

## **FASTER, BETTER AND MORE EFFICIENT DISPUTE RESOLUTION**

**For Ozmine - Shangri La Hotel Jakarta March 2011 - by Campbell Bridge SC**

### **INTRODUCTION**

Disputes, delays and uncertainty are bad for any business. The business community has no affection for disputes which threaten mutually beneficial business relationships. Incurring huge costs in terms of both professional fees and for business interruption and unnecessarily prolonging disputes are all particularly unattractive activities. The longer the disputes continue, the more the relationships are damaged and the more expensive it becomes to extricate oneself from the wreckage which follows.

As the final resolution of the bitter war between Indonesian Government and the Free Aceh Movement (GAM) demonstrated, even the most tragic and long standing disputes can be resolved. Many disputes are not really amenable to litigation or arbitration – some other method must be found. The ideal way to resolve most disputes will have the following attributes:-

- a) It must be economical;
- b) It must be fast;
- c) In most instances the parties perceive it to be fair;
- d) It minimises risk for the parties whether the risk be financial, cultural or risk of any other sort; and
- e) The whole process and the outcome will remain confidential unless the parties otherwise agree.

Not all disputes can be resolved by mediation, but it is the best way to resolve most disputes. Mediation is a term used much misused and even more misunderstood. It is a specific dispute resolution procedure competent and experienced professional mediators, often from diverse backgrounds. Mediation can highly effective in any dispute from the seemingly trivial to a civil war. This paper will focus upon the overwhelming benefits of mediation in the resolution of commercial disputes in Indonesia and elsewhere. Mediation has become the pre-eminent means of resolving major litigation and commercial disputes in many common law and civil law jurisdictions. The reason for the rise of mediation in the past 20 years in particular is simple – it works.

The paper will examine the advantages of mediation for most disputes for any commercial enterprise inside or outside Indonesia – how, when properly utilized, mediation will shorten disputes, minimise legal and other costs, and allow you to maintain valuable business relationships.

## **MEDIATION – WHAT IT IS – AND WHAT IT IS NOT**

One working definition of a mediation is suggested by Folberg and Taylor as follows:-

*“(Mediation) can be defined as the process by which the participants together with the assistance of a neutral person or persons, systematically isolates disputed issues in order to develop options, considerable alternatives and reach a consensual settlement that will accommodate their needs”.*

A fundamental feature of mediation is that the parties arrive at their own decision rather than have a decision imposed on them. Mediation is very different from and is not to be confused with other ADR procedures such as negotiation processes (whether formal or not), ombudsman-type procedures, early neutral or independent evaluation, and commercial arbitration. Unlike other procedures, mediators do not decide anything - they assist parties to make their own decisions.

There are many apparent paradoxes within mediation and many aspects of it which border on the counter intuitive. While mediation is a structured process, one of its many benefits is its flexibility. It is best to regard it as a process of dispute resolution where the parties, with skilled impartial outside assistance, look at addressing the issues in dispute and endeavour to resolve those disputes themselves.

Because other forms of adversarial dispute resolution - litigation and commercial arbitration - have the very real potential to degenerate into time consuming and expensive legal trench warfare, the business community in Australia has looked for better ways to resolve disputes. The answer has been the wide spread use of mediation.

## **A CHANGE OF CULTURE – THE AUSTRALIAN EXPERIENCE AND WHAT WE CAN LEARN FROM IT**

There are many surveys on the subject of impediments to doing business and investing in Indonesia. Those matters identify a perception of business and investment uncertainty, and a reluctance on the part of potential investors to become involved in the court system as a major impediment. Some of those concerns are universal - the business community in Australia has become increasingly reluctant to engage in protracted litigation despite a relatively efficient court system. All litigation or arbitration wherever conducted involves huge costs (both personal and financial), delay in achieving a final result, and uncertainty.

Twenty years ago, Australia was among the most litigious societies in the world. The burden, financial and otherwise, on litigants was severe. The public purse was severely strained by the necessity of allocating huge resources in terms of infrastructure and personnel (judges, juries,

facilities and support staff) to the hearing of all these cases. A major difference in the litigation landscape now is that the courts and the parties are very much focussed on alternative dispute resolution, with mediation in the forefront of that push.

