

INTERNATIONAL COMMERCIAL MEDIATION TRAINING ROLE-PLAYS

Cases from the ICC International
Commercial Mediation Competition

Edited by Greg Bond and Colin J Wall

International Commercial Mediation Training Role-Plays

Copyright © 2015

International Chamber of Commerce (ICC)

All rights reserved. ICC holds all copyright and other intellectual property rights in this work subject to existing rights of the authors of the “role-plays”. No part of this work may be reproduced, distributed, transmitted, translated or adapted in any form or by any means, except as permitted by law, without the written permission of ICC. Permission is not necessary for the making of photocopies of “role-plays” in the publication by the purchaser for the sole purpose of teaching in not-for-profit educational institutions provided that:

- The information relating to the title and source of the publication, and the authorship of the individual “role-plays” remains visible on the copies; and
- Not more than three “role-plays” are photocopied for the same purpose.

Permission for other purposes can be requested from ICC through publications@iccwbo.org

ICC Services
Publications Department
33-43 avenue du Président Wilson
75116 Paris
France

ICC Publication No. 765E
ISBN: 978-92-842-0298-0

Contents

FOREWORD

by Andrea Carlevaris, Hannah Tümpel, Sara Debendetti, ICC 5

EDITORS' FOREWORD

by Greg Bond and Colin J Wall..... 6

OVERVIEW OF ROLE-PLAYS 8

ROLE-PLAYS 8

CONTRACTS AND DISPUTED TERMS

Tracy Allen	
Hot & Spicy BBQ	10
Thierry Garby	
Big Games v TroVrai	18
Richard Lutringer	
Joint Venture Adventure	23
Rebecca Attree	
Distribution of Hair Care in the UK	31
Michel Kallipetis	
WTL v BTL	38

SALES CONTRACTS AND DISPUTES OVER QUALITY

Mohamed Ali Chicktay	
Cape Wine Industries v Kenyan Spirits	45
Giovanni De Berti	
Top Piping Ltd. v SuperDrilling Ltd.	50
Heather Douglas	
A Problem with Carpets and Shawls	57
Colin J Wall	
A Sticky Printing Problem	65

INTELLECTUAL PROPERTY DISPUTES

Giovanni De Berti	
Softender v Mogul	74
Alan Limbury	
Parallel Imports	82
Manon Schonewille	
Special Chemistry	87
Alan Limbury	
The Spacenook Saga	93

INTERNATIONAL CONSTRUCTION DISPUTES

Colin J Wall	
Five E and JLH	101
Christopher Miers	
The Palm Leaf Shopping Mall	110
Rosemary Jackson	
A Fine Mess	116
Christopher Miers	
The Beachfront Condominiums	121

PERSONAL AND EMOTIONAL DISPUTES

Alan Limbury
Tribute to Bablo’s Lizard 129

Murray Armes
Wheels of Fortune 136

Pedro Fida
Dispute for Goals 142

Colin J Wall
Chris v Kim 148

AUTHORS’ COPYRIGHTS..... 159

AUTHORS’ AND EDITORS’ BIOGRAPHIES..... 160

ICC DISPUTE RESOLUTION PUBLICATIONS..... 163

ICC AT A GLANCE..... 164

Foreword

It gives us great pleasure to introduce this book, which is published on the occasion of the 10th ICC International Commercial Mediation Competition.

The International Chamber of Commerce (ICC) is well known for the dispute resolution services it provides worldwide through its International Centre for ADR and International Court of Arbitration. Over the years, it has administered countless commercial mediations involving parties from all regions of the world, making it the most experienced mediation institution for cross-border disputes.

Yet ICC does more than provide dispute resolution services for private companies and sovereign states. Ever since its creation in 1919, it has played a central role in the development of alternative dispute resolution. Through its vision and leadership, guidance, training, attentiveness to users' needs, collaboration with other important stakeholders, and the crafting of effective rules and procedures, ICC has indelibly marked international dispute resolution as we know it today.

The present book celebrates the success of the ICC International Commercial Mediation Competition and reaffirms ICC's commitment to its educational mission and to supporting the worldwide development of mediation.

