# International Mediation – The Art of Business Diplomacy

by
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With a Foreword by
Lord Hurd of Westwell

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# Chapter 1. The Potential for International Mediation

*Someone who hails from the business world – with its emphasis on 'let's get the deal done', on behaving constructively, on finding ways to resolve impasse – simply isn't prepared for the ambivalence over whether or not to settle that seems ingrained in the typical dispute. One minute, the client appears interested in what can be worked out; the next, he's ready to go back to war. An atmosphere of mistrust hangs over the proceedings, poisoning the climate for successful negotiations. The sense of solubility that pervades the deal context – awareness that to reach a mutually satisfactory arrangement you may have to help the other guy solve his problems – is notably absent where a dispute is concerned. And too often the players stand around shuffling their feet, afraid to initiate talks and thereby convey weakness, while waiting in vain for the other side to blink.*

James Freund, *The Neutral Negotiator, New York.*

*In litigation you lose control. With mediation you keep control of the process, particularly on costs. Mediation clearly has a significant role to play in international disputes.*

Hans Peter Frick, General Counsel, Nestlé Switzerland.

Mediation is a powerful art and structure bringing together into an open dialogue the architects and implementers of the commercial process that is in crisis. When disputes are left entirely to the legal community to resolve – it is like asking structural engineers to fix a major defect on a suspension bridge without letting the engineers see the design plans and talk to mechanical engineers so that they can understand the options available to investigate and come up with solutions. Fixing a default on a suspension bridge would obviously involve a number of disciplines and the solutions would not focus solely on the defect but also on consequences of action and non-action.

In contrast, when commercial companies fall out because there is a default in their relationship – for example, they have not been paid or there is a conflict over services offered, they will, having failed to resolve it, often hand it to a legal team to find a legal solution based on entitlement and rights. Others who have responsi-

bility and value to add to the resolution of the problem step back or are excluded from the process. The result is that the problem tends to be only viewed from one expert's view, the legal analysis. Commercial, technical, people expertise may be excluded or is certainly not central. With this approach the whole 'bridge' between the parties may effectively be closed, without the commercial community having an effective and fair route to resolution.

The experience of the authors in the last ten years is that resolution of complex commercial problems requires many layers of understanding and approach. The more complex the problem, the greater the need for a broader and flexible approach to solutions. In international disputes the problems are compounded by distance, different cultural understanding, political interference, changing commercial agendas and the many other potential hazards that can drive on to this metaphoric bridge.

Given the difficulties that are particularly present in international disputes, it is not surprising that to adopt a wholly legal approach to their resolution often brings enormous frustration and disappointment to all parties. These include:

The time taken to achieve a workable result

The result not meeting expectations or predictions

The time and costs involvement do not match initial expectations

The lack of commercial and technical understanding can be frustrating to principals.

Ironically, the lawyers often share this frustration on behalf of those involved. However, like their clients, they may be caught in what negotiation specialists have described as the 'negotiator's dilemma' – open dialogue and conciliatory approaches may tempt the other side to greater demands in a *high-risk* process. Until the growth of commercial mediation practice, lawyers lacked a systematic professional technique to address the problem. This may explain the realisation by some very experienced jurists that mediation has so much to offer all those engaged in assisting international corporations solve their conflicts.

> *...and in the same way as I have had my mind changed about litigation in favour of arbitration, my long devotion to arbitration is now being eroded by the realisation that the future will belong to ADR.*[1]
>
> Sir Michael Kerr, past President of the London Court of International Arbitration.

1 *ADR = Alternative Dispute Resolution. Mediation is the most common ADR Technique.*





## Mediation: Bridging the Gap

Getting back to our metaphor of the bridge, mediation itself provides a new form of conceptual suspension bridge between managers or advisers in conflict. It offers an interim structure to open up a traffic of dialogue, marks out lanes over which communications can pass with less risk of head-on collision and adjusts the traffic flow to give users a sense of managed risk, momentum and relative safety from which to explore the various views from the bridge. The good mediator needs both the skills of the project manager, the vision and maps of the bridge designer, yet also the inherent respect for the creativity of principals, experts, advisers once the mediation process unleashes an effective flow of communication.

In its combination of flexibility alongside a degree of disciplined form, mediation is especially suited to the diversity – cultural, managerial, technical – of global business traffic. It renews time honoured ancient processes of community tribal adjustment at a 21st Century level.

Of course mediation is not a panacea. It cannot on its own overcome deeply-rooted intransigence or irreconcilable differences between businesses or other organisations in the global community. The alternatives to mediation however – arbitration, litigation, economic sanctions – are much blunter and costlier in approach and outcome. They need mediation as a complementary 'fast lane' when traffic conditions allow. The more businesses experience the difference and commercial benefits of mediation, the sharper will be the pressure on managers to opt for this alternative track or fast lane structure.

