

Stories Mediators Tell

WORLD EDITION

Lela Love & Glen Parker, editors



ABA Section of
Dispute Resolution
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CHAPTER 21

It Really Happened in Frankfurt

Jawad Sarwana

Whether your first love or your first kiss, your firsts often remain the most memorable moments of your life. They offer the most surprises and new lessons to learn. This is the story of my first case as a mediator in Pakistan.

A Brief History of Mediation

In Pakistan, the concept of mediation is mostly unknown to judges, lawyers, and the general public alike. In 2002, to keep pace with the modern methods of dispute resolution, the Civil Procedure Code of Pakistan was amended to include a provision enabling the courts, where parties are agreeable, to refer pending cases to mediation. From 2004 to 2012, the International Finance Corporation, the private-sector arm of the World Bank, implemented a mediation program to create awareness and promote mediation among the judges, lawyers, accountants, financial consultants, architects, corporate executives, and other professionals and provide institutional and resource support to facilitate resolution of court disputes through mediation. The UK Centre of Effective Dispute Resolution (CEDR) accredited approximately fifty mediators in Karachi and another ninety-five in Lahore. In 2007 and

2011, two newly established mediation centers were set up, one in Karachi and the other in Lahore, respectively. To provide all members of its panel of mediators the opportunity to practice their newly acquired knowledge and training, the Karachi Dispute Resolution Centre (KDRC) decided that all disputes referred to the center would be co-mediated.

Mediation Case by Way of Background

In 2009, fellow mediator Khalid and I were appointed co-mediators by the KDRC to mediate a dispute referred by the High Court (the Appeals Court of the Province of Sindh). It was the first mediation case for both of us. The case involved intellectual property (IP) rights and was pending in court. Both parties were textile manufacturers. They were doing business using almost the same name but were manufacturing different goods.

The appellant, Al-Hakim Textiles Private Limited (“Al-Hakim LLC”), was a limited liability company incorporated under the Companies Act in the early 1960s. At the time the dispute arose, it was one of the leading exporters in Pakistan of different types, colors, and sizes of cotton towels. The company’s list of buyers included the world’s leading international brands, stores, and hotels in the United States, Europe, and Asia. The towels were exported without the “Al-Hakim” brand affixed on them. Often the foreign buyers would direct Al-Hakim LLC to affix the buyer’s own labels on the towels. Al-Hakim LLC did not register any trademarks because it did not consider it necessary to do so. The company continued to do business as usual.

Meanwhile, another entity, an unregistered partnership firm by the name of Al-Hakim Textiles (“Al-Hakim Partnership”) took a different approach. Before Al-Hakim Partnership started business in the early 1970s, the company filed an application for registration of the word mark “Al-Hakim” with the Trademarks Office indicating that they intended to use the trademark “Al-Hakim” on the goods produced by the company. By the time the Trademarks Office issued the certificate of registration of the trademark “Al-Hakim” in the late 1970s, Al-Hakim Partnership was already a major exporter of sheets and linens.

A Bit on Trademark Laws

Under Pakistan's trademark law, once a mark is registered with the Trademarks Office, the proprietor of the trademark acquires a legal right to the exclusive use of such trademark in the particular class of goods. Under the International Classification of Goods, towels, bed linens, and bed covers all fall in Class 24. However, because the business lines of the two companies were different—towels versus bed linens/sheets, there had been no legal dispute between the two companies. Both companies, without interruption by or interference from each other, continued to thrive and make profits in peaceful coexistence until the day that Al-Hakim LLC decided to file an application for registration of its mark, "Al-Hakim," with the Trademarks Office.

The Trademark Dispute

When Al-Hakim LLC filed an application for registration of its mark, "Al-Hakim," in Class 24 and its mark was advertised in the Trademarks Journal, Al-Hakim Partnership opposed the registration of the mark by filing Opposition Proceedings against Al-Hakim LLC. As a counteraction to the Opposition Proceedings, Al-Hakim LLC filed an action in the civil court against Al-Hakim Partnership for passing off. The law of passing off prevents one trader from misrepresenting goods as being the goods of another. It can be used to enforce unregistered trademark rights and protects the goodwill of a trader from a misrepresentation. After almost two years of proceedings in the Trademarks Registry and before any substantial hearings could take place in the civil court, the registrar dismissed the Opposition Proceedings on the grounds that Al-Hakim LLC had prior use of the mark. Al-Hakim Partnership appealed to the High Court on the grounds of nonreading and misreading of evidence by the Registrar of Trademarks. The matter continued to linger in appeal for another two years in the High Court until it came up for hearing before the chief justice, who was a member of the board of directors of KDRC for some time in the past. The chief justice referred the dispute to mediation.

