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MEDIATING COMMERCIAL DISPUTES: HOT TOPICS AND PRACTICAL TIPS

Commission(s) in charge of the Session/Workshop:

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BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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Mediation Procedure

1. What is the typical mediation procedure in your country?

One of the phenomena affecting the administration of justice in Spain in recent years has been the increase in litigation, which is having an impact on the smooth operation of the justice system. For this reason, alternative ways of resolving conflicts are being sought which are more efficient than those offered by the current model. Mediation is one such way, together with arbitration and conciliation.

2. Is mediation popular in your country? Why? Why not?

Although mediation is a recognised form of ADR, there is not a strong mediation culture in Spain. However, the legislator's increasing interest in the practice of mediation led to the recent passing into law of the Spanish Mediation Act 2012 (Ley 5/2012, de 6 de julio (RCL 2012, 947), on mediation in civil and commercial matters (the "Mediation Act"). The Mediation Act transposes into Spanish law Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters.

So then, according to the aforementioned Spanish Mediation Act, once the mediation request has been filed and the informative session3 has taken place, the mediation procedure will commence with a constitutive session in which, among other issues, the subject-matter of the dispute submitted to mediation, the program of activities (i.e., the procedural calendar) and the deadline for completion of the procedure shall be agreed upon by the parties and recorded in the corresponding Minutes. If no agreement is reached on any of those matters, the Minutes of the constitutive session shall state that the mediation was not successful.

The Mediation Act stresses that the procedure shall be as brief as possible and the different stages be condensed into the fewest possible number of sessions. The procedure may end without an agreement due to any of the following reasons: (i) one or all the parties exercise their right to terminate it, (ii) the time limit allocated to the mediation procedure elapses; or (iii) the mediator determines that the parties'

positions are irreconcilable. The Final Minutes executed at the end of the procedure shall include any agreements reached.

3. How does mediation differ from arbitration/state court proceedings in your country?

Due to the vast amounts of time and money involved in the trial process, the Spanish system has increasingly turned to legal alternatives. So then the Alternative Dispute Resolution (ADR) refers to the wide spectrum of legal avenues that use means other than trial to settle disputes.

- ✓ Mediation is an informal process where an impartial third-party, the mediator, helps the disputing parties find a mutually satisfactory solution to their issue. The mediator guides the parties toward a mutually agreeable settlement by helping them clarify their underlying interests and concerns, and encouraging compromise and trade-offs based on the relative importance of each item to each party. Mediators cannot impose a resolution upon the parties since they are not able to make legally binding decisions. Any settlement reached, if in fact one is reached, is simply an agreement signed by the parties just like any other contract. The settlement does not have the same legal force as an Award which results from arbitration. Mediation is usually well-suited to disputing parties who still have a somewhat amicable relationship, who are still able to negotiate, and who do not want a third-party to make final decisions.

- ✓ Arbitration is a procedure whereby two or more parties agree to have an unbiased, neutral, third-party (or third-parties) act as judge and jury to resolve their dispute for them in private -- outside of the public judicial system. It is a much-simplified version of a trial involving less complicated rules and procedures. Arbitrators have more flexibility than court judges to decide how the arbitration should proceed and what weight to give evidence. The parties typically agree to abide by a particular arbitral institution's existing rules. After giving the parties the opportunity to present their side of the story and to present any relevant documents or other evidence, the arbitrator decides who wins the case and what the resolution will be. If the parties agree in advance to "binding arbitration," the decision of the arbitrators, called an Award, is enforceable in a court of law if the losing party does not comply with the terms of the Award. Binding arbitration is more comparable to litigation than is mediation. One important distinction between arbitration and litigation is that the former offers very limited rights of appeal after an Award is made by the arbitrator.

4. **In your country, what are the typical disputes where mediation works? When does mediation not work?**

(i) **Mediation in the labour field**. Mediation is very common in labour disputes. It is sometimes compulsory to attempt mediation before resorting to the courts. Collective disputes are usually subject to mediation and in some Autonomous Communities individual disputes are mediated. The Autonomous Communities have employment mediation bodies which specialise in such matters. At national level, the Servicio Interconfederal de Mediación y Arbitraje, SIMA, (interconfederal mediation and arbitration service) offers a free mediation service for disputes which fall outside the remit of the bodies of the Autonomous Communities. Law 36/2011 governing the labour courts introduces a genuine novelty by establishing a general rule that all applications must be accompanied by a certificate attesting to a prior attempt at conciliation or mediation before the appropriate administrative service, the Mediation, Arbitration and Conciliation Service (SMAC), or before bodies performing such functions under a collective agreement, although the article following lists the procedures that are exempt from this requirement.