Those who have experienced mediation in international disputes attest to its effectiveness across a diverse range of international conflicts. A mediator can smooth out the process of managing difficult or tough communications, for example between joint venture partners who have been unable to agree a critical commercial issue between themselves. The mediation process can also provide a formal structure and mode of operation for crystallising, debating and resolving an intractable legal battle on complex legal issues between two or more corporations – even when they may previously have invested millions in the formal process of law or arbitration and are close to (sometimes even beyond) the court door before they seek the assistance of the mediator. The case summaries reported throughout this book are all real cases, all mediated by the authors or by other CEDR mediators. All but one reached successful outcomes agreed by the parties despite earlier impasse between sophisticated managers and advisers.

The challenge is to increase the extent of mediation's use so that there is more experience and therefore a greater body of people to support its growth. For this to be

achieved, more advisers and businesses need to test its potential. Alongside this the international mediation community has the responsibility to research mediation experience objectively and to use the results to advance training, scholarship and practice. We hope that this text will form a groundbreaking foundation on which further experience can build to enhance global business diplomacy in the 21st Century.

## Mediation Know-How

To operate effectively in the global market place requires managers and professional advisers to apply new management tools or at least to adapt well-tried ones. International commercial mediation – use of a trained third party to facilitate and assist international negotiations – is still a relatively new technique of business negotiation and dispute resolution practice. However the potential and power of successful mediation interventions, along with recent growth trends in the use of this technique, suggest that it is likely to emerge as a key mechanism within the activities of new generations of international managers and professional advisers. In this book we aim to demonstrate clearly international mediation in practice, explore when and how it is best used, and provide the beginnings of a practical theory to explain why mediation adds value to business negotiations on the one hand and legal negotiations on the other.

Two special interests have motivated our writing of this book. First, to share our growing experience – as international mediators and as advisers, trainers and campaigners for international mediation. Business and legal mediation is now a more common subject of legal textbooks, but there has been little attention paid to the special characteristics of international mediation practice. We seek to share our experience in order to encourage broader use of this technique and to provide a benchmark which can be tested against future experience.

Second, we wish not just to describe the mediation process but also outline how and why it works. Because of the inherent flexibility of the process, particularly in the complex context of international work, it is vital that mediators and advisers understand how to adapt mediation to the specific circumstances of a case. It has been said that 'there is nothing so practical as a good theory.' We hope to provide in this work concepts about mediation practice which can assist as guides to advisers and managers so that they can adapt the mediation option to suit their specific needs and the circumstances of particular cases.

International commercial mediation practice has developed out of the work of creative lawyers seeking to avoid for their clients the costs and expense of formal,





traditional processes. Knowledge of how and why mediation works, however, can allow business managers to exploit the process to add value to direct commercial negotiations with their business partners, suppliers, customers or other business contacts and stakeholders. By unravelling in this book the mystique sometimes associated with mediation practice, we hope to bring mediation more into the mainstream of management know-how and action.

## The Recent Growth of International Mediation

Global business diplomacy by professional mediators owes its growth to the two great converging forces of supply and demand – creative lawyering and cross-border trading.

## Creative Lawyering

'Let's kill all the lawyers' as a simple commercial slogan goes back to Shakespearean times. Businesses in difficult conflicts need lawyers. But lawyers, as with all professional services, need to adapt to survive. Mediation owes its growth to lawyers searching for alternative, systematic approaches which will streamline and simplify the management and resolution of conflict.

Campaigning for such a process change can only be effective if other advisers and clients learn the techniques and if legal systems can also adapt. Promotion of the process and culture change to reduce adherence to traditional adversarial methods – these are necessary correlates of mediation finding an effective place in the lawyer's toolkit for resolution of conflict. The promotion of mediation for 'domestic' disputes has therefore been a vital foundation for mediation growth, later extended to international business lawyering.

Mediation has its origins in ancient practices. The *wassit* as facilitator in Arab business relations, the community elder as mediator in Chinese society, the judge with a duty to promote settlement in Swiss, German and Japanese practice – all of these attest globally to long recognised benefits of third-party facilitation as an alternative to adjudication in defusing unnecessary conflict and overcoming deadlock.

In our experience these methods rarely represent professional mediation at its best so much as 'primitive' informal settlement practices. They rely on encouraging settlement either by way of exhortation to the parties or by giving an early indication

to the parties of the way the adjudicator is inclined to decide the case, should it proceed.