Case Openings

Al-Hakim Partnership was represented by its sixty-five-year-old founding partner, Mehtab Uddin Khewra. Mehtab was a short and portly man who came dressed in a crisp traditional shalwar-kameez, a local dress consisting of a long shirt and baggy pants. His family had migrated from India and settled in Pakistan following the partition of the Indian subcontinent in August 1947. Mehtab's ancestors had been traders of homeopathic medicines between Delhi, Amritsar, and Lahore and had entered the manufacturing trade in Pakistan for the first time after the 1965 war between India and Pakistan. Mehtab was accompanied by his lawyer, Kamran Ul Guari, who was an IP specialist with neither experience nor training in mediation.

On the other side was the founder and chairman of Al-Hakim LLC, Seth Abid Ebrahim. Seth Abid also appeared to be in his mid-sixties and not much older than his opponent. He was known for his negotiation skills in the market and hailed from a prominent Gujarati-speaking Memon family that had been active in the manufacturing sector in the Indo-Pakistan subcontinent since the 1930s. He was a much taller man than his opponent and was dressed in a sharp business suit, looking ready to go to work on Wall Street. Seth Abid's lawyer, S. Hussain Premani, belonged to a Shia sect of Islam that had mandated that all members of the community must mediate their disputes. Thus, besides Khalid and me, Seth Abid's lawyer was the only one present who was familiar with mediation.

Khalid and I were not surprised when the opening joint session of the mediation began with the usual finger-pointing, accusations, and counter-accusations. It was exactly what we had been taught to expect in the opening phases of most mediations. Each party alleged that it had started doing business earlier in time than the other and was entitled to the exclusive use of the mark on the grounds of prior use. Both parties fiercely maintained their ground.

As we moved into private meetings with the parties, neither side was in the mood to change its position. For three hours or so, my co-mediator and I shuttled between the two rooms. The parties and their lawyers refused

to come out of litigation mode and seemed unwilling to explore any other options but their legal cases.

It now began to get frustrating for us. The only option each party came close to offering, which both Khalid and I refused to communicate to the other party, fearing it would amount to an insult, was the alleged value of goodwill associated with the “Al-Hakim” brand. Both Al-Hakim Partnership and Al-Hakim LLC had obtained an exorbitant valuation of their brand from two different leading international chartered accountant firms doing business in Pakistan. If Al-Hakim LLC wanted to use the brand, then the company would have to purchase the same from Al-Hakim Partnership. Similarly, if Al-Hakim Partnership wanted to use the brand, then the company would have to purchase the same from Al-Hakim LLC. The problem was that neither party was willing to buy the brand from the other. Khalid and I were running out of ideas and not hopeful that our first mediation case would be a successful one.

Like a Prayer

Both parties were religious and took breaks at the call of prayers. There was nothing extraordinary about this. When the first prayer break time came around noon, the parties proceeded to the nearby mosque to offer their zuhr (noon-time) prayers. My co-mediator and I had decided to skip the zuhr prayers and stayed in the mediation room with Seth Abid’s lawyer, Hussain, who did not attend prayers because he belonged to a different Islamic sect. We waited with Hussain for the parties to return.

When Seth Abid, Mehtab, and Guari returned from the mosque, we recommenced private caucus. These meetings produced no change in either party’s position. The dispute remained at a deadlock.

At about 4:30 p.m., we had still not made any progress. The parties had been apart in separate rooms, and each had continued to be equally entrenched in its position. Each repeatedly argued prior use of the trademark as if we were judges, and each claimed ownership and demanded compensation from the other. On hearing the early evening call for prayers, the parties, sitting in separate rooms, decided they would take a break to offer their asr (early-evening) prayers.

