

Using mediation as a business tool - Part 2

By Paul Sills

In the last article Paul introduced the concept of early intervention in commercial relationships – using mediation as a business tool rather than as an adjunct to litigation. In Part 2 we will look at some practical examples of this concept at work.¹

Deal mediation

A deal mediator may be appointed to assist parties that are not in dispute but who are trying to agree the terms of a commercial contract. This is an emerging trend and recognises the fact that parties who have a great deal invested in the outcome of their negotiations often need help getting through impasses in the process.

Deal mediation addresses two things:

- Parties invest a great deal in commercial negotiations (due diligence, loss of business opportunity, sunk costs on advisers, funding costs etc.). This investment can create an adversarial aspect to the negotiations because the parties may each feel they need to recover their investment by obtaining some advantage in the final outcome. Deals fall over when both parties reach a stalemate for these reasons.
- Parties in this position can benefit from a deal mediator's neutral and objective perspective. Just as when the parties are in dispute, a deal mediator can build rapport and trust with both parties, help maintain relationships that are starting to fail, assist in option generation and essentially carry out all the functions they would when mediating a dispute.

Deal mediators may also remain engaged with the parties and effectively stay on as a mediator to the agreement (discussed below). The mediator can then continue his or her role in assisting the parties to manage the relationship and their communication, as well as mediating any disputes which may arise under the agreement.

Mediator to the dispute

This involves appointing a mediator to a dispute at the earliest possible opportunity. Under a mandatory mediation provision, this would occur when one of the parties first gave notice of the dispute.

The aim of such an appointment is for the mediator to assist the parties in reaching a resolution. Given the early stage of the intervention, the role of the mediator would include:

- Assisting in identifying impediments to settlement;
- Ensuring that the right decision makers are engaged for each party;
- Assisting with the fair exchange of information (an essential ingredient for early resolution);
- Managing expectations;
- Early reality testing;
- Assisting parties to manage the relationship and coaching them on this aspect;
- Designing the dispute resolution process that will best suit the nature of the dispute.

All of these roles can equally be applied to the facilitation of issues that are not yet disputes but may become so if the parties' communication (or lack thereof) lets them down



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Rather than looking at the appointment of a mediator to the dispute with a defeatist attitude (i.e. the parties are inevitably going to end up in dispute), the appointment can be taken out of the context of dispute resolution and reframed as the appointment of a mediator to the agreement. The rationale and focus for the appointment then shift from the "*inevitability*" of a dispute to maintaining healthy relationships and communication between the parties.

Mediator to the agreement

Large construction contracts make great use of Dispute Boards to ensure that disputes – as and when they arise – do not interfere with the critical path of the project. The Board decides which disputes to resolve along the way (and then does so) and which disputes can be held over to the end of the project and on what terms. The Board's involvement keeps the construction project on track.

Dispute boards are mostly used in complex, high-value construction projects. The Board is created by contract and the decisions can be either binding or non-binding. The Board can stay active throughout the contract with regular site visits and meetings with the parties in order to proactively identify and resolve issues before they escalate

into disputes and, where necessary, make formal determinations. The alternative is a Board that determines disputes only as and when they are referred to it.

I am advocating a similar application in the mediation/facilitation sphere. That is, the parties use the assistance of a neutral, objective, trained mediator to assist them to resolve all issues that may potentially derail their relationship and therefore the contract. This form of dispute avoidance is proactive, effective and has the best chance of maintaining and developing the relationship between the parties.

Singapore Dispute Protocol

An example of this concept and practice is the new Singapore Dispute Protocol launched in October 2018 which is aimed at minimising time and cost overruns in large infrastructure projects. The intent of the Protocol is to assist parties involved in mega infrastructure projects to manage their disputes and minimise any risks associated with overruns. The Protocol is part of the efforts to establish Singapore as the infrastructure hub of Asia.

Asia apparently needs US\$1.7 trillion of infrastructure per year from 2016 to 2030. Infrastructure projects are renowned for cost and time overruns as they are typically complex and involve multiple parties. Disputes are often unavoidable and will lead to delays in higher costs if not managed properly.

Under the Protocol, differences will be proactively managed to prevent them from escalating into disputes. From the outset, the parties to a project will appoint a Dispute Board comprising up to 3 neutral professionals. The Board members will be experts in relevant fields such as engineering, quantity surveying and the law. The Dispute Board will follow the project from start to finish and manage issues through a range of customised dispute avoidance and resolution processes. Building on international best practice, the key aspects of the Protocol are:

A proactive dispute prevention approach is adopted. The Dispute Board is appointed from the start of the project, not waiting until disputes have developed and are entrenched. This prevents matters snowballing out of control.

The Protocol provides for a wide range of methods to help address disputes should they arise. This includes mediation, opinions and determinations.

The Protocol has professional and administrative support through the Singapore International Mediation Centre and the Singapore Mediation Centre. Both will assist with identifying and appointing board members, administrative services (physical meetings, escrow arrangements, other administrative services).

Mediation as a business tool may prevent time and cost overruns in specific contracts and foster positive commercial relationships that may generate future opportunities. While pre-dispute mediation strategies are already being used effectively for large-scale projects, the benefits are equally available to parties engaged in smaller projects by tailoring the process appropriately.

¹ Tailored Commercial Mediation Options: What are they, and how can a sceptical market be encouraged to try them? Mark Kelly, Barrister & Commercial Mediator, July 2015

End Notes

ABOUT THE AUTHOR



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