MEDIATION IN THE COMMERCIAL SECTOR

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Perspectives, process and pitfalls

A short tour of the mediation process in the context of commercial disputes

A mix of the practical and the theoretical – observations

Invitation to contribute and debate
Points of view

My perspective:

Work experience

Subject matter of issues I typically deal with

Practice in advocacy and adjudication as well as mediation

Your perspective:
Managing expectations

Every conflict we experience, no matter how trivial, points us toward a crossroads in our lives. One path leads us into anger, fear, confrontation, and bitterness and draws us into quarrels over the past. This path reveals a deep level of caring about outcomes, sterile communications, contemptuous ideas, negative emotions, and unpleasant physical sensations, blinding us and dissipating our energy and spirit. This is the path of impasse, aggression, and antagonism.

A second path leads us into empathy, acceptance, honesty, and mutual respect and draws us into negotiations over the future ...

In addition to these is a third path ... This path leads us into increased awareness, compassion, integrity, and heartfelt communications and draws us into awareness of the present. It integrates the honesty and caring about outcomes encountered on the first path with empathy and caring about people encountered on the second ...

In this way, every conflict leads us to two different crossroads. In the beginning, we face a choice between fighting and problem solving. Later, we face a subtler, more arduous and far-reaching choice between merely settling our conflicts and seeking to learn from them, correcting our behaviours, and moving toward forgiveness and reconciliation.

Ken Cloke, 
The Crossroads of Conflict – A journey into the heart of dispute resolution
Janis Publications, 2006
Really?

It's about:

- Talking to someone who does not share your point of view
- With the assistance of a neutral third party
- Cutting deals in preference to some other outcome
- Compromise

There is nothing terribly new about it

It is not rocket science
What are the options?

Do you really need to employ a mediator?

DIY settlement discussions

Targeted adjudication processes

Judicial settlement conferences
Timing is everything

If you don’t really want to settle, don’t try

If you don’t think the other side wants to settle, be very slow to try

Sensible people would always mediate (or try to settle) before litigation

People are not always sensible

Face the reality that most (95%?) of litigation is about creating a platform from which to negotiate.
Getting started

Mediation panels vs *ad hoc* appointments

Evaluative? Facilitative? Transformative? What the …?

Using a third party to choose – e.g.,

www.applicationform.co.nz/nzdrc-apply-for-mediation.html

Choosing

When considering a potential mediator, ask the following questions of those who have worked with him/her in the past.

*Does the mediator operate from an interests based perspective?*

*Did the mediator develop a relationship of trust and confidence with you?*

*Was the mediator creative?*

*Was the mediator patient yet tenacious?*

*Would you hire this mediator again?*

From Programme on Negotiation, Harvard Law School see:  
http://www.pon.harvard.edu (accessed 16/6/13)

Also

How many times has this person been mediator in matters involving the other side?

How many times has this person been mediator in matters with counsel on one side or the other?

What professional standards will apply?
The agreement to mediate

Published protocols/Rules

www.nzdrc.co.nz/site/commercialdisputes/files/Mediation/SAMPLE%20NZDRC%20AGREEMENT%20TO%20MEDIATE.pdf

Or … ad hoc agreements

Does it require legal representation?  Conflicts
Make sure the dispute is properly described!  Indemnities
Preparing for mediation

Preparation is key

Understand not only your BATNA and WATNA but also what you think the other side will see as their BATNA and WATNA

The issue of authority to settle

Who really needs to be there?

Supporters and their role

Using documents
The confidentiality problem

Section 57 Evidence Act 2006: Privilege for settlement negotiations or mediation

(1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
   (a) was intended to be confidential; and
   (b) was made in connection with an attempt to settle or mediate the dispute between the persons.

(2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

(3) This section does not apply to—
   (a) the terms of an agreement settling the dispute; or
   (b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or
   (c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—
      (i) is expressly stated to be without prejudice except as to costs; and
      (ii) relates to an issue in the proceeding.
Two views:

- The Evidence Act is a Code and so there are no other exceptions
- The Evidence Act was not intended to extinguish other exceptions to privilege recognised at common law
- Law Commission recommendation:
  - “A court may order disclosure in a proceeding of a communication for which a person has a privilege under [section 57] if the court considers that, in the interests of justice, the need for the communication to be disclosed in the proceeding outweighs the need for the privilege”
- Also Nina Khouri ‘Privilege for settlement negotiations and mediation: Law Commission acknowledges the elephant in the room’ NZ Lawyer 17 May 2013
Of facts and feelings

Think you will be able to persuade the other side to change their minds on the law/likely outcome of litigation?

Don’t fool yourself

When there will be no decision, feelings can (and often do) trump facts

Don’t get angry!

Venting

But …

Always remember the other side has chosen to be there, and chooses to stay there
Commercial power

Mediation takes place in the real world

Despite all that is said about mediators and what they can do to address power imbalance in a negotiation, they are not magicians.

A well-resourced insurer against an impoverished individual does not suddenly become a soft touch

But ... a mediator can help the parties to find outcomes that meet their interests and needs rather than simply respond to legal rights

And anything is possible by agreement (well, almost)
The $64,000 question

When the issue is really just money, there will come a point at which you will have to show your hand.

A moment of truth: the ‘haven’t they heard a thing I have said?’ syndrome

The ‘What if?’ question, and why it is not always in your interests to have it asked.

Giving yourself room to move.
Caucusing: a note of caution

Reality checking … ok. But beyond that, just whose benefit is caucusing for?

People attend a mediation to talk to each other and then go into separate rooms??!

Seeing how it goes down

If Henry Kissinger is there he better get it right.
How long is a mediation?

As long as it takes on the day? Why?

If you don’t want to settle, don’t

Keeping the position open

Calderbanking


Agreements and agreements to agree

Leaving the mediation on foot
And finally, an argument against compulsory mediation ....

It is time to consider that mandatory mediation in the United States, sanctioned under the ADR Act of 1998, has outlived its usefulness. Compulsory mediation was once a helpful pedagogical tool to inform parties about mediation. It engaged otherwise reluctant clients and lawyers so that they could experience the benefits of mediation. But we now have a pervasive mediation regime in state and federal courts. There are multiple models of mediation practice. Law schools and business schools teach mediation on a regular basis and there is a substantial literature to assist them. Many lawyers and clients are now knowledgeable about mediation. In fact, some lawyers are so familiar with the process that they have become skilled in mediation tricks —spinning the mediator, using mediation for discovery purposes, lying and transforming mediation into a legal process that fits more with their adversarial inclinations.