While some parties may be prepared to litigate for so long as their financial resources permit, in Australia the courts have become increasingly less willing to permit the court system (which is a public resource) to be utilised by affluent belligerent litigants in this way. Judges are acutely aware that Courts are funded by taxpayers' money. The resources are not unlimited and the Court system should be available for all litigants, not just those who can afford to spend inordinate amounts of time in them.

While the change in culture has been initiated by the Courts, it has been driven by the clients. Most large corporations, institutions and insurers demand that their lawyers be active and competent at the mediation process. Most clients will not tolerate the "fight everything with no regard to cost" mentality which was common only a decade ago. The sophistication and awareness of clients, particularly institutional organisations and insurers, is such that any lawyers who actively advocate protracted litigation as an alternative to mediation, will run a great risk of forever losing the client. In general the clients not the lawyers have ensured that the culture of mediation has swamped the previously existing strong adversarial legal culture of Australia. There is no culture now of a perception that an attempt to seek an early resolution of a dispute indicates a sign of weakness or vulnerability.

Today the great majority of cases in Australian courts are now referred to mediation. While raw statistics on the success ("success" being a difficult term in itself) of mediation in Australia are inadequate, the current experience of the author and number of professional colleagues and mediators has been that now at least 70% of substantial commercial disputes which are mediated settle either at the mediation or within a short time thereafter. It is misleading to analyse the success of the process only by reference to this narrow paradigm. Such an analysis does not take into account either the multiple benefits which the parties recognise as rendering mediation preferable to litigation, nor does such an analysis recognise the collateral benefits to the business community which follow from a properly and professionally implemented culture of mediation.

In Singapore, which operates in an Asian cultural context under a common law system not dissimilar to New South Wales, statistics kept by the Singapore Mediation Centre provide overwhelming support for mediation. Between June 1994 and March 2009, the Subordinate Courts in Singapore mediated some 188,000 relatively minor cases with an average settlement of 90 per cent. Ongoing surveys addressed to parties and lawyers at the end of each mediation resulted in the following responses from some 1,911 parties from 1997 to the end of March 2009:-

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81% of litigants indicated that they had saved costs.

85% of litigants reported that they had saved time.

Perhaps surprisingly, the response from 1590 lawyers who responded was equally positive.

82% noted that their clients were likely to have saved costs.

81% thought that they and their clients were likely to have saved time.

In total, 93% of the parties and 98% of the lawyers reported that they would recommend the use of mediation to others in similar situations.

The results with respect to major commercial disputes in areas of banking, construction, contracts, information technology, insurance, negligence, personal injury and shipping disputes is only slightly less impressive – as at 1 April 2009, more than 1,400 matters have been referred to the Singapore Mediation Centre of which about 75% were settled.

The distinction between Australia with its strong common law tradition and Indonesia with its civil law tradition does not really have any impact upon the benefits of mediation. Because the process remains the property of the parties, mediation is not constrained by legal systems (common law or civil law) or international borders. Because the culture of mediation is ingrained in the culture of Indonesia, one would expect that there would be cultural support and sympathy for mediation which is long standing here. Surprisingly, in some countries in South East Asia, the encouragement to mediate commercial disputes is being relatively recent and has arisen primarily in business cultures where mediation of disputes has far smaller historical base than in other areas of day to day life.

## **WHY MEDIATION IS BOTH ATTRACTIVE AND EFFECTIVE**

### **Mediation is Fast**

Many commercial disputes can be mediated before they get anywhere near a court or indeed even before the initiation of proceedings. Others will require the gathering of some evidence before a mediation can take place. Commercial disputes which may drag on for years (delaying investment and destroying a potentially profitable business relationship in the process) can be dealt with in weeks at most (from planning to finality) with the actual mediation taking only between one and several days.

The fact that many disputes can be mediated early and mediated fast makes it a very attractive proposition for any business. If problems are solved early, it becomes easier to restore previously profitable business relationships.

