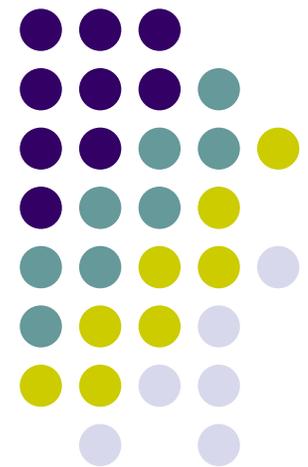


Resolving Banking Financial Disputes between Consumers and Banks : In a Diverse and Global World

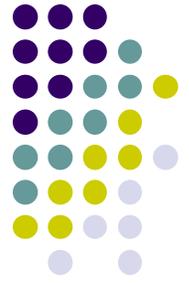
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4-5 June 2009

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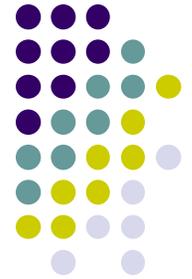


Resolving Banking Financial Disputes between Consumers and Banks In a Diverse Global World

Important elements for mediating in times of challenges in diversity and in the current context.



- basic fundamentals in mediation
- mediation ethics
- mediation styles
- training and development & ongoing benchmarking best practices
- knowledge management culture
- clear objective
- process
- tools : co-mediation, private caucus, questioning, reframing
- Med – Arb ; current trends
- Accountability and immunity
- Practical workable settlement
- Systems: Designing dispute resolution systems : needs analysis & knowing the internal and external culture & potential threats
- Online ADR : assistance
- Ability to change learn and relearn



Background of The Financial Mediation Bureau (FMB) General Statistics

- 2005 to 2008, settled 7096 out of the 8999 cases registered
- wide variety of subject matters
- Banking Mediation Bureau (BMB)1991
- Insurance Mediation Bureau (IMB)1996
- Financial Mediation Bureau 2005
- 1059 references in the year 2008
- consumer claims and disputes arising out of
- conventional and Islamic Banking products and services

An independent body set up to help settle disputes between consumers and financial services providers

- The FMB provides the Consumers a free, fast, convenient avenue to refer their disputes for resolution as an alternative to the courts



The Challenges In A Diversed and Global World

- scope and scale of disputes : sharp increase
- this is seen in most jurisdictions
- the most **sophisticated dispute resolver** may be unaware of how to respond
- if they have not dealt with multiple and recent disputes
- if all the relevent stakeholders are not attentive to this changes in the landscape of disputes registered;
- **need for systems and human capital** : fast adaptation
- dispute handling process is going to lose value
- these phenomenon are seen globally in most jurisdictions

Resolving Banking Financial Disputes In a Diverse and Global World



- Acceleration of globalisation
- Culturally diverse world :
- Cyber culture and popular culture
- Established tried tested approaches : no longer effective?
- New leadership & / process designs : what are they?
- Toward changes at the speed of light : are we there?

“... a period of crisis can provide an opportunity to drive change more rapidly and effectively than a period of prosperity... just as a jumpstart is needed instead of a gradual change in certain conditions a transformation is needed ...”



Talent Management

- competencies
- knowledge
- skills and
- attitudes

Abilities

Awareness

*“It is generally agreed that competence is determined by some combination of three general factors: **personal characteristics, training and experience**. In some kinds of disputes, ...some would argue that mediator effectiveness is **enhanced by subject-matter expertise**. Finally, individual mediators have **different styles and different approaches to the mediation process**. **Parties’ own goals** will determine what kind of mediation they will undertake...”*

The Selection of the Mediator by [Margaret Shaw](#), Adjunct Professor, New York University School of Law, (New York, United States of America)

Banking and Financial Disputes between Consumers and Banks in Financial Mediation Bureau : What does it entail?



The Mediator is to have regard to:

- (i) (a) The Contract ;
 - (b) The applicable rule of law, judicial authority or statutory provision;
 - (c) The general principles of good banking practice;
- (ii) And not to be bound by any previous decisions of any Mediator
- (iii) in the light of (i) and (ii), to assess what solution would be fair and reasonable in all the circumstances.

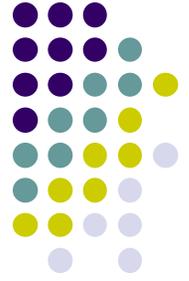
The Mediator will endeavour to assess the fair and reasonable solution in the circumstances.



