

Presenting a case in mediation – a QC's perspective

Phil Boulding Q.C.
Keating Chambers

What is mediation?



- A structured process
- Comprising one or more sessions
- One or more impartial individuals (without adjudicating a dispute or any aspect of it) assist the parties to do all or any of the following:
 1. Identify the issues in dispute;
 2. Explore and generate options;
 3. Communicate with one another;
 4. Reach an agreement regarding the resolution of the whole, or part, of the dispute.

Points for the advocate to remember/emphasise to client



- Ability for a party to control the outcome
- The parties 'own' the settlement that the advocate can and must assist his client to achieve
- Mediation can produce outcomes that more formal, conventional dispute resolution procedures simply could not achieve

What is arbitration/litigation?



- More public or totally public process
- Far more formality/lack of flexibility/rules
- Need to direct advocacy and submissions at arbitrator/judge – as he will decide and not just facilitate a settlement
- Constrained by pleadings/rules of evidence/legally available remedies
- Must prove case in a ‘managed’ process
- No extended hours to suit the parties
- Cannot walk away (absent paying costs or sum claimed)
- Uncertain result (over which there is no control) but binding – subject to any appeal

Further points for the advocate to bear in mind:

- In most cases mediation voluntary and (subject to a possible costs sanction) parties can 'walk away' at any time
- Non-binding (unlike arbitral dispute resolution processes) so settlement can only be achieved on the authority of both parties concerned (in which case the settlement can form part of an enforceable contract)
- In many cases mediation is only a catalyst for settlement, with many cases settling shortly after the mediation
- It is private, 'without prejudice' and confidential

Consequences:

- Parties, acting by themselves or their advocate, can disclose information or express views, make suggestions or offer concessions KNOWING that if the matter proceeds to a trial they will not be precluded from arguing and adopting a different position
- A party can refuse offers, or even end its involvement without any risk of such fact being held against them if a court determines costs in the future

Compare and contrast:

- The courtroom, or even an arbitration, which is public (or at least 'public' to some degree) where such approaches cannot be adopted for fear of e.g. prejudice or embarrassment

Never forget - settlement in a mediation



- Can only be achieved by consent of parties
- Settlement seeks to maximise the parties' interests (“win”/”win” outcomes)
- Usually confidential, but need not be the case e.g. if public apology is a term of the settlement in a defamation case
- Inherently flexible, so can be ingenious and incorporate reliefs that cannot usually be the subject of claims of determination in arbitration and court e.g. an explanation, agreements as to future relationships or agreement by one party to do something without any existing legal obligation to do so
- No imposed solutions
- This flexibility frees the advocates and parties from having to think in terms of e.g. causes of action/proving the case/destroying a witness in XX/the remedies that are available at law

Advocate's preparation is key



- Mediation can be as expensive as a day in arbitration or court
- Inadequate preparation means less chance of settling
- Unsuccessful mediation, particularly in a small claim, could substantially increase a party's costs (and perhaps even double them)
- Advocate must prepare in manner that best represents the client's interests and most likely to achieve the (potentially very flexible) desired solution
- Reliance on documents should be minimal (no need to prove case) and generally only a jointly agreed core bundle of key documents is required (not least so that the mediator can prepare)

Further 'tips' for the advocate - documents



- Reliance – if documents relied upon, it should be in order to establish relevant background and explain issues to the other party e.g. by way of a Statement of Case to establish the framework within which the mediation can take place
- Quantum - documents relevant to quantum should be provided to the other party (and mediator) well in advance of the hearing (for obvious reasons)
- Confidential documents - consider whether the mediator needs to be shown confidential documents either before or during the mediation
- Exception to the general rule on limited documents - expert reports if mediator needs to understand issues between the parties (but can a summary or abstract suffice? NB over-complexity unlikely to assist)

What else?



- Don't prepare as if the mediation were a trial/arbitration or get ready to 'prove' to the mediator that your client's case is better than the other side's (not least as that will require too much material)
- Witness statements? Generally not (especially when relevant personnel in attendance and Statement of Case is properly prepared). Consider summaries, but as advocate push the point if really necessary
- Opening statement - avoid duplicating the position statement and concentrate on undermining the other side's position statement
- Don't use 'legalise', present evidence or submit
- Parties can speak without having to go through lawyers and there are often considerable benefits in having a 'principal to principal' meeting

But also remember that



- Mediation is a complete departure from independent decision making dispute resolution process
- Mediation is controlled by the parties
- Advantage of no formal structure and any settlement reached is voluntary
- No exclusive rights of audience. Who should speak?
- Lay party involvement permitted and to be encouraged (release emotion, 'day in court', embarrass other side, need to be heard, show off potentially good witness if matter were to proceed)
- Plan any split role well in advance in terms of exactly who will do what

So how to approach a mediation?



