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Commercial mediation and lawyers: some thoughts for a useful and fruitful collaboration to the process

Christophe Imhoos (Esprit d'entente) · Tuesday, August 7th, 2012

What is the possible role of the lawyer in a commercial mediation? How the lawyer should interact with his client in the mediation process? Here are some thoughts for using the lawyer as a positive element in the mediation involving a commercial dispute.

Before mediation

The lawyer should, as far as possible, facilitate transactional solutions and engage in a trial only after he had realized that an out-of-court settlement is not possible (such a recommendation is contained in the Code of Ethics of the Geneva Bar Association). In this respect, the use of mediation should be freely and openly discussed between the lawyer and his client, with a view to consider it as a possible and useful method for settling disputes amicably. The lawyer, exercising his professional functions, ensures that the client understands the nature, content and effects of the mediation process and its advantages and disadvantages, compared to a judicial or arbitral proceedings. Moreover, as counsel and practicing in the area of litigation, the lawyer is able to highlight any dimension that these can take. The client must feel free to discuss in the presence of his lawyer the state of his personal and business relationships with his business partner and its future prospects in order to better assess the issues of conflict and to identify options that may arise for an amicable settlement. This implies that the lawyer knows the dynamics and techniques of mediation in order to inform and advise his client effectively. The lawyer and his client also define at this stage, the place and role of everyone in the mediation – if it takes place – in order to gain full benefit from the process and to achieve efficiency, whilst keeping in mind its objective, that is the research by parties themselves of a solution to the dispute that is mutually acceptable and profitable. In particular, the lawyer should prepare with his client a list of the present and future needs and interests of the latter and how and by whom such a list will be submitted in the mediation. Before the occurrence of a dispute, the lawyer must also inform his client about the possible use of mediation when drafting a commercial contract, providing for a dispute resolution clause that includes such as settlement method.

During mediation

The Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce provides that parties may be assisted by counsel of their choice. Likewise, the Swiss Chamber of Commercial Mediation Rules provide that, when assisted by counsel, the parties must preliminary inform the other party and the mediator; said rules even recommend to hire a “qualified” counsel, without

making him indispensable. In commercial mediation, the lawyer plays most often an active and useful role during the mediation. He assists his client throughout the process, usually in a collaborative and constructive manner and may well become the best advocate of the mediation in the interest not only of his client but also in the interest of all other participants. Without taking the place of his client, he can support and stimulate him or refocus the dialogue, especially on interests and needs, whilst advising him on the limits of the process and ensuring his free and full agreement to the solutions that can be found. The role of the lawyer makes really sense when the mediation is concluded by a written agreement. As an advocate for his client, the attorney verifies that the agreement complies with the wishes of his client who measures its scope and effects, drawing his attention to the legal consequences arising therefrom, for the sake of protection of his rights. The lawyer defends here his client, not against mediation but in the mediation so that such process becomes viable and reliable. The lawyer will also ensure that the agreement does not contain any element that would be contrary to the law or that would prevent its ratification by a judge, if necessary or when agreed. In general, the agreement resulting from mediation is drafted by the parties' lawyers, with the assistance of the mediator or not.

After mediation

Once the mediation is completed and the agreement reached and signed, the lawyer follows up its implementation and ensures that both its letter and spirit are respected. The lawyer uses the legal proceedings of recognition and enforcement of the agreement reached in the mediation process, when and where available, in case the other party fails to comply or honour its terms after the mediation had ended. The lawyer may also, on behalf of his client, seize the mediator again in case of difficulties in implementing the agreement or when clarifications are needed.

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