – don't conceal or avoid obviously relevant issues (doing so may diminish trust);
- *Belief* – emphasise a belief in the mediation process, let the other side know you are approaching the process with good faith and intend to listen to what they have to say; and
- *Optimism* – finish on a positive and optimistic note.

During the opening phase of the mediation, the mediator ought to:

- remind the parties at the beginning (and if necessary during) the opening statements that they should listen carefully to what is being said by the other party/parties without interrupting;
- listen actively, to what is being said by each of the parties, whilst keeping an open mind;
- encourage the parties to speak directly to each other (rather than to the mediator) – it is after all the decision makers from the other party/parties that need to be persuaded, not the mediator;
- at the end of each opening statement ask any members of the same team whether they have anything to add to what has been said (this is particularly important if the lawyer has given the opening statement or if the key decision maker has not contributed to the opening statement);
- at the conclusion of each opening statement ask any clarifying questions that the mediator has about particular issues addressed in that opening statement; and
- acknowledge the contribution the party giving the opening statement has made before moving on to the next opening statement or the next phase of the mediation.

Some mediators will give the parties a guide as to the expected length of their opening statements. Others will leave the length of time to the parties themselves to decide. There are no set rules governing the appropriate length of time for an opening statement, but generally speaking it is rare for one party's opening statement to exceed 45 minutes and they are often finished in ten to 15 minutes. If an opening statement appears to be dragging on and/or is becoming repetitive, the mediator may choose to gently ask the person speaking to bring an end to the statement as quickly as they can or give them a further five minutes to finish.

After the opening statements, dialogue between the parties may begin to flow naturally. If this happens, the mediator may encourage the parties to continue for as long as such dialogue is constructive. The mediator may then try to identify the main issues and create an agenda for the remainder of the mediation. The process is flexible and at this stage, the mediator will decide whether it is best to continue with the mediation in joint session, have a short break before continuing in a joint session, or to break into private meetings with each party.

How to Use Experts in Mediation

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Experts can be an invaluable resource to help resolve certain disputes, but like all mediation tools the specifics of the dispute must be analysed to determine what would be most helpful in achieving a resolution. Many, and probably most, disputes do not present issues that suggest that the use of an expert would be helpful in the mediation, although the expert might well be useful, or even crucial, or if the matter proceeds to adjudication. At the mediation stage the additional expense, often considerable, associated with retaining an expert can be reason enough not to engage such services. In addition one must consider whether it might lead to an escalation of the dispute or an undesirable emphasis on who is 'right' and interfere with a more interest based resolution. But in appropriate cases experts can enable the settlement and provide solutions to end the dispute. The two most prominent uses of experts in mediation are what are referred to in this article as 'technical experts' and, with respect to discrete issues, 'early neutral evaluators.'

Technical experts

Experts can be effectively used at a mediation to address issues that raise technical questions. Most commonly they are used to cover engineering matters but they can also be useful in many other areas of specialised expertise such as knowledge of custom in the trade in the particular industry or ability to build a damage analysis. The expert on such matters can be an independent expert retained by the parties for the case or can be an employee of the party with specialised expertise. The expert in the first instance serves to educate the parties as to the respective positions of the parties and the

basis for those positions. But the expert can often provide a much more valuable service. Having the experts engage in some back and forth about the issues in dispute can often narrow the areas of difference and eliminate certain disputes as compromises are reached. For example, disputes as to construction projects can sometimes be resolved issue by issue as the experts discuss each problem, brainstorm and price out possible solutions, and try to come to consensus as to acceptable solutions.

Early neutral evaluators

If the parties are stuck on a particular issue of fact or law that is absolutely blocking their ability to move towards settlement, a single independent expert can be brought in to provide either a binding or a non-binding opinion on that point. This is a tool only to be employed where absolutely necessary and useful. The mediator should, of course, first work himself or herself, to vigorously test the parties' positions and, with the parties consent, speak to the potential strengths and weaknesses of each position. It must always be remembered that retaining the expert to serve in this function, with the equivalent of a mini-trial in the midst of the mediation, will add to the cost and delay the resolution. However, in some cases using an early neutral evaluator will make the difference between settling and not settling. For example, whether or not the statute of limitation lapsed may be an issue as to which the parties have an absolute disagreement and which is obstructing meaningful discussion.

Preparation for expert in mediation

Before the mediation, if the case is one in which the use of technical expertise might be useful, the mediator should raise the possibility of bringing in party employees with the requisite technical knowledge and ask if experts had already been retained by the parties. Careful consideration should be given to the parties' views as to whether it would be helpful to include such experts in the mediation. In all cases, whether in-house or independent experts are coming should be part of the normal review of who will be attending the mediation as it is important to avoid having one side be blind sided by having the other party bring an expert to the mediation without advance notice.

Maintaining the confidentiality of the information exchanged should be formally agreed. A specific discussion as to whether and how any statements or positions taken by the expert can be used in any subsequent proceedings is important. Absent of such protections, as the mediation is often at an early

stage of the experts' review, positions or statements taken at the mediation may subject the expert to damaging cross examination as the expert's opinion evolves with greater familiarity of the case.

Often the experts are simply part of the informal discussion around the mediation table. But if formal presentations are to be made by the experts, advance discussion of the details including the length of any expert presentations and the nature of the presentations, eg, PowerPoint, and graphics, is essential to set the stage for an even handed process.

Using experts is not the norm in mediation but there are cases that revolve around complex technical issues and cases that present singular matters on which expert guidance can be helpful. It is a tool that every mediator should keep in his or her tool box.

The Importance of the Interaction between the Mediator and the Parties' Attorneys

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Many essays have been written about a mediator's training, style, role, and selection. Many essays have been written about the need for the decision makers to come to the mediation with an open mind, a good faith desire to settle and the authority to settle. Similarly, many essays have been written about the role of attorneys in mediation. However, little has been written on the critical importance of the interaction between the mediator and the parties' attorneys in mediation. This essay focuses on that topic.

Understanding the differing goals of the mediator and the attorney in mediation

Those familiar with mediation know that the mediator's role is to move the parties to a settlement. The mediator is not responsible for the 'quality' of the settlement; that is, whether or not the settlement is 'fair' to either party. If the mediator can motivate the parties to achieve a settlement on whatever terms the parties accept, the mediator has done his or her job.

The attorney for a party to mediation, however, has a very different responsibility. The attorney is charged with reaching a settlement that is fair to the client as 'fairness' is perceived by the client. Thus, the mediator and the attorney are pursuing different goals. While the attorney-advocate and

the mediator may have a shared desire to see a settlement achieved, they could just as easily become adversaries as they could become allies in the mediation, if they are not careful, because their missions are very different.

To serve their clients in mediation in an effective manner, attorneys must be trained in the mediation process and have sufficient experience to understand what makes it work. The effective attorney recognises that mediation is not litigation or arbitration and calls for a different set of skills and a different approach. In mediation, the attorney is trying to persuade the adverse party – not a third neutral party – through the mediator, to accept an offer that the attorney's client is willing to make and that the adverse party does not want to accept.

How should the attorney work with the mediator?

Since most communication with the adverse party in a mediation is through the mediator, the attorney must figure out how to most effectively use the mediator to convince the other party to pay or accept a fair settlement offer. The attorney must always remember that the mediator is not the decision-maker and the attorney's goal is not to persuade the mediator of the correctness of the client's position, although there is some benefit to the mediator believing in the client's position when the mediator deals with the other side. The attorney's primary goal in mediation is to provide the mediator with information that the mediator can use to move the other party. The attorney also wants to learn as much as possible from the mediator about the other side's position on the issues in the case and regarding potential settlement.

Litigation-style advocacy that confronts adversaries with insulting or 'take no prisoners' rhetoric seldom is effective in persuading the adverse party to be more generous or accept less in settlement. Instead, faced with this approach, the adverse party typically stops listening to the bombastic rhetoric and fights harder to prevail with its position. Nor will these tactics help with the mediator. The mediator's natural reaction will be to push back against the aggressive attorney and not to work as hard for them. Ultimately, if the mediator concludes that the attorney cannot play a constructive role in achieving a settlement, the mediator may attempt to separate the attorney from the client. If the client receives signals from the mediator that its attorney is an obstacle, the client may 'take over' the mediation from the attorney and make decisions without the benefit of sound legal advice. Thus, an attorney who pushes a client to that point is not doing the client any favours.

Attorneys who are well trained and experienced in mediation understand that they need to act reasonably throughout the process and be open to consideration of the adverse party's perspective, while still advocating with enthusiasm and earnestness on behalf of their client. They know how and when to accept the mediator's suggestions and to recognise when it is in the client's best business interest to accept compromises that may not be as favourable as the potential outcome in court or arbitration. They understand that they are more likely to reach a fair settlement by working as a team with the mediator and not simply trying to convince the mediator that they are correct in their position. With this knowledge and understanding of the process, the qualified attorney confidently works with the mediator to achieve the client's goal – a fair and reasonable settlement.

Development of the relationship with the mediator begins even before the mediation commences. Some ways to get an early start on developing the appropriate relationship include:

- Holding preliminary *ex parte* discussions with the mediator about the mediator's approach to the mediation.
- In the preliminary session with mediator, the attorney should share his or her views of the case, the attorney's opinion as to why the parties have not reached a settlement through direct discussions, and some of the attorney's mediation strategy (including a preview of the mediation 'presentation.')
- In the preliminary conference, the attorney should also seek the mediator's advice and assistance relating to quality of the arguments the attorney has shared that he or she intends to make, insight into the other sides' position, and the best way to achieve a reasonable settlement. This information will be invaluable to the attorney during the negotiations and help develop a rapport with the mediator.

During the mediation, the attorney should be looking for further opportunities to build on this relationship and work with the mediator to help obtain a reasonable settlement for the client. Some of these actions include:

- Taking the mediator aside privately when the attorney believes the mediator is going astray or missing an opportunity and candidly sharing that view – even if that results in a polite debate with the mediator.
- Thinking like a mediator! There is no better way to help guide a mediator to action that will result in a fair settlement than to think like a mediator and then suggest solutions to major roadblocks to settlement that the mediator may not have considered. Some refer to this as 'spinning the mediator', a term which has negative connotations. However, the experienced mediator will always be seeking insights from the parties and counsel that might help the settlement process and will welcome all suggestions.

- Giving the mediator suggestions in private on how to best work with the attorney's own client. There are certain arguments and suggestions that simply will not sell with the client and in some cases, may alienate the client. There is no reason for the mediator to lose credibility with the decision maker by pushing these positions.
- Soliciting the mediator's suggestions and opinions throughout the mediation. Information is always a valuable asset.
- Being reasonably honest with the mediator. Many settlements are lost because the mediator is trying to sell a proposal that the mediator believes is the party's bottom line when it is not.

The truly qualified attorney understands that he or she can develop a partnership with the mediator, without compromising the client's position in the dispute. In fact, a partnership is likely to lead to a better settlement for the client. Collaboration between the attorney and the mediator should be the goal of the attorney in all mediations. However, in many cases, the attorney elects a less constructive path.

How should the mediator work with the attorney?

How should the mediator view the relationship with the attorney? The competent mediator recognises that the attorney will be spending large blocks of time alone with the client during the mediation and that in most cases the attorney is there because the client has confidence in the attorney. As a result, the attorney will have a great opportunity to influence the decision-maker during the mediation. The mediator cannot afford to have the attorney advocating against settlement. The competent mediator will therefore try to turn the attorney into a collaborator or co-mediator and will try to develop a partnership with the attorney – which is just what the mediation-savvy attorney wants.

But what will the mediator do with the confrontational attorney who is a settlement 'blocker' rather than a dispute 'resolver', an attorney who is preventing, not helping, the settlement? A mediator who humiliates an attorney in front of the attorney's client probably will create a permanent obstacle to the achievement of a settlement. Thus, the mediator who believes an attorney is acting in a manner inconsistent with the parties' efforts to settle should take that attorney aside and have a private, respectful conversation. While some attorneys are unable to avoid a confrontational approach, most are intelligent enough to realise that their client is in mediation because of a desire to reach a settlement and will, therefore, temper their behavior if asked to do so by the mediator in a respectful way. Attorneys must understand that a mediator,

who approaches them with respectful but critical observations, is not doing so to show superiority over the attorney or to be disrespectful of the attorney's loyalty to the client, but rather is doing so to help the process succeed.

If the mediator is unsuccessful in this process, the mediator's next approach likely will be to try to separate the client from the attorney and/or diminish the attorney's role and influence over the client. The good mediator does this in a subtle but effective manner that accomplishes the purpose without offending the attorney. In some cases, subtlety does not work. In any event, the result is the same – the client loses the thoughts and wisdom that the attorney might add to the settlement process and the attorney may lose the client.

The unfortunate circumstances referred to above can be avoided by the following:

- Parties should select attorneys to represent them in mediation who understand the process and how to thrive in it.
- Parties should take the time and trouble to carefully consider who should serve as the mediator and learn through research whether the 'style' of that mediator and the style of the party's representative and attorney will work well together. The same consideration should be applied to whether the mediator's style will work well with the other party and its attorney. Selecting a mediator whose style is to be very direct, blunt and perhaps 'pushy' works with some parties and is a disaster with others. Similarly, selecting a mediator whose style is to 'gently massage' the parties carries the same risk in result.
- The parties, their attorneys, and the mediator should invest the time to get to know each other and inform each other of their expectations and aspirations in advance of the joint mediation sessions.
- The attorney and the mediator should be willing to accept and be open to constructive advice and even criticism from the other. A successful result speaks well of the accomplishments of both.

Conclusion

In summary, a party is more likely to achieve its goal of a fair and reasonable settlement if it retains an attorney and mediator who understand the need to develop a partnership and recognise the need to work in a collaborative manner towards settlement.

Tips and Hints

- A discussion at the 2009 IBA Annual Conference suggested that many mediators believe that the mediator has a role in ensuring 'fairness' at the mediation in the sense of attempting to limit any imbalances between the parties with respect to numbers of representatives, legal representation and gender. Participants felt particularly strongly about addressing issues where only one party is legally represented. The risk of appearing biased was well understood but considered worthwhile.
- In technical disputes involving experts, the mediator can use the experts to move the parties closer together. While there is always the potential for some professional rivalry between them they are unlikely to be as emotionally involved in the dispute as the parties. By having the technical experts work together, perhaps without the presence of the parties, to explore the areas in which they agree the parties can then be encouraged to see that the area of difference is smaller than they thought and to look at ways of bridging those differences.
- In asking the parties to prepare an opening statement the mediator may ask them to consider including in that statement any thoughts they may have as to how the problem might be resolved even if these only offer a partial solution. As well as sending positive signals to the other side, there is also the possibility that the other party may be receptive to that initial line of reasoning.
- Try mirroring back to people what they have said. This can be done in the course of the mediation to clarify or to ensure that the other party has heard what the speaker has said or to offer reassurance that the concern is being understood. However, it may be used at the start of the mediation where the mediator describes the case as he understood it from the brief in order to reassure the parties of his understanding of the situation, ability to conduct the mediation and his neutrality.
- An alternative to mirroring is to ask the party to restate something they have just served to ensure that the other party has truly heard and understood what they are saying.

- A mediator who introduces a mediation by recapping his understanding of the case whether from the briefs or from the parties opening statements runs a risk of framing the case on his terms rather than that of the parties.
- When dealing with difficult, position orientated parties it may help to start the parties thinking about the process as opposed to their own well-prepared analysis. By getting them to reciprocate small concessions, even on things like the order of offers or who should be present at various sessions, you start the parties thinking in terms of compromise and develop a more cooperative environment.
- Make sure you begin the session by carefully explaining the role of the parties, including the mediator and the lawyers and the ground rules for the process.
- Potential opening questions include: 'What are you looking to get out of today?'; 'What are you expecting from me?' (the mediator).

Confidentiality in Mediation – the Common Law Tradition

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Confidentiality is an essential element of mediation. The desire to maintain the confidentiality of information which is commercially sensitive is a compelling reason for parties to turn to mediation, and not to the courts, to resolve disputes. The general rule is that what is said and done within a mediation is confidential. But what does this actually mean and what happens if a party discloses confidential information to third parties?

Confidentiality refers to both the overall confidentiality of the process and to the confidentiality of the private meetings between the mediator and each party during the process. But when the word confidentiality is used in the context of mediation, it is often referring to the principle that what is said or done during the mediation process cannot be disclosed or used as evidence in subsequent legal proceedings.

A mediation agreement will typically cover confidentiality issues and the without prejudice nature of the process. It will impose obligations of confidentiality on the lawyers, parties and the mediator. The agreement may also list some of the exceptions to the obligations of confidentiality. Under certain circumstances, the law requires parties to breach their confidentiality.

Information learned in mediation may sometimes lead to a subsequent chain of enquiry and it might also be used to subsequently amend pleadings to add new causes of action or defences. The extent to which matters remain confidential will be affected by the prevailing law and confidentiality is treated differently in different jurisdictions.[1]

1 See for example 'Confidentiality in Mediation' by Michele Zamboni in *Int A L R* 6(5) 175-190

Confidentiality of mediation under English law

Under English law, negotiations conducted within a mediation are treated in the same way as party-to-party negotiations. That is, they are both treated as subject to the without prejudice rule (*Brown v Rice* [2007] EWHC 625 (Ch)).

The without prejudice rule governs what is and what is not admissible as evidence. The rule is intended to encourage parties, so far as possible, to settle their disputes without resort to litigation and parties should not be discouraged by the knowledge that what transpires in the course of their settlement negotiations may be used against them in the litigation.

In a recent case before the courts where A, who was being sued by B, applied for disclosure of documents arising out of the mediation between B and C, the judge confirmed the position that mediation is treated in the same way as party-to-party without prejudice negotiations and refused to order disclosure.

'… the court should support the mediation process by refusing, in normal circumstances, to order disclosure of documents and communications within a mediation…Mediators should be able to conduct mediations confident that, in normal circumstances, their papers could not be seen by the parties or others.' (judgment of Judge Kirkham, paragraphs 30-31, *Cumbria Waste Management Limited, Lakeland Waste Management Limited v Baines Wilson (A Firm)* 2008 EWHC 786 (QB)).

Exceptions

However, the use of the words 'in normal circumstances' makes it clear that there are circumstances when the court will order disclosure of documents and communications within a mediation. That is, despite a mediation agreement saying that everything said and done in a mediation should stay confidential, some information will be admissible as evidence.

The types of communications and information that would be admissible as evidence are:

- When the issue is whether without prejudice communications have resulted in a concluded compromise agreement, the communications are admissible;
- Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence;
- Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel;

- Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety'. However, this exception should be applied only in the clearest cases of abuse of privileged occasion;
- Evidence of negotiations may be given, for instance, on an application to strike out proceedings in order to explain delay or apparent acquiescence; and
- The exceptions or apparent exception for an offer expressly made 'without prejudice except as to costs'.

The exceptions are worth listing because they illustrate that there are some limited circumstances when a court will order disclosure or allow a party to use information obtained in the course of mediation as evidence. That is, confidentiality in mediation is not absolute. But if we look at the examples listed, it is also clear that the type of information or communication that can be disclosed and used as evidence is the information relating to the actual mediation process – how it was conducted, if a settlement was reached, etc – as opposed to information relating to the actual dispute mediated. The distinction is important as parties who chose to mediate rather than to use the courts to resolve their dispute are often more concerned about confidentiality of the subject matter of the dispute rather than the actual procedure. That is, they do not want, for example, trade secrets or other sensitive information about their business that might be discussed in the mediation to be disclosed to third parties.

In the very recent case of *Farm Assist Ltd (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs* (No 2) (2009) EWHC 1102 (TCC)) the issue arose whether a settlement agreement arrived at during a mediation in June 2003 was entered into under economic duress. The mediation agreement contained the usual stipulation that none of the parties would call the mediator as a witness in any litigation but restricted to 'in relation to the Dispute' and not the wider stipulation one sometimes sees: 'in relation to the Dispute and the mediation'. In his judgment Mr Justice Ramsey gave a useful summary of confidentiality and privilege in mediations in these terms:

> '44. Therefore, in my judgment, the position as to confidentiality, privilege and the without prejudice principle in relation to mediation is generally as follows:
>
> (1) Confidentiality: the proceedings are confidential both as between the parties and as between the parties and the mediator. As a result, even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce

the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the courts will order or permit that evidence to be given or produced.

(2) Without Prejudice Privilege: the proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.

(3) Other Privileges: if another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege.'

The Judge concluded that the mediator could be compelled to give evidence; the issue in court related to the mediation process (alleged economic duress) rather than to the underlying dispute between the parties and it was in the interests of justice that the mediator should give evidence.

Another exception to the rule of confidentiality is when the law requires the mediator to breach his or her confidentiality. A mediator is for example obliged to breach confidentiality where 'financial crimes' are involved (Proceeds of Crime Act 2002; Money Laundering Regulations 2007). Other exceptions to confidentiality include cases of abuse of the elderly or children or where there are fears of harm to the life or safety of any person.

Sanctions

If confidentiality is agreed between the parties to the mediation, whether expressly or impliedly, as part of the mediation agreement, breach of confidentiality by any party, including the mediator, will generally provide an injured party with a cause of action for breach of contract.

There also exists a potential cause of action for breach of the equitable duty of confidence. Breach of confidence will generally occur in respect of information imparted to the defendant where the information had a necessary quality of confidence, the information was imparted in circumstances importing an obligation of confidence and there was unauthorised use of that information to the detriment of the party that communicated it (*Coco v AN Clark (Engineers)* [1969] RPC 41). This will generally cover information imparted during mediation proceedings.

Both of the above causes of action will also provide the claimant with a potential remedy by way of damages. However, the way such damages are assessed will depend on whether the claim is made in contract or for

breach of confidence. In either case, such damages are likely to cover any quantifiable financial loss suffered by the injured party, subject to the rules of remoteness. Loss of reputation as a result of the breach is unlikely to be recoverable as a separate head of damage, although it may be an element of a quantifiable loss, for instance, for loss of profits. In the case of a breach of confidence, the offending party may also be required to account for any profits received by virtue of the breach.

If a party is threatened with a breach of confidentiality or a breach of confidence, then they may be entitled to apply to court for an interlocutory injunction to prevent disclosure by the other party, but only if damages would not be an adequate remedy, eg, because the claimant would suffer irreparable reputational harm. Such an application will commonly be conducted without notice to the other party and in the privacy of the judge's chambers. A permanent injunction may then be obtained at trial which, if breached by the defendant, could lead to them being held in contempt of court.

Additionally, statutory protection of confidentiality exists in certain circumstances through secrecy or privilege provisions, for instance, in mediation of employment disputes and certain types of family mediation.

If the mediator is required to make disclosure of information, as an exception to confidentiality, then, depending on the legal rule that requires him to disclose, the mediator may be subject to penalties or professional disciplinary action for any failure to do so.

Conclusion

It is clear that confidentiality and the without prejudice rule are essential elements of the mediation process under English law. For many potential litigants, mediation offers a level of privacy that the courts are unable to offer and this is one of the advantages of mediation that has led to it becoming an increasingly common feature of commercial contracts. Of course, the protection afforded by confidentiality and the without prejudice rule is useless unless sanctions exist to enforce compliance and compensate a party for any loss suffered as a result of a breach. Such sanctions commonly include injunctions and damages. However, confidentiality cannot be absolute and safeguards necessarily exist in the form of exceptions to the rules. These exceptions should be borne in mind when considering the merits of mediation and the level of confidentiality offered under English law.

Confidentiality in Mediation – the Civil Law Tradition

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Introduction

Confidentiality in a mediation procedure plays a crucial role for the success of this out-of-court method of settling a dispute. Mediation can only result in a truly successful outcome if the parties can at least openly express the motives, needs, and interests and – if applicable – the emotions that pertain to the points of conflict and their environment. Civilian Law Systems know of various methods to ensure confidentiality, in particular in a civil court procedure following the failure of a mediation attempt. The means for assuring confidentiality however sometimes leave a lot to be desired, and they are not always effective. In light of this, the success of mediation is endangered, especially since, as a general rule, the parties cannot be sure whether the information disclosed in the mediation can later be used against them.

Starting point: contractual agreements for ensuring confidentiality

Often the parties will manage somehow or other to ensure confidentiality by means of contractual agreements. Within this framework, the mediator is obligated to employ the right to refuse to give evidence or legal privilege. The parties for their part are obligated not to use the information that has become known in the mediation procedure in a subsequent civil action.

Contractual agreements are not a suitable method for ensuring confidentiality. Such agreements only obligate the parties and not the court that is dealing with the matter. Thus, if a party infringes this type of agreement, it has no effect on the proceedings. The facts presented must be

taken into account by the court in any case, unless a higher constitutional action justifies that they are not to be heeded. Such a situation is not generally known. The question nevertheless arises whether one party can become obligated to forego introducing certain facts in the proceedings in advance of a procedure. In the civil law countries, it is believed that such a scenario is not possible. This is generally justified by asserting that an option for one litigator to freely make a decision as to which facts it will present for substantiation of a claim or for a defence would be an essential requirement for a lawful reconciliation of interests and ensure a minimal level of procedural justice.

It is effective nevertheless to sanction the infringement of a contractual understanding not to use information that became known during the mediation in a subsequent legal proceeding with a claim for damages. Reimbursement of damages that have arisen from utilising the information could thereby be demanded.

Protection of confidentiality

The contractual assurance of confidentiality does not result in the hoped for effect.

Legal basis

In several states, therefore, measures have been enacted that prohibit any information of the parties and/or mediation participants disclosed within the context of the mediation to be used in a subsequent legal proceeding. A legal basis is required in civil law countries in order to enforce confidentiality. The starting point of the initial laws was usually the UNCITRAL Model Law on International Commercial Conciliation from the year 2002 (**www.uncitral.org**). Article 9 of this model law specifies the following under the heading of 'Confidentiality':

> 'Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.'

Thus, for example, Croatia laid down provisions regarding confidentiality in 2003 based on the UNCITRAL Model Law (**www.nn.hr**).

Austria was the first country in the world to lay down a fundamental mediation law on 1 May 2004. In this case, the mediator is obligated to maintain confidentiality regarding facts that were entrusted to him within the scope of the mediation or otherwise became known to him as part of

the process. The principality of Liechtenstein laid down a similar law on 15 December 2004.

The EU has also become active in this area and on 21 May 2008, laid down Directive 2003/52/EC on certain aspects of mediation in civil and commercial matters (EU Directive on Mediation). Article 7 concerns confidentiality:

> '1. Given that mediation is intended to take place in a manner that respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediator nor those involved in the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
>
> (a) Where this is necessary for overriding considerations of public policy of the Member State concerned, in particular, when required to ensure the protection of the best interests of children or to prevent harm of the physical or psychological integrity of a person, or
>
> (b) Where disclosure of the content of the agreement resulting from the mediation is necessary in order to implement or enforce that agreement.
>
> 2. Nothing in paragraph 1 shall preclude the Member State from enacting stricter measures to protect the confidentiality of mediation.'

According to Article 216 of the Swiss Code of Civil Procedure (ZPO), which will come into effect on 1 January 2011, mediation is confidential. Statements made by the parties may not be used in judicial proceedings.

In addition, various behavioral rules try to ensure the confidentiality of the mediation, such as the European Code of Conduct for Mediators, which specifies the following in Article 4:

> '4. CONFIDENTIALITY
>
> The mediator must keep confidential all information arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.'

In individual countries of the civil law system, the requirement for a legal basis results in the fact that the confidentiality does not apply for all mediation proceedings under some circumstances. The respective legal text is always the decisive factor. In Italy, therefore, confidentiality is only expressly governed

for business and corporate disputes. In France, on the other hand, the rule of confidentiality applies to court-annexed mediations.

Absolute or relative confidentiality

The cited legal provisions show that confidentiality is either *absolute or relative*. Absolute confidentiality means that there are *no exceptions* to the confidentiality. On the other hand, relative confidentiality signifies that the information disclosed in the mediation can be and may be disclosed to third parties *under certain circumstances*.

The EU Directive on Mediation envisions relative confidentiality, while Swiss procedural law makes absolute confidentiality the standard.

Exceptions to confidentiality

The most important exception for confidentiality is certainly the agreement of the parties. The parties may consequently agree that the disclosed information simply must not be treated confidentially. The EU Directive on Mediation in particular provides for this exception. This makes overall good sense, especially since the mediation procedure is controlled by the principle of autonomy of the parties.