At the time of asr prayers, my co-mediator and I decided that we would accompany the parties to the mosque. All of us, except for Hus-sain, who stayed behind at the KDRC, walked together to attend the early evening prayers.

Mosques, churches, synagogues, and temples are all sacred places. They have no conference rooms, chairs, desks, or racks and shelves for documents. They offer a completely different environment. At this point, my co-mediator and I, along with the mediating parties, stood in a single file with the co-mediators in the middle, Seth Abid on one side, and Mehtab and his lawyer on the other side, everyone standing shoulder to shoulder with our hands folded across our chests, heads looking downward at the prayer rug facing the direction of the Kaaba, the house of Allah in the holy city of Mecca, Kingdom of Saudi Arabia, praying to the Almighty. On conclusion of the prayers, the imam leading the prayers asked the worshippers to hold their hands together and pray for peace and betterment.

With early-evening prayers concluded, Khalid and I returned to the KDRC ahead of everyone else. We planned to recommence the evening session with a joint meeting summarizing where matters stood before we left for the prayer break. We decided we would give the parties an honest appraisal of what seemed to be an impasse and ask the parties how they wished to proceed.

When the parties and their lawyers returned from the mosque, we directed them to the conference room to begin our joint session. Before we could start the joint meeting, Seth Abid submitted that he wished to speak first. He shared with the group that earlier during the mediation day, when he had gone for zuhr prayers to the mosque, he had noticed his opponent offering prayers too. Thereafter, they had both returned to the mediation to try to solve this problem, which had taken time and resources for many years now. At asr prayers, the co-mediators had also accompanied them (the parties and their lawyer).

He confessed that he was moved by the fact that everyone had gone to the house of the Lord to seek his help and guidance jointly to remove and resolve the difficulties they faced, both in their personal lives and those

faced by their brethren Muslims, which included the present opponents. He proposed that to begin to resolve this dispute, he and the founding partner had to first talk about the events in Germany, and thereafter the rest could follow.

As Melville notes in *Moby-Dick*, “[T]he great floodgates of the wonder-world [had just] swung open.”

Nothing Better Than the Real Thing

The HEIMTEXTIL fair in Frankfurt, Germany, is one of the oldest and largest tradeshows in the world for textiles, with over 2,750 exhibitors and more than 68,000 trade visitors including manufacturers, distributors, and designers from all over the world.

Both Al-Hakim LLC and Al-Hakim Partnership had been participating in the HEIMTEXTIL fair for many years. Both brought a large contingent of staff to the fair. The founding members of both companies attended as well, working the floor to push their products to potential buyers. For cost-saving and other reasons, all Pakistan-based textile companies, numbering close to forty delegates, would jointly rent an entire hall and set up their individual stalls to promote their business lines in the designated area, which was identified as the Pakistan pavilion. Thus, all the stalls of Pakistan-based companies were located in this large hall on the same floor.

Although Mehtab and Seth Abid knew of each other’s participation at the fair, there had been no problem at previous fairs. The problem arose one year when the two Al-Hakim stalls were located closer to each other than in the previous years, which led to an increasing number of visitors asking whether the two “Al-Hakim” brands were under joint management or related to each other.

Confusion among foreign visitors between the Al-Hakim LLC and Al-Hakim Partnership brands continued over the four days of the fair. On the last and final day, the continuous cross-inquiries from visitors regarding the relationship status of the two Al-Hakims reached the boiling point. Seth Abid walked over to the Al-Hakim Partnership stall and let the employees manning the stall have it. Mehtab was not far away and heard Seth Abid’s

outburst. Soon enough, Mehtab and Seth Abid were in a war of words, accusing each other of being “copycat cheats,” “impersonating thieves,” and “misrepresenting marketers.” The tirade quickly reduced to language of the lowest denominator, with both parties hurling the choicest four-letter abuse and its derivatives in the Urdu language and their equivalent in the English language. It was a loud and obscene exchange. All of the leading businessmen from Pakistan’s international textile manufacturing houses and their staff witnessed the show.