Such techniques are now replaced by a more comprehensive array of recognised skills and tactics available to the mediator to assist negotiations. These are techniques which are closer to the arts of international political diplomacy than to legal culture. Much has been learnt over the last 25 years from the 'shuttle diplomacy' of international politicians such as U.S. Secretary of State, Henry Kissinger, from the Norwegian diplomats such as Terje Larsen and Mona Juul who helped broker the Oslo Agreement and more recently U.S. Senator George Mitchell who chaired the Northern Ireland peace talks process.

The process is also informed by more sophisticated modern knowledge now available on negotiations, group dynamics and decision-making. Most importantly however within the last two decades – particularly in the common law jurisdictions seeking to avoid the costs and delay of the adversarial legal system – there has developed a significant core of practical experience in mediation of commercial and civil litigation actions. This experience has provided the basis for more advanced training of mediators and of advisers which is also gradually extending into international practice.

Apart from the growth internationally of non-profit organisations such as CEDR, international arbitration centres have been increasingly willing to extend their service offerings to include mediation and other ADR (Alternative Dispute Resolution) techniques (*see* Appendix 1). Alongside this, leading international law firms are also recognising the need to adapt their professional practice to incorporate mediation contract clauses, advice and advocacy.

The pace of professional adjustment to new service technology is often slow. However it has been speeded up in those jurisdictions where the courts have begun to direct cases into out-of-court mediation efforts – 'court-annexed' or 'court-referred' ADR. In directing cases into mediation the judges are also recognising the potential value of mediation to achieve faster and sometimes better settlements than the courts can offer by traditional methods. For example by 1996 the Commercial Court in London, 60% of whose cases are international, had adopted robust Practice Directions which gave its judges the power to direct litigants into ADR proceedings. It has increasingly done so, fuelling the growth of international mediations and awareness in London professional services. By 1999, ADR directions were part of the entire English civil justice system.

This development was not limited to the English system or even common law jurisdictions spawned by the English system. Similar directions by the end of the





20th Century were in place globally in countries such as Argentina, Australia, Canada, France, Greece, Hong Kong, Israel, New Zealand, Singapore and the USA.

Mediators and creative lawyers were by and large seeking to tackle only domestic challenges – logjams in national courts and a crisis of confidence in the effectiveness of the adjudication/professional lawyering process. However this movement to oil the wheels of national systems has been caught up in an evolution of even more profound social consequence.

## The Global Economy

The 20th Century has seen an exponential growth in the internationalisation of products and services, not only the multinational companies but also companies exporting regularly, or providing insurance or financial services across borders. Alongside and related to this, is the increasing impact of new technology facilitating global production, distribution, services and culture. In its turn this global marketplace drives the need for flexibility and responsiveness in business and consumer relations, and equally throws down a challenge to governments and legal systems to offer matching flexibility and responsiveness in legal systems and dispute resolution mechanisms. The trend to mediation growth is itself part of a deeper and broader rethinking of the role of international law, legal systems and corporate governance.

These changes are reflected in the need to find or train more 'international managers' to service international business or business relationships. Such relations are underpinned by legal structures, particularly contractual mechanisms, which in themselves have be addressed.

Traditionally international contracts have provided for negotiation by senior executives as a first and final negotiation stage to resolve disputes in joint ventures, distribution, licensing and similar long-term arrangements. If the negotiation mechanism is ineffective, international contracts have attempted to find a way around the difficulty of national courts and legal systems by a referral to international arbitration – judgment of the issues by a privately-appointed tribunal of one or three persons.

In international arbitration too, the pressure to respond to the needs of international businesses has been apparent. National governments have increasingly given recognition to the importance of this privatised alternative to national justice systems, both by restricting in national laws the ability of parties to overturn the arbitration clause in national courts, and by signing up to international conventions to ease

the enforcement of international awards in national courts. These processes are still continuing in the development of international arbitration practice.

However arbitration itself has largely mimicked lawyer litigation habits of formalism and adversarialism. Its core purpose of resolution by judgment has tended to clash with the need for flexibility and speed required in the global economy. Contract draftsmen therefore increasingly resort to a mediation procedure to 'fill the gap' between negotiation and arbitration contractual mechanisms.

Finally the demand for flexible legal processes extends beyond the needs of individual businesses. The global economy has also spawned global trading and economic and political blocs to smooth the path of international trade. Mediation is also increasingly finding its way into the legal structures and practice of these organizations. Today, the European Union and other regional trade bloc regulations have included mediation process requirements. At a global level the World Trade Organisation's dispute settlement procedures include a mediation potential for disputes on economic issues and principles which now transcend national sovereignty.

## Global Mediation Practice

This convergence of creative lawyering and global economy is by no means an obvious or even development. There is still a significant mismatch between the development in national legal systems of mediation services and skills and the needs of the global business and global politico-legal community. We hope this book will assist in the profound developments still to take place.

