Dispute Resolution: Mediation

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> "There is no perfect solution to our problems, only a series of temporary solutions which may in due course themselves require to be modified or abandoned as circumstances change." (Lord Goff)

INTRODUCTION

In today's dispute resolution landscape there is a sharp division between litigation and arbitration where the solution to the dispute is imposed upon the parties and other methods which have as their objective, and are dependent on, achieving agreement between the parties. Of these consensual methods of dispute resolution the most popular is mediation. The parties control both the process and the outcome. Because of the ability of the parties to prescribe each and every detail of the course to be followed or alternatively, apart from broad parameters, simply to allow a free-ranging discussion directed towards resolution of the dispute, the methods of mediation are as varied and as susceptible to party choice as can be imagined.

That having been said I wish at the outset to sound a warning against the suggestion that mediation is a panacea which cures all ills. Most obviously it is not suitable for all disputes particularly ones of general commercial importance where an authoritative decision is required.

The mediator's role is essentially to create a negotiating environment which enables the parties to reach their own determination of the way

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in which the dispute should be resolved. Fisher and Ury conveniently summarise the problem solving principles to be applied as being:

- the avoidance of fixed positions;
- the concentration on the respective interests of the parties;
- sticking to a problem-solving approach and not allowing differences to dislodge it;
- generating as many options as possible, particularly those creating mutual benefit, before reaching decisions; and
- establishing objective and fair criteria for a resolution, rather than the judgment of either party.

There are three essential criteria by which to identify and classify a mediation.

1. The parties appoint an agreed mediator who will meet the parties in joint session but crucially confer with each party privately and in total confidence during the course of the mediation.
2. The mediator has no authority to make any determination or decision.
3. The whole process is voluntary and driven by the need for consents from the time of the initial agreement to embark on mediation right to the end. It is only the end result of a successful mediation which creates a legally enforceable contract recording the settlement.

THE ROLE OF THE MEDIATOR

The mediator is a neutral, impartial, third party totally independent of the disputants. Often the mediator has legal qualifications but at times this may be more of a hindrance than a help. Equally it is unnecessary that the mediator be highly skilled or knowledgeable in the subject matter of the dispute. A lawyer may, in appropriate cases, be suitable as a mediator of a highly complex engineering dispute. However, whatever other qualification the mediator possesses, a knowledge of dispute resolution processes and techniques is essential. Mediation is after all a highly structured dispute resolution process.

The process involves the mediator moving the parties through three fundamental phases:

- The first phase focuses on communication between the parties.
- The second phase focuses on developing an understanding by the parties of their own and their opponents' perceptions of the dispute and the respective strength and weaknesses of the positions of the parties.
- The third phase focuses on the emergence of the negotiated consensus.

For the purposes of the second and third phase often a mediator suggests that a report or an opinion be obtained from a mutually acceptable expert on the matter of significant difference between the

parties which they can utilise both to enlarge their understanding of their respective strengths and weaknesses and to carry the negotiations forward. A laboratory report on a scientific question or evaluation or an accounting report on financial disagreements are instances.

Again, as a matter of technique, the mediator may perceive and suggest that a particularly deeply divisive issue should be severed from the total dispute and taken separately to restricted arbitration or perhaps even litigation with the view to using the arbitrator's award or the judgment as part of the overall matrix of the material which the parties will have available for consideration in arriving at their settlement.

At times a mediator may suggest that in relation to the particular aspect of the dispute there should be argument put forward by the legal representatives of the parties. This should be confined both in scope and length. The mediator needs to be careful to ensure that the parties are not tempted into adopting an adversarial stance by allowing them to indulge in legal argument.

The two phases of communication and understanding are necessary precursors to the informed and dispassionate objective appraisal that each party must make in negotiating effectively towards achieving a consensus.

Frequently a successful mediation will involve a rearrangement of the commercial relationship between the parties and a mediator drawing on knowledge gained in the course of private discussions with the parties may be of significant assistance. With this in mind it is helpful if the mediator is knowledgeable and has an understanding of the ordinary course of business and commerce as well, perhaps, as some knowledge of the process of litigation and arbitration.

THE ROLE OF LEGAL ADVISERS

A successful mediation conference needs to be able to engage in a free and totally confidential person-to-person exchange of views about the dispute and ways in which it might be able to be settled. Legal advisers are not present as advocates or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party.

The role of legal advisers is essentially threefold:

1. To advise and assist their clients in the course of the mediation.
2. To discuss with the mediator, with each other and with their respective clients such legal, procedural or practical matters as the mediator might suggest or their clients might wish.
3. To prepare the terms of settlement or heads of agreement recording the agreement reached at the end of the mediation for signature by the parties.

THE ROLE OF PARTY REPRESENTATIVES

It is essential that each party be present in person or have present at the mediation a representative with full authority to negotiate and settle the dispute. The representative should not be subjected to any limitation or restriction of authority to settle. Large corporations recognise this requirement and in major disputes are ordinarily represented by their chief executive, an executive director or other very senior person who has been vested with total authority in the dispute. It is recognised that an intensive one- or two-day mediation has an 80 per cent or better prospect of settling a dispute that may occupy weeks or months of contested hearing, so it is generally accepted that the time of such senior officers is amply justified. At the heart of the mediation process is the opportunity for each party to make a dispassionate and fundamental objective reappraisal of the whole dispute in the free and totally protected discussions that take place within the mediation. These discussions enable each party to make a more fully informed and reliable assessment of its own position and interests, of the other party's position and interests and of likely future developments and options. The reliability and validity of such assessment will develop and grow throughout the course of the mediation discussions. A predetermined limit on the authority of a representative denies that party the full benefit of on-the-spot, informed reappraisal and inhibits the prospect of a successful outcome.

