

Mediation in the UAE

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It is a process which allows the parties to focus on the commercial aspects of their dispute rather than the legal issues and it can be used in all disputed matters, subject to a few exceptions. In recent years the use of mediation has increased exponentially. It is a concept which is widely considered and used in common law jurisdictions and more recently within the civil law jurisdiction of the UAE.

Whilst the benefits of Alternative Dispute Resolution (“ADR”) are recognised and explored within this jurisdiction, the advantages of the mediation can sometimes be overlooked; possibly due to lack of understanding of the process which can lead to negative attitudes. The mediation process is certainly being explored and implemented favourably in the UAE, however it can take time for attitudes to change in order to accept a settlement concept which may previously not have been considered.

The introduction of the Civil Procedure Rules (CPR) in England and Wales meant that mediation became an integral part of the pre-trial process, a process which any party to litigation cannot afford to ignore for fear of costs consequences. Parties who refuse to enter into mediation as a pre-trial process without a valid and reasonable reason will be penalised by costs penalties imposed by the judge.

There are many advocates who would argue that mediation should be considered as a pre-trial process in all jurisdictions, whether for fear of costs consequences or otherwise. The true benefit of mediation will only be recognised if the attitudes of those in the position to use the process, or indeed advise on it, are focused on the positive aspects of mediation rather than the draconian idea that settlement is a compromise beneficial only to one party.

In order to make an informed decision whether or not to mediate a dispute, it is important to understand what the process involves. Mediation is a voluntary and confidential dispute resolution process, which is non-binding to the point of agreement. During mediation a neutral third party mediator helps the parties to attempt to reach a settlement, negotiated by the parties.

A voluntary process

Mediation is a voluntary process. It is therefore not possible without full participation and commitment from all parties, and it will cease if one party walks out, which they are free to do at any time. All parties must therefore agree to enter into the process with the right mindset, although in some jurisdictions this may only be after judicial recommendation with associated risks of cost sanctions against the party which refused to mediate.

In a jurisdiction where the parties do not have to consider cost consequences, the idea of mediation as a pre-trial option may not even enter into the equation. For the process to become widely accepted therefore, it is important that the advantages of mediation are promoted so that any misconceived negativity can be disregarded.

Confidential dispute resolution process

Mediation is both “without prejudice” (under the law of England and Wales) and confidential. This means that the discussion and/or any documents submitted during the process cannot be used against the party who made or produced them in subsequent proceedings. A mediator is bound by a duty of confidentiality to each party both during and after the mediation. This means that the position of either party is not compromised in any way if the mediation fails and litigation or some other dispute resolution route is pursued. Should mediation break down a party is free to formalise an offer made during mediation within

any subsequent court procedural process or even attempt mediation again at a later stage.

The terms of any settlement agreed in mediation are confidential. However, the parties are free to agree to an alternative arrangement. For example a party may insist on a public apology or vindication and this can form part of the mediated settlement, if agreeable to the other party.

Non binding to the point of agreement

The mediation process does not bind the parties to reaching settlement. This can only come about when the parties have given authority to settle. The mediator will not make any binding determination or order and if the parties do not wish to agree a settlement at the end of the mediation then the matter will simply move onto the next stage of legal proceedings.

If and when a settlement has been agreed by the parties, the terms of the settlement will be written into a binding and enforceable contract.

The neutral third party mediator

The mediator must be a truly neutral person having no association with either of the parties or any interest in the outcome. It is essential that all parties trust and entrust authority to the mediator. Should any party withdraw that authority, the mediation will come to an end. Likewise, should trust in the mediator be broken for any reason, it is unlikely that a settlement will be reached.

The mediator's role is to facilitate the discussions between the parties, allow them to explore options which they may not have previously considered and focus the parties on their aims and requirements for settlement. The mediator is not there to judge, give opinions or impose a decision. The mediator creates the conditions for dialogue between the parties using a non-adversarial, non-partisan approach. The final outcome of mediation is agreed by the parties, not the mediator.

Mediation is more likely to succeed when the mediator is properly trained and qualified. There are various respected organisations which provide ADR professionals and services globally. These include the Centre for Effective Dispute Resolution ("CEDR"), the Royal Institute of Chartered Surveyors ("RICS") and the ADR Group to name a few. The three mentioned organisations provide mediation training accredited by the Civil Mediation Council ("CMC") which accredits mediators and mediation bodies in England and Wales. CMC accreditation is recognised throughout the EU, the Commonwealth and in most nations of the world.

A settlement, negotiated by the parties

The process of mediation is completely flexible and will allow the parties to remain in control of both cost and outcome while being guided by the neutral mediator. The parties remain responsible for their own decisions and answerable for the terms of any settlement that may be agreed.

Parties can run their mediation in whatever manner they chose. There is, however, a developed classic mediation model which recommends that the parties open the mediation with a joint session, whereby the mediator explains the process and answers any questions. During the opening joint session each party makes an opening statement and thereafter the mediator separates the parties into private rooms and spends time with each party in turn (known as private sessions). During the private sessions the mediator will discuss the dispute, explore and challenge the required aims and assess the attitude of each party towards settlement. The private sessions are an imperative part of the mediation process as they give the parties opportunity to talk about the dispute from their point of view, vent feelings, say what they want, and generally 'clear the air'.

Mediation aims to resolve a dispute by maximizing all parties' interests and achieving a "win-win" outcome so that the parties do not feel compromised or hard done by. The parties must agree the terms of the settlement themselves and hence the results achieved are such that may never be considered or imposed

by a court or tribunal. A judge or a tribunal will simply review available evidence and apply the applicable legislation to a dispute, whereas during mediation the parties must agree their own terms of the settlement and this allows for ingenuity and extra-legal solutions.

