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Preparing the Mediation Meeting: A Mediator's Perspective

WIPO Mediators Meeting
Geneva, March 24, 2017

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WIPO Mediation in the Automotive Sector (I)

- Dispute between US company & Swiss company (competing suppliers to the worldwide automotive sector)
- Patent infringement dispute involving US patents owned by US company
- Original license agreement executed in 2007
- ADR clause: WIPO Mediation followed by WIPO Arbitration
- Dispute arose under 2007 Agreement
- Request for Mediation filed with WIPO Center in April 2009
- WIPO Center proposed list of candidates to parties
- Parties chose from such list a patent practitioner who had knowledge of US Patent Laws, fluency in English, and experience in mediating patent infringement disputes

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WIPO Mediation in the Automotive Sector (II)

- Mediator held preliminary teleconference with parties and counsel to define and schedule mediation process -- Spring 2009
- Mediation statements were then filed by both parties
- Thereafter, the Mediator held multiple rounds of separate pre-mediation caucuses and initiated multiple rounds of inter-partes communication, the latter initially through the Mediator and then, at the Mediator's specific instruction, directly between the parties – the Mediator wanted to employ June-August 2007 period (session originally scheduled for June but delayed to August) to advance the mediation process along and maximize efficiency of subsequent August mediation sessions
- Two-day, in-person mediation sessions held in August 2009 at WIPO/Geneva

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WIPO Mediation in the Automotive Sector (III)

- What happened?
  - At start of first session day, the Mediator gave an introduction, explained rules of the session (e.g., confidentiality, neutrality, voluntary, authority, written signed term sheet at conclusion) and his role
  - Then, the Mediator gave his diagnosis of 2007 agreement, specifically that its tiered royalty structure incentivized disputes and needed to be reformed in any ensuing settlement
    - Different royalty rates applied depending on whether a licensee contended that a licensed patent was invalid and had a supporting opinion of counsel (royalty was approx 2%), or not (royalty was approx 4%)
    - Given the amount of royalties involved, the decrease in royalties due, resulting from a successful invalidity contention, was quite significant
    - If patent holder disputed the contention to get the higher royalty rate, it automatically triggered the ADR provision to resolve validity
    - Basically without realizing it, the parties had monetarily incentivized themselves to launch a series of separate successive validity disputes and ADR proceedings -- the first such dispute is just what happened here and the parties were 2 years into it when the Request for Mediation was filed with WIPO
    - Neither side was previously aware of this problem and both were surprised by learning it (parties didn't see the "big picture")

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WIPO Mediation in the Automotive Sector (IV)

- What happened thereafter:
  - Early agreement on a new framework for royalty payments that eliminated prior potential for multiple disputes and multiple ADR proceedings going forward
  - Further discussions on business aspects
  - Settlement reached in the afternoon of second day
  - Term sheet: 2007 Settlement was replaced with new agreement with totally different royalty scheme; provided for a down payment, annual installments, and royalty based on net sales
  - Original 2007 license agreement was re-drafted with a final agreement entered into during September 2009
  - End of 2-year dispute reached within 5 months, parties avoided U.S. arbitration / high costs, and successfully repaired their business relationship and engaged in further business collaboration going forward

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When to prepare for the Mediation Session (or more broadly, Mediation)?

1. Before / at inception: starting before the Request for Mediation is filed (Claimant; sometimes, also Respondent if Respondent knows request will be filed) or shortly after (Respondent)

2. During the Preliminary Scheduling Conference

3. After the Preliminary Conference but before the Session

Read: Jon Lang, "The Pocket Mediator – A brief guide to getting the best out of mediation"

- Very concise, well-written direct overview of mediation process, with guidelines and pointers for consideration as to how to prepare for mediation, and what parties should expect and do during the process
- Even for those experienced in mediation, read this overview before engaging in a mediation -- it's a very thorough refresher
- Available for free download

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What to do before / at inception:

- Chose the right Counsel: counsel should be familiar with and have experience in mediation
  - Mediation advocacy is not litigation advocacy – neither positional nor adversarial
  - Mediation's goal: Not about finding the truth, rather it's about finding a deal
    - No need to solve the underlying legal dispute (e.g., whether a patent in dispute is valid/infringed or not)
      - Should be no postering/arguing legal issues or precedent and debating about who is right/wrong
      - "Negotiating in the shadow of the law" – so parties can't totally ignore the law as law influences, informs and constrains what parties can agree in their settlement, but range of settlement options is usually very wide, much more so than in arbitration/litigation
      - Voluntary mediation: approx. 80% successful, court-annexed: approx. 50% successful
    - Mediation is guided joint problem-solving
      - Counsel need to encourage client to be engaged with other side, candid in recognizing its interests and those of other side, and creative in formulating options that meet those interests, preferably "expanding the pie" (beyond just claiming value on a zero-sum distributional basis)
      - Wise counsel should not passively submit to mediation, as it is more than the mediator merely being a messenger, but pro-actively shape the process to their client's needs and participate in it.
  - Inexperienced counsel can sabotage a mediation without realizing it

