MEDIATION IN COMMERCIAL DISPUTES: FINALLY TAKING THE LEAD?

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Mediation is a process in which an impartial third party, without the authority to impose a solution, helps others to resolve a dispute. It has a rising profile across Europe as a result of the 'Mediation Directive' (April 2008) intended to encourage its use in crossborder commercial disputes.

In the Anglo-Saxon world mediation is among the most popular forms of ADR, but within Latin countries it is still seen by some practitioners as a sign of weakness

or a desire to compromise. Arguably, they think that once a dispute has arisen, if the parties cannot settle they should automatically seek a binding and final result through litigation or arbitration.

Nonetheless there are a number of inherent benefits to the mediation process:

I The ability of a neutral third party to 'reality-test' or propose solutions, removing the burden of initiating concessions;

II It offers solutions generally beyond the power of a court or arbitration order;

III The legitimacy of a consensual result;

IV The possibility of maintaining ongoing commercial relationships;

V Potential savings in the time and costs involved in arbitration or litigation;

VI Confidentiality to which both the process and any information disclosed will be subject; and

VII The active involvement of directors or company legal representatives in a solution that they may perceive as a personal achievement.

La entrada en vigor en abril de 2008 de la directriz europea relacionada con la mediación está fomentando el uso de este método de resolución de disputas comerciales transfronterizas en Europa. Los autores de este artículo, Cristián Conejero Roos y Alberto Fortí°n, del bufete Cuatrecasas, opinan que mientras exista una larga tradición de mediación en jurisdicciones anglosajonas dentro del

ámbito de la denominada Resolución Alternativa de Disputas (ADR, siglas inglesas), prevalecerá cierto escepticismo en los mercados comerciales de Latinoamérica. Los mencionados abogados creen que esta actitud no es merecida ya que la mediación ofrece beneficios que no existen ni en los litigios ni en los arbitrajes.

It is becoming increasingly common for large companies to establish their own internal conflict resolution procedures, with mediation a main instrument. But to succeed parties need to fully understand the process and to put aside ordinary dispute resolution baggage.

Think about business interests more than legal positions

In a commercial setting there are underlying business interests that may not always reflect into a legal position in a dispute (ie potential synergies from ongoing or future business). Parties to a mediation are encouraged to be creative and to bring non-legal issues to the table to help settle their dispute. By broadening the potential solutions, the parties are able to tackle more efficiently the issues in conflict – without restricting any future options.

Be ready to move from an adversarial to a problem-solving approach

In arbitration and litigation the parties aim to persuade a third party that one or the other is ultimately right. Mediation seeks agreement from both parties and requires active cooperation, which in turn promotes more focused problem solving.

Assess the weakness of your case and the strengths of your opponent's

Mediation may allow the parties, with the mediator, to value their case prior to court or arbitration proceedings. This may help to predict potential outcomes and, more importantly, to bridge the gap between parties initial positions and identifying common interests as basis of a settlement. This presents potential cost and timesavings as well as a monetary value associated with preserving ongoing business relations.

Choose carefully the mediator

The mediator's role is critical to the outcome of the process. They may engage in a number of techniques, including (1) asking questions about the nature of the business and potential synergies going forward; (2) helping parties to exchange proposals, while respecting their confidentiality; and (3) helping the parties to evaluate the benefits of proposals against the likely consequences of non-settlement.

A judge or arbitrator might not necessarily be a good mediator. Likewise, an evaluative mediator, able to highlight the weaknesses of a case, may be welcomed while others may appreciate someone more facilitative. The selection is a crucial step and furthermore, given the fragile and conciliatory nature of mediation, it is extremely important that the parties reach agreement on who is appointed in order to avoid any obstructing of their task.

Mediation is not a panacea and there will be cases more suited to the process than others. However, as a general rule, it can be utilised where the parties are ready to use good faith to reach an amicable solution. Mediation might otherwise be a waste of time, but it would be unfair to blame the process entirely.

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