Seth Abid felt humiliated. The first thing he had on his mind was revenge for the embarrassment suffered at HEIMTEXTIL. On his return to Pakistan, he visited his family lawyer, who advised him to file an application for registration of the company trademark, which he did through the IP law firm recommended by the family lawyer. However, when he did so, the IP law firm informed him that the trademark “Al-Hakim” already stood registered with the Trademarks Office by Al-Hakim Partnership. This just added fuel to the fire, and as a counter-blast Al-Hakim LLC filed a suit for passing off, seeking a mandatory injunction to stop the Al-Hakim Partnership from trading under the name of “Al-Hakim” in Pakistan. The parties had been embroiled in litigation for over six years when the case was referred for mediation.

It was evident that the IP lawyers on both sides were clueless and caught by surprise about the episode at HEIMTEXTIL. Both clients had not disclosed the HEIMTEXTIL affair to their lawyers.

Words Don’t Come Easy to Me

Khalid and I sensed a feeling of regret in Seth Abid’s disclosure. On occasion, his choice of words reflected a sense of personal and professional failure to handle the situation appropriately and an acknowledgment of an offense. Mehtab’s prompts and interventions on the events at HEIMTEXTIL suggested that he felt like he was a victim of Seth Abid’s abuse. The mediation required further caucus. Accordingly, we decided to start the first caucus following our joint meeting following asr prayers with Seth Abid.

Seth Abid felt he had overreacted and was regretful for the events that had unfolded at HEIMTEXTIL. He wanted to bring closure to the

episode but was not sure if this was the right time or occasion. Although he was willing to apologize to Mehtab, he did not want to be the initiator without being sure that Mehtab was specifically asking for an apology. Khalid and I indicated to him that we were happy to discuss this with Mehtab if we thought he was ready as determined by us at the time our meeting with him, and Seth Abid gave us permission to do so. As we left the room, we tasked Seth Abid and his lawyer to start work on how he would frame an apology if Mehtab was also willing to offer an apology to Seth Abid.

When Khalid and I met Mehtab and discussed the matter, it was clear that there was potential for both parties to apologize for the HEIMTEXTIL event. However, Mehtab had a trust deficit with Seth Abid. He had doubts regarding the sincerity of Seth Abid's offer to apologize and felt it was probably Seth Abid's trick. Khalid and I assured him that we would not procure any apologies from Seth Abid until Mehtab was sure Seth Abid's apology was sincere and not simply for the sake of giving it.

It was now obvious that an apology would end the deadlock.

The Power of Apologies

Khalid and I worked with both parties for the rest of the evening to help frame an apology that would be acceptable to both. The terms of the draft settlement agreement involved Seth Abid hosting a dinner at his residence and inviting all the delegates who were present on that fateful day when the incident took place at the Pakistan pavilion during HEIMTEXTIL. During the dinner speech, Mehtab would apologize for the unfortunate events at HEIMTEXTIL and the misunderstandings between the parties. This would be followed by Seth Abid making a similar apology at the dinner. Additionally, Al-Hakim LLC would withdraw its civil suit against Al-Hakim Partnership, and the latter would withdraw its appeal. Further, both organizations would continue their business lines and undertake not to cross over; that is, Al-Hakim LLC would restrict its business to towels, and Al-Hakim Partnership would restrict its business to bed linens and sheets. The lawyers were tasked to work jointly on the final shape of the

settlement. At this point, it appeared that these savvy businessmen who had been stuck on their egos and spent unnecessary time and money on a petty incident that had taken place approximately 4,500 miles away from Karachi had come to their senses and would soon be settling this dispute with an apology. But fate had other plans.

A Final Twist and Shout

All seemed to be going well until Seth Abid received a telephone call from his eldest son, Ahmed Ebrahim, asking for an update. Ahmed was the chief executive officer (CEO) and one of the three directors of the family-run company. Following the telephone discussion with his son, the chairman requested a private meeting with us. Returning to the private meeting, Seth Abid disclosed that Ahmed had recently graduated from a prominent university in the UK with a master's degree in supply chain management. He submitted that he and Ahmed had been discussing plans to expand the family business from manufacturing of towels to the business of items related to bath, bed linens, and beyond. If Al-Hakim LLC was going to diversify and start to manufacture and export bed linens too, it was critical for the company to retain exclusive rights to the brand name "Al-Hakim." Seth Abid did not wish to upset Ahmed and needed some time to discuss the matter with him.

