Jon Lang Mediation

THE POCKET MEDIATOR

A brief guide to getting the best out of mediation

A. Introduction

The adjudicative processes by which commercial conflict is often dealt with can often perpetuate and enhance barriers to a negotiated solution. Mediation is a consensual, confidential and privileged process which breaks down those barriers, often leading to the resolution of what disputing parties once considered to be an entirely intractable dispute.

The mediator's task is to give the parties the best chance of reaching a settlement of their dispute that is quicker, less expensive and more appropriate than anything that might be available from a court or arbitral panel.

Some characteristics of a commercial dispute

The kitchen sink

- If parties are in dispute, they can sometimes take the view that they may as well be fighting over more rather than less, and claims – number and quantum – often become inflated

Extreme positions

- It is a characteristic of conflict, particularly in an adversarial system, that parties will take, from a range of positions, those that are at the extreme, leading to a polarisation of positions

Absolute statements

- Parties will express their views in the most forceful way possible, in absolute terms and without giving any credence to any possible counter-view

Reactive devaluation

- Parties in dispute have a tendency to diminish or dismiss any point, suggestion or proposal being made by those 'on the other side'

Denials (only)

- In the adversarial system, there is not much room for anything other than bald denials to claims being made – there is little room for expressions of regret, explanations or the full 'story' as to why parties are where they are

Confirmation trap

- Parties who are in dispute sometimes have a tendency to look only at information that confirms or supports their position, ignoring information that may challenge, contradict or undermine it

Validation

- Parties in dispute often look for people to support or validate their position, rather than challenge or 'reality test' it, which can lead to further entrenchment

Assumptions

- People tend to judge others by the effect their actions have had on them and make all sorts of assumptions, often incorrect, as a result

A skilled mediator will address barriers or impediments to effective dialogue, encourage settlement option generation and exploration, help make manageable emerging ideas for resolution and maintain traction during negotiations.

Negotiation

- Negotiation is the art of finding a compromise by the exchange of information and (usually) concessions
- Doubt and uncertainty about the future – usually the outcome of an adjudicative process and the process itself - fuel negotiation
- Power in negotiation is the ability to influence your opponent
- Preparation will put you in a better position to influence, not just your opponent, but also the outcome of a negotiation
- Parties are influenced in negotiation by
  - their views on the merits of the case
  - their willingness and ability to endure conflict
  - their attitude to risk
  - their true interests and needs
  - their analysis of the alternatives to settlement

Why an assisted negotiation (or mediation)?

- Because it works!
- Also…….
  - it brings efficiency and structure to a negotiation
  - it encourages a focus and intensity that builds traction
  - meaningful information exchanges are encouraged
  - the future as well as the past is discussed, with an emphasis on a forward looking approach to resolution
  - there is a focus on true interests and commercial imperatives, not simply rights based remedies
- There is a skilled mediator present whose aim it is to give the parties the best possible opportunity of settling their dispute.

Understanding the mediation process

It is about…

- finding a compromise that gets you the best deal possible
- influencing the outcome
- persuading the other side to think again, to re-visit their views
- effective communication and appreciating that in order to persuade, you must find a way to ensure that your opponent listens
- being on ‘receive’ as well as ‘transmit’
- understanding that those on the other side will not change their position unless they believe it is in their interests to change their position

It is not about…

- getting a deal no matter what the cost
- trampling on the other side’s position
- trying to force the other side to move position by threats of defeat, annihilation or humiliation (as opposed to the use of logic and reason)
- losing sight of the alternatives to settlement if, on balance, the only available deal is sub-optimal
- throwing yourself on the mercy of the process and hoping for the best – it’s easy to get a deal at mediation, it’s quite another to secure the best settlement possible
- trying to agree on every issue between the parties