Projects are less likely to be delayed, and delays which might be regarded as inevitable can be reduced in duration.

## **Mediation is Economical**

The actual cost of a mediation will almost always be far less than a contested hearing or arbitration. Cases that may take months or even years to prepare then occupy several weeks of hearing are commonly mediated in several hours to a few days at most. At the conclusion of a successful mediation, there is no appeal.

As a comparison, the cost of a hearing can be many thousands of dollars a day. Vast sums of money or expensive investments may be dependent on the outcome of the dispute. The witness fees in any technical trial or arbitration will invariably be expensive.

The parties commonly share the fees of the mediator which are usually limited to the time taken to read some of the background material plus whatever time is taken for the actual mediation itself. While it is true that the Courts can provide mediators at no cost to the parties, this is often false economy. In terms of the amount of money involved in commercial matters, a skilled mediator having sufficient seniority and reputation is more likely to be effective. When one compares the cost of hiring an experienced and skilled mediator(s) with the amount of money in dispute in the litigation, the amount of money by way of investment or otherwise which may be dependent on the outcome, the costs of any contested hearing or arbitration which might follow an unsuccessful mediation, and the collateral costs in terms of business interruption caused by the litigation itself, it is false economy not to engage a good mediator.

Apart from the financial cost of litigation, there are also collateral costs in terms of damage to reputation, relationships and other matters. These aspects are minimalised in a mediation rather than a contested hearing. If a large investment may be dependent upon the outcome, mediation can be an effective way of reducing delay by identifying and eliminating irrelevant “issues” formerly in dispute.

Even if all of a dispute cannot be resolved, mediation can be used to shorten the duration of the dispute. Even if an entire dispute is not resolved, significant issues within a dispute can be removed from as a result of a mediation.

## **Flexibility**

Mediation is an extremely flexible procedure which can be utilised for everything from the trivial to a civil war. Mediation is never a stand alone or exclusive process. Whereas litigation and arbitration are alternatives, mediation is a process which can be used either as an alternative or in conjunction with either of the other procedures. One can mediate a dispute or part of a dispute before or during the conduct of litigation in Court just as well as one can during the course of arbitration. Issues (even interlocutory issues) within a larger dispute can be mediated. The object of a mediation need not even be the resolution of whole dispute – it can be to narrow the areas of dispute and shorten

the duration of a dispute. Protracted disputes can be recast through a discussion or mediation process so that their likely duration will be measured in months rather than years.

The actual procedure at a mediation is more user-friendly for the parties. A skilful mediator will allow the mediation to take place in a relatively relaxed, simple and flexible way.

There can be differences with respect to the role of the mediator in western and Asian cultures. If cultural issues are regarded as important, it may be appropriate to consider using co-mediators. There is no set formula to joint sessions in terms of the occurrence of them, their duration or their frequency. It is all within the discretion of the mediator who ought simply react to the course of discussions as the mediation unfolds.

### **Control and Risk Minimization**

Litigation or arbitration is like any form of gambling – when the game or race starts, anything can happen. It is a sobering thought that almost everyone in the law reports thought they would win and at least half of them lost. All litigation or arbitration is expensive even if your win. There are significant ongoing legal costs, business costs and personal costs. Very few litigants actually enjoy the process. If you can reach a result by agreement, these risks are minimised.

A mediation is a great opportunity for a skilled mediator to point out to the parties that their self perceived strengths may not be invulnerable after all. Parties can be reminded in a somewhat sobering fashion that in a common law system, if you are 49.99% correct in your argument, you usually get nothing. Close seconds in litigation or arbitration are like good losing hands in poker – very expensive. Likewise, the parties can be again reminded that most of the litigants going all the way to the highest court in any country thought they were going to win and nearly half of them lost. Sometimes there was no winner at all. When confronted with these home truths against the fact that the great burden of cost including business and personal disruption is yet to fall, the parties can often be reminded to see the whole dispute and its consequences in a more realistic light.

