

NEWSLETTER

MEDIATION

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION



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IN THIS ISSUE

From the Chair	1
Editorial	2
Committee officers	3
IBA Annual Conference, Singapore: reports	
Diversity of cultural perspectives on mediation: keynote speech	5
Diversity of cultural perspectives on mediation: mediation in Australia	8
Using a third party to assist M&A negotiations	16
Asia	
Mediation in India	17
Europe	
Enforcing mediated settlement agreements in England	18
Enforcement of mediation agreements in Italy	23
Mediation in employment and labour law in Germany	24
Foreign investors, executive bodies and the resurrected Ukrainian Commission	27
North America	
Med-arb in Ontario	29
Can mediation become international?	32
Amanda's corner - An imaginary dialogue between Gandalf and Prospero on the question of mediators	37
Mediation – back to basics	42
The mediation of international business disputes	43
Our legal system is flawed	45
Settlement in international arbitration (and what this might mean for ADR)	47
IBA Mediation Subcommittee on the UNCITRAL Model Law on International Commercial Conciliation (MLICC)	
Update	49
Report	50
Questionnaire	56
Response sheet for questionnaire	59

FROM THE CHAIR

Worldwide acceptance of mediation rising

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The IBA Annual Conference held in Singapore in October impressively confirmed what most of you have already known for a long time: mediation is receiving growing attention and recognition as an alternative dispute-resolution technique around the world, particularly in the countries appendant to the civil-law tradition which so far has shown a more hesitant attitude.

The sessions organised (or co-sponsored) by the Mediation Committee were not only well attended by many delegates from traditionally mediation-friendly jurisdictions but also by participants from continental Europe (and Asia of course). Excellent speakers and moderators provoked lively and open debates and many of us took home a basket well-filled with food for thought.

For the first time our committee was responsible (or shared responsibility) for four half-day sessions. In addition to a programme on 'Mediation in aircraft accidents' (sponsored by the Aviation Law Committee) and a session on 'Pursuing and defending discrimination claims in the workplace' (main sponsor Discrimination and Gender Equality Committee), a panel consisting of Miguel de Avillez Pereira, William H Baker, Nikolaus Pitkowitz, Patricia Barclay and Joseph Tirado with Birgit Sambeth Glasner as Chair explored 'Deal mediation: the use of mediation in the course of M&A transactions'.

A further half-day session dealt with 'Diversity of cultural perspectives on mediation: face-saving, attitudes, systems, relationship to courts and other considerations'. This session, which was chaired by Karen Mills, particularly benefited from the keynote address made by Dato' Mahadev Shankar. Participants on the panel were Louise Barrington, Juliet Blanch, Ajmalul Hossain, Bronwyn Lincoln, Adedoyin Rhodes-Vivour, Kathleen Scanlon, Mercedes Tarrazón and Claus von Wobeser. The keynote address of the

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session is reproduced in this newsletter.

The committee also held for the first time a Mediation Luncheon which was attended by some 60 participants. During the luncheon John Richardson gave a status report about the work of our subcommittee on the UNCITRAL Model Law on International Commercial Conciliation (MLICC). The results of a survey conducted by the subcommittee are available on the committee website at http://www.ibanet.org/legalpractice/Mediation_and_Conciliation.cfm along with the subcommittee report. Please turn to pages 49-63 for more details. It is proposed that the specific issues of confidentiality, statute of limitations and enforcement of settlements be further explored at next year's IBA Annual Conference in Buenos Aires in the context of a session on 'Hot topics in mediation' which will also deal with further aspects of current interest.

Thanks to our Vice-Chair, Jon Lang, the number of national representatives is growing (22 at the latest count) and we certainly hope that before too long we have all major countries covered and are in a position with the help of contributions from the national

representatives to provide more insights into interesting developments in the various jurisdictions in this newsletter.