The mediator's role

A mediator…

- Synthesises negotiating styles
- Manages the process
- Overcomes 'reactive devaluation'
- Embarks on effective 'reality testing'
- Unlocks fixed positions
- Sets the tone of the mediation
- Is an effective voice for each party
- Encourages option generation
- Floats ideas that if coming directly from a party could risk insult or ridicule, or be seen as a sign of weakness or an attempt to inflame an already difficult situation
- Helps parties think the unthinkable
- Creates and preserves 'traction' in difficult dialogue
- Helps make potential solutions manageable
- Closes the gap
- Breaks deadlock
- Encourages the primacy of commercial imperatives

B. Preparation for mediation

- Think about..
  - what you want - financial and other goals
  - the strengths of your case and how you will explain them
  - the problems with your case and how you will deal with them
  - the problems with your opponent's case and how you will exploit them
  - the key benefits of being in the same building as your opponent for a day
  - obstacles to settlement (incomplete knowledge, unrealistic opponent, etc) and how you will overcome them

Establishing a range of acceptable solutions (<u>not</u> necessarily the opening offer!)

- Try and formulate a range of possible solutions that would make a settlement both attractive and, importantly, achievable
- Aim high, think ambitiously
- But be realistic! Here are a few questions you might consider
  - what is the range of likely outcomes at court or arbitration, and the realistic prospects for each
  - what are the best terms of settlement you could realistically hope to achieve given, for instance, the merits, your assumptions about the way your opponents currently see their position and how, thinking ambitiously, you might be able to change the views of your opponent at mediation
  - what are the least attractive terms you could live with whilst still making it preferable to settle rather than fight
  - what are the various permutations within the settlement range i.e. between the best terms at one end and least attractive terms at the other, and the desirability or rank order of each
- Think also about value creation (as opposed to mere value distribution) opportunities which may make settlement more attractive to your opponent, e.g. possible agreements or relationships going forward

Planning a strategy

- Think about how you might be able to persuade your opponent to think again about the merits, their attitude to risk, their willingness/ability to endure conflict, the alternatives to settlement and anything else that may have a bearing on their overall approach to settlement
- Think about how you might be able to address your opponent's underlying interests or needs
  - interests and needs are rarely verbalised, yet they are important because it is these needs and interests that have driven your opponent to take the actions and positions they have

Put yourself in your opponent's shoes…

- and think about….
    - their likely approach to the range of settlement options you have contemplated, and
    - what might influence your opponent to accept the best outcome within your settlement range, rather than the outcome you could only just about live with

Think about what will make a difference to your opponent's thinking

- How best can you persuade your opponent to think again, using reason and logic rather than bluster and bluff
    - are there any areas of misunderstanding that need clarifying?
    - what further information can be given?
    - what aspects of the case need to be emphasised or explained?
    - do the alternatives to settlement need further examination?
    - what questions can be asked, explanations requested or conundrums posited, so as to encourage your opponent to focus on what you feel they need to focus on, for instance, specific difficulties in their position or particular strengths of your case?
    - can the logic that appears to underpin your opponent's position be undermined?

Remember…

- No one moves their position, particularly someone 'on the other side of the fence', unless they think it is in *their* interests to move
- One way of getting what you want is to help your opponent get what they want
- There is no third party judge or arbitrator to tell your opponents they are wrong – *you* need to convince them of the wisdom of re-visiting their position
- And then *you* need to demonstrate how, for your opponent, the solution you hope to achieve (a), measures favourably against the likely alternative outcomes (before a court or arbitral panel) and (b), if it be the case, addresses their underlying needs and interests

Implementing the strategy

- You have thought about a range of acceptable solutions
- You have thought about what might make a difference to your opponent's approach to settlement and what you could do to increase the chances of settlement at the most attractive end of your settlement range
- You now need to think about how to implement your strategy

