

The Legal Use of Mediation to Resolve Disputes Between Parties

Originally published by Antonio M. Prida in *El Seminario* on June 19, 2020

On Wednesday, 17 June 2020, I was honoured to take part in discussion panel organized by the prestigious Spanish institution FIDE, the Foundation for Legal and Business Investigations, together with fellow mediators Paulino Fajardo Martos and Martha Lázaro Palmero from Spain, and Fernando Navarro Sánchez from Mexico. The seminar was moderated by FIDE president, Cristina Jiménez Savurido. The purpose of the panel was to discuss the role of party attorneys in the commercial mediation process in Ibero-America.

The topics discussed included the role of attorneys at each stage of the mediation process, the value that their intervention lends to the process, the ways in which the legal costs of mediation can be shared and which aspects should be left out of the process.

Cristina opened the discussion by asking what the parties expect from their attorneys in the management of a dispute. The panelists gave the words effectiveness and efficiency as key attributes when choosing the appropriate mechanism to resolve the dispute in question. These mechanisms include mediation, conciliation, expert opinion, arbitration, dispute boards and collaborative law, and ultimately litigation before the courts. The advantages afforded by these alternative dispute resolution mechanisms over court litigation are particularly the time and costs which can be saved.

The moderator also asked how one party should go about proposing a mediation process to the other. The panelists said that in accordance to deontological norms to which attorneys in the most developed jurisdictions of the world are subject, they are obliged to offer their clients alternative means of dispute resolution to prevent the parties from having recourse to national courts. This duty to explore ADR might derive from a legal obligation established by law, or from a contractual convention or agreement between the parties. Alternatively, the work may be entrusted to a mediator or to an institution that carries out mediations by one of the parties to the dispute.

Another question to the panel was how to select a mediator. The most important attribute was thought to be the quality of the mediator's training in mediation techniques, his experience, and his character and determination to achieve a settlement between the parties to the dispute. The panelists also emphasised the importance of considering the mediator's style, which can vary and may be facilitative, evaluative or proactive. The panelists also agreed that although the mediator must have some knowledge of the technical language of the dispute, his experience in mediation is of

greater importance than his substantive technical knowledge of the subject. It was thought that the mediator, ideally, should have experience in both fields of knowledge, but failing this, the parties could go to co-mediation to have the requisite experience in both fields.

The moderator then asked what the role of the party attorneys is during the mediation process. To answer this, the speakers divided the process into the following phases: firstly, the attorney's work focuses on choosing the appropriate dispute resolution mechanism, after a prior analysis of the dispute. It is then necessary to select the type of procedure: institutional mediation or ad-hoc. Thirdly, the attorney must prepare by understanding the positions of the client and the opposition to be able to set out a suitable negotiation strategy. To do this, the attorney must look at the legal options available, undertake a reality test and a generation of value in order to reach a solution to the dispute which is satisfactory to all parties. Once the agreement is drafted, the lawyer's work in the last phase focuses on analyzing its consequences and legal scope to select the appropriate means of formalising the agreement. This might be through settlement agreements derived from the Civil Code, signing before a notary public or, for disputes raised in Mexico, before a private mediator certified by the Alternative Justice Center of the Supreme Court of Justice of Mexico City. Other legal means exist across Latin America, and the provisions of the Singapore Convention will apply where has been adopted.

Regarding this last phase, the panelists agreed that, ideally, the drafting of the mediation agreement resolving the dispute should be entrusted to the party attorneys and that the responsibility of the mediator be limited to clearly setting out the agreements that conclude the dispute. The Mexican mediators on the panel clarified that certified private mediators in Mexico have the duty to draft mediation agreements that are registered with the Alternative Justice Centers of the various states of the Mexican Republic, to ensure that the rights and obligations established in any agreement have legal force. Under Mexican law, such agreements usually have the effect of being considered *res judicata* and of having executive force, as if they were a court judgment or an arbitration award.

Finally, the issue of mediator and party attorneys' fees was addressed. Regarding the mediator's fees, it was pointed out that it is a general practice for them to be paid in equal parts by the parties involved in a dispute, although it was pointed out that there would be no problem in their being paid by one party, or that it be agreed that are to be set out in the eventual mediation agreement. Regarding the attorneys' fees, it was pointed out that it is essential to align the interests of the clients with those of their attorneys, so that there is not a clear disincentive to achieving a settlement more quickly. In this regard, it was considered appropriate to offer a contingency fee to an attorney who is successful in a mediation process, since it is in the client's interest to resolve the dispute either by obtaining a favorable judgment, through direct negotiation

between lawyers for the various parties, or through mediation. In general, the panelists agreed with the idea of maintaining contractual freedom for the parties to negotiate their own fee agreements with mediators and party attorneys and they were against the idea of establishing tariffs.

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Please feel free to contact Antonio M. Prida if you have any questions on this important development.

Special thanks to Diana Maudslay Cross, an independent translator based in the UK, for translating this article from Spanish into English.



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