(ii) **Mediation in the civil and family fields**. Law 5/2012 on mediation in civil and commercial matters includes the possibility of informing the parties at the preliminary hearing that they have the option of using mediation to try to resolve the dispute and, taking into account the purpose of the court proceedings, the court may invite the parties to attempt to reach an agreement that would end the proceedings or allow the parties to request a stay so that they can undertake mediation or arbitration. Law 5/2012 involves a major change in this area of law in that it introduces into the Code of Civil Procedure express reference to mediation as one of the non‑judicial methods of ending proceedings. As far as the Spanish system is concerned, it is in the area of family law that the mediation process is most structured and reaches its maximum development. At central government level, Law 15/2005 takes a significant step forward by viewing mediation as a voluntary alternative means of resolving family disputes and proclaiming liberty as one of the highest values of the Spanish legal system; it provides that the parties may at any time ask the court to stay the proceedings so that they can resort to family mediation and attempt to reach an agreed solution on the issues in dispute. Furthermore, the Code of Civil Procedure provides for the possibility that the parties, by common accord, may request a stay of proceedings so that they can undertake mediation, but it does not require the court to suspend the process ab initio in order to refer the parties to an information session, nor does it even recommend such a step.

(iii) **Mediation in the criminal field**. Mediation in the criminal field is aimed, on the one hand, at reintegrating the offender and, on the other, at

compensating the victim. In the juvenile justice system (for ages 14 to 18), mediation is expressly stipulated as a means of re-educating the minor. Here, mediation is carried out by teams supporting the service responsible for the prosecution of minors (Fiscalía de Menores), although it can also be carried out by organisations of the Autonomous Communities and other bodies such as associations. In the adult justice system, there is no provision for mediation, although in practice it is carried out in some provinces on the basis of criminal codes and codes of criminal procedure which allow for plea bargaining and a reduction in the sentence by making good the loss, as well as under the applicable international rules. Usually, mediation is carried out in connection with less serious crimes, such as petty offences, though it is also possible in cases of serious offences depending on the circumstances.

(iv) **Mediation in the area of contentious administrative proceedings.** The Law on contentious administrative proceedings does not expressly provide for the possibility of using alternative means of resolving disputes facilitated by a third party, although nor does it prohibit such means.

5. **What psychological aspects need to be taken into account in your country like negotiation tactics and cultural aspects?**

Does not apply.

6. **Is there a particular style/approach to mediation in your country? Do mediators tend to approach mediations in a neutral/facilitative way (acting as an intermediary between negotiating parties) or do they adopt an evaluative approach (expressing views/opinions as to merits and/or likely outcomes)?**

The preamble of Royal Decree-Law 5/2012 emphasises the requirement that all professionals involved in the process of mediation must be "neutral". This characteristic defines the role of the mediator to the point that in many countries, a person acting as a mediator is called "neutral". According to article 8 of the Royal Decree-Law, specifically devoted to the principle of neutrality, a mediation must take place in a way that it allows the parties involved in the conflict to reach an agreement on their own accord.

The role of the mediator, according to this principle, is, ultimately, to facilitate the communication between the parties and to ensure that the necessary information and advice is made available to them. It is the duty of the mediator to assist the parties with all means available to him/her in achieving a resolution of the conflict on their own. If this is achieved, not only are the chances of maintaining the

underlying relationships between the involved parties higher, they are also in control of the process until the final resolution.

In order to reinforce neutrality on mediating institutions, Article 5 stipulates that should they also be involved in providing arbitration services, they are to adopt the necessary measures to ensure a clear separation between both activities.

Mediator

7. **How is the mediator chosen/appointed in your country? Is there a list?**

   A neutral mediator is directly appointed by the parties. The mediator will assist the parties while working towards a negotiated settlement of their dispute but the parties will remain in control of the process and the outcome of the mediation at all times. Parties are often assisted by their lawyers during the mediation sessions and the costs are usually shared between the parties, especially if an agreement is not reached.

8. **Who is an eligible mediator? What hinders a mediator from accepting a mediation?**

   The mediator must be a natural person satisfying the following requirements: (a) he must be in full possession of his civil rights, (b) must not incur in any conflict of interest and (c) must have completed specific training that has been provided by "duly accredited" institutions. Additionally, a mediator must have a civil liability insurance policy.

   The mediator shall disclose any circumstance that may affect his impartiality or generate a conflict of interest and, in particular, the circumstances mentioned in the Mediation Act (Royal Law-Decree 5/2012): (i) the existence of personal, contractual, commercial and/or business relationships with any party; (ii) direct or indirect interest; (iii) previous actions by the mediator or a member of his company or organization in favor of one or more of the parties, in any circumstance, excluding the mediation process at stake.