Selecting the negotiating team

- Think about what you are trying to achieve
- Who is likely to make the biggest positive impact in terms of achieving your goal
- Who is likely to best be able to communicate what it is you have decided needs to be communicated to make a difference to the way your opponent sees their position
  - Lead negotiators?
    - those who were not (necessarily) involved in the circumstances giving rise to the dispute but who have a business interest in seeing resolution e.g. finance directors, chief executives
  - Witnesses of fact?
    - people who were intimately involved in the circumstances giving rise to the dispute e.g. project managers on a failed project
  - Expert witnesses?
    - if there are technical areas that it could be helpful to explore
    - or difficult issues of quantum to understand
  - Other third parties?
    - Insurers
  - The legal team?
    - Solicitors, counsel, perhaps specialists on stand by (or present) e.g. competition, employment, tax law experts
- There are no hard and fast rules – but it is important to have present the mix of individuals that are going to give you the best chance of reaching settlement and who you feel comfortable having around you before making the final decision on whether to settle

Attendees

- It is helpful to advise your opponent who, from your side, will be attending the mediation
  - those who are listed as attending should attend!
  - no-shows can look like snubs and set the process back, particularly if the no-show is a senior person
  - no-shows can also lead to speculation as to the ‘real’ reason for non-attendance e.g. a weakness in the case that the non-attendee is assumed (by your opponent) to know about

Position Statements

- Position Statements, usually prepared in advance of the mediation and exchanged between the parties, lay the groundwork for the day and provide an introduction to the dispute for the mediator
- Position Statements…
  - should ideally be discussed and finalised in conjunction with a pre-mediation preparation meeting
  - are typically between 5 and 10 pages in length
  - will be the most recent account of a party's position
  - should be concise
  - can be used to clear up misunderstandings
  - should not be designed to prove any particular legal or factual point, but rather to sow the seeds of doubt and encourage your opponent to re-think their position
  - should not read like a statement of case
  - will be the first step in the mediation process towards persuading an opponent to think again
  - will be the one document that will almost certainly be read by the lead negotiator on the other side
  - guides the mediator through the case and the position adopted, and introduces key documents
  - are in permanent form (unlike the vapours of the spoken word), so use with care!
  - are under-used

The basic ingredients of a Position Statement

- Parties
  - essential information, perhaps website addresses, etc
- Background to dispute
  - business relationship etc
  - chronology
- Brief summary of factual and legal issues that would have to be decided by a court/arbitral panel
- Agreed issues
- Explanation of quantum points
- Clarification of any misunderstandings
- Description of any proceedings
- References to key documents
- Progress of any settlement dialogue
- Costs
- Attendees

The mediation bundle

- Think about the key documents
  - contracts
  - important correspondence
  - key statements of case
- Preferably no more than one or two lever arch files
- Other documents can be taken to the mediation venue and referred to if and when necessary

Other ‘paperwork’

- Confidential position statements ‘for mediator’s eyes only’
  - often an early draft of the position statement which is eventually exchanged
  - this early draft might contain information you are not certain you want to share, at least at the outset, with your opponent but are happy to share it with the mediator as a further aid to preparation
- Draft settlement agreements incorporating key terms it is hoped will be agreed (to be kept confidential until required)
  - drafts will also bring some clarity as to how key elements of the settlement it is hoped to achieve might be reflected in a contractually binding agreement
  - and it is better to start drafting a settlement agreement, particularly after a hard day of negotiation, from something other than a blank piece of paper

Pre-mediation preparation meetings are a good idea

the following tips might help…

- encourage brainstorming (but without attribution or retribution!)
- encourage every member of the team to think about your case from the other side's point of view
- appoint a devil's advocate to ask the difficult questions
- think about the *best* answers to the likely questions to be asked by the other side (not just the first answer that comes to mind)
- do the same for the less obvious questions
- decide how to deal with any areas you would rather avoid discussing and/or the difficult questions
- decide who is going to do what in terms of the opening joint session
- prepare the negotiating team for direct and robust dialogue, to 'roll with the punches' so they are not de-railed by what your opponent might say or do
- think about the questions *you* are going to ask
- think about which individuals are likely to make the most difference and have the biggest impact e.g. chief executive, independent expert
- think about who the lead negotiator should be
- work through any difficulties within the negotiating team (doves and hawks are healthy but extreme views that are poles apart can lead to difficulties, particularly if disharmony within a team becomes apparent to the other side)
- plan and rehearse presentations of points that it is important to get across
- have a dummy run of key presentations

