MEDIATION TECHNIQUES

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Mediation Techniques

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**.

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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.

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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.