9. **Can a lawyer mediate in your jurisdiction? Does he need training to be eligible?**

   A lawyer can mediate in Spanish jurisdiction if he satisfies the requirements to be an eligible mediator: he must be in full possession of his civil rights, (b) he must not incur in any conflict of interest and (c) he must have completed specific training that has been provided by "duly accredited" institutions.

10. **Can a Judge/Court be a mediator in your jurisdiction? If so, are there separate mediation sessions or can a mediation also occur within State Court Proceedings?**

A Judge / Court can't be a mediator in Spanish jurisdiction. The Spanish Civil Procedure Rules do not provide any particular judicial powers to support mediation. Judges may invite litigants appearing before them to mediate, but they may not act as mediator themselves in that mediation. However, courts are increasingly making orders compelling parties to mediate, particularly in family disputes, despite the lack of any legal obligation for the parties to do so.

Mediation legislation / Relationship between State Courts and Mediation.

11. **Is there any state law regulation of mediation or mediators in your country? If so, what are the fundamental principles of such law?**

Royal Law-Decree 5/2012 of 5 March implements Mediation Directive 2008/52/EC in Spain, by way of urgent legislation, which was already due before 21 May 2011. In addition, Royal Law-Decree 5/2012 furnishes a brand new general regulation of mediation and conciliation in civil and commercial matters something that was until now lacking in Spain. Mediation and conciliation are now available provided that the matter of the dispute may be solved by mediation/conciliation, according to the applicable law. The new legislation came into force on 7 March 2012.

In spite of its general scope of application, the new legislation excludes from its material scope of application the mediation in criminal matters, the mediation concerning public administrations, the mediation in labour relations and consumer mediation. Mediation in labour relations as well as mediation in consumer relations is both separately regulated by former Spanish rules.

Moreover, the new general legislation coexists with former regulations stemming from the Autonomous Communities (Comunidades Autónomas) that had already ruled on civil mediation within the scope of their legislative competence. Concerning commercial mediation and conciliation Royal Law-Decree 5/2012 stands as the only applicable Spanish law as only the central State has legislative competence in commercial law matters. Therefore, internal conflicts of laws are thus avoided.

The Spanish regulation on commercial mediation and conciliation is applicable in cross-border disputes when the parties expressly or tacitly submit to it or, in the absence thereof, when mediation/conciliation takes place in Spain and one of the parties is domiciled in Spain according to articles 59 and 60 of Regulation 44/2001 ("Regulation Brussels I"). Cross-border disputes are defined as disputes between parties domiciled in different States.

Concerning the substantive aspects of the new Spanish legislation, its main legal underpinnings are of course Mediation Directive 2008/52/EC but also 2002 UNCITRAL Model Law on International Commercial Conciliation. Therefore, it is an important feature of the new Spanish legislation that in legal terms "mediation" refers either to mediation and conciliation. In the same manner, the legal term "mediator" refers both to mediators and conciliators. Consistently, mediation is legally defined as a mean to settle disputes on a voluntary basis by which the parties try to reach an agreement by themselves with the help of a mediator.

12. Do the Courts encourage or impose mediation, or impose sanctions for failure to explore mediation, or is it a purely voluntary process?

This is a well-known characteristic of mediation/conciliation, according to which none of the parties can be forced to sustain a mediation procedure, much less to reach an actual agreement ending controversy. Nevertheless, Spanish legislation attaches some effectiveness to the agreement to mediate.

First, an agreement to mediate is enforceable in the sense that parties have to start a mediation procedure before going to court and the law grants to the party willing to start the agreed mediation a right to stay judicial or arbitral procedure until ediation has finished.

Second, although mediation procedure ends if a party fails to attend the preliminary information session, lack of appearance of the parties is not confidential information so it can be brought to the attention of judicial or arbitral courts.

13. Is an agreement reached during mediation enforceable? Does it need to be confirmed by a Court? What would be the consequences of said confirmation?

The parties may include the terms of the agreement resulting from mediation in a public deed, thereby constituting an enforceable title. The Spanish Notary Public will verify whether the requirements established by the Mediation Act are satisfied and the content of the agreement is not contrary to the laws.

Without prejudice to the provisions of EU regulations and international conventions, agreements enforceable in another State will only be enforceable in Spain when their enforceability stems from the intervention of a competent authority performing functions equivalent to those accomplished by the Spanish authorities. A foreign agreement resulting from mediation that has not been declared enforceable by a foreign authority will only be enforceable in Spain upon its formalization in a public deed before a Spanish Notary Public at the instance of all the parties or at the instance of one of them with the express consent of the others.

The agreement resulting from mediation may be challenged before the courts with an action seeking annulment of said agreement based only on causes for the annulment of contracts.