Pre-mediation meetings are a good idea, but…

…take care not to…

- stifle courageous conversations about weaknesses in your own case or the strengths of your opponent's case
- encourage group thinks i.e. encouraging all those in the negotiating team to think in exactly the same way about your case and that of the other side
- have a pre-mediation meeting without key members of the negotiating team, especially the lead negotiator
- allow fundamental differences in approach within the team to go unchecked if it is likely to prejudice the team's ability to work together, or the differences are likely to 'spill-over' at the mediation and be noticed by your opponent
- forget that negotiation is all about persuading the other side to re-visit their perceptions of the strengths and weaknesses of their case, not by trampling, browbeating, bullying, annihilating or ridiculing, but by the use of logic and reason
- forget that the process is about effective communication
- over-script what needs to be said
- fall into the confirmation trap i.e. only looking for evidence or data confirming your position and overlooking or ignoring disconfirming evidence or data

C. The art of persuasion

- Actively listen
  - rather than just hear
- Step out of the adversarial mode – you are not…
  - persuading a third party to find against your opponent
  - ‘winning’ points
- Think ‘measured diplomacy’
- Think about who needs to be persuaded and how best to go about it

Effective communication – a few thoughts on what can help

- think about the effect you are trying to achieve and the messages you are trying to convey
- think about how best to effectively communicate with an opponent whose position and apparent interests conflict with your own
- think ‘measured diplomacy’
- be assertive (but not aggressive, arrogant or passive)
- speak frankly, but calmly
- be clear and confident
- use logic and reason to support arguments and proposals
- sell the merits and fairness of a position or offer
- think about what you want your opponent to focus on
- think about delivering the points that need to be made in readily digestible, understandable ‘bite-size’ chunks
- develop clear cohesive themes
- know your audience and think about how to keep them with you
- avoid losing your opponent by overly long, complicated speeches
- succinct points, delivered convincingly with confidence and determination works well
- if possible, tailor your style of delivery to who on the other side needs to be persuaded if there is to be significant movement
- listen out for ‘signals’ i.e. slight alterations in tone or language that might suggest a change in position is on the cards
- demonstrate a real appetite to understand your opponent's case (albeit not necessarily agree with it)
- adopt an objective rationale for your position
- try and build rapport, effective lines of communication
- be observant – particularly watch for reactions to what is being said
- remember that you are not persuading a third party to ‘find against’ your opponent - you are persuading your opponent to think again
- a party must listen before being persuaded

Effective communication – a few thoughts on what can hinder

- avoid *uncontrolled* cathartic behaviour
- trampling, ridiculing, belittling your opponent's position
- making threats
- making absolute statements
- maintaining extreme positions
- making proposals before having heard what your opponent's have to say
- not listening
- interrupting (thereby giving the impression that what you have to say is so much more important than what your opponent has to say)
- reading from a script
- huffing and puffing, and other dramatic behaviour
- making unsustainable points or taking unsustainable positions
- talking for too long
- using IT equipment as part of a presentation without having checked that it works, and works well
- communicating uncertainty
- vagueness
- adopting a superior approach
- Over-using jargon
- value laden statements
- a 'take it or leave it' approach
- public displays of disharmony within your negotiating team

D. A few tips -

A few tips – gestures

- Do not underestimate the positive effect magnanimous gestures can have on an opponent's attitude to negotiation. For instance…
  - acknowledgements of your opponent's unhappiness and frustration at the position you have adopted can have a positive effect on their general attitude, including their ability or willingness to really listen to what you are saying – a prerequisite to effective persuasion and influence
  - so too can it be helpful to acknowledge good points made by your opponent (but take care not to give false hope or impressions, or concede points that should not be conceded)

