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Do you want your mediator evaluative and are more inter-party meetings in mediation a good idea?

Mediation for a mediator is like going out with two people at the same time: it gets tricky when they then meet – this was just one of the comments at a symposium which discussed the extent to which mediators should be evaluative rather than merely facilitative. In this briefing we review (i) whether mediators should be evaluative or encouraged to be so and (ii) how some mediators are pressing for more inter-party meetings rather than caucuses, putting more pressure on the party representatives.

Should mediators be evaluative?

At a recent symposium in London on mediation arranged by The Chartered Institute of Arbitrators, the eighth such event, there was a vigorous debate between the speakers and the audience (most of whom were mediators) about whether mediators should be evaluative or not. It turned out that a great deal depended on what was meant by being evaluative.

No one wanted a mediator to impose his assessment of the merits like a judge descending momentarily from the bench. At the same time it was recognised that the reason why many mediators are chosen is because they are thought to already have knowledge and experience relevant to the topic in dispute and can therefore be respected and bring their experience and knowledge to bear on the discussion. Otherwise there is a risk that one side, whether intentionally or otherwise, can sidetrack the mediation by suggesting outcomes that any-one with experience and knowledge would dismiss as very unlikely. Why else are so many leading barristers and solicitors selected to be mediators in disputes involving specialisms such as commercial litigation, employment, construction and insurance? The list of specialisms is endless. Given the general freedom as to choice of mediator, but the need to reach agreement with your opponent, the mediator ultimately chosen will often be someone specialising in the relevant legal area. And, if it is an employment dispute, for example, and the parties have appointed an employment specialist as mediator, then their specialist knowledge is one reason for that appointment.

The courts in England certainly think this is what mediators should be doing and it is the courts, in any dispute which has gone to proceedings, that have ultimate supervisory power over parties' conduct in approaching mediation. The Jackson ADR Handbook, which is regularly cited with approval by the English courts, asserts that the published success rate of mediation shows that generally mediation is likely to be successful (paragraph 13.03) and that mediation can resolve disputes even if the claims have no merit, as a mediator can bring a new independent perspective to the parties if using evaluation techniques (paragraph ll.13). The reference to evaluation techniques implies approval of them. This has then been reflected in views expressed by the English courts, as follows.

In PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288 it was submitted that there had been no point in mediating as the dispute settled before trial only because of a defect in the claimant's case upon which neither party had alighted until just before trial. Yet the Court of Appeal considered that was precisely the sort of insight which a trained and skilled mediator, experienced in the relevant field, could bring to an apparently entrenched dispute and that the point would probably have emerged at a mediation. Emphasis was placed on the mediator being skilled and experienced in the relevant field.

In Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd [2014] EWHC 3148 (TCC) the court held it was a classic case where a mediator could have brought the parties together. Ramsay, J. commented: "In assessing the prospects of success I do not consider that the court can merely look at the position taken by the parties. It is clear that if BAE did not want to pay anything and if NGM would not settle without payment then there would not be a settlement. However, this is the position in many successful mediations. It ignores the ability of the mediator to find middle ground by analysing with each party its expressed position and making it reflect on that and the other parties' position. It allows the mediator to bring the necessary skills of evaluation and facilitation to find solutions which have not been considered."

Again, the skills of evaluation were emphasised and the English courts do appear to view the benefit of mediation as lying in the mediator's ability to look beyond the polarised positions of the parties and find middle ground by analysing the parties' positions and making each reflect on its own and the other's position.

It was suggested at the symposium that the desire to have more evaluation was client driven and the product of client impatience with what can often be seen as slow progress in mediation discussions. A process, in which discussions are facilitated most of the day and first offers are not put on the table until 4pm on the day, is one which may not be evaluative but can also be unduly time consuming. Given the desire of most clients and users to finish the mediation at a sensible hour, it was suggested they may think some evaluation could assist.