We wanted this work to be intensely practical, so we have asked lawyers and managers from a number of international companies to share their experiences with us, both in interviews and in a questionnaire survey. Their views and experiences are incorporated throughout this work, in addition to the experiences and views of those with whom we have mediated at an international level.

In addition we have tried to answer typical questions posed about mediation. We intend to distil and present the best of practical experience of international commercial mediation. We hope this will encourage greater use of mediation by international business and its advisers, but also provide a platform from which all of those engaged in international disputes can enhance their practice and enter debate with us on how best to continually improve that practice.





**The most frequently asked questions in the field of international mediation:**

- How does it work?
- How can it work for an effective, enforceable outcome if it is a non-binding process?
- How does it differ from international arbitration?
- What is the practical experience?
- What are the skills of the international mediator?
- What is the role of the lawyer and the commercial manager?
- How long will it take?
- How much will it cost?
- What is the likelihood of success?

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arbitration, which essentially requires a third body to decide on an outcome, and mediation which essentially facilitates a party re-evaluation of the issues in a commercial context to lead to an agreed and binding party-controlled outcome.

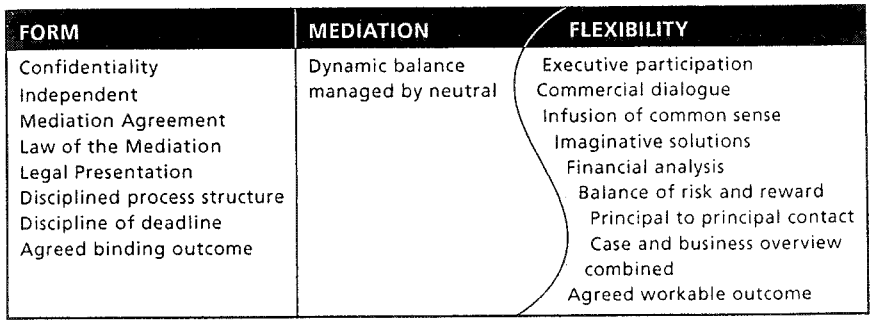
In all these circumstances parties and mediation organizations have to learn to treat preliminary matters, particularly choice of mediator, as themselves issues for a mediation process requiring the same skills and sensitivity as a mediation of the substantive case.

We predict that international mediation will grow rapidly because its flexibility and project management potential is particularly suitable for the complexity of international disputes and cost-effective in comparison to existing alternatives. Case selection and entry to mediation will become a less critical issue, and current lack of awareness of mediation will be overcome by court-annexed and contract developments. As the process becomes more established, it is equally important that the mediator community can sustain the quality needed for this regular practice tool.

# Chapter 4. The Mediation Framework – 'Form and Flexibility'

*There is in our work as mediators, when it is going well, a peculiarly American blend of learned structure and conventions, and improvisation strongly supported by talent and intuition. It is jazz: There are a few orthodoxies and a lot of ad hoc ensemble invention.*

Howard Bellman, US Environmental/Labour Mediator.




There are a number of issues in terms of legal and procedural framework to be considered when advising on the use of mediation as a tool for resolution of an international dispute. These include the following:

- Design of process;
- Confidentiality;
- Law of mediation agreement;
- Termination of the mediation;
- Impact on other legal processes;
- Role of commercial managers/lawyers/other experts;
- How long to prepare – pre-mediation work;
- How long for the process;
- Where to conduct the process;

- Documentation;
- Estimate of costs of process;
- Authority to settle – necessary steps.

### Process Design

If you are working with a mediation organisation it will have a blue print and guidelines for the mediation process. An example of the main elements of such a framework can be seen in Appendix 2. This covers most of the issues outlined in this chapter. In more complex, multi-party cases there may be a need for process design to be negotiated carefully as a first phase of confidence-raising entry into substantive negotiations.

### Confidential and Without Prejudice

Mediation is often described as a 'safe haven' to explore opportunities for settlement. This requires the parties to have confidence that what they say in mediation to each other by way of compromise suggestions and what they say to the mediator in private sessions are treated as confidential. In many common law jurisdictions negotiations in the spirit of compromise are protected from disclosure particularly if the parties contract with each other and the mediator to preserve confidentiality. In such jurisdictions there is likely to be case law to support the statement that the mediator cannot be required to divulge confidences made in the course of mediation, nor can parties present evidence of what was said in the mediation.

In a jurisdiction – some civil law countries – where compromise negotiations are not so clearly protected the parties should consider whether this restriction would preclude them from having negotiations. If not, they should treat the mediation as an extension of the negotiation process – which is what it is – provided a third party to negotiations has the legal protection afforded to the direct negotiators.