The Strength of the Mediation Process

Mediation addresses the underlying causes of conflict or tension. Mediators are skilled in investigating the potential for joint gains in resolving disputes. This is one of the most important tools in unlocking the potential for settlement. By gaining a birds-eye view of the conflict, and exploring the respective needs and priorities of the parties, the mediator is usually able to encourage the parties to consider mutual gains.

Mediation enables the parties to consider and identify what value there is in avoiding legal proceedings, where the arguments will focus on the merits of the case, and look to extra-legal solutions which a court or tribunal could not provide. This inevitably focuses the minds of the parties on the reality of the dispute and any potentially negative outcome, rather than the legal arguments.

When considering mediation one must bear in mind the objectives of the process and consider the following:

- You may have a strong case, actual or perceived, but you need to consider the value of your wasted time, your irrecoverable costs (especially in the UAE Courts, even if you win your case), the time of any witnesses, employees or co-workers in preparing for litigation and attending any court/tribunal hearings; the impact of such time loss on your business or employment; the impact of any publicity; the proportionality of cost and time against your chances of recovering any damages if the matter were to proceed to court or arbitration.
- You may have a weak case which should not be tested on the merits.
- There may be an ongoing commercial, social or economic relationship between the parties which may be ruined by years of legal disputing.

Mediation has a very high success rate. It is a quick and relatively cheap process when compared to litigation or arbitration. The average mediation will last one or two days and therefore the process enables parties to swiftly finalise a dispute and move on. In the minority of cases that do not settle, the mediation process helps to narrow the number of disputed issues between the parties, often saving costs in preparing for litigation. Involvement in the mediation process is a wise investment, likely to save both time and money and providing the opportunity for rebuilding trust where relationships have broken down.

Mediation can be attempted at any stage of a dispute. If a dispute has already been running for a long time the parties are free to consider the possibility of recourse to mediation in the interests of achieving a speedy resolution to an ongoing matter. This is another advantage of the flexible process.

When is Mediation not suitable?

Mediation is unlikely to work unless all parties genuinely wish to reach agreement, or if one party has little incentive to enter into the process. It is not suitable when:

1) A legal decision is needed because an area of law is unclear or untested

This is less likely to be a consideration in the UAE civil law jurisdiction which does not recognise the doctrine of stare decisis, although Court of Cassation judgments are considered as guidance and are binding on the lower courts.

2) There is no bona fide dispute, i.e. one side's position is devoid of merit

If a party believes that his case has merit, when in fact it does not, the legal adviser must be able to deal with this and manage his client's expectations effectively. In reality, there will always be difficult parties who believe that they have a "right to justice", even though they technically have no case to answer.

3) You need a remedy which mediation cannot achieve, namely an injunction or other mandatory or prohibitory order of the court

These are remedies which will need a court order and hence could not be agreed by way of mediation.

Recent Developments in the UAE

The Centre for Amicable Settlement of Disputes

His Highness Sheikh Mohammed bin Rashid Al Maktoum, Vice-President and Prime Minister of the UAE and Ruler of Dubai, created the Centre for Amicable Settlement of Disputes in Dubai under UAE Law Number 16 of 2009. The publication of this law demonstrates that the Government wishes to encourage and increase the use of mediation in Dubai.

The Centre deals with amicable settlement of civil and commercial matters excluding certain categories of case and those involving Government bodies. The settlement of a dispute before the Centre is reviewed by a number of mediators under direct supervision of the concerned judge and based on relevant laws and regulations.

Dubai International Financial Centre (“DIFC”) and Mediation

The DIFC Courts have their own rules regarding ADR, found in Part 27 of the Rules of the DIFC Court (“RDC”). While emphasising its primary role as a forum for deciding civil and commercial cases, the DIFC Court encourages parties to consider the use of justice by reconciliation (such as, but not confined to, mediation and conciliation) as an alternative means of resolving disputes or, particular issues within a dispute.

The DIFC Court will not compel parties to engage in justice by reconciliation as a prerequisite to litigation (although Part 38.24 of the RDC gives the court discretion, when assessing costs, to consider efforts made in trying to resolve the dispute). The court will however, if appropriate, invite the parties to consider justice by reconciliation at the Case Management Conference, and may adjourn the case for a specified period of time to encourage and enable the parties to use justice by reconciliation.

In addition, the DIFC-LCIA Arbitration Centre, established in February 2008, offers mediation as well as arbitration services to users of the Centre under the rules contained in the LCIA mediation procedure.

RICS UAE Mediation Panel

The RICS has been actively promoting its mediation services in the UAE with great success. It has recently conducted a further training course in Dubai in order to train and prepare members of the proposed RICS UAE President’s Panel of Mediators in time for its official launch at the joint-hosted RICS and Dubai Land Department Conference in Dubai on 1 October 2012. The launch of the RICS Mediation Panel demonstrates growth in the demand for mediation in the region.

Summary

The UAE has made some impressive recent progress in implementing various forms of mediation. As the process becomes more readily available and accepted in the jurisdiction, it is hoped that it will be more widely used. Recognised mediation service providers are promoting mediation within the jurisdiction with very positive effects. As continued professional training is provided in the UAE it is likely that the process will gain further momentum and the popularity of the process will increase.

Mediation is a positive, forward-thinking way of resolving disputes using a neutral third party. Parties should be encouraged to use mediation as a pre-trial process, where possible, as the process is an excellent way to assist those in dispute to find a resolution, before costs start to escalate and the commercial relationship is destroyed forever.