

IBA e-book

Mediation Techniques



the global voice of
the legal profession™

Editor: Patricia Barclay

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Patricia Barclay

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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

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'.