When the agreement is reached as a result of a mediation process that took place after the commencement of judicial proceedings, the parties may request judicial approval ("homologación") of said agreement.

14. Are the mediation proceedings confidential? Is it possible for a party to submit in court elements revealed during the mediation proceedings? How?

The mediation proceedings are confidential so than any person involved in the mediation (including the mediator) must keep confidential any information he acquired as a result of the mediation process, and is exempted from giving evidence about any such information in judicial or arbitration proceedings, unless the parties agree otherwise in writing or the evidence is requested by a reasoned decision of a judge of the criminal jurisdiction. In addiction we have to say that the parties involved in the mediation process must act in good faith, with loyalty and showing mutual respect.

Conclusions.

15. What are the pros and cons of mediation?

This list is by no means exhaustive but the advantages of mediation compared to more formal forms of dispute resolution include that:

- ✓ The process is flexible and can take account of commercial issues (such as a desire to maintain a business relationship) as well as the legal strengths of the parties' positions;
- ✓ A good mediator will be able to introduce novel ways of resolving disputes that the parties may not have considered;
- ✓ The fact that parties have gone to the trouble of arranging the mediation means they are more likely to enter into negotiations with a view to settling, rather than "going through the motions";
- ✓ Discussions with the mediator are private and confidential. Any offers or concessions made in the mediation are "without prejudice" and cannot be revealed by the other side in later proceedings in court;
- ✓ Mediation may save the costs of a formal litigation process.

This list is by no means exhaustive but the disadvantages of mediation compared to more formal forms of dispute resolution include that:

- ✓ Mediation does not always result in a settlement agreement. Parties might spend their time and money in mediation only to find that they must have their case settled for them by a court. Opting for mediation, therefore, presents something of a risk.
- ✓ Mediation lacks the procedural and constitutional protections guaranteed by the federal and state courts. The lack of formality in mediation could be a benefit, as noted above, or a detriment. Mediation between parties of disparate levels of sophistication and power, and who have disparate amounts of resources available, might result in an inequitable settlement as the less-well positioned party is overwhelmed and unprotected.
- ✓ Legal precedent cannot be set in mediation. Many discrimination cases, among others, are brought with the intention of not only securing satisfaction for the named plaintiff, but also with the hope of setting a new legal precedent which will have a broader social impact.

16. Is the mediation practice in your jurisdiction influenced by other countries' mediation practices?

As I said before, the aforementioned Spanish Mediation Act transposes into Spanish law Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters.

17. Are costs of mediation perceived to be high/low in your country? Who pays for the mediation?

Generally speaking, mediation connected with the court is free of charge.

In the employment field, the services of the Autonomous Communities and of SIMA are free of charge.

In the family field, the services offered by the bodies working with the courts are generally free of charge. In Catalonia, the cost of the mediation process is regulated for those who do not receive legal aid.

In the criminal field, the mediation offered by public bodies is free of charge.

Outside of mediation connected with the court, the parties are free to use a mediator and to pay freely agreed fees. Regarding the cost of mediation, Law 5/2012 expressly provides that whether or not mediation has ended in an agreement, the cost will be divided equally between the parties unless otherwise agreed.

With the aim of encouraging the out-of-court settlement of disputes, Law 10/2012 regulating certain fees in the area of the administration of justice and the National Institute of Toxicology and Forensic Sciences, provides for a refund of the amount of the fee when an out-of-court settlement saves some of the costs of the services provided.

18. Are there current mediation trends in your country?

Does not apply.

19. Do you use any other forms of Alternative Dispute Resolution ('ADR') in your country? If so, please give a brief description of each of those.

In Spain the main ADR alternatives to civil litigation are arbitration, mediation and conciliation:

- ✓ **Arbitration.** Arbitration is an ADR method where the disputing parties involved present their disagreement to one arbitrator or a panel of private, independent and qualified third party "arbitrators." The arbitrator(s) determine the outcome of the case.
- ✓ **Mediation.** Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other.
- ✓ **Conciliation.** Conciliation is another dispute resolution process that involves building a positive relationship between the parties of dispute, however, it is fundamentally different than mediation and arbitration in several respects. The "conciliator" is an impartial person that assists the parties by driving their negotiations and directing them towards a satisfactory agreement. Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. Although this sounds strikingly similar to mediation, there are important differences between the two methods of dispute resolution. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure who is responsible for the figuring out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. In this regard, the role of a conciliator is distinct from the role

of a mediator. The mediator at all times maintains his or her neutrality and impartiality. A mediator does not focus only on traditional notions of fault and a mediator does not assume sole responsibility for generating solutions. Instead, a mediator works together with the parties as a partner to assist them in finding the best solution to further their interests.