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Choosing A Mediator

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Prologues Always put yourself in the other person's shoes .
Understand the deal from the other side of the table.
Solve the other sides' problems as the means of solving your own.
Do not undervalue other side's case, or become entrapped by biased perceptions.[1]

I. When, Why, Who and How

A. When –

Any time
Before dispute
During dispute
After apparent resolution
E.g.: settlement contract
court ruling
arbitration award
Avoid pre-dispute designation of specific person

B. Why, Who and How: After preparation, etc., as set out below

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[1] From James K. Sebenius, "Six Habits of Merely Effective Negotiators", Harvard Business Review, April 2001.

II. Preparation, Preparation, Preparation

A. Identify the Players
   - Yours
   - Theirs
   - Others

B. Identify the Problems
   - Yours
   - Theirs
   - Others

C. Identify "Material" Facts
   - As you see them
   - As they see them
   - As others see them

D. Identify Business Interests and Needs
   - Yours
   - Theirs
   - Others

E. Identify Emotional Interests and Needs
   - Yours
   - Theirs
   - Others

F. Identify BATNAs
   - Yours
   - Theirs
   - Others

G. Identify Further Information You Need
   - From your team
   - From them
   - From other sources

H. Identify Objectives
   - Yours
   - Theirs
   - Others

I. Explore Options
   Substantive
   Procedural

J. Stand in the Other Person's Shoes
   Physically stand in the other person's shoes
   Examine the situation thoroughly from the other side's perspective
   Examine both side's perspectives
   Consider applicable options as if you owned both sides of the problem

K. Determine How You Expect To –
   Gather information
   Share information
   Express your views
   React to their views

III. Determine Why –

A. In light of –

The problems
The players
The "material" facts
Business interests and needs
Emotional interests and needs
BATNAs
Objectives
Potential options

Consequences of failing to resolve
To you
To them
To others

Consequences of resolving
For you
For them
For others

Compelling circumstance
Pre-dispute agreement
Court order
Court's suggestion
Arbitrator's suggestion
Institutional pledge
Institutional culture
Third person "good offices" intervention

Change in other conditions
Between the parties
External to the parties

B. Can the players negotiate their own resolution, or do they need help?

IV. Who: Determine[2] –

A. The Mediator's Role

Ascertain what is appropriate re this situation
- What does each party need?
- What does the mediator need?
- What do others need?
- What is happening in the market place?
- Are the parties ready?
- Are the parties committed?

Assist the parties in –
- Getting to the table
- Remaining at the table
- Agreeing on procedures and ground rules
  - Confidentiality
  - Settlement privilege
  - Written submissions
  - Ex parte communications
  - Joint meetings
  - Private caucuses
  - Proper participants
    - Attend
    - Participate
  - Schedule
  - Venue
  - Commitment

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[2] I.e., undertake human due diligence. See Harding and Rouse, "Human Due Diligence," Harvard Business Review, April 2007, page 124.

Assist the participants in –

- Understanding the process
- Understanding the problem(s)
- Understanding each other's real interests and needs
- Understanding each other's emotional issues
- Understanding each other's BATNAs
- Assuring that every one has communicated clearly each intended message
- Assuring that every one has understood what has been said
- Exploring options (i.e. brainstorming)
- Getting unstuck (i.e. avoiding and breaking impasse)
- Finding a mutually acceptable and beneficial solution to their problem(s)
- Sealing the deal

Assure that adequate time, is available

Assist the business people in participating, in lieu of lawyers

Be prepared to move to and from facilitative, evaluative, and directive roles, as appropriate

Earn trust

Serve as an arbitrator under agreed conditions[3]

Co-mediate

Assure that a durable agreement is endorsed by each side

- Substantive
- Procedure re future activities
- Written
- Signed by all
- Binding
- Enforceable

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[3] Suggested rules under which a mediator may serve as an arbitrator appear in the Annex.