- Counsel should educate the client as to general mediation process and what to expect from it
  - What the process is, what generally occurs (caveat: the procedure followed in each mediation varies depending on the characteristics of the dispute, parties' needs, etc)
  - What to physically expect: mediation is draining, stressful, can be frustrating, slow and aggravating; patience is absolutely necessary (often 90% of actual negotiations are completed in last 10% of available time)

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What to do before / at inception (cont.):

- Selecting the mediator – decide what qualities are desired and what selection process to follow
  - Each side should independently define its own list of desired qualities prior to engaging in discussions with other side or with WIPO, and prioritize them
  - WIPO Center, based on discussions with all parties, will compile a strike/rank list of candidate mediators from its roster of neutrals (now numbering approx. 800-1000) and supply it and accompanying bios to each side; desired qualities often include:
    - Experience in relevant industry
    - Proficiency in certain language(s)
    - Necessary knowledge, e.g., engineering or scientific background, experience in US patent or other law, accounting, media and entertainment?
    - Cross-cultural knowledge/experience, what cultures?
    - Availability (time and geographic)
    - Locale (travel considerations to mediation site)
    - Cost (hourly or daily rates)
    - Further candidate vetting, e.g. publications and other writings, peer-review ratings, to extent necessary
  - Parties can even interview selected candidates or submit questions for them to answer, if desired, to gain additional insight

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During the Preliminary Scheduling Conference:

- Any mediation is really “two” mediations:
  - A process mediation – procedural aspects of the mediation, followed by
  - A substantive mediation – substantive discussions and negotiations

- The process mediation starts with the Preliminary Scheduling Conference (usually telephonic) and continues throughout the rest of the mediation
  - Mediation is dynamic, uncertain and can evolve rapidly and unexpectedly. Party approval is needed at any time before varying from the previously agreed process. So, the process mediation is ongoing.

- Business representative from each party should attend the conference

- Define the entire mediation process with the Mediator and the other side, get “buy-in” from all parties
  - Delineate all component steps and corresponding dates
    - Any information exchange necessary? If so, provide for it, schedule it and strictly narrow its scope to information only needed for mediation (substantially less than for litigation/arbitration)
    - Further pre-session activities (mediation statements, separate phone/in-person caucuses; joint caucuses; etc)
    - Mediation session (block out sufficient adjacent days, including a reserve day if possible)

- Mediator will memorialize all points agreed during conference and issue scheduling memo to Counsel

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After the Preliminary Conference but before the Session:

- Strategize your case
  - Define your interests (what at a minimum do you need from other side) and wants (aspirational), and, to the extent you can realistically surmise, those of other side
  - Understand your BATNA/WATNA and, again to the extent you can surmise, BATNA/WATNA of the other side
  - Other factors of both sides that may influence outcome, e.g. constraints (monetary, time, etc)

- Provide mediation statements – confidential or exchanged, possibly confidential version for Mediator for his/her education (include prior offers, perceived obstacles to settlement including personalities, settlement options including limits and corresponding reasons; be candid) and abbreviated non-confidential version for other side (other side will carefully and thoroughly read this), nature of statements and type will be defined and agreed on during Preliminary Conference

- Confer with the Mediator – pre-caucus sessions; the Mediator will probe for interests and relevant information not provided in each mediation statement and further options that might create value, Mediator may also assign “homework” to a party to undertake, such as more analysis or in-house discussion, in advance of mediation sessions and/or further discussion with Mediator

- Consider instituting communication with other side through the Mediator; Use the Mediator’s power

- Consider conducting mock mediation sessions in-house to try out different negotiating strategies

- **Prepare, Prepare, Prepare**!!

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A Mediator's Power:

- A Mediator has no physical power.
  - Mediator cannot coerce a party to do anything, including remaining at a voluntary mediation.
  - Mediator has no power to award anything to anyone.

- But, a Mediator has substantial PSYCHLOGICAL power -- "Power of Special Relationship"
  - Far more than just the power of neutrality (impartiality)
  - Predicated on many factors including, e.g., **trust**; **credibility**; **perceived authority** and **experience**; **dogged determination** to reach a settlement; **ability to control time, format and sequence** (separate parties into caucuses, then bring them together and when) including continuing negotiations and declaring an impasse; **optimism and confidence in reaching settlement**; and **active listening and constructive use of silence**
  - Disputants cede some of their own power of self-determination to the Mediator in the service of settling their dispute. They transform their conflict into a more constructive process with the Mediator being an agent of that transformation. (See: Jan F. Schau, "The Source of the Mediator's Power: How We Connect the Disconnect and Engineer Agreements", *ABA Annual Conf. Dispute Res. Section*, April 27, 2007; also Dwight Golann, *Sharing a Mediator's Power – Effective Advocacy in Settlement*, Amer. Bar. Ass'n © 2014)

Practice point:

- **Each party should pro-actively use a Mediator's power** -- to effectively advance negotiations either to reach settlement or until the parties have developed enough trust in each other so that they can directly work together to achieve settlement

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Thank You!

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