If there is a problem of a less favourable legal environment, the parties should consider whether they would prefer to opt for a mediation agreement that is governed by the law of a jurisdiction that protects confidentiality and ensuring the mediation takes place in that favourable jurisdiction. This should also extend to selecting a mediator whose training and professional code of ethics supports adherence to mediation confidentiality.





There is also the issue of use of documents or other evidence produced at the mediation. Typically mediation agreements and general law would distinguish between documents created specifically for the mediation process which can be protected from later disclosure in legal proceedings, and documents contemporaneous to the dispute which evidence factual and technical issues. The latter category of information will not be protected from disclosure in arbitration or the courts, if this information would in any event have been admissible and required to be disclosed. If in doubt parties may use the protection of mediation confidentiality to disclose a document to the mediator only.

The mediation is intended to be 'without prejudice' to any party's right to continue or pursue legal proceedings if the case does not settle. This is an essential feature of mediation to assist the parties by providing a legal cloak of safety over the 'no risk' aspect of mediation discussions and settlement offers. If the case is a court-referred mediation, the court in some jurisdictions may however keep an overall view on proceedings or the costs of the mediation may be subject to later judicial direction. Also mediation may in some instances be an essential step under contract procedures before a court will permit proceedings to be initiated.

Absolute answers are not available on many of these questions. As a new process mediation case law or statutory protection is still evolving within and across jurisdictions.

### Law of the Mediation Agreement

The law of the substantive contract may be deemed to govern the mediation agreement, unless otherwise specified. It is often simpler to have the same governing law but it is important to consider if this will have any undesirable results in relation to confidentiality as previously discussed. A mediation agreement should also normally provide that any settlement will not be legally binding unless and until it is reduced to writing and signed, to avoid scope for misunderstanding over oral agreements apparently reached in the process.

### Termination of the Mediation

The essence of mediation is that the mediator cannot impose any settlement on the parties. The parties will want to define the mediation so that it is clear when the me-

diation is finished and a mediation agreement will provide for termination at any or all of the following points:

- A party withdrawing from a mediation with or without notice; or
- A written settlement agreement is concluded; or
- The mediator decides that continuing the mediation is unlikely to result in a settlement; or
- The mediator decides that he should retire due to ethical concerns which may be covered in a mediators' code of conduct.

It is common practice for mediators to make contact with parties after an unsuccessful mediation. The mediator or parties should make clear that such communications are intended to be covered by the appropriate provisions of the mediation agreement *i.e.*, confidential and without prejudice.

### Stay of Arbitration or Litigation Proceedings

Where the parties are engaged in the legal process they can agree to stay further steps during the course of the mediation process, or they may wish to continue. If legal proceedings or arbitration have not been commenced they can agree (subject to the general law of the jurisdiction allowing this) to withhold action subject to avoiding problems with legal rules on time periods within which legal proceedings can be started. It will depend on the jurisdiction, and on the tactical deployment of arbitration/litigation as to whether there is any disadvantage to proceeding in one or other manner.

### Record or Transcript of Mediation/ Mediation Outcome

The nature of mediation as a facilitated negotiation makes it inappropriate to keep formal transcripts of the proceedings. If there is a settlement then the mediator and parties should ensure that the parties prepare a written agreement and take such other steps as appropriate to ensure a workable settlement. This should be done as soon as possible, preferably at the termination of the mediation itself.

Where there is no settlement, the parties may want to request that the mediator prepare a non-binding written recommendation, on terms of settlement. This generally will not be an attempt to anticipate what a third party body would order but





rather would recommend a settlement that the mediator believes the parties may be prepared to endorse once they have had time for reflection. Where one is dealing with a government body or state owned entity, the parties may want to agree that the mediator makes a clear recommendation. This can help a party 'sell' the agreement to senior managers or within the context of an audit trail. In some cases, the parties have wished the mediator to go further and state in writing, for example, that the agreement is a 'reasonable' settlement for that body to enter into.

*Arbitration route*
*In one case mediated by the authors, an Asian public sector organisation also asked the mediator to include a statement on the estimated costs of taking the case to arbitration had it not settled, to reinforce the case for settlement. If parties are aware in advance that a case may need this kind of outcome, there is a stronger case for including an appropriate expert to work alongside the mediator.*

### Venue for mediation

Location is particularly an issue for international cases. However it is important in international mediation not to be overly concerned on the neutrality of the venue. There may be considerable benefit in locating the mediation where the project is or has taken place. This will assist with site visits, access to local managers, access to political and economic decision makers, cost-saving for one of the parties.

Venues in overseas mediation will very often be hotels. Care needs to be taken to choose venues with appropriate facilities for private meetings, joint meetings and preservation of confidentiality, as well as access to business centres. Mediators should be willing to accommodate the parties and they will generally travel to countries of the parties' choice.

