

MEDIATIONS GET BETTER DEALS

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A lot has been written about mediation, mostly in support, some casting doubt on its suitability in resolving insurance disputes. This article is written by a non-lawyer commercial mediator who has been resolving insurance (and other) disputes for the past 13 years. It concentrates on what added-value may be brought by the mediator and on the business advantages derived from mediated deals. The aim is to show how those who are ignoring mediation in the insurance industry (insurers, underwriters, brokers, reinsurers, loss adjusters, claims organisations) are missing the opportunity to strike better deals.

What is mediation?

Simply, the mediator is there to

give the disputing parties the best chance of doing a deal

by creating the environment, dynamics and generating the co-operation that gets the parties to a position where they can all say “Yes” to the deal. In effect, mediation is an assisted negotiation. The best and most efficient way of resolving a dispute is through negotiation. When that fails, or deadlocks, the next most efficient way is through an assisted negotiation – bringing an independent third party into the negotiations. And it works! Around 80% of mediations settle nationally and it is probable that the percentage is even higher in insurance cases.

Why better deals?

Michael Leathes, senior in-house counsel to British American Tobacco and head of BATMark, has to deal with over 2000 disputes at any one time. Asked why he is such an evangelist for mediation he replied “I get better deals”. Not that he uses mediation in every case – just as mediation is not suited to all insurance cases. Sometimes the other side needs to be squashed, because of pirating or counterfeiting – or just making a totally spurious claim. But they are the minority of cases. Most claims are suited to mediation and the biggest barrier is unwillingness to use it. More of that later.

But why better deals? What is it that gets better deals in mediation than through other forms of dispute resolution? Consider these reasons:

- Life is not about being totally right, or totally wrong. We all know that there are many shades between the two extremes. People see the same events and facts differently, for a whole load of reasons (education, culture, age, politics etc, etc) and it does not have to mean that they are any more right or wrong, just different. Unlike most other forms of dispute resolution, mediation can take that into account. Deals are crafted from common sense, not legal argument.
- The power is with the parties. All the parties. In mediation everyone has to say “Yes” to the deal. That means everyone has to take account of the needs of all the parties, not just their own. This usually moves the mediation into an atmosphere of co-operation and away from adversity. A co-operative solution leaves parties far more satisfied than any imposed solution. And for lawyers, a satisfied client means the potential for more business. For insurers it means enhanced business relationships.

- There are few industries where parties have no further dealings after settling a dispute. The world is shrinking, paths cross in the most unexpected ways. Few people can ignore the likelihood of having to work with opponents again in the future. One of the benefits of mediation is the fact that it can strengthen, even restore, relationships. The very fact of recognising that this is a common problem and therefore parties need to work towards a common solution, creates a different dynamic to adversarial routes. Co-operation usually means understanding, if not accepting, the other's position rather than rejecting it out of hand. Settlements are therefore more likely to stick (mediated settlements almost never break down) and parties are often happy to work together in the future.
- Even if there is no continued relationship, the satisfaction of a 'fair' deal will prevail. 'Fairness' and 'Justice' are not words used in mediation but, even in the most difficult settlements, the fact that parties are seen to share the pain is often enough for deals to be struck that would otherwise not seem possible.
- And those deals are not always only about money. Anything can be put into the settlement pot, so the 'pie' is potentially larger and the parties share bigger than a money-only deal. Arbitration and Litigation cannot do that.

Why not mediation?

There are several perceived barriers to using mediation in resolving insurance disputes:

- Mediation is not about 'winning'. Most negotiators want to win, even better to screw the other side(s). This is much less easy if the negotiator is expected to be co-operative. Reputations (and egos) are not grown by being nice. Or are they??
- Mediation is seen as being soft, if not a sign of weakness. This still persists even though the Lord Chief Justice has said that the courts must be the last resort and that mediation is front line. Indeed many courts are virtually insisting on cases going to mediation (or some other form of ADR) so the wise player will choose the optimum time to use it rather than let it be forced upon them.
- Mediation brings an extra level of cost. Certainly...but it is usually the last level of cost because most (80% plus) settle. The preparation that parties/advisors carry out for a mediation is never wasted even if it does not settle and the actual cost of the mediator (usually shared equally between the parties) is probably no more than £3000 for a one-day mediation.
- ADR still means 'Alarming Drop in Revenue'. Lawyers acting for insurance clients are increasingly driven by fee targets and PEP (Profit per Equity Partner) and these are challenged by settling cases quickly through mediation. Conversely, of course, this should be a powerful reason for insurance clients using mediation!
- It can be an advantage to delay settlement of insurance disputes as some will fall away. Tactics are an important part of negotiation and timing of the mediation is key. Timing also affects cost and the disclosure of information. With all that goes increasing costs. There is a point where all three come together...enough information to reduce the risk to an acceptable level, costs being kept low and the people involved in the case still being available (and interested). Mediation still works no matter how late in the case it is used (as demonstrated by the Court of Appeal mediation scheme).
- Cases are too big/too complex/have too many parties. Or are too small. Rubbish! Any case can be mediated (except where an injunction or a precedent is needed) and many mediators would say that the more complex it is the more suited to mediation. The largest insurance dispute that I have mediated was £250million (although that did not settle and the company went bust some time after!). Two years ago I mediated a 13-party dispute, most of whom were insurers/reinsurers

on the defendant side. It was mediated over two days, the first of which was a mini-mediation of the defendant parties to get them to speak with one voice. Two months later I mediated a two-party insurance dispute that settled within a day at less than £10,000. Mediation is a quick, cheap and effective way of resolving disputes, large or small, complex or not.

The key question to ask is not “Is this case suited to mediation?” but “Why not mediation?”.

The ‘added value’ of a commercial mediator

What is it that a mediator brings to the negotiation (in addition to an extra cost)? Of course, s/he brings an extra brain (or even two because most mediators have an assistant). S/he brings detachment; distance from the detail of the problem and therefore the ability to see the ‘big picture’. S/he brings skill in helping parties avoid face-losing situations and experience in helping many parties resolve many other disputes. S/he brings confidence that, although most mediations reach a point of despair, most still settle. And, uniquely, s/he carries both/all side’s confidential stories and so has an insight into the case that no-one else can have. That brings real value to the negotiations and is probably the single most influential factor for such a high settlement rate.

Specialist mediator or not?

Most people ask for a mediator from the sector in which the dispute occurs. More and more are also asking for a lawyer mediator who is specialist in the area of dispute. The irony is that mediation is intended to lift the negotiations from legal argument to commercial common-sense and it is difficult to see why a lawyer is seen to be able to do that better than a non-lawyer mediator. Also, specialism has a down side – it may mean that the mediator understands the environment in which the parties operate and that s/he speaks the language of that environment. The danger also is that the mediator either gets immersed in the detail because it is familiar territory or, consciously or unconsciously, forms an opinion on the merits of the various arguments. In other words, the mediator gets in there with the parties rather than keeps an overview and helps the parties extract themselves from the bog of detail. In the end mediations are settled by ‘global’ negotiation not detailed argument. Better deals are more likely using a mediator with a business mind rather than legal expertise.

Much better then to have an experienced mediator who is strong in business negotiation and preferably a non-lawyer like me!

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