

A Practical Guide to Mediation
in
Intellectual Property, Technology & Related Disputes
By
Jon Lang
London: Sweet & Maxwell, 2006, 115 pages.
ISBN No. 978-0-421-93860-1

Reviewed by Colm Brannigan

For most practitioners and clients in the Intellectual Property and Technology areas using ADR has meant defaulting to arbitration. The professional and academic literature confirms arbitration's position as the premier ADR process in Intellectual Property and Technology disputes.¹ But is this the way it should be? Should such the choice of arbitration be so clear cut? This book says otherwise.

Jon Lang, an experienced commercial mediator in London, England should be congratulated for venturing into relatively uncharted territory with this pioneering work.² He champions mediation as the dispute resolution process with the greatest promise and utility in the highly complex and technical areas of Intellectual Property and Technology.

Many, if not most, technology and intellectual property disputes are suitable for mediation. Mediation is low-risk and cost-effective. Specialized litigation is very expensive. As with civil litigation in general, most cases in these areas are resolved through settlement before trial. A well known U.S IP/Technology lawyer, James Pooley, has shown that that 97% of all intellectual property disputes are resolved before trial.³ So, if cases are unlikely to go on to trial anyway, there is no reason a mediated solution should not be sought.

Mediation is the preferred method of dispute resolution in many countries in Asia, as well as becoming increasingly more popular in the United States and in Europe. But, even so, counsel and clients in North America, and especially in Canada, have generally lagged behind Europe and the U.K., in recognizing that mediation is especially well suited to dispute resolution in IP and Technology cases.

¹ Examples of the literature which confirms the emphasis on arbitration are found in WIPO's Bibliography on Intellectual Property Arbitration and Mediation available at:

<http://www.wipo.int/amc/en/center/bibliography/general.html>

² See www.jonlang.com

³ See www.pooleyoliver.com/articles/po-successful-mediation.pdf and www.pooleyoliver.com/articles/po-might-of-mediation.pdf

Prompt resolution, which can be provided by mediation, can be critical to the survival of clients businesses where disputes involve a short product lifespan and both technology and laws are in a state of constant change. Sometimes even the elements of the dispute are unclear and require flexibility in outcomes. This is not possible through arbitration or litigation.⁴

Mediation can deal with issues outside the legal dispute to provide a more comprehensive resolution. As an example of possible outcomes, mediation can provide for future business relationships between the disputants. Courts cannot award this type of remedy. Most clients want a business solution to their problems, not necessarily a legal one. Agreement reached through mediation, because it is reached by the parties themselves, is generally more sustainable than an imposed resolution. Mr. Lang clearly reinforces the utility of mediation in providing such a solution, which reflects the “win-win” approach of interest based bargaining in the mediation process.

This is the first book that I am aware of specifically focussed on mediation in these practice areas, and is part of the European Intellectual Property Review (EIPR) Practice Series. It must have been extremely difficult for the author to choose whether to emphasize the subject areas (substantial knowledge) or mediation itself (process knowledge) in his work, but he found the right balance between them.

Mr. Lang divides his book into 10 logical chapters:

- Introduction
- The Mediation Framework in England and Wales
- Mediation in IP and Technology Disputes
- The Importance of Preparation and Timing
- The Mediation Day (and Getting There)
- The Mediator and Their Appointment
- Preparation for Mediation
- Mediation Advocacy
- Settlement
- Case Studies

It is chapter three, “Mediation in IP and Technology Disputes,” the core of the book, that sets it most clearly apart from other practice guides and

⁴ For further information on this point, see Colm Brannigan and Michael Erdle, “Resolving IT Disputes through ADR, Part I – Mediation,” (2007) 8 (3) Information Technology 6. Available at: http://www.oba.org/en/PDF_newsletter/tecjun07web.pdf

books about mediation. It is subdivided into "The Use of Mediation in Intellectual Property Disputes and Mediation Related Developments in the IP Field and takes the reader through a convincing argument on why mediation should be utilized in these types of disputes.

The final chapter also set it apart and is five case studies in which mediation was successfully used as the dispute resolution process. These include copyright/confidential information; trade mark; passing-off; and, two technology related disputes. This chapter clearly illustrates how the mediation process can, and does work, in different types of disputes.

He provides guidance on navigating through the mediation process to the reader in a clear and straightforward manner. Where necessary, checklists and diagrams are used for even more clarity. By taking a step by step practical approach to the mediation process and by covering a variety of topics from the timing of mediation and the importance of picking the appropriate mediator, through to the importance of mediation advocacy and option generation, the author clearly illustrates and guides the reader. Mr. Lang clearly confirms his thesis by demonstrating how mediation can, and should be, used to resolve intellectual property disputes. Providing a balanced guide to both process and substantive areas can be difficult to achieve, but he has managed to do so in a brief, yet comprehensive fashion.

All in all, this is a very nice balance of theory and practice in a highly readable mix. It is a welcome addition to the fast growing literature on mediation, and will be very useful to counsel, clients and mediators in the technology and intellectual property fields.

Colm Brannigan, LL.M. (ADR), C. Med., mediates and arbitrates technology and intellectual property cases. He can be contacted through his website, www.technologymediation.ca or by e-mail at colm@mediate.ca

Reprinted from the December 2007 Edition of "Alternative Dispute Resolution," the Newsletter of the Ontario Bar Association ADR Section. The Ontario Bar Association (OBA) is the voice of the legal profession in Ontario, representing the interests of more than 17,000 lawyers, judges and law students. www.oba.org