- Do not concentrate on 'winning and losing' but on evaluating the client's true needs and interests
- Consider any underlying problems with parties' relationships
- Encourage 'common parlance'
- Encourage the parties themselves to embrace the mediation process and to find and subscribe to their own solutions

Anything else?



- Look for and identify 'joint gains'
- Look for and articulate 'goals' beyond the ambit of the existing dispute
- Legal case (any pleadings or statements of case) should provide no 'formalistic' boundary and should exist only as a loose framework to guide the parties and the mediator (or to measure any settlement proposal against what might happen subsequently if the case goes to arbitration/court)
- Have a draft settlement agreement prepared in advance of the mediation (not least because it helps identify the items that need agreeing)



- Negotiations between the parties are an essential, integral part of all mediations
- Discuss and agree with client the 'ground rules' for any negotiations e.g. all offers on the basis of adjusted contract sum; defects will/will not be remedied; tax considerations etc
- Identify the 2 or 3 main hurdles that your client will need to overcome to achieve its objective and agree the approach strategy in relation thereto

Recognise the differences between joint and private meetings



- Do not hesitate to make points in private that may assist mediator achieve your client's needs and interests e.g. suggest possible compromises, or offer non-binding views on the merits or seek to identify another party's 'Achilles heel' which may have nothing to do with the issues/merits of the dispute
- Ask tough questions of mediator concerning another party's position in the reasonable expectation that they will be relayed by him to another party (and perhaps affect its 'executive mindset' and reduce expectations)

What else should the advocate do?



Make sure:

- The advocacy not pointless in any event
- Assist your client to move from 'entitlements' to 'needs'
- There is authority to settle (on both sides) at limits which accommodate the client's legitimate expectations /objectives
- Parties observe the mediator's directions
- Parties will remain at the mediation for a minimum period e.g. one session

The Position Statement



- Concise statement of client's case
- Produce and send before the mediation day
- At least a three-fold purpose: (1) inform mediator and opposing party of live issues in dispute and your client's position; (2) explain and justify your client's stance (may not be just legal grounds); (3) use as vehicle for settlement e.g. by identifying possible terms/concessions and include reference to a bona fide intention to agree a settlement (although not at any price)
- Direct Statement primarily at the opposite party as may be the first time it has seen the information contained therein

Ingredients of a good Position Statement



Suggested that it should contain:

- Relevant, but concise, history leading to dispute
- Identity of parties and their representatives (including status)
- Outline of dispute
- Client's case: primarily meritorious facts but include summary of any relevant law; include any quantum and 'key' issues in dispute

- Summarise why client's case likely to be upheld in court
- Include any settlement proposals (including issues/claims which it is believed are capable of being resolved, including terms). Any objectives (legal, commercial or personal) should also be identified
- A 'neutral' chronology can often assist, particularly in a complex dispute

Opening Statement – the day has arrived



- Address the other party
- Provide information about client's concerns, and avoid negotiating or altercations
- Brief and punchy and deal with core issues, concentrating if possible on the future and not the past
- Avoid reference to documents unless essential (see above)
- Summarise main points of dispute, using broad themes

And what else ...?



- Avoid emotive language but explain the effect of the dispute on client
- Suggest what decisions need to be made at the mediation and identify topics for discussion during the day
- Be realistic and do not ignore weaknesses - say how they are factored into any proposal
- Recognise the fact that there are risks on both sides and emphasise the opportunity to avoid an adverse outcome by agreeing a settlement that recognises the risks
- Use language that engages the opposite party and be positive e.g. that you want a settlement which satisfies both sides
- Get your client to listen carefully to what the other side says - he might not have heard it before

Other VIP functions of the advocate during the hearing



- Allow the client/client's representative to speak in open and closed sessions BUT do not lose overall control (cf. arbitration/litigation)
- Don't just be a 'mouthpiece' but also be a supporter and manage the client's expectations, as necessary, as the mediation progresses
- Focus on interest as opposed to strict legal rights/obligations
- Negotiate as necessary and promote positive solutions

- Stay cool' and keep lines of communication open even in 'challenging' circumstances e.g. when emotions are running 'high'
- Remain positive, retain a sense of humour and try and maintain momentum in those potentially lengthy, 'dark' times when the mediator is in private session with the other party
- Emphasise the importance to the client of (if possible) having a range of settlement options

Private sessions



- Disagree with mediator if you need to, but remain flexible
- Try and be constructive
- Consider whether the mediator should be permitted to divulge what he has been told, and for what purpose
- Check what the mediator intends to do at end of each session (and approve or otherwise)
- Try to use mediator to obtain information from the other side

The need for stamina!



- The court/arbitration day is regulated
- BUT mediations are often lengthy as any movement towards settlement is initially very slow, and may take a long time to start
- Avoid personal engagements on the day of the mediation
- Eat, so ensure that refreshments are readily available!

And finally



- Constantly evaluate case and its progress
- Think laterally to try and achieve/improve client's position
- Explain to client exactly what is happening at all times

A good mediation!



But on the other hand