In case of an existing interest of overriding importance, the confidentiality of the mediation may be lifted. What constitutes an *interest of overriding importance* is usually not defined. According to the EU Directive on Mediation, it pertains to protecting the interests of children or preventing any damage or injury to other persons. It is a prerequisite, therefore, that this interest of overriding importance be manifested in a legal foundation (see also European Code of Conduct for Mediators). Other reasons that may result in a situation where confidentiality does not apply include a threat to life and property or the misuse of the mediation in order to commit a crime.

Means for ensuring confidentiality

Despite the legal declaration that mediation is confidential, confidentiality in the civil law countries is far from being guaranteed. For this reason alone, nothing is accomplished by it. Suitable means for implementing confidentiality in mediation is still needed:

Introduction of professional secrecy

Confidentiality in mediation can be ensured by introducing professional secrecy, similar to that of an attorney, for the benefit of the mediator. As a consequence of this, the mediator may not be able to disclose any information to third parties. This by no means constitutes ranking the mediator equal to an attorney.

Right to refuse to give evidence and obligation to recuse

In individual countries of the civil law system and in particular according to the EU Directive on Mediation, the mediator is entitled (as a rule) to a limited right to refuse to give evidence. He can refuse to make a statement regarding facts to which he was privy in his capacity as mediator. The legal provisions either provide for a duty to refuse to provide evidence or the refusal is at the discretion of the mediator. The right to refuse to give evidence is limited from a factual standpoint, ie, to the information disclosed during a mediation.

If, on the other hand, a judicial person previously served as the mediator in the same matter, he/she must refuse to take the case. The judge loses his/her impartiality in the case of previous activity as mediator.

Prohibition of utilisation

There is also a so-called prohibition of utilisation, which some countries have enacted. Pursuant to the future Swiss Code of Civil Procedure, for example, statements made by the parties during the mediation may not be utilised in a subsequent legal proceeding. The mediation proceeding may not, however, endanger the right to legal protection of either party. The duty to cooperate in proceedings applies to parties in the civil law countries. According to this, only those statements and documents that have been qualified as confidential by one party, were not known to the other party before the mediation, and were also not otherwise known to the public can be considered confidential. In other words, the prohibition of utilisation encompasses those facts that one party could only have found out about within the context of the mediation. The confidentiality pertains to the mediation dialogue, as well as all information associated with the respective mediation. The confidentiality also encompasses all documents (minutes, etc) created within the scope of the mediation. The prohibition of utilisation also pertains to any concessions expressed by one party, to their willingness to compromise, and to any suggested proposals for a solution.

As a result of the prohibition of utilisation, a judge may not base his decision-making on any questionable facts. They are irrelevant and may not be utilised. Proof as to what is confidential and what is not is incumbent upon the party supported by the prohibition of utilisation.

Claims for damages

In a few cases, a legal claim for compensatory damages that may arise from an infringement of confidentiality has been permitted.

Scope of confidentiality

From a personal perspective

Confidentiality generally concerns not only the mediator himself but also assistants of the mediator (eg, the secretarial staff), persons in training under the direction of the mediator, or persons or institutions that organise mediations.

As a general rule, the parties and the representative are subject to the same confidentiality as the mediator himself. In most countries, confidentiality is extended to all participants (eg, persons called into one's confidence).

From an objective perspective

From an objective perspective, confidentiality pertains to all of the facts that the mediator and the opposing party have learned about within the context of the mediation. Information that is qualified by one party as confidential, was not known to the other party before the mediation, or that was not otherwise publicly known is classified as confidential. Only facts that one party has learned about solely within the context of mediation are considered confidential. The confidentiality pertains to both the mediation dialogs themselves and to all information associated with the respective mediation. Included as confidential are also all documents (minutes, etc) created with the scope of mediation. The confidentiality also includes any concessions expressed by one party, to their willingness to compromise, and to any suggested proposals for a solution.

Generally not included in the legally fixed confidentiality is the fact that a mediation has actually taken place and, in some countries, the parties to the mediation. This item is especially relevant in countries that have a court-

annexed mediation. The precept of confidentiality for the mediator also generally applies in these cases as well. However, according to the laws of most countries, the mediator will be required to inform the responsible court as to the parties of the mediation and its representatives, the fact that mediation has taken place, and whether the parties have come to an agreement. On the other hand, the mediator is not authorised to discuss with the court the course of mediation or the position of the mediator.

From a timeline perspective

The obligation to maintain confidentiality continues to exist even after the mandate has ended.

Summary

The key element of mediation is confidentiality. Confidentiality is an essential prerequisite for mediation. Mediation is only successful if there is openness among the parties. Up to now, prohibition of utilisation or other sanctions have been introduced only rarely by legislators. Ensuring confidentiality in mediation has not yet progressed very far in the civil law countries. The EU Directive on Mediation was an initial step. It is up to the member states to implement the directive.

The Use of Joint and Separate Meetings

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Introduction

Experienced mediators differ in their attitudes towards the use of joint or separate meetings. Some mediators believe that the joint meeting forms the basis of mediation and that separate meetings ('caucuses') should be held only if there is a particular and exceptional reason to do so, whilst other mediators prefer an extensive use of separate meetings especially in the exploration stage and during negotiations. Sometimes mediations are carried out in joint meetings without any separate meeting whereas the converse is rarely the case. However, in some mediations it may be appropriate and relevant to conduct the entire process in separate meetings only, for instance where the parties (or one of them) are too fraught to be in the same room or to hear the other side argue their contentions, or where severe time constraints demand immediate separate discussions.

In some situations separate meetings are considered as an occasional technique to promote productive negotiations[1] whilst in others they are regarded as a regular part of the mediation process.[2]

Advantages and disadvantages of separate meetings

The debate concerning separate meetings is influenced by different attitudes as to the extent to which the mediation process ought to be a pure facilitative

1 See Christopher W Moore, *The Mediation Process*, 3rd Edition, 2003, p 371.
2 See David Richbell, *Mediation of Construction Disputes*, 2008, p 73.

process, or whether there is room for the mediator to influence not only the management of the process but also the direction and the content of the negotiations.[3]

In separate meetings the mediator receives information from both parties, sometimes on a confidential basis, so that the mediator may be the only person in the process who knows the whole story from both parties. This places the mediator in a unique position whereby the mediator is able to assist the parties not only in creating a solution that meets their needs but also in ensuring that no possibility of resolution is left unexplored. On the other hand it must be acknowledged that this also opens up the possibility of misuse by the mediator in the form of manipulation of the information gathered.

The parties are rarely completely open-minded towards each other and it is much easier to get the parties to talk frankly about their real interest and needs in separate meetings. In joint meetings the parties will frequently withhold information for tactical or other reasons. Separate meetings also allow the parties to provide confidential information that they would never disclose to the other party.

Separate meetings may also be used to break an impasse, which is a well-known phenomenon in mediation, or to maintain momentum if the discussions in the joint meeting are unproductive.

Other advantages are the opportunity for the mediator to make a reality test of either or both parties' claims, or to clarify misunderstandings and wrong interpretations. If the discussions in the joint meeting are overheated a separate meeting would also allow the mediator to assist the parties to keep focus and get back on track. The separate meetings could also allow the parties to reconsider their strategies if they have doubts as to whether the negotiations are moving in the right direction.

Despite the numerous advantages of separate meetings there are also some disadvantages.

Joint meetings provide the parties with the same experience even though that they may have different interpretations. In separate meetings the parties will each have different experiences, which may lead to misunderstandings and thereby disturb the process towards a solution.

Furthermore, separate meetings do not allow the parties to have the spontaneous and direct impression of the other party's words, actions and reactions (for example to proposals), or their point of views. Rather, they depend on the mediator's report on them.

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3 By this is not meant evaluative mediation where the mediator evaluates the claims and the objections of the parties. This author considers such procedure as merely adjudication or evaluation.

Confidential information received in a separate meeting could in some cases put the mediator in an ethical dilemma, for instance if one of the parties discloses confidential information about some facts which are obviously of importance for the other party. There is no easy answer as to how to resolve such dilemmas. One solution could be for the mediator to terminate the mediation despite any objection from either or both of the parties. The mediator might consider breaching confidentiality, but this could well have serious adverse consequences for the mediator and the process and would only be an option in exceptional circumstances (and this whole issue of confidentiality and its exceptions ought in any event to be covered by the terms of the agreement to mediate). Some mediators avoid this issue by refusing to receive confidential information, but this precludes their receiving information that possibly could contribute to a constructive process and maybe even to a solution.

For most mediators – at least in the commercial field[4] – separate meetings are an important part of the strategy in mediation.[5] However it must be realised that both joint meetings and separate meetings imply challenges for the mediator.[6]

Maybe it would be appropriate to look at separate meetings not as a tool for the mediator (amongst other tools) but rather as an integrated part of the mediation process. The fact is that all elements in the mediation process have the capacity to be either positive and constructive or negative and destructive, depending on the specific mediation, the parties and all other circumstances. In the process the mediator takes a number of decisions which can lead in either direction. It depends on the situation. Similarly there is no easy answer to the question when to have separate meetings. Like all other initiatives, this depends on the individual circumstances and the mediator's judgment. Nevertheless, there are some guidelines, eg, when the parties can no longer work constructively together; when there are underlying issues that need probing but which cannot be achieved in joint sessions; or when parties would benefit from being able to explore options and possibilities privately.

This leads to another point: what is considered to be a separate meeting? Maybe a broader perspective could be useful.

Many mediators hold that the mediation must start with a joint session. However, the start of the joint meeting is not necessarily the first contact with the parties or their advisers. Before this, there will usually have been some telephone conversations or correspondence regarding the agreement to

4 Some family mediators never use separate meetings.

5 Cf, Christopher W Moore, *The Mediation Process*, 3rd Edition, 2003, p 377, who states that in many disputes it would be impossible to reach a solution without separate meetings.

6 Cf, Henry Brown and Arthur Marriott, *ADR Principles and Practice*, 2nd Edition, 1999, p 174.

mediate and practical matters. Such contact is also part of the process, and of building a relationship between the mediator and the parties. Furthermore, it is rare for the parties to arrive at the mediation venue exactly at the same time. It is normally not considered to be a good idea to install the first arriving party in the joint meeting room, because it could give the other party the feeling that the meeting room has in a way been 'colonised' by the other party and that they are dominating the room. In commercial mediation many mediators choose to install each of the parties in their respective separate rooms on arrival. This further allows the mediator to have an informal pre-meeting with each of the parties, which is also part of the entire process.

Pre-meetings are usually used to talk about practical matters, the forthcoming process and sometimes to get the mediation agreement signed, but it also gives the mediator the opportunity to start to build confidence ('rapport') with the parties, which is crucial in all mediation. All experienced mediators know that the key to success often lies in the beginning of the process and the pre-meeting is an excellent place to start.

Where a number of people attend on behalf of a party, meetings with that party are usually held with all members of the group; but there are times when it could be more beneficial to split the group and meet with only some of them.

Information on separate meetings

The mediator ought to inform the parties about the possibility of having separate meetings as early as possible, ie, when setting up the mediation and discussing the process but at latest in the pre-meeting or at the beginning of the joint session. Otherwise there is a risk that the parties may gain the impression that something has gone wrong, which may lead to unnecessary mistrust or set the mediation off course. The mediator should also invite the parties to request a separate meeting if they feel a need for one.

When the mediator decides to call a separate meeting it is important that the transition is as natural and relaxed as possible.

Who to start with?

The mediator must decide which party he wants to see first. A number of criteria need to be considered and balanced. If the mediator feels that some kind of imbalance between the parties exists, it could be a good idea to start with the party perceived as being weaker. If the mediator has the impression that one of the parties holds a key to resolution or is withholding relevant

information, the mediator could start with that party. If one of the parties has requested the separate meeting the mediator might choose to start with that party. Sometimes the mediator may simply start with the claimant first. However, there is no general rule on who to start with. The mediator must consider what is likely to be the best for the process.

The meeting rooms

The parties must be completely separated. The best arrangement is to reserve a specific room for each of the parties, other than the joint meeting room.

The length of separate meetings

Ordinarily, separate meetings ought to be short, ideally ten to 15 minutes as a maximum. However, there may well be a need for longer, and sometimes very long, meetings in which event the mediator needs to keep the absent party engaged in the process and if necessary periodically informed of the likely time frame.

There is a view that separate meetings with each of the parties should be of the same length. However, this is likely to be impracticable and is only true to the extent that the mediator must be sensitive to the need to avoid any imbalance between the parties, or mistrust of the mediator.

Waiting time

The mediator cannot be at two places at the same time.[7] The mediator must consider how the waiting party could use the time in a constructive way. This may be done by giving the waiting party tasks to do while waiting, for instance making calculations of consequences, considering different issues or obtaining missing information. If the waiting party is left unoccupied for too long, there is a risk that frustration and negativity may set in.

Confidentiality

Most mediators agree that there needs to be scope for the parties to give the mediator confidential information that cannot be released to the other party.

Some mediators achieve this by agreeing with the parties that all information given in a separate meeting is confidential unless otherwise

7 In co-mediation the mediators can of course be in more rooms at the same time. The challenges of co-mediation are outside the scope of this article.

agreed. This can be appealing to the parties because it gives them security and control. However, it also narrows the mediators latitude later on in the process. It is rarely possible to know in advance which information may be useful to release and when to do it. If at some point the mediator considers it useful to release some confidential information but has to get consent before doing it, the opportunity to do so could be lost. The mediator is in the unique position of having heard the full story from both parties, so in some mediations it may be in the interests of the parties to leave it to the mediator to decide if and when information gathered from one party should be released to the other. However, generally it is safer to have a rule that nothing is disclosed without specific authority.

If it is agreed with the parties in advance that information given in a separate meeting may be released to the other party unless the party has stated that any specific information must be kept as confidential, it would be a good idea at the end of each separate meeting to specify what information must be considered confidential.

If some of the information is covered by confidentiality and other information is not, the mediator must make and keep an accurate record of that. There are many different methods of doing this. The important thing is to ensure that the mediator does not mistakenly leak any confidential information, since this could damage the party's faith and undermine the whole process.

Concluding remarks

Separate meetings are a very important part of most mediations in commercial disputes. However, there is not any clear answer to the question when to go in caucus. It depends on the specific circumstances in each mediation. In the presentation above is indicated when separate meetings could be useful.

Recognising the Interests of Constituents Who are not in the Room but May Be Relevant to the Outcome of a Mediation Process

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When we are trying to take into consideration the interests of constituents who are not in the room but may be relevant to the outcome of a mediation process, two questions come to mind: the first is who should attend a mediation session and the second question is if the person attending a mediation session should be represented by an attorney. We may also ask if the parties should attend at all. Or should only the lawyer attend.

The immediate response to the first question would be: the person who attends a mediation session should be the plaintiff or the defendant – that is the parties to the dispute that we are attempting to mediate. This very obvious answer is not so simple when one of the parties to the dispute is a legal entity, a company, a school, a union, or simply a group of people.

In the case of a corporation, Arnold states that CEOs settle more cases than vice presidents, house counsel or other agents. Why is this so? For one thing, they don't need to worry about criticism back at the office. Any lesser agent, even with explicit 'authority', typically must please a constituency which was not a participant in the give and take of the mediation. That makes it hard to settle cases.[1]

1 Tom Arnold, '20 Common Errors in Mediation Advocacy', 13 *Alternatives* 69 (1995) cited by Menkel Meadow, et al, in *Dispute Resolution, Beyond the Adversarial Model*, 2005 Aspen Publishers, Inc, p 376.

If the CEO is not available to attend the mediation session (they rarely are), then the person who should attend a mediation session is a person with deciding authority and with very clear instructions from the constituency, whether it is the shareholders, the school board, the union leaders, or the leaders of the group of people.

What happens when one of the parties to mediation is not a clear legal entity with decision making bodies? Or with an efficient decision making process?

Liebman[2] describes the mediation that took place between the protesters that took over Hamilton Hall in Columbia University in April 1996. After the 'student leaders' and the team appointed by the university had reached an agreement after a weekend of mediation, the 'student leaders' talked to the rest of the student protesters and tried to 'sell' the agreement reached to the rest of the student protesters, who voted against it. So a whole new negotiation began, trying to convince the student constituency that the agreement reached was indeed a good one. It was only after speeches by the students and certain faculty members that the students agreed to the terms reached by the 'student leaders' and the team appointed by the university.

Liebman describes how one of the lessons learned in this mediation is that the mediators did not prepare the student negotiators to 'sell' the agreement to their constituents.

In the mediation narrated by Liebman it is very clear that there was a constituency with no efficient decision making process. This is an extreme case but there may be a case where this can also happen and it might not be as clear. For example, a board of directors sends an attorney to mediate a case with a very clear ceiling of where the settlement figure should be. The other party to the mediation, however, is a former employee who was fired (in his view, wrongly) and is simply seeking an apology from the company and a letter of recommendation. The attorney only has the monetary compensation in mind. The former employee is trying to find a new job for which the letter of recommendation would be a great help.

The attorney sent by the board of directors cannot offer these alternative compensations to the former employee because the board of directors has not authorised (or even thought about) these. This mediation session most likely will not result in any agreement because the parties to the mediation seek different things; their interests are like two ships passing in the night. The attorney will likely have to get back to the board of directors, get their authorisation to grant the non momentary compensation sought by the former employee and come back to the mediation with a clear understanding

2 Carol B Liebman, 'Mediation as Parallel Seminars: Lessons from the Student Takeover of Columbia University's Hamilton Hall', *Negotiation Journal*, April 2000.

from the board of directors and willing to address the needs of the person sitting across the table.

In order for mediation to be successful and in order for there to be compliance with the mediation agreements, the interests of the constituency that are not in the room should be taken into consideration. The constituency, however, should also understand the needs of the other party in the mediation process in order for the process to work.

The immediate response of any lawyer to the second question would be 'of course'! Any lawyer would have to be insane to allow a client to talk to an opposing party and maybe settle without the assistance of their attorney. If it were up to most litigation lawyers the parties would not even be in the room. In order for mediation to work, however, the parties' interests and underlying issues must be addressed, and these are only truly known to the parties.

Galton[3] describes the parties to a mediation of a medical negligence claim, where a couple who had lost their newborn, and the doctor, at the mediator's suggestion wished to speak to each other after the settlement was signed. The parties' lawyers rejected the idea thinking such a meeting would be awkward and uncomfortable. The parties, however, agreed to see each other, the doctor ended up apologising to a crying mother and embracing both parents. Apart from the monetary settlement, which is what the lawyers had concentrated on, the parties needed closure and conciliation.

In California, lawyers are typically excluded from mediation sessions, and the parties are required to speak for themselves, whether or not they wish to do so.[4]

Although lawyers are hired to protect their clients' interest, and should do so zealously, sometimes their presence can be an obstacle to a process in which the goal is more than a monetary settlement.

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3 Eric Galton, 'Mediation of Medical Negligence Claims', 28 *Cap U L Rev* 321, 234-235 (200) cited by Menkel Meadow et al, in *Dispute Resolution, Beyond the Adversarial Model*, 2005 Aspen Publishers, Inc, p 301.

4 Trina Grillo, 'The mediation alternative: Process Dangers for Women', *The Yale Law Journal*, Vol 100: 1545, p 1597.

Tips and Hints

- Participants from civil and common law traditions may have very different expectations regarding confidentiality and the mediator should make sure that everyone understands the systems they are working with before the mediation starts.
- Where a participant has to contact someone outside the mediation process for further information or for permission, the other party may become anxious that the confidentiality of the process is being compromised. It may help to alleviate those concerns if the mediator is present during the phone call or otherwise supervises the contact.
- Some mediators use a process whereby everything that is said in caucus can be repeated to the other party unless the disclosing party objects. Other mediators prefer to say that everything is confidential unless the disclosing party expressly authorises him to repeat the conversation to the other party. Whatever method is chosen the mediator has to keep track of what can and cannot be said. A simple method is to circle with a red pen what can or cannot be said depending on which rule the mediator is using. The mediator should also expressly confirm with the disclosing party at the end of the caucus what he is permitted to take to the other party.
- There should be a clear understanding as to what information will be retained by the mediator after the mediation and the timescale for the destruction of the other material. It is suggested that only the contract to mediate, any resulting settlement contract, and any invoices or other materials required to be retained for tax purposes be kept by the mediator and that all the notes he has taken and the materials that have been disclosed by the parties be destroyed 60 days after the hearing unless otherwise agreed by the parties or required by the mediators for professional or statutory obligations.
- There is no clear answer to the question whether or not the parties ought to be represented by their lawyer in the mediation process. This depends on the nature of the dispute, the parties, the lawyers and all other circumstances. Sometimes the lawyers contribute to a productive process,

whilst other times the presence of the lawyers could restrict the parties in the exploration of their real interests and needs.

- From a practical point of view the mediator may reduce confidentiality problems by destroying all documents, notes, etc, once the mediation is finalised and by having a short memory.

Brainstorming to Generate Options

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Introduction

In the course of the mediation process, after the parties have got a sense of each other's interests and concerns and have agreed upon the agenda (the issues that need to be addressed and dealt with for the parties to be amenable to conclude the mediation amicably), the mediator should either ease into or schedule a specific session solely for the purpose of brainstorming. In this session, the parties are invited to let their creative juices flow freely to come up with multiple thoughts and ideas for achieving a win-win situation by arriving at a resolution acceptable to both the parties. To achieve productive results in a brainstorming session, a few pointers may be borne in mind.

What & why

The purpose of a brainstorming session traverses beyond the mere necessity to come up with logical solutions; the purpose is to in fact go beyond the logical mind, the left brain, and activate the right brain, so as to get one's creativity to work 'outside the box'. Some facilitators even suggest doing simple exercises for activating the right brain, like drawing with both hands, just before starting the session. The importance of this session lies in the fact that, if the facilitation and participation are conducted in an open and good spirited manner, parties can, and have, come up with such fantastic 'win-win' outcomes that even they themselves fail to believe they were capable of achieving on their own and often credit the outcome to the mediator/facilitator or divine intervention.

A brainstorming session, which is well facilitated and in which the parties fully engage, can afford parties an excellent opportunity to break whatever dead-locks they may be facing, to 'enlarge the pie' and, in the process, dramatically improve the quality of their relationship.

How

Before scheduling or starting the brainstorming phase, a mediator will need to keep a few things handy in the room where the session is to be conducted. These include flip-charts with a stand, markers of different colours, blu-tack and, if possible, a speedy writer or two. In addition, the agenda arrived at by the parties must be clearly listed on a whiteboard (if possible, with the stated interests and concerns) and strategically placed up front in a manner that will require the opposing parties to sit shoulder to shoulder, as if they were working as a team to look at and make reference to it. The resultant seating arrangement makes a great contribution to the parties' collaborative approach in this and successive sessions.

At the start of the brainstorming session, the mediator should introduce it by explaining the purpose and that it comprises of two phases. In the first phase, parties contribute as many ideas for each of the points listed on the agenda as come to them in whatever random order. These are noted on the flip-chart (preferably one for each item on the agenda) and after a sufficient number of options have been generated or after a certain period of time, the mediator will move on to the second phase. Here, after grouping together similar ideas, eliminating duplications and clarifying any ideas that may be unclear, the flip-charts are placed separately on the wall with the help of the blu-tack and then each idea would be taken up for individual consideration. It is only when this phase starts that the parties shall be allowed to criticise, comment on and evaluate on the ideas generated. They could again individually build upon and modify those ideas they find most attractive and such modified ideas would once again be neatly and clearly noted (preferably on a separate flip-chart). At the end of the brainstorming session, these would be taken up for reality testing. For a smooth functioning of the session, the mediator should announce certain simple ground rules as follows:

- There shall be no evaluation – the parties are to raise ideas as they come to their mind, without waiting to consider as to whether they are feasible or favourable;
- There shall be no criticism – no one in the room shall criticise any idea suggested by any party. Nor shall they request deletion of any idea;

- Everybody must participate – far better outcomes are achieved when there are multiple options generated for any given issue;
- Ideas of one can be built upon by others – while no one is allowed to criticise any idea, they may certainly suggest an improved version of the same or, taking a cue therefrom, suggest a fresh option;
- Contributions do not bind the contributor – neither the contributions nor the comments thereon shall bind the source thereof, for they are merely ideas and not offers – this gives parties the courage and liberty to think and express freely, affording a flow of more creative contributions;
- Time limit – this should be stressed by the mediator. By setting a time period for the completion of at least the first phase even if there is no external time constraint it has been found that such pressure works wonders on one's creative abilities.

Being new to this style of interaction, parties often get tongue-tied initially, or sometimes wait for the other side to suggest something first so that they can say something in response thereto and often some are just simply sceptical about the whole approach and may even find it childish. However it has arisen, the mediator is nevertheless stuck with a dead-lock of sorts. One way of kick-starting the session without losing one's neutrality is to make two contributions, one favouring each party. And to ensure the effectiveness of this style, make that pair of contributions a bit far-fetched. This is sure to get them butting in, if only to build on one or both of them or make some contra suggestion. The other way of getting them going is to infuse silence, where the mediator does not nudge parties to say something but just remains calm and still, having no body language. Even if there be eye contact, there is nothing being conveyed thereby by the mediator. Being unused to silence in a gathering, the parties tend to start mumbling something after a few of minutes. If the mumbling is written on the flip-chart to the extent that it is best understand, the contributor is bound to respond with a correction, if thought necessary. The trick however is to write as fast as possible, focusing more on the speed than on the quality of hand-writing. This speed in writing has a profound effect on the parties grey cells which too start working speedily and the ideas/solutions just start pouring in. For this reason, if there are more parties, it's better to have two writers with their own flip-charts and stand, ready to start writing in tandem with each other. This not only ensures the capture of all ideas as soon as they are expressed, but often, this heightened activity further ignites the parties' adrenalin and gets them to contribute even more.

When

It is recommended that a mediator ensures sufficient de-positioning of the parties and takes care that each has a fair sense of the interests and concerns of the other side before a brainstorming session is held. This will sub-consciously get them to think of broader options. The initial contributions by the parties will nevertheless be prompted by their self-interests, but they usually soon move on to broader suggestions. If they do not, a couple of outlandish suggestions by the mediator could do the job.

Where

There are divergent views with regard to the ideal settings for brainstorming to take place. Some suggest it should be done in a caucus (private meeting with one party) only whereas others swear by the benefits of brainstorming in the joint meeting. The appropriate choice would depend on which setting has fewer pitfalls.

In a joint session, parties can build on each other's options and come up with an even better outcome. Furthermore, the collaborative manner of achieving this enriches their relationship phenomenally, greatly reducing chances of future disputes. It in fact introduces them to a new style of interacting, which also beneficially permeates their other relationships. However, parties may hold back their ideas lest they be perceived as offers, ground rules notwithstanding. A power imbalance or fear of 'reactive devaluation' may be other obstacles for brainstorming in a joint session.

In caucus, parties can speak freely and make more generous suggestions for reality testing with their lawyer and the mediator. They can even get the mediator to put across a suggestion which they feel the other side would view with suspicion merely because it came from them (reactive devaluation). But the collaborative element is missing.

The mediator, in selecting the appropriate setting, should consider the maturity and openness of the parties as well as whether they have been sufficiently 'de-positioned' and that there is no power imbalance. If they rank high on these points, a joint session would be more conducive to a quality 'win-win' outcome.

Developing Options

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Introduction

The purpose of every negotiation and mediation is to reach a settlement that is beneficial to all parties. When parties come to the mediation table, they usually come with expectations, demands, set objectives and very frequently a fixated mindset.

Thus, for a mediation to succeed, the parties in the process, ie, the disputing parties must derive some tangible or intangible benefits at the end of the process. A mediator must be equipped with skills to help parties generate options that are beneficial to all.

Consequently, it is a core-competency requirement for a mediator to possess the ability and the skills with which he/she can help parties generate options for mutual gain.

The art of developing options for mutual gain is not an easy one. Developing solutions that meet the interest of all parties requires great skill and creativity. The mediator must be an option developer and a catalyst who guides the parties towards outcomes that are mutually beneficial.

Strategy

How can we develop options for mutual gain? What strategy do we deploy?