General Process of Resolving Disputes in FMB between Consumers and the Banks

- Mediation First
- The FMB Office's primary recourse to dispute resolution is mediation
- The Mediation in this context is :
 - initial intake process
 - registration of cases rests on the Mediator;
 - details of facts and documents from both parties
 - a direct face to face meeting and or via documentation
- The meeting can be;
 - Fully facilitative/ directive/ both

General Process of Resolving Disputes in FMB between Consumers and the Banks



- Investigation, Findings and Decision Award :
- If the above step of Mediation First is not possible,
- investigation toward a decision not a legal process
- the Mediator's recommendations are not binding except when an award made by the Banking Mediator is accepted by the customer
- binding on the bank
- The process of Mediation First encourages dialogue between the parties and promote understanding of each other's case
- (see further discussion on Med-Arb)



Increased use and recognition of Mediation in financial disputes due to :

- Facilitation of the dispute by a third party mediator
- Achievement of understanding & communication
- Cost saving
- Education
- To enable parties to move on with their life
- Engaging loyal customers and winning them back
- Finality by the parties own determination or by the Mediator
- Time saving
- Face saving
- Confidentiality
- Justice, fairness & reasonableness



General principles of good dispute handling involves:

- the parties' involvement in the process;
 - the parties' self determination and how they wish to settle;
 - Preparation by Mediator through parties' input and submission of their case
 - Keeping Communication channel open to enable movements forward
 - The other aspect being the Analytical assistance and facilitation by the Mediator, are appreciated by the parties
 - questions from the parties, parties starting to talk to each other
 - Persistence by the parties in terms of follow up and by the Mediator
-
- parties go for mediation only if there is good faith
 - parties are free to seek independent legal advice; and
 - free to be able to take the court option

The importance of Training and Development for effective mediation practice & decision making



- **Internal** ongoing learning and training
- **External** specific training for development of the skill mix relevant to the dispute resolution practice in the organisation
- **Leadership** of the lead mediator or supervisor:
 - **Ongoing supervision** of learning, skills, knowledge, attitude, analysis, research & development orientation
 - **analysis and best possible solution and outcomes** for the directive evaluative mediator
 - KM : importance of starting a KM system : ongoing: **scaleability**
- It is a medium long term process and not short term
- for positive changes and tranformational developments & changes in mindsets habits & authentic commitment toward dispute resolution



Training: It is important to know :

- Who are the trainers; What types of cases do they mediate?
 - The inclination of certain organisations to only produce facilitative style mediator training...
- Their track record and experience
- Their commitment to best practices and continuing developments and analysis in dispute resolution
- Their ongoing coaching and mentoring skills and approach toward dispute resolution development



The Mediator Factor : the Mix:

- personality orientation

- Knowledge,
- Skills
- Attitudes

- Awareness
- mindful contemplative analytical
- decisive



Knowledge management

- So that knowledge can be **shared**
- So that knowledge can be **retrieved easily**
- So that knowledge **does not get hoarded** by individual/s
- So that there is **tracking** of knowledge and **further use** of it
- So that knowledge can be **replicated**, and further **analysed** and **improved on** for future use
- To ensure they can be **further developed**
- **Scaleability & meritocracy**



The mediator's role

- excludes advisory functions and legal advice
- Confidential
- Flexible
- Voluntary
- Lawyers for the parties are allowed to assist the parties
 - But we communicate direct with parties
- Not decision makers during mediation meetings
- Self determination
- Co-mediation

Med-Arb



- Immunity and accountability issues :
- “that the functions of a mediator are comparable to those of a judge, (in the context of court annexed mediation) describing the general process of encouraging settlement as "a natural, almost concomitant of adjudication";
- the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and,
- the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct, (in this case, concerns about bias could be addressed by application to the judge who referred back the matter to the case evaluator.” **Wagshall v Foster** 28 F.3d 1249, 1251 (D.C. Cir. 1994)

- *Cains v Wadiwel* [2007] NSWSC 207, Supreme Court of New South Wales, 8 March 2007 Gzell J:
- a clear distinction between an **informal** mediation conducted by a solicitor and a **formal** mediation
- In this case, the J took into consideration of the formal specialised mediation

Med - Arb

At FMB

Mediation First and Investigation Findings Decision if there was no settlement



- The same person in mediation as Mediator and also at decision making: “**in fairness and reasonableness**” for **prompt decision making**: it is within the terms of reference:
- Banks are to furnish all necessary documents;
- being a Consumer and Bank dispute within our jurisdiction: therefore;
- Banks to expedite in furnishing information in the dispute filed

Concern against:

- First, a party during the mediation phase of med-arb may disclose confidential or privileged information to the mediator. Should the mediator subsequently act as an arbitrator in the arbitration phase of med-arb, he might be in possession of information that the other party is not given an opportunity to explain or rebut, in breach of the rules of natural justice.