A further important and positive development in our committee is the formation of a new Subcommittee on State Mediation under the leadership of Margrete Stevens and Jack Coe. The subcommittee plans to organise a half-day programme for Buenos Aires. Another project planned for next year's conference is a half-day workshop on mediation techniques and already now I would like to ask interested speakers to contact either Patricia Barclay (patricia@bonaccord.eu) or Nikolaus Pitkowitz (pitkowitz@gmp.at) who will take the lead on this project.

The Mediation Committee will continue the tradition commenced by our Past Chair, John Townsend, to hold a Mediation Breakfast on the occasion of the yearly IBA Arbitration Day. Next year's event will be on 1 February in New York. Visit http://www.ibanet.org/conferences/Conferences_home.cfm to find out more. Please mark the date in your calendars now! I hope to see many of you then.

EDITORIAL

Welcome to the newsletter

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In his opening note to readers, the Chair of the Mediation Committee, Siegfried Elsing, remarks that the IBA Annual Conference in Singapore confirmed (as many already knew) that mediation is receiving growing attention and recognition as an alternative dispute-resolution technique around the world, and in particular in civil law countries where a certain degree of reluctance was previously shown to it. This second issue of the committee's newsletter for 2007 is hopefully demonstrative of that gaining of popularity as it covers among other things topics such as settlement, enforcement and the use of mediation in labour and other disputes.

In this issue, contributions from both civil and common law jurisdictions offer the reader an interesting perspective on why mediation is gaining popularity and how it can be used effectively in commercial and other disputes. Finally, the contributions demonstrate a consistent dedication on the part of certain committee members and others, who so generously give their time and know-how to the continued development of this burgeoning field.

On behalf of the committee and myself, I thank these individuals for their generosity and commitment.

I hope this most interesting issue finds you well and take this opportunity to send you my best wishes for the holiday season.

Bonne fin d'année!

Contributions to this Newsletter are always welcome and should be sent to the Publications Officer, **Babak Barin**, at the address below:

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Amanda's corner

An imaginary dialogue between Gandalf and Prospero on the question of mediators – criteria for appointment ... and for reflection?

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Gandalf and Prospero: mythical men well acquainted with mindfulness and reflection on issues emerging from disputes, control, influence and risk, and also mediators. What might they say about the challenge of choosing a mediator to guide people to productive resolution and agreement?

Gandalf: I was asked a very interesting question recently by a lawyer about choosing mediators. He told me how it had all seemed very straightforward until a recent mediation which had been very disappointing. He had looked foolish in front of his client who he had persuaded with some difficulty to attend the mediation in the first place. After the mediation, his client had said 'I thought you said this guy was the bee's knees!' This has resulted in an atmosphere between them.

Prospero: How did you answer him?

Gandalf: I asked him what was good about the mediator – which surprised him a bit. He said that he had a good name, everyone says he is wonderful, he is a very busy, well-known senior lawyer and has been involved in some pretty amazing cases. The mediator is 'smart, charming and earns a fortune'.

To which I said 'is this someone you admire?'

'Absolutely!' said he, slightly missing the point, and went on to say 'I thought he would manage my client, who can be such a pain!' To which I said 'were you hoping for someone to help you control your client?'

Prospero: Hmmm!

Gandalf: To give him his due, he stopped to consider for a moment and then I asked him 'what went wrong?' He said that the mediator was pushy and seemed irritable, impatient and a little too frank about the strength of the case, and whilst his client had seemed quite well behaved in the opening session he soon complained once they returned to their room. The lawyer knew it was going downhill when his client said 'who does he think he is?'

Then I asked him how he came to choose that mediator in particular? Before I tell you what he said, what do you think? What are the criteria on which representatives appoint mediators? I have a strong sense that there may not be a full interconnection between those criteria and the positive contribution which the mediator actually makes on the day or perhaps more importantly, the experience that the parties have on the day.

Prospero: I expect there are some criteria of which the appointor is aware when making the choice and some that sit well below the surface of conscious choice.

I imagine the predominant ones are that the mediator has a strong presence in the market place; that she or he is already known to the appointor either through previous experience in a mediation or through recommendation by a colleague.

I think the question of profile may be important but I suspect that is as much about their legal expertise in a specific field as their expertise in mediation and the former might indeed be more influential in the selection process.

