Commercial Mediation For Owner Managers

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An Introduction

Owner managers are used to controlling their own fate. They enjoy it.

They also enjoy making money, and hate to see it wasted.

That is why mediation is a sensible alternative for owner managers looking to resolve commercial disputes in a controlled, timely and cost-effective manner. Yes, it can be unpleasant, confrontational and adversarial. That is the nature of any dispute. But it can be a worthwhile and effective alternative to litigation, as long as the right conditions are in place, the right mediator is retained, the right mediation process is implemented, the parties approach the mediation with the right attitude, and the unique aspects of "commercial" disputes are addressed.

What Is Mediation, and How It Is Different From Litigation or Arbitration?

Put most simply, mediation is a voluntary process for resolving disputes in which another person helps the parties negotiate a settlement to their dispute.

Litigation and arbitration, on the other hand are adjudications. They usually involve an involuntary process in which the parties turn to an adjudicator to impose a solution on the parties based on what the adjudicator believes is fair and just.

Mediation is assisted negotiation, with the parties deciding for themselves.

Litigation and arbitration are adjudication, with an adjudication deciding for the parties.

Mediation is different from litigation and arbitration in other ways. For owner managers, this list includes:

- The parties collectively retain control of the outcome.

- The parties often speak for themselves and to each other, rather than through third parties to a third party.

- The process is completely without prejudice, allowing the parties to say and propose things they might not be willing to do in more formal proceedings.

- Mediation usually allows the parties to consider a variety of solutions to their problems simultaneously, and offers a more creative and flexible forum for problem solving.

- Mediation is informal and private, without the usual rules of evidence and legalism associated with formal proceedings, and without creating any public record.

- Issues not typically addressed in adjudication can be accommodated, including purely business or emotional issues.

- Mediation can be faster and cheaper.

- Mediation can provide an opportunity for relationships to be saved.

- Mediation does not have to come up with a final solution in the first instance, and can be adjourned or reconvened as often as necessary in order for the parties to get more information, take additional steps, or consider certain ideas or proposals.

Some owner managers think negotiation is a sign of weakness when engaged in a major dispute. For this reason they also think mediation is a sign of weakness. Owner managers who believe in these sentiments should remember what John F. Kennedy had to say about negotiation:

> *"Let us never negotiate out of fear. But let us never fear to negotiate." John F. Kennedy* [1]

Mediation is an excellent forum for implementation of that principle.

Some Unique Features Of Commercial Mediation

Commercial disputes often contain features that are not present in other kinds of disputes and other kinds of mediations. These features need to be kept in mind in deciding whether to participate in commercial mediation, and how to most effectively take advantage of the mediation process.

This list of positive features includes:

- Commercial disputes can generally be measured in dollars and cents. While they will often include matters of "principle", at the end of the day the issues in question and the positions of the parties can be measured in money.

- In most commercial disputes the parties care as much about money as they care about principles.

- The framework of most commercial disputes is well established. There are well-developed and widely known principles of commercial law, finance, accounting and business at play. While there may be strong differences of opinion of how to apply those principles to the circumstances in question, the existence of the principles can rarely be denied.

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[1] Sorensen, Theodore C., *"Let The Word Go Forth": The Speeches, Statements and Writings of John F. Kennedy*, Delacorte Press, New York (1988), p. 13.

- In most commercial disputes the problem will not go away if the mediation is not successful. The alternative for the parties is almost always litigation of some kind. The costs, delays and uncertainties around litigation can usually be quantified and compared to the alternatives the parties are negotiating for themselves.

The list of negative features includes:

- Many owner managers have a "win-lose" approach to disputes. They get bogged down in making sure they "win", or that they do not "lose", or that the other side does not "win". These tendencies are an impediment to negotiated settlement. In many commercial mediations time may have to be spent rekindling the "win-win" attitude most business people profess to have.