In Asian culture, mediation is practiced in fact at all levels of society. Where social order, harmony and face saving are highly valued (as in many Indonesian cultures, in particular Javanese), it is an appropriate means of dispute resolution from the village level right through to major international disputes. The Indonesian practice of *musyawarah* - reaching agreement through discussion, negotiation or mediation is indicative of how the culture of mediation is ingrained in Indonesia.

Some disputes will begin or be exacerbated by cultural misunderstandings. The nature of commercial conflict is that, once they start, the parties tend to get more entrenched with the passing of time. What are really cultural misunderstandings can be elevated to major stumbling blocks with disastrous financial consequences for both sides. Early mediation can effectively “detune” a dispute and permit the parties, through the use of a skilled intermediary, to see what appear to be

substantial barriers to resolution in an objective and perspective light. To do so early in a dispute will cause many issues to simply go away, but it may need an independent third party to have that effect.

Cultural risks, issues and perceptions are a problem in any dispute. Certain attributes of human nature are common to all of us. For example, it is usually easier to get someone to agree with you if you are nice to them. It may not always work, but it is usually a good starting tactic. In negotiations and in any mediation, there may be fundamentally different concepts of confidentiality and trust in the western and Asian mind. Greater weight may be placed on relationships than written contracts.

Perceptions of bad faith are extremely damaging to resolving differences, whether or not those perceptions are sound. An issue that can arise in a business dispute is that if a party perceives that the other is not acting in good faith, it can be very difficult for the parties to maintain a business relationship. Generally if there is a perception of bad faith, one of the functions of the mediator is to get to the bottom of the issue and endeavour to deal with that perception. If there is no basis for it (as there often is not), then a frank discussion by the mediator with the parties, often in private, and some follow up communication between parties themselves can often enable the mediation to proceed to a good conclusion.

Bad faith can be extremely difficult to pinpoint. Potter Stewart J said in the United States Supreme Court when asked to define pornography, "I cannot define pornography but I know it when I see it". Bad faith is not dissimilar.

### **Confidentiality**

The issue of confidentiality is at the heart of any mediation. Everyone who participates is required to undertake to keep the deliberations confidential. The fact that deliberations are confidential and the mediator has the trust of those participating enables issues to be frankly explored. Unless the parties otherwise agree, the result will also be confidential.

The many benefits of confidentiality are obvious. The subject matter of many commercial disputes often involves highly sensitive valuable information. Mediations provide a better way than open hearings of protecting such information.

All businesses are most concerned at having their names publicly dragged through the mud in the media. They are justifiably terrified of the damage which might be done to their reputation as, in such circumstances, any publicity is invariably bad publicity. The last thing any business wants, for obvious reasons, is the airing of dirty linen in public.

The issue of confidentiality is of critical importance for many other bodies other than business corporations. It is particularly important to governments and institutions such as government agencies, hospitals and (in Australia), churches and religious bodies.

### **Mediation is Effective – Why and How it Works**

The debate about whether mediation “works” involves, on a superficial level, a simple consideration of what proportion of cases settle at mediation (i.e. on the day of the mediation) or shortly thereafter. This approach is overly simplistic. As is stated elsewhere in this paper, there are many other benefits other than whether a case settles on the day of the mediation.

However intractable a party may be, explanations and acknowledgement of grievances during the course of the mediation can be remarkably effective. It does not always happen but attitudes can and often do change during the course of the mediation.

In a mediation, where everything is done on a without prejudice basis, there is a real opportunity to identify the real issues in dispute. Without the intervention of a skilled mediator who can subjectively listen to the parties but objectively identify what the issues are, parties’ misconceptions will often exponentially compound with the result that without the intervention, the relationship may become unsalvageable.

A skilled mediator can get the parties communicating frankly, even within a very high level within their organisations, but in a way which is non confrontational and informal. In this way, the real matters in dispute can be crystallised. Furthermore, the very fact of becoming aware of the other side’s complaints can have the effect of causing one side or the other to see things in a slightly different light while not changing their overall perspective of the dispute. It is by means of slowly redefining issues in this way that the parties become aware of what is important to them in a dispute as opposed to what is in pleadings or other court documents.