The competition was founded for the purpose of providing students with an opportunity to acquire hands-on experience in mediation. Today it has grown well beyond that initial objective, becoming not only ICC's biggest educational event, but also one of the most important annual international mediation events in the world. In addition to being a unique learning experience for students, the competition plays an important role in capacity building by bringing together mediators and mediation specialists from all parts of the globe to engage in exchange on diverse approaches to mediation, lessons learned, latest know-how and predictions for the future.

ICC's commitment to providing the platform on which the competition can grow has exceeded our expectations with the extraordinary input of all those who have contributed to the event. Thanks are due to the many generous supporters of the competition, including the sponsors, the mediation experts, the universities, the professional mediators who participate on a pro-bono basis, the many volunteers and, of course, those who devise the role-plays for the competition. This book includes some of the role-plays created for the competition over the last 10 years.

Our thanks also go to the co-editors of the present publication, Greg Bond and Colin J Wall, without whom the book would not have been possible. We are especially grateful for their careful selection of the published role-plays and excellent preparation of the commentaries. It has been a privilege to work with them and we pay tribute to their professionalism, enthusiasm, passion for mediation and desire to provide a lasting and useful legacy for the future. Their interest and investment are typical of so many of the mediators who participate in the competition on a voluntary basis, to all of whom we extend our warmest thanks.

Last but certainly not least, we would like to thank the many students who have participated in the competition. Their enthusiasm to learn how to settle complex disputes amicably and efficiently has been the principal force driving the event.

It is our hope that this book will prove to be a useful resource for mediation training worldwide. The role-plays illustrate the complexities and competing interests often encountered when analyzing cross-border disputes. They are intended for use when teaching interests-based conflict resolution skills. We hope that lawyers and business people around the world will take advantage of this unique resource and that it will help them to acquire a better understanding of the role mediation can play in the effective and efficient resolution of disputes.

Here's to many more ICC International Commercial Mediation Competitions, and to many successful mediations worldwide!

Andrea Carlevaris — Hannah Tümpel — Sara Debendetti
Paris, January 2015

Editors' Foreword

This book is a collection of 21 of the best role-plays used in the first nine years of the International Chamber of Commerce International Commercial Mediation Competition, which is held at the ICC in Paris every February. This publication marks the 10th anniversary of the competition, with which we have had the pleasure to have been involved in many ways throughout the years. Colin J Wall assisted in setting up and sponsoring the competition in 2006 and has been co-chair with Alan Limbury of the working group writing and editing competition role-plays since 2012. Greg Bond joined the competition in 2011 and has been a member of a working group devoted to the competition rules. Both attend the competition as judges and mediators.

The ICC International Commercial Mediation Competition began in 2006 with just 10 teams. From those humble beginnings it has become the world's premier mediation competition and an international meeting place for law and business students. Now over 65 university teams from all over the world participate each year. The competition is also an important forum for professional mediators, academics in ADR fields, and trainers to meet and exchange ideas.

Each year, professional mediators taking part in the competition write role-plays for the competition based on their years of experience in the field, and it is from these that we have made our selection for this book. As editors we were spoiled for choice as to which role-plays to include in this book. As the competition has grown, the ICC has devoted considerable work to the quality of the role-plays, and so we have tended to use role-plays from the latter years. In 2012, to further improve the quality of role-plays used in the competition, the ICC introduced the best preliminary rounds role-play award, voted on by the participating students, coaches and professionals. We have included the three winning role-plays in this book.

The role-plays in this book can be used for commercial mediation and mediation representation training at universities and by training organizations around the world. We have edited them as lightly as possible, in order to preserve each author's original work. In many cases we have removed specific dates, to make the role-plays date-neutral and thus durable for training purposes over the coming years. In recent years, competition role-plays have increasingly used fictitious countries, while some of the role-plays included still contain the original real countries used by the authors. In all the role-plays, the roles and names (where given) of the parties are gender-neutral, so students playing the parties do not need to assume any role of the opposite sex. In some cases we have updated the role-plays to adapt them to new circumstances. Earlier role-plays, for example, referred to the ICC ADR Rules, and we have replaced this with the ICC Mediation Rules that came into force in January 2014.

