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Jon Lang Mediation

Guidance notes on Mediation Preparation

Initial Preparation

Power in negotiation is derived from the ability to persuade those with whom negotiations are taking place to think again. Proper preparation raises the level of that ability. A well prepared party will have greater success in persuading those on the other side that they should think again about the strengths and weaknesses of their case, about their attitude to risk, about their ability to endure conflict and about the alternatives to settlement.

In good time before the mediation, parties and their advisors should think about their negotiation strategy, and how best to implement that strategy in terms of selection of the negotiating team and their roles. A key part of any negotiation strategy is to consider how best to communicate points that need to be conveyed if those on the other side are to be persuaded to revisit their position. Pre-mediation preparation meetings, at which members of a negotiating team can test their case by nominating one of their number to play devil's advocate, can be extremely useful. Dummy runs of presentations or opening comments, critiqued by those in the team, can iron out any wrinkles.

Position Statements

Position Statements should be seen as the first serious step in the mediation process towards persuading the other side that they should think again about the strengths and weaknesses of their position. Mediation is all about changing an adversary's view, such that they consider it to be more in their interests to settle than fight. But disputants rarely move their position unless they consider it to be in their

interests so to do. So they must be encouraged and persuaded to think again about the merits, about how their true interests can best be served by way of settlement rather than litigation, about their views on risk, and about their ability and willingness to endure conflict. Position Statements lay the groundwork, provide an introduction to the dispute for the mediator and can set the agenda for the mediation in terms of the issues that need to be discussed.

A Position Statement should be short and in summary or "skeleton" format. As a rough guide, it should be between 5 and 10 pages in length. A separate note is available on the preparation of Position Statements. Position Statements should be provided by each party to every other party, and the mediator. The parties should endeavour to exchange Position Statements.

In advance of the mediation, parties will often want to share more information about their position with the mediator than their adversaries, and should therefore consider whether a 'for mediator's eyes only' Position Statement should be provided, as well as the version that is to be exchanged. In fact, these confidential Position Statements often turn out to be an early draft of the Position Statement that is eventually exchanged with the other party or parties.

Mediation Bundle

"Less is more" should be the guiding principle. As a rule of thumb, one or two lever arch files is the norm. The Mediation Bundle should, if possible, be agreed between the parties to avoid duplication, but not too much time should be spent trying to agree a bundle. If agreement is proving problematic, documents can be provided by each party to the mediator separately. The Mediation Bundle might contain pleadings,

relevant contracts, key correspondence and any documents referred to in the Position Statement.

It is useful to have the Position Statements and Mediation Bundle provided at the same time, no later than around 7 to 10 days prior to the mediation.

Other documents

Although I urge parties to keep the Mediation Bundle to a manageable size, each party should have with them whatever other documents they think might be useful. Whilst not generally fruitful to spend too long on the underlying detail of a dispute - agreement is rarely reached on the detail and, more importantly, agreement on the detail is certainly not a pre-requisite to an overall compromise - there may be occasions where parties do wish to illustrate a particular point by reference to the underlying documents. On such occasions, having available the documentation to enable a "drilling into the detail", can be helpful.

Venue

There should be a private room for each party's team and a larger 'neutral' room for the initial and subsequent joint meetings. Thus, in a three party dispute, four rooms in all would be needed. Ideally the rooms should not be adjacent to one another. The individual party rooms should be big enough to house each party's team and the neutral room big enough for all teams combined, mediator and any assistant mediator. Flip charts sometimes come in handy and ideally there should be one in each room. There should be at least one available. Typing/basic secretarial facilities are also useful.

The Mediation Agreement

A Mediation Agreement must be signed prior to commencement of the mediation. A draft of my standard Mediation Agreement is available on this website. If any party wishes to propose any amendments, this should be done at least a few days before the date set for the mediation so that time is not lost on the day itself discussing changes.

Who should be there?

Clearly those with authority to settle and other key decision makers should be present at the mediation. It can be helpful to have present those who were involved in the events giving rise to the dispute. It can also be helpful to have present people who were not! The make up of a negotiating team needs to be carefully thought through. The team must be made up of those individuals who will maximise the chances of reaching a settlement. This means having people in the negotiating team who are able to effectively communicate with those on the other side, in a manner that will encourage listening, reconsideration and movement.