Case for :

- we may further **pursue further questioning and investigation** which the party may tell us, because we need to get the truth and the nearest to the truth if possible;
- Useful use of **private caucus**; and joint session: parties communicate and inform the best they can: and it works!
- suitable for consumer claims in contracts vs. commercial whereby parties have equal powers of negotiation



Med - arb

- **Against:**
- Second, a party may be **less open** during the mediation phase of med-arb if he is concerned that the information provided to the mediator may be relied on by the mediator; thus undermining the effectiveness of the mediation phase of med-arb.
- **Case for:**
- This is not the case at FMB, because there is a need for follow through and to ensure fairness and justice and promptness in decision making;
- Further for the same person mediator, the parties tend to communicate more and inform the Mediator, : the parties are encouraged to inform to enable a fair and reasonable decision
- we were able to have both parties communicate at **joint session** and if such case does happen at **caucus**, when back at joint sessions; the Mediator may ask if they wish to communicate to the other party directly; they may wish to think about it;
- * consumer disputes



Med – arb

- The use of a single neutral **reduces costs** associated with educating a second neutral about the facts of the *case* which may achieve inaccuracy of information (recorded, experienced and seen eg. demeanour of the parties, seriousness in achieving resolution and many other details needed);
- A strong case for med –arb with single mediation decision maker in certain type of cases
- 'Med–arb' clauses (which provide that the mediation process will become arbitration should the parties fail to agree) are increasingly common
- In particular, the court is likely to be broad–minded about challenges against arbitrators based on their prior involvement with the issues; arbitrator ceases to be sufficiently independent only if he or she has stated a clear and irrevocable view on the legal consequences of the facts of the particular situation.

Alternative Dispute Resolution approaches



Avoidance – Negotiation – Assisted Negotiation – Mediation – NEE/ENE

Mini Trials – Peer Adjudication – Hybrids – Arbitration – Court



Mediation resulting in agreement or failure to reach agreement

- Bad faith
- The dispute is not ripe for mediation yet
- The mediator & the process
- Lawyer's assistance
- Educational level and understanding or capacity
- Mandate and authority to settle



Lawyer's assistance

- Encouraging their clients to participate actively in the mediation c.f. litigation.
- (b) Encouraging their clients to be realistic; emotional cost, social cost, efficiency cost
- (c) Providing technical, legal advice.
- (d) Helping to generate various options
- (e) Making use of opportunities to speak to their clients privately.
- (f) Taking an active part in documenting the settlement terms.



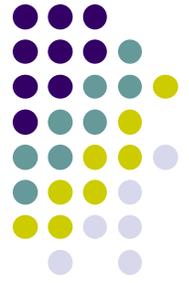
Directive Mediation compared to the Facilitative Mediation

- Instant culture
- The subject matter of dispute calls for prompt decisions
- Reliance on authority figure
- Spanning 3 generations : Baby Boomers, Gen X, Gen Ys various styles, 3 main race (Malays, Indian & Chinese)
- Not wanting to give in “face saving”
- Formal specialist forum
- A thorough full scale mediation process often result in a response to this effect :
 - “We will leave it to Madam Mediator to decide”
 - “We trust and will follow your decision”



The Mediation and Dispute Resolution Design is integral to :

- support a fair evaluation and judgment for the parties
- 1. Mediation first
- 2. Findings, further investigation and decision
- Mediator
- Assistant Mediator
- Audit Committees
- Binding on the Consumer only if the Consumer wishes to accept the decision by the Mediator; binding on the FIs if Consumer chooses to be bound
- Final and no appeal



Online Alternative Dispute Resolution (O ADR/ e ADR / ODR)

- FMB uses the features in emailing, “shuttle mediation”
 - combination of telephone, face to face Mediation meetings and postal communication.
 - has its benefits and also negatives
 - confidentiality and security.
-
- face to face Mediation meetings are more effective in our diversified plural culture, varying degree of language competencies, understanding, educational level

Online Communication Methods which may be helpful to consider when moving forward to the future:



- Same time communication = Synchronous Communication
- Communication at different times = Asynchronous Communication
- Segmented spaces
- Entirely Online
- Hybrid

Important elements for mediating in times of challenges in diversity and in the current context.



- To have in mind the **essential elements** of good dispute resolution principles and to analyse it according the culture of the particular subject matter of dispute with all the relevent stakeholders...to build the system to enable the objective of transforming dispute resolution and mediation to serve the parties concerned...the end is to serve the parties concerned toward fairness and reasonableness...and a workable solution...
- **The key is in the fundamentals Slide 2**

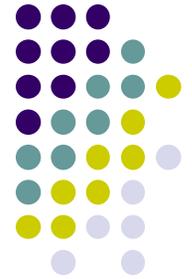
Cost Effectiveness: cost savings
Social, Emotional, Monetary Cost
Ways to encourage more mediation work



- Cost benefit analysis suggests that all ADR processes are far less costly than traditional litigation generally;

Ways to increase use of Mediation :

- **'Med-arb' clauses** (which provide that the mediation process will become arbitration should the parties fail to agree) are increasingly common
- **Mediation clauses** in banking documentation contracts
- **More “cross-industry” collaboration;** because we do not work alone in a diversified and global world; there is a need for platforms of various industries to respect and learn from each other in practical ways;
eg. IT disputes and Banking disputes, Community resolvers and Criminal Justice lawyers in restorative justice works for petty crimes, Islamic scholars and experts in Financial areas and Commercial Mediator in co-mediation
- **multi party disputes** and for large disputes involving various experts



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Thank you

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