BOOK REVIEW

THE COMMERCIAL MEDIATOR’S HANDBOOK*

by Cyril Chern

Joel LEE
Associate Professor, Faculty of Law,
National University of Singapore.

1 It is difficult to do justice to such a tome in the space of a relatively short book review. The author has extensive experience as, inter alia, a barrister, arbitrator and mediator, and sets out to achieve a relatively ambitious goal with this book. As he indicates in his preface, he feels that the flaw in the training of mediators is that there is too much focus on achieving a particular method of mediation. The author has instead started with the end in mind, which is to focus on helping parties get closure. This involves mediators understanding how people make decisions, what their motivations are and how different contexts in which the mediation occurs may call for different tools and techniques. Drawing upon various fields like “medicine, Madison Avenue, psychology, marketing and common sense”, the author seeks not only to cover “all of the known ‘methods’ of mediation” but also to examine the underlying principles of why they work.

2 The Commercial Mediator’s Handbook is divided into 25 chapters ranging over a myriad of topics. To this reviewer’s mind, the chapters in this book can be grouped into five different and sometimes overlapping areas.

3 The first area focuses on setting the scene. Chapters 1 to 3 look at the raison d’être of why mediation exists. What is the purpose of settlement? Why should one mediate, and, more importantly, why should one mediate today? This looks at the history of dispute resolution spanning ancient cultures, from the Chinese Qing dynasty to the modern alternative dispute resolution (“ADR”) movement, including English, European Union and Islamic developments. Without being explicit about it, the key was certainly to highlight that there are very good reasons why one should settle a matter via mediation rather than take it to a lose-lose litigation outcome. Chapter 4 looks at the development of contemporary mediation worldwide. Focusing on the UK and the US, this chapter takes the reader through the Woolf reforms, changes to the Civil Procedure Rules and some of the relevant cases in England and the US. The reference to “worldwide” is probably a misnomer but to be fair, developments in the UK and the US will inform development of the field in the rest of the world.

* Informa Law (Routledge), 2014.
4 The second area focuses on, unsurprisingly, the various processes within mediation. For example, chapter 6 looks at the now well-known distinction between interests and positions, the different types of bargaining (integrative, positional and distributive), and how to manage co-operative and competitive styles of conflict resolution. Chapter 7 deals with the mediation process in general and provides helpful guidance as to how to sequence and structure a mediation to deal with the conflict at hand. Chapter 14 deals with the commencement of a mediation, dealing with parties and their representatives and, interestingly, the use of oaths in mediation. Chapter 18 provides summaries and checklists that a practicing mediator will find very helpful. Chapter 5 is also interesting. Simply titled "The Process", it considers matters like whether mediators should take on every mediation, issues relating to the initial party interviews, documents and their use, hearsay evidence, and the use of the mediator as a tool. It also contains a segment on the importance of eye contact in various parts of the world.

5 No book on mediation would be complete without some attention on the techniques in mediation. This is the province of the third area of focus. Chapter 16 looks at the different styles of mediation (facilitative, evaluative and transformative) that mediators can choose to engage in and argues for a blended approach. Chapter 17 looks at techniques that can be used in commercial mediation, including the use of the Best Alternative to a Negotiated Agreement ("BATNA") in dispute settlement mediation. What is unusual is that this chapter not only looks at pre-dispute mediation (which encompasses mediation before litigation has been started and can still be considered a dispute settlement mediation) but also mediation to sort out pre-contractual matters, also known as deal-making mediation. This last conception of mediation is relatively new and not something that has caught on yet. However, to the reviewer's mind, there is tremendous potential for mediators to help parties create value in deal negotiations and this chapter is prescient in addressing this issue. Chapter 15 is devoted to dealing with deception, a topic which is rarely addressed in any detail. Chapters 8 ("Preventing Settlement Remorse in Mediation") and 25 ("Advanced Techniques") deserve special mention. Both of these chapters explore principles and techniques that mediators will find useful, including the role of the use of heuristics, framing, the fight or flight response, dealing with emotions, the Cialdini principles and biases, just to name a few. What is noteworthy about these two chapters is that the material draws from many different fields, including psychology, neuroscience and decision science.

6 The fourth area of focus is on what this reviewer would term tools for running and managing a mediation business. To be clear, it is difficult to draw a clear line between what a mediator does to help parties resolve a dispute and some of the ancillary matters that support that process of dispute resolution. However, to give readers an idea, this cluster of eight chapters include topics addressing forms, documents and questionnaires for parties, structured mediation boards, mediator payment and drafting of settlement agreements. The inclusion of these forms and
documents is both practical and useful to any mediator seeking to run a professional business and who may not necessarily be associated with an institutional mediation service provider.

The final area of focus consists of three chapters. Chapter 20 looks at the tricky question of mediator ethics and particularly useful is the provision of guidelines on what are prescribed and proscribed in mediation. Reference is also made to the Dispute Board Federation Mediator Code of Ethics and the European Code of Conduct for Mediators. Chapter 22 looks at legal issues in mediation, focusing on mediator liability, immunity and confidentiality. Chapter 24 is dedicated to a situation when one is not a mediator but representing a party in a mediation. Acknowledging that a lawyer's typical skill set in litigation is unsuitable for mediation, the author goes on to provide helpful guidance on how a mediation representative can prepare for mediation as well as traverse the process of mediation and achieve the client's goals.

The Commercial Mediator's Handbook is to be commended for its practical, multidisciplinary and interdisciplinary approach to the material. While the organisation of the chapters could have been better and some of the overlaps across chapters rationalised and streamlined, the book achieves what it sets out to be, a handbook which can be said to be a storehouse of the sum total of experience of the author. Overall, The Commercial Mediator's Handbook will be useful to any practicing mediator.