In many instances, feelings such as the requirement of an apology, a sentiment of revenge or a sentiment of wanting to stop allegedly grievous behaviour occurring somewhere else may be a driving factor. Such factors may be present in the minds of landowners who perceive that their land which they see as their livelihood and their children’s inheritance disappearing as a consequence of the activities of a mining company. They may see perceived environmental damage (whether or not it is real) in exactly the same way. These issues can be explored and defined in mediation in a way that cannot happen in any more formal legal process.

The normal conduct of litigation involves seeing lawyers inexorably preparing documents and complying with interlocutory procedures then lining up for the full-on battle. It becomes almost a situation of where once the army is mobilised, it is very difficult to slow the momentum down. The

mindset is directed towards fighting rather than compromise. Mediation allows the parties to temporarily break this cycle of conflict.

It is always beneficial if, even if the matter does not resolve, there is a significant shortening of whatever is left of the dispute. In practical terms, this will translate to a shorter hearing in Court or at a commercial arbitration. It may also be that many perceived matters in dispute are recognised as false issues. The parties may realise that some of the more acrimonious aspects of their dispute which might have been ventilated not need to be. No case gets longer as a result of mediation.

## **PRACTICAL AND OTHER ISSUES**

### **Get the Contract Right - Specify Mediation as the first step in any Dispute Resolution Clause**

As mediation is not an exclusive alternative to any other litigation or dispute resolution process, it has the advantages and characteristics set out above, and can be utilised earlier in a dispute than almost any other process, it makes sense for the original contractual documentation to prescribe mediation as the first resort when a contractual dispute arises. It is extremely important that the parties not only make themselves aware of the benefits of mediation, but that they recognise its contractual significance. This is done by enshrining in the contract an obligation to mediate prior to embarking on more expensive, combative and destructive legal processes.

### **When Mediation may be Inappropriate**

If there are fundamental legal issues which control the outcome and on which the parties are totally unwilling to compromise, it may seem to be inappropriate to mediate such disputes. While it has been said that if there is a complete absence of trust between the parties it is virtually impossible to mediate a dispute, settlements sometimes do come from seemingly impossible situations. Personal explanations in a mediation setting can have a remarkable effect on even the most recalcitrant combatants. While it is true that some mediations are doomed to failure for the above reasons, the resolution rate varies little between disputes where no one wants to mediate in disputes where mediation takes place with the consent if not the enthusiasm of both sides. Until everyone gets around the table, you simply never know what can be achieved.

### **Enforceability**

The fact that any contract or settlement which could be reached is incapable of enforcement in an appropriate jurisdiction in the event of breach can create difficulties but need not be an absolute bar to mediation. The issue of enforceability is a concept which some lawyers wrongly regard as determinative of the whole question of whether a mediation or take place or not. It is respectfully

suggested that this view is too narrow. Many mediated outcomes, particularly in international disputes involving matters of foreign policy, are not enforceable in a legal and practical sense. An example of the latter is the agreement between GAM and the Indonesian Government.

Frequently, many terms within an agreement resolving a dispute will not be strictly enforceable, and sometimes whole disputes are resolved on bases which are not legally enforceable. Many partnership disputes are mediated, with results usually being unenforceable in a strict legal sense, yet mediation is regarded as by far the best and really the only effective way to resolve most partnership issues. Some “game breaker” ploys used by mediators in commercial mediations may be strictly unenforceable, but the fact that parties are willing to embrace them is a benefit of mediation. If the parties leave the mediation with an agreement and wanting the dispute to end, it will usually occur.

It is desirable if any agreement reached during a mediation can be formalised in terms of settlement filed in a court whether or not the mediation is court annexed, but this may not be possible in many jurisdictions.

One of the real objects of mediation is to get the parties to a point where they want to resolve their differences however difficult their relationship might have been in the past. If this state of mind is achieved, then a settlement reached with even a modicum of goodwill will survive although parts of it are not enforceable in a black letter legal sense.