In the last number of years London has frequently been chosen as a neutral seat for international mediations in matters not involving English law. However it is important for the development of international mediation that parties recognise the flexibility of the process and the ability to have the mediation at whatever location is likely to provide the most and best ingredients for resolution. In a longer-running mediation for example, meetings can be conducted in each party's country in turn with perhaps a final meeting in a neutral country to emphasise the psychological difference from earlier stages in terms of finality.

## Time and Duration

The timescale and duration of mediation needs to be assessed carefully in international cases. The choice may be whether to have a single mediation event or to lead up to the mediation with a number of pre-mediation events and meetings. Most mediators prefer to engage with the parties before the main mediation event to develop a rapport and understanding of the issues and to help the parties design the best approach particularly in multi-party and more complex problems. Equally however this needs to be balanced with one of the benefits of mediation, that it is not protracted in the same manner as arbitration or international litigation.

Generally mediators will want to get the 'mediation process proper' on track within three months of engagement and to limit preliminary stages to a few meetings and/or telephone calls, and reading of mediation submissions. Mediators or parties may limit preliminary meetings if the parties are clear that they are seeking a 'last-shot' attempt at settlement negotiations following a number of earlier efforts. The typical international mediation event, even with multi-parties, lasts somewhere between 2–5 days.

The length of the mediation day is also flexible, closer to negotiation than arbitration/litigation practice. In some mediations the mediators will work into the small hours of the night if that is likely to benefit the process. This may not always be sensible or appropriate and one has to be cognisant of the cultural expectations of all the parties involved. The important objective against which decisions on questions of timing are measured is as to whether the mediation can create an energetic environment with pace so that the parties feel engaged and have a sense of momentum towards settlement, with appropriate breaks for review and reflection of negotiation issues and progress.

## Participants

The right team at the table for each party will be important to the success of the process. The general unswerving principle of mediation is that commercial decision makers are critical. It can also help to bring a fresh mind to the problem, a commercial decision maker with no earlier direct involvement in the project and who does not have the need to justify past actions or who can take a more detached perspective. This can be an advantage if organisational politics allow. It can be the case that in-house counsel play a lead role as the commercial representative. Technical experts, external lawyers, accountants, project managers and process experts may also





have a role. Most mediations involve lawyers but principals should have a much more central role.

Involvement of advisers may depend on exactly where a party is in the dispute and the type of case. Early in the negotiations and in the commercial stages, it may be more appropriate for managers to be closely involved, perhaps with in-house lawyers, only later in the project or post-project for external lawyers to be brought in. On the other hand, if there is a lot of value in the dispute – or for example an important contract interpretation or when commercial principals want additional advice on the likely result of going to court or arbitration, early external advice may be advisable in order to decide on a negotiating position.

In practice parties may also be influenced by whom the other side choose and to some extent there may be a 'tit-for-tat' approach in this. Closer to legal proceedings parties may wish to use the trial team in order to demonstrate to the other side the strength of case, to control the risks of disclosure in mediation or to assess the strength of the other side's case if mediation were to fail.

One should bear in mind however that the process is fundamentally a commercial negotiation process rather than legal one, and that however strong the back-up team, there will be need for a core commercial negotiating team at some stage of the mediation. For this reason in some cases there may even be an argument to separate the negotiating team very strongly from the team involved in any court or adversarial or arbitration process.

Outside experts may also be important. They could be appointed by party agreement to give joint non-binding neutral advice to the parties and/or mediator. Otherwise the mediator has to facilitate dialogue between party experts and assess common ground and differences. It is important that experts are there for reasons of re-assurance and confidence within the management team or to engage in dialogue with the other side but there is also the danger to be watched that they can have a tendency to take the parties into fixed positions. Managers have to retain their ability to make a commercial judgement as to how far to go along with the expert assessment.

In international cases one would also bear in mind whether there is any need for local advisers on the situation or local agents who can explore the wider implications and attitudes blocking or facilitating the negotiation – for example, local commercial or political circumstances or potential future opportunities for contracts or tenders that could influence the negotiation position taken.

The management team directly connected with a project – or a key witness of fact - may equally be an important element. In a particularly technical case, it would clearly be important to have technical managers with the appropriate know-how and confidence to influence and persuade the other side.

Overall in choosing a management negotiation team or legal negotiation team, one would also bear in mind their personal abilities, attitudes and experience and the overriding need to find co-operative, effective negotiators with a good track record of building relationships and doing deals. In practice a team focused on the end game which is about resolution rather than gamesmanship or winning outright – is going to be the most effective.

In an international mediation where parties have sometimes to travel considerable distances it is important that each team is satisfied that they have the right team and that the other parties bring key decision makers to the mediation table. The mediator can have a key role in facilitating an agreement to have the right personnel at the mediation table.

