



Mediation in Commercial Disputes

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Introduction

The main purpose of this article is to discuss mediation as an alternative dispute resolution mechanism so that, at the very least, an individual, a corporation, or any other entity which finds itself on either side of a dispute will be familiar with the concept and the procedures involved.

Mediation is a process in which an impartial and independent third party facilitates communication and negotiation and promotes voluntary decision making by the parties to a dispute to assist them to reach a mutually acceptable solution.¹ Mediation, as an alternative to engaging in litigation is expected to become increasingly more common in Ireland as a means of settling commercial disputes. In accordance with the rules of the Commercial Court², cases may be adjourned for mediation on application by either of the parties to a dispute or the presiding judge may direct that a case be adjourned for mediation to take place. Notwithstanding such a direction, neither party to a dispute is obliged to partake in the mediation process; however, parties to a dispute should be aware that there may be cost implications if one party is later found to have adopted an unreasonable position in the context of considering mediation to find a resolution. In 2009, a survey conducted by the Irish Commercial Mediation Association³ reported that attempts to resolve commercial disputes by mediation were expected to double during 2010. It is also now expected with the recent introduction of the new Circuit Court Rules⁴ that the number and types of cases entering the mediation process as a means of alternative dispute resolution will increase. The new Circuit Court Rules contain almost identical provisions to those used in the Commercial Court whereby a judge can direct the parties to consider mediation, thus shortening proceedings and the associated costs. With effect from 1st January 2010, a Circuit Court Judge or the County Registrar at a case progression hearing may adjourn certain civil proceedings for a period not exceeding 28 days to allow the parties to use mediation, conciliation and arbitration or any other dispute resolution process to settle or determine the proceedings issue.⁵

While there are many variations on the mediation theme in Ireland, as a general rule, mediation is a confidential, without prejudice and voluntary process in which a neutral third

¹ The Mediators Institute of Ireland. www.themii.ie

² Hears commercial disputes where the value exceeds Euro 1 million

³ Commercial Mediation Awareness Survey 2009. Author: ICMA

⁴ Circuit Court Rules, S.I. 539 of 2009

⁵ The Mediators Institute of Ireland. www.themii.ie Article entitled "New Circuit Court Rules Allow for Greater Use of Mediation"

party assists the disputing parties to resolve their dispute. The mediator has no role in making any decision and the parties therefore retain absolute control over the outcome. The process typically involves a series of meetings mixing open and private discussions, usually in one day. While mediation as a process is structured, it remains sufficiently flexible to allow the mediator to assess the developing situation and to have meetings with participants in a manner considered most conducive to constructive dialogue. The rules of engagement provide that until such time as both parties are in agreement, either party is free to disengage from the mediation process at anytime. Mediation, therefore, creates a safe environment in which the parties may engage in negotiation and indicate to the mediator or to the other party directly that they would be prepared to make a concession on a certain point if the other party were prepared to reciprocate. Once a settlement is reached between the parties, it is stated in writing, signed and becomes legally binding.

Unlike court proceedings, where the outcome typically is that one side is ordered to pay the other side a sum of money and its legal costs, mediated solutions can take any form as may be agreed between the parties. For example, in a case involving a debt due in respect of a liquidated sum, the debtor, rather than paying a monetary amount, could agree to provide its goods or services to the other party at a reduced rate over a period of time until the debt owing has been eliminated. Also, in terms of finalising the dispute from a timing perspective, the mediation process saves time. Typically, once the parties have decided to mediate, the process can be initiated within a matter of days or weeks and it is not dependant on a court to determine fixed dates.

Because the mediation process involves the individual parties to the dispute coming together rather than being represented solely by their lawyers, the possibility exists that these commercial people may during the mediation process determine their own solutions to the difficulties in a conciliatory manner facilitated by the mediation process. Mediation presents the possibility that damaged relationships may be restored because of the direct contact between the principals; quite the opposite to litigation where there is a winner and a loser, or in a broader sense everyone loses. Mediation further presents the possibility that damaged reputations may be avoided due to the fact that mediation is conducted in private and the facts of the dispute are not available to the public as is the case if the matter proceeds in court.

While it is readily accepted, even by the most ardent supporters of mediation, that the process is not a panacea and is not a quick fix for every single situation, there is a growing acceptance that mediation should, at the very least, be considered and evaluated as an alternative in every single case. If mediation is considered not to be appropriate at a given point in time, it should be reconsidered at various stages in a dispute and should not simply be discarded. A survey by the Irish Commercial Mediation Association⁶ found that there was

⁶ Commercial Mediation Awareness Survey 2009. Author: ICMA

a growing acceptance amongst the commercial and legal fraternity of mediation as a highly effective form of dispute resolution. Perhaps more importantly for any party to a dispute, the survey also reported that mediation saves time, money and business relationships.

The statistics indicate clearly that mediation has a success rate of approximately 70%. The incidences of mediation being adopted by parties in high value and high profile cases which come before the Commercial Court are increasing. Sceptics are being converted on a daily basis and therefore anyone involved in the handling of a dispute needs to familiarise themselves with the process of mediation.

The benefits of mediation is that it delivers privacy, confidentiality, costs savings, reduces management time preparing for lengthy litigation and singularly offers parties an opportunity to eliminate the risk of an adverse decision by retaining a large degree of control over the process and its outcome. Even where mediation does not result in a settlement, time and costs may still be reduced as issues may be narrowed and preparation invested in the mediation process will have a value in any ultimate litigation. One might ask is mediation a sign of weakness? This question may arise with any type of settlement discussions which so often take place “on the steps of the court” at which stage very significant costs have been incurred. One could argue that the party proposing mediation may be seen as strong rather than weak since they are showing a willingness and confidence to engage in a process which they are confident will result in a satisfactory resolution of the dispute. It has been noted that mediation, as an alternative dispute resolution mechanism, saves time, money, reputation and relationships; whereas in litigation all of the aforementioned can be lost. That is why, particularly in commercial disputes, mediation should always be considered.

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