

# Commercial Mediation: A User's Guide

By John Brand, Felicity Steadman and Christopher Todd

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At last, a handbook for commercial mediators written by experienced South African mediators.

One would expect from these authors a seminal work and the reader will not be disappointed.

The opening words of the preface are pertinent: 'Mediation has arrived in the civil justice system. It is here to stay.'

The authors point out that not only does this reality follow international trends, but the South African courts and legislature are alive to the potential and need for mediation as a dispute resolution mechanism. This recognises, too, that mediation is part and parcel of South African customary law, at the core of which is the concept of *ubuntu*.

The book commences with a background, creates perspective, moves on to a description of the key characteristics of mediation and deals with the nuts and bolts of the process. The combined practical experience of the authors clearly manifests itself.

Although exponents of the process, they make it clear that mediation is no panacea. They face head-on the concerns of segments of the legal fraternity that mediation threatens their livelihood. This is debunked by showing the positive role that lawyers can play in the mediation process, which in commercial mediation

calls for their active involvement. Coupled with this is the warning quoted in the book from a 1983 issue of the *Journal of Legal Education*, which I have rephrased as: If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow for human inclinations toward collaboration and compromise to flourish, rather than stirring proclivities for competition and rivalry, they will not be at the centre of the most creative social experiments of our time (Dereck Bok 'A flawed system of law and practice training' (1983) 33 *Journal of Legal Education* 570, cited in Simon Roberts & Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (United States of America: Cambridge University Press 2005) at 48).

How to decide on whether or not to submit to mediation, what circumstances favour it and when it is not appropriate are discussed. The perception that proposing mediation to clients or an opposing party is a sign of weakness is also addressed. Much of this has to do with the absence, at this stage, in South Africa of a strong mediation culture in commercial disputes. With time, and as court-referred mediation becomes entrenched in the civil justice system, this perception will diminish.

Practical issues, such as choice of venue, setting up the venue and related is-

sues, are dealt with, as is the running of the mediation and the role of the lawyer.

The ethics of the mediation process are also clearly spelt out.

Listed among the appendices are 49 statutes that currently provide for mediation in one form or another (this figure has subsequently increased to 51). Templates are also provided for agreements to mediate.

For those with no or limited knowledge of mediation, this book will provide a clear, practical insight into the workings of the process. To experienced mediators, it offers a back-to-basics reference, particularly where the process gets stuck, as is sometimes the case.

All in all, a book to be highly recommended as a necessary addition to the library of all lawyers.

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