### Authority to Settle

Authority to settle is a key ingredient of most mediation agreements, and vital to effectiveness of mediation. However, in practice, the situation can often be more complex. Insurers or company Boards or government ministers may need to give approval to any negotiated settlement. Even senior commercial managers may enter negotiations with limits on what they can offer. Where the dispute is with a state-owned entity or government department, it is often unlikely that anything more than a recommendation may be achieved from the mediation.

In so far as possible, parties and particularly the mediator, should be clear as to the power and constraints of the decision-makers. Ideally this would be established in advance of the mediation. However in practice in international cases, it is only by working closely with the teams and building up confidence and awareness, that the mediator often gets a clearer picture of what can be achieved and the limits on authority. This should be factored into negotiations and mediation efforts.

In some cases, the mediator or other parties may need to arrange to meet government officials, or make informal contact with local trade consulates or funding agencies in order to assist in the influence process, or to confirm what systems are in place (including telephone contacts during the process) to 'deliver' a workable deal. Clearly such contacts have to be handled with considerable sensitivity, for confidentiality and political reasons, as well as their effect on the negotiation process. The key objective is for the mediator and mediation process to sustain momentum even if there appear to be roadblocks on authority. This can also call for effective follow-up to mediation meetings.





### Documentation

Documentation for mediation need not be so extensive as for other proceedings. A common core requirement is for the mediator and other party to receive a brief narrative summary of case, usually no more than 15 to 20 pages in length, highlighting the key issues. This is often a more challenging document for advisers to prepare than a more formal legal statement of case. Other back-up documentation is limited to what will serve to educate the mediator or the other party, or which may be called on to substantiate negotiating positions or claims. Documents are normally exchanged simultaneously two weeks or so before the mediation event. Additional documents may be presented at the mediation or given to the mediator in confidence as background. Preparation for mediation is a new and developing professional service.

### Mediation Structure

The mediation generally has three phases. Given the flexibility of mediation, a mediator's own personal preferences and the range of types of case, there can be considerable variation in the details of how this structure is acted out by mediators and parties.

### Phase One – Preliminary Matters

In this phase parties will work through most of the issues highlighted in this chapter, with the mediator and/or ADR organization. It should not be forgotten that this phase itself may be important in re-opening dialogue and contacts, although often it reflects a background of distrust in terms of skirmishes over a number of issues such as confidentiality, participants, venue, etc. A preliminary meeting with the mediator may also take place, jointly or separately and on one or more occasions.

### Phase Two – Exchange of Information

The information exchange will usually involve prior exchange of documents with a subsequent review of positions in the presence of each party's larger team in the mediation first joint session. In addition to the mediator's formal introduction at the joint meeting, the opening meeting offers the opportunity for each party to set out

their view of the issues that confront the parties – legal, factual, financial, emotional and procedural. This serves both as a summary of case to remind each side and the mediator of starting positions, but may also signal new information, arguments or settlement proposals depending on prior activity and case strategy.

### Phase Three – The Negotiating Process

The heart of mediation practice takes place in this phase, where the mediator in a series of joint and private meetings encourages the parties to explore and re-assess each other's case, and assists in the search for options that will lead to serious bargaining over the terms of a deal. To be truly effective in this phase, the mediator will want to work with a smaller core team with the commercial decision makers at its heart. In most of the large international mediations the Phase Two team can often be six–ten strong whereas the Phase Three team is more often two-three participants from each side.

### The Economics of Mediation

Mediation costs can be classified under the following headings:

#### 1. Mediation Costs

These can vary according to the mediator and/or mediation organisation used, and will cover any referral costs, preparation including reading time, and fees for the mediation meetings. Practices vary but reflect the range of practices found in professional practice generally, namely:

- Daily basis;
- Fixed fee;
- Hourly rates;
- Success fees (though this is unusual).

These may also be linked to the value of the amount in dispute.

Parties normally agree to share the costs of the mediation equally although this may vary, for example if one party or an external project funding agency has agreed to pick up the costs in order to facilitate entry to the process. Also, with the increase





in court-referred cases, parties may also leave open the question of seeking a costs order from the court or arbitrator to recover their costs if a mediation does not succeed and they go on to succeed in the action.

#### 2. Party Costs

- Management time;
- Legal team preparation, experts etc.;
- Expense of travel, accommodation and venue.

