

# The future of mediation: The default option?

Thursday 26 November 2020, 4.00 - 5.00 pm GMT

## Key Takeaways...

### from Baker McKenzie's Future of Disputes spotlight session

In the final session of our Future of Disputes series, we explored the role and future of mediation in commercial disputes.

#### Why are we talking about mediation?

Mediation has had an interesting journey through the COVID-19 pandemic. COVID-19 and the subsequent rise of virtual meetings presented a possible threat to mediation's use as a form of Alternative Dispute Resolution (ADR) that has typically been presented as effective because of the requirement to get key decision makers "in the room" and talking face to face.

However, we have seen a rise in the use of online mediations, which raises a question as to whether virtual mediations will become the "new norm", and what this changing landscape means for the use of mediation as an ADR tool more generally.

We recently ran a survey in conjunction with KPMG that explored participants' views and experiences of virtual hearings and mediation. We found that, regarding mediation:

1. The majority would prefer to conduct a mediation face to face than online, if given the choice – perhaps unsurprising.
2. The large majority of respondents had no experience of online mediation but, of those who did, the majority found it very satisfactory or excellent. This raises an interesting discussion about the evidently negative perception as to the efficacy of online mediation, versus the reality that, in fact, many have found online mediations to be successful.

#### Recent developments in mediation

It is worth noting the recent developments that suggest mediation is becoming more popular, structured and supported as a form of ADR. These include:

- **The 2019 Singapore Convention.** Before the Singapore Convention, signed by 53 countries and currently ratified by 6, no harmonised enforcement mechanism existed for mediation settlements. The only remedy for a party faced with an opponent refusing to honour the terms of such negotiated settlement was to bring an action for breach of contract and then seek to have the subsequent judgment enforced, potentially in multiple jurisdictions. The signatories to the Convention will now instruct their courts to enforce settlement agreements without the need to commence new proceedings.
- **The courts are increasingly encouraging parties to mediate,** levying cost consequences where parties have failed to engage.
- **The impact of COVID-19:** The pandemic has accelerated the need for dispute resolution mechanisms to operate effectively online, and mediations are no exception. This has led to a clear increase in the use of online mediation, to certain clear benefits:
  - Costs are reduced, as participating parties are not required to travel (often internationally) to attend the mediations in person.
  - As a result, in some cases, this had made it easier to schedule a mediation and ensure that key stakeholders are able to participate and contribute.

## Is mediation right for every dispute?

The short answer is no but it is a form of ADR that may be worth considering alongside any arbitration or court process. Of course, every case is different and there is no recipe or formula. When considering mediation, the following factors should be considered:

- **Benefits of mediation:** This form of ADR offers a flexible, without prejudice process, where the parties can tailor the settlement agreement under the supervision and assistance of an independent third party. The mediator essentially acts as a process manager for a difficult negotiation and can help to narrow the issues between the parties and steer the dispute towards a suitable settlement.
- **Nature of the dispute:** There are many factors to consider here. Mediation may be appropriate where:
  - there is a desire to resolve the dispute quickly and at minimal cost
  - the value of the dispute is likely to be disproportionate to the costs of litigation

- there is a need or desire to repair relations, particularly where the parties have an ongoing commercial relationship to preserve
- one side has an over-optimistic view of its position or where one's own position is not strong and a settlement would be preferable to the risk of losing at trial.

- **Position and personalities of the parties:** Disputes are frequently affected by the personalities and characters of the individuals involved. The success of a mediation will often rest on whether there is a genuine appetite to find a commercial resolution to the dispute.

It remains to be seen whether the logistical simplicity and reduced cost of online mediations will pave the way for online mediation to become the "new norm". Even with these benefits, it is conceivable that if the parties have less skin in the game – both in terms of costs and time – they may be less invested in making the process work. However, mediation organisations have published reports suggesting the success rate of mediation is at a high.

## Practical tips

Whether you are attending an online or face-to-face mediation, one thing is clear – preparation is key. From our own experience, we recommend considering the following:



## In summary

Our discussion concluded with the ultimate question on mediation's future in disputes – is the use of mediation on the rise and will online mediations prompt a broader change to how mediations are conducted going forward? Whilst the answer is not a simple yes or no, there is certainly evidence to suggest that mediations will continue to be a significant part of any commercial dispute consideration and strategy (whether that be to propose, accept or reject a mediation to your opponent). Certainly, parties may approach mediations differently, with more focus on the preparation phase and more conversations taking place before the day of mediation, both with the mediator and between the parties.

Could we perhaps see the rise of a hybrid approach with online meetings followed by a shorter face-to-face session where the deal in principle gets agreed in full? Only the future will tell.

## If you would like any more information, please contact us:



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