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THE 10 Cs OF MEDIATION

Mediation is becoming increasingly important in the sphere of civil litigation and its benefits are not as widely known as they should be as highlighted by Lord Justice Jackson in his "Review of Civil Litigation Costs: Final Report" (December 2009). It is something which the parties to a commercial dispute should consider as a matter of course. This articles sets out 10 reasons - "the 10 Cs" - why mediation should be fully considered. But before coming on to this it is worth highlighting what mediation actually is and why it has increasing importance.

What is mediation?

It is an informal method of dispute resolution in which a neutral third party, the mediator, attempts to assist the parties in finding resolution to their dispute. A typical mediation lasts for up to a day and it takes place in two or three separate rooms in the same building. It usually starts with an opening session where all parties are present. This gives the mediator the opportunity to set down the ground rules and either party the opportunity to say whatever they want to say (within reason!) to their opponents. This is followed by the parties moving to separate rooms which the mediator shuttles between in order to discuss the issues in dispute and to identify common ground with a view to facilitating agreement between the parties. The mediation is conducted in private and on a "without prejudice" basis (see below).

Increasing importance of mediation

Lord Justice Jackson was appointed to lead a review of the rules and principles governing the costs of civil litigation and to make recommendations due to the issue of increasing costs in civil litigation. Whilst he did not endorse mandatory mediation as a means of addressing these issues, he did see it as having a vital role in reducing the costs of civil disputes and recommended a campaign to promote the potential benefits of alternative dispute resolution such as mediation.

Additionally, the Practice Direction on Pre-Action Conduct (PDPAC), which came into force in April 2009, expressly deals with mediation by encouraging the parties to consider it before the start of proceedings and requiring them to produce evidence that they have considered mediation. Judges are also actively encouraged to deal with mediation during case management as they will seek compliance from the parties with PDPAC requirements.

So why should parties mediate? - "the 10 Cs"

- **Costs saved**

  Mediation can be a relatively cheap opportunity to resolve a dispute compared with the costs of court proceedings and can save a business the costs of wasted management time, damaged relationships, lost productivity and legal costs.

- **Cuts time**

  Parties can avoid the lengthy process of court proceedings.

- **Creative Solutions**

  On the day of the mediation the mediator should encourage both sides to "think outside the box"; what can the other party offer you in settlement? Whilst the amount of money payable by one party to the other is often the sticking point at a mediation, many mediations do involve creative solutions. The mediator is not there to adjudicate - and this enables the parties to reach solutions which no court could impose.

- **Costs sanctions**

  There are various costs sanctions which the court may apply where a party has unreasonably refused to mediate. In Dunnett v Railtrack plc, a party who won at trial was deprived of its costs because of its refusal to mediate. And once they have agreed to mediate (perhaps with the aim of protecting their position on costs), the parties must also be careful of going through the motions; a party who adopts an unreasonable approach may face adverse costs consequences.

Confidentiality/without prejudice

There are strict ground rules which apply to a mediation which are usually set out in the Mediation Agreement and in the opening session. The mediation process is confidential. This also means that, during the mediation, anything said to the mediator will only be passed on to the other side with express authority. The mediation process is also without prejudice. This means that either party can make concessions at a mediation in order to try and promote settlement. These concessions cannot be taken into account by a judge if the matter ever reaches trial.

Control

Mediation has the ability of handing back control to the parties. Court proceedings can lead to a solution being thrust upon both parties which neither wants, often dictated by the party with the strongest legal argument. Whilst mediations often do deal with the legal merits of each party's case, parties can decide to put on one side the legal merits and focus on the commercial interests of both parties in reaching a settlement. During the mediation, each party can make offers to settle and neither party is forced into taking something they don't want. All in all, the process is more capable of delivering a solution which satisfies both sides.

Concrete (binding)

Mediations can lead to a legally binding solution. As the solution reached has not been imposed on either party there is often a higher rate of compliance with the terms of the agreement, saving time and cost in the long run. Whilst some mediations do not necessarily settle on the day itself, the effect of the mediation is often to focus the minds of both parties and lead to a settlement shortly after the mediation. And if the parties do not settle at mediation, they are free to continue their dispute through the courts.

Court day

Some parties want their day in Court - a mediation often involves opening submissions where all parties are present. This gives either side the opportunity to highlight the key issues to them and even air their grievances (although stop when you notice the other side are about to walk out!). This can often focus the minds of the opposing party and give them a greater appreciation of the dispute between the parties.

Can-do procedure (flexible)

In terms of preparation for the mediation, the procedure for exchanging position statements and documentation is flexible and can often be very simple. CEDR ("Centre for Effective Dispute Resolution") has a standard procedure for this). The events on the day of the mediation itself can also be flexible, and can be decided by agreement between the parties with guidance from the mediator. Either party can bring legal representatives or experts.

Compromise

Each party may have to accept something less than it wants at a mediation. But a lot of mediations do settle because both parties see the benefits in reaching a solution before getting involved in the expense and risks which the court process holds. The first step in mediation is getting the other party to attend the mediation, and often attendance by both parties shows a willingness to do a deal. The second step is more difficult in that each party needs to persuade the other to move from its original position. But it is remarkable how successful the process is. According to CEDR, the investment of mediation pays off in anything from 60-90% of cases depending on a number of factors.

Summary

Whilst some disputes are unsuitable for mediation, many are and with the increased push by the Government to decrease the costs of litigation the parties to a commercial dispute should fully consider mediation bearing in mind "the 10 Cs".

This bulletin summarises complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.

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