There was a discussion as to how evaluations were delivered, whether directly or by implication. Comments from a mediator like: "Please talk me through that argument again. The other side are having difficulty with it." can imply some form of evaluation. As one participant commented, whether one uses rhetorical questions or direct statements depends on the person you are dealing with and how you deal with them. Others felt that, if the parties were stuck, it was for the mediator to help them to address the questions in order to get to a resolution, by asking coaching type questions. Implied evaluational questioning seemed to be generally accepted as a useful tool.

It was suggested that, as a rule, mediators should never evaluate at the beginning of the day and that evaluation was not the open sesame to settlement: it did not settle disputes. On a philosophical note, it was suggested that getting to the truth was not helpful, as there was no universal truth, just different perspectives and the more you focused on factual issues, the more wedded people became to their perspective. And most parties wanted validation of their view or perspective, not a precise evaluation. So evaluation should be light-touched.

Med-arb, a combination of mediation and arbitration, was offered as a means of providing binding evaluation as the backdrop to the mediation. The mediator would hear submissions and make a written determination of the outcome which was placed in a sealed envelope at about 11am, to be opened at 6pm. The mediation would then start with the parties under pressure to resolve the dispute themselves by 6pm or face an unknown but binding decision. It was said that such mediations tended to conclude with a settlement by 4pm and the envelope stayed closed. It was suggested that there was market interest in such approaches but others felt parties and their advisers would not want to put themselves under such pressure or to trust the mediator/arbitrator to that extent.

The push for inter-party meetings rather than caucuses, putting more pressure on the party representatives

A number of mediators explained how they were keen both on an opening plenary session, and on subsequent plenary sessions, as it allowed parties to "give it their best shot" in terms of persuading the other side. But, at the same time, they were not so wedded to them as to insist on plenary sessions. It was possible for the parties to have a mediation without one at all. (It was in this context that mediation was described as being like going out with 2 people at once: it got tricky when they met.)

Inter-parties meetings may help in evaluation as one side may find it easier than the mediator to set out some home-truths about the other's case. With that in mind it is interesting that some mediators are pushing for more inter parties meetings, where the other side can, in effect, do their work for them.

It was suggested that, if you asked the parties to a mediation for their offers and numbers at 9.30am, and they were given, most mediations would end at 9.35am. It was thought best to do more than just negotiate. In order to give the process a chance, there was a need to have a conversation about the issues.

One of the things parties wanted out of mediation was vindication and catharsis and to vent emotions. The inter-

party plenary session provided that opportunity. It was seen as having the potential to unlock the entrenched positions of the parties, more so than a series of private caucuses with the mediator, with the mediator shuttling between the parties but no direct engagement.

Against this approach, there is the desire of users for the mediation to resolve matters sooner, rather than later. The reluctance of parties to engage in inter-party opening sessions was said to be explained as seeking to avoid repetitive presentations by PowerPoint. An example was given of an entire expert's report being presented slide-by-slide, which was not seen as a valuable use of time.

Another problem with too many inter-party meetings is that it applies more pressure to the parties and their individual representatives. They may not be ready for this, particularly if less experienced or less regularly involved in mediation. If the parties are not ready and able to explain their position, this may lead to it being unfairly discounted in the negotiations.

In order to make mediation irresistible to the parties, it was suggested that all involved should work towards a 'sacred' moment when the parties come together and are in a better position for having done so. It did not have to result in a win/win. It should just be that they were in a better position. It did not have to be a very large improvement in position but it was suggested that all mediations should be geared towards this and inter party plenary sessions were a good way to achieve this.

In summary, what became apparent is that mediators like to present themselves as not being directly evaluative. But the English Courts tend to view them as being appointed for exactly that purpose. To meet all expectations, the evaluative element of the work is more likely to be done by the mediator in the privacy of the parties' own rooms, rather than with the other side present. But inter-party meetings may be used for this purpose and are therefore an aspect of English mediations which carry some risk.

The comments and views showed how fluid and flexible mediation is in practice and how so much depends on the approach and attitude of the mediator and the parties.

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