

Assisted deal making

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Assisted deal making, sometimes also known as deal mediation, may easily be distinguished, from the point of view of structure, from mediation of a commercial dispute. However, a number of the techniques which are required to be used are common to both. This would indicate that there is a lot of assisted deal making out there waiting to happen. Our researches indicate that whilst there is some development of this topic in the academic literature of North America and Australia, there is little that is traceable in our main jurisdiction of practice, namely the United Kingdom.

Typically, one would think that suitable subject matter would include joint ventures, franchise agreements, commercial agreements, mergers and acquisitions. A US survey reported 14 commercial sectors in which assisted deal making had been employed by the appointment of a mediator. These included, for example, the formation of a partnership, the sale of a dealership, the sale of cable television access rights, the creation of a joint venture to produce software, etc.

The example narrative which follows draws on our experience and expands it in a hypothetical way to illustrate the potential benefits in as wide a manner as possible.

First, of course, there is no overt dispute which either is or threatens needing to be resolved in court. There has been no external legal analysis of rights and obligations. People are seeing the commercial advantages, indeed in many cases a need, to make a deal to maximise commercial outcome, but are finding difficulties in managing profit share, risk, and interpersonal dynamics – both in relation to the negotiation, and also going forward into the period of the hoped-for agreement. Taking an enlightened approach, they both opt to appoint a mediator.

A very lengthy, carefully drafted (with legal advice) commercial agreement has expired. That agreement was intended to regulate the parties' commercial interactions over several years by careful definition of terms, by careful formulae as to pricing, and with real attempts being made to manage risk. However, over the period of the agreement it has emerged that there were certain eventualities for which the parties had not bargained, particularly in relation to the underlying/developing commercial strategies of each corporation and, of course, in several important respects, the marketplace had moved on. Therefore, the agreement expired in a state of uncertainty. A lengthy period of negotiation ensued without resolving the various

difficulties which emerged and which, as distrust grew, multiplied. The conversation took place on many levels, with specialists in particular areas engaging with each other, with perceptions as to the other's motives, in which patience decreased as risk and exposure increased. In particular, the people involved began to recognise after a while that there were some difficulties in their abilities to communicate the one with the other.

Mediators will have observed in their practice that there is a tendency amongst the participants to assume intention or strategy on the part of the other when in fact the action or statement is the result of unrelated circumstance. We hold others to a high standard and can be less demanding upon ourselves. Thus each side in a commercial negotiation which is intended to bring mutual benefit and managed risk could, through such perceptions, be drawn into thinking that it is the one defending itself against an aggressor, and this can provoke anger, which militates against interest-based solutions and may result in increased distrust and accusations of opportunism. So the deal mediator here is addressing issues of 'fairness and also what has been described very helpfully as 'reactive devaluation' of the other side's position. It will immediately be seen that such difficulties are as often encountered in dispute mediation as in assisted deal making. Just as parties can easily fail to settle litigation on sensible terms if they don't think it's fair to do so, parties can equally fail to do an eminently sensible deal in the first place. Some of the elements of human nature, for want of a better word, are going to be common to each process and one is reminded of having heard a weary corporate lawyer after a gruelling business transaction sighing with words to the effect of 'That's a court case waiting to happen'. What the deal mediator can do in such a negotiation is to try by using tested techniques to encourage the parties to focus on the interests of the deal rather than their own individual interests.

Crucially however, what the deal mediator can bring to a commercial negotiation of whatever kind is the imposition of structure and timetable. Against the background of that structure a mediator will work to facilitate an agreement that will stick. In a complex deal there will be many specialists in connection with the commercial subject matter of the business who will need to have their input included. There may be outside consultants, there will undoubtedly be business managers at varying levels. There will be perceptions of how balanced the teams are with each other and the

mediator can work to remove any difficulties in this respect. The mediator will engage at each level separately to establish relevance, contribution and best opposite number with whom to deal. He will have carefully discovered through private conversation where interpersonal relationships will either help or hinder the process and will assist in creating core negotiating teams on each side, who could meet at length with the mediator in order to thrash out an agenda and the timetable. Specialists could then be tasked over the course of an adjourned period to do the work necessary to continue the conversation. A process of this kind could easily take a period of months as one by one, each side's individual concerns are worked upon and addressed. Then a balance can be found, which includes what each side considers to be a fair apportionment of risk and reward. Particularly, through this process, a positive momentum can be created, so that a far higher percentage of the relevant overall energy is directed towards a positive future rather than agonising over distrust.

From the point of view of structure, assisted deal making is far more likely to involve round table meetings rather than diplomatic 'shuttling', or caucusing. Once the structure and tone have been established, the mediator may be more in the role of a chairman of a meeting, tasking, directing, timetabling. The mediator may in these circumstances judge that it is appropriate to ask for and obtain permission to be challenging in open meeting where he felt that discussions were leading nowhere, or getting stuck in negativity or unreality. The dynamic that develops here is of a unique kind, which effectively sidelines the standard evaluative/facilitative debate.

This process can lead people to an increase of trust with the resulting reciprocity, which itself leads to flexibility, creativity and increased value, interest-based outcomes. As mediators maybe what we need to be thinking about is how we can communicate the benefits of this process to the culture which tends to subsist amongst the commercial community, particularly in the UK where the biggest challenge we face is to increase awareness of what mediation can deliver.

Controversial introduction of the mediation regime in Argentina

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After more than a decade since the mandatory mediation proceeding was introduced in Argentina (specifically in the city of Buenos Aires) now the Province of Buenos Aires – a different jurisdiction with covers the extensive Province of Buenos Aires – is following the trench.

During recent years, academics, judges and litigators in general have insisted on the important role that mediation has played in the judicial scenario, permitting judges to rely on mediators to solve disputes that otherwise would be brought before the already overloaded courts of the city of Buenos Aires.

And the experience has been definitively positive. During these years, thousands of cases have commenced and terminated within this out-of-court process, disregarding the nature of the dispute and without any intervention of judges.

Personally, I have participated as counsel in several mediation processes in relation to disputes concerning

a wide range of commercial or civil conflicts (from credit card complaints of consumers against banks through intellectual property claims of inheritors against media publishers), and I have realised the importance of mediators to resolve conflicts within a mediation environment: flexibility in the proceedings, reduced costs, and definitively, timing. In many circumstances with seemingly no amicable solution possible, mediators were capable of meeting the parties and convincing them on the benefits of a proposed solution.

Under this scenario, it was not surprising that the legal doctrine claimed for a similar institute for the province of Buenos Aires. It is important to mention that the province of Buenos Aires is a jurisdiction that surrounds the city of Buenos Aires, and thus many practitioners litigate simultaneously in both jurisdictions. In fact, the procedural codes are very similar with the exception of certain specific terms.