

Commercial Mediation on the Rise

By Urs Weber-Stecher, Independent Mediator and Arbitrator

Commercial mediation on the rise? - Yes, I think this is correct. I see this not only in my own practice, but also hear it from various colleagues. Until recently, in conversations with colleagues, I emphasised the advantages of mediation in order to make this conflict resolution mechanism more appealing to potential users. I also always wondered why commercial mediation is still so rarely used, especially in German-speaking countries, but also in continental Europe in general. This is despite the fact that it offers most of the advantages that are often criticised in commercial or investment arbitration today: it reduces complexity to the essence, saves a great deal of time and human resources, is cost-effective and leads to more satisfactory solutions for both sides by enabling the parties to reach a compromise. This often allows the parties to maintain good business relations.

This almost sounds as if mediation is a miracle cure for efficient conflict resolution. Of course, it is not. But in more cases than many of us think, mediation provides an efficient solution. Or, in other words, in my opinion, in most cases it would be worth trying mediation first. If it is not successful, the additional time and costs would be negligible compared to the subsequent court or arbitration proceedings. And statistics show that in about 75 percent of the cases, mediations are successful or at least help resolve parts of a broader conflict. My perception is that an increasing number of companies are beginning to see it this way and every positive experience further strengthens their motivation to try it again when the next dispute comes up.

The same applies to colleagues who represent parties in adversarial proceedings. During the first mediation, they are sceptical and express the usual concerns about mediation (like, is this really a serious conflict resolution mechanism or more of a circle for psychoanalysis?). In particular, according to my experience, counsel worry about losing control of the process if they no longer hold the reins, as they believe they do in adversarial proceedings in court or arbitration. However, I think that this is a misperception anyway, because in mediation, counsel can work on the solution until the very end, in adversarial proceedings, they lose this opportunity because, in the end, it is the judges or arbitrators who decide.

However, those who have ventured to engage in a mediation recognize that this is not the case. In mediation, the role of counsel is not primarily to "speak for the party", but rather to work with the client to assess what makes the most sense from a business perspective. When parties are more directly involved and counsel collaborate with them – rather than having control on the whole judicial process – it becomes easier to identify solutions that truly fit the parties' needs. So, in mediation agreements can be tailored to the parties' actual interests, rather than being confined to legal positions or adversarial arguments. Direct participation and collaboration allow parties to explain their real interests, commercial constraints, and risk tolerances firsthand. This, however, does not diminish counsel's importance. The parties' decision making in mediation is shaped against the backdrop of the legal proceeding which

follows in case no deal is reached. Counsel's legal advice can, thus, not be missed in order for the parties to know their alternatives to the negotiated agreement.

In a well-structured mediation process, all participants have a role to play, and counsel do not always have to be at the centre of the action. They are involved at the outset when it comes to structuring the process and agreeing on the documentation on which the process is to be based. This usually takes place in a kick-off meeting, which is very similar to a case management conference in arbitration proceedings.

The parties agree with the mediator which documents are to be made available to the mediator and which arguments are to be presented by the parties in so-called position papers. Often, the request for mediation is already the position paper of the requesting party, so that the next step is a position paper of similar length and detail from the responding party, and the parties agree who will send which documents to the mediator. The rest of the process can be designed in a flexible way to ensure that all parties are satisfied with how they were able to present their position ahead of the joint mediation session.

The parties' position papers are usually no longer than 15 to 20 pages. The documentation provided to the mediator consists of 10 to 20 documents, mostly contractual documents and correspondence between the parties, which usually do not exceed a total of around 100 pages.

The next step in most cases is an in-person (or online) mediation session with the parties and counsel. How to start the first mediation session is very individual, depending on the person of the mediator. Here I will briefly describe how I usually do this. I typically start with a joint mediation session and summarise after an introduction my current understanding of the dispute, based on the limited information available, and give the parties the opportunity to correct any misunderstandings on my side and add any important information that was not mentioned in my summary. These clarifications and additions to the facts are usually made by the party representatives themselves and not by their counsel.

This approach immediately highlights that, unlike in adversarial proceedings where written submissions require very detailed and highly complex presentations of the facts by counsel, supported by expert opinions, documentary evidence and witness testimony, the presented facts in mediation proceedings are reduced to the absolute essentials. The parties can supplement these facts during the mediation session in specific areas where this is required in order to work on solutions. Where this is necessary often only becomes apparent during the discussions.

Anyone who looks back honestly and openly on past arbitration proceedings and the amount of evidence submitted, will see that many of the facts presented and numerous documents submitted were ultimately irrelevant to the arbitral tribunal's decision. But out of legal caution, they had to be submitted anyway. Therefore, the inherent inefficiency of adversarial proceedings, as compared to mediation, is much more fundamental than the current

discussion about the usefulness of the document production procedure and other procedural features in arbitration suggests.

For counsel, engaging in a mediation also means that in this process they can focus on the essentials (which does not mean, however, that they do not need to know the case very well). Together with their clients, they can work out the essence of the dispute and do not have to deal with various contingent scenarios and countless procedural questions, as is inevitable in adversarial proceedings. During this preparatory phase, the counsel can also lay the groundwork for the joint mediation session so that they no longer need to worry that the client will disclose information that could weaken their position. In the course of the mediation session, it almost automatically follows that the counsel, who was in the background at the beginning, becomes increasingly involved when it comes to discussing and formulating possible solutions and compare a potential agreement to the client's alternatives to the negotiated agreement. It also becomes clear what information can be disclosed to the mediator in a private session (caucus) without the other party being present and what information the mediator should subsequently convey to the other party. Counsel are regularly involved in this process. Towards the end of the mediation, they take centre stage once again, when it comes to turning the proposed solutions into concrete terms of agreement. In this phase, the party representatives and the mediator merely have a supporting role.

In my personal experience, the vast majority of counsel are very constructive throughout this entire process. Clients also realise this and they are usually happy as they benefit most from a quick and cost-effective solution. Successful mediation is therefore worthwhile for everyone involved. For the parties, because they obtain a more satisfying, quick and cost-effective solution to the dispute, and for counsel because they can win over their clients through solution-oriented and efficient conflict resolution.

So let us work together to build trust and ensure that the rise of commercial mediation continues and becomes even greater!

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