A major challenge to inventing options for mutual gain is the fact that parties and indeed some mediators are usually under great pressure when it comes to generating options that are mutually beneficial. There exists the temptation to criticise and judge options as they are generated. This is usually counter-productive.

Parties usually get defensive when their suggestions are criticiqued and shot down by others. What follows is that parties become reactionary rather responsive to each other's suggestions. Thus, they fight each other's suggestion.

A way out of this situation is outlined in the following steps:

Step one – separate the act of inventing from the act of judging

This step presupposes that the mediator assists the parties in developing options. In this phase, the mediator encourages the parties to come up with suggestions on possible ways of resolving the problem between them.

To avoid the tendency of parties to shoot down each other's suggestion, the mediator must encourage the parties to conclude the option developing or suggestion-making phase before going on to judge, analyse or criticise them.

When achieved, the parties will see themselves as partners in a side-by-side search for an outcome that meets everyone's needs. By separating the act of judging from the act of inventing, parties can bring a clear head to the process and reach outcomes that are mutually beneficial.

Separating the act of inventing from the act of judging presupposes that each party come up with suggestions on the way forward. Parties are enjoined to come up with as many suggestions as they can. Then the parties jointly and collectively look at each suggestion analysing it together with a view to identifying that suggestion(s), which best addresses the needs of all concerned.

The greatest benefit of this step is that it builds in the parties a team spirit and encourages collaborative problem solving. Parties no longer view themselves as adversaries but rather as teammates with a common goal and purpose and a strong desire to win together.

Step two – broaden options on the table

A major challenge to any successful mediation is the fact that parties are usually welded to particular outcomes and consequently, seek for simple or single outcomes rather than broaden the options on the table.

This search for a simple or single outcome prevents the parties from being creative and from seeking options that meet their collective interest. Thus, the solution is for the mediator to help the parties broaden the options on the table by inventing options for mutual gain, ie, by expanding the pie before dividing it.

This the mediator achieves by helping the parties look beyond their declared positions and focus on their underlying interest. When parties focus on their interest rather than positions, they quickly discover that their interests are not competing but rather compatible and indeed sometimes complimentary. The story of the two children fighting over an orange illustrates this very well.

The natural thing to do when two children are fighting over an orange is to split the orange in two. This is the natural tendency for most parents

and the natural reaction to the sharing of scarce resources. However, by so doing, most of us (parties and indeed mediators) focus on the positions of the disputing parties rather than their interests. In this situation, there certainly can only be one outcome, a single solution.

However, if the parties under the guidance of the mediator focus on their interest rather than their positions they most certainly will discover that they can end up with more than a single outcome. It is at this phase that the role of the mediator as a resource expander is crucial.

Take the story of the two children fighting over the orange. If their parent was to focus on their interest rather than on their positions, they will discover that the children need two different things out of the orange, with one wanting the pulp and the other the skin. Thus, there is more than a single outcome.

Step three – search for mutual gains

The next natural step after broadening the options on the table is to ensure that the options developed meet the needs of all the parties. Thus, the mediator must assist the parties in searching for mutual gain.

Any settlement agreement that does not result in mutual gains will fail. Parties more often than not will renege on such an agreement. Thus, a mediator must in assisting parties develop options ensure that the options generated convey a benefit for each of the parties.

Only then will an enduring and sustainable agreement be arrived at. The mediator, as a resource expander who helps to broaden options on the table, must ensure that there is mutual gain for all concerned.

The benefit conveyed on each party must address their needs, fears, hopes and concerns. Concisely, it must address the interests of the disputing parties. When a settlement addresses the interest of the parties, the parties feel committed to that settlement and will voluntarily and naturally comply with the terms of settlement.

Step four – invent ways of making their decision easy

Finally, another fundamental step to the process of developing options for mutual gain is the ability of the mediator to help make the decision making process easy for the parties. In the course of every dispute, emotions run high, parties are blinded by passions, and they make statements that they feel unable to rescind subsequently.

One often hears parties make comments like 'over my dead body will so and so happen'. These statements are ego based and a withdrawal or rescission of it subsequently seems like an admission of weakness.

Thus, the mediator as scapegoat is called upon. The mediator must deploy creativity and a sensitivity that will help him/her to assist the parties reverse their decision without seeming to lose face. This is called the principle of helping the parties save face.

Parties very often need a scapegoat whom they can blame for taking a certain decision or rescinding one. Once this is achieved parties are emboldened and feel safe to make commitments that they hitherto would not make.

The fact that they can claim intervention of another as the reason why they have gone back on their original position helps them to save their face in an otherwise emotionally charged situation where pride and ego hold sway and where imposition of wills is the order of the day.

The story is told of a mediator who while facilitating a settlement between parties offered to and indeed apologised on behalf of one party in a situation where the mediation session had deadlocked because a party insisted on an apology as a condition precedent to his taking steps towards a final resolution of the matter. By playing the scapegoat, the mediator made it easy for the party who needed the apology to receive one and the party who had initially refused to give the apology on learning that the mediator apologised on his behalf felt encouraged to put in his own apology.

Both parties were able to save face because the mediator as catalyst for settlement played the scapegoat thus facilitating the decision making process.

Conclusion

In conclusion, the art of developing options for mutual gain is fundamental to the success of any negotiation or mediation. Because parties are usually blinded by emotion this is a job for the mediator. Thus, the mediator must help parties generate options that are broad based, of mutual benefit and that accommodate the egocentric and idiosyncratic tendencies of each party. He must possess the ability to help the parties work towards a decision that is wise, balanced and advantageous to all concerned.

Only then can voluntary compliance to the agreements arrived at be safeguarded. Only then can agreements, which can be sustained, be reached and true resolution achieved.

Using Business Tools in Mediation

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The business world offers a wealth of techniques for analysis and management of information. There is no reason why a number of these techniques cannot be applied in the mediation area and indeed they may be particularly attractive tools to use when dealing with commercial parties as their immediate familiarity with the techniques will counteract any anxiety over the unfamiliarity of the mediation setting.

This essay introduces three possible techniques, others such as decision tree analysis are covered in other essays while business management books and websites are a source of many more.

SWOT analysis

A particularly easy technique to use is SWOT analysis. You begin by drawing a four cell grid on a large piece of paper and label each of the cells Strengths, Weaknesses, Opportunities, Threats. You then invite a party, probably in caucus, to fill in their analysis of the particular situation they are facing under each of the four categories. They will likely have given some thought to this before the mediation day however it may be worth taking the time to do it together and in particular drilling down on any areas where there appears to be uncertainty or disagreement among that party's representatives or where the analysis appears superficial. Of particular interest may be to flesh out further the Opportunities section as this may open up a line of thinking going forward towards resolution and is likely to draw out their interests rather than positions. This may be particularly useful if the parties are having some difficulty

in moving away from a positional stance. A powerful activity can be to ask one party to analyse the other party's interests in the same manner, again drilling down on any uncertainties and trying to expand the Opportunities block.

SWOT analysis can be used at any stage in a mediation and not just to review the overall position. In particular it can be used to consider an offer made by the other party in an open and perhaps more creative manner that might normally be achieved. It may also be helpful if an impasse is reached to go back and look at the analysis conducted earlier in the mediation and to review whether any of these elements have changed as a result of what has been discussed that day, and so open the way for some reconsideration of earlier conclusions.

Venn diagrams

Complex situations can often benefit from some form of visualisation. In some interpersonal situations people find it difficult to describe in words their feelings about underlying relationships and how they perceive they are being treated, but they may be able to draw something showing themselves isolated, parties arguing, cliques grouped together or blocking walls or ditches between different people and so on. No less in complex business situations a drawing can be helpful. In a patent case for example there may be a number of different patents covering different features and competing technologies allegedly using one or more of the features. It can be very difficult to maintain focus on the points that really matter in an oral discussion however by drawing a Venn diagram it becomes much easier to see which elements are not in fact part of the controversy and can be eliminated from the discussion and where the real focus should be concentrated. It can also be a useful aide memoire when people start to get confused.

One could start by using a circle for each of the patents under discussion-if both parties own patents then a different colour should be used for each party's patents. If one patent is clearly dependent on another it could be shown as a circle completely within the original patent or as an overlapping circle where there are areas covered by that second patent that are quite separate from the original patent. Where the interdependence of the patents is a matter of dispute the circle could be drawn by a dotted rather than continuous line. If there are technologies as well as patents in dispute these could be overlaid by squares rather than circles to keep matters simple and again maintaining the colours and dotted or continuous lines used in the initial analysis. Wherever there is overlap these are areas that need to be explored, where there is no overlap whether the lines are a dotted or continuous they can be ignored.

The 'Six Thinking Hats'

Edward De Bono has revolutionised how we think about thinking itself. His basic theme is that we are surrounded by information, well in excess of what we need to make good decisions, however we fail to make the most of this as we do not think creatively and are poor at processing information. He has written a number of books offering practical advice on how to encourage creativity and process information in different ways which I highly recommend whether you come to his work as a business person or a mediator. My personal favourite is 'the Six Thinking Hats'. In this book he describes a methodology for analysing an issue or proposal whereby participants are encouraged to break down their thinking into six themes – in a way this is a more sophisticated variation on the thinking behind SWOT analysis. De Bono refers to his themes as coloured hats which one dons in turn, each representing a different line of thought:

- White – the factual analysis of the situation including an assessment of what further information might be required, this part of the exercise is conducted without making any value judgments;
- Red – the participants note their 'gut feeling' about the proposition without having to give any justification for their feelings;
- Blue – the organisation of the process and any necessary follow up;
- Green – the generation of new ideas both obvious and creative;
- Yellow – the benefits of any proposal and ideas as to how something could be made to work; and
- Black – why something might not work, the identification of obstacles to be overcome.

By concentrating our thinking on one aspect at a time, Professor De Bono believes we can work more efficiently, ensure everyone participates fully – even in areas that they might not consider their natural forte – and assess ideas fairly without being influenced either overtly or subconsciously by the strength of our feelings with respect to other aspects. He suggests that it is not necessary to use all the 'hats' on every occasion or to use them in any particular order and proposes ways in which to maximise the benefits of the exercise. In some circumstances he suggests it may be beneficial to use a 'hat' more than once.

He says that we may be blocked from making the best decision by a failure to deal with underlying emotions properly or through a tradition of negative criticism when asked to comment on a new proposal. These traits are commonly encountered in business but in a conflict situation negativity and emotion are likely to be heightened and a tool such as this that specifically addresses these problems is all the more valuable. While many businessmen

will have used this technique before if you do have people in the room who are unfamiliar with it, it has the great benefit that the basics can be learnt and applied within minutes.

Conclusion

Mediation is about finding practical and pragmatic solutions to real life problems that suit the needs of the parties concerned. Businessmen are faced with this sort of issue every day and so it makes sense to explore their arsenal of techniques to see which could be applied to mediation. This essay could only look at three popular techniques but an exploration of the literature is likely to pay dividends in identifying tools that suit the particular mediator and the issues he or she may face.

Reality Testing

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Every disputant is in love with his case.
As a mediator, my job is to break up the affair.
David Shapiro

Reality testing is the technique of inviting a party to adjust his perceptions of the claim. A party may overestimate the likelihood of success on the merits, or the other side's ability or willingness to pay. He may have an unrealistic assessment of his alternatives to settlement. The transaction costs of continuing the dispute in court may not have been accurately addressed. He may not have confronted business, competitive, or psychological obstacles to a successfully negotiated conclusion of the dispute. The purpose of reality testing is to help to eliminate those obstacles.

Reality testing is a necessary part of mediation. Intelligent and rational parties, advised by competent counsel, may have laboured long and hard to place a value on a claim or defence, and discussed the weaknesses and strengths of their position. Good counsel will have put probabilities on success at various junctures of the litigation process, and together they will have lived with the matter for months, sometimes years.

Now along comes a mediator, who has just learned about the matter for a few hours, seeking to cast doubts on all this good work. Why would a mediator put herself in such an unwelcome and vulnerable posture?

By reality testing, the mediator is testing the positions of the parties, inviting reassessment and forcing an articulation of certain hitherto tacit assumptions. In the process of reality testing, counsel and client may discover that they have not always been starting from the same place, or using the

same logical analysis of the situation. They also may not have accurately or thoroughly assessed the situation from the perspective of the other side. The more specific the mediator's probing, and the more determined the mediator is in following-up each area of reality testing, the more useful the exercise is to the parties.

There are many ways to start off this type of inquiry. Note the distinctions among these questions:

- What do you see as the main weaknesses of your claim?
- What do you see as the main strengths of their defence?
- What do you think they perceive as the biggest weakness in your claim? Do they have a logical basis for that? In other words, do they have a point (however misguided it may be)?
- If you were in their position, how would you attack the logic (or the facts or the conclusions) that underlie your demand?
- So do you think that, from their perspective, they are behaving rationally when they offer XXXX?

The intent of this series of questions is to encourage a realistic – dare one say objective – view of the status of the negotiation process. The discussion undermines the 'demonisation' of the opponent that is an inevitable product of longstanding conflicts, and assists each party in assessing the bid/ask gap in a more productive way.

Another series of questions tests the solidity and sophistication of a party's BATNA:

- If we don't get an agreement today, what's your best-case scenario?
- What's the worst thing that might happen to you if we don't get this done today?
- How much does your counsel project it will cost to take this matter to the end of discovery? Through a motion for summary judgment prior to trial? To the eve of trial? To the end of trial? To appeal, in the event that the trial doesn't go as you expect it will?
- How much of your own time is being spent on this case and away from your business? Do you expect that will decrease or increase if we fail to end it today?
- Do your other customers and competitors and vendors know that you have this lawsuit going? What impact do you think it will have on your good will and your business reputation if this has to go to trial?
- Does your boss have a view on this? Does your wife?

There are risks in posing reality-testing questions. One risk is that the mediator may be perceived as being rhetorical. If one is going to ask these questions, one must be prepared to listen to the answers and to pursue what

is unclear. Why do you say that? What do you base that on? And one should take care in each case to say, 'I think I understand how you're going about this, and I follow you'. Even in reality testing, everyone needs to be validated.

Another risk is that a party may feel she is being coerced. Too often, mediators who think they are being clever are in fact brow-beating the parties they are trying to help. It is too easy for a tone of voice or an arch of a brow to give the suggestion that there is a right and a wrong answer to a question when the mediator honestly intended to provoke discussion, not bear down with implied shame or humiliation.

A third risk is that the mediator may be viewed as offering an indirect or implied evaluation of a claim or defence. Great care must be taken to avoid that perception (unless it is intended) by prefacing one's questions with such disclaimers as: 'Well, you know your business better than I do, so let me just ask you …' or 'Your counsel has given you a far more reliable piece of advice on this than I could, so let me just ask what your sense is of ….'. The goal of reality testing is, after all, to provoke a change of the party's assessments and assumptions, not to give the party the fruits of your own wisdom. They have legal counsel already – what they need now is an invitation to make a fresh assessment.

Reality testing is particularly helpful when it focuses on business, rather than legal, questions. Why do you think that your co-venturer breached the agreement? How does she think she might profit by making that move? What have you heard on the street about the possibility of a bankruptcy filing? Would the other side consider it attractive to lower the unit price but extend the term of the agreement? Why? Why not? How did you come to that conclusion? What if the other side thinks differently, rightly or wrongly – what would the consequences be for you?

Reality testing can take many forms. It is not a discrete set of tools to be used at a discrete stage of the mediation process. It often arises spontaneously and its form reflects the nature of the claim itself. And sometimes it just doesn't work.

I once got an employer to agree to accommodate a physically disabled employee in every way she sought – including a change in supervisor. When I relayed this success to the claimant, she unexpectedly made an additional demand of $100,000.

Why do you need $100,000?

Because they hurt my feelings and caused me months of grief.

Why $100,000? Why not $50,000 or $200,000?

Okay, $200,000.

Why would they pay you that?

They better if they want me to go away.

But they don't want you to go away; they want you to continue to work for them. They might think that's a lot of money, especially since your annual salary is $35,000. Have you heard of any other employee who was paid $100,000 to settle a case? Have you read in the paper about anyone getting $100,000 to settle a case? Did any lawyer even give you the opinion that you could get $100,000 to settle this case?

No, no, no.

So if we don't settle this today, you figure you will tell the judge (in four years or so, when your case comes up) that they treated you badly because of your disability, and they will say that they fixed every one of the problems by arranging everything you asked for, and you will say you also want $100,000, and the judge will say sure, makes sense, pay her?

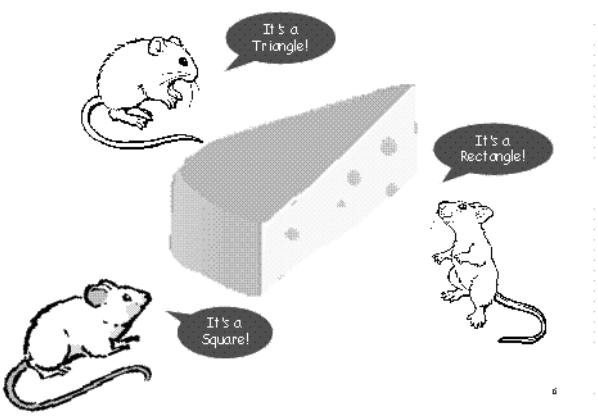
Yup. Or I at least want to have a try.

What do you think they will say when I walk into the other room and say that you want $100,000?

They can say what they want. But you tell them.

Even persistent reality testing will not have an effect on an irrational or obstinate party. But most business parties are commercially rational, in the end. And failing to press the matter would mean failing to engage in one of the unique values that a mediator adds to the negotiation process. In the real world, attorneys cost something. Juries are uncertain. Arbitrators sometimes err. Laws change. All claims and defences must be discounted for mere uncertainty.

Moreover, reality testing, properly conducted, will often dispel a major obstacle to settlement: concerns of the other party's bad faith. I carry the following diagram with me to my mediations and it has proven quite helpful from time to time:



The mere fact that one's opponent has a different assessment of the claim does not mean they are lying or stupid. It may mean that they are viewing the same set of facts and the same body of law from a different but equally valid perspective, and basing their assessments on different but equally valid assumptions. Testing a party's view of the other side's assessments and assumptions can be enormously helpful.

The great American jurist Louis D Brandeis once wrote that: 'The logic of words should yield to the logic of realities.' [*Di Santo v Pennsylvania*, 273 US 34, 43 (1927)]. In business disputes, the logic of the law should yield to the reality of commercial markets. Reality testing, if done with empathy, sensitivity and genuine curiosity, can be an enormously effective tool to achieve this end.

Pros and Cons of Making the First Offer

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One of the most frequent questions people ask about negotiation tactics is 'should you make the first offer or wait for the other party to put their offer on the table first?'

Conventional wisdom seems to suggest that it is better to wait for the opponent to make the first offer. The reason given for this is that at the start of negotiations discussions are often vague and an opening offer provides the opponent with valuable information too early in the negotiation process. The first offer gives the opponent an indication of where the lower end of the zone of potential agreement ('zopa') lies and clues about acceptable agreements. This may allow the opponent to work further downwards of the zopa to the detriment of the giver of the information. Moreover it is also possible that in response to the first offer the other side may offer misleading information in an attempt to get a bargaining advantage. It is therefore wiser to wait for the other side to speak first than make the mistake of a first offer.

Most academicians, researchers and scholars have now come to disagree with this conventional wisdom. They contend that research and statistical studies have established that the party who opens first gets a huge advantage during bargaining particularly when the party making the first offer comes well-versed and prepared to the negotiating table. In such a situation the first party making the opening offer is more likely to succeed in fulfilling its hopes and desires than the other who chose to delay making its offer and decided to suppress its emotions. The reason for this is two-fold: (i) the power of anchoring; and (ii) relationship enhancement.

Anchoring is the principle that the first time a number is thrown out during negotiation, the discussion will naturally revolve around that numerical

value and all other financial possibilities will arise out of and/or in relation to the number. The numerical value attached to the offer tends to have a 'magnetic effect' as it pulls judgments of the parties throughout the rest of the negotiation to the first number; hence the numbers are known as 'anchors'. Research into the effect of anchoring strongly suggests that a party's response to an offer is highly influenced by any number that enters the negotiation process and the first number introduced in the process enjoys a powerful negotiation advantage.

Professor Adam D Galinsky, from the Kellogg Graduate School of Management, contends that anchors affect the judgment of even those who think they are immune to such influence. He basis this on research into the phenomenon of anchoring conducted by Greg Northcraft and Margaret Neale which involved price lists for properties provided by real estate agents; and on similar research by Thomas Mussweiler of the Institute of Psychology at the University of Wurzburg involving the value of used cars quoted by car mechanics in Germany. The reason that anchors affect peoples' judgments is that during negotiations, each point under discussion has both positive and negative qualities, ie, qualities that suggest a higher price and qualities that suggest a lower price. High anchors selectively direct attention towards an item's positive features whereas low anchors direct attention to its negative features. Hence in the above-mentioned studies, a high list price directed real estate agents' attention to the house's positive attributes (such as spacious rooms or a new roof) while pushing negative attributes (such as a small yard or an old furnace) to the back recesses of their minds. Similarly, a low anchor led car mechanics to focus on a car's worn belts and ailing clutch plates rather than its low mileage and pristine interior. Professor Galinsky argues that more aggressive and extreme first offers lead to a better outcome for the person who made the offer as the numbers are anchored nearer to the seller's number with the zopa. However, if the first offer is too aggressive and falls completely outside the opponents zopa, the same may be perceived as an insult and scare and/or annoy the other side and perhaps even cause the other side to shut down negotiations and walk away.

Another advantage of making the first offer is gaining a relationship advantage. Research and studies have found that the first offer correlates to the party's confidence and sense of control at the negotiation table and enhances its relationship status. A numerical value as a first offer which is supported by a considered rationale justifying the offer as reasonable also enhances the stature of the party making the first offer. Once the first offer has been made, the party framing the justification and rationale for such offer is in a position to set a positive tone for discussion. Making the offer first also gives a positive impression to the other side that the party making

the offer is interested in continuing its relationship beyond the current dispute/differences with the other side. On the other hand, the opponent receiving the first offer, particularly if the numerical value is at the lower end of its zopa, is forced to counter the offer with criticism and explain why the offer made is either wrong or unreasonable. Thus the opponents' frame of reference to object to the first offer is likely to be defensive and clothed in negative language during the course of negotiation.

Yet another advantage of making the first offer relates to the satisfaction with the outcome of the negotiation. According to research one of the best predictors of a successful negotiation is the number and size of concessions exchanged between the parties. Making a first offer, particularly if it is an aggressive and high offer, enables the maker to grant concessions and allow the opponent the opportunity to extract a perceived 'better deal'. An opponent who is satisfied that he has reached a duly bargained outcome will be more likely to respect the terms of the agreement leading up to a mutually beneficial outcome for both parties.

Of course, there is no hard and fast rule in negotiation. There can be situations in which it would not be advantageous to make a first offer. For instance, when there is inadequate information regarding the other party or it is apparent that the other side is better informed about the issues being negotiated and possesses superior market and industry information. It would be unwise to make the first offer in such cases as it would be difficult to explain the basis for the numerical value. Another instance, according to Professor Margaret Neale of Stanford Graduate School of Business, when it makes sense to wait for the other side to make an offer, is 'when you honestly believe that the other side dramatically values the object of the exchange at a much higher rate than you do'.

This does not mean that the party not making the first offer will always end up on the losing side. After all the opportunity to make an offer first is not available all the time. In such an event, a counter-offer should be based on the same information as one used to construct a first offer. Suffice to say, counter-offers should also be framed to explore the other side's BATNA as well as gather more information about the issue and the market/industry. A positive attitude will always help make a more confident, effective and respected negotiation regardless of who makes the first offer.

Objective and Legitimate Offers and Counter Offers

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A key ingredient to a successful negotiation is ensuring that each party presents a legitimate basis for an offer or counter offer. If one party selects an offer figure that cannot be related to the facts at issue, the result can be frustrating for the mediator and the parties. Such a figure may have no relation to any measurable loss or damage, but is merely the result of a 'strong arm' approach or, worse, a subjective and emotional response to the subject matter of the mediation. Parties who can objectively view the strengths and weaknesses of the case and who can articulate a legitimate basis for an offer or a counter offer have greater credibility in the negotiation and have the better bargaining position.

Offers that lack a legitimate basis

> *To avoid appearing arbitrary, express a rationale for your position.*
> *- Smart Negotiating: How to Make Good Deals in the Real World*
> by James C Freund

Offers that lack a legitimate basis are usually easy to spot as they are often unrelated to the facts of the dispute and are not defensible when challenged. When challenged, the party presenting the offer lacking legitimacy may have a reactionary, knee-jerk response when asked how they arrived at the figure. The offer appears overreaching, and there is an absence of the 'why' with respect to the offer. For example, an offer lacks legitimacy when a party seeking to recover back pay in an employment dispute offers a figure for settlement that cannot be rationally connected to the claimed amount of

back pay owed or other damages. Such offers can set a poor tone for the mediation, show a lack of commitment to the mediation process, and evince an unreasonable unwillingness to compromise.

Offers lacking legitimacy undermine the mediation process. In mediation, the parties can construct a settlement that is practical and meets their needs. Often, these remedies are broader than traditional legal remedies and the parties can save significant time and money by avoiding protracted litigation. An unreasonable offer that lacks a legitimate basis can result in an unsuccessful mediation for the party and set a tone for contentious litigation.

Factors to consider in determining whether an offer is legitimate

I always caution my clients against putting a figure on the table that they can't back up with a plausible rationale.
- Smart Negotiating: How to Make Good Deals in the Real World
by James C Freund

In considering an offer or counter offer, it is imperative to understand whether the offer being presented is a legitimate figure. Some factors to consider include:

- What remedies did the party seek at the outset? How were they quantified?
- Does this offer seek remedies 'above and beyond' the value of the harm claimed?
- Does this offer take into account the negative facts for the opposing party?
- Does this offer take into account the positive facts for your position?
- Is the offer defensible?

Focus not just on the figure but on the justification for that figure. Ask these questions of yourself and the opposing party. Break the issues down into sub-issues, and examine the legitimacy of each of those issues with respect to the offer on the table. For example, if the opposing party is seeking a remedy based on a contract dispute, that offer should take into account the stated value of the contract and rationally and quantifiably relate to the damages claimed. By considering quantitative as well as qualitative factors in evaluating an offer, you focus on the merits of the case rather than a haggling process where success hinges on each party's willingness or unwillingness to alter their positioning in the mediation.

Challenging the justification for the offer or counter offer and breaking down the issues into sub-issues also presents the opportunity for exploring varied workable solutions towards a resolution. If the opposing party has

solid justifications for some claims but not others, this focus on the legitimacy of each claim may narrow the issues in dispute and encourage greater flexibility in the negotiation process. By closely examining and articulating the substance of each claim, each party is more likely to think creatively and identify alternative means towards satisfying their objectives.

The Importance of having objective criteria when making and considering offers

The ability to see the situation as the other side sees it, as difficult as it may be, is one of the most important skills a negotiator can possess… To accomplish this task you should be prepared to withhold judgment for a while as you 'try on' their views.
– Getting to Yes: Negotiating Agreement Without Giving In
by Roger Fisher and William Ury

Coming to the negotiation table armed with objective criteria for evaluating the facts and the interests involved is an incredibly powerful tool. Such criteria provide the necessary foundation for considering the reasonableness in making and considering offers and counter offers and articulating the legitimate basis for your offer to the opposing party. Additionally, you bring to the table the distinct advantage of having evaluated the facts based on those objective criteria in advance. Such preparation can yield distinct advantages in the negotiation process. You have reviewed both party's positions in light of those criteria and can assess possible creative solutions before you ever enter the mediation room. Moreover, in the heat of negotiation, you can use those criteria to evaluate and reevaluate the claims of the other side in light of your goals.

While it may be human nature to immediately criticise the other side's offer, such sentiments are not likely to facilitate a settlement to the dispute. Letting emotions and subjective criteria influence your responses to offers is counterproductive and diverts the focus away from the merits of the case. If you have a set framework of objective criteria for evaluating the offer, you can effectively explain why the offer is not workable and put the ball in the court of the opposing party to justify their offer. Moreover, by having such objective criteria from the start, the opposing party will likely respond to your concerns by applying your methodology. Your objective criteria not only foster legitimacy in the negotiation but also provide a greater opportunity for leverage. Your framing of the issues becomes the platform for further negotiation and standards to evaluate the legitimacy of offers in the negotiation, thereby substantially increasing the chances of you achieving your goals in the mediation.

