

Kluwer Mediation Blog

Mediation Magic

Andrea Maia (Mediar360 – Dispute Resolution) · Friday, September 26th, 2014

I believe that by now you all had enough of my comments on the 2014 FIFA World Cup. So let's move on to other aspects of life.

Last month, IBA's Mediation Committee organized a regional meeting in Brazil in order to discuss the latest trends in Commercial Mediation. The event was supported by Veirano Law Firm, one of the most prestigious Firms in Brazil, and was attended by several lawyers, in house counsels and members of the public sector, some of them hearing about mediation for the first time. In addition to being a great success, the event could be seen as another small step towards increasing the general awareness level of Commercial Mediation in the country.

Although I could provide highlights of the whole event, I will focus on the messages delivered by the first two speakers (Mauro Rubino-Sammartano and Leandro Tripodi) due to their particularly challenging aspects.

Mr Sammartano, chair of the IBA Mediation Committee, opened the event (via Skype) addressing a very insightful issue: Lawyers Self-Assurance. Rather than explaining it myself, I will quote his exact words in order to maintain the essence and allow you to reach your own conclusions: "Many lawyers feel on the one hand that they are automatically good mediators and on the other hand that they do not need mediation, because if the matter is capable of being settled, they know how to do it themselves and do not need a third person for that.

I am doubtful about both attitudes.

As to the first one, many lawyers are accustomed to antagonizing their opponent, while in mediation proceedings a party must see the opposite side as a partner in a constructive search for the best solution for all the parties. These attitudes are extremely different and being good in Court proceedings does not mean at all to be able to negotiate in mediation proceedings.

As to the second issue, the need for a neutral arises exactly when counsel is unable to settle by himself. This neutral must have been well trained in psychology and consequently be able to be trusted by the parties, to understand the parties and in particular their silence and to help them, in particular through separate meetings to narrow their differences and to change their attitude towards the dispute.

In fact, in the absence of such a change of attitude, no settlement is generally reachable."

Following Sammartano's outstanding opening remarks, Leandro Tripodi, Chief Editor of CISG Brasil website and visiting researcher of United Nations' UNCITRAL and Vienna's Law School,

highlighted the importance of resorting to other social sciences, such as behavioral economics, social psychology, cognitive science and game theory, in order to understand the importance of mediation and other ADR's for the legal profession.

Mr. Tripodi emphasized that Mediation, as an essentially cooperative procedure, generates value for parties, whereas non-cooperative games, such as court litigation and, to a certain extent, arbitration, normally tend to produce zero-sum results (i.e., one party's gain at the expense of the other party's loss). In other words, unlike litigation, Mediation can produce winning results to all parties involved (provided that it is not interrupted).

Continuing on the subject, Mr. Tripodi also touched base on Mediation in international trade disputes, where multiple cultural dimensions may be involved. In these cases, the ability to combine Mediation and other ADR's formats can in fact bring a number of advantages over more traditional methods. However, it is necessary to use mediation (as well as arbitration) parsimoniously, under a multi-door perspective for dispute resolution, in order to avoid the depletion of "shared resources", such as mediators, arbitrators and institutions.

Finally, at the Q&A session at the end of the day, a remark from one of the attendants (a well-known lawyer) ended the day on a high note. Although still skeptical about Mediation and other ADR methods, he stated that after personally witnessing a high profile Mediation session, where "feelings" and perceptions were very far apart and, like magic the two opposing parties came to an agreement, he realized that he should try to understand more about the topic and that he was very glad that he attended the event.

The above statement was very rewarding and YES, he may be right. Maybe we are like magicians, like "the business world Houdinis", constantly upping the ante from handcuffs and straightjackets to locked water-filled tanks, but this is for another post.....

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