Should you Mediate?

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However when a negotiation fails, the next step does not have to be litigation or arbitration. There are a myriad of other ways that can be used to help parties break the deadlock and reach an amicable settlement. Mediation is one of the most effective. In its conventional form it is a confidential process that involves having a neutral third party (the mediator) facilitate the settlement negotiations by listening to the parties and then, over a period of perhaps a day or two, having a series of separate meetings with them to discuss the issues and how they might be overcome. By having a trained professional whose sole purpose is to focus the parties' minds on settlement, parties are often able to rise above any emotion, posturing or unreasonable conduct, and find a solution to the real issues that divide them.

The Process

The mediation process is flexible to meet the demands of the parties and the issues involved. As with arbitration, mediation can be administered by the parties themselves or with the assistance of an institution (such as the ICC or LCIA). Although an institution will charge fees for its services, the assistance it brings in terms of providing a set of rules, identifying and negotiating fees with a mediator, and ensuring the process progresses in a timely manner, means the fees are usually well spent.

Mediation does not have a set format, but most follow a familiar pattern. The following summary of the process is based on the 2012 LCIA Mediation Rules:

- A Request for Mediation is filed, either by one party or by all the parties jointly. The Request briefly states the nature of the dispute and the value of the claim, and should be accompanied by a copy of the agreement to mediate.
- The LCIA appoints a mediator, having regard to any nomination or criteria put forward by the parties. The mediator must be impartial and independent.
- The parties will discuss with the mediator what procedural steps are needed, but unless agreed otherwise each party will submit, seven days before the first mediation session, a brief written statement summarising its case and the issues to be resolved, accompanied by any documents referred to within the statement.
- The mediation session itself will then take place. The rules do not dictate how this will be conducted, but typically it starts with a group session where the mediator explains the process and the parties have an opportunity to make an oral statement on their position and the issues. The parties will then retire to separate rooms, and the mediator will shuttle from one room to the next, trying to facilitate progress in the negotiations. Within their own teams the parties will have identified a person who has the authority to settle the dispute on behalf of that party, and that person will usually be present so that a settlement can be entered into at the mediation session.
- The mediation ends when either there is a settlement or one of the parties (or indeed the mediator) declares that a settlement cannot be reached and they wish to terminate. It can also happen that a time limit set by the parties will expire without an agreement for its extension.

A key aspect of the process is that nothing communicated to the mediator in private during the course of the mediation is to be repeated to the other party without the express consent of the party making the communication. This allows the parties to speak openly with the mediator, something they could never do

with the opposing party, and this often allows for new solutions to be identified.

The Costs of Mediation

The costs of mediation tends to fall into three categories:

- Institutional Fees
- Mediator Fees
- Legal Fees

The institutional fees are usually modest. When a request is filed a registration fee needs to be paid (which for an LCIA mediation is GBP 750). After this the institution will estimate its fees, either on a time spent basis (the approach of the LCIA for example) or with reference to the amounts in dispute (the approach taken by the ICC for example).

As regards the mediator, his or her fees will usually be charged on an hourly rate (for example, the LCIA dictate an hourly rate of no more than GBP 450 per hour). An estimate of the time that the mediator will likely need is made at the start of the process and paid by the parties in equal shares. If at the end of the process there is an excess this will be repaid to the parties; if the process takes longer than expected, further funds will be requested.

Finally, although the parties are not required to be legally represented, this will almost always be the case. The flexibility of a mediation means that it is not possible to accurately say how much the costs will be, but because the parties are not presenting their cases in detail, no evidence is being examined, and no award or judgment written, the costs involved will be much smaller than if the dispute were arbitrated or litigated.

In terms of time, mediations tend to take 2-4 months from the date of filing the Request to the end of the mediation session.

