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Mediation gets its Act together

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The much-delayed Mediation Act 2017 has finally been enacted but not yet commenced by the required ministerial order so it is timely to take a look at how Mediation operates and what it has to offer in the context of commercial disputes.

What is Mediation?

Mediation has been defined in the Act as a "confidential, facilitative, and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute". The fact that the process is confidential makes it especially suitable for disputes in which the parties would not wish to have their dispute aired in public. Nothing said at Mediation or documents especially produced for Mediation can be referred to in litigation if the case does not settle.

Objective of Mediation?

Typically, the aim of Mediation is to settle a dispute or, in a complex dispute, to at least resolve as many of the issues as possible so that if there is litigation it will be shorter and less expensive than it otherwise might have been. As with all forms of negotiation, there may be a need for compromise on all sides but Mediation does offer a party an opportunity to demonstrate its own strengths and point out the other side's weaknesses so that it does not have to concede much ground to get a deal done.

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The Process

The first thing to be said about the process is that it is more art than science but there is an underlying substance to it. It is extremely flexible and while one can describe a "typical" Mediation, there are always differences depending on the parties and the nature and scale of the dispute but also on the individual Mediator. There is no strictly right or wrong time to go to Mediation but it is generally accepted that if Mediation is attempted too early on, then the parties may not have sufficient information to make informed settlement decisions. The Mediation Act requires plaintiffs' solicitors to fully advise clients about Mediation before proceedings are issued. That may or may not be the appropriate juncture in many cases and perhaps it would have been better had the Act included a requirement that Mediation had to be considered at a later stage in proceedings. The prospect of an expensive discovery process may operate as a more realistic prompt to agree to Mediation.

The process starts with the parties agreeing to go to Mediation – either because of a court order (personal injuries cases), or court encouragement, because of a contractual obligation or most frequently, just because one party suggests it and the other agrees. The solicitors then discuss the nomination of a Mediator and several may be approached. Their proposed fees, availability and lack of conflicts are checked and assuming that all is agreed, the Mediator is appointed. As a general rule (only), each party will pay its own costs of the Mediation but those costs may become costs in the cause and it is essential that the position on costs of the Mediation is clearly agreed and recorded. The mediator is likely to want to meet with the parties and/or their lawyers before the Mediation day. The more complex the case, the more preparation will be required.

In personal injuries cases there is a possibility that a court will direct that the parties must go to Mediation where the court considers that Mediation would assist in reaching a settlement. In other High Court litigation, whether in the Commercial List or otherwise, the court has the power to adjourn proceedings to allow the parties to consider going to Mediation. There may be adverse costs consequences for a party if they unreasonably refuse to participate in Mediation.

Who should Attend / Authority?

Like every other aspect of Mediation, there are no rules as to who should attend except that it is expected that each party will commit to have with them a person who is authorised to sign a deal if one is reached. It is not necessary for parties to have solicitors and barristers present but it often happens that they do. The Act will require the mediator to advise the parties of their right to legal advice before signing a settlement agreement. It is probably more important in complex cases to ensure that any settlement agreement which might be signed is properly drafted so that it will be legally enforceable.

Depending on the circumstances, parties may decide to have present, or at least to have telephone access to, external advisers such as experts for example, accountants or tax advisers. In appropriate cases, the parties' experts may attend the Mediation if it is considered that they may be able to reach some level of agreement on some of the issues in the case.

The Mediation Day

Typically, there will be one room allocated to each party and one room set aside for any joint meetings. On the day of the Mediation, the mediator is likely to stagger the arrival times of the parties so that he (or she) can spend some time with the first party and then spend some time with the second party. These initial "caucus" sessions are important as they allow the Mediator and the parties to get to know each other and establish a mutual confidence. In some circumstances the mediator may meet one or both parties before the Mediation day. Once the Mediator has met each party individually, a decision is made by the Mediator as to whether convening a joint session would be constructive.

Opening Statements

The parties, or perhaps just one of them, may wish to make an opening statement and it could be made by the lawyer or the client directly. The other party may respond, or not, as it sees fit. Sometimes these opening statements, particularly if made directly by the client, can have the effect of getting some emotional issues out on the table and dealt with and that may be required before the parties can attempt to resolve the dispute. The opening joint session affords the parties an opportunity to advance their arguments directly to the other side, without being filtered through lawyers and this can have powerful effect. Depending on how the Mediation goes, it may be the parties' only opportunity to put their case directly to the other side. Preparation for this opening statement is vitally important.

The Role of the Mediator

Throughout the day, the Mediator will move from room to room gathering information and will try to get the parties to genuinely assess the relative merits of their case by "reality testing" and making the parties reflect on their claim/defence. The Mediator will typically get parties to consider what the future will be if the case does not settle and will get them to focus on the cost of commencing or continuing litigation in terms of pure legal costs as well as personal/management time and resources and the simple fact that being involved in litigation is distracting them from what they should be doing. The Mediator will seek to find ways of breaking deadlock by seeking to have a party make the first move or give an indication that they are willing to compromise.

What is discussed in each private room stays private and the Mediator does not disclose anything to the other party without having express consent to do so. There will be periods, sometimes long

periods, where the Mediator is with the other party so it is advisable that parties know in advance that there may be periods of down-time so that they can spend that time as they wish. On leaving one room to go to another, a Mediator will usually indicate how long they expect to spend in the other room so that the people know and can use the time accordingly. Sometimes a Mediator may leave a party some "homework" to do while they are in the other room. That may be some task like working out exactly what the costs would be if the case were to run to a trial or to call their accountant to get advice on the possible tax implications of a possible settlement.

Outcome of Mediation

At Mediation, nothing is agreed unless and until everything is agreed and a settlement agreement written up and signed. At that stage the settlement is legally binding.

The desired outcome from Mediation is a legally binding settlement. One of the main advantages of Mediation over litigation or arbitration as regards outcomes, is that the parties can design their own settlement however they wish and it is flexible enough that it is not necessarily a black and white, win/lose situation. For instance, if the defendant owes money to the plaintiff, it might be able to agree a schedule of payments so that it can afford to pay what it owes. The advantage to the plaintiff is that that might be a lot better than getting a judgment which forces the defendant into liquidation. Other outcomes range from partial settlement, where certain issues are agreed, to no agreement and the Mediation simply ends and the parties commence or resume their litigation.

Conclusion

Over the past decade or so, Mediation has gradually moved from the margins of the dispute resolution world to become an accepted, trusted, mainstream method of resolving commercial disputes. The courts have long-since encouraged its use in appropriate cases and the legislature has now put Mediation on a statutory footing. In a most welcome recent development, the Department of Expenditure and Reform has issued a Circular (17/2017 which is effective since 26 October 2017) which has the effect of obliging Government Departments, offices and public bodies to consider resolving workplace, contract and other disputes through mediation before resorting to litigation or arbitration. The Circular confirms that it is Government policy to promote mediation and states that the Irish Government Economic and Evaluation Service and the Comptroller and Auditor General have recommended mediation as a means of efficient and cost-effective dispute resolution.

It is reasonable to expect that the growth of Mediation will be exponential on the commencement of the Act and parties will have a very viable alternative to the traditional adversarial court system. We await the commencement of the Mediation Act with interest.

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