Cross-cultural issues to consider in offers and counter offers

People are disturbed not by things, but by the view they take of them.
- Epictetus

In the context of cross-cultural mediation, the need for legitimacy and objective criteria in offers and counter offers is even more pronounced. Cross-cultural mediation involves parties with different behaviors and beliefs. The parties must have a heightened awareness of these issues in cross-cultural negotiations because, even if cross-cultural issues are not the cause of the dispute, they can be critical to the outcome.

If communications are delivered in a way that one party finds offensive, there is a greater possibility of an adverse, subjective response to what you intended to be an objective, legitimate offer. In articulating your objective criteria and providing a legitimate basis for your offer, be careful with the words you choose and how they can be interpreted. Do not assume that what you say is being understood. A word or phrase may seem objective and neutral to you, but its use may be highly offensive to the opposing party. One way to avoid such misunderstandings is to understand the other culture and ask questions regarding the terms you wish to use in articulating your objective criteria. Ask how the other party would define a particular word or interpret a phrase before you use those words in explaining the objective criteria and legitimate basis for your offer. By having that dialogue in advance in a cross-cultural setting, you can make adjustments if necessary, so that the objective and legitimate basis for your offer is fully appreciated by the opposing party and not hindered by possible communication barriers.

Conclusion

Decisions based on reasonable standards makes it easier for the parties to agree and preserve their good relationship.
- Getting to Yes: Negotiating Agreement Without Giving In
by Roger Fisher and William Ury

As an advocate for your position, you enter the mediation focused on obtaining the best possible, reasonable result. In order to best facilitate that result, you must insist upon reason and legitimacy at each stage of the negotiation. Having an objective understanding of the issues and insisting on legitimacy in offers and counter offers will lay the foundation for a successful negotiation. An offer with a legitimate basis supported by objective criteria can be a linchpin to a party's satisfaction with the outcome of the negotiation.

Tips and Hints

- Take time to explore the parties needs, do not assume you know what they are and do not rush immediately to look for settlement options.
- While the mediator is talking to one side, send the others out for a walk – this may clear their heads and help them relax leading to a more productive round of discussions. If you reach an impasse, sending everyone out for a walk in the park for half an hour can sometimes be effective.
- Useful reality checks can be to ask a party what elements would they have to prove to win in court and what evidence would they need. Parties may not have fully considered the practicalities or may be over optimistic as to their ability to prove an issue.
- Ask the parties to consider the reputational impact on their business of various options or continuing with the status quo.
- And therein mind that the decision maker is unlikely to have understood the signs in detail in technical disputes and clarification of those points may help break an impasse.
- Encourage the parties to consider that ideally they need to arrive at a number that will make the other side lose sleep if they do not accept it.
- One way to break an impasse is to ask everyone to look at each element of the issue from the other way around and not just that of the other party.
- Ask the parties to consider before making an offer how they would feel if they received such an offer.
- Ask the parties to consider what with hindsight they would have done differently in relation to the situation that gave rise to the dispute.
- Ask if they were advising the other party on this issue, what would they be saying.
- Ask them what they would like to hear the other party say.
- Ask them to consider what a settlement in this dispute would mean to them.
- You may be able to break an impasse by changing the topic currently under discussion and looking at another area first, by setting deadlines for different elements or by moving away from a discussion on money to some of the other issues.

- Summarising the process until the point of impasse showing what has been achieved may provide an impetus to move on beyond the deadlock and may remind them of issues that have now been settled which may help them think about the remaining issues in a fresh light.
- Listen to what the parties are not saying.
- Ask a few questions to pick out the hardest positional bargainer in the caucus room and then get this person to explain in a narrative fashion what will happen following an unreasonable 'positional' offer or unreasonably hard bargaining position. As this person is rarely the most senior person in the room it inhibits their bravado to have to tell the story in front of more senior client representatives. Note the language used and then 'reality test' the story with the group to show that with even a slight deviation the BATNA analysis is flawed. Then you can reconstruct the story on several settlement scenarios which lead to the inescapable conclusion that the party's interests are better served by principled settlement.
- Ask the parties if they have a suggestion on how to achieve a more constructive discussion.
- Ask what they could do to contribute to a productive negotiation.

The Mediator's Use of Law

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In the adversarial mode the law's codes are the principal instruments we use to resolve conflict. In mediation we depart from the adversarial and employ concepts and strategies to bring about a settlement between parties. Nevertheless, the law does not absent itself from the mediation table. It surfaces at several stages from the start to the end of the mediation.

In deciding whether a case is suitable for mediation or not, we may have to look to the law to see if there are any barriers or impediments to mediation. Examples include some criminal offences which cannot be compounded and thus a settlement will still leave the case pending in the court. A settlement in a probate matter may handle the dispute between the claimants but may not permit the court to depart from the terms of the will. These factors will need to be considered while deciding whether to pursue the mediation.

The main application of the law by the mediator comes during the process when the parties need to be exposed to the strengths, and more importantly the weaknesses, of their case. When people embark on litigation it is usually with a heightened sense of the strengths of their case and a disregard for the merits of the claims on the other side. Legal advisers sometimes encourage these feelings, often they do not dampen them, and at other times the parties do not listen to sound cautionary legal advice. A skillful mediator can bring about the needed realism on the legal side, pointing to flaws in the build up of facts, difficulty of proof, a statutory bar, or an uncomfortable precedent. A recent judgment of the Supreme Court may have altered the law. There are plenty of examples to show that the first court may uphold a plea, the appellate one reverse it and the final one restore it. There are also plenty of examples to show that superior courts do overturn precedents or distinguish them to near extinction. Thus even a party who may have a

reasonably sound case can by no means be assured of success. An informed estimation of what the court might do in the event the case went to trial could make all the difference. Providing accounts of how the courts have dealt with similar situations may make parties alter their positions. Drawing attention to a statutory provision or precedent which has eluded the parties and their lawyers may be the tipping point. Knowledge and use of the law will obviously be required here.

Since much of the impulse to litigate and not to settle arises from the certainty of victory in the court, the exposure to litigational uncertainty will considerably aid interest in a mediated outcome. And there are several litigational uncertainties – disputes over interim orders, delays in decree, appeals and further appeals, further rounds in execution and recovery, all of which spell draining cost, time and effort. These are present irrespective of any view on the merits of a case. Bringing these to the forefront is part of the strategy to orient parties to the alternatives that await them should they depart empty handed from the mediation table. BATNA and WATNA – Best and Worst Alternatives to Negotiated Settlement (examples of sound concepts being reflected in less than elegant acronyms) are favourite mediator phrases and strategies. They routinely focus on the grim wheels of the justice delivery system, the 'Chamber of Horrors' as a mediator puts it. I suppose it was contemplation of these that caused Justice Learned Hand to say that '…as a litigant I should dread a law suit beyond almost anything else short of sickness or death.' The mediator is the person best placed to bring all these to the full view of all the parties and their lawyers. He is neutral, in a position of trust, likely to be a respected professional – and so the parties will give weight and credence to what he says. Parties will realise that it is far better to receive these views from him, rather than from the opposing lawyer's presentation in court, or worse, to read them embodied in the court's judgment.

Knowledge of the law may also be needed in scrutinising the agreement that emerges in the mediation. A judge may refuse to order its implementation if it is contrary to public policy or a statutory provision. Agreements should come within the four corners of the law. A settlement agreement that resolves a matrimonial dispute by providing inter alia that the parties will cooperate to have the marriage dissolved within three months is unworkable if the law prescribes a minimum waiting period of six months for a divorce by mutual consent.

Some additional points may be made in connection with the use of law by the mediator.

Such use would obviously be greater when the mediator enters the evaluative mode and engages with the parties in bringing about more legal realism about the merits of their case and the working of the legal process.

In the purely facilitative mode, much less knowledge and use of law would be required from the mediator.

When the parties are represented by their lawyers, the mediator can expect that their counsel will be mindful of the legal aspects impinging on the case. This is subject to the rider that legal realism may ultimately have to come only through the mediator's intervention, when parties are unwilling to accept, or do not get, sound advice from their lawyers.

The requirement that the mediator must use the law does not mean that the mediator must be a lawyer. A subject-expert mediator may be quite conversant with the legal issues that apply to his area of focus. A general knowledge of law may suffice to handle issues of framing of agreements and enforcement. That said, one finds that most mediators are lawyers or retired judges; parties do tend to prefer trained legal professionals for dispute resolution. Mediators can also work in pairs, a subject-knowledgeable mediator can accompany a lawyer-mediator.

Confidentiality is another area where the law plays a role. Legal statutes and codes of practice govern disclosure of material generated during mediation. Obligations of secrecy are cast on the mediator, especially as regards information divulged to him in confidence in the separate sessions. The parties are also mandated to keep confidential the views expressed and proposals made at the mediation table. The mediator may have to instruct them on these aspects. The limited permissibility of communication between the mediator and the court is another aspect for which the law will provide.

Observance of the code of ethics is another field where legal knowledge may help (I am by no means suggesting that legally trained personnel are superior to others in this area, nor, conversely, that lawyers need greater improvement on the subject). Some questions of ethics will import legal mandates. Examples include:

- What if child abuse comes to the knowledge of the mediator?
- What if the mediator comes to know in a mediation session that a crime is going to be or has been committed?
- What about information that the tax laws of the country have been breached?
- What if a mediation settlement involves payment of money which is not going to be revealed to the taxman?

The answer to these questions will involve knowledge of what duties of disclosure the law imposes.

How much does the mediator use his knowledge of the law when parties fail to spot an important legal issue? Take for example the case where the plaintiff's suit is barred by limitation but the defendant and his counsel have failed to spot this. Take another case where a document will not be

admissible in a court and the defendant's counsel does not object to the plaintiff making strong use of it. What should the mediator do under these circumstances? Does he remain silent, or openly declare the deficiency or follow a middle path of pointing out to the plaintiff separately that its case is flawed and hinting to the defendant separately that there are some areas which need examination. Questions like these are part of the mediator's dilemma, which arise from being in a position of trust and having to give primacy to party negotiations.

Decisions of courts are now coming through on issues of mediation. In some jurisdictions where a party refuses unreasonably to mediate, it can be deprived of costs even if successful in the litigation. Tests have been laid down to determine when such refusal is unreasonable. In an extreme case, the judge has gone further and examined whether the conduct of a party at the mediation table was unreasonable. In another unusual order, the judge was irked by the fact that the person attending the mediation on behalf of a corporation did not have authority to settle the claim; the CEO was ordered to be present. Mediators may well find that continuing a mediation well into the night invites judicial displeasure on improperly conducting the process. While courts in general are respectful of the mandate of confidentiality in mediations, there are occasions when troubling questions arise, and incursions into absolute confidentiality are sought to be made. Mediators will have to keep abreast of decisions of courts, and bring some of these aspects to the knowledge of parties.

Aggression in Mediation

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Preliminary statement

I have been mediating commercial disputes for some time now. In commercial litigation, seldom is the mediator required to deal with aggressive behaviour; but it does occur and this is how I deal with it.

Types of aggression

First of all, we should understand the various kinds of aggressive behaviour. The most obvious, is party-towards-opposing-party aggression, followed by attorney-towards-opposing-attorney. Then there are situations where the aggressive behaviour is party-towards-opposing-attorney and its mirror image, attorney-towards-opposing party. Additionally, but far less frequently, is aggression from client-towards-attorney and attorney-towards-client.

Finally, there may at times be aggression directed at the mediator from one or both parties and/or their attorneys.

Diffusing aggression

Be prepared

The most important first step in effectively dealing with aggressive behaviour, is to be prepared for it. I generally have an initial *ex parte* conference separately with each of the attorneys involved in the mediation. During that first conference, I ask each attorney, separately and confidentially, if there is likely to be any aggressive behaviour from his/her client or from

one or more of the opposing counsel. If any one of the attorneys responds affirmatively, I make sure to make that issue a prominent agenda item for the first all-attorney pre-mediation conference I conduct. During that all-attorney initial conference I bring the subject of aggressive behaviour up and discuss with the attorneys ways in which it can be minimised. If any party is not represented by counsel, I speak with the unrepresented party.

Mediating with aggressive parties

If I suspect that aggressive behaviour might occur, instead of holding a joint first mediation session, I will start with the opposing parties, and their counsel, in separate rooms, so that there is no chance for the aggressive party to be in the presence of the person against whom the aggression is directed (I also have them leave the mediation centre at different times so as to avoid them having to be in the same elevator together). I then shuttle back and forth between groups until a resolution of the matter is achieved, or there is absolutely no likelihood of success.

This procedure works well in commercial disputes, which are usually resolved as a business decision – ie, a straight cost-benefit analysis.

There are times, however, when a dispute cannot be resolved until one or both of the parties have had an opportunity to 'confront' each other in a 'get-it-off-my-chest' session. If you believe, as a mediation tactic, that such a meeting might help to resolve the dispute, then you can bring the parties together for a joint session, provided there is no risk of any physical aggression. The best thing to do before such a confrontation is to discuss it privately with the lawyers, jointly or separately.

Much of the same reasoning applies to attorney-towards-opposing attorney aggressive behaviour, although here the mediator has additional ways to diffuse the situation. If I have been sufficiently warned about attorney-towards-opposing attorney aggression, I will start a mediation session with the parties in different rooms and will not have any joint sessions.

Moreover, as officers of the court, the attorneys can be ordered by a mediator appointed by a court to conduct themselves in accordance with proper court room decorum.

In the worst of situations where one attorney's unreasonable aggressive behaviour is a material hindrance to an otherwise successful mediation, I have taken the matter up with that attorney's client. If both attorneys are acting unreasonably aggressive, I have the option of inviting only the clients into a joint session in an attempt to resolve the dispute without counsel present.

When aggression begins during mediation

Although party-towards-opposing party and attorney-towards-opposing-attorney are the most common forms of aggressive behaviour during litigation, and therefore carry over to mediation, other forms of aggression can occur during the mediation process itself, for which the mediator does not have an opportunity to plan ahead.

For example, an opposing party may act aggressively towards an opposing attorney and vice-a-versa. This kind of aggressive behaviour is dealt with by keeping the participants in a mediation separated from each other. Such aggressive behaviour usually will not cause an otherwise appropriate mediation of a dispute to unravel.

The most unlikely aggressive behaviour is client-towards-counsel and counsel-towards-client. Usually the cause of this is discovered by the mediator during a mediation and only by picking up hints during a session with the client and counsel. If the mediator suspects that client/counsel aggression is occurring, the attorney should be called out of the room on some pretext and the mediator should have a private conversation with the attorney to find out what the problem is and how best to solve it.

Finally there is aggression directed at the mediator. This kind of aggression generally occurs after the mediation begins, because if there was any attorney-towards-mediator aggression, then the mediator would not have been chosen by the parties in the first place.

If such aggression occurs, the mediator is liable to loose the confidence the parties have towards him/her, so the mediator has to either be able to diffuse the aggression or call off the mediation either temporarily or completely and find another mediator for this dispute.

The best way to handle this is for the mediator to split out those individuals displaying aggressive behaviour and try to find out what caused it and how to deal with it. Such behaviour is likely to occur when one side believes – correctly or not – that the mediator is siding with the opponent, because the parties rightly expect complete neutrality from the mediator. Most of the time this kind of aggressive behaviour can be diffused. But the mediator should never return aggression with aggression.

Tips for successful mediation

Whether confronted at the outset with aggressive behaviour or if it arises as a process proceeds, here are a few suggestions that might help to defuse the situation. As a mediator you should try to understand all parties' perspectives including why one or more of them is exhibiting aggressive behaviour. Thus,

to the extent you are able to do so, acknowledge the various perspectives, including a statement that you can understand why one or more of the participants is expressing aggression.

Aggression usually develops when one or more of the participants feel threatened, so it is very important that as the mediator you reduce any actual or perceived threat. You can do this by asking the aggressor if separating the sides is something that would help diffuse the aggression. If so, then break them apart or you can focus on non-threatening issues to try to reduce the aggression. Above all, the issues in dispute should not become personal or aggressive behaviour will follow.

If there are multiple participants on each side of the dispute, ask a colleague of the aggressor to address the issues in a less aggressive and more constructive manner. You might also want to ask the aggressor how he/she would feel if attacked in the same manner.

Aggressive behaviour should never be ignored. Once the aggressor has calmed down either by separating the sides are otherwise, be sure to address the aggressive incident so that everyone knows that has been dealt with and is now over.

Conclusion

There are some mediators who themselves begin a mediation with an aggressive posture – telling counsel they do not understand the law, or are going to lose, or are inept. Some mediators yell at the participants. Other mediators are so benign that they become ineffective to resolve the disputes.

The best course is to be firm, but fair; remain neutral so that both sides accept you; be prepared for the mediation and try to find out how the disputes can be resolved. Never respond to aggression with aggression; that only raises the levels of aggression. You will avoid most of the aggression if you follow these simple rules.

Using Decision Tree Analysis to Break an Impasse in Mediation

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Mediators use a variety of techniques to break impasses that arise during mediation. These techniques include focusing on facts, reducing emotional tension, improving communication, identifying the specific issues that are in dispute, and exploring the consequences of failure to resolve the dispute (also known as reality testing). The decision tree is a useful and practical tool that enables mediators to implement these techniques.

To illustrate the benefits of decision tree analysis, assume that a software company has sued a licensee ('Licensee'), claiming that a software product sold by the Licensee infringes on the company's copyright.[1] The company owner ('Owner') is confident of victory and anticipates recovering US$6 million in damages (after deducting future attorney fees of US$300,000). The two parties have agreed to mediation.

During the mediation, the parties conclude that there are three key issues in dispute:

Is the Licensee's software substantially similar to the company's software? The company's attorney has privately advised the Owner that there is a 'better than even' chance of proving similarity.

Did the Licensee have access to the company's software before developing its own software? The Owner has been told that 'it is likely' that the company will prevail on the access issue.

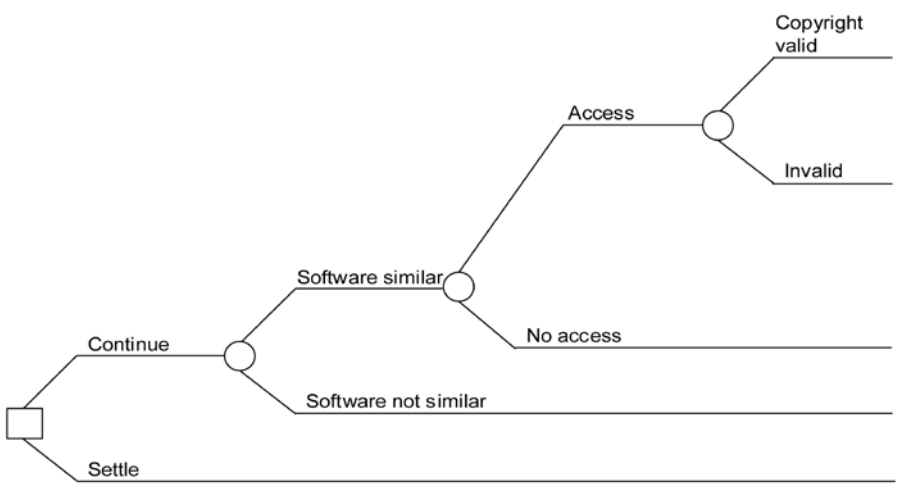
1 The example of decision tree analysis in this article is adapted from my book *Using the Law for Competitive Advantage* (John Wiley & Sons, 2002).

Is the company's copyright valid? The lawyer has advised the Owner that there is a 'high probability' that the company will prevail on this issue.

The Licensee has offered to settle the case for US$1.5 million, but the Owner adamantly refuses to accept anything less than US$5 million. This impasse results in part from the Owner's emotional reaction to the Licensee's alleged copyright infringement, although the Owner is also confident that the company will win US$6 million in court. Given the large gap between the US$5 million demand and the US$1.5 million settlement offer, the mediation is at a standstill. At this point, the mediator suggests that the parties use a decision tree to analyse and discuss the case. Using the decision tree to break the impasses is a three-step process.

Step one in decision tree analysis involves diagramming the conflict in the form of a tree on its side. Decisions in the diagram are represented by squares while uncertainties are represented by circles. A decision tree representing the Owner's decision whether to continue the litigation or accept the settlement offer is depicted in Figure 1. As the decision tree shows, if the Owner continues the case there are three uncertainties: the similarity, access and copyright validity issues. The decision tree graphically illustrates that the Owner must prevail on all three issues to win the case.

Figure 1



Because development of this decision tree and the linkage of the issues is a fairly straightforward process, the mediator can use step one as an opportunity (in *Getting to Yes*[2] terminology) to 'separate the people from the

2 Roger Fisher, William Ury & Bruce Patton, *Getting to Yes* (1991).

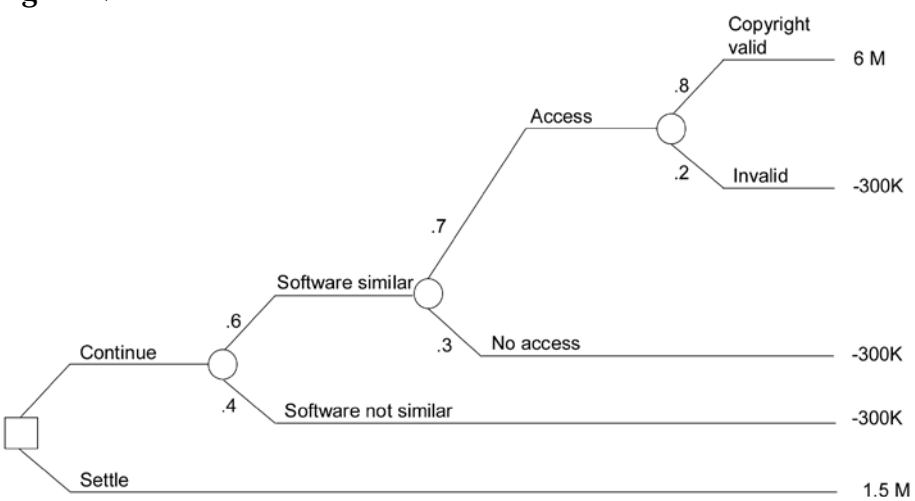
problem' by encouraging the parties to work side-by-side on the tree. The process also encourages the parties to focus on 'objective criteria', the three fact questions in dispute. This focus on the facts might diffuse the emotional reaction of the Owner to the Licensee's settlement offer.

In **step two** of the decision tree process two sets of numbers are added to the tree: (i) probabilities for each of the three uncertainties; and (ii) dollar values at the end of each branch on the tree. This step might be difficult for the disputing parties because it involves disclosure of confidential information. For this reason, the mediator will probably want to caucus with the parties to obtain the probabilities and end-point dollar values.

For example, a caucus with the Owner might reveal that the Owner's attorney has assigned these probabilities to the chance of success on each issue: (i) 'better than even' (similarity issue) = 60 per cent; (ii) 'it is likely' (access issue) = 70 per cent; and (iii) 'high probability' (copyright validity issue) = 80 per cent. Caucusing with the Owner to determine end-point values would also reveal that the company's future attorney fees are US$300,000.

Figure 2 depicts the decision tree after the addition of these probabilities and values. As this figure shows, by prevailing on all three issues, the Owner will net US$6 million after deducting US$300,000 in attorney fees. If the Licensee prevails on any one of the issues, the Owner will lose US$300,000 in attorney fees.

Figure 2



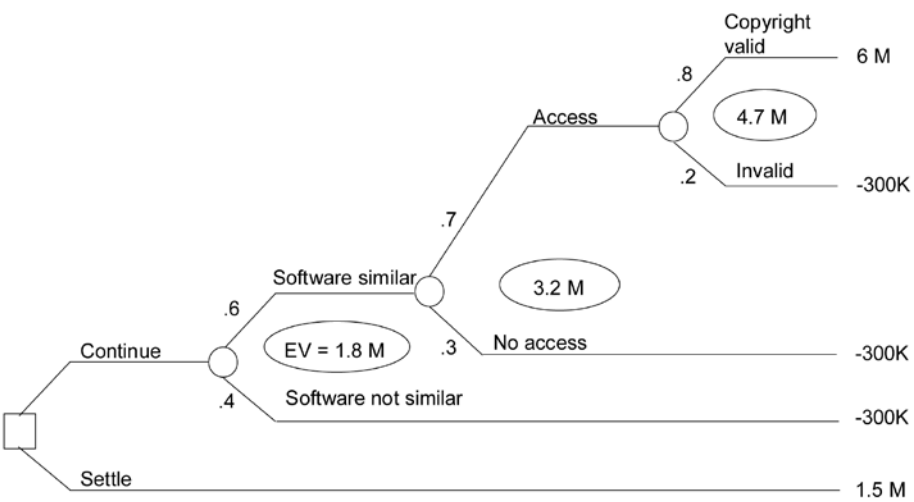
Step two is especially useful in dealing with an impasse because it facilitates communication between the disputing parties and their own attorneys, who might have differing views on the meaning of statements like 'high probability'. This step also enhances communication between the parties by

enabling them to pinpoint the specific issues in dispute. For example, the mediator might learn in caucus that both sides have the same assessments of the Owner's chances for success on the access and copyright validity issue. With their permission, these assessments could be disclosed so that the parties could focus on the key issue in dispute, the similarity issue.

Step three requires the computation of weighted averages for each of the three uncertainties. Working from right to left, the mediator and disputing parties can calculate an expected value of continuing with the litigation, as shown in Figure 3. The weighted average of the copyright validity issue is US$4.7 million, the sum of 80 per cent of the US$6 million win and 20 per cent of the Owner's US$300,000 loss (representing payment of attorney fees). The weighted average at the access node is US$3.2 million, the sum of 70 per cent of the US$4.7 million and 30 per cent of the US$300,000 loss. The final calculation, adding 60 per cent of US$3.2 million and 40 per cent of the US$300,000 loss, provides the Owner with an expected value of US$1.8 million.

This final step provides the mediator with a tool for reality testing. The calculations in Figure 3 reveal to the Owner that the expected value of proceeding with the litigation is US$1.8 million, which is not too far removed from the settlement offer of US$1.5 million. In *Getting to Yes* language, this is the Owner's best alternative to a negotiated agreement (BATNA). The mediator can enhance the reality testing by pointing out that the calculations do not include the Owner's opportunity costs – that is, the time spent away from business pursuits during discovery and trial.

Figure 3



Are there any drawbacks to the use of decision tree analysis? In his article *Computer-Based Risk Analysis: A Tool for Mediators*, David Hoffer notes that disputing parties and their attorneys might be hesitant to use decision trees for the following reasons: 'Litigants may… fear that use of a decision model deprives them of control of the mediation process [while] lawyers may be reluctant to begin the decision-analytic process for fear that the parties' expectations will later become anchored around an as-yet-unknown figure' (**www.ombuds.org/center/aaron/center/hoffer.html**).

Mediators can alleviate the concerns of the disputing parties and their attorneys by emphasising that, because decision tree analysis is simply a tool for assisting in the resolution of disputes, the parties are not bound by the analysis. In the words of Hoffer, mediators can point out that decision analysis helps 'identify and sort out the issues in the case… [but] nobody commits to anything by merely engaging in the analysis.'

Mediators might also be reluctant to use decision trees. This reluctance can be overcome by considering the benefits that arise at each step of decision tree analysis, as described in this chapter. Step one (diagramming the issues in the case in tree form) provides the mediator with the opportunity to 'separate the people from the problem' by focusing on the objective criteria depicted in the decision tree. Step two (adding probabilities and dollar values) enhances communication between the disputing parties and their attorneys, resulting in information that encourages the parties to pinpoint the issues in dispute. Step three allows the mediator to engage in reality testing through calculation of the expected value of litigation, which is the parties' BATNA. By enabling mediators to use these techniques, the decision tree becomes a valuable tool for breaking an impasse.

MEDALO: A Recent Positive Experience in Switzerland
Or Using Baseball Arbitration to Break a Mediation Impasse

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What is MEDALOA?