- Many owner managers are control oriented. They do not like to be in situations that they cannot control, and do not like to be controlled by others. They often prefer an adjudication process where they can be passive observors to a mediation process where they must face and interact with the other party. Getting owner managers actively involved in the mediation and speaking for themselves can be a problem.

- Emotions are usually masked in commercial disputes. Owner managers and their advisors often believe displaying, acknowledging, resolving or dealing with emotions is a sign of weakness. This can be a real impediment to a successful negotiation, and must be managed in the mediation process.

The commercial mediator, the parties and their advisors have to be aware of and account for these positives and negatives if they are going to get the most out of a commercial mediation process.

Can Commercial Mediation Work In Your Case?

Not every dispute is a candidate for mediation. Some disputes can only be resolved through adjudication, no matter how long that takes or what it costs.

Some things that make a commercial dispute a good candidate for mediation include:

- Parties who need or want to have an ongoing relationship, or are concerned about managing their reputation, standing in the community or adverse publicity.

- Parties who are genuinely worried about the delays, costs and uncertainty associated with litigation or arbitration.

- Parties who favour resolving the dispute on a commercially sensible basis, and are not stuck on "legalities" or any particular "principle".

- A dispute whose "legalities" or "principles" are fairly balanced between the parties.

- Parties who are concerned about setting an adverse legal precedent.

- Parties who can leave their ego at the door, and are not hung up on achieving a win-lose outcome.

On the other hand, the following factors suggest a commercial dispute that may not be a good candidate for mediation:

- If one party simply wants their day in court, and is willing to wait for it and pay for it.

- If one party perceived the "legalities" or "principles" are strongly imbalanced in their favour.

- If some key parties are reluctant participants, or worse yet won't participate at all.

- If one or more party has a hidden agenda, which prevents the real issues from ever being on the table.

- If a party feels more strongly about the "principle" at stake than the money at stake.

- A party who cannot leave their ego at the door, and is committed to achieving a win-lose outcome.

What To Look For In A Commercial Mediator

There are some basic things to look for in a mediator that would apply us much to a commercial mediation as a non-commercial mediation, including:

- Impartial, neutral and objective.

- Trusted and respected by all parties.

- Patient, civil and dispassionate.

- Insightful, persuasive, and able to solicit participation and co-operation.

- Able to maintain momentum, focus and decorum for the parties.

- Able to summarize, simplify, collate and coalesce.

In the context of a commercial mediation, there are some other things to look for in a mediator, including:

- Business experience and skills, including an understanding of accounting, tax, business law, business contracts, transactions, reading financial statements, etc.

- A good understanding of commercial realities, and what makes commercial sense.

- A well-defined mediation process acceptable to the parties.

- The ability to assist the parties with defining the key commercial and legal issues to be resolved, the details to be dealt with in documenting any settlement, documenting a well-crafted settlement agreement, and preparing a complete settlement implementation plan.

Facilitative Versus Evaluative Mediation

Before suggesting a typical commercial mediation process, it is important to point out that there is more than one kind of mediation. Owner managers and their advisors need to know what kind of mediation they are agreeing to, and make sure it is right for their situation.

In that regard, the two most common types of mediation are "facilitative" and "evaluative".

A facilitative mediation focuses on the interests of the parties. The process is very much a negotiation, and the mediator is there to help the parties negotiate their own solution.

An evaluative mediation, on the other hand, is a blend of arbitration and mediation. The evaluative process is substantively a negotiation, but the mediator will provide their own non-binding recommendation on how the dispute could be fairly resolved, and may even end up trying to impose their view of the solution on the parties.

In commercial mediations:

- It is generally best to start with a facilitative approach, especially if there is no major imbalance of power between the parties, as the parties usually have access to good professional advisors as able to assess the merits of the situation as the mediator.

- If it looks like it could help the parties to switch to an evaluative approach, then the switch should be done openly, with the prior consent of all parties, and with the issues to be evaluated clearly spelled out and agreed to.

