MEDIATION – AN ALTERNATIVE TO ARBITRATION?

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INTRODUCTION

Commercial parties increasingly recognise that disputes can be costly and distracting, and can consume significant management time. Litigation or arbitration is often confrontational, particularly within adversarial common law jurisdictions. Whilst legal expenses may be recovered, there is always an element of unrecoverable costs and despite authoritative legal advice, litigation risk means that litigation will always represent a gamble. Few, if any, legal advices come with guarantees of success. Mediation can be seen as a means of resolving disputes via compromise. Litigation can prompt parties to become more entrenched. However, compromise is always necessary in a commercial environment; just as parties are prepared to compromise and negotiate contracts or relationships, they should equally be open to compromise in order to settle their disputes. Compromise that allows the parties to retain or improve their commercial relationship can be attractive to both sides. Mediation can allow rigorous assessment of a case's strengths and weaknesses, and give indications as to the likely approach of any ultimate arbitrator/judge, whilst giving the parties opportunities to reach an amicable settlement and potentially maintain commercial relationships. Mediation as a form of alternative dispute resolution (ADR) has become increasingly popular in many European countries, including the UK, as well as other jurisdictions such as the US and Canada.

ROLE OF THE MEDIATOR

In mediation, the parties meet and constructively discuss the dispute in question. A neutral third party (the mediator) actively assists the parties in working towards a mutually acceptable negotiated settlement. The mediator does not act as a judge or arbitrator, adjudicating over the proceedings. As such, the mediator does not impose upon the parties a resolution or settlement. Instead, the mediator simply facilitates discussions and helps to identify common aims and objectives between the parties, in the hope that a mutually acceptable settlement can be reached.

ADVANTAGES

There are a number of advantages to mediation compared with, say, arbitration. All discussions during a mediation are strictly private, confidential and 'without prejudice'. Nothing that is said by either party in mediation is admissible as evidence in current, or future, legal proceedings. The same principle applies for any documents that are disclosed in mediation. However, if a settlement agreement is reached and signed by the parties, then the written settlement becomes legally binding and enforceable, as if it were the subject of a contract or court order.

Mediation offers speedy resolution. For example, mediation can be arranged within a few weeks and, whilst the mediation itself may take a day or two, the whole mediation process is much quicker than, say, seeing arbitration through to a final award. For the same reason, mediation is generally much cheaper than pursuing a claim through to arbitration. If the parties are able to reach a quick and amicable settlement of a dispute, they are more likely to maintain a working, commercial relationship, than if matters are to proceed by way of formal legal proceedings.

Whilst mediations are strictly private and confidential, as are their outcomes, it is widely reported that mediations have a high success rate (between 70% to 80% in the UK).

COURT APPROACH

In the UK, the courts are actively encouraging parties to consider mediation. For example, the Civil Procedure Rules, the Commercial Court Guide and the Pre-Action Protocols all seek to encourage parties and prospective litigants to consider mediation.

In addition to this encouragement, parties are also at risk as to costs if they refuse to mediate their differences. For example, in the widely reported Dunnett v. Railtrack PLC, the English Court of Appeal disallowed Railtrack's legal costs, notwithstanding that it was successful on appeal in defending the claim being pursued against it, because it refused to meet Mrs Dunnett for a mediation despite the court stating at an earlier hearing that the parties should attempt mediation.

Further, in Halsey v. Milton Keynes General NHS Trust, the Court of Appeal stated:
"All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. The Court of Appeal indicated that the courts would be robust in their encouragement, and parties will now face significant adverse cost consequences if they unreasonably refuse to consider mediation."

RECOMMENDATIONS

Whilst mediation may not be a suitable alternative to arbitration in every scenario, parties who litigate or arbitrate their differences now need to seriously consider mediation during the legal process and may be exposed to cost consequences if they refuse to attempt mediation without good reason. We recommend that parties consider incorporating a 'mediate before arbitrate' provision in their contracts. This can save time in agreeing the location, timing and format of a mediation in the event of a dispute. However, even without such prospective agreements, parties to a dispute should actively explore mediation as part of their dispute resolution process.