In Appendix 5 we have referred to more detailed examples of international mediations to give the reader some impression based on actual experience. This draws on a range of cases with illustration of the kinds of value at issue (from $160K to $160M), time taken to mediate and at what cost, and the result. The cases handled demonstrate that mediation can work with different sizes of cases from small to large in financial scale, and two-party or multi-party. Our experience also confirms that even high-value, complex cases can be mediated in two-three days with one-two days preparation, at a cost to the parties of around $40,000 – 56,000 (based on 1999 scale of fees) if the mediation is being conducted on a fixed fee and fixed time basis (and excluding travel costs and other expenses of the mediator).

The economics of mediation have to be measured by a number of criteria:

- The amount in dispute;
- The likelihood of achieving a satisfactory solution;
- The future transaction costs of an arbitrated or court solution;
- The management investment in time which should be compared with the time that will be involved in achieving an arbitrated or court based outcome;
- The opportunity costs of achieving a result in mediation *i.e.*, freed up management time.

### Comparison of International Arbitration/Mediation

The following table compares an actual complex arbitration case prepared for arbitration over a four year period with the potential outcomes from a similar case typically settled in mediation. The parties have agreed to mediate in this instance after one year of the arbitration preparation. While not an exact science, the figures and

corresponding notes give an easy but realistic framework for parties to measure the settlement benefits of taking a case to mediation.

| | ARBITRATION 4 years | MEDIATION 1 year | POTENTIAL NET GAINS FROM MEDIATION |
|---|---|---|---|
| Amount at issue | $12.8 million | $12.8 million | – |
| Time to reach result | Award at end of year 4 | Settlement at end of year 1 | 3 years |
| Management time to handle dispute | 1000 hours | 200 hours | 800 hours |
| Direct costs of process | $0.8 million | $56,000 | $744,000 |
| Legal costs and party expenses | $2.56 million | $380,000 | $2.18 million |
| Possible results: | Range Win Loss $12.8m*$[5.56m] | Range High Low $8.0m**$2.0m | Mediation creates opportunity for faster and possibly higher net return at less risk. |

*There would be interest on an award but we have assumed this is cancelled out by deductions for irrecoverable costs and arbitrator cutback on some heads of damages.
**Assumes for pragmatic purposes a 60 per cent recovery minus costs is the likely maximum mediation outcome.

On the basis set out in the example above one could see that the following could be achieved through the effective use of mediation at the appropriate time (and the earlier in the dispute the more benefit that will be derived). The potential benefits include:

- Certainty of result. In mediation the claimant would walk away after one year with a known settlement somewhere in the region of $2.0m–8.0m as a possible net outcome (after deducting own costs). Arbitration after four years could result in a loss for the claimant as high as $[5.56m], after paying their own and the other side's costs. On the upside, they could win a higher amount by way of arbitration award of $12.8m net (after deducting irrecoverable own costs, and assuming arbitrators would rarely allow all the elements of a Claimant's damages calculation and interest), but following a long period of uncertainty and management diversion;
- Effort appropriate to result. Of course there is a small chance that a mediation would not achieve settlement, either at the mediation or soon after. However the work of preparation and negotiation would contribute towards activities that normally would be required for later in the arbitration. Conversely a majority of arbitrations will settle before the final hearing, probably in a range little better than that predicted for mediation and often without giving value for interest and costs;
- Timeliness. In this example the settlement is achieved three years earlier than the predicted arbitration award. This takes no account of the time that would be taken to enforce an arbitration award;
- Management time. In this example one can see that in addition to the settlement amount there is potential minimal management saving of 800 hours. There is also the opportunity cost of developing future work without the persistent distraction of a dispute over a long period of time. Many mediations in addition may involve an opportunity to settle on the basis of a worked out commercial outcome between the disputing parties in addition to any positive compensation payments;
- Transaction savings. Will be dependent on the timing of the mediation but could be as this example shows in excess of $2.18million. If one factors in the travel and fees for experts, legal fees for the arbitration panel, the cost savings could be close to $3m to add to the cash settlement;
- The value of certainty and the possibility of reaching a broader based solution are more difficult to quantify but certainly tangible benefits of the process.

The difference mediation can make can therefore be dramatic.

Finally it is not an uncommon occurrence in mediations that parties resolve more than the dispute that brought them to mediation or identify other commercial deals as part of resolution. This is a common feature in disputes involving financial institutions or corporations who have more than one piece of business together. It is also however a myth that mediation solutions require continued business relationships. Probably at least 60 per cent of international mediations do not have the feature of a potential future business relationship. Clearly in major joint ventures and project finance initiatives involving major construction and engineering projects going on over a number of years, there will be a necessity to evolve a solution that allows the parties to work together or to terminate in a manner that is least disruptive.

Mediation therefore has significant 'Form and Flexibility' to make it a tool that suits the needs of lawyers for structure and business people for commercial opportunity and 'fairness'. Both business people and lawyers stay more in control of costs, process and outcome, to reduce the risk ratio of alternative adversarial combat.