We returned to the joint session with the other side realizing that the tectonic plates of resolution had been shaken by the chairman's son. At the joint meeting, Seth Abid explained to the parties that although he had authority to settle the matter as the chairman of the board and founding member of the company, there was a difference of opinion between him and his son regarding the terms of the draft settlement. He did not wish to discuss this any further but wanted some time to speak to his son before he determining how to move forward in this mediation. He requested that the parties take a break and said that he would follow up with the co-mediators to schedule an agreeable date to continue with the mediation. Accordingly, the mediation was adjourned.

During the week, we followed up the matter and tried to schedule a session with Seth Abid and Ahmed at their office. Ahmed was not willing to attend a session. No further mediation took place. Although the two founding members of the contesting parties had come to an apparent agreement, it was not going to be possible to settle this case amicably. The mediation had failed. The case was returned to the Appeals Court.

Almost six years after my first mediation case, as I pen this story, both the appeal filed by Al-Hakim Partnership and the suit filed by Al-Hakim LLC continue to be listed for hearing in the Appeals Court and the civil court, respectively.

Reflections

Identifying Cases Suitable for Mediation

When a case is referred by the court to a mediator, the mediator has no information on the background of the case except the documents that accompany the case file and a copy of the court's order to mediate. The documents do not reveal the parties' needs or interests. By the time the dispute reaches the court, parties have already handed over their dispute to their lawyers to litigate and obtain a favorable result. Mediators are also not aware of the submissions made by the advocates before the judge, and in this case during hearings before the Registrar of Trademarks. In Pakistan, judges are not trained in mediation. With experience, some judges have developed the knack of being able to identify legal disputes suitable for mediation when reading pleadings or hearing arguments.

When we had asked the parties' lawyers to submit the relevant papers regarding the dispute to the co-mediators, they had couriered to the KDRC 300 sheets of paper consisting of copies of the entire pleadings before the Trademarks Registry and the appellate proceedings. There was no mention of the events of the Frankfurt incident in the pleadings. The chief justice of the Appeals Court, Justice Mushir Alam, who was a former director of the KDRC, had mastered the art of referring cases appropriate for mediation to

the KDRC. During the course of the arguments advanced by the lawyers, he must have heard or felt something in this trademark dispute that led him to refer this case to mediation.¹

Alternatively, it may be that Seth Abid's lawyer, Hussain, had suggested mediation as an ADR mechanism in this case to the chief justice. Hussain is a member of the Ismaili community. Members of the Aga Khan International Conciliation and Arbitration Board of the Shia Imami Ismaili Muslim community, led by their spiritual leader His Highness Prince Aga Khan, have been pioneers of mediation across the world. His Highness has mandated that any and all disputes within the community must be mediated first. This parallel system of justice supplements the civil judicial system and most likely has reduced the workload of courts across the world. With an estimated 15 million followers worldwide, the Shia Ismaili sect is scattered throughout at least twenty-five nations, including sizeable populations in the United States and Canada.

Case Preparation—Mediator Advocacy

Despite Hussain's familiarity with mediation, the pleadings and lawyers' submissions to the KDRC had offered no case analysis. At all times, the lawyers believed that the case was about the IP rights case of their clients pending in court. There was no exercise on their part to assess how a trademark dispute could be settled by mediation. The lawyers had walked into the mediation focusing solely on their legal case, producing voluminous documents to support their arguments of prior use and expecting that the other side would get intimidated, retreat, and compromise.

I always ask disputants or, when acting as a mediator advocate, my clients to reduce the dispute to the most important elements rather than taking a confrontational and positional approach. I have found it beneficial

¹ When General Pervaiz Musharraf had removed the entire judiciary and sent them packing home, Justice Mushir Alam was requested to join the KDRC as its honorary director, which he did. The judges, including Justice Mushir Alam, were eventually reinstated. Thanks to the general, the chief justice of the High Court got involved in mediation in Pakistan and has turned out to be a great supporter of mediation.

to have the client write the dispute on a single sheet of A4 paper to read in the joint meeting at the beginning of the mediation. Lawyers, myself included, tend to get caught up in facts and law and miss the big picture. I think if the lawyers in this case had realized that there was a backstory to the dispute, the approach would have been completely different. Case preparation would have been different too. The son who got involved late in mediation could have been included in the discussions earlier. The exercise could have helped explore the son's perspectives and attempt to accommodate these in the terms of settlement.

