



Commercial dispute? Should you consider Mediation?

Falling out with a customer, supplier or even a business partner can happen, and the reasons for the ensuing dispute can be both commercially and emotionally driven.

The ending of any business relationship can be fraught, and whilst amicable negotiation may be both parties initial intention, often positions are taken and parties can become entrenched. The costs of resolving the dispute can often drive the litigation on when settlement could otherwise be reached.

So what should happen? There are choices for resolving disputes and each will have its place and time. There is no defined path to follow and the options are not mutually exclusive.

A sensible and dispassionate view would be to attempt the most cost effective route first and try not to make the dispute personal. But, when you are in the middle of a dispute that impacts on even a small part of your business the impact is often felt in a disproportionate way.

So what can mediation offer? Mediation has several advantages over other forms of dispute resolution – it is flexible, cost effective, private, constructive, and voluntary.

Flexible. The mediation process does not have to follow a set of rules like litigation does. The outcome therefore can be entirely flexible to the wishes of the parties, unlike litigation which imposes a solution on the parties (which neither may want!).

Cost effective. Mediation is generally a shorter process than litigation so is more effective with its use of time and hence cost. There is no timetable within the dispute when mediation can and cannot be used. It can be used whenever the parties want to use it, and it can be used more than once. It could be at the outset of a dispute, to avoid delay and deterioration of the relationship, or it could be used later when all the evidence has been collated and as a final attempt to avoid going to court.

Private. The fact that parties are mediating is entirely a private matter and not a public one as would be in the case of litigation. The process and the outcome of a mediation is private, and the parties agree to keep it private. Indeed if the mediation fails, the matters discussed within the mediation cannot be used as evidence in any subsequent litigation of the dispute.

Mediation is therefore a safe environment in which to explore both the strengths and weaknesses of your case.

Constructive. The process of mediation is one which looks for a solution, rather than to apportion blame. The process looks for a solution that both parties can live with. It is therefore constructive and positive in outlook, and the privacy of the process encourages parties to explore all possible solutions without fear of looking weak by considering settlement. Compare this to litigation where parties generally push hard on the evidence that supports their case and that which destroys their opponents; an entirely destructive approach to dispute resolution.

Voluntary. Parties to a dispute cannot be forced to settle their dispute by mediation. Parties attending a mediation may obtain a better understanding of the dispute from their opponents viewpoint, if they approach the process with an open mind. This may result in a settlement being reached at mediation, or it may narrow the issues to be resolved and allow a settlement to be reached later in time or by other forms of dispute resolution.

So what are the downsides of mediation? I could state that there are none, but that would be a blinkered view. No process for dispute resolution is perfect and each dispute has its own unique set of facts which may lend the dispute to different resolution processes.

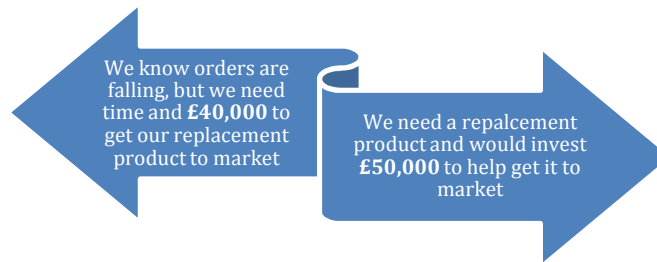
Sometimes the parties are so entrenched that no matter how long a mediator tries to facilitate a settlement its never going to happen. Other times it may appear that the gap between the parties is so wide that it can never be bridged, but by simply getting the parties to talk in a safe environment it can open the way for a settlement to be achieved.



What does a mediator do? A common misconception is that a mediator settles the parties dispute. This is obviously incorrect when you consider the above benefits of mediation. The solution to the dispute is reached by the parties in a voluntary and constructive way. The mediator helps this to happen, but cannot impose it.

A skilled mediator facilitates the discussion between the parties by listening to, repeating and testing the positions taken by both parties. Commonly the process will involve private sessions between the mediator and one of the parties and nothing discussed in that session can be passed to the other party, unless the party authorise the mediator to do so.

By having these private discussions with both parties a mediator is in a unique position to identify any areas worth further exploration, or which might result in a settlement.



A good mediator will be able to put the parties at ease, inspire confidence in the process, and encourage an open discussion. If this is achieved a settlement is more likely. A mediator does not need to be a specialist in the type of dispute as they do not provide any advice or opinion to the parties.

However, experience of the type of dispute or the industry in which the parties operate can be an advantage by saving time understanding the basics, and bringing relevant and valuable experience to the process of resolving the dispute.

My own experience with commercial disputes, especially the smaller disputes, is that parties often have a pre-conceived idea of the likely outcome and what they think their opponent wants. They spend too much time on positions and too little on solutions.

It is the mediators role to move the discussion from stating positions to considering solutions. Then a settlement may be reached by the parties and a commercial relationship preserved.

Biog.

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