B. The Mediator's Characteristics

Three Classic Categories –
- Facilitative
- Evaluative
- Directive

Committed
Patient
Persistent
Creative
Empathetic listener

Willing to speak candidly –
- When instructed by one side to demand something from another side
- When faced with emotion
- When a party has brought the wrong people
- When a party is not participating in a committed, candid manner

Aware of his/her own strengths and weaknesses, especially –
- Emotional buttons
- Biases
- Fears

Sensitive to and able to work with –
- Different personalities
- Different cultures
  - Personal
  - Institutional
- Power imbalances
  - Personal
  - Institutional
- Sophistication imbalances
  - Personal
  - Institutional

C. The mediator's experience
- Training
- Actual mediations

V. Professional Responsibility And The Mediator

A. Independent
   No financial or other interest in the outcome.
   Is this possible?

B. Impartial
   Neutral with respect to the parties and their interests, needs and objectives
   Is this possible?

C. Disclose all relationships with any party or its lawyers
   Before the mediation
   During the mediation
   After the mediation – for a reasonable period of time
   When in doubt, disclose

D. Preserve the integrity of the process

E. Fees –
   Must be independent of the value of a settlement or other outcome of the mediation[4]
   Cancellation or lost opportunity fees
   Who is liable?
      One side.
      All parties jointly and severally liable
      All parties and all counsel jointly and severally liable
   Retainer

F. Expenses
   Reasonable

G. Openly deal with potential abuse of the process

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[4] Compare Article 4 ICC ADR Rules (and Appendix C.) and Article 22(b) WIPO Mediation Rules. The latter take into account the "amount in dispute" in setting a mediator's fees.

VI. How: Determine –

Who should approach the other side(s)
How the approach should by made
When the approach should be made
What should be communicated
How to avoid appearing weak
How to persuade the other party it is in the other party's interest to try mediation
How a mediator may assist the parties
How to find an appropriate mediator

VII. Where To Look?

ADR providers' lists
Inquire of colleagues
Business
Legal
Accept the other side's suggestion, if the mediator is otherwise qualified

VIII. Remember –

The biggest problem with communication is the illusion it has occurred.
(G. B. Shaw)

Annex

I. Suggested Rules under which a Mediator may Serve as an Arbitrator

A. Typically applicable in situations where parties have resolved all but one or two issues, e.g. money, configuration of a product, capacity of a machine, territory, ownership. Useful in resolving impasse. The Mediator and the parties expressly agree in writing to the procedure set out in Paragraphs B. - F. below.

B. All parties shall agree on all language in a written settlement agreement, except for the disputed number or language.

C. The places in the written settlement agreement where the disputed number or language would appear but for the dispute shall be left blank.

D. The written settlement agreement with the blanks shall be executed by an authorized representative of each party.

E. The written settlement agreement with the blanks shall provide expressly that the agreement shall be binding and enforceable with respect to each party immediately upon execution by all parties.

F. The written settlement agreement shall provide expressly that –

1. The parties have intentionally left blank [described number, language.]

2. The parties expressly authorize the Mediator to insert a number/language selected by the Mediator in the appropriate blanks. A procedure for providing the Mediator further information may be specified.

   [The Mediator may, for example, base the Mediator's choice of number on a high/low or baseball arbitration procedure, with or without formal submissions, or on the Mediator's sense of what is fair.]

3. After completion of any agreed procedure (as set out in Paragraph F.2. above) and appropriate consideration by the Mediator, the Mediator shall insert the selected number/language in the appropriate blanks.

4. The settlement agreement with the inserted number/language shall continue to be binding on all parties after the Mediator inserts the selected number/language in the appropriate blanks.

5. After the Mediator has inserted the selected number/language in the appropriate blanks, an authorized representative of each party shall initial the margin of the agreement opposite the place(s) where the Mediator has added a number/language – to ratify each party's acceptance of the inserted number or language.

II. Arbitrator as Settlement Facilitator

A discussion of this possibility appears in D. W. Plant, Resolving International Intellectual Property Disputes, ICC 1999, at pages 105-114.

This is the inverse of a mediator-as-arbitrator scheme such as described in Section I. above.

Under appropriate circumstances, a sitting arbitrator may serve as a settlement facilitator (i.e. mediator).