MEDALOA or 'Mediation and Last Offer Arbitration' comes from the sports industry as it is used in player salary negotiations in major league baseball. It is often referred to as 'baseball arbitration' or 'night baseball arbitration' and describes a process which combines mediation with last offer arbitration.

Indeed, the parties do mediate first. If they reach a point of impasse and do not reach a settlement they will submit their last offer made in mediation to the Neutral, who will have to choose one offer or the other and render a decision.

The Neutral does not have the authority to modify the figures submitted, or select another figure. He is limited to the last offers of the parties who keep some control over the process. Anticipating that the Neutral will choose between the offers, the parties are encouraged to make a realistic settlement offer at the onset.

The case of SKYGUIDE

In 2007, SKYGUIDE, the company providing civil and military navigation services as well as air traffic control in Switzerland, faced an important issue related to the renewal of parts of its Collective Working Agreement.

At that time, they were approximately 1,400 persons employed at SKYGUIDE in various locations around Switzerland, each of them speaking one of the official Swiss languages (German, French and Italian).

Negotiations had gone on for quite some months between the management of the company and the unions representing the employees, without real success and there was very little time left to find a solution before the expiration of parts of the Collective Working Agreement. This would greatly endanger the company and its activities as stand still and strikes were being threatened.

As there were only a couple of weeks left, the parties decided to get the assistance of a mediator to facilitate their discussions and help them settle their dispute. Indeed, SKYGUIDE had previously experienced a positive mediation process with the same mediator and was eager to try again. However, after a thorough analysis of the situation, the mediator realised that the dispute resolution process had to be adapted to a completely new context, ie, a situation whereby the Collective Working Agreement provided for the authority of the president of an 'Equal Commission of Conciliation' (Commission paritaire de conciliation) to render a decision together with representatives of each parties.

After some creative brainstorming, it was decided to appoint the mediator as the president of the said commission, not with the authority to take a decision but instead with the duty to mediate the issues between the representatives of the parties (the unions on one side, and the direction of the company on the other side).

The mediation lasted three sessions of four hours each. It took place at one of the airports in order to allow each party to fly in for the session and leave immediately thereafter. At the end of the third session, the parties realised that there was only one session left (of four hours). With the assistance of the mediator, they decided to put in place some MEDALOA proceedings which they defined as follows:

- The parties would very carefully prepare for the last session and, considering all progress that had been made during the mediation process, they would come with their best offer still to be improved if possible.
- After two hours, the mediator would see whether it would make sense to continue or to get into some 'last offer arbitration' as this is often used in the resolution of money claims or in the resolution of salary disputes.

Thus, the parties would submit their last offer of settlement to the Neutral, who would change hat and become a kind of arbitrator who would have to choose one offer or the other, with the parties having previously agreed to be bound by that decision. In this respect, the parties had already set the limits of the arbitrator's award. Furthermore, due to the complexity of the issues

involved and the very short time at disposal, it would have been impossible for the Neutral to make an adequate analysis of the case before rendering his decision. That is why the parties decided to give him only the power to choose between one or the other closed envelopes containing their last offers. Further, the Neutral did not have to justify his decision.

What happened next speaks for itself! Realising that the parties' best interest was to be as realistic as possible in submitting their offers, they mediated very seriously until the time had almost elapsed when a common negotiated solution was finally found between the parties.

Last but not least, the envelopes containing the last offers were never opened! And the agreement has been in force since.

Concluding remark

This instrument is very powerful as it puts the parties under the necessary pressure to settle the case by themselves instead of delegating its outcome to a 'third party neutral'.

Acknowledgments and Apologies in Mediation – it's not always about the Money

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Introduction

Unfortunately, most of what is written today about mediation is no different than what you hear about taking a case to trial in the court system in any country or to hearing in the commercial arbitration system of any provider. Counsel are advised to prepare for mediation like it is a trial, ie, prepare lengthy legal briefs on the issues, bring and prepare witnesses – there is even provision for the input of experts orally or in writing. How different this is from the purposes of mediation and the techniques that many of us studied and honed years ago when this all started.

We also learned long ago that mediation did not always have to be successful. I shudder when I hear mediators bragging that their cases always settle. Why it is often stated, and I hear this in mediations all the time, that the benchmark should be what a jury trial would fetch in this case. The short answer is a jury trial would fetch a considerable cost, an inordinate waste of time and an enormous emotional strain on the parties.

When mediation seemed to be just a fad, it was about sharing the lemon between the disputing parties by discerning who wanted the juice and who wanted the rind for their recipes. The skill that is required first and foremost, if a mediator wants to apply acknowledgments and apologies to such a successful conclusion of a mediation is that he or she must be someone who does not just listen to but also hears what the parties are saying. This is not the easiest skill to acquire and is also not one that

is honed by mediators who take a results or money oriented approach to mediating cases. Obviously, this does not always work. However, my experiences have shown me that it is not always about the money and that there are ways to achieve this end.

Discussion

Like any safe landing, the approach is the most important part. From the extensive briefs and opening statements, mediators need to get a handle on and set the tone for the session as soon as possible. While some venting is generally necessary, insult only adds to injury. At this point, the mediator should acknowledge the injured feelings, battered reputation or other human emotions that could be a driving force behind the dispute and, if possible, set the table for the use of acknowledgment and apology as a vehicle towards settlement. These topics can heat things up, so you need to know how much steam to let out of the kettle before someone gets burned.

If it is not readily obvious from the prior written submissions, this is the time to ask reassuring questions to uncover whether there is a connection, familial, business, etc, that evidences a potential for the use of acknowledgment and apology. Many times in a business setting, the parties may very well want to do business together again and this is the perfect tool to accomplish this end. Such a focus helps to address emotional issues that are often ignored and prohibit settlement.

Many attorneys are not prepared properly for mediation and see money as the only impediment to settlement. This is especially true with many contingency fee cases in the United States. The mediator needs to ensure that the client remains the decision-maker. If the case does not settle, then a judge or arbitrator will have the pleasure of doing that for him.

This approach also promotes the free flow of information between the parties, which is necessary for any good decision making. It shows that you are not just listening to, but also hearing what the parties are saying. Additionally, mediators evidence neutrality and add to their credibility when they address the human side of the dispute. If need be, there is no reason why a mediator should not talk to the attorneys separately to make these points.

Examples

Back to basics

I learned an early lesson about the curative powers of the use of acknowledgment and apology in one of my first mediations that involved a personal injury case with familial overtones. The petitioner/daughter slipped on the front steps at her brother/respondent's home, where their father lived, and was injured. After much acrimony and mistrust was vented, the sister admitted that she was worried about their father slipping as well. The brother's agreement to apply adhesive strips to the steps resulted in the civil case being dismissed without any monetary recovery.

Try humour

In another case, the parties were from the Philippines and not even speaking to one another. I thought that the one party's claims were pretty extravagant. I asked if she felt that the other party had inherited Imelda Marcos's collection of shoes, putting him in a financial position to afford the demands. It got her smiling and turned out that while the underlying litigation revolved around the purchase of some real estate that went sour, the parties were related by marriage. Feelings had been hurt when it did not work out the way they planned and an apology between the parties was part of the settlement that required a level of financial commitment that the other could now afford. The extravagant demands were just an attention-getter in my opinion.

Know your audience

While we are on the subject, tuning in to and turning on your audience based on ethnic or other character traits is advisable and essential in most cases. I had one party who spoke with a very distinct Irish accent. We were getting nowhere with the mediation, when I asked what part of Ireland he was from. Fortunately, I had travelled there several times and knew my way around. I also enjoyed my time there, so we could talk pleasantly and at some length about his native country. Here, an attorney had sued him for unpaid fees, so it was not hard to figure out that he was not happy with the quality of the work the attorney did. Once I suggested that his attorney should be paid something, and the attorney acknowledged that his work was somewhat shoddy, the credibility that I had established was more of a key component in finalising the settlement than one might have thought at first glance.

Conclusion

The use of acknowledgment and apology allows the parties to transform their relationship back into something positive; rather than leaving everyone with that horrible feeling after many mediations that neither party is happy or satisfied and has given up too much just to reach a King Solomon's decision. Acknowledgment and apology serve as important vehicles in achieving settlement in most mediations. Mediators need to return the mediation process to the alternative to dispute resolution that it was initially intended to be. Like everything else in this modern world, we seem to be losing the human touch that made mediation something different.

Tips and Hints

- Because probabilities used in decision trees are subjective, mediators should remind the parties that they should be cautious in relying entirely on expected value calculations. While useful as a communication tool, the decision tree is only one approach among several that are useful in breaking an impasse.
- If the mediator is to move from facilitator to decision-maker at any stage of the process, it is important that the parties fully understand the situation and where appropriate to take legal advice. The original mediator's letter of engagement may have to be amended to cover the new situation. A mediator taking on this new role should ensure that his insurance policy covers this type of activity.
- All disputes involve emotion. It is worth asking the parties to reflect on how their actions have been or will be interpreted by the other party and the extent to which they are consistent with the words they are using.
- An apology made without understanding is valueless and so it may not be appropriate for an apology to come very early in the proceedings although it may be appropriate for a party to express regret at the situation that has arisen, and some sympathy for the situation in which the other party finds itself, in the opening statements.
- Where personal injury or death has been caused it may be presumptuous to use words such as 'I understand' as the injured person may find it unbelievable that anyone could understand their hurt and may find the comments superficial or patronising. Similarly it may be inappropriate to talk about 'compensation' or 'putting things right'. A safer approach may be to ask the injured person how they would like to see the matter resolved and to explore those elements of the future important to them and then to reflect the rest of the discussion using the terminology. This will ensure that they feel engaged in the process and should avoid inadvertent offence. The party that has caused the hurt may like to think about who should deliver the apology if there is to be one and that that need not be the person primarily involved in making any financial restitution. An apology from the representative of a hospital's insurance company is unlikely to be meaningful no matter how strongly that individual may feel about the case.

Post Mediation

Closing the Mediation Where a Settlement Has Not Been Reached

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The subject to be covered in this short piece relates most obviously to the situation in which, on a mediation day, it becomes clear to the mediator that further work is not going to produce a signed agreement. This can arise where there is a gap to be closed, or an issue or issues to be resolved, and all options have been explored, or time simply runs out due to the commitments or exhaustion of any of the decision-makers. Another possibility would be that during the course of exploration of the dispute and its possible resolution it becomes clear that any agreement between the parties cannot be confirmed without the input or buy-in of a further party who is not involved and not available. There could even be missing information without which, for example, the paying party is unable to commit.

In the latter situation it is usually fairly straightforward to agree actions and a timetable. The mediator should be assertive in finding a role in that timetable to ensure that all the work done on the mediation day to neutralise negative positions is not lost to the re-emergence of interpersonal relationship difficulties and reactive devaluation (always thinking the worst of the motivation of the other side and therefore failing to value any reasonable concessions which have been made). This often involves further participation as a matter of goodwill. Additional fees can always be discussed later with the legal representatives, at a calmer time.

Where there is real work still to be done in ascertaining the zone of possible agreement and then finding the settlement number, a good suggestion at the

end of the mediation day is to obtain agreement to a new date – stating that of course this is simply a fall back in case the parties cannot reach closure themselves. Where parties genuinely want to settle (and most do) there is never any difficulty in getting buy-in to such a suggestion.

On occasion, of course, it is by no means as simple as the above would suggest. The mediator as shepherd (or even sheep-dog!) comes to mind in remembering a situation of acute embarrassment on having to explain to one room of people (the hosts) that their opposition guests had simply walked out. The pretext was catching a train and the tactic was to bring forward unexpectedly and at short notice the actual train time that was said to be essential to a successful homeward journey – but the mediator was left with a big question mark in his mind as to whether this could have been prevented. Fortunately, some hard work on the telephone in the following few days bore fruit.

The lesson to be drawn from this tale for the mediator is always to be mindful of the personality and emotional issues even where the mind is engaged mainly on fitting the logical jigsaw of a complete settlement together; always paying attention to what the party might be doing whilst fully engaged with difficult conversations with the other.

Whilst the mediator will always look first and foremost to facilitating the continuing of negotiations, it does happen that it is clear that no circumstances can at that moment be envisaged in which the dispute will be resolved by agreement. Reasons may vary, but it is possible to identify such a situation. In that event my strong instinct would be to encourage all concerned to meet together with me to summarise the efforts made on the mutual decision which has been made to close the mediation. Simply to do this can bring new force or impetus to people's intentions but equally to an obligation to face up to what is being let go. I have known situations where on enquiring a couple of weeks after such a process as to the present position I have been informed by a legal representative: 'Oh yes, it settled without too much difficulty'. It can also happen following such a closing that lawyers having shared the moment of 'failure' of the mediation then adopt a more collaborative approach to subsequent negotiation, the time for aggression having come and gone.

Let me now widen this discussion to a few thoughts of general application. There has grown, in the UK at least, a mentality which regularly equates to 'we must settle on the day at all costs'. This is to some degree understandable where, for example in a commercial dispute (which is my field), the legal charges incurred in preparing for and attending a full day mediation have been estimated to the client as very substantial in their own right, running in some cases into tens of thousands of pounds. So there is pressure to

please the client in being able to close the file as well as submit that big bill. Here the mediator has to be proactive in leading parties to having faith in their abilities to continue to negotiate on the days which follow, offering continuing support and/or meetings as discussed above. It is of note that on many occasions parties bring a very great degree of pressure to bear on their opponents that the deal 'must be done today, or all bets are off'. This raises the temperature at a late stage of the negotiation process, parties are tired and all the old dark places are revisited through threats, perceptions of bullying, etc. This is where a negotiation can break down with blaming and self-justification. Where this seems inevitable, a mediator should be aware of offering options to both sides which show a real hope of later progress, pointing out the damage that can be done by an insistence on hardball behaviour and walk-out threats. While such behaviour has been known on occasion to produce agreement, it can hardly be argued that such an agreement is of any quality. Despite this, the mediator is not concerned in my view with quality: party autonomy dictates that a properly advised party who is prepared to engage with such behaviour should not for a moment be prevented from doing so by mediator intervention.

So the mediator may consider it worthwhile to keep going using all options available; when it appears that there will indeed be no settlement on the day – perhaps because of mediating early and thus insufficient certainty through information exchange, or perhaps the need to feel the pain of the dispute a little longer – to design tasks and timetable, to summarise the options available, to propose questions for reflection. In this way, all concerned may lose the need to measure success or failure on the basis of the 'settle on the day at all costs' model. Mediators may be less tempted to give opinions, and instead provide a more benign kind of advice which fits the commercial context and which the parties can take on board or discard as they choose.

After Mediation

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What happens after a mediation? These remarks pertain to the responsibilities of the mediator after the mediation.

Generally, the work of the mediator ends when an agreement is concluded among the parties but a number of institutionalised mediation procedures impose obligations on the part of the mediator after the fact. Thus, under certain circumstances, the mediator must submit the agreement concluded in the mediation to a higher-ranking office for approval. These types of obligations are not included in the subject matter of these remarks.

In reality, problems can arise following the mediation which the mediator cannot simply allow to pass over to the usual order of business.

On one hand, it is possible that the parties may encounter difficulties in the implementation of the agreement that was concluded in the mediation. They decide that this agreement is not complete or one party is simply obstructive. What type of arrangements should the mediator make? What is his role?

On the other hand, the mediator will want to finish the work. He will want to become involved and learn from the concluded mediation.

Problems in execution

The question then arises, who is responsible for enforcing an agreement concluded within the framework of mediation. As a general rule, it is the parties. For each combination of circumstances, however, the mediator must also ensure the enforceability of this type of agreement: whether he points out to the parties that they should obtain the appropriate legal advice or whether he brings his own knowledge in with respect to the wording of the agreement.

Based on the above, it is expected that the mediator will intervene in the event of difficulties in the implementation of the agreement concluded within the scope of mediation. However, his obligation to maintain independence requires that he withdraw in these types of cases. According to the view represented here, intervention by the mediator presupposes a new contract between the parties. Without a contract, the mediator may not become involved on his own. On the other hand, it is completely reasonable for the mediator to make inquiries of the parties after the implementation of the mediation agreement. The mediator knows the expectations and interests of the parties. He is therefore able to assess how the agreement should be implemented.

While problems with the implementation of the agreements can certainly not be avoided, they can by all means be minimised by incorporating a mediation clause in the agreement concluded between the parties. It would therefore be advantageous if the mediator already involved in the matter were to be reappointed as the mediator.

Assessment and monitoring of one's own work

Self-assessment and monitoring

People are seldom prepared for changes. A mediator, however, is committed to continuous training. He is better off if he improves from mediation to mediation. In other words, every mediator becomes his own trainer.

This goal can only be realised if the mediator reappraises this accordingly after the mediation. The classic means for this include supervision as well as intervision. Such means are time-consuming, however, and not always available. Self-monitoring can therefore provide some help.

The mediator will ask himself what he did well and what he can do better the next time. He will work out the advantages and disadvantages of the mediation just concluded for his own benefit. In the process, he should emphasise the advantages and look for solutions in problematic cases. A structured self-assessment according to the following criteria is recommended:

- *Time management during the mediation* – The mediator will have to account to himself as to whether he gave the parties sufficient time to present their situation and whether he nevertheless pressed ahead with the mediation.
- *Empathy* – The mediator will also have to reflect upon whether or not he showed sufficient empathy toward the parties.
- *Ensuring independence* – The independence of the mediator is an important asset. It is therefore important for the mediator to be concerned about complying with independence.

- *Selection of interventions* – Upon conclusion of the mediation, it is a good idea to have the individual interventions that the mediator incorporated reviewed, and to account to oneself primarily with respect to one's authority.
- *Style of the mediation* – The mediator will in general need to be concerned as to which style he maintained during the completed mediation.

Over time, this will result in a record of one's own progress, which is helpful for developing one's mediation practice.

Assessment by a mediation party

The mediation parties also provide excellent input for improving one's own work. It is in no way wrong to urge them to submit an assessment after the mediation. On the contrary, such an assessment precisely after the conclusion of mediation sometimes discloses information for the mediator that would hardly have become known during the mediation, because the parties were busy with the mediation itself, or because the parties hold back in the mediation.

Such an assessment should include the following items:

- *Selection of mediator* – How did the party select the mediator? Who was the driving force? Was the mediator imposed upon them?
- *General satisfaction* – How do the parties assess the mediator's work? Would the parties recommend the mediator to others? Would the parties select this mediator again?
- *Assessment of the mediator's skills* – How do the parties assess the mediator in general? What skills does the mediator possess?
- *Assessment of the mediator's style* – What is the mediator's style, in the opinion of the party? Does this style fit the mediator?
- *Course of the mediation* – Did the parties feel comfortable during the mediation? Did the parties feel that they were understood?
- *Setting* – Are the parties satisfied with the setting? Did the parties want for anything?
- *Outcome of the mediation* – Did the parties feel that they were under pressure to enter into an agreement? Were the (disputed) items expressed by the parties handled in the mediation?
- *Costs of the mediation* – Have the expectations of the parties with respect to the costs of the mediation been met? Do the parties have the feeling that they saved money by having the mediation?
- *Time* – Have the expectations of the parties with respect to the time sequence of the mediation been met?

It is assumed that the assessment of one's clients will be continually analysed and incorporated into one's own assessment. An assessment can include other criteria as well. It is a good idea to incorporate such assessments into an intervision or supervision.

Summary

The mediator's work is not over at the end of the mediation. On the contrary, the period immediately following the conclusion of the mediation is decisive as to whether the mediator can abstract the most important items from the mediation for himself and his continued mediation practice. He will therefore ask the parties about the implementation of the mediation results on a regular basis.

It is further recommended that the positive elements, above all, be extracted from the completed mediation by means of a self-assessment. In any event, the mediator should not disregard the resources of his own clientele and should ask his clients to submit an assessment upon conclusion of the mediation.

Enforcement

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The enforcement of mediation settlement agreements has always been a hot topic within the mediation community. As mediation settlement agreements were commonly adhered to by the respective parties, procedures to enforce them were not an issue. When mediation ultimately entered the corporate world, the wish for legally binding and enforceable mediation settlement agreements grew steadily. Despite the alleged contradiction between voluntariness as a key component of mediation on the one hand and enforceability on the other hand, the mediation community supported the idea of rendering mediation settlement agreements enforceable.

Today's widespread opportunities to legally enforce a mediation settlement agreement can consequently be regarded as a breakthrough for corporate mediation. In times when mediation was labeled as being too 'soft', the mediation community had a hard time in proving that mediation was anything but: it had to show that mediation was in fact goal-orientated and finally leads to satisfactory and enforceable results for all parties concerned. Legal provisions which help to enforce mediation settlement agreements sustainably support the attractiveness, acceptance and credibility of corporate mediation.

Legal provisions regarding enforcement

The obligations agreed upon by the parties in a mediation proceeding constitute a contract and, therefore, are not enforceable without further ado.[1]

1 Rauscher/Staudinger, *European Civil Procedure Law* (2003), Article 57 Brussels I-VO, Rn 6.

Meanwhile, various international as well as domestic laws contain provisions dealing with the enforcement of mediation settlement agreements:

UNCITRAL model law

- The UNCITRAL Model Law (MLICC)[2] contains a provision (Article 14) which explicitly deals with the enforcement of settlement agreements. It states:

  'If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable… [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement].'

  The annex to Article 14 in parentheses clarifies that the specific enforcement method is left to each individual contracting state when enacting this provision.
- While Article 14 MLICC states that a '*settlement agreement is binding and enforceable*', such provision applies only to Member States that explicitly provide for such a possibility in their applicable domestic laws.[3] In Member States where such a provision does not exist some form of judicial endorsement of the mediation settlement agreement needs to be issued in order for a party to effect enforcement.
- The vast majority of Member States have not yet enacted special provisions on the enforceability of settlement agreements. Therefore, in these Member States mediation settlement agreements are only enforceable in the same way as any other contract between the parties.

Directive 2008/52/EC

- With the approval of the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters by the European Parliament on 23 April 2008,[4] the European Union tried to overcome the lack of a consistent legal framework for mediation in its Member States.[5] Pursuant to Article 12 (1) of the Directive, Member States shall transform the Directive into domestic law by 21 May 2011. The Directive is only applicable to cross-border disputes.[6]

2 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002.

3 When implementing the procedure for enforcement of settlement agreements, an enacting state may consider the possibility of such a procedure being mandatory.

4 Directive 2008/52/EC of the European Parliament and of the Council was adopted on 21 May 2008.

5 Pursuant to Article 1(3) of the Directive the term 'Member States' shall mean Member States with the exception of Denmark.

6 Cf, Article 1(2) of the Directive 2008/52/EC.

- Article 6 of the Directive deals with the enforceability of settlement agreements resulting from mediation. Pursuant to its Article 6(1), sentence 1:
  'Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable'.
  Thus, the enforcement of a mediation settlement agreement under Article 6(1) of the Directive is subject to the consent of all parties. Should one party to the settlement decide not to uphold a written settlement that is already in place, the other party is barred from enforcing the agreement. Though this provision implies a certain legal uncertainty it is in line with the fundamental principles of mediation proceedings, such as the principles of consent and voluntariness.
- Article 6(1), sentence 2 of the Directive contains limitations on the enforceability of mediation settlement agreements by taking into consideration specific particularities of the states' national laws. Pursuant to the preamble of Article 6(1), sentence 2 of the Directive:
  'it should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement'.[7]
- Under Article 6(2) of the Directive:
  'the content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made'.
  The irritating use of the (non-compulsory) English term 'may' instead of 'shall' under Article 6(2) of the Directive becomes clearer when taking recourse to paragraph 20 of the preamble of the Directive which clarifies that:
  '[the] content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law'.
  However, we note that the content of this provision does not contain any particularities with regard to the already existing legal status in the Community: settlement agreements that are made enforceable are automatically subject to recognition and enforcement under Articles 32 – 58 of Council Regulation EC No 44/2001.[8]

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7 Preamble of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, (19).

8 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Today, further refinement of enforcement procedures still differs between the various Member States. To illustrate this, we want to demonstrate the differing legal situations in Germany and France.[9]

Legal situation in Germany

Germany has not yet enacted a Mediation Act. Nevertheless, certain provisions of the German Civil Code and of the German Code of Civil Procedure make reference to the enforcement of mediation settlement agreements. Other than in court-related mediation, the parties to out-of-court mediation procedures generally agree on an out-of-court mediation settlement agreement. A mediation settlement agreement no doubt constitutes a 'settlement' within the meaning of section 779 of the German Civil Code. Under the law governing German civil procedures, an out-of-court settlement cannot be enforced without being declared legally enforceable. The German Code of Civil Procedure contains different ways to obtain this declaration:

- Should the parties decide to settle the dispute at an approved Conciliation Centre *(anerkannte Gütestelle)*, then the settlement agreement is automatically deemed enforceable pursuant to section 794, paragraph 1, No 1 of the Code of Civil Procedure.
- Pursuant to section 794, paragraph 1, No 5 of the German Code of Civil Procedure a mediation settlement agreement is also enforceable if it is notarised, and pursuant to section 796a of the German Code of Civil Procedure a settlement agreement between lawyers on behalf of their (mediating) clients can also be given enforceable effect by a court or a notary pursuant to section 796b or 796c of the German Code of Civil Procedure respectively.

Legal situation in France[10]

At the outcome of out-of-court mediation proceedings the parties generally agree on a 'settlement agreement'[11] under French law which is subject to

9 Other than, for example, the USA (Uniform Mediation Act), England (Civil Procedure Rules) and Austria (Austrian Law on Mediation in Civil Matters), neither Germany nor France have enacted domestic mediation laws.

10 The authors are very grateful to Dany Khayat and Olivier Yau, Mayer Brown LLP, Paris, for their input on this topic from a French perspective.

11 Pursuant to Article 2044 of the Civil Code, a settlement agreement is 'a contract by which the parties settle an arisen controversy, or prevent a controversy from arising'.

special rules.[12] The highest French Court, the *Cour de Cassation*, has ruled that a settlement agreement requires both parties to settle by mutual concessions.

The most notable effect of a mediation settlement agreement is its 'res judicata' effect between the parties. Pursuant to Article 2052 of the French Civil Code*:*

> *'Settlement agreements have, between the parties, the authority of res judicata of a final judgment. They may not be challenged on account of an error of law, nor on account of loss.'*

As a result, no other claim relating to the dispute settled by way of the settlement agreement may be submitted by the parties.

There are other options. Article 1441-4 of the French Code of Civil Procedure provides the basis for applications for settlement agreements to be given this same status. Such application is made before the president of the Tribunal de Grande Instance (a first instance court):

> *'The president of the Tribunal de Grande Instance, petitioned by a party to the settlement agreement, confers a writ of execution to the deed submitted to him*'.

This procedure gives a settlement agreement the same effects as those of a final judgment rendered by a French court. As a result, it may be enforced.

Conclusion

The possibility to enforce mediation settlement agreements is an important step to ensure the further acceptance and credibility of mediation proceedings – particularly in the corporate world. However, it is essential to secure that the enforcement procedures do not consume too much time and costs. Otherwise, the consensus between the mediating parties which is reflected by the mediation settlement agreement might be at stake.

12 Additionally, French law offers the opportunity of an enforcement of agreements resulting from mediation proceedings instituted by a judge. Première chambre civile de la Cour de cassation, 3 May 2000, No 98-1281. This decision can be found at: **www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007043586&fastReqId=339246018&fastPos=1**

Tips and Hints

- Generally mediators recommend having the parties sign the agreement settling the dispute before leaving the mediation. Sometimes this is only heads of terms but it is generally recommended that the parties endeavour to sign something that is legally binding and contains a full description of the terms agreed. In some areas, such as family law, some mediators suggest that it is better for the parties to go home and think about what they have agreed and then return the next day to sign the agreement or to renegotiate the parts with which, on reflection, they are uncomfortable. This is because the contract is directed towards an ongoing interpersonal relationship more than a commercial settlement and so the emotional side is of more significance.
- Where there is no judicial mechanism to give the mediation agreement any special force, it is advisable to execute the agreement in whatever way gives it the most probative value and makes it easiest to enforce, for example in England one would look to sign it as a deed or in Scotland before witnesses.