### **When should you mediate?**

Some disputes can be mediated very early – virtually as soon as a dispute arises, while others will need a good deal of evidence, technical or otherwise, to be gathered before mediating. It really requires one to consider the nature of the dispute, the circumstances of the parties, their cultures, and whether or not the commercial relationship is to be preserved or is capable of resurrection.

Some of the matters that can be pertinent to this question have been raised elsewhere in this paper. One should have in the back of one’s mind that in an ideal world of mediation, the notion of waiting until the forensic process is able to crystallise issues can be at odds with its purpose and with the inherent and proven advantages of mediation. If in doubt, mediate early – even if the process must be deferred, nothing will be lost and much may be gained.

### **Addressing Parties Non Legal Needs**

In much commercial litigation, parties to such litigation will often have a strong psychological need to be heard and have their grievance understood. The strict nature of more formal litigation and its rules of evidence often leaves parties intensely personally dissatisfied. Such feelings can be a significant impediment to settlement.

An empathetic mediator who demonstrates some understanding about how the parties really feel and acknowledges their concerns will greatly assist in having them come to a decision which will resolve the case. For psychological reasons, much “conventional” litigation cannot be resolved until these needs of the litigant are met.

Commercial disputes will frequently involve protagonists who know each other. There has often been a business relationship in existence for a significant period of time. This may complicate the feelings of anger which one party may have towards the other but it also may enable critical issues to be identified in the course of frank discussions. For example, an issue which one side views as deliberate cheating can be re-categorised, after a frank exchange of information, as a genuine mistake brought about by miscommunication.

The views of one party can so strong that there can even be a revenge element in their psychological landscape of the litigation. To successfully mediate such disputes, these feelings must be diffused by the mediator.

### **Selecting your Mediator**

In his paper given to the Asian Mediation Association conference in Kuala Lumpur in February 2011, John West QC of the Sydney Bar identified required attributes of mediators and pitfalls which might flow if an unsuitable mediator was retained. A poor outcome will often be the result of the involvement of a well meaning, yet incompetent, mediator. One does not need bias or malevolence to be operative before propriety is destroyed. Stupidity or inexperience can also cause havoc. This is why mediation requires both standards and standing. If a mediator is chosen from the ranks of the legal professionals, one can get some comfort from the fact that not only is he or she subject to licensing and disciplinary control by a state Bar Association or Law Society, but, equally importantly, experienced litigators and negotiators will have a very sound understanding of concepts of conflicts and confidentiality. Because of the structure of the legal profession and the enforced independence of the bar, barristers are well suited to bringing a detached mind to any dispute.

By “standing”, reference is made to the personal quality and experience of the mediator. In the Australian experience, we have people of standing who were the pioneers of mediation (senior ex-judges, Queens Counsel and Senior Counsel) who set the standard, so to speak. As mediation has become more popular, and the number of mediators has increased, there has been a recognition that there should be standards, both of ethics and competence, to which adherence is required and the satisfaction of which is a prerequisite for a license to practise as a mediator.

There is much support for the view that mediation should be left to skilled mediators and judging should be left to the judges. There is a fundamental distinction between the roles of the courts on the one hand and the provision of mediation services on another. It is said by some experienced

mediators such as Sir Laurence Street, the former Chief Justice of New South Wales, that it is wholly inappropriate for a court to provide mediation services within their own institutions and fabric.

The mediator must be persistent but patient. It is often part of the process for people to take time to make a decision. If they are rushed, it will not occur. Parties should be told that there is no immediate time constraint and they ought to be aware that decisions made quickly can often be bad decisions.

A skilled and experienced mediator has the ability to allow the parties engaged in litigation to examine the differences in a relatively detached, confidential and non-judgmental atmosphere which is different to normal litigation. However difficult it may be at first, the reality is that the parties are usually more able to separate the issue of personalities from the problem in a mediation setting than they would be in the context of litigation.

If there are particular cultural or technical issues in a dispute, or the parties come from completely different backgrounds, or one side or the other is not comfortable with just one mediator from just one discipline or cultural background, it is wise to consider whether the appointment of co-mediators might not be appropriate.

