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Briefing note November 2016

Settlement Proposals from the Mediator: A Helpful Intervention or a Tactical Minefield?

An increasingly common phenomenon in recent mediations is for the mediator, at the conclusion of the mediation, to make a proposal to the parties as to how the case could be settled with a sealed response process being used for acceptance or refusal of that proposal. In the right case, this may be a catalyst to achieving a settlement but what risks do the parties run in allowing such a process to take place?

As mediation continues its inexorable path to becoming a routine form of alternative dispute resolution to be used within any dispute, the format of mediation continues to evolve and the typical procedure continues to adapt itself to different types of disputes in which mediation is used.

The standard format of a mediation involves the mediator having initial meetings with each party, then bringing the parties together for a plenary meeting at which they present their positions verbally and may, depending on the mediator's approach, have an opportunity to ask questions of each other. This is then followed by caucuses, individual sessions between the mediator and each party which are confidential, save insofar as the mediator is authorised to take information across to another party. A point may come at which the parties can reach agreement and a settlement agreement is then concluded. If not, the mediation ends without settlement, although many mediators are also willing to remain involved to facilitate any ongoing discussions between the parties.

If the mediation ends without the parties having reached agreement, this does not mean that it was a pointless exercise. At the least, the progression of the mediation may give them a more realistic idea of the prospect of settling. However, it may also be the case that the mediation lays the foundations for further discussions to take place at a later stage either with or without the mediator being involved, which may end up bringing about a settlement of the dispute. Alternatively, even if settlement is not reached, the mediation may result in clarification or narrowing of the issues in dispute, resulting in the more efficient running of the case.

That said, settlement on the day is by far the most desirable outcome, not least because mediation is often the best chance the parties have of reaching a settlement and, even if the case is subsequently settled, that will usually only be after additional costs have been incurred and further time has been wasted by all involved. What therefore can the mediator do to help the parties bridge the gap? Classically, the to-and-fro of the caucus process, coupled with the mediator's pragmatic advice, commercial perspective and diplomatic skills, will be the way of achieving this goal. If that does not work, other techniques may be used, including having further face-to-face meetings to allow the parties to confront each other or a med-arb process may be envisaged whereby the mediator makes a written determination of the outcome, which is placed in a sealed envelope to be opened only at the end of the mediation if no settlement has been reached.

In a number of recent mediations, we have seen an increase in an interventionist tactic designed to bridge the gap between the parties. In these instances, when the mediation reached an unsuccessful conclusion, the mediator proposed a process whereby he or she would indicate a settlement deal and leave the parties to respond separately directly to the mediator as to whether or not they would accept the proposed deal. If both parties accepted it,

the case could then proceed to settlement. However, if both parties did not accept, there would be no settlement but the mediator would not say why. Thus, if one party accepted and the other did not, the party that did not accept would not know whether or not the other party had accepted.

The advantage of this process is that, where there is a degree of intransigence or stubbornness on both sides, the mediator can seek to bridge the gap by making a proposal which may be acceptable to the parties if they can see that it requires both sides to make movement. The process of responding confidentially to the mediator leaves them free to accept without revealing their hand to a non-accepting opponent.

There are, however, a number of risks involved in using this type of process, which relate to the mediator's need to have a basis for calculating the proposed settlement level:

- The mediator could rely on a subjective assessment of his or her views of the strength of the parties' cases. This would require the mediator to be "evaluative". The problems associated with this approach include that it may lead to an undue focus on the substantive merits of the case on each side, rather than the commercial realities of negotiation and could therefore reduce the possibility of a settlement deal being done during the course of the mediation itself.
- The mediator may make a recommendation based on the parties' negotiating positions during the course of the mediation. This creates a risk of compromising the relationship between the parties and the mediator. Most mediations proceed on the basis that what the parties tell the mediator in caucuses is confidential as between the party and the mediator. However, if a mediator makes a recommendation based on the parties' negotiating positions, there is clearly a risk of that confidential information influencing the mediator's recommendation. Would this then persuade the parties to be less open and frank with the mediator during caucuses or to hold back such information that might be used against them when it comes to calculating a possible settlement proposal? For example, a party may be less willing to communicate flexibility in its position if it thought that this might be used by the mediator as an indication that a settlement proposal quite far from that party's end position in the negotiations might be acceptable.
- A third possibility is that the mediator would rely on projections as to how the negotiations would run if they were left to continue indefinitely. However, this would result in speculative results, rather than sensible rational commercial proposals.
- In practice, a mediator left with the task of proposing a settlement figure at the outcome of a mediation will probably use a combination of these different factors with the result that the mediation process is infused with the difficulties associated with all of them.

Against these objections, mediators who wish to use this technique would point out that any process that results in a successful settlement being agreed at the end of a mediation is surely a good one. As to the influence of that process on the mediation itself, they may also say that this type of proposal is only made as a last resort when nothing else has worked and it would usually not be something that the mediator would indicate as a proposal when the mediation is being planned or is underway. That may be true but, if this technique were to become more commonplace, one might foresee a risk of parties tailoring their mediation strategy to wait for a last resort proposal from the mediator and, in that way, to maximise their chances.

When this type of technique is used in mediation, the mediator will usually first seek the parties' consent to the technique being used. So, what is the best course of action when such a proposal is made? The answer depends on how the mediation has been conducted and how the legal team perceives the potential weaknesses in the case.

If, during the course of a mediation, a party has made concessions to the mediator in caucuses and not authorised the mediator to communicate these to the opposing party, there may be good reason not to agree to a mediator's proposal because, even if the mediator does not reveal any of those concessions when making his or her proposal, the level of the proposal or its terms may subliminally reveal something of the party's view of its position. It may also give the opposing party an unrealistic view of the level at which it can ultimately expect to settle.

In contrast, where a party has been upfront about its position but there has been limited clarity about the opponent's position, or where the opponent's position does not appear to be supported by the merits, a mediator's proposal may be tactically advantageous.

As a final anecdotal remark, in none of the cases mentioned above was the mediator's proposal accepted by the parties. This reflects the fact that the proposal is only made at a point at which there is a large gap between the parties' positions, which will always be hard to bridge. Nonetheless, it shows that the mediator's proposal is not a magic solution to bridge the gap. At the same time, it was not all negative: one of the cases did settle further down the procedural track at a level close to the proposal that had been put forward by the mediator at the end of the mediation.

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