Special situations

Mediation and Collaborative Law and Practice

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What is Collaborative Law and Practice?[1]

Collaborative Practice is a recent mode of dispute settlement, often used in family law (divorce, separation) and sometimes in civil matters (inheritance, commercial disputes), allowing the disputants to work as a team with trained professionals to resolve disputes respectfully without going to court. The term encompasses all of the models that have been developed since the Minnesota (USA) family lawyer Stu Webb created the Collaborative Law model in 1990. This model is at the heart of all of Collaborative Practice. Each client has the support, protection and guidance of his or her own lawyer. The lawyers and the clients together comprise the Collaborative Law component of Collaborative Practice. As of today, the Collaborative Law movement encompasses more than 200 practice groups spread over more than 20 countries (mostly in North America, United Kingdom, Ireland, Australia and some European countries). Most collaborative practitioners are affiliated with the International Academy of Collaborative Professionals (IACP) which just celebrated its tenth anniversary.

While collaborative lawyers are always a part of such a process, some models provide, on an interdisciplinary basis, the assistance of specialists

1 The principles of Collaborative Practice as established by the International Academy of Collaborative Professionals, IACP are set out at **www.collaborativepractice.com**; selected bibliography on the topic: Sherrie R Abney, *Avoiding Litigation: A Guide to Civil Collaborative Law*, Trafford Publishing, 2006; Ron Ousky and Stuart Webb, *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids – Without Going to Court*, Hudson Street Press, 2006; Pauline Tesler, *Collaborative Law – Achieving Effective Resolution in Divorce without Litigation, 2nd Edition*, ABA Publishing, 2008; **www.collaborativedivorcenews.com**/.

(eg, financial specialists, child specialists) and coaches (mental health professionals in divorce disputes) as part of the clients' team. In these specific models the clients have the option of starting the collaborative process with the professional with whom they feel most comfortable and have initial contact. The clients benefit throughout this process from the assistance and support of all of their chosen professionals.

Although Collaborative Practice comes in several models as mentioned above, it is distinguished from traditional litigation by its inviolable core elements. These elements are set out in a contractual commitment defined as 'Participation Agreements' among the clients and their chosen collaborative professionals to:

- negotiate a mutually acceptable settlement without using a court to decide any issues for the clients;
- withdrawal of the professionals (lawyers and others) if either client goes to court ('disqualification' or 'withdrawal' clause);
- engage in open communication and information sharing; and
- create shared solutions that take into account the highest priorities of both clients.

Collaborative Practice is a client-centred and client-controlled process that begins with an assessment of the individual needs of each client. In response to client needs, the collaborative practitioners selected by the clients provide them with professional services using an integrated approach. This approach creates a supportive, problem-solving environment, where the clients can negotiate their own agreements face to face, assisted by their collaborative practitioners.

Collaborative Practice strives to provide clients with the support, information and structure they need to reach agreements that are voluntary and of maximum mutual benefit. To achieve this goal, collaboration begins with and emphasises education prior to negotiation, explores common goals in place of divisive positions, and creates a safe environment for constructive conversation.

The Collaborative Participation Agreement the clients and professionals sign at the start of collaboration mandates that any collaborative practitioner in the case must withdraw from representing or assisting either client, if either client engages in any form of litigation about the dispute. This requirement mitigates the negative impact of the power-based procedures inherent in the adversarial court model. At the same time, it encourages continuing efforts to find creative solutions in the face of apparent negotiation impasse.

To reach agreements that are of greatest mutual benefit, and to ensure the integrity of the process, the clients and their professional practitioners must freely disclose all relevant information. The collaborative practitioners help

each client to make fully informed, intelligent and voluntary decisions. The commitment to full disclosure and the withdrawal requirement are essential elements of a safe process.

Collaborative Practice represents an opportunity for clients to achieve their best at a time when circumstances frequently encourage fear of the worst. Through professional teamwork that involves clients as working partners, the possibilities for successful resolution are maximised.

Does Collaborative Law and Practice substantially differ from mediation?[2]

Collaborative Law and Practice does not substantially differ from mediation as a process for dispute settlement. Although they are certain differences between mediators who are neutrals and collaborative practitioners, especially attorneys, who are advocates for their clients, both mediators and collaborative professionals strive to resolve conflicts and to bring about agreements. In addition, both usually utilise the same dispute resolution skills, such as interest-based negotiation, and generally strive to preserve the parties' relationships, regardless of whether the disputants are married, neighbours, business associates or others.

Family cases may include mental health professionals who serve as coaches either in a one or two coach model, a neutral financial professional and, if appropriate, other neutral experts such as child specialists, business evaluator, etc. In civil cases, other experts can be included, however it appears that such cases are most likely to need mediators as a resource to the collaborative process participating in a manner designed to enhance its success.

In addition, bringing trained and experienced collaborative lawyers into a mediation process, whatever sort of dispute it may be, can also contribute to a better and safer environment for the disputants to manage and resolve their dispute.

2 What follows is inspired from a workshop 'Mediator Facilited Collaborative Practice', conducted by Nora Kalb Buschfield, MSW, JD from the Collaborative Law Center of Atlanta, Georgia, and was held on 24 October 2009 in Minneapolis, MN (USA) during the 10th Anniversary Networking and Educational Forum of the IACP.

How mediation can be used in combination with Collaborative Law and Practice?[3]

A mediator can help in the collaborative process in a number of creative ways:

- Mediation can serve to initially bring the parties together before they meet with collaborative professionals.
- Mediation can facilitate communication between the parties' attorneys when barriers are recognised.
- Mediation can facilitate multiparty conferences, especially if high emotions are foreseen.

Utilising mediation as an initial step may serve to quickly determine whether the case may be difficult or easy to resolve. This will help collaborative practitioners to determine the need for the possible inclusion of further 'team' members. Regardless of how well or how long two attorneys have known each other, even if they are committed to the collaborative process, they may still be stuck in positional bargaining that prevents them from seeing each other's client point of view. Mediation can therefore help the attorneys to come to a common ground and avoid the necessity of litigation.

Clients may actually be presented with the following options at the outset of a case:

- *Parties reaching an agreement on their own*: the parties can discuss issues and reach agreement alone, without third party assistance.
- *Mediation*: the parties meet with a mediator to determine issues and begin work on resolving any disputes. The attorneys can remain in the information loop through memos and phone calls from the mediator. The attorneys can serve to advise their clients on legal issues and review drafts. A five-party meeting (ie, clients, attorneys and mediator) is convened to finalise all issues and draft the final agreement.
- *Mediation with attorneys present*: the mediator(s) assist(s) in the planning for moving forward with the case, including the determination of the need for a team and assessment of the client's financial situation. The mediator(s) may participate in some or all of the parties' meetings with their attorneys. A mediator can serve as a facilitator, by setting agendas, taking notes of meetings and drafting memoranda of understanding.
- *Collaborative process*: A mediator can be used as a case mediator, case manager or facilitator. He can also be used as an impasse breaker or for dealing with post-collaboration issues, as explained below.
- *Court litigation.*

3 *Idem*; see also as selected bibliography: Chip Rose, *The Client-Centered Process: Common Ground for Mediators and Collaborative Professionals*, **www.mediate.com**, 2008, also published in the *Collaborative Review of the International Academy of Collaborative Professionals*, 2007, No 9/3 **www.mediate.com/articles/rose7.cfm**; Forrest S Mosten, 'Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making', *Journal of Dispute Resolution*, Volume 2008, No 1, pp 176-179.

The mediator as case mediator/manager/facilitator in the collaborative process

A mediator in the collaborative process can play such a role, as labeled, depending on the function that is allocated to him. Acting as a 'neutral', his role is to assist all parties in a collaborative case as follows:

- to determine the format or configuration of the professionals that will be involved;
- to help professionals in determining cases goals; and
- to facilitate communication among the professionals as well as the parties.

In particular, the case mediator can meet with the attorneys for an initial triage after they have met with the parties. The case mediator can also meet with the attorneys for brainstorming options as to how best to approach the case based on the needs of the clients and their financial situation. It may be that the attorneys will need to explain the case mediator's role in their initial meeting with their respective clients. An agreement will be signed along with the Participation Agreement that will delineate those issues which are to be addressed with the case mediator.

The case mediator may also meet with the parties to resolve issues in the collaborative process:

- when the parties have limited financial resources;
- where the issues at stake are fairly simple and do not require input from other professionals; and
- when the parties' communication seems to be open and free.

Mediator as impasse breaker

In any conflict resolution situation impasse is always a possibility. Mediators can bring a fresh perspective to help to move the negotiations forward. This is true whether the mediator has been part of the collaborative process from the beginning, or is brought in to break the impasse.

Post-collaboration mediation

Mediation may serve as an alternative dispute resolution process for future potential disputes that may arise after the initial matter has been finalised.

It is worth pointing out that attorneys serve as advocates for the process and for their clients' goals and interests in collaborative cases. There is often a tension between process, substance and advocacy in a team model. This tension makes it difficult for the attorney to balance the competition between

his role as a professional and his role as a collaborator. This is most likely to be the first opportunity to utilise a mediator in the collaborative process. Adding another member to the team may seem to be 'over kill', however, designating that professional to act solely as a case manager/facilitator can help advance the process. The mediator, as case manager or case facilitator offers neutrality which can guide participants through the process and free up their attorneys to focus on their roles as advocates.

Mediators who serve as part of a collaborative team need to have the clients sign a Collaborative Participation Agreement which allows them to withdraw from the process if the case breaks down and the parties decide to retain litigation attorneys.

Mediators, like any professionals that venture into Collaborative Practice, need to be creative and to come up with ways in which they can enhance the collaborative process and convince themselves that they have a true role to play in such a dispute management and resolution scheme.

Collaborative attorneys in mediation

In the reverse situation, mediators will also appreciate the whole benefit of having, in usual standard mediations, attorneys that have been practicing Collaborative Law, used to such methods, contrary to litigation attorneys more used to positional bargaining.

Aspects of Mediation within a Traditional Culture

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How to define a traditional culture? In England, all our yesterdays have provided us with a tradition in which the common law has grown at home. And when it has spread across the world it has often been encouraged to develop appropriate traditions (eg, of dress, address, and so on) some more strict and formalised than those to be seen in England. But our concern here is with legal systems which have grown up within underlying cultures so strongly established as to have fed their traditions into the law, so-called religious legal systems being obvious examples.

In rural Nigeria mediation was the norm, and when dealing there it is wise to be aware that the urban litigious sector remains on the whole reserved about ADR despite all attempts to underline the advantages of less expense. In South Africa mediation is again traditional; the issue is not adding mediation to a tradition, but rather adding other things to the traditional mediator role, and the impetus for commercial arbitration comes from the old tradition in combination with new local initiatives, which are numerous. Nevertheless a comparatively straightforward approach can be adopted.

But because the common law (and civil law) have themselves their own traditional and acquired values, any newer process, such as arbitration or mediation, comes to a greater or lesser extent imbued with those traditions and values, and in Canada, the United States, parts of Africa, Singapore, Malaysia, Hong Kong, Australia and New Zealand, it is being adopted into a legal context in which common law (the same would be true for civil law examples) has been established in modified forms (in Canada there is often legislation to find, sometimes borrowed along the line by the common law provinces).

Those who espouse what is often described as a relationist approach to a contract will say that socio-legal considerations require us to add subjective factors introduced by the expectations and intentions (visible or otherwise) of the parties, but that approach is considered below, if only because of limitations of length, only in relation to choice of law.

The Middle East

The author conducted a mediation in respect of kabanas built around the swimming pool of a major hotel. Priceless fabric had several times been put up and taken down by an English sub-contractor (English law) under the main contract (Saudi law), who said he could not provide the finish required because a Spanish sub-contractor (Spanish law applied) did not provide a sufficiently good surface, something which the Spaniard blamed on having to use local gesso.

Perversely, when at last the kabanas were to come into use, the problem which arose was from the placing of screens around the pool, which broke Sharia law. Customary law usually plays a more central role in the mediation than that! For example in the Gulf Cooperation Council it is important to ascertain whether Sharia law is exclusive, governing all matters (Oman, Saudi Arabia and effectively UAE), the alternative being varying degrees of precedence given to Sharia (least so in Kuwait and Bahrain), and whenever there is such precedence the effect is that Sharia is the principal source of law, even in comparison with legislated or even constitutional (but the Dubai Courts Law of 1970 makes Sharia subordinate to its enacted law). Sharia will expect an arbitrator to possess the same qualifications as a judge, and will create some tension with the common law approach (but perhaps now to a decreasing degree) because of the expectation that the arbitrator will intervene in a more civil law manner. One should still prepare for an interventionist arbitration.

But it is in choice of law, substantive and procedural, that the greatest influence of the culture is to be seen, because Sharia law will be applied where a Western approach would include party autonomy, or use US restatement-type or other weighted presumptions. It is therefore ineffective, in the absence of a plainly chosen proper law, to think in terms of choice of law (and jurisdiction) approaches which would normally be used to determine what the proper law might be, including the subjective approach of looking at the parties' apparent intentions based on what they did say, and effort needs to be devoted to managing the status quo and the consequences of the effective applicable law, often in practice less removed from the desired result than might at first be expected.

China

To turn to China next may seem strange, but I do so because what has just been said has little significance unless one takes on board the effect on the general population in Islamic states of the ingrained religious law. That is to say, they accept without thought or question the system to which this ingrained religious law gives rise. So in China, where law, however modern, is applied in ways which are dictated by the traditions which are similarly permeating the system, notably the way in which administrative discretion is exercised with little or no reliance necessarily on the degree of discretion permitted by the law (which is often great) but simply because the people accept that 'that is the way it is'. Again it is its history which explains why China has so many arbitration stipulations which are totally inimical to UNCITRAL and its basic framework. Our energies need to be devoted to gaining an acquaintance with the system which is in place and turning the bureaucracy to an actual focus on the written law, for which there remains considerable respect, the written law of course as viewed through the inescapable administrative filters.

South East Asia and India

Limitations of space render it quite impossible here to examine the effects of individual religions in the Indian subcontinent. But something of the impact in India of nearby modernisation which is having a local effect may be seen from a case in which it may well be that the Indian perception derived from the secularisation in the peninsula.

An examination in the Indian court of the Singaporean legal system, to check for potential unfairness, raised some arguable issues and perhaps paralleled what happened in the UK when experienced immigration and asylum lawyers (a handful of us) heard appeals against deportation of asylum applicants to European countries where they had first landed. Would they be properly processed if returned there? Very similarly in *State Bank of India v Navaratne,* in 2006 the defendants actually declined to defend for fear of even being unfairly detained in Singapore. But must not religious views versus secular modernity have contributed to this case?

It is difficult to avoid detecting, in accounts given of the setting-up of ADR in India, a tone of self-satisfaction which strongly suggests that actually there were no traditional sources of misgivings, and certainly none were visible, yet there was before the early 2005 changes wide resistance to ADR. Was it the very process in India of enthusiastically embracing and exploring the potential for form and ceremony in the common law which

held back customary local *mores* from asserting themselves and at the same time resisted the informality and flexibility of arbitration and mediation? This is most probably true, and after all there was nothing in the way of a single institutionalised state religion to yield its own customary law. The approach in India is to respect the comparatively formalised approach of the 1995 fresh beginning which secured a better reception for ADR generally. The 'technique' is to go along with the procedural formalities and press the operative substantive law, taking advantage still of course of the less stereotyped workings of arbitration and mediation.

Enforcement and recovery of overseas debts

In some jurisdictions a foreign arbitration or award (treated the same way as a judgment) will be unenforceable unless it goes through a process in the local court (that of ratification in the UAE is a particular example and one which occurs in a traditional context). Determine whether there is subsequent legislative provision (take as an example the DIFC Arbitration Law of 2008 and its English common law sources, overlaying the local law dictation of recognition rules). This is not an uncommon situation, recognition and cognate rules often being displaced in this way by legislative supremacy, so look for legislation.

Mediation and Cultural Differences

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The recognition and proper handling of cultural differences in mediation is an essential step in the main undertaking of resolving the dispute. This article presents some considerations and suggestions that may prove helpful in that respect.

It is beyond any doubt that culture has a significant impact on mediation even though the exact scope of the influence may be difficult to determine and to measure.[1] Already the starting point of the discussion, the concept of culture is extremely complex. Finding an adequate definition of culture is not an easy task. Culture is regarded as part of human consciousness, which goes beyond rules, etiquette and customs, which includes generalisation and stereotypes but also individual characteristics within a group as well as characteristics spanning different groups.[2] The crux, however, is not to find the proper definition but to realise the multifaceted nature of culture and the many dimensions which may affect conflict resolution. One single person may carry along several cultures, for example, ethnic, national, religious, or occupational. Therefore, culture must always be seen

1 M Davidheiser, *Conflict Mediation and Culture: Gambian Techniques and Perspectives*, Graduate School of Humanities and Social Sciences, Nova Southeastern University, 2003; Joel Lee and Teh Hwee Hwee (General Editors), *An Asian Perspective on Mediation*, Academia Publishing, Singapore, 2009; Donna Stringer and Lonnie Lusardo, 'Bridging cultural gaps in mediation', *Dispute Resolution Journal* (American Arbitration Association), Aug-Oct 2001; Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution*, Jossey-Bass, San Francisco, 2001.

2 Kevin Avruch, *Culture and Conflict Resolution,* United States Institute of Peace Press, 1998; Joel Lee and Teh Hwee Hwee (General Editors), *An Asian Perspective on Mediation*, Academia Publishing, Singapore, 2009.

in several aspects and every interaction (including negotiation) may be multicultural on several levels. Several scholars have attempted to categorise these dimensions and their work is an important first step in identifying aspects a mediator needs to observe.[3] In the following note some of these dimensional aspects are described.

- *Hierarchy v egality*: Inequalities among parties may be handled differently in different cultures. A hierarchic culture favors clear structures and attribution of powers and authority whereas an egalitarian culture adopts flat structures and shared powers.
- *Achieved status v ascribed status*: Another power related aspect is the attribution of status in a culture which may be based on personal achievements or ascribed aspects, such as age or birth.
- *Individualism v collectivism*: An individualist culture emphasises the role of the individual whereas in collectivism the relationship and integration prevail.
- *Masculinity v femininity*: Clearly, the masculine or feminine role may have different significances in different cultures.
- *Specificity v diffusion*: While certain cultures strive for regulations and control to avoid uncertainty, others readily cope with uncertainty and taking risks.
- *Long term v short term orientation*: A culture may be forward looking with long term objectives and a high respect for tradition and future rewards. For another just the opposite may be the case.
- *Direct communication v indirect communication*: A culture favoring direct communications will convey messages in an open way, ie, explicitly and directly. Indirect communications can often only be understood when considering the entire context of the message.
- *Monochronic v polychromic*: Some cultures will act in a sequential way and first complete a task before engaging in another, whereas others tend to engage in several tasks at the same time.

The above list is not exhaustive and there are certainly many other cultural dimensions, such as for example the orientation towards nature or behaviour (such as active v passive). Also, even though most dimensions were described in a bipolar manner, there is clearly a sliding scale and cultural dimensions may thus range anywhere between the two poles.

The (international) mediator's task in addressing cultural difference is thus twofold. A mediator must first identify the cultural differences in play and then address them. Identifying cultural differences, proves challenging.

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3 G Hofstede, *Culture's Consequences*, CA, Sage Publications, 2nd Ed, 2001; J M Brett, *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions across Cultural Boundaries*, San Francisco, CA, Jossey-Bass, 2001; C M Hapden-Turner & F Trompenaars, *Building Cross-Cultural Competence*, 2000; F Rockwood Kluckhon & F L Strodbeck, *Variations in Value Orientations*, 1961.

It will require both a high degree of self-awareness as well as awareness of others. In addition to doing his or her homework on perceptible and documented cultural difference, a mediator must remain ever vigilant for cultural differences that remain submerged between the parties and are perhaps even imperceptible to the parties themselves. While there may be clearly visible 'real' cultural differences, there could just as well be perceived cultural differences or unknown or well buried cultural differences. All three have the potential to harm the process of conflict resolution.

Perceived cultural issues differ from real cultural in that they are subjective rather than objective. Perceived cultural differences cannot be measured. They are unique and subjective to each individual. The underlying stereotype that led to a perceived cultural difference may or may not be grounded in a real culture difference, ie, perceived cultural differences may or may not overlap with real cultural differences. One example of a cultural difference that has risen to the level of a stereotype, which ultimately leads to a perceived cultural difference that can affect a mediation, is a specific attribution to a certain culture (eg, a representative of this culture inherently regards his counterparts with suspicion and will negotiate 'with his back against the wall' so that no one can stab him in the back). Regardless, if this perception is ever true, occasionally true or never true, people know it and take it into consideration in negotiating with a representative of this culture. This perceived cultural difference can lead to a number of problems because it can become self-fulfilling. In the negotiation process the internal chess player may assert itself and the counterpart may attempt to think ahead and game the upcoming result. This may in turn compel the other side to take a defensive position to counter balance the starting position and at the end of the day the perceived cultural difference may became a self-fulfilling prophecy: a position that could have been avoided if the parties had taken a neutral position at the beginning, rather than attempting to game the systems by relying on a perceived cultural difference. Perceived cultural differences can naturally also have positive effects. For example, when a party perceives one culture to be particularly professional, up-front and reliable, the party from another culture may begin with a more positive initial stance or vice versa (the party form the more 'professional' culture may take a more negative stance to compensate for the perceived cultural difference of other party).

In view of the complexity of the issues there is no general rule or uniform recipe for a mediator to identify and address cultural issues. Only the aggregation of various methods may achieve this. As a starting point the mediator will need to adopt or possibly reverse his expectations as to be prepared for the unexpected. Also, the mediator – despite carefully listening – cannot automatically assume that his message is understood by the parties

or that one party understands the message of the other, even though the mediator may believe he understands it himself. In this respect active listening techniques can prove very helpful. In addition to internal skills (curiosity, concentration, authenticity) external skills such as paraphrasing, inquiry and acknowledgement may be particularly valuable in bridging the cultural issues impacting communication and thus enable the mediator to surface the interests of the parties.

Once the mediator has become aware of cultural issues (and sometimes even as a method to bring these to light) the mediator may apply a number of techniques to address these. An often used technique is to individually ask all participants what they expect from the mediator and the mediation process, to ask them to describe their roles and the role of the mediator as well as the rules they need to feel respected to communicate effectively and resolve their problems. The mediator may also initiate a process whereby the parties are encouraged to describe their own and the other side's culture and compare these. This could be done by having them identify and describe (and when appropriate criticise) specific aspects of their culture and common stereotypes. This process may go as far as to demonstrate (role play) how conflicts are resolved in these cultures with the objective of establishing a mutual understanding and common values affecting their relationship. In the course of this process the mediator may find it useful to call in a co-mediator of a specific culture in order to gain the trust of the parties and assist in understanding the cultural issues.

The foregoing hopefully raises a mediator's awareness of the cultural differences that can play a role in mediation and provides some guidelines how to address these.

The Insurer's Point of View

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This chapter solely represents the views of the individual authors, and does not purport to represent the insurance industry at large.

Pre-mediation issues

Since each participant may positively or negatively impact on the success or failure of the mediation process, no individual or collective party carries the distinction of being labeled 'the key party'. The emphasis on who effectively controls the mediation from the perspective of the defence may however be objectively influenced by several factors, including the availability of insurance funds, and the attendance at mediation by the insured and/or insurer. Where coverage is provided, most insurers will want to work with their insured. They share a common interest to resolve claims, which are generally aligned. Issues of which to be cognisant however are the insured's desires to avoid the potential publicity associated with a trial and/or preservation of their loss record and general commercial relationships. In other words, there is not always conformity of interest when coverage exists.

But where any self insured retention (SIR) or deductible has been eroded, the emphasis will, by necessity, be on the working layer, in conjunction with any primary and/or excess insurer(s). A pragmatic insurer should not allow this to derogate from the insured's ongoing interest. If the SIR has not been eroded, the insured either needs to attend the mediation to work within

their SIR, or make the funds available to the primary/excess insurer. In cases involving serious/significant injury or loss of life, we would generally urge an experienced insured representative attend as the 'face' of the company.

As in litigation, preparation is paramount, as is effective communication between the insured, insurer and their attendant lawyer (defence and/or representation counsel) prior to the mediation process. The importance of the relationship between the lawyer and the insurer cannot be under stated. Whilst there will inevitably be issues for debate on the lead up to, and during the various caucuses at mediation, unless the attendant parties are largely aligned on liability, quantum and settlement/verdict value, the likelihood of success will be diminished.

Various dynamics are likely to be at play at any one time prior to, and at mediation, with the parties posturing and seeking to manage their opponents' expectations. Frequently unknown, is the fact that this dynamic may well extend to the respective insurers, with potential demands from an excess insurer to a lower lying insurer to settle within their limits. Whilst insurers generally work together for the benefit of their mutual insured, occasionally, differences of opinion arise on liability, value or strategy, which may result in subsequent disputes/litigation in itself. Where an insurer is defending subject to a reservation of rights, issues such as which elements of the claim are covered are also likely to arise. This will create a further potential dynamic, with coverage counsel (potentially) in attendance at mediation, together with defence counsel, the insured and insurer. Individually and/or collectively, these issues further highlight the importance of pre-mediation communication, between the pertinent parties.

Posturing and managing expectations often begins long before the mediation process has been conceived. This may take the form of subtle, or not so subtle communication between the parties, on both liability and quantum. The signs are there to be read, and available to be made. We would caution that veiled threats, uncompromising attendant parties and disproportionate demands and offers may well be misguided, and derail the process, which could otherwise be compromised. While there may be an obligation to mediate in good faith, or it may otherwise be considered a prerequisite to any mediation, and whilst conceptually appealing, it has proved difficult to enforce, on a practical level.

Even where the parties are diametrically opposed to the others' case or stance, some good can come from the process, which can forge closer working relationships with your opponent, bring the parties closer financially, clarify and/or narrow issues in dispute which collectively and/or individually may ultimately contribute to a subsequent successful mediation/compromise.

The assumption therefore that court ordered mediations result in fewer compromises is perhaps subjectively flawed.

Failure to resolve the claim at mediation should not be perceived as the determining factor that the matter cannot resolve amicably. Many claims resolve post mediation, with the direct involvement of the insurer, through direct negotiation with the plaintiff/claimants counsel. A follow up to the mediation process may be well advised, but is often dictated to by the progress made within the mediation, the mediator, and the will and/or experience of those involved in the process. Insurers can be a useful tool in the defence armory during the mediation process. Often the 'money-person', they can bring a new slant to the process, and often successfully intervene with direct communication with the plaintiff/claimant's counsel, during and after the process. Tactically, an insurer and defence counsel may be perceived as having opposing views on settlement value/worth, on which they can similarly capitalise.

More complex and/or hotly contested claims may well require more than one mediation. Plan and anticipate for that eventuality. Set realistic goals and objectives for the first mediation. Consider the pros and cons of setting pre-mediation parameters, demands and offers. These may be directed to your opposing number, or through the mediator, with information packs, which can be confidential or exchanged between the parties.

The mediation

Who attends from the insurer?

It is often perceived that a case has an increased chance of a successful outcome if personal attendance by the insurer is secured. The counter argument against this proposition, is when an insurer representing a higher and 'non working' layer chooses to attend, which can have a detrimental effect on the expectations of the plaintiff.

In our experience, it is important to have an appropriately skilled insurance claims adjuster personally attend when the potential financial impact of the case warrants this. From the beginning of any case through to mediation the insurer may quite justly rely on the advice and investigative materials of the lawyer or other expert, however when it comes to mediation the 'playing field' is not just leveled but arguably the experience and negotiation skills of the insurer's representative are the most pivotal part of the process for the defence.

To this extent it is important to establish the insurer's presence early on in the mediation. Ways of doing this include playing a role in any opening presentations and developing an early relationship with the mediator.

Every insurer will have a ball park figure, and generally they will travel to mediation with settlement authority. Ultimately the relationship with either defence or representation counsel will determine whether this authority should be disclosed to the defence team. Interestingly, there are some lawyers who do not wish to know the authority level, however we do not necessarily subscribe to this theory of working in a vacuum. Although there are always exceptions it is generally regarded that the most efficient use of resources is to have the defence team working together. One useful technique of course is that the insurer may well know early on that he will have to call back to the office to obtain additional authority. This is not something that has to be disclosed at the outset.