### **Mediation Documentation**

The documentary preparation for a mediation is relatively simple. The mediator should send you a copy of his or her usual mediation agreement and confidentiality undertaking. A mediation agreement is necessary so that the parties understand:

- (a) The ground rules of the mediation;
- (b) The obligations of confidentiality;
- (c) The role of the mediator including the limitations upon that role;
- (d) The costs for which the parties are agreeing to be liable;
- (e) The immunity of the mediator.

These matters will usually explained by the lawyers for the parties to the parties. Where a party is not legally represented, the mediator must satisfy himself that the party acknowledges his understanding of the agreement. The mediation should not commence until the mediation agreement is executed and all persons present have signed the confidentiality undertaking. The executed mediation agreement is retained by the mediator, although the parties are entitled to copies of it.

Each mediation and its lead-up will be conducted differently depending on its own particular circumstances.

Position papers are always of assistance. A good position paper will succinctly spell out an outline of the dispute, a summary of the evidence, what the party providing the paper perceives to be the issues, the arguments which it propounds in support of the issues and an analysis of the contrary arguments, not simply a rebuttal of them. Position papers which are formulated principally as an attack on the other side's case are never helpful.

### **Who Should be Present?**

It is essential that all parties have someone present with authority to resolve the dispute or at the very least, have a line of immediate communication to such a person. In any event, whoever is present must include key people who understand the issues and who know what it is worth to the party to settle or not. Because the process is so flexible, it is not unusual for proposals to be floated during the mediation which, through no fault of anyone, have not been considered in advance.

Although ultimate decision makers (such as the Board of Directors) need not be physically present at the mediation, it is important that they or their chairman be able to be contacted by their representative if necessary. Failure to ensure that persons of sufficient seniority or authority are present can be taken as an insult by other parties and jeopardise any agreement. It may even constitute evidence of bad faith. One of the cornerstones of a mediation process is the knowledge shared amongst the participants that every party has authority to settle.

### **Cultural and Technical Issues**

Cross cultural issues are obviously of critical importance in any mediation involving parties from different backgrounds. It is important to bear these issues in mind when considering the appropriate mediation papers and how to best conduct the mediation itself. In dealing with the persons present it is important to understand how propositions put or discussed are likely to be received. One must be sensitive in explaining a position which will not necessarily be attractive to a party so that it is put in a way that does not offend or cause embarrassment, and ensure that it is not put in such a way as to suggest that if adopted the party will have lost the contest. Other problems which need to be watched include the notion of bargaining or negotiating in good faith and not misleading the other party by propounding a false case. It is no part of a mediation for one side to actively mislead or deceive the other - with or without the involvement of the mediator.

A perception by all sides that the mediation is a fair process conducted by an impartial mediator is critical to the success of the process. As stated above, if there are particularly sensitive cultural issues, then it may be appropriate to consider whether co-mediators would be appropriate, one from each culture. Such an approach is also commonly utilised in technical areas – where one mediator may have expertise in a scientific field or background and one from another area such as a lawyer.

## **THE FINAL WORD**

In order to make it work, the parties must either arrive at the mediation in a position where they are willing to compromise, or be put into that mindset as the mediation proceeds. It is important that representatives of parties do not create false expectations in the mind of the parties themselves.

The course of the mediation can be an emotional roller coaster with its good and bad moments. It is usually unrealistic to say that the whole process will be a wonderful “win/win” situation where everyone will be overcome by a state of joy and happiness at the end. Many settlements will involve equal pain on the part of both sides – one side will feel that it has paid too much and the other feels that he or she did not get enough. A good settlement will often leave the parties feeling a little flat, but in the cold light of day the next morning, next week or next year the parties will realise that they in fact made the right decision.

Arrive at the mediation with an open mind and be reasonable. Everyone should be prepared to compromise but no-one should be expected to capitulate. It is rare for one side to be completely right and the other completely wrong. There are usually many sides to the same argument, and there is no case which cannot be won or lost. Remember, as Oscar Wilde said, “the truth is rarely pure and never simple”.

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