- It is also a good practise for the mediator to share his or her thoughts on what is right, fair or legal with each party privately and in sequence, starting with the party most likely to be negatively impacted by his or her views, before using that evaluation as the basis of moving forward. The mediator should also respect the wishes of a party if they feel that the evaluation is too one-sided and should not be shared with the other parties or used as the basis for moving forward.

A mediator who does not follow these principles and upsets the balance of power in a commercial mediation can ruin mediation, as they can significantly add to one party's best alternative to a negotiated settlement at the expense of another party.

BATNA – Best Alternative To Negotiated Agreement

The mediation community often talks about BATNA – a party's Best Alternative To Negotiated Agreement. BATNA is very important in a commercial mediation context, and should be openly discussed among the parties for a variety of reasons including:

- A party is not likely to agree to a negotiated settlement unless they feel that the agreement better meets their interests than their BATNA.

- In commercial cases, BATNA usually involves litigation or arbitration, which means the party's are able to get a good handle on adjudication costs, delays and range of outcomes.

- Even if adjudication is not the principle BATNA for the parties, their respective BATNAs can usually be fairly well quantified in terms of time, resources and money, issues quite dear to most owner managers and easy to compare to whatever settlement proposals are on the table.

A BATNA inquiry can lead to two useful types of discussion in a commercial mediation:

- First, a discussion of how a particular proposal is better for a party than their BATNA because of the nature of the proposal.

- Second, a discussion of how a particular proposal is better for a party than their BATNA because they are over-rating their BATNA.

If mediation leads to the point where all parties feel that the negotiated agreement is better than their respective BATNAs, than the mediation should be successful.

Robert Kennedy put it this way:

> *"Objective assessment of the prospects for a negotiated settlement rests on clear analysis of the minimum goals of both sides, our adversary's as well as our own." Robert F. Kennedy* [2]

BATNA represents a framework for minimum goals to be openly discussed, with a resolution achieved either by changing the minimum goals to meet the deal, or changing the deal to meet the minimum goals.

However, when it comes to owner managers, it is important to keep in mind that hidden agendas, unspoken emotions, control issues, and win-lose or lose-lose attitudes, can all undermine an otherwise commercially reasonable BATNA discussion.

[2] Kennedy, Robert F., *To Seek A Newer World*, Doubleday & Company, Inc., New York (1967), p. 209.

A Commercial Mediation Process

It is very important that your commercial mediator have a well-defined process for the parties to follow, at least as a starting point, and that the process make sense to everyone. One of the first things you should ask a potential mediator is to outline the process they plan to use in your mediation.

In that regard, it is my opinion there is more to a meaningful commercial mediation process than "shuttle diplomacy" and "caucusing". In some situations it may be the only way to get things done, and in most mediations it will be necessary at some point. However, simply putting the parties in separate rooms and running back and forth between them is not, in my respectful opinion, the first choice of process offered by the best commercial mediators.

There are entire books written on mediation process. What follows is a very abbreviated outline of how a commercial mediation process could work, as an example to those readers who might not have been through mediation before:

Step 1 – Agree To Mediate – Before The First Group Session: Agree to mediate. Retain a qualified, independent mediator, including signing an Agreement to Mediate. Confirm the mediation will be completely "without prejudice", and that nothing said or done in the mediation process will end up as evidence in court. Confirm that the mediator will never be called as a witness in the event the mediation is not successful. Set a time and place for the mediation, allowing enough time to get the job done. Confirm the fees and costs of the mediator and the mediation facility, and who is paying what. Confirm attendees, including everyone necessary to confirm the key facts, negotiate a deal, document a deal, approve a deal and execute a settlement agreement. Prepare and exchange mediation briefs, keeping in mind that your goal is to negotiate a settlement with the other parties, not convince the mediator to take your side.

Step 2 – Set Parameters and Goals – First Group Session: Opening statement from the mediator. Opening statements from the parties, including why they are there and what they hope to accomplish. Establish and document mediation goals for the parties, and the group as a whole, to refer back to if necessary during the mediation process.