A few tips – the effective use of questions

- Use questions to control the…
  - general direction of the discussion
  - specific issues to be discussed
  - pace of the discussion
  - tone/mode of the discussion
- Use questions to also…
  - plant ideas
  - sow the seeds of doubt
- And also to check assumptions you have made about your opponent's case and/or their underlying needs and interests

A few tips – listening

- If you demonstrate you are listening to your opponent, your opponent is more likely to listen to you, which they will of course need to do if you are to have any chance of influencing them
- Listen out for 'signals' – a subtle change in language used to tentatively explore whether a concession or change in position is worth making
  - e.g. '*we will never agree to that'* may become *'it would be extremely* difficult *for us to agree to that'*
  - such a signal should generate questions to clarify where it might be leading in terms of possible movement or concession
  - *e.g. 'in what circumstances could you agree..'*
- 'Listen' out for what is *not* being said

A few tips – concessions

- Negotiation is sometimes described as the trading of concessions
- Think about what you want in return for the concessions you might be willing to make
- Look for ‘trades’ (what you can give) that are low in value to you but high in value to your opponents
- Rational and logical concessions should not be thought of as a sign of weakness
  - a concession can demonstrate that you have listened to your opponent, which may in turn lead to your opponent listening to you and reciprocating with their own concessions
  - a concession strengthens the legitimacy of your position in relation to those points on which you are not going to concede
- Always give very careful consideration to the making and timing of any concession

E. Offers

- Who goes first?
  - think about the advantages of making the first proposal
    - anchoring the essential terms of an agreement
    - managing expectations
    - sending messages
    - suggesting workable settlement frameworks
  - any disadvantages to going first?
    - usually imagined rather than real
    - is there a risk you will undersell or overpay – unlikely, particularly if proper preparation has been undertaken
- Think about how, if at all, any earlier without prejudice meeting or correspondence should or might influence the way in which the first offer is made, and by whom
- Offers can also be used….
  - to reflect, positively, concessions which have been made
  - to generate movement – most offers will be met with a response
  - to explore e.g. '*we could agree X, if you could agree Y'*
  - to elicit information e.g. '*we could perhaps agree A, if we knew more about B'*

Where to pitch the opening offer/counter-offer

- Aim high, but be realistic
- Think about what will be taken seriously by your opponent
- Will it maintain traction, or destroy it?
  - is it within your realistic settlement zone, not that far outside the upper end, or way up in the stratosphere?
  - will it give the impression that nothing that has been said by your opponent has made a difference to your thinking?
  - will it be dismissed out of hand by your opponent as unrealistic?

When to make the opening offer

- Often the most appropriate time to make an offer is after all parties have spoken frankly about the dispute and everything that each side feels needs to be said, has been said.

Presentation of the offer

- It can be helpful to demonstrate that you have reflected on everything your opponent has said when formulating a proposal
- Think about the impact that you are trying to achieve
- If you have made a concession in the offer as a result of something that has been said, let your opponent know…
    - it will usually make a difference, for the better
    - and will reinforce your position on those points you have not conceded
- Avoid 'take it or leave it' type offers – a party might reject a perfectly good offer simply because of the manner of its presentation
- So think very carefully before describing an offer as 'final'

Communicating the offer

- If delivering the offer direct (as opposed to through the mediator)…
  - speak as if you expect the offer to be accepted
  - explain the offer, the reasons for it and the underlying logic
  - present it well
    - you are selling an outcome
    - show that it represents value for money
- If the mediator is delivering the offer…
  - ensure the mediator understands it
  - and the messages the offer is designed to convey, including any nuances
  - and is able to deal with any obvious points of clarification

Receiving an offer

- Avoid *reactive devaluation* – the automatic dismissal or devaluation of anything at all coming from your opponent, simply because they are your opponent
- If the offer is unacceptable, think about a reasoned response that shows you have considered it
- Try and indicate areas where agreement might be possible, or which might provide a basis for further discussion

And finally…

Prepare
Prepare
Prepare