As with any business, it is of course important to maintain confidentiality when it comes to disclosing settlement authority to any outside party, or indeed discussing the value of cases either on the telephone or in any public place. Anecdotally, the author was scheduled to travel to Houston, Texas from the UK to participate in a recovery action verses a prominent London insurer. Whilst at Heathrow airport a booming voice pierced the sedate atmosphere of the Club Lounge, and it became immediately apparent it was the insurer's representative on the other side of the case obtaining his settlement authority for the forthcoming mediation.

Whilst I was of course ethically and morally prohibited from using this information to my advantage, it did cause some interest when the insurer put on his jacket, picked up his briefcase, apparently offended, and made to 'walk out' of the mediation at the point we declined to accept an offer US$1million below his authority. He came back.

How to determine whether pre-negotiation presentations are necessary

Some cases are so egregious that it can be better to move straight to negotiation. In the event of catastrophic injury or death there may be no advantage in face to face meetings with grieving or traumatised family members as the situation may only be aggravated when the defence makes its own presentation. With that said however, all due consideration should be given to the personnel on the other side of the case because there can be valid reasons why a presentation is appropriate. For example we know that the majority of cases do not go to trial and in the absence of the plaintiffs group 'having their day in court', the mediation process can go some way to allowing a family to have their views aired in a formal environment and with that done there can be an increased opportunity for a resolution to occur on the day.

How to get the most from the mediator

Again relationships are important. If you can establish your credentials as honest and forthright with a genuine interest in resolution, then you can have the mediator as an ally. Never forget however that the mediator is not on your side. Their role is to seek a resolution and many are not concerned about who is getting the better deal.

Are settlement prospects enhanced by offering a structured settlement?

Firstly in relation to which cases should I appoint a structured settlement broker? In terms of value, the threshold number for the use of a structure is generally regarded as approximately between US$250,000 – US$500,000. Clearly the larger the case, the better opportunity to structure and most brokers will tell you that there are very few personal injury cases which cannot be structured.

Essentially a structure settlement is a mechanism for taking a cash lump sum and utilising a life assurance firm to enhance this sum into an annuity – static or increased periodic payments over a guaranteed period of time. There are taxation concessions to this approach which make it an attractive proposition, however the real benefit is the peace of mind that is generated by a fixed income which can cover anything from cash for medical requirements/future care, to future college fees for dependants

Whilst the structure broker is not always viewed as a member of the defence team inner circle, it is vital that in appropriate cases they are incorporated into the process during negotiation. These brokers are essentially sales people and when an offer is made to settle, every effort should be made to allow them to 'sell' their product face to face with the plaintiff's representative. The bi-product is an enhanced and more attractive settlement package for the plaintiff/claimant, and a lesser sum payable by the insured/insurer(s).

Conclusion

The key to success is the simplicity of the process and reliance on the principle that a successful resolution at mediation offers the satisfaction of compromise and finality to all parties. The 'no winners no losers' principle effectively holds the key, however as discussed there are many ways of ensuring that you secure the more favourable outcome.

From Tension to Cooperation and Development: Negotiating and Mediating in Disputes over Natural Resources

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Natural resources have a potential to cause or fuel conflicts. However, they also have the potential of becoming a tool for peace building, cooperation and development. The big challenge of mediating or negotiating over natural resources is to capitalise on this potential and succeed in overcoming inherent tensions.

The mediator will help people negotiate as a neutral third party. Therefore he has to understand and use the basics of negotiation techniques as applied to conflict resolution and peace building. In this paper, we are going to see how particularly complex it is to apply these guiding principles in the context of international or national disputes over natural resources.

A source of tension

There are always inherent tensions in any dispute that have to be mediated or negotiated. In cases involving natural resources, this tension can be particularly acute. According to UNEP, at least eighteen violent conflicts have been the result of the exploitation of natural resources since 1990.[1] Tensions are caused by different reasons:

1 UN Security Environment Program (February 2009), *From Conflict to Peace Building*, p 5.

Scarcity coupled with a growing population

Scarcity of resources, like water or fertile lands, is caused by limited supply due to the impact of climate change or destruction of the environment. With the constant growth in population, demands on those natural resources will increase. The MENA Region (Middle East & North Africa) stands as a striking example: this region has five per cent of the world population and three per cent of the freshwater supply so 50 per cent of the population are 'poor in water' (less than 1000m^3/hab/year).[2] All prospective studies predict a decrease of fresh water supplies and a drastic increase in population.

This growing scarcity creates very big tensions between parties and neighbouring countries or regions that share common supplies of natural resources which have to agree on their allocation in often extremely tense situations. Some of those conflicts, like in Darfur, have involved control of resources, such as fertile lands and water.

Unfair repartition of resources

The unfair repartition of natural resources is also a source of tensions and has different causes. It can arise from the behaviour of socially irresponsible local or foreign investors in poor countries who invest in natural resources, exploit and export them, without sharing the profits locally (often with the consent of corrupt government officials).

Moreover 'high-value' resources like timber, diamonds, gold, minerals and oil are also a target for groups who seek to take control of those 'rich' territories. Civil wars such as those in Liberia, Angola and the Democratic Republic of Congo are largely, but not exclusively, due to the attempt by groups to take control of these types of territories. In case of transboundary natural resources, a non equitable repartition due to political tensions can create a lot of resentment.

Other realities

History: Countries or regions that fight for control of natural resources often have a history of tense relations; this has also to be taken into account in any mediation or negotiation.

Lack of governance: the eruption of conflicts over natural resources almost always happens in poor or developing countries. In these countries, we

2 IPEMED (Paris, March 2009), *Le Changement Climatique Autour de la Méditerranée*, p 14 (translation: Climate Change Around the Mediterranean).

often find governments who have a hard time getting organised and whose authority is undermined by corruption.

Environment: the overexploitation of natural resources is often the cause of major long term disasters.

Towards cooperation

A lot of legislative efforts have been made, not only by the UN but also by the EC and other international and regional organisations, to reverse the situation and transform natural resources from a weapon of war into a tool for regional cooperation and peace consolidation.

In this context, mediators acting as neutral parties in national or international disputes over natural resources or negotiators trying to craft a deal face the same challenge: how to overcome tensions and transform the dispute over natural resources, from a potential source of conflict into a tool for cooperation, development and peace.

This approach is becoming more commonly used by mediators and negotiators and is called, 'hydro diplomacy' when it deals with water supplies.[3] In these circumstances, mediation or negotiation needs a lot of preparation. The role of the mediator or the negotiator, when dealing with natural resources, is very complex. He has to deal with technical complexity and sometimes contradictions between experts, a multiparty context, multiple opinions, possible tensions, diverging political agendas, the necessity of sustainable development, complex political, social and/or economic implications.

The three-step process

We said at the very beginning of this chapter that mediating is to help people negotiate. The mediator will use the same tools that the negotiator uses but at different time.

Step 1: General preparation

The mediator dealing with natural resources needs the same preparation as a negotiator does in order to mediate well. Even if the role is different because he does not represent a party, the mediator will have to be able to

3 Fadi Comair, (Juillet 2008), 'Gestion & Hydrodiplomatie de l'Eau au Proche-Orient', *Les Éditions L'Orient Le Jour*, Beyrouth. (Translation: Management & Hydrodiplomacy for Water in the Middle-East) 4.

unlock numerous situations and guide the parties through a complex path. He has to be able to understand:

- *History*: Learn about the history of the region's diplomatic and economic issues.
- *Culture*: Learn about the cultural mores of the different parties involved: in negotiations or mediation, understanding cultural contexts and behaviours is always important.
- *Cooperation*: Understand what specific interest would be derived from cooperation. Indeed, at some point, he will have to help the parties move towards a cooperative attitude, especially if their situation has reached a dead end. As we are going to see later, he will use a particular process to dig into these matters and bring the parties to a cooperative stance. In the case of natural resources, he has to prepare in advance and articulate the different advantages for each party: long term environmental benefits, improvement of public health (in matters like water and fertile lands: security of food production), increased economic productivity, base building for long term regional cooperation. To do so, he can try to answer the following questions in each case: What are the benefits? Why are these important? When and how can they materialise?
- *Technique and science*: the allocation of natural resources always involves very complex technical issues. The mediator or negotiator has to understand the basic technical and scientific questions underlying the problem, even if the help of experts will be required as we are going to see later.
- *Long term sustainable development*: always remember that any agreement dealing with natural resources should be considered in the context of a long term sustainable development vision and its impact on local populations.
- *Legal framework:* Know the legal framework in which the parties operate and, in case of trans-boundary disputes, be able to refer to the legal texts (generally international or regional).

Step 2: Carefully manage the process

Taking into consideration the complexity of cases involving natural resources, mediators and negotiators who want to create a win-win deal have to be very proactive and, in the case of a mediator, much more so than in a more usual mediation. He should:

- make sure that all the decisional levels are present;
- encourage parties to articulate clearly the national or regional objectives of their country, region or community, before beginning the process;
- create a team of experts: if the problem is technically complex, he should propose the creation of a group of experts for the parties, and if there

is disagreement on the experts, propose experts that both parties will agree on;
- for multiparty mediations and negotiations, encourage the parties to regroup and name a chief negotiator. The chief negotiator will report to his group and go back and forth to the negotiation table;
- encourage the parties to name a team of negotiators and a chief negotiator that will be open to work in the context of a peace resolution process;
- create a space where parties can ventilate their emotions: As we have seen at the beginning of this presentation, parties in the process of mediation or negotiations are often tense and need to ventilate their emotions, frustrations, or concerns before going deeper into the process. This preliminary step is often forgotten and, if missed, can create a lot of subsequent problems; and
- practice active listening.

Step 3: Patiently go through the seven questions

The process can then move on through the Seven Elements of Principled Negotiation. Originally developed by Professor Fisher of Harvard University, these steps, adapted to each situation, are considered as an extremely efficient working tool to prepare for negotiations or to mediate and help people negotiate.[4] Using these elements, mediators will ask a number of questions to the parties at one point or another in the course of the mediation to help them, and negotiators will prepare ahead of time, by testing these questions on themselves, thus allowing them to help the other parties think differently, if necessary. These principles are covered in a great deal of literature which we encourage the reader to study. For the purpose of this article, we are going to highlight some of the key points for mediators or negotiators to remember:
- *Explore interests, not positions:* Positional bargaining, in which each side comes to the table with its own demands, is common in the context of natural resources but ineffective, most of the time. The mediator will have to help the parties focus on their underlying needs and wants.
- *Assess alternatives to a negotiated agreement:* Each party should understand clearly what the end result will be if no agreement can be reached. The parties will thus gain flexibility.
- *Develop options to their mutual benefit:* Brainstorming joint options is a very useful tool that allows thinking 'out of the box' and eases tensions.
- *Use objective standards:* Objective standards, in the context of natural resources, are not often easy to assess and can lead to conflicts among experts. As we have seen before, the mediator or the negotiator can propose

4 Roger Fisher & William Ury (1981), *Getting to Yes Without Giving In*, Penguin Books.

a joint committee of experts to help establish those standards, making it easier for parties to agree.

- *Separate people from the problems:* Always keep in mind that substantive issues have to be addressed separately from 'people' issues that are often a major source of tension.
- *Help the parties understand the other side's perceptions:* It will improve communication and enable a party to reframe its proposals in a way that allows the other party to agree to them.
- *A clear commitment in the end:* Make sure that the parties do not leave the table without having a clear idea of the next step.

Over the past three decades, the use of mediation and negotiation at a national and international level to resolve environmental disputes has been on the rise and evidence suggests the practice will continue to gain in popularity. Moreover the use of natural resource as a platform for dialogue and cooperation is now often used with success at an international level.[5]

5 Afganistan & Iran; Iraq & Iran; Egypt & Sudan; 2002 Agreement between Lebanon & Syria ect.

Tax Mediation in the Netherlands

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Mediation has been a hot subject in the Netherlands for a number of years. It made its first appearance here in 1980 and since 1990, has been increasingly used as a means to resolve disputes. Following measures taken by the Ministry of Justice from 2000 to 2003, the role of mediation was closely examined, which resulted in the Ministry's policy document *Mediation and the legal system* (Mediation en het rechtsbestel) in April 2004. In this way, interested parties are encouraged to seriously consider mediation more often as a means to resolve disputes. In addition, in the end, all district courts and courts of appeal in the Netherlands became involved in referring disputing parties to mediation.

Mediation in tax matters

As regards tax matters, having taken part in a Ministry of Justice study, the appeal court in Arnhem referred a number of cases to mediation in the 2001-2003 period. An evaluation of the study showed that the willingness for parties to negotiate was the most important condition for referral and reaching agreement. Having the room to negotiate turned out to be less important, as regards preconditions. This is especially the case in administrative and tax matters. Having no room for negotiation or the fear of setting precedents may encourage administrative authorities to take the view that when dealing with disputes they should not consult civilians, and definitely not where law enforcement is concerned. For this reason, it was generally assumed that administrative and tax disputes are not areas where negotiation works. However, the number of referred administrative law-related and tax-related cases where mediation was successfully used, have shown just the opposite.

Despite this, the obvious absence of room to negotiate – if a point of dispute clearly relates to a question of law – is and remains a contraindication.[1]

Following the outcome of the study by the Ministry of Justice mentioned above, it was decided in 2003 to start a pilot project for mediation in tax matters. This project was carried out by the Dutch tax authorities/Process and Product Development Centre. After the pilot project's success, the Ministry of Finance decided to pursue mediation as one of the means to resolve disputes between the Dutch tax authorities and a taxpayer.[2]

Currently, the Dutch tax authorities are deploying their own employees as mediators. In special cases, an external mediator (for example, an independent tax adviser) can be used. Where an in-house mediator is used, the full mediation is free of charge to the taxpayer. It appears that more than 80 per cent of these mediations end successfully.[3]

The district court and courts of appeal refer disputes, including tax disputes, to external mediators who need to meet certain criteria (court annexed mediation). The referral is normally done by the judges, either once they have reviewed the case and, thus, prior to the first court session or during the first court session. As to tax disputes, some of the district courts send the taxpayer or their adviser a letter upon receipt of their appeal and ask the taxpayer or their adviser whether they think that their case is suitable for mediation. Upon receiving a positive reply, the court will ask the tax authorities whether they are willing to start mediation. In all cases, the parties involved participate voluntarily in the mediation. In the period mid-2005 to the end of 2008, in at least 630 of the tax disputes referred by the courts, mediation was started. Of these mediations, more than 80 per cent ended successfully. In around ten per cent of the mediations, the financial interest was €45,000 or more.[4]

Tax disputes suitable for mediation

Mediation can be one way to obtain a solution in cases where objections (and/or appeals) to tax assessments covering many years have been lodged and/or discussions have already spanned several years. In such cases, relations between the taxpayer and/or their adviser and the Dutch tax authorities will probably be poor. In such situations, neither party can see that things will

1 WODC, Justitiële verkenningen, 8/03, Mediation.

2 Letter of the State Secretary of Finance dated 8 April 2005, nr DGB 2005/1109, *Vakstudie Nieuws* 2005/21.3, Kluwer, Deventer, the Netherlands.

3 Letter of the State Secretary of Finance dated 31 May 2005, nr DGB 2005/2841, *Vakstudie Nieuws* 2005/29.2, Kluwer, Deventer, the Netherlands.

4 Source data: The Netherlands court-connected mediation agency (Landelijk bureau Mediation naast rechtspraak)

work out in their favour. Moreover, mediation can be a handy way to deal with international disputes between tax authorities from different countries as regards transfer prices used within a corporate group between group entities in these countries.[5] Another situation where it could be wise to try mediation is in discussions on valuations. These are just examples, as there are many other situations and kinds of tax disputes in which mediation can be suitable. As a general guide, a tax dispute that would be suitable for mediation would be characterised by (some of) the following features:

- complex and unclear/ not fully clear set of facts and circumstances;
- various tax matters are subject of discussion;
- application and/or the interpretation of the law is unclear and leaves room for various interpretations;
- misunderstandings and miscommunications back and forth; and
- a poor relationship between the parties involved.

Where taxpayers, their tax adviser and the tax authorities will easily believe that their tax dispute relates only to a question of law (and so in their view they have a strong case), the challenge is to make parties gain insight in their own dispute. This can be done by having them realise that, first, the origin of their dispute is completely different to what they think, and, secondly, that the legal arguments are only non-negotiable positions taken for their own interests behind these positions.

The foregoing can be explained by the following simplified example. Imagine a dispute between a company's in-house tax counsel and the tax authorities about whether certain interest payments are deductible in the year 2007. The parties' positions are non-negotiable. It appears that the interest behind the in-house tax counsel's position is that due to the credit crunch, he cannot return to his CFO having failed to convince the authorities that some part of the deduction should be accepted and, instead, with the announcement that extra tax is payable for the year 2007. The interest behind the tax authorities' employee appears to be that his colleagues will not agree if he accepts the deduction of the interest expenses, especially in the case at hand. Knowing these interests behind each of the positions taken, the next step is for the parties to start looking for a solution whereby the interest paid is non-deductible in the year 2007, and at the same time does not result in extra tax being payable for the year 2007 taking into account other elements in the company's 2007 tax return. Together they start to examine whether there are any costs in 2007 for which the deduction has been overlooked or an income element in 2007 which can be considered unrealised and, therefore, does not yet have to be reported as taxable in the year 2007.

5 See EU Joint Transfer Pricing Forum, secretariat discussion paper on alternative dispute avoidance and resolution procedures, meeting of Tuesday 21 June 2005.

Co-mediation in tax disputes

The role that I see for mediation in tax disputes other than the ones referred by the courts, is partly based on experiences with its application in the United States.[6] In the United States, mediation is used in the so-called 'Pre-Filing Agreement' programme, among other applications. In these cases, before submitting their tax return, the taxpayer agrees with the Internal Revenue Service on what the tax treatment will be in one or more situations or in view of facts that have come to light in the relevant tax year and which following submission of the tax return (or upon audit) would very likely lead to discussions with the Internal Revenue Service.

One of the reasons for the Dutch tax authorities to use an in-house mediator is undoubtedly the cost considerations. In the case of an external mediator, in principle, the Dutch tax authorities have to finance part of the costs of the external mediator. An in-house mediator can offer advantages, being familiar with the internal workings of the Dutch tax authorities. However, an external mediator also offers some advantages. They know more about commercial and non-tax-related aspects which could be important to a taxpayer. If a taxpayer opts for mediation via an in-house mediator, it would be wise for the taxpayer to obtain counsel from an external mediator (during the mediation sessions or beforehand in any event).

I would like to see the Dutch tax authorities offer co-mediation as an option for dispute resolution. This then means there are two mediators: one in-house and one external. The taxpayer bears the costs of the external mediator, and the Dutch tax authorities do the same through their own in-house mediator. The question then arises whether the external mediator is sufficiently neutral if they are paid by one of the parties only, namely the taxpayer. On the other hand, as regards neutrality, the in-house mediator has appearances working against him. I am assuming that neutrality is guaranteed for both the external and the in-house mediator since both are registered with the Netherlands Mediation Institute ('Nederlands Mediation Instituut (NMI)') and subject to rules on conduct and the institute's complaints and disciplinary provisions. It appears that as to neutrality, parties do not have different or better experiences with external mediators than with in-house mediators.[7] Nevertheless, I believe that there is a better likelihood of neutrality through co-mediation than through relying on just one in-house mediator. In addition, taxpayers will be more inclined towards opting for

6 Internal Revenue Bulletin No 2002-26, 1 July 2002, *Part III – Administrative, Procedural, and Miscellaneous,* Rev Proc, 2002-44.

7 Letter of the State Secretary of Finance dated 31 May 2005, nr DGB 2005/2841, *Vakstudie Nieuws* 2005/29.2, Kluwer, Deventer, the Netherlands.

mediation.[8] The United States have already moved ahead of us when it comes to co-mediation as well. There, in tax mediations, they offer the opportunity to call upon an external co-mediator, paid for by the taxpayer, independently of the in-house mediator from the Internal Revenue Service.[9]

Conclusion

Tax mediation is a tool for resolving tax disputes that is definitely strongly gaining recognition. Mediation is very well suited for differences of opinion or disputes between taxpayers and the Dutch tax authorities, unless a pure and clear question of law is the subject of the discussion (which is often not the case). In the United States, experiences with applying mediation in tax disputes have already proven very positive as well. What is holding other countries back from doing the same as in the Netherlands and in the United States? Even if the benefits of applying mediation are not immediately obvious, nothing should stand in the way of trying it and seeing what the advantages are. There is really nothing to lose.

8 See J G Kuiper, 'Mediation – het compromis voorbij', *Tijdschrift voor Formeel Belastingrecht*, nr 6 October 2006, SDU Uitgevers, Den Haag, The Netherlands.

9 Internal Revenue Bulletin No 2002-26, 1 July 2002, *Part III – Administrative, Procedural, and Miscellaneous*, Rev Proc 2002-44, section 5.08.

Mediation with a Government Party

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In Taiwan, if a dispute arising out of the performance of a government procurement contract between a private contractor and a government party, the parties, in addition to litigation or arbitration, may also resort to mediation administered by the Appeals Review Committee pursuant to Article 85-1 of the Government Procedure Act to solve a dispute. As an alternative dispute resolution mechanism, mediation offers a relatively expeditious, private and cost-effective means for the parties to resolve their disputes. Under the relevant regulations, a mediation case has to be resolved within four months of application, unless the parties concerned mutually agree to extend the mediation period. Further, the mediation procedure is not in principle open to the public. Statistics reveal that mediation has been increasingly used by the parties and is quite effective in terms of its success rate. In 2008, the total number of new mediation cases is 1,140 and the success rate is 67 per cent. With such a high success rate, mediation has become a widely accepted alternative dispute resolution mechanism with respect to government procurement contracts between a private contractor and a government agency in Taiwan.

Prerequisite reconciliation of mediation

Under 85-1 of the Government Procedure Act, a party to a government procurement contract may initiate mediation only when the parties thereto fail to reach a settlement agreement over a dispute in relation to the performance of such contract. There is no statutory provision regarding how such a negotiation for settlement must be conducted. If the contract set

forth provisions dealing with the procedural matters of reconciliation, such provisions must be observed. In case of no such contractual provisions, the Appeals Review Committee in practice adopts a flexible view and recognises that negotiation by means of letter, e-mail, fax or telephone would satisfy the condition precedent of attempted reconciliation and there is no minimum requirement as to how many rounds of the negotiation must be conducted or for how long the negotiation must last.

If the parties fail to reach a settlement agreement through reconciliation, either the private contractor or the government agency may file an application for mediation to a local Appeals Review Committee, or to that of the Public Construction Commission, Executive Yuan. The government party cannot reject mediation initiated by the private contractor.

Mediation procedure

After the Appeals Review Committee agrees to take a mediation case, the Chief Officer of the Appeals Review Committee shall appoint one to three of its Members as the mediators of this case. The Appeals Review Committee is composed of seven to twenty-five Members, who are selected from high-ranking government officials or impartial persons with qualifications like judge, prosecutor, lawyer, accountant, architect, engineer, professor, or a person who has knowledge and experience in government procurement for at least five years. Furthermore, the Appeals Review Committee may appoint certain advisors for consultation by the mediators if the need arises.

The Appeals Review Committee may, at its discretion, inform or allow a third party having legal interests in the dispute (ie, a third party whose rights and obligations may be affected by the result of the mediation) to participate in the mediation. If a third party believes that the outcome of the mediation may affect its rights or obligations and thus it is an interested third party, such third party may request the mediators to allow it to participate in the mediation procedure. The mediators have the sole discretion in deciding whether or not to allow an interested third party to participate in the mediation procedure. As a general rule, the mediators will allow an interested third party to participate in the mediation procedure if they believe that such participation will help reach an agreement between the parties to the mediation.

During the mediation process, the mediators may, at their discretion, propose a 'written mediation recommendation' in the name of the Appeals Review Committee and request that the parties respond as to whether they consent to such recommendation within a stipulated time limit. If the government party disagrees with such recommendation, it shall, after

reporting to its superior entity for approval, provide a written response to the Appeals Review Committee and the private contractor.

During the mediation process, if the parties fail to reach an agreement but their positions are very close, the Appeals Review Committee shall propose a 'mediation proposal' by considering all of the circumstances, consulting with the mediators, balancing the parties' interests, and not deviating from the scope of the parties' main intention. The Appeals Review Committee then serves the mediation proposal on the parties and any interested third parties. Within ten days from the date following the date of receipt of the mediation proposal, the parties or the interested third parties may file an objection to the mediation proposal with the Appeals Review Committee. The mediation shall be deemed failed if an objection is filed during such period, and shall be deemed successful if no objection is filed during such period.

After the mediation process, the mediators shall prepare a mediation agreement, notice of mediation proposal, or certificate of failure of mediation which shall record the mediation process, and submit the same together with the case files and relevant evidence to the Appeals Review Committee for review and deliberation. Furthermore, the mediation must be completed within four months from the date following the date of receipt of the application for mediation, although it may be extended with the parties' consent.

The effect of mediation agreement

A mediation agreement takes the same effect as a finalised judgment not a contract. Therefore, if a party refuses to perform its obligation under the mediation agreement, the other party may apply to the court to enforce the mediation agreement rather than filing a complaint of breach of contract. However, a party may file a complaint with the court to avoid or revoke the mediation agreement if there is any legal ground for avoidance or revocation. Such legal grounds include but are not limited to violation of mandatory statutory provisions or public order/good moral, fraud or coercion.

Mandatory arbitration

The failure of mediation may result in mandatory arbitration. According to Article 85-1 of the Government Procurement Act, where a failure of mediation with respect to construction work is caused by the government party's disagreement with the mediation recommendation or mediation proposal proposed by the Appeals Review Committee, the private contractor is entitled to apply for arbitration by operation of law and the government party cannot object to such arbitration on the ground that there is no arbitration agreement between the parties.

Settlement of Family Disputes Through Mediation – Challenges

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Mediation is gradually being used more extensively in the settlement of family disputes in India. Although partition suits have yet to be a greater beneficiary, matrimonial disputes are receiving greater attention. By and large one can find peculiar similarities in the challenges faced in settlement of these disputes. This may be prevalent in most regions making a transition from community values to an inclusive modernisation.

Main causes of family disputes

The main causes of family/matrimonial disputes in India are on the increase. The shift from joint family to nuclear family has mostly created a 'out of sight, out of mind' attitude. With affection getting further diluted due to urbanisation, there is a need to provide for the next generation with better education, coming to terms with the empowerment of women, change of cultural values and disparity between children. Further, the transition to a nuclear family has brought out of the closet psychological chaos. Neurotic, realistic and moral anxieties are increasing with competitiveness and lack of emotional security provided by the joint family system. Disputes caused by a jamboree of factors being so anarchic, only deserves a more conducive environment for easy settlements. Although there are sincere efforts employed in providing the best for settlement of disputes through mediation, there are a few challenges only time will resolve.

The mediator

Although the mediator is only a facilitator, some of them have a tendency to don hats of morality and indirectly nudge the sessions from their natural course. This is sometimes caused by a subtle bias to the likes of inter alia gender, age, class, culture and also due to the limitation of time. This may be attributed to the core or genesis of the mediation culture.

The courts in India and the respective Bar Associations, in their enthusiasm to reduce the backlog of cases have been pushing forward with training lawyers to mediate. Mediation requiring maturity, the qualification is that the lawyer ought to be enrolled for 15 years. This poses as a challenge as most lawyers who have practiced for that long are either successful and have very little time to spare for the subtleties of the art of mediation, or have been unable to make their mark and therefore take it up as an attempt to make a mark in the fraternity. We find only a handful that genuinely subscribe to the cause of mediation and have made an impact. The remaining spend their valuable time in either subscribing to or dodging nepotism for the protection and enhancement of their stature. This environment denies most mediators the opportunity to improve and service their skills. It is probably time that mediation is taught at the university level and younger professionals are allowed to take it up as a specialisation (they need not be lawyers, let alone enrolled for 15 years). This may help the mediators to take on the other challenges faced in the settlement of disputes.