Step 3 – Information, Issues and Interests – Group Session: With the assistance of the mediator, the parties review the factual background to the dispute; catalogue the factual, legal, financial, commercial, relationship and emotional issues affecting the dispute or that need to be taken into account in any negotiation; discuss the impact of the dispute on the parties; discuss the impact on the parties of the dispute not getting settled through this mediation attempt; and attempt to define and document the key interests of each party that need to be addressed for there to be a successful settlement (especially financial, commercial, relationship and emotional interests).

If they have not already done so, the parties might also discuss how they perceive each party's BATNA (Best Alternative To Negotiated Agreement).

Step 4 – Brainstorming – Group Session: With the assistance of the mediator, the parties catalogue solutions to the various issues that have been identified, and the manner in which the

interests of each party can be addressed, without getting into pros and cons; after the catalogue is complete, the parties discuss the pros and cons of each possible solution, their impact on each of the parties, and how they might address the interests of the parties.

Step 5 – Negotiating – Usually In Caucus: After the preliminary steps set out above, the negotiations can really begin. There are many different ways this could happen. In most cases, the parties will be guided by the mediator, although in some cases the mediation may be going well enough that the parties simply start negotiating between themselves without much mediator assistance.

Typical forums for negotiation in a commercial mediation context include the following:

- *Shuttle Diplomacy (aka Caucusing)* – The parties are segregated into separate rooms. The mediator goes back and forth between the parties, receiving and imparting information and communicating offers, counter-offers and rationale. The parties are free to discuss whatever they want with the mediator, but the mediator only communicates what he or she is asked to communicate. This is, after all the, parties' negotiation.

  In a commercial mediation, it is important that the mediator not slip into evaluative mediation while engaged in shuttle diplomacy without doing so openly and with the approval of the parties (see above). It is also very important that the mediator does not spend too much time with any one party, or that they give the parties significantly unequal time. In most situations, thirty minutes per session should be enough to keep people focussed and moving along.

- *Ping Pong* – In some commercial cases a technique known as "ping pong" can work effectively. It is a form of shuttle diplomacy. It can only be used if there are multiple issues to be resolved. Party #1 proposes a solution to Issue A. The mediator takes this to Party #2. Party #2 is allowed to change one thing in Party #1's Issue A solution, and then proposes a solution to Issue B taking Party #1's approach to Issue A into account. Party #1 then is allowed to change one thing in Party #2's approach to Issue B, and propose a solution to Issue C taking into account how Issue A and Issue B are now being resolved. This goes back and forth until all issues are on the table, and then the parties start again with Issue A. This cycle continues until a deal is reached or it is clear that the parties will get nowhere.

- *One Text* – One text is another form of shuttle diplomacy, but includes an element of evaluative mediation and should not be implemented without meeting the concerns for evaluative mediation in a commercial context as discussed above. The mediator prepares the text of a settlement agreement that he or she thinks is fair and covers all issues. The parties say what they can or cannot accept, or how the draft does or does not meet their interests. This information is shared with all the parties. The mediator takes all feedback into account, and produces another draft. The cycle continues until a deal is reached or it is clear that the parties will get nowhere. The parties may or may not be told what the other side had issues with.

- *Double Blind* – Double blind is a similar approach to One Text. It can be very effective when there are three or more parties to the mediation. The mediator prepares an outline of a solution to all issues (again, after meeting the consent and disclosure suggestions concerning evaluative mediation noted above). The mediator presents it to all sides without discussion. The parties are asked, in separate caucuses, if they would accept the solution if all the other parties accepted the solution. If all parties say "Yes", the deal is done. If one party says "No", the mediator goes away and comes back with a revised solution that tries to deal with the collective concerns of the parties. No party is ever told what the other parties have said, and none of the amendments are ever discussed when they are presented. The cycle continues until a deal is reached or it is clear that the parties will get nowhere.