Unless the client has a long-standing relationship with his or her counsel, the chances are unlikely that the lawyer will get to hear the "real" needs of the party before heading into mediation. In most cases, the revelations come up during the course of the mediation process, and the lawyer needs to have done his or her homework to come up with an answer for something that may never have arisen as an issue in an adversarial dispute mechanism. Parties and their lawyers should remain flexible and fluid even if they have come prepared to mediation regarding what they wish to get out of it. Needs and interests may have to be reconsidered in light of previously undisclosed information shared by parties in the confidential setting of the mediation.

Two Sides of Spirituality

In purely commercial matters, religion is relegated to the background or at best plays a marginal role. Still, it is a factor to be reckoned with. In Pakistan and in most Islamic countries, mediation momentum breaks with the call for prayers. The parties may leave the room to pray together at a mosque, which changes the room dynamics, creates a breather, and gives an opportunity for parties to reflect. Attending prayers with the parties can be beneficial or troublesome, and the mediator has to be conscious of this. In the present case, both parties were attending prayers; hence, we took a chance and accompanied them. However, if only one of the parties had been attending prayers, we would not have risked going to the mosque with the opposing party. It could easily have been perceived as compromising our neutrality.

Muslims across the world are not homogenous in their practice of religion. There are conservative and liberals. There are many Muslim sects in Islam: the Sunnis, the Shias, the Ahmadis, the Ismailis, the Bohras, and so on. When mediating disputes where both parties are Muslims, the mediator should be conscious of both the common ground and the differences among the Muslims. For instance, Mehtab, Seth Abid, and Guari were Sunni Muslims and thus offer prayers in a mosque. Hussain was from a different sect and offers prayers at a Jamaat Khana. At the call of first prayers, the zuhr (noon-time) prayers, we did not wish to leave him alone. We felt it would not be appropriate. Hence, we stayed behind. As the day progressed and everyone was more comfortable with one another, Khalid and I decided to leave Hussain at the KDRC and offered prayers along with Seth Abid, Mehtab, and Mehtab's lawyer at the nearby mosque. It turned out to be that special spark to jump-start mediation. Handled with care and respect, a deeper understanding of religion can help in mediation.

Preparing Apologies and Apology Legislation

We spent a considerable amount of time working on the numbers and goodwill of the companies and trying to determine the value of the brand name "Al-Hakim." However, in the end, it all seemed to have boiled down to an apology. An apology can be a powerful reason for settlement if made at the right time. The lawyers took a long time drafting an apology. They did not want their client to make any admission in the appeal and the civil suit, yet they wanted to meet the demand for an apology to reach settlement. The time they spent on drafting the apology resulted in losing momentum and drive. Sometimes I wonder whether the outcome may have been different if the lawyers in this case had experience in drafting apologies.

Some jurisdictions, but not Pakistan, have apology legislation. Apology legislation offers evidential protection on an ongoing basis until settlement or trial. In certain cases, apology legislation offers wider protection, including more comprehensive protection than what is available for communication exchanged and made during settlement in negotiations

and mediation. In the coming years, apology legislation may well prove to be a significant game-changer in dispute resolution.

Authority to Settle—Legal and Real

The KDRC made three attempts to reconvene the mediation before returning the case file back to the court. The parties did not show up. Ultimately, the decision of whether to mediate rests with the parties. There was little we could do if they did not want to settle.

The dispute between the parties could have been settled if the difference between Seth Abid and his son could have been overcome. Although we tried to meet them to see if we could potentially mediate the difference, they were not willing.

Before we started the mediation, we had checked on authority. We were dealing with founding members of the firm. Clearly, they had authority to settle. From a Pakistan-based perspective, it was a surprise to us that the patriarch in a family-run business, who had participated in the mediation himself, would be constrained to exercise his authority. We assumed that the chairman had authority, but he refused to exercise it because he was reluctant to go against the wishes of his son. Thus, he did not have authority to settle in the real sense. Legal authority is important but still not complete. Even when it is present, extraneous factors may influence it. Mediators should therefore always be aware of the possibility of team dynamics when persons with authority are present but persons who matter are absent.