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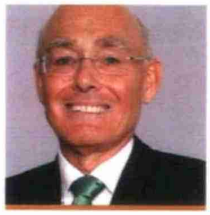
When to call on an arbitrator or mediator



Charles Gordon, panellist at alternative dispute resolution specialist JAMS International, explains how arbitration and mediation can save you time and money over litigation

Around 20 years ago, no one had heard of mediation or other forms of alternative dispute resolution. Arbitration was not much used and parties who could not negotiate their way out of disputes found themselves in court.

What changed? Well, the United States litigation scene got the wake up call first. Not only was litigation becoming increasingly expensive in time and lawyers' fees, but court outcomes were getting more bizarre – not to say costly in terms of punitive damages.

Litigants started embracing the novel concept of mediation – the use of a neutral third party to help negotiations. Arbitration also caught on for certain disputes.

Although mediation and arbitration are both private, rather than court remedies, they're as different as chalk and cheese. Mediation is a voluntary, non-binding process. The mediator works with parties to come to a deal. If no settlement emerges, the parties can pursue litigation or other remedies, and what happened during mediation remains confidential.

Arbitration, which usually arises because the parties have provided for arbitration in their contract, is also confidential. But the decision of the arbitrator(s) is binding. You cannot usually appeal to court if you don't like the arbitrator's award: you are stuck with it.

Arbitration has been established here for many decades and London is one of the leading arbitration centres in the world.

Mediation, however, was new to us 20 years ago. Now it is part of the main stream. Judges now encourage parties to mediate and a refusal to do so will likely lead to cost penalties, even if you ultimately win the litigation.

How does it work and, crucially, when should you use it? The great merit of mediation is that it's flexible. There are no hard and fast rules. It is also lightly regulated. There is no formal accreditation or regulation of mediators – anyone can set themselves up as one. In practice however, the good and experienced mediators in different fields are well known to the general counsel and external lawyers who handle disputes.

It is never too early during a dispute to consider mediation. The earlier the better in terms of saving cost, avoiding uncertainty, and preserving commercial relationship.

From the mediator's perspective, all you ask is that parties come to a mediation willing to listen and engage. The mediator will usually have preliminary discussions with the parties and then convene a meeting. It is always important to get the parties and their lawyers face to face at the start of the process – they may not have spoken for some time. But the real work is done in private sessions between the mediator and individual parties.

Why does mediation achieve results that direct negotiation between the parties can't? There are many reasons. Emotions may be running too high. Parties are often unwilling to disclose their real negotiating position and people have unrealistic views about the merits of their case. The mediator can cut through all that.

But how does this compare to arbitration? Sadly arbitration is now as expensive, if not more, than litigation. The judge comes free in litigation and is usually more available. In arbitration you have to pay for the arbitrators and the venue. You may also have to wait months or years for experienced arbitrators to be available.

Where arbitration really scores is in international disputes, where the quality and independence of local courts may be in doubt and where enforcement of court judgment is difficult. Ironically, it is generally much easier to enforce arbitration awards in many parts of the world because most countries have signed up to the New York Convention. This binds signatories to enforce arbitration awards in their local courts.

Finally, I would mention the benefits of thinking about dispute resolution at the time you draft contracts. There are clear benefits in providing for a dispute resolution process involving mediation (and arbitration) in every dispute.

That way, no one need feel that it is a sign of weakness to propose mediation. It will simply be following a process laid down in the contract.

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