This is a list of sample techniques only. The parties and their mediator can be as imaginative as they want to be in structuring a negotiation process.

Step 6 – Record Outcome – Group Session: If the parties are successful in negotiating a resolution, it should be recorded as part of the mediation process and not put off to a later date. It is best if a binding agreement is drawn up and signed as part of the process and before the mediation ends. The parties might also need to outline a specific plan to implement the settlement. Even if the parties are not successful, it is important to document the final position the parties got to, or a summary of the points of agreement or disagreement, so that everyone has the basis for future negotiations if the opportunity arises.

Step 7 – Closing the Mediation – Group Session: This is an opportunity for feedback to the mediator or any parties, discussion of next steps, or even scheduling a future session if appropriate.

As mentioned, this is a sample process only. What matters is that the commercial mediator have a process to recommend and follow for the mediation in question, and that the process support the main goal of mediation as alternative to adjudication – that it produce a comprehensive settlement agreement the parties have negotiated for themselves.

Getting The Most Out of Your Commercial Mediation

Once the parties have committed to mediation, retained a good mediator, agreed on a meaningful process, and put their mediation team together, the next most important thing they need to do is to cultivate the right attitude among all the participants to the mediation, including the other parties. This attitude is well expressed in the following quotations from the Kennedy brothers:

> *"Let both sides explore what problems unite us instead of belabouring those problems which divide us." John F. Kennedy* [3]

> *"The task of leadership, the first task of concerned people, is not to condemn or castigate or deplore; it is to search out the reason for disillusionment and alienation, the rationale for protest and dissent – perhaps, indeed, to learn from it." Robert F. Kennedy* [4]

[3] JFK, Let The Word Go Forth, p. 13.
[4] RFK, Newer World, p. 3.

> *"... it is a test of our ... maturity to accept the fact that negotiations are not a contest spelling victory or defeat ... They are likely to be successful only if both sides reach an agreement which both regard as preferable to the status quo – an agreement in which each side can consider its own situation to be improved." John F. Kennedy* [5]
>
> *"... let us understand what negotiations are. A negotiated settlement must be less than victory for either side." Robert F. Kennedy* [6]

For many owner managers this can be a difficult attitude to cultivate in the context of their commercial disputes, especially if emotional issues are at play. However, some practical suggestions include:

- Be prepared to clearly and openly discuss what matters most to you.
- Respect what matters most to the other parties.
- Acknowledge common goals and interests among the parties.
- Be prepared to speak for yourself to the other party, not through third parties to a third party.
- Do not threaten, and do not get inflamed by threats sent your way.
- Do not initiate character attacks, and do not get inflamed by character attacks made on you. You can disagree with a person's ideas or interpretations without attacking the person.
- Be prepared to bargain, which means you have to give up something to get something.
- Consider all alternatives before accepting or dismissing any one idea.
- Try to implement the win-win spirit you probably bring to business dealings in which there is no dispute.
- Set an example, and insist your whole team do the same.

[5] JFK, Let The Word Go Forth, p. 396.
[6] RFK, Newer World, p. 204.

A Closing Thought

Mediation is not right for all parties or for all commercial disputes. However, it should always be thoughtfully and carefully considered. If nothing else, an honest attempt at mediation will help you understand the issues and interests at play in your dispute, both your own and the other parties'. You will need this understanding to manage your way through any future adjudication or negotiation. In this respect, mediation has the opportunity to be a "no lose" scenario, even if a settlement agreement does not result. It is an opportunity that should always be considered, and seized when appropriate. As President Kennedy put it:

> *"If vital interests under duress can be preserved by peaceful means, negotiations will find that out. If our adversary will accept nothing less than a concession of our rights, negotiations will find that out. And if negotiations are to take place, this nation cannot abdicate to its adversary the task of choosing the forum and the framework and the time ..." John F. Kennedy* [7]

[7] JFK, Let The Word Go Forth, p. 396.