Mediation Of Commercial Disputes – How it works and tips for getting the right result

Mediation became a recognised method for resolving commercial disputes nearly 15 years ago. The initial impetus for mediation came via a review of the rules governing civil litigation in 2000. Since then there have been further changes to the rules and various court cases on the subject, which together have cemented the position of mediation as an important method for resolving most types of commercial dispute.

In principle almost all forms of commercial dispute are amenable to resolution through mediation. Rare exceptions are for example those cases where it is essential to obtain an urgent injunction in order to protect assets or prevent some form of significant and imminent harm.

The main driver behind the popularity of mediation has been the saving of cost and time that would otherwise be involved in the litigation process.

Nevertheless, many mediations take place under the umbrella of ongoing litigation. This is because typically the parties will want to gain a reasonable understanding of the nature of the dispute before engaging in mediation. The litigation process facilitates this, so that many mediations take place once the parties have exchanged statements of case and completed the disclosure process. Other mediations do not take place until a later stage, for example following the exchange of at least some evidence including expert evidence.

Even though cost and time may have been expended in the litigation process by the time that mediation takes place, a successful mediation will of course avoid the further cost and risks involved in taking the case onward to trial.

Despite the popularity of mediation, many commercial organisations still have little experience of the process or how best to prepare for it. The nature and key stages of mediation are as follows:

Legal foundation

First and foremost, mediation is a consensual process, meaning that the parties and the mediator have a degree of flexibility as to how the mediation should be carried out.

Whilst neither party is absolutely required to engage in mediation, the court may impose heavy cost sanctions on a party who unreasonably refuses mediation. In practice the question for the parties is therefore not whether to mediate but when to do so.

The mediator will be independent of the parties and qualified to act as mediator. The parties' lawyers will be able to suggest appropriate mediators for a given case and the identity of the mediator must be agreed by all parties.

The mediator will prepare a formal agreement to mediate, setting out the role of the mediator, the status of information produced during the process and other matters. Once signed, the parties and mediator will be bound by the agreement. The key elements of the agreement to mediate will be that nothing raised in the mediation can be referred to in any ongoing litigation, the mediator cannot be called to give evidence in the litigation, and no settlement will be created until a formal settlement agreement has been drawn up and signed.

Once they have engaged in a mediation the parties are not required to conclude a settlement – however if a settlement is not possible it may nevertheless be possible to narrow some of the issues in dispute.

Format

Most mediations follow a fairly well-trodden path, comprising:

- Opening

Although the parties will be housed in separate rooms during the mediation, the mediator will normally invite them to join in an opening session. In this session the mediator has the opportunity to introduce the parties, to explain the format of the mediation and build a rapport with them.

The mediator will also ask the parties if they wish to make an opening statement. This can be useful to help the parties engage with each other and provide their perspective of the dispute. However the practice of opening statements is now somewhat in decline since they can often be no more than a generic statement of the approach that the party intends to take to the mediation – which is not of particular benefit to the process. Nevertheless, a joint opening session can be of benefit in that it can enable all concerned to establish a connection to enable discussion and to focus attention on the key issues in dispute and how best to approach them through the mediation.

- Investigation

Once the parties have returned to their separate rooms the mediator will hold private sessions with each. These are on a confidential basis: nothing said in them can be reported to the other party unless the mediator is specifically authorised to do so.

At this stage the mediator will be aiming to fully understand each party's key motivations, concerns and objectives, and to help them discuss openly the strengths and weaknesses of their case.

- Negotiation

During this phase the mediator will encourage the parties to exchange offers and counter-offers for settlement. These are put via the mediator and although the mediator will therefore be acting as a conduit, he or she will also try to increase the prospects of the parties finding common ground. This can

be done by reality testing the parties' positions with them and if necessary mentoring them in the negotiation process.

The parties will also be encouraged to explore creative options for settlement, many of which would not be potential outcomes of the litigation should it proceed to trial.

- Settlement

If it is possible to reach agreement in principle, it is then necessary for the agreement to be formalised through the drafting and negotiation of a settlement agreement. This process may take several hours since the agreement will need to cover all issues and deal realistically with all contingencies that may arise.

Normally all concerned will want the agreement to be completed and signed by all parties at the mediation itself. The settlement agreement will be a legally binding agreement, enforceable through proceedings if necessary.

Following the mediation an order can be made by consent in the litigation that will either bring the case to an end there and then, or to defer that step until the terms of the settlement agreement have been performed.

Tips for getting the right result at mediation

- Pick the right mediator

There are many qualified mediators, ranging across most professions and areas of expertise. Consider any particular expertise that the case might require (accountant, surveyor, engineer, lawyer) and nominate accordingly. Mediators also vary in style and approach so it is helpful to take guidance and judge who is most likely to facilitate settlement bearing in mind the characteristics of the parties.

- Play the right team

It is essential to have a representative who has authority to agree any likely terms of settlement. Secondly it is important to have representative who is fully familiar with the detail of the issues in the case so that these can be addressed if necessary. Finally in practice it is often helpful to also have a senior representative who has not had day to day involvement in the case and who is therefore able to take a dispassionate and objective approach to both the dispute itself and the negotiations. This person may also be able to open a separate channel of communication with the other party that is not confined to the issues in the case.

- Be prepared

Ensure that the team is fully aware of the format that the mediation will take and the contributions they are expected to make to the process. Review key documents from the case and those prepared for the mediation. Consider and identify the essential "bottom line" settlement terms you are aiming for and those that are desirable but not essential.

Be prepared to compromise – settlement via mediation inevitably involves each side making certain concessions in order to find common ground. The art is to secure your essential settlement terms.

- Don't be bounced

Parties will sometimes seek to apply pressure for the conclusion of settlement terms on the day of the mediation. Whilst it is best to try to conclude a settlement there and then if possible, this is not a requirement. It is perfectly feasible to agree terms in principle on the understanding that time is needed to reflect before finally completing a settlement agreement. The settlement can then be concluded at a later stage.

- Work with the mediator

Show the mediator why your position is reasonable and get him or her on side. If you can have the mediator believe in your position and approach he or she is much more likely to persuade the other party to make concessions to achieve settlement.

Preparing for and completing a successful mediation therefore requires thorough preparation and often intense work at the mediation itself. Such investment is however often rewarded either by the settlement of the dispute at the mediation or subsequently, or failing that, at least the establishment of a dialogue, a better understanding of the other party's position or the narrowing of issues in the case.