Sometimes experts should be present, sometimes not. If quantum is complicated and very much a live issue, may be forensic accountants should be included in the team. If a party wishes counsel to be present, even if it is simply because they want their complete legal team available before making any final decision on settlement, that's fine too. In short, a party must feel comfortable that they have ready access to all those whose input is likely to be helpful throughout the mediation.

"Out of hours" contact details should be available for any interested non-attendee who a lead negotiator might conceivably wish to call, e.g. a fellow board director. (This is quite different from the issue of authority – each party must have someone with authority at the mediation). And if

specialist legal points are likely to arise on any settlement, e.g. the tax consequences of a transfer of a minority shareholding, the right legal specialist should be on standby to take a call.

The day

I am in the hands of the parties regarding start times, but typically it is agreed that everyone will turn up at the venue either at 9.00am or 9.30am.

Initial Private Meetings

I tend to spend between 15 and 20 minutes speaking to each party privately before commencing the first joint meeting. There is no fixed agenda for these initial private meetings, but there are usually a few issues that I or a party wishes to discuss before we all get together. I tend to talk first to whichever party has their complete team available. Following these private meetings, we begin the opening joint session.

The Opening Joint Session

I will explain, briefly, the ground rules of the mediation - confidentiality, privilege, my role, etc. I might make one or two practical suggestions depending on the type of dispute, e.g. regarding the appropriate marking of documents created during the mediation. I will then invite each side in turn to give a short account of their current position. This is a very important opportunity for the parties. Each party should explain how they see the dispute and offer their view as to what needs to be addressed throughout the day if progress is to be made. These opening comments might contain questions or conundrums that the other side are invited to consider.

The parties themselves, as well as or instead of their lawyers, should use this opening joint session as an opportunity to speak directly to each other. Often it will be the first time the parties have spoken directly to

one another (as opposed to through lawyers), since the dispute arose. It is therefore an extremely important stage of the mediation, often setting the tone, as well as the agenda, for the rest of the day. Effective communication is the key - formal submission style presentations or a simple recitation of what has already been pleaded, tends not to advance matters. In terms of style of presentation, think board room rather than court room! In mediation, parties must seek to persuade their opponents to think again about their case and approach to settlement. They are not persuading a judge to make a formal finding against an adversary. As a result, the style of advocacy is very different to what one would expect if participating in an adjudicative process, such as litigation or arbitration. One could perhaps describe the ideal style as 'measured diplomacy'.

After an opportunity to respond to what each side has heard, perhaps some further comments or questions from me and maybe some general discussion between the parties, the private meetings begin.

Beyond the Opening Joint Session

From this point on, the mediation will develop a rhythm of its own. It is sometimes said that mediation is a form of shuttle diplomacy. And it is the case that mediators do spend time with each party, separately, often passing information and proposals from one room to another. But mediation is so much more than mere shuttle diplomacy. I often urge each side to meet frequently with each other, often in smaller groups rather than with each side's complete team. For instance, I might suggest joint meetings between quantum experts accompanied by the lead negotiator and senior lawyer on each side. I might suggest that lead negotiators for each party meet without lawyers. And when it comes to settlement proposals, I might encourage parties to make offers directly to one another, presenting the underpinning rationale and logic

in their own words. Alternatively, I will communicate offers. It all depends! The golden rule is to make sure that every step that is taken increases, rather than diminishes the chances of settlement.

There is no rule book to follow once the mediation gets under way. Much depends on an instinctive view of what might advance matters, what the key 'levers' for each party appear to be, personalities on each side of the fence etc. For this reason, it is important that parties tell me straight away if they consider anything I have suggested we do or not do, to be unhelpful, and to themselves suggest ideas for maximising the chances of achieving settlement.

Settlement

Mediation can be a long process. If there are trains and planes to catch or other immovable deadlines, we need to have these in mind as we progress through the day. Moreover, it can take a few hours to draft the settlement agreement once terms have been agreed in principle. It can help to come armed with a draft settlement agreement in editable form - there is nothing worse than setting out to draft a complicated settlement agreement from scratch after a hard day of negotiation. And as any eventual deal is likely to look different to what was envisaged at the outset, having access to the means by which the draft can be amended throughout the day, to keep pace with its ever changing shape, can also be very useful.

And finally…

These guidelines are, by necessity, very general.

The Pocket Mediator (*A brief guide to getting the best out of mediation*), also available on this website, provides a little more detail.

However, I am always happy to talk to anyone involved in a mediation about preparation or otherwise. The parties need only pick up the phone or send me an email and I will respond.

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