These role-plays were designed for the competition format. In the competition they are mediated in a relatively short time (just under two hours), with one mediator and two representatives of each party, a business person with settlement authority and an in-house or external lawyer. At the competition, the mediations rarely conclude with full settlement and are not intended to, as time is too short. They are mediated by professional mediators, trainers and academics, while students play the roles of the parties and lawyers. The role-plays are designed for students of law, business and commercial mediation, and for an interests-based and facilitative model of mediation that is used at the competition, in which much of the mediation takes place in joint / plenary session but caucus is encouraged when helpful.

When used in training and educational programmes, these role-plays can be more fully and more flexibly exploited by trainers. They can be used to train mediators, students of business who may act as parties and students of law practicing mediation representation. They can be used in a variety of mediation styles and models. They can be mediated over longer periods of time, including full-day mediations or mediations over several sessions. Trainers can easily adapt them to various needs, such as allowing larger numbers of participants with more company representatives and co-mediators. They can also be used to concentrate on specific aspects of the mediation process, such as opening statements, exploring interests, using caucus, developing options and settling and writing mediation settlement agreements. They can also be used as study materials for general discussion on the principles and practice of commercial mediation.

Each role-play has three parts — General Information, Confidential Information for the Requesting Party and Confidential Information for the Responding Party. It is important for use in training that the parties and mediator only read the relevant parts of the case in advance. All participants should read the General Information but only the relevant parties and not the mediator should read the Confidential Information. It is assumed that the General Information contains knowledge of the case that is known to both parties in advance of the mediation, and that the mediator has been given access to it, perhaps by way of position papers. The Confidential Information contains further briefing for the parties on their interests and facts that are not yet generally known, but are likely to play a significant role in the mediation. After the role-play has been used in class, students and trainers can then refer to both sets of Confidential Information in feedback or debriefing.

At the ICC International Commercial Mediation Competition students playing the roles of the parties and their lawyers are encouraged to prepare their mediations thoroughly. A sound knowledge of the facts is essential and for some of the role-plays this will require considerable study. The complexity of these cases reflects the complexity of real international commercial mediation and makes using them all the more rewarding. In preparation, students are advised to work on their party's legal arguments, their commercial and personal interests, their options and their no-agreement alternative or BATNA. They should also consider what the other party's interests, options and BATNA might be. They are also recommended to plan a strategy concerning which issues to discuss in which order, which matters might require caucus, how to react to likely claims and statements made by the other party and what they expect of the mediator. The mediation will usually begin in joint / plenary session with a brief introduction by the mediator and opening statements by both parties in turn and students will prepare these meticulously. In addition, students should be clear on the division of responsibility between the business representatives and the lawyers. It is a good idea for students to write a mediation plan including all the above points by way of preparation for the mediation.

Each role-play in this book has also been briefly commented on by each editor, with Colin J Wall focusing on legal and business analysis, and Greg Bond adding a look at one possible training and learning experience that the role-play can offer. Experienced trainers using these role-plays will clearly know how to make the most of them for their own needs and training programmes.

The cases in this book all offer different options for mediation settlement, ranging from creative and new win-win business opportunities to settlement with no future relationship or mediations that end without settlement. The legal and business issues covered range widely, as does the level of the parties' personal and emotional involvement. The book begins with five cases on contracts and disputed terms or terms that must be renegotiated; there follow four on sales contracts and disputes over quality, four intellectual property disputes, four in the international construction industry and four in which the disputes address a variety of business matters that also have a distinctly personal and emotional element. This is not to say that there is no emotion — and room for some play-acting in training — in the other cases as well. For better orientation, an overview of the role-plays with short summaries is also included.

The editors would like to warmly thank the authors of the role-plays included in this book and all authors of role-plays for the ICC International Commercial Mediation Competition over the years, who have all contributed to the increasing quality of this work. We also wish to thank the students, team coaches, professional mediators, academics and trainers from all over the world who have given feedback on the role-plays over the years, and who always make the ICC International Mediation Competition such an unforgettable and rewarding experience. Our greatest thanks go to all the dedicated staff and interns at ICC who work so hard every year to ensure that the competition is a great success.

We wish all users of this book every success in mediation training and practice, and hope that these role-plays will be as much fun to use as they have been to edit and to write.

On a final note: both editors are donating all of their royalties from this book to pancreatic cancer research or care.

Greg Bond and Colin J Wall
January 2015