STRUCTURING OF MEDIATION

As I have already remarked, the structure leaves room for almost unlimited flexibility in the actual conduct of the mediation. The nature of the dispute, the stage it has reached and the personalities of the individuals involved all play a part in tailoring the course of proceedings.

A mediation may sometimes follow from a provision in the original contract. For a long time prior to the growth of the mediation process, international commercial contracts commonly included arbitration clauses which were generally regarded as being of great value. The advantage of including a mediation clause is that not infrequently all parties to a dispute would be minded to submit it to mediation but each hesitates to make the first move lest it be interpreted as a sign of weakness. A mediation clause in a contract will remove the occasion for this hesitation.

The mediator usually holds a preliminary conference to settle the preparatory arrangements. The parties will be invited to join in collating and presenting in advance of the mediation the more important and significant documents necessary for the purposes of the exercise. The contract, significant correspondence, significant technical statements and significant reports are normally incorporated in such an agreed bundle. Judicious selection is necessary by each party in putting together the bundle as it is to be remembered at all times that the object

of the mediation is to gain an overview of the dispute and not to allow the parties to descend into argument over evidentiary details such as occurs necessarily in the ordinary course of an arbitration or litigation.

Often sensitive internal material and other confidential documents are not included in the agreed bundle but are shown to the mediator in the private caucus which the parties enjoy. The propriety of such a course is commonly drawn to the notice of the parties at the preliminary conference.

It is usual for the parties to agree to exchange position papers summarising the non-technical terms of their respective position and contentions in relation to the dispute. The position paper should be only about 10-12 pages and may perhaps be likened to an expanded executive summary. Its purpose is threefold:

1. It is a useful internal discipline for each party to have to condense and present its view of the dispute within the confines of an expanded executive summary type document.
2. It serves to communicate from a party to each of the others the position and contentions of the opposing parties.
3. The position paper serves to acquaint the mediator with an overall perspective of the dispute that will assist the mediator in planning and conducting the mediation.

Often the mediator will suggest to the parties that each should prepare and bring to mediation for its own use and for the mediator's confidential information and therefore not to be shown to the other parties a litigation forecast setting out such data as:

1. An estimate of the likely date for the commencement of the hearing of the litigation.
2. An estimate of the length of the hearing.
3. The amount already expended in costs.
4. An estimate of the further costs which will be expended on carrying the litigation through to finality.
5. A particularised estimate of the practical outcome on the party's best case.
6. A particularised estimate of the practical outcome of the party's worse case.

At the preliminary conference it will be necessary to agree on a venue which will require to provide one large room for the joint meeting and then individual smaller rooms for each of the parties to caucus with the mediator and to hold internal discussions.

CONFIDENTIALITY

The mediation agreement to be signed by the parties will have as one of its most crucial and essential provisions a clause requiring execution of a confidentiality agreement. The parties are required to agree that

there shall not be introduced as evidence, or relied on in any arbitral, or judicial proceedings, or otherwise disclosed, any oral or documentary material emerging in the mediation, views expressed or suggestions or proposals made within the mediation by the mediator or by any party in respect of a possible settlement, admissions made, the fact that any party has indicated willingness to accept any proposal for the settlement made by the mediator, or call the mediator as a witness in any subsequent proceedings.

Unfortunately, as demonstrated in the course of the AWA proceedings, such a confidentiality agreement may itself give rise to difficulties. When the proceedings resumed after an abortive mediation exercise, subpoenas were issued by one party to another for the production of certain documents. The party resisting production submitted that the documents, which pre-existed the mediation, only came to light in the course of the mediation process. I rejected that argument because in my view the documents were of an objective character which had a bearing on the dispute and which it could be expected would have become known quite apart from the mediation. What of the case where the only reason that one party becomes aware of the existence of a particular document is because mention is made of it in the course of the mediation? The resolution of that question will no doubt have a significant impact on the future success or otherwise of the mediation process.

Nonetheless, the confidentiality agreement is an essential feature of the process of private consultation or caucusing that takes place between the mediator and the respective parties. It is then that the mediator is able to examine with each party specific aspects of the dispute so as to assist that party to gain a more complete understanding of the total picture. It is also the forum in which the negotiation process can be progressed. Strengths and weaknesses may be frankly discussed, needs and interests examined, options generated and evaluations made of the best and worst alternatives to negotiated agreement.

Caucusing gives to the mediation process a unique advantage that is not to be found in any other dispute resolution mechanism. The mediator is made privy to the innermost confidences of each party and is thus equipped with a comprehension of the total dispute situation. The mediator will be aware, on a basis confidential to each party, of hidden agendas, collateral considerations, areas in which a party may be prepared to move and other areas that are not negotiable. The mediator, by piecing together the totality in his or her mind, will be able to form a soundly-based assessment on how best to move forward the course of negotiations with a view to achieving a resolution. No arbitrator or judge could ever be made privy to such a totality of comprehension flowing from each side.

GOOD FAITH

Most mediation agreements contain an undertaking by the parties that the mediation will be conducted by them in good faith. Many civil codes have express provisions of good faith as an overriding duty in the

negotiation and performance of contracts. What does that mean in the context of mediation? At the very least it should embrace an obligation not to break off negotiations without reasonable cause. How much further, if at all, does it go?

CONCLUSION

In arbitration and litigation the mechanism is of necessity operated by the legal advisers of the parties. The issues are joined and fought between the legal advisers. Inevitably this distances the real parties from the dispute resolution process. Mediation provides a mechanism which will empower the parties. Both the working through of the process and the negotiation of its resolution are in the hands of the parties themselves. As well as informality, flexibility and expedition of the mediation, the crucial factor is that the parties retain control of their own dispute.