Challenges

The courts and the judiciary

Court referred mediation sometimes acts as disguised coercion. Even when a party makes an application to refer the matter to mediation, the other party is seldom in a position to decline it. This is predominantly due the excesses of the judiciary. The appointment of judges is synonymous to bestowing power rather than responsibility. A transfer to the bench of a family court is a stairway to rise in the ranks of the judiciary but it is sometimes used as a reprimand for a poor track record. In such an environment there is a need for sensitivity in referring family disputes to mediation. The judge ought to suggest that it may be useful to try and settle through mediation rather than directing the parties to resolve their dispute through mediation.

Procedural limitations

The environment mentioned above offers little to tackle the challenges of dogmatic customs, mores, and the traditions of certain families in settling their disputes. Further, the procedure is tailored to use the limited resources (as compared to the number of disputes) and to make them more accessible. This tends to compromise efficacy. Sessions may be spread over days and weeks, with obvious undesirable consequences and may lead to haziness in the minds of the parties at dispute. The family unit is the wind by the strength of which the individual sails. A family dispute makes the family synonymous to stormy winds and the procedure the fog. This prevents the parties from understanding what their best alternative and worst alternative are going to be.

Conclusion

A commercial dispute has fewer inhibitions as the governing factor may be confined to ethics, reputation and money. A family dispute has additional factors, most of it packed with intense emotions. Although the success of the mediation cells in the country is commendable, the elimination of some of its drawbacks mentioned above could provide a greater accomplishment. Mediation in India, more particularly in family matters, has been prevalent in various forms, however institutionalised mediation is gradually being widely accepted and improving.

Working with Parties with Disabilities

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The World Bank estimates ten to twelve per cent of all people in the world have disabilities of various types and levels of severity, which means that you will have parties with disabilities in your mediations.

Many countries have implemented laws which require accommodations for people with disabilities and have included a legally-required process of interactive discussion to determine what accommodations are best. Mediation is well-suited to this due to its innate flexibility. As a provider of services to the public, you should be aware of what your jurisdiction requires to make your services accessible – intake, case management and the mediation itself. Here are some ways to make the mediation process functional and inclusive.

Making mediation accessible

Your intake process for each party should identify any disability that requires accommodation. It may be as simple as asking 'Is there anything you will need in order to help you participate?' People who require accommodation will be familiar with identifying their needs. The person with the disability is the one most knowledgeable about his or her disability and the accommodations that will help them. We all make assumptions about particular disabilities – including assumptions about how severe an impairment it may present – and therefore we may assume an accommodation is needed where it is actually not necessary. For example, not every person with a hearing impairment uses sign language to hear and speak. Many people use hearing devices, sometimes in conjunction with reading lips, and are able to speak clearly. In

this example, accommodation may be as simple as seating everyone in the room so that the party is able to clearly see all faces, and helping to ensure that participants do not turn away or cover their mouth when speaking. This is only one example but it illustrates that each individual will have different levels of disability and different corresponding needs.

Many organisations around the world provide excellent 'disability awareness' training that is designed to provide a practical approach and to dispel any anxiousness about what may be unfamiliar territory. One could spend one's entire career in 'politically correct' trainings of some sort, but I promise that you can achieve, with an investment of only a few hours, a level of comfort and confidence in the area of disability that will be a powerful tool in your mediation toolbox. When you consider how important rapport-building and trust are to you as mediator, I suggest that this is a wise investment.

Also find out what resources exist in your jurisdiction to help public service providers determine their responsibilities and appropriate accommodations. There is likely a relevant government body with this remit and it is a useful resource for you. [In addition, you may wish to refer parties to that resource if the matter in dispute has to do with provision of accommodation, as in an employment, education, or public services matter.]

Ability to participate

You may find that you need to assess a party who may experience impaired decision-making, whether through a mental disability such as bipolar disorder or through a physical disability such as a brain injury. Physical discomfort or pain may also impair decision-making. A mediator should work to find ways in which a party may participate despite the challenges posed by difficulties in decision-making, except in the most extreme examples. This may mean changes to the way your mediation process typically operates. For example, sessions may need to be shorter or have more breaks. It may be critical that the party has time apart from the mediation to consider his decision before making a final agreement. Parties may need to bring someone for emotional support or to help them keep track of key information. More caucus may be required to recap progress, or points may need to be noted in writing or on a flipchart.

Obviously it is essential that parties can understand the purpose of the mediation and the ramifications of any agreement reached. Parties who might not be considered to have legal capacity may be able to productively participate in the mediation process, with support and accommodation, and a careful and forward-thinking assessment should be made on a case-by-case

basis, with emphasis on inclusion where possible. An example from my own practice is mediation between parents of an adult with Down's syndrome, as to support responsibilities, where the son participated in the discussions as a party with his own interests and concerns in the matter. You may wish to have more than one person within each party sign any agreement intended to be legally enforceable.

If the matter is related to a potential violation of disability laws, I recommend you urge all parties to inform themselves about relevant law prior to the mediation. In my practice I provided to all parties existing government materials about the relevant laws, and additionally advised parties to seek legal counsel if desired. I found this dramatically helped parties reach consensus at the critical stage.

Accommodation

Accommodation will include ensuring physical access to all locations in the mediation process, and aiding the party's ability to perceive, understand and apply information during the entire mediation process. Below are a few examples as illustration.

Someone with a hearing or speech impairment may require an interpreter. If so, view it as you would any language barrier, where the interpreter should be a qualified neutral professional and not a family member or friend who may inject opinions. In many jurisdictions, the cost of an interpreter is viewed as part of providing accessibility and may not be added to the mediation fee. The interpreter may need to confer with the party before and during the mediation to clarify particular terms. Mediator and participants should address the party and not the interpreter, to ensure the party does not feel alienated or patronised.

If the party brings a personal assistant for physical aid or other assistance, the assistant should not participate in the discussions. This should be discussed prior to the mediation to ensure everyone is clear. Some parties with disabilities may ask to bring someone to provide emotional and/or moral support, or an attorney. If your process typically would not include or would discourage this, it is useful to consider whether given the disability this might benefit a party's participation. You should discuss, prior to the mediation, the expectations regarding that additional person's participation.

Start times or length of sessions may be another area where accommodation is essential. For example, a party may be taking medication that makes it difficult to get up early, or conversely may experience tiredness that makes long sessions unproductive.

Occasionally a disability may cause behaviour that you perceive as disruptive or undermining the process. An example from my own practice is a mediation I conducted with a party with Tourette syndrome. This disability causes difficulty controlling motor and verbal tics, which threatened to conflict with the need for parties to speak uninterrupted. The party identified that this would be a challenge, and we discussed how best to handle this to ensure his well-being and desired confidentiality as well as preserving the working method of the mediation. We agreed on various steps including more caucus time and a confidential pre-agreed verbal cue to signal the onset of difficulties. Another example is that of an individual who has had some injury or has a condition impairing her memory, causing her to repeat information or ask questions that have clearly already been answered. The likelihood is that the party is aware that this is a challenge for her, and may have identified coping mechanisms for herself which you should discuss.

Sometimes increasing accessibility is simply a matter of your heightened awareness. For a participant with a visual impairment, for example, introductions around the table should be designed to help them identify each participant by voice and location. Be aware that it is not only a matter of your comfort level and awareness of how to include the person, but also a matter for other parties who are participating. Some comments during the introduction can quickly address what might be unease or insecurity by other parties.

Confidentiality

Confidentiality is an essential mediator tool in trust-building and in moving parties toward agreement. It is useful to discuss the level of confidentiality the party may desire about his disability.

For example, if the disability is not material to the matter, and is not obvious, the party may wish to keep it confidential (and in many jurisdictions has a legal right). The example above regarding Tourette syndrome provides some illustration of this. Even where no legal right exists, it is advisable to honour the request as part of the trust-building process, unless to do so would impair the effectiveness of the mediation, in which case you may wish to privately discuss if the party is willing to disclose or for you to disclose.

Even when the disability is material to the matter, a party may wish to keep confidential certain elements (diagnosis, severity, symptoms, side effects). This should be discussed explicitly to avoid errors. The desire for some level of confidentiality often arises in relation to mental disabilities, which still carry an unfortunate but powerful stigma. But similarly it may arise, for example,

where a party is worried about an employer finding a pretext to terminate him or where a party may not have disclosed her disability to colleagues or clients to protect her sense of independence and strength.

You will also want to consider how confidentiality is legally required if you find that you must withdraw from a mediation, particularly if the disability has somehow played into your reason for withdrawal (for example a belief that a party lacks the capacity to conclude an agreement).

More information

It is impossible to cover all the angles of mediating with parties with disabilities in a brief article, but there are an increasing number of excellent resources to help you. Many bar associations have an arm dealing with diversity issues. The not-for-profit world has many organisations which address general disability, as well as specific disabilities, and are eager to assist you in making your services accessible. Many government bodies have also produced resources addressing disability in mediation.

The United States has taken the lead in laws protecting disability rights, and in the area of mediation with people with disabilities, so the following two links are to excellent materials from the US that will be useful to mediators in other jurisdictions as a preliminary resource:

- Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA): **www.eeoc.gov/mediate/ada/ada_mediators/html**
- The ADA Guidelines by the Kukin Program for Conflict Resolution at Benjamin N Cardozo School of Law: **www.cardozojcr.com/ada.html**

In closing, I recommend that you view a party with a disability like any other party in your mediation. Every party presents varying needs and challenges, with a varying ability to participate. Thoughtful discussions and heightened awareness of potential assumptions are at the core of providing functional and accessible services to all your parties.

Mediating Multiparty Disputes

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First principles

The fundamentals of mediation apply however many parties are involved. And it is important to remember that apparently straightforward mediations featuring only two 'parties' may in fact exhibit many of the dynamics of a 'multiparty' dispute, with different interests, needs and positions present within one camp. We need to avoid making superficial assumptions about any situation. However, for the purpose of this essay, we will assume that the presence of more than two parties adds an extra layer of complexity to the mediator's task and we shall explore how this might be addressed.

Preparation

As with all good things in life, preparation and planning hold the key to making best use of mediation where there are several parties. It is clearly vital to manage the expectations of participants and ensure that they enter the stage of mediation meetings fully prepared to engage and to discuss the key issues. To achieve this will require a number of preliminary steps:

- Selection of the mediator or mediators: in matters involving several parties, it may be appropriate to have co-mediators, or at least more than one active mediator, even if one is technically an assistant to the principal mediator. Thought needs to be given to the most effective combination and the skill set required for the circumstances and, in particular, to the ability of the mediators to work together as a team.

- A meeting or telephone conference call for the mediator(s) with legal advisers (at least), and possibly principals, as soon as practicable after it has been agreed to use mediation: with several parties, a physical meeting (or meetings) may be more difficult, but is likely to be rewarding in engaging participants in full discussion about how to proceed. Such meetings should of course themselves be managed in a way which gives the parties a sense of confidence in the mediator and the process and may need to be conducted with just as much care and sensitivity as the more formal meetings on the mediation day or days.
- Clarity about what are the central issues for mediation, who the parties are, who will be attending and in what capacity, authority to make decisions and duration of the mediation process.
- Identification of a venue with the capacity to hold the number of participants in various combinations and rooms, with adequate catering and technical back up.
- Discussion about the preparation of written materials: often, it will be useful to have the parties allocate tasks between and among themselves, such as drafting a joint background briefing paper, preparing a schedule of relevant documents, and finding a way to focus on what is really in dispute and why (often, this can be mapped out in a joint summary or matrix). Preparation questionnaires may be issued and risk analyses sought by the mediator in advance.
- An agreed approach to ensure that all parties feel engaged at the beginning of the mediation day or days and that each team is well managed from the outset.
- Regular contact between the mediator and the parties (or their advisers): this is likely to be productive in building rapport and, just as important, in ironing out little difficulties that may manifest themselves along the way and which may become disproportionately troublesome if not dealt with quickly.

Starting the mediation day(s)

As in all mediations, the initial engagement by the mediator is critical. With several parties, this becomes an important issue of management. My preference is to stagger the arrival of parties and to have a carefully planned timetable to minimise disruption and inconvenience to each team. Each situation is different of course but here are a few examples from my experience of how multiparty mediations may commence:

- All convene at the start for an initial meeting and discussion about the process which will be followed for the rest of the mediation day(s), followed by separate, private meetings with each team.

- Separate meetings on a different day, giving time to assess the situation prior to all participants gathering in one place and at one time (often vital for a mediator as the information gathering process from several parties can be (i) lengthy and (ii) sufficiently informative that it impacts on subsequent process).
- Prefacing or following initial private meetings with breakfast together, to allow mingling and informal discussion – often, this brings people together informally who have not met before and can overcome the wariness associated with not knowing who else is taking part when there is a large group.
- Separate meetings first, then all convene to plan and/or present. As a variant, after meeting with all parties separately and privately, bringing all participants together for a briefing and introduction by the mediator who can seek to set the tone in his or her remarks – in one example, the participants then ate a buffet supper together.
- In an organisational setting, meeting individuals separately and then, with the requisite permission of the individuals, meeting with a senior manager within the organisation to discuss the next stages and design of those stages.

Separate, private meetings will give the mediator a sense of the dynamics in a room and of any tensions that may exist within a team, as well as identifying the key players and their styles.

The mediator needs to understand the respective roles of all participants in each room and to continue to recognise these (including apparent backroom players) as the mediation progresses – and be aware of changing roles at different stages in the mediation process.

Continuing on the mediation day(s)

There are a number of features that a mediator may need to bear in mind where there are several parties:

- Management of his or her time: keeping parties notified about what the mediator is planning and when they can next expect to see the mediator is both effective and respectful – and keeping private meetings with parties succinct in order to keep up momentum.
- Management of the dynamics in each room: look for or even appoint a natural facilitator in each team, who will be responsible for keeping that team focussed and alert on the task or tasks in hand and for maintaining morale, as well as for bringing any concerns to the mediator's attention. Such a person need not be the key adviser or lead negotiator: one of the advantages of sharing out roles is to spread the load and engage

more people. These team 'managers' can meet to discuss logistical arrangements without being weighed down with the baggage of the central issues.

- Watching for and encouraging 'moderate' voices (within one team or across teams) while acknowledging and managing the contribution of more vociferous and perhaps 'extreme' views. And be careful about making such judgments in the first place!
- Having (large or small) groups of participants work together, sometimes concurrently (for example, experts on a technical issue, legal advisers on a point of law – or in beginning a rough draft of the final agreement) may produce momentum even when the mediator is not in the room. In particular, this may lead to the establishment of new coalitions which break the old moulds.
- Engaging the key players, possibly across teams, often building alliances or communication bridges where appropriate, and looking for stabilising influences if there are tensions. This may involve setting up private meetings in unexpected places and at unexpected times. Or have the senior negotiators work together as an appraisal team and invite more junior members of their respective groups to present to that appraisal team. That can change dynamics.
- Management of time where joint sessions are held to enable parties or their advisers to make formal presentations: it is remarkable what can be distilled into 30 minutes or less if that is what is expected. In one example, six parties with leading counsel presented their clients' respective cases to an audience of the other parties and their advisers in a complex matter over a period of two and a half hours – in total.
- A well-timed and positive summary or stock-take by the mediator may be an important contribution from time to time, especially if there is a sense of lack of progress: this can often be a concern in multiparty matters where participants can feel disengaged for significant periods of time. If more than one day is being used, such a summary may be a useful starting point at the beginning of a subsequent day; the use of 'stock-take' questionnaires can also be an aid to focussing minds on the key points going forward.
- Releasing some participants when their job is done: for example, technical advisers whose input is complete and whose continued presence may be unnecessary or even disruptive.
- Taking regular breaks: often ignored and usually important along with fresh air and exercise – and adequate catering.

At the end of the mediation day(s)

Managing the end game, as in all negotiations, takes patience, persistence and perseverance. This may be exacerbated when there are several parties and fatigue is setting in. It may be necessary to mediate within a team, where the imminence of a solution or outcome reveals differences between interests within that group.

Working with the key players, being prepared to leave others on the sidelines, fashioning frequent and sometimes off-line discussions, maintaining good humour throughout, and mental and physical stamina, are all essential for the mediator – and others. By this stage, the benefits of initial preparation, an effective start and continued engagement throughout should bear fruit.

Mediation in Construction

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Dispute resolution in the construction industry

The construction sector has been characterised for its constant search for effective dispute resolution methods that meet the needs of the projects.

Litigation, arbitration, expert determination and dispute boards are some of the dispute resolution systems that have been used by the industry in order to resolve controversies in the best possible way for the projects, which in many cases are destined for the benefit and use of the public such as public works or PPPs (Public-Private Partnerships).

Nevertheless, in a world where time is money, and where after the financial crunch money is scarce, parties involved in construction and infrastructure projects have a special interest in limiting the typical effects of disputes such as potentially broken business relationships, excessive legal and administrative costs, and the risk of the suspension of the works.

That is why mediation is becoming an increasingly popular process for resolution of construction disputes, since this dispute resolution method offers hope to contractors, owners, developers, design professionals and others of limiting the cost and emotional stress that a construction dispute naturally generates.

In addition, in recent times, the construction industry has bitterly criticised aspects of construction arbitration – the most used and accepted dispute resolution method in the world – for delays in the arbitral procedure; lack of commitment of arbitrators; absence of responsibility of the institutional arbitrations; excessive costs and fees of attorneys and arbitrations institutions; and so negating the original 'efficient, fast, cost effective' characteristics of arbitration.

Mediation in the construction industry

Mediation in the construction industry is no different in nature than that used in other commercial or civil areas where mediation is used. Nevertheless, in the complex sector of construction, several distinct factors should be considered. These factors are discussed in the following sections.

Knowledge of parties of the nature of mediation

Since litigation and arbitration have been the natural paths to solve a dispute in the construction industry, mediation is not yet always fully understood. Lawyers, parties and even mediators often arrive at the mediation procedure without knowing the nature of such procedure.

During my professional experience I have seen several critical situations which I would like to share. The first one was that the counselor of my counterpart filed the notice for mediation as a judicial claim, using procedural language and invoking legal provisions first of all. During the meetings and hearings, he insisted on the 'breaching of the procedure' and acted aggressively even towards the mediator. Of course, this situation did not help us resolve the matter since the mediator could not convince him to adopt a different attitude.

The second one was the contrary: both parties discussed previously to the mediation the nature and usefulness of the method and agreed to submit our issues to mediation. Nevertheless, the mediator did not say a word in all the joint meetings and the parties noticed she seemed distracted. When I asked her for her initial recommendations to move forward, she said to both parties: 'This is your case, I am only a witness'.

On the third occasion, a person came to my office very upset since he had a mediation process in which the mediator did not issue an award nor a decision. He said he was very disappointed in the mediation since he expected a more traditional dispute resolution. Of course, needless to say, when I asked him about the procedure in more depth, I noticed that none of the parties nor the mediator, had a clear or useful idea of what the mediation was about.

Knowledge of parties of the construction industry

Although there is controversy on this matter, in which there are people that consider that a mediator can solve any kind of disputes, while others think that a specialised mediator in construction gives better results, I personally think that mediators that participate in construction disputes must be familiar

with the construction industry and the construction principles and practices.

Concepts such as delay, disruption, force majeure, hardship, change of specifications and some other basic concepts on engineering and construction are essential not only for a mediator, but for any professional to understand and articulate with clarity their ideas in relation to a construction dispute.

Besides, knowledge of the matter increases the possibility of good participation by the mediator since he or she will not take time trying to understand what the parties are talking about and on the other hand will try to identify what are the critical aspects of the dispute for the parties to address in order to reach an agreement.

Fortunately, nowadays, it is not difficult to identify and contact construction specialised mediators all around the world. Organisations such as the International Bar Association (IBA), through the International Construction Projects Committee (ICP), and the American Bar Association's (ABA) Construction Forum are a wonderful source of specialised professionals and mediators from all over the world. Therefore, there is no need to take a risk by using a non specialised professional.

Timing of mediation in construction

In this book, many professionals have expressed the benefits and positive outcomes of mediation, which it is unnecessary to repeat. But in construction it is necessary to stress something: timing of initiating a mediation is essential in order for this method to become efficient.

For example, in the typical case of a contractor who claims additional costs as a consequence of extra work requested by the client who does not accept such costs, it is very possible that this situation would lead to different effects: first, that the contractor starts to be financially affected; secondly that he starts to think about suspending the works; thirdly the client starts fearing a breach and preparing legal actions; and consequently, the project is put at risk. This very moment can be stressful at some points but timely to initiate a mediation since parties are starting to suffer stressful thoughts that could lead to a breakdown of the relationship. In this case, the participation of a good mediator could not only help to solve the dispute but avoid further consequences of the conflict and allow parties to keep on working on future projects.

In this case, if mediation starts when parties are extremely angry with their counterparts, a very wise and efficient mediator that not only looks at the dispute but first draws the parties closer and encourages them to understand the other's position will be necessary.

Loyalty to mediation in construction

Contractors are considered in many cases as very obsessive and stubborn people that look for the last penny for their purposes. The reality is that, although there are companies that fit into this description, contractors take lots of risk during the execution of delivery of a construction project. On the contrary, clients do not often care about the contractor's interests, instead focusing on the project itself and its earliest delivery.

Therefore, it is usual that parties in a construction contract think of mediation not as a real method of solving disputes but as a method to discover all the pros and cons of their counterparts in the dispute, in order to obtain as much information as possible for the classic dispute resolution methods such as arbitration or litigation.

Therefore, parties need to be really loyal to the nature and concept of mediation, in order to give this dispute resolution method a real chance since one of the most important elements of mediation is the intention of the parties to reach an agreement.

Public works, private construction projects and mediation

Another thing to take into consideration is the nature of the construction project. In the case of private construction projects (where the owner and the client are not part of the government), parties have more possibilities to reach an agreement even out of the nature and scope of the contract since there are usually no legal barriers for them.

On the contrary, when it is the case of public works contract where the owner is an authority or a government entity, the public officers have to act in accordance to certain laws and regulations that can tie their will and decisions. In these cases, the mediator has to take into consideration the laws that rule their action besides the controversy itself, since an agreement that affects or potentially may affect any of the government officers can cause further unhappy consequences for any of the parties – including the mediator.

Conclusion

As can be seen, mediation in construction is a dispute resolution method with increasing acceptance as a consequence of the search of the industry for less aggressive, more efficient and less expensive ways of solving disputes.

As in every issue of life, many things have to be taken into consideration in order for this method to have real success: training and specialisation of

mediators, knowledge of the construction industry, will and good faith of the parties, and even the nature of the contract.

In any case, mediation is a fast growing and accepted dispute resolution system which allows parties in the construction industry to help construct and not destroy relationships for current and future projects among parties.

Using Mediation Techniques to Support M&A

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Many lawyers are now undertaking mediation training but have no intention of practising full-time as mediators. Some simply wish to explore alternative forms of dispute resolution or to prepare themselves to represent their clients at mediation however there is no need to restrict the benefits of a mediator's training purely to the dispute resolution arena. Quality training as a mediator will normally involve a rigorous analysis of the elements of negotiation and the development of new negotiation skills which can clearly be used in many other aspects of professional life and indeed where efficiently exercised may reduce the need for dispute resolution of any type.

A type of commercial transaction badly in need of improved technique is the merger or acquisition which it is well known often fails to deliver the anticipated benefits and may indeed prove to be value destroying. I believe that use of mediation techniques throughout the process could improve the odds of a successful outcome. In my experience a common problem that allows deals to proceed when they really should be stopped is that they take on a life of their own. So many people become involved in the activity and so much preparatory work is done that it becomes the general assumption that the deal will proceed and anything or anyone that stands in its way as perceived as creating a failure.

I think the most effective opportunity to put a brake on the project is at the stage of taking instructions. Professional advisers are involved in many more M&A transactions than their clients and yet often fail to provide the clients with the full benefit of their experience. If at the time of taking instructions the professional advisers concentrated on the interests rather than the

positions of clients in doing the deal then a more structured approach to the negotiations could be taken and so if the parameters of the interests were not met the client managers would in effect have 'permission' to walk away from the deal. Thus, the process would be much more similar to the taking of instructions and negotiation of the settlement of a piece of litigation.

It would however be very important that in taking instructions the professional adviser worked with the whole management team rather than just the instructing lawyer or a single manager. Within an organisation people may have a very different understanding as to why a deal is to be done: is one particular product key? Are there other assets such as manufacturing capability that make this deal so attractive or is the goal to achieve critical mass in a particular territory or market? It may be that the management team themselves have never prioritised the potential benefits of the transaction for if the manager of each unit saw some advantage in doing the deal he would vote in favour of it and there would be no perceived need to decide which were the most important elements, indeed one manager keen to do the deal might 'sell' the project to another manager as being particularly beneficial for his unit in order to gain his support while all the time believing that the true benefits lay elsewhere. All this has great significance in agreeing a negotiating strategy and the 'must haves' for concluding a deal. Conversely the lack of clear, prioritised 'needs' can make it very difficult for the negotiating team to structure the most beneficial deal and also of course it becomes extremely difficult for them to know at which point they should walk away. A proper consideration of the BATNA and WATNA would avoid this problem.

A further opportunity to put mediation skills into practice is in the negotiation of ancillary issues. Some people have suggested using a neutral to assist in the negotiation of the principal deal however unless the situation is particularly sensitive, for example a forced sale or one between related parties, I think that this is unnecessary and unlikely to be helpful although were more negotiators to take a cooperative and interest-based approach, that in itself would undoubtedly be helpful. The negotiation of ancillary matters however is rather different. Those entrusted with the task may be less used to negotiating and there is likely to be a greater sensitivity towards defending one's territory. Typical examples would be how teams or different staff benefits are to be integrated: the use of a neutral with mediation skills here could help ensure that all relevant elements are fully discussed and that decisions are made on the basis of the ongoing interests of the organisation. This may be particularly helpful where there is an imbalance in power between the parties or the particular negotiators. Just because the acquirer is larger does not necessarily mean that it has the best people, procedures or programmes and if the shareholders of both

companies are to get the full benefit from the transaction then this must be taken on board.

Where integration is to be particularly complex or requires to be conducted over a period of time there may be value in considering some form of dispute resolution board. (This subject is covered in more detail in another essay in this book). It may be helpful to have a specially trained panel to which disputes and concerns can be taken. As well as ensuring that similar issues are handled consistently and that the central plan is fully carried out across all parts of the organisation it will also relieve some of the pressure on individual managers who are entrusted with implementing policies that are perhaps locally unpopular. This will free them up to start building proper working relationships with their new team and to concentrate on implementation rather than having to fight unfairly personalised hostility. It would also be worth offering some basic training to managers in key roles in some elements of mediation in order to help them resolve potential problems at grassroots level and to work with their new teams to establish mutually acceptable processes towards agreed goals. By harnessing the cooperation and experience of all parts of the workforce it is much more likely that disputes can be avoided and a more successful enterprise built out of the constituent parts. People often overlook the combined expertise of the workforce as a whole in a merger. Those working within an organisation are usually very well-placed to see opportunities for improvement and if provided with the facts in an open and cooperative manner will often also recognise where difficult decisions have to be made and will be the more willing to accept them if they have seen that a proper debate has been held regarding potential alternatives.

The current process for M&A does not work: there is surely every incentive to try something new.

Tips and Hints

- In family mediation in particular there may be serious trust issues which makes it difficult for one party to respond positively to an initiative coming from the other. One question to try asking could be 'what do you think you need to do to give X confidence to be able to do Y?' Or 'what can Y do that would give you the confidence to do Z?'
- While parents may say they are focused on the interests of their children, when faced with a partner with whom they are in conflict they may find it difficult to remain focused. A possible question might be 'if your child were to be in the room now, what would they be thinking?'
- If participants in a family mediation continued to argue during the process than one approach is to ask if this is the type of argument they had during their relationship and, on being told yes, ask if they have found this way of behaving helpful in dealing with whatever the argument is about. Once they admit that this was not helpful you can propose laying down some ground rules in order to move forward.
- Many of the points made in relation to mediation in the construction industry are also true of intellectual property disputes: this is a very complex area of law and having someone knowledgeable of the subject can be enormously helpful in avoiding delay or loss of faith in the mediator who does not appear to the parties to understand their concerns. A speedy resolution of the dispute is attractive to all businesses but if patents are involved any delay can be value destroying to the principal assets, and this is particularly true if the product concerned has a long development requirement before it can be launched as the window to commercialise the idea may be quite narrow. Similarly if the product is likely to have only a short lifespan any delay may destroy the business opportunity.