



Commercial Mediation – The New Norm for Dispute Resolution?

Mediation is increasingly talked about as the future of commercial dispute resolution. But what is it and is it here to stay?

Robert Rooney of Quigg Golden discusses the issues.

Commercial mediation has gained an increased profile in Irish dispute resolution over the past number of years. The most well known example is the *Kenny v Chareilton* case, which saw the broadcaster and his solicitor-neighbour come to a mutually palatable solution in a seemingly impossible land dispute. More quietly, the Commercial Court Judge, Peter Kelly, has long been an advocate of mediation and frequently adjourns cases to see if the process can work its magic. The most recent support for mediation came from *An Bord Snip Nua*, which recommended that the State seek to limit its expenditure on litigation and arbitration by the use of mediation. The vast majority of

participants in mediations speak highly of the process. Mediation is fast becoming the norm in the construction industry, where upwards of 80% of cases settle in the process, according to the CIF.

Mediation is a voluntary process. Cynics wonder how a voluntary process can be successful between two parties who are caught up in bitter disagreement. In fact, most participants come to mediation with a fair degree of cynicism themselves. They are convinced that the process is unlikely to succeed and that the other side will be totally unreasonable.

The first reaction of most well-seasoned business people when they hear a description of mediation is that it is vague and wishy-washy psycho-babble. Mediation is often only given a chance because the parties have nothing to lose. On the other hand, there is the possibility of gambling with five or six figure legal bills into the future. It is particularly rewarding to see parties arrive to a mediation fully expecting failure, only to see them shake hands at the conclusion of the day.

What is commercial mediation and who should use it?

At its simplest, mediation occurs when two or more parties to a dispute ask a neutral third party to assist them in coming to agreement on the matters in dispute. The Mediator is not a judge or arbitrator. It is not the function of the Mediator to decide on right or wrong or to judge a party's position. He is solely there to facilitate the parties in reaching their own agreement.

Mediation is suitable for the vast majority of commercial disputes. Mediation works well when negotiation between the parties have broken down and fresh impetus is needed or where confidentiality is key. Equally, mediation should be considered where the dispute is more nuanced – for example, where the parties wish to continue in a commercial relationship. In complex technical disputes where there is a real risk that a judge or arbitrator simply won't grasp the issues, the parties will have a real incentive to resolve their own dispute rather than hand it over to a third party for an unpredictable outcome.

Why Mediation?

Costs

Although a full day mediation may seem expensive, compared to the cost of litigation or arbitration, it is usually cost-efficient. A full High Court trial over a land issue will rarely cost less than €100,000.00 and may be a very great deal more. The hourly rate for a mediator is comparable to that for an arbitrator. However, a mediator will only invest one to two days of his time. An arbitrator may spend tens or even hundreds of hours on a case.

Time

The decision to proceed to litigation or arbitration should never be taken lightly. In our experience, parties realise the financial implications of the decision but underestimate the amount of their own time that will be absorbed in pursuing an arbitration or litigation over one, two or even three years. On the other hand, most mediations, if successful require an intense period of preparation and a long hard day.

Confidentiality

The mediation process is entirely confidential. It is “without prejudice” which means that any information disclosed within the process may not be relied upon in litigation or arbitration. Information which is disclosed to the mediator may not be disclosed to the other side without the express permission of the party making the disclosure. Furthermore, the mediator may never disclose any information revealed to him in the course of the mediation to any third party. He may not be subpoenaed to give evidence in any arbitration or litigation about the matters in dispute.

A legally binding solution – agreed by the parties

No agreement will be reached unless both parties are content to agree. The terms of the agreement may be unpalatable to both parties but it might be the best the parties can hope for in the circumstances. The alternative is for a Judge or Arbitrator to impose the settlement on both parties which may satisfy neither party. Where mediation is successful and results in an agreement, that agreement is binding on the parties. It cannot subsequently be reneged upon.

What does the process involve?

The first step in any mediation is that the parties agree to mediate. Usually, this occurs after a dispute has arisen and the parties are seeking a way to resolve it. Sometimes, however, a contract will contain a mediation clause.