The Benefits of Mediation

The benefit of mediation above most other forms of dispute resolution is that because the mediator is able to speak privately with both parties, the mediator can strive to bridge the gap between them. The mediator has the ability to challenge those parties that have unrealistic expectations regarding the strength of their case, cut through the emotions that may have built up, and suggest possible solutions, pushing the parties to reach a settlement. Even if the process does not result in settlement during the session, settlement will often occur shortly afterwards as a result of the discussions. Settlement avoids the risks, costs and time of a court or arbitral claim, and parties are much more likely to comply with the solution, having consented to it.

Should the mediation fail the parties can be satisfied that they did all they could to reach an amicable settlement.

The Risks of Mediation

Despite its benefits mediation is not a perfect process and will not be suitable for every dispute. The process does cost time and money and there is no guarantee that it will be successful. Sometimes the parties are too far apart, and there is always a risk that one party may have no genuine desire to settle and is merely delaying the prospect of litigation (or arbitration) or trying to learn more about the strengths of the case against them. They may agree to a settlement agreement and then refuse to comply with it. Although these risks can all be managed, they do exist and parties need to be aware of them.

When is the Best Time to Mediate?

If the contract has a mediation clause in it then it may dictate when the mediation is to take place.

Otherwise it is for the parties to choose. The conventional time would be once negotiations have identified some issues but both parties remain committed to resolving the dispute amicably. Although mediation can take place during litigation, usually the parties mediate to avoid the time and cost of litigation, since the later it is left the less benefit there will be.

Parties are often concerned that if they propose mediation this will be taken as an indication that they believe their case is weak and wish to avoid litigation. However there are two reasons why these concerns should not dissuade a party proposing mediation:

- Whilst it is true that a party with a weak case will be less keen to litigate (or arbitrate) a dispute, there are also good reasons why parties with strong cases will want to avoid litigation. Litigation is expensive, time-consuming, inherently risky and limited in terms of solutions it can impose. A party would be foolish to think that an offer is a reflection that the other party has doubts regarding its case.
- There is nothing to lose by proposing mediation. The strengths of the parties' respective positions will remain the same, and if the proposal is rejected the case will proceed to litigation or arbitration as before. However if the proposal is not made, one will never know if an amicable solution might have been possible.

Some Practical Issues

There are a number of practical issues to be borne in mind when considering mediation:

Since mediation is not suited for every dispute, it may be best not to agree to mediation in the contract but to wait until the dispute has arisen, at which time the parties can assess whether settlement might be possible.

When choosing a mediator the parties will want someone who is trained in mediation techniques and who ideally is familiar with the industry in question (this will ensure the mediator has some insight into what is commercially suitable as a settlement). The mediator does not need to be a lawyer but often this helps as a lawyer will be aware of the legal aspects of mediation and settling disputes.

Each of the parties will need to be sure that the person settling the dispute for the opposing party has the necessary authority. This should be assessed before the mediation session.

Should you Mediate?

Fundamentally, whether you should mediate a dispute comes down to perhaps three issues:

1. Are the issues suitable for compromise?

Although rare, some issues that arise may simply not be suitable for settlement. There may also be cases where a party requires a judgment in order to set a helpful precedent, or where there is a significant risk that a settlement will encourage other potential claimants to bring claims.

2. Does the other party have an incentive and ability to settle?

Given the costs and risks of litigation, parties almost always have some incentive to settle. However it may be the other party is short on funds and will not be able to settle on realistic terms. Furthermore, if trust between the parties is low one party may suspect that the other party will only use the process to delay matters.

3. Will mediation significantly save costs if successful?

The answer will almost always be that mediation will save costs if successful. However if the case is shortly to be tried before a court, the parties may have already incurred the bulk of the litigation costs. Not only do these incurred costs become a further issue to be resolved in any mediation, but the parties are more

likely to take the view that having already spent the time and money preparing the case for trial the process should continue.

In conclusion, whilst not every dispute is suitable for mediation, it is always appropriate to consider whether mediation might help the parties reach an amicable settlement that could not only save considerable time and money, but possibly the relationship between the parties themselves.