Profile is likely to be important to an appointor and that must include success or track record. So I suggest the predominant indicators of a good mediator might be profile, expertise in the relevant legal field, reputation and track record.

Gandalf: Yes, but what do we mean by that? What are the sources of such a perception? Perhaps this relates to coverage in the Legal 500 and/or Chambers Directory – these are based on independent research after all. But we should bear in mind that even though the researcher will indeed conduct confidential enquiries the mediators themselves are likely to have submitted material, which is - quite naturally - self-serving. Also, the researchers can vary from year to year between experienced journalists specialising in the field and less experienced researchers in terms of their knowledge of the mediation sector. It might be fair to say that positive listings over some years in both directories would create a fair expectation of quality. Would you agree?

Prospero: In a sense, yes. But this is a narrow view, some might even say lazy, if the expectation is that by going for particular individuals a stellar performance is virtually guaranteed, thus reducing the risk that the party/client may react badly to the appointor's choice. So it's an insurance policy.

Gandalf: Indeed so. However, a careful reading of the editorial copy in these publications makes it clear that each mediator is valued for particular reasons of an individual nature. So it simply cannot be sufficient to guarantee a good experience to select on that basis only.

Prospero: Another point which occurs to me in this area of mediator selection is the reputation in other fields, not just as a mediator, which any individual may have. So if the mediator is

- a lawyer;
- a barrister;
- a QC; or
- a (retired or former) judge;

might that bring further comfort/security/insurance of the kind we have mentioned? And, is there a scale which increases exponentially as one goes down the list?

Gandalf: I think you are touching on some of the unconscious criteria that influence the choice of mediator. I wonder if my questioner was influenced in this way since he so admired his choice? It is somewhat understandable to seek to engage someone who is more experienced and with a higher profile especially if you have in mind that they should give opinion. I suspect there is a cost issue underneath that somewhere too.

Prospero: What do you mean?

Gandalf: That you only have to pay half for 'an opinion' and can't possibly afford someone more expensive and for a whole day. If you think about it, it is quite a good deal. And if you get a retired judge then perhaps you might think you have a very cheap 'day in court'.

It also raises the question of just how much of a good/specialised lawyer a mediator needs to be. There seems to be an increasing impression that appointors think they want a mediator especially knowledgeable in/qualified in the area of law in question. The appointor perhaps has a strong sense of conviction in his own legal analysis and believes that a specialised mediator will agree with him and 'lean' on the other side.

Prospero: So an appointor with a strong case, or who thinks she has a strong case, will want a legal specialist mediator, and vice versa?

Gandalf: I suppose that may happen. But of course the specialist mediator may very easily take a different view, in which case the strategy has backfired, and may also decline to express a view at all!

Prospero: So it would seem that a more effective approach – so far as the process of mediation is concerned – might be simply to ensure that the mediator is able to understand the issues between the parties, and that it doesn't really matter whether the mediator is able to be in the position of a judge having heard all the evidence and the legal submissions in any dispute. It would be odd if parties having agreed to mediate actually thought they wanted that 'judge' persona.

Gandalf: Very odd indeed but undoubtedly many parties do. We have seen how they may be sorely disappointed. If the 'understanding' mediator is appointed and a settlement is reached, what will the appointor value at that

point? We will be coming to that I expect in a while.

Prospero: Yes, but let's just first of all look at any other factors which tend to affect mediator appointment. One obvious one is prior experience – the lawyer in question has used the mediator before, knows him – this can see off a lot of the 'insurance policy' worries which we have referred to.

Gandalf: I understand that, and it is hard to fault it, because the decision to re-appoint must follow a positive experience and reaction to what the mediator actually did rather than what the expectation was. But in practice it very often happens that a mediator proposed by one side will be rejected out of hand as a tactical manoeuvre by the other side or worse for them – in the mistaken belief that expertise is a better insurance than experience in mediation. Old adversarial habits die hard! I also think the issue of habit is a dangerous one if the re-appointment of the same mediators is only because of familiarity. For sure, it will become a problem. If you seriously want an insurance policy then you need to pay attention to the leading negotiation theory which says 'separate the people from the problem.' (Ury & Fisher) If you constantly choose a mediator to suit the legal problem then there will be times when he or she doesn't suit the people in the room. In fact it might be said that it will be more by luck than judgement that a mediator is a good choice for the people. That is a very big risk as my young friend found out.

Prospero: Are you saying that the mediator should be matched to the people?

Gandalf: I would have thought it would reduce the risk of many things going wrong. The latest research asks 'what if the people are the problem?' We know that in the end it is the people who agree to the deal. I would have thought it was very risky indeed to ignore that – there is enough evidence to say it is very real one.

Prospero: Your point about tactical manoeuvring is a good one. Yes it is true that there remain party representatives who include that sort of game playing in the appointment process. But let's look at another positive criterion. Let's continue with the matching the mediator to the people idea and particularly

the notion of style. I think this gets more to the heart of what mediation is all about – most of the factors we have referred to already sound more familiar in the litigation rather than the mediation context. I'm not sure you really want to think about mediator appointment in the same way as you would the appointment of a leading Counsel to present your important case at trial – in that case the legal reputation would be paramount, and it would be a bonus if the participants hit it off on a human level.

Gandalf: That seems to be part of the people/problem consideration. I also think that style goes with tone. Are you saying that style is the most important factor in mediation appointment? Or perhaps more that it isn't and should be? Perhaps even to combine some of the safety factors with giving yourself the best chance of getting the mediator behaviour that you will later look back on as valuable.

Prospero: Yes, I think that's right. But first I've thought of another of the 'safety' factors, which lead to preference at the appointment stage. This is the notion of the settlement rate or percentage. Actually, I think this is a bit of a red herring in practice but it is often spoken of. It seems to have real importance in the way US mediators market themselves, but less so in my experience. In fact I can't think of a time when I have been asked this directly! Perhaps the English reserve ... but just as well, as I am a believer in the proposition that if the mediator cares too much about settlement or not settlement, the parties soon get wind of this and feel no responsibility themselves to find a settlement. So, in a sense, caring about settlement rate is counterproductive for everyone. And of course, we know of parties who were incredibly pleased and appreciative of the job the mediator has done even when there has been no settlement! So just what are those nebulous characteristics/ways of behaving that cause people to say that they made a good choice in retrospect?

Gandalf: I think this might be a good point to talk about the notion of 'tone' because although I think it is part of the mediator's style it is more about what they do rather than what or who they are. Would you agree?

Prospero: Indeed.

Gandalf: Infinitely flexible?

Prospero: Yes.

Gandalf: To your mind does it include choosing the right environment, the way you mix people, adjusting the approach to suit the people in the room and that might mean being different in each room whilst remaining constant?

Prospero: I think that is very important. And had your questioner's mediator been more alive to 'tone' he might have had more success.

Gandalf: What else does it mean? Choice of language? Knowing when to use expert knowledge and when to keep it out of the conversation? Pushing things along at the same time as slowing things down – a bit like syncopation.

Prospero: I like that. Don't you think it might be a bit nebulous for some though?

Gandalf: It might be new for many but I think we are going to hear a lot more about tone and style and how important they are and how to manage them.

Prospero: Do you think that is something parties actually experience? Do you think it is reflected in the feedback, for example?

Gandalf: Now there's a point! OK, let's think of a few things that parties might identify as influential when looking back at how a mediator performed. It is absolutely clear that it is quite hard to identify these in advance. So if the mediator feels that this or that style factor might be likely to produce good feedback the problem is somehow to get that into the minds of the appointors. To some extent the directories are helpful here, but they would be more help if they could produce more detail than the few lines they have space for. Perhaps any idea of expanding access to feedback may be helpful; at present there are the directories, and then the mediators' own biographies, which often include feedback sections. I think my argument would tend to be that appointors would do well to have regard to style and feedback factors as being more likely to influence how they will view their experience in retrospect than any apparent qualifications.

Prospero: I agree. Here's an example – hugely important in my view. (So simple, it might be overlooked whilst people concentrate on the

rarefied detail of legal analysis and perhaps become more entrenched as a stuffy day drags on).

'the mediator succeeded in getting people to actually talk about money and terms of settlement at a reasonable stage in the day rather than at 6pm.'

There is so much implied into such a statement, but particularly:

- an improved experience for the client;
- a better settlement;
- a better relationship with the client.

Gandalf: I think we need to be more specific about criteria if we want people to use them. And we should remember that we do have some leading research on the topic* I am not sure that appointors have taken on board how important the experience of mediation can be to keeping clients and encouraging them to put more business their way. They only need to remember that even clients who win in litigation are frequently very unhappy either about the experience or about the level of costs they have to bear even when they have won! I suspect that denied or acknowledged, it must have a bearing on future business with that client. Just imagine if win or lose the experience of settling disputes was always a positive experience and how much that might affect client loyalty? It is such a shame that this is not sufficiently appreciated.

So, can I suggest a useful criterion arising out of that feedback as I see it?

Prospero: Please do!

Gandalf: The feedback suggests a few things as you say. Principally, a better settlement and a better experience. It also implies, managing momentum, rapport building and getting people to start talking to each other sooner than later.

Prospero: Indeed!

Gandalf: And to achieve progress in that way I suggest the mediator needs to have a good understanding of the people in the room, the commercial issues and therefore be able to quickly convince the parties that the mediator has understood their points of view so that the parties can move to negotiation sooner. Patience, persistence and a sense of what will

satisfy the parties so that they can move to talking about a deal. Some people call it 'quick on the uptake' which is frequently mistaken for expert knowledge.

Prospero: I am certain those skills are essential.

Gandalf: So in this case simply by facilitating a momentum of communication, by presence and paying attention, attracting the trust and commitment of both sides, by discouraging game playing by the example set, by avoiding settlement by exhaustion, the mediator has succeeded and will understandably be re-appointed. This success has nothing to do with legal track record – it is about commitment, energy, enthusiasm, persistence, patience and persuasion. Perhaps a little humour has been required to lighten moods into optimistic visualisation of life without the dispute!

Prospero: Absolutely so. Shame they don't teach those things in Law School.

Gandalf: So what shall I tell my lawyer? How do you know if a mediator has those skills? Are you saying that you have to look beneath the superficial meaning of sound bites of feedback?

Prospero: Well you might tell him that if he wants to impress his client next time he is more likely to succeed if he chooses a mediator who has the skills to engage his client on his or her own terms – that is highly unlikely to be with just legal nous especially for a commercial client. And the best way he might do that is to look at the feedback from previous mediations carried out by the mediator. Does the feedback concur with independent sources such as Legal 500 and Chambers Directory? If the mediator has been recommended, then ask the referee about the style of the mediator and how everyone felt at the end of the mediation. What amazes me is why no one ever rings a mediator to ask important questions. Even more surprising, very few mediators are keen to speak with the clients prior to the mediation.

Gandalf: Why do you think that is so?

Prospero: Possibly some echo of legal etiquette and possibly lack of time. That is what is so refreshing about mediators who spend time in preparation – of themselves and everyone attending the mediation. It helps momentum on the day and helps the mediator identify the issues; to plan the day.

Gandalf: What if you have twenty people around the table?

Prospero: Then talk to the decision makers and those of whom you get a hint that they might need more 'attention' from their lawyers.

Gandalf: You mean focus on the people not the problem?

Prospero: Exactly!

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*In 2006 Amanda published the results of the first research project into the skills, attributes and behaviours of effective mediators, a qualitative study which took two years to complete and based on data from senior mediators and appointors with joint experience of over 2500 commercial mediations.

CORRIGENDUM – In the last issue of Amanda's Corner, certain references to the United Kingdom should have read as England & Wales. For more details in that regard, please contact Amanda Bucklow at the address above.

This Newsletter is intended for lawyers interested in, or involved in, laws and regulations as they apply to mediation. Views expressed are not necessarily those of the International Bar Association or its officers.