The next step is that the parties choose the mediator. Anybody can be a mediator but it is not wise to let everybody act as one. When parties fail to agree on the identity of the mediator, there are appointing bodies who will appoint a mediator on request. Our experience is that appointments should be avoided if at all possible and the parties should agree on the identity of their mediator. This allows them to choose a mediator with a well established track record of resolving disputes and appropriate skills and technical knowledge. It is also our experience that the personal and commercial skills of a mediator are more important than the technical knowledge, provided the mediator has a basic understanding of the topic.

The mediator will send both parties a copy of his or her Terms and Conditions of Appointment and request a deposit. Usually the mediator will ask for payment in advance for the full day of the mediation. Once parties have parted with their own money, their commitment to the process does tend to increase.

At present in Dublin, one can expect a mediator to charge between €150.00 and €350.00 per hour. It should be noted that expense is no guarantee of value and very fine mediators are to be found charging at the lower end of the scale. Indeed many mediators genuinely view their service as a contribution to their profession.

At this point, the process diverges in accordance with a particular style of mediator. On one extreme, some mediators will request no more than a one or two page document in advance of the mediation. This is submitted to the mediator in confidence. On the other extreme, some mediators will seek to anticipate the questions to be posed by one party to another and ensure that both parties come ready to answer those questions and bring with them acceptable evidence.

The next step is to arrange for the day of the mediation itself. This will be a neutral venue. The parties will also need to give careful consideration to their choice of attendees. The most important fact is to ensure that both parties have an individual present with full authority to bind that party and settle to dispute. Those with actual knowledge of the job should also be present. Finally, appropriate expertise should be in the room.

The mediator will make a brief opening followed by submissions of a few minutes from both parties.

The morning of a mediation usually involves an “exploration phase”. This involves meetings in different configurations. For example, there may be meetings of all present, meetings with the principal from each party or meetings involving the experts from both sides on a topic.

The mediator often engages in shuttle diplomacy between the parties as they seek to explore the factual background to the dispute. Most mediators adopt a style whereby they seek to build a shared understanding of the facts. It is important to stress that information which is revealed to the mediator by one of the parties cannot be divulged to the other without express consent.

During this phase, the mediator will also be working with the parties to help them identify the underlying motivating factors in the dispute so that they might be addressed. For example, a participant in a dispute may be aggrieved by allegations of unprofessional conduct cast by another party in the heat of the dispute. It is not uncommon that mediated settlements will include a provision that such allegations are withdrawn.

When the mediator feels that he made sufficient ground in the exploration phase, he will seek to edge the parties towards the negotiation phase. In the evaluative style of mediation, the mediator will challenge each party in private to analyse the

strengths and weaknesses of its case in light of what has emerged during the morning. Using the information now available to the parties, the mediator will invite them, in confidence, to consider what the best and worst alternatives to a resolution are.

The mediator will then use his or her imagination to present different scenarios and options to the parties. It is very common that both parties will come to the day with a fixed monetary bottom line but leave the day with an agreement that may encompass different aspects that they had not considered before they began. For example, one of the parties may agree to use the services of another party into the future.

In any successful mediation, there will come a point in the day where it is clear that a resolution will be reached and the outline of those terms will be agreed. It is vital that the parties’ agreement is put in writing and signed. The conclusion is always delicate with each party anxious to ensure that the written agreement accurately reflects the oral agreements that have been reached throughout the day. The agreement should ensure that it covers all the issues in dispute, it should be workable and practical and avoid the possibility of a dispute between the parties into the future.

Conclusion

The UK Government’s decision to adopt mediation precipitated a culture-shift which has filtered throughout the business world there. The growth of mediation in Ireland in recent years has been one of the most noticeable trends in commercial dispute resolution. Awareness has grown that traditional dispute resolution procedures simply costs too much, takes too long and leaves both parties dissatisfied. Mediation addresses many of those concerns. *An Bord Snip Nua* suggests that this State should follow the UK in seeking to use mediation wherever feasible.

Sectors as diverse as construction, franchising and funeral directors have long adopted mediation as their norm for dispute resolution. This method of dispute resolution is likely to